A comparative analysis of the "regulatory independence" of the Financial Sector Conduct Authority and the National Credit Regulator

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OPSOMMING

'n Vergelykende analise van die reguleringsonafhanklikheid van die Finansiële Sektor Gedragsowerheid en die Nasionale Kredietreguleerder

Die artikel evalueer die Finansiële Sektor Gedragsowerheid en die Nasionale Kredietreguleerder om te bepaal of hierdie reguleerders onafhanklik is wanneer dit by reguleringsonafhanklikheid kom. Alhoewel Suid-Afrikaanse beleidsdokumente en wetgewing die bovermelde reguleerders as onafhanklik bestempel, dui internasionale kenners daarop dat onafhanklikheid 'n belangrike konsep met verskeie fasette is. Een van hierdie fasette is reguleringsonafhanklikheid, wat dui op die vermoë om op 'n selfstandige wyse reëls vir die gereguleerde daar te stel. Die artikel evalueer die Suid-Afrikaanse posisie in die lig van internasionale kenmerke van reguleringsonafhanklikheid. Die navorsing bevind dat die Nasionale Kredietreguleerder nie behoorlik onafhanklik is nie en verskaf voorstelle wat onafhanklikheid kan bevorder.

1 INTRODUCTION

Independence[1] is a valuable characteristic of a regulatory body, especially if the entity operates within a financial sector.[2] The main purpose of independence-related safeguards built into regulatory institutions is to limit undue influence by

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1 The term "regulatory independence" is placed in quotation marks in the title because the specific term comes from Quintyn and Taylor *Should financial sector regulators be independent?* 8 March 2004 *International Monetary Fund Economic Issues No 32*, Pamphlet available at https://bit.ly/2T84Sri ("Quintyn and Taylor *Pamphlet*") and Quintyn *et al The fear of freedom: Politicians and the independence and accountability of financial sector supervisors* (IMF working paper wp/07/25) 2007 ("Quintyn *et al*") 7 8–9, available at https://bit.ly/2TaAIJw. See also fn 19 *infra.*

2 Quintyn and Taylor *Pamphlet*; Quintyn *et al* 5 34–35; Mwenda *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) ("Mwenda") 25 29–31; Organisation for Economic Co-operation and Development *G20 high-level principles on financial consumer protection* October 2011 5, available at https://bit.ly/1vCn7NO ("OECD *G20 principles*").

those with political and commercial interests, who may be affected by the conduct and decisions of the regulator.[3] While total independence is neither a realistic aim nor necessarily wanted,[4] a number of scholars have identified specific features that may be incorporated into the institutional structure to enhance the regulatory body's independence and protect it from undesirable interference.[5] Unfortunately, there is no assurance of successful regulation just because a regulator is independent.[6]

The description of an autonomous entity does not lend itself to uniform indicators because the concept is construed through content ("characteristics"), which does not comprise a closed selection of traits.[7] Various factors determine whether, and to which extent, an agency is independent.[8] The level of independence can also differ from agency to agency.[9] Some authors describe an organisation as independent when a specific set of circumstances is present – bestowing authoritative functions and powers on a regulatory institution, so-called "security of tenure" for high-level office holders, several persons that govern the regulator and budgetary freedom.[10] Others identify core regulatory functions that the institution must execute independently – meaning that the actions must be executed free from constraint and the institution must have the capacity to decide on its actions *vis-à-vis* its obligations on its own.[11] Some of the features relate to mechanisms that ensure that a regulator is sufficiently empowered to execute its duties – ranging from autonomy in respect of the execution of its mandate and granted authority, and independence regarding income, expenditures, personnel appointments and staff compensation, to its corporate structure and broader positioning within the legal and administrative frameworks.[12] Many features of a regulator therefore influence autonomy.[13]

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3 Barkow "Insulating agencies: Avoiding capture through institutional design" 2010 *Texas LR* 15 17 19–20 22 79; Quintyn and Taylor *Pamphlet.*

4 Mwenda 33–34; Hüpkes *et al The accountability of financial sector supervisors: principles and practice* (IMF Working Paper wp/05/51) 2005 5, available at https://bit.ly/2tI4CjD. See *Glenister v President of the Republic of South Africa* [2011] ZACC 6 ("*Glenister*") para 122 (by Ngcobo CJ).

5 Barkow 2010 *Texas LR* 17–18; Quintyn and Taylor *Pamphlet*; Quintyn *et al* 7–10; Mwenda 25–30.

6 Mwenda 26 34–35.

7 Morrison "How independent are independent regulatory agencies?" 1988 *Duke LJ* 252 252. See also Verkuil "The purposes and limits of independent agencies" 1988 *Duke LJ* 257 259; Barkow 2010 *Texas LR* 15ff.

8 Gadinis "From independence to politics in financial regulation" 2013 *California LR* 327 337–338; Morrison 1988 *Duke LJ* 252; Mwenda 20–22 26–27; Quintyn and Taylor *Pamphlet*; Barkow 2010 *Texas LR* 26; Verkuil 1988 *Duke LJ* 259–263. See International Organisation of Securities Commissions *Methodology for assessing implementation of the IOSCO objectives and principles of securities regulation* May 2017 25–29, available at https://bit.ly/2sgKT8A ("IOSCO *Methodology*"). Barkow 2010 *Texas LR* 45 notes (in the context of funding): "It is critical to assess the overall structure of the agency."

9 Gadinis 2013 *California LR* 336.

10 Quintyn and Taylor *Pamphlet*; Morrison 1988 *Duke LJ* 252; Barkow 2010 *Texas LR* 16 18 27 37 42; Verkuil 1988 *Duke LJ* 259 260; *Glenister* para 210 (by Moseneke DCJ and Cameron J).

11 Quintyn and Taylor *Pamphlet*, Quintyn *et al* 7–9; Gadinis 2013 *California LR* 337; *Glenister* para 117 (by Ngcobo CJ).

12 Quintyn and Taylor *Pamphlet*; Mwenda 13–14 27–28; Barkow 2010 *Texas LR* 18 44 48; IOSCO *Methodology* 25–28; OECD *G20 principles* 5.

13 See Gadinis 2013 *California LR* 337–338; Mwenda 13–14 27–28; Barkow 2010 *Texas LR* 18 79.

Substantive literature on the independence of regulators is scarce in South Africa and even more so where financial regulators are the objects of scrutiny. Although independence is a recognised trait of the market conduct regulators for the South African consumer credit industry with which this research is concerned[14] – policy documents and legislation denote the Financial Sector Conduct Authority[15] and the National Credit Regulator[16] as independent[17] – I could not analyse the South African position meaningfully without first extrapolating factors that affect the independence of financial regulators (and mostly international) literature. The number of influential factors and the detail required to explain the nature and impact of the identified factors on independence fully,[18] necessitate that I deal only with selected criteria in this article. I have chosen to establish whether the aforementioned regulators have been endowed with the necessary characteristics for "regulatory independence" – a concept initially formulated by Quintyn and Taylor as one of four categories of independence.[19]

2 INDEPENDENCE

2 1 Background

Autonomy means that the regulatory body is not subject to domination or prescriptions by external institutional arrangements.[20] Promotors of independence argue that the measures taken by regulators, uninhibited by politics, will promote the constructive development of the regulatory institution as an open, steadfast and knowledgeable regulator and supervisor.[21] An autonomous entity within the financial sector sphere therefore can be invaluable when it comes to safeguarding financial interests, especially where the financial welfare of the nation is at stake.[22] The independent characteristics of some regulators are seen as protective measures to prevent interference by stakeholders, particularly politicians who are predisposed to "powerful industrial interests".[23] Although many examples of independence are

14 Financial Regulatory Reform Steering Committee *Implementing a twin peaks model of financial regulation in South Africa* Published for public comment 1 February 2013 18, available at https://bit.ly/2XyMOp1; National Treasury *Treating customers fairly in the financial sector: A draft market conduct policy framework for South Africa discussion document* December 2014 7, available at https://bit.ly/2XvrLna ("Treasury *Market conduct policy*"); Financial Stability Board *Peer review of South Africa review report* 5 February 2013 5, available at https://bit.ly/2IKi54S ("FSB *Peer review*").

15 "FSCA".

16 "NCR".

17 See Treasury *Market conduct policy* 72; National Treasury *A safer financial sector to serve South Africa better: National Treasury policy document* 23 February 2011 25–26 30, available at https://bit.ly/2UfGnFg ("Treasury *A safer financial sector*"); s 12(1)(c) of the National Credit Act 34 of 2005 ("NCA").

18 See, eg, the work of Barkow 2010 *Texas LR* 15ff.

19 Quintyn and Taylor *Pamphlet*; Quintyn *et al* 3 7–10.

20 Quintyn and Taylor *Pamphlet*; Mwenda 20; IOSCO *Methodology* 25. See also Treasury *A safer financial sector* 26 (for the desire expressed by the policy drafters); World Bank *Good practices for financial consumer protection* 2017 Ed 11, available at https://bit.ly/2Ha11CJ.

21 Quintyn and Taylor *Pamphlet*; Mwenda 31.

22 Quintyn and Taylor *Pamphlet*; Mwenda 25 29–31.

23 Scott "Evaluating the performance and accountability of regulators" 2014 *Seattle Univ LR* 353 356. See also Barkow 2010 *Texas LR* 24 *re* "interest group pressures" and Barkow

continued on next page

given within the context of financial systemic disasters,[24] market conduct regulation cannot be discounted when it comes to financial crises because market malpractices contributed to the so-called "subprime crisis".[25] I therefore also considered literature that focused on independence in systemic and prudential contexts[26] even though the regulators that I deal with are market conduct regulators.[27]

Formal government intervention by state structures that are under the direction of chosen political leaders may be underscored by objectives of "short-term political gain".[28] A politics-based approach results in directives that are unsustainable and ill-suited to changing sectors, or biased towards political supporters as opposed to the general population.[29] An independence-based approach aims to safeguard directive choices from market players concerned with their own welfare within frameworks of self-governance.[30] Unfortunately, autonomy does not eliminate the risk of influence by stakeholders – including industry participants – but it can limit interference or "insulate" the entity.[31]

The independence of financial regulatory authorities has garnered international attention.[32] The regulator may be mandated by government, but the entity is often designed to effect its mandate independently and without interference from the government.[33] The risk then manifests that the regulator may further its own

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(*idem* 19), who argues that the study of autonomy should concern a deliberation of "what the agency is supposed to be independent of".

24 Quintyn and Taylor *Pamphlet*; Mwenda 25–31.

25 Treasury *A safer financial sector* 40 (see also 13 27 28 32).

26 Eg Quintyn and Taylor *Pamphlet*; Quintyn *et al* 5 8–9; Gadinis 2013 *California LR* Appendix I.

27 See fn 14 *supra*.

28 Scott 2014 *Seattle Univ LR* 356–357. See Barkow 2010 *Texas LR* 17; Bressman and Thompson "The future of agency independence" 2010 *Vanderbilt LR* 599 613. Gadinis 2013 *California LR* 331 explains: "Moreover, while politicians in pursuit of reelection are sensitive to their voters' urgent demands, independent agencies can prioritise long-term goals over immediate gains and ensure regulatory stability."

29 Scott 2014 *Seattle Univ LR* 356–357; Barkow 2010 *Texas LR* 20.

30 Scott 2014 *Seattle Univ LR* 356–357.

31 Barkow 2010 *Texas LR* 20 79.

32 See, eg, Zywicki "The Consumer Financial Protection Bureau: Savior or menace?" 2013 *George Washington LR* 856 875; Quintyn and Taylor *Pamphlet*; Quintyn *et al* 3–4; Mwenda ch 2; Bressman and Thompson 2010 *Vanderbilt LR* 599; OECD *G20 principles* 5; Financial Stability Board *Consumer finance protection with particular focus on credit* 26 October 2011 9 and 11, available at https://bit.ly/2UbYNXe ("FSB *Consumer finance protection*").

33 Thatcher "Delegation to independent regulatory agencies: Pressures, functions and contextual mediation" 2002 *Western European Politics* 125 125 127; Thatcher and Stone Sweet "Theory and practice of delegation to non-majoritarian institutions" 2002 *Western European Politics* 1 3; Spiller "Politicians, interest groups, and regulators: A multiple-agency theory of regulation, or 'let them be bribed'" 1990 *J of Law and Economics* 65 66; Bressman and Thompson 2010 *Vanderbilt LR* 612–613; Gadinis 2013 *California LR* 330. See Thatcher 2002 *Western European Politics* 125 129ff; Thatcher and Stone Sweet 2002 *Western European Politics* 3–4; Gilardi "Institutional change in regulatory policies: Regulation through independent agencies and the three new institutionalisms" in Jordana and Levi-Faur (eds) *The politics of regulation Institutions and regulatory reforms for the age of governance* (2004) 67 72ff; Bendor *et al* "Theories of delegation" 2001 *Annual Review of Political Science* 235 235–236ff; Barkow 2010 *Texas LR* 19–20 28 regarding delegation of state authority.

plans or avoid the optimal performance of its obligations.[34] A relevant aspect arising within this context, recognised by international scholars and drafters of best practices, is the matter of accountability of financial sector regulators.[35] I will only be dealing with independence in this article, but the challenge is aptly summarised by Scott:

> "Debates over accountability have to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to be able to achieve their tasks, while at the same time ensuring an adequate degree of control."[36]

2 2 International perspectives on independence

When it comes to financial regulators, Quintyn and his co-authors categorise independency-characteristics according to the "[f]our dimensions of independence": "regulatory, supervisory, institutional, and budgetary".[37] The first two categories are the "core" aspects whilst the latter two are "essential to support the execution of the core functions".[38]

"Regulatory" and "supervisory independence" pertain to the role of the regulator.[39] These two components focus on the development of standards that apply to the regulated industry and the role of the regulator *vis-à-vis* the industry.[40] "Regulatory independence" concerns the binding prescriptions effected by the regulator, which necessitate conformation by the regulated industry.[41] A benefit associated with agency determination of directives is that it encourages the agency to compel compliance, hence the assertion that "[r]egulators who are able to set these rules independently are more likely to be motivated to enforce them".[42] In addition, the ability of these entities to modify standards in accordance with industry developments is unconstrained by arduous political courses of action.[43]

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34 Spiller 1990 *J of Law & Economics* 66; Thatcher and Stone Sweet 2002 *Western European Politics* 4; Lodge "Accountability and transparency in regulation: Critiques, doctrines and instruments" in Jordana and Levi-Faur (eds) 124 126; Mwenda 26 and 34.

35 See, eg, Hüpkes *et al* (fn 4) 3–5; Quintyn *et al* 4–5 11; Quintyn and Taylor *Pamphlet*; Bird "Regulating the regulators: Accountability of Australian regulators" 2011 *Melbourne Univ LR* 739 742–745; Scott 2014 *Seattle Univ LR* 353 360; Goodhart *et al Financial regulation: Why, how and where now?* (1998) 68–69 ("Goodhart *et al*"); Organisation for Economic Co-operation and Development *Policy framework for effective and efficient financial regulation general guidance and high-level checklist* 2010 18–19, available at https://bit.ly/2EEBdNA; Mwenda 25; OECD *G20 principles* 5; FSB *Consumer finance protection* 9 11.

36 Scott "Accountability in the regulatory state" 2000 *J of Law and Society* 38 39.

37 Quintyn *et al* 3 7–10; Quintyn and Taylor *Pamphlet*. See also Mwenda 20–22.

38 Quintyn *et al* 8.

39 *Idem* 8–10.

40 *Ibid*; Quintyn and Taylor *Pamphlet*; Mwenda 20–21.

41 Quintyn *et al* 8–9. See also Quintyn and Taylor *Pamphlet*.

42 Quintyn and Taylor *Pamphlet*.

43 *Ibid*. These authors (*ibid*) note that independent regulators will be "able to adapt the rules quickly and flexibly in response to changing conditions in the global marketplace without having to go through a lengthy, high-pressure political process." See also Quintyn *et al* 8–9.

A feature of independence is thus the ability to draft and modify rules for the regulated industry with the intention that regulated entities should follow these rules and that these rules may be enforced.[44] Independence in respect of rule-based normative direction is nevertheless anomalous in the case of market conduct regulators but specific state authorisation can bestow the ability to determine rules on regulators.[45] Equally, the capacity of external role-players to reconsider and nullify determinations, made by the regulator as part of executing its mandate, must be considered when the regulator's independent status is assessed.[46]

Mwenda indicates that the regulator and supervisor can be one entity even though the concepts differ.[47] I will briefly explain the concept of "supervisory independence" although I do not deal with it in this article. The purpose is to show why certain aspects are not analysed in the article – they fall under a different category.

"Supervisory independence" relates to the management of regulated entities and the reproach of non-conforming industry members.[48] This aspect is of core importance but challenging to realise.[49] Regulatory conduct is often obscured from the public, and external manipulation may "be subtle and can take many forms".[50] As such, there is a need to safeguard the veracity of regulators[51] and various mechanisms to enhance independence in respect of oversight exist.[52] Specifying regulatory powers regarding punitive and intrusive authority will reduce the need for value judgments by the regulatory entity, and limit the scope for manipulation by either the state or the market.[53] The autonomous supervisory body should be responsible for bestowing and revoking permits because this function speaks to the expert knowledge of the configuration of the financial market, and is necessary to compel appropriate behaviour from regulated firms.[54]

The extent to which a regulator's duties are set out in the legal framework increases its independence from the industry and government, as the regulator cannot adjust its behaviour in accordance with a specific group.[55] In respect of

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44 Quintyn and Taylor *Pamphlet*; Mwenda 20. See also FSB *Consumer finance protection* 11.
45 FSB *Consumer finance protection* 11. See also Quintyn *et al* 9.
46 See Zywicki 2013 *George Washington LR* 874; Quintyn *et al* 9; IOSCO *Methodology* 28.
47 Mwenda 5.
48 Quintyn *et al* 9–10.
49 Quintyn and Taylor *Pamphlet*; Quintyn *et al* 9.
50 Quintyn and Taylor *Pamphlet*. See also Quintyn *et al* 9.
51 Quintyn and Taylor *Pamphlet*.
52 *Ibid.*
53 Quintyn and Taylor *Pamphlet*. See Quintyn *et al* 9 and Goodhart *et al* 6 *re* supervisory authority to determine market participation.
54 Quintyn and Taylor *Pamphlet*; Quintyn *et al* 9–10. See IOSCO *Methodology* 28: "Criteria for decision-making also can insulate the process from inappropriate political interference. For example, the ability to reverse licensing decisions at the ministerial level without clear criteria both for the refusal to licence and related decision-making process would inappropriately infringe independence."
55 Quintyn and Taylor *Pamphlet*: "Crafting a rules-based system of sanctions and interventions also lessens the scope for supervisory discretion – and thus for political and industry interference." See also Quintyn *et al* 10 in respect of "a rules-based system of sanctions and interventions".

legislative provisions, statutes should govern aspects such as licensing, disclosure, marketing, and other behavioural prescriptions for regulated persons.[56]

2 3 South African perspectives on independence

I follow the view that the absence of a direct legislative statement denoting an entity as "independent" is not an indication that the entity should not be independent.[57] This is the point of departure for the forthcoming discussion of the specific features that affect the independence of the NCR and the FSCA.

Section 12(1) of the NCA created the NCR. Section 12(1)(c) of the NCA is clear: The NCR "is independent" and, if there is any doubt as to the extent or nature of its autonomy, "subject only to the Constitution and the law". Section 12(1)(e) and 12(1)(f)(ii) determine that the NCR should conduct itself in a fearless and unbiased manner. In contrast, the Financial Sector Regulation Act[58] created the FSCA via section 56(1) but the FSRA does not stipulate that the FSCA should be independent. Independence nevertheless features in the policy framework supporting the FSCA's establishment.[59] Section 58(6) of the FSRA stipulates that the FSCA should "perform its functions without fear, favour or prejudice". Albeit in the context of the judiciary, Carpenter provides the following valuable comparison of autonomy and unbiased conduct:

> "Independence and impartiality are mentioned in the same breath, as it were, but are quite different concepts, even though they are interdependent – impartiality implies independence of mind on the part of the individual (hence the constitutional importance of dissenting judgments). Independence is primarily based on structure, while impartiality is personal and subjective. However, the need for judicial officers to act impartially and without conscious bias (in other words, fairly and in good faith) is so self-evident that it needs no further discussion, except to say that judicial officers whose functional – and personal – independence is compromised, cannot conceivably act 'impartially and without fear, favour or prejudice'."[60]

The value of her contribution for the article is that independence supports equitable actions and the latter is dependent on the former.[61] Apart from the jurisdictional criteria – as I briefly show in the next paragraph – I follow her approach to justify bringing the FSCA into the ambit of this research project.[62]

The financial products and services arena is the domain of the FSCA.[63] The consumer-credit regulatory arena is the domain of the NCR.[64] Whilst the focus of

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56 Mwenda 27–28; Quintyn and Taylor *Pamphlet*.

57 *Glenister* para 131 (by Ngcobo CJ); cf s 1011(a) of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (which refers to the Bureau of Consumer Financial Protection as "an independent bureau") with the Australian Securities and Investments Commission Act 51 of 2001 (which does not specifically refer to the Australian Securities and Investments Commission as independent, but the Commission is nevertheless viewed as an independent organisation – see *Fit for the future A capability review of the Australian Securities and Investments Commission A report to government* December 2015 (copyright: Commonwealth of Australia) 30 180, available at https://bit.ly/2Hc3ahl).

58 Act 9 of 2017 ("FSRA").

59 Treasury *Market conduct policy* 72; Treasury *A safer financial sector* 30.

60 Carpenter "Without fear or favour – Ensuring the independence and credibility of the 'weakest and least dangerous branch of Government'" 2005 *TSAR* 499 500.

61 *Ibid.*

62 *Ibid.*

63 Ss 57–58 of the FSRA; para 3 1 *infra*.

64 Ss 13–18 of the NCA; para 4 1 *infra*.

the NCR is the welfare and sustainability of the consumer-credit market and the protection of credit consumers, the focus of the FSCA is the proficiency and veracity of the financial market and the protection of financial customers.[65] The NCR is a sector-specific regulator within a broader scheme of financial regulation.[66] The FSCA has a general mandate that is not as focused and delineated as that of the NCR.[67] Against this background and in light of the provisions of the FSRA, there are overlaps in respect of the two regulators' jurisdictions as the following selected extracts of the FSRA show:

> "[In this Act] 'credit' has the same meaning ascribed to it in section 1 of the National Credit Act."[68]
>
> "In this Act 'financial product' means . . . except for purposes of Chapter 4 and section 106, the provision of credit provided in terms of a credit agreement in terms of the National Credit Act."[69]
>
> "In this Act 'financial service' means . . . a service related to the provision of credit."[70]
>
> "In relation to a financial institution that is a credit provider regulated in terms of the National Credit Act, the Financial Sector Conduct Authority may, in addition to regulating and supervising the financial institution in respect of the financial services that the financial institution provides, and notwithstanding section 2(1)(g), regulate and supervise the financial institution's conduct in relation to the provision of credit under a credit agreement only in respect of those matters referred to in section 108."[71]

This affects the regulatory authority of the regulators *vis-à-vis* each other and their specific domains.[72] Section 108 of the FSRA lists aspects, over and above those mentioned in section 106, which may inspire the drafting of conduct standards by the FSCA.[73] The list is broad, ranging from character attributes of natural persons to enterprise policies and procedures.[74] These matters speak to the ordinary business practices of regulatees and will necessarily affect those involved in credit extension.[75]

In the next section of the article, I establish whether the FSCA and NCR have indeed been endowed with the necessary characteristics for "regulatory independence".

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65 Ss 13–15 of the NCA; s 57 of the FSRA; paras 3 1, 4 1 *infra*.

66 Treasury *Market conduct policy* 8 15–16; Department of Trade and Industry *Consumer credit law reform – policy framework for consumer credit* August 2004 para 7.3, available at https://bit.ly/2tSyXMF ("DTI *Policy framework*").

67 Treasury *Market conduct policy* 35; Treasury *A safer financial sector* 6 32–33 36.

68 S 1.

69 S 2(1)(g).

70 S 3(1)(g). See also the exclusions set out in this subsection, but which are not relevant to the article.

71 S 58(2).

72 See, eg, Treasury *A safer financial sector* 35.

73 See para 3 2 *infra*.

74 S 108(1).

75 *Ibid.* See also Van Zyl "Registration and the consequences of non-registration" in Scholtz *et al Guide to the National Credit Act* (June 2018 Service Issue 10) ("Van Zyl in *Guide*") fn 142h.

3 FINANCIAL SECTOR CONDUCT AUTHORITY

3 1 Introduction

The FSCA was created by the FSRA.[76] The regulator is comparable in function and purpose to the NCR, insofar as both are conduct regulators *re* the financial sector.[77] It is the result of a major policy enquiry undertaken by the National Treasury *re* the South African financial sector.[78] The FSCA is mandated to protect the productivity and veracity of the South African financial market and is responsible for the protection of financial consumers,[79] but also has a supportive role insofar as financial stability is concerned.[80]

Its objectives are to regulate the behaviour of financial institutions in respect of justifiable dealings with consumers, manage the proper and reliable functioning of these institutions and endorse training schemes aimed at consumer financial knowledge and skills development.[81] Its jurisdiction is not limited to consumer credit but encompasses most of the financial sector.[82] The FSCA is mandated in terms of section 58(1)(a) to control and oversee financial institutions as per financial sector laws to realise its goals. In addition, the FSCA is empowered to consider the boundaries and extent of financial sector regulation and manage risks that could jeopardise its mission of attaining its outcomes.[83] Apart from a mandate to endorse certain outcomes such as "sustainable competition"[84] and "financial inclusion",[85] the FSCA has a research objective.[86] Finally, section 58(4) is worded in the widest sense possible, mandating the Authority to "do anything else necessary to achieve its objectives", and the legislation suggests specific examples thereafter.

3 2 Industry directives and guidelines

I noted earlier that Quintyn and Taylor associate regulatory independence with the ability of the regulator to issue binding prescriptions that the regulated industry has to follow.[87] The 2014 market conduct policy document envisaged a regulator with "[f]lexible and broad subordinate regulatory powers".[88]

Section 1 of the FSRA determines that "financial sector law" includes "a regulatory instrument made in terms of this Act" and "regulatory instrument" includes "a conduct standard". The FSCA is enabled to create these norms within the substantive boundaries set by the FSRA in *inter alia* section 106. It can retract or modify its own standards.[89] The FSCA has been endowed with regulatory independence

76 S 56(1).
77 FSB *Peer review* 5; Treasury *A safer financial sector* 6; paras 1 and 2 3 *supra*.
78 Treasury *Market conduct policy* 7–8; Treasury *A safer financial sector* 23.
79 S 57(a) and (b) of the FSRA.
80 S 57(c) of the FSRA. See also Treasury *Market conduct policy* 7.
81 S 57 of the FSRA.
82 See the definitions in ss 1–3 and ch 4 of the FSRA *re* the mandates of the FSCA. See also Treasury *Market conduct policy* 8.
83 S 58(1)(i) and 58(1)(f) of the FSRA.
84 S 58(1)(d) of the FSRA.
85 S 58(1)(e) of the FSRA.
86 S 58(1)(h) of the FSRA.
87 Para 2 2 *supra*.
88 Treasury *Market conduct policy* 34.
89 S 108(3) of the FSRA.

insofar as it can issue these behaviour-changing conduct standards and enforce same in a court of law: "The responsible authority for a financial sector law may commence proceedings against a person in the High Court for an order to ensure compliance with the financial sector law."[90]

The FSRA provisions pertaining to conduct standards[91] are divided into four categories and these are interrelated to some extent. Firstly, the legislation provides for a target to whom the standard will apply.[92] Secondly, provision is made for the standard to meet a specific objective.[93] Thirdly, the standard may have bearing on a specific subject matter.[94] Fourthly, the standard may prohibit particular behaviour:

> "A conduct standard may declare specific conduct in connection with a financial product or a financial service to be unfair business conduct if the conduct – (a) is or is likely to be materially inconsistent with the fair treatment of financial customers; (b) is deceiving, misleading or is likely to deceive or mislead financial customers; (c) is unfairly prejudicing or is likely to unfairly prejudice financial customers or a category of financial customers; or (d) impedes in any other way the achievement of any of the objectives of a financial sector law."[95]

In terms of section 108, the FSCA has authority to issue standards for other aspects. These provisions set a fifth category for standards: measures that will enable the FSCA to reach the regulatory objectives determined by section 57.[96] In addition, section 108(2) provides that

> "[a] standard may . . . provide for a financial sector regulator . . . to make determinations, in accordance with procedures defined in a standard, for the purposes of the standard; and . . . impose requirements for approval by a financial sector regulator in respect of specified matters".

The FSCA may thus develop processes and evaluative indicators, publish same as conduct standards and then, following the published processes or based on the set evaluative criteria, conduct appraisals and come to attested conclusions.[97] This may very well mean that the FSCA issues binding conduct standards for itself.

The FSCA is further able to issue "guidance notices", which pertains to the application of relevant legislation but are only informative and not compliance driven.[98] By contrast, the FSCA is mandated to provide the industry with "interpretation ruling[s]"[99] which retain its authority until the legislature modifies the law or the judiciary decides differently from the interpretation in part or in whole.[100] The interpretation ruling is publicised as a statement, which statement must also designate the conditions under which the construction or relevance of

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90 S 152(1) of the FSRA.
91 Treasury *Market conduct policy* 37: "In effect, conduct standards are the rule-making instrument created through the FSR Bill to give effect to legislative powers delegated to the FSCA."
92 S 106(1).
93 S 106(2).
94 S 106(3).
95 S 106(4).
96 S 108(1).
97 S 108(2).
98 S 141.
99 S 142(1).
100 S 142(4).

the interpreted provision would function.[101] The ruling aims to simplify and harmonise the understanding and application of relevant provisions of financial law,[102] and it binds the FSCA.[103]

4 NATIONAL CREDIT REGULATOR

4 1 Introduction

The NCR was one of the first establishments strategically positioned in the regulatory sphere as part of a comprehensive government scheme of expanded consumer-credit regulation within the context of consumer protection.[104] Its primary functions, as per the NCA, are to advance the South African credit market in a manner that improves the availability thereof to certain categories of consumers;[105] assess and endow suitable credit market role-players with permission to conduct commercial credit related activities;[106] oversee compliance with the NCA;[107] explore the dynamics of the credit market; report, and edify the South African community with regard to credit;[108] and keep the responsible Ministerial office informed with regard to aspects that pertain to the sphere of application of the Act, which the office of the DTI administers.[109]

I noted earlier that Quintyn and Taylor associate regulatory independence with the ability of the regulator to issue binding prescriptions that the regulated industry has to follow.[110] The NCR is responsible for the regulation of the credit industry[111] and in effecting its mandate, the NCR has been active in shaping the credit regulatory landscape and compelling compliance.[112] It has done so, notwithstanding its "softer" legislative authority when compared to regulators under the auspices of non-DTI departments.[113] The NCR does not have the direct authority to modify the legislative or regulatory landscape – it is empowered to

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101 S 142(1).
102 S 142(2).
103 S 142(3).
104 DTI *Policy framework* paras 7.3–7.5 and 8–9. See also Otto "The history of consumer credit legislation in South Africa" 2010 *Fundamina* 257 271; Pearson "A credit lens: Implementing twin peaks" 2017 *Law and Financial Markets R* DOI: 10/1080/17521440. 2017.1419621 1 4. See, generally, Vessio "What does the National Credit Regulator regulate?" 2008 *SA Merc LJ* 227.
105 S 13.
106 Ss 14 40(3) 43(2) 44(2) 44A(2) 134A 134B(6).
107 S 15.
108 S 16.
109 S 18 read with s 1.
110 Para 2 2 *supra*.
111 Eg s 13 of the NCA.
112 Paras 4 2–4 5 *infra*.
113 The discrepancy between the authority granted to regulators shaped by legislation governed by the Departments of Finance and Justice and Constitutional Development ("DF" and "DJCD" respectively) *vis-à-vis* the Department of Trade and Industry ("DTI"), is noteworthy – see, eg, the differences between the NCR (established by the NCA and administered by the DTI) and the Information Regulator (established by the Protection of Personal Information Act 4 of 2013 and administered by the DJCD – see Boraine and Van Wyk "Credit bureaus in South Africa and Namibia: A comparative analysis of the regulatory frameworks evaluated against the World Bank's principles for credit reporting: Part 1" 2017 *CILSA* 147 190–192) or the NCR and the FSCA (established by the FSRA and administered by the DF – see this article).

monitor and take action, but not to effect immediate change unilaterally and without recourse to higher authorities.[114] Its guidelines and opinions are not considered binding.[115] I nevertheless argue hereafter that the NCR has cleverly used a combination of its legislative authority to effect changes to regulatory landscape pertaining to the conduct of registrants, and that some courts have erred by not recognising the validity of the NCR's actions.

The debt counselling procedure is a case study in this regard.[116] The NCA sets the foundational procedure in section 86 and regulations 24 through to 27, but the practical designs necessary to implement the procedure were developed through case law and initiatives by the NCR and the industry.[117] In order to access the consumer-credit market as a debt counsellor or credit provider, the aspirant has to be registered as such[118] and subscribe to conditions of registration that the NCR is authorised, by law, to determine.[119] The subjection of a registration to certain conditions has provided the NCR with the ability to specify the standard of conduct expected of a registrant.[120]

4 2 Conditions of registration

A successful application for registration generally includes acceptance of conditions of registration.[121] The NCA does not imply that conditions of registration assume the position of legislation within the hierarchy of rules that role-players

114 Paras 4 2–4 5 *infra*; Vessio 2008 *SA Merc LJ* 231 232.

115 S 16(1)(b) of the NCA; Vessio 2008 *SA Merc LJ* 231.

116 The debt review industry provides numerous examples of problems regarding challenges to and developments in the debt counselling sphere, see Roestoff *et al* "The debt counselling process – Closing the loopholes in the National Credit Act 34 of 2005" 2009 *PELJ* 247ff; Van Heerden "Over-indebtedness and reckless credit" in Scholtz *et al Guide to the National Credit Act* (June 2018 Service Issue 10) ("Van Heerden in *Guide*") para 11.3.3.2(j); NCR "Debt Review Task Team Agreements of 2010" Guideline 1 of 2015 January 2015, available at https://bit.ly/2BYGluh ("NCR Guideline 1 of 2015"); two reports by Business Enterprises (commissioned by the NCR and research undertaken by University of Pretoria Law Clinic) *The debt counselling process – Challenges to consumers and the credit industry in general* 2009, available at https://bit.ly/2VnBZnI and *An assessment of debt counselling: December 2011 – April 2012* 2012 Executive Summary, available at https://bit.ly/2NEPr40 (accessed on 6 April 2014 and on file with author); De Villiers *A workable debt review process for South Africa: At last?* (LLM diss UP 2010) may be consulted in respect of earlier industry developments.

117 Roestoff *et al* 2009 *PELJ* 249 258; *National Credit Regulator v Nedbank Limited* 2009 6 SA 295 (GNP) ("*Nedbank*") 299; Business Enterprises *An assessment of debt counselling* (fn 116) Executive Summary para 3.1. The formulation and codification of behavioural guidelines through industry rules, development of software to produce repayment plans, standardisation of documentation for purposes of conformity when communicating the necessary information between debt counsellors and credit providers, and industry guidelines initiated by the National Debt Mediation Joint Debt Review Forum (and later by the NCR's Credit Industry Forum) serve as examples – see Roestoff *et al* 2009 *PELJ* 249ff; NCR Guideline 1 of 2015; NCR "Update from the Credit Industry Forum" Circular 8 of 2014 May 2014, available at https://bit.ly/2Elk0r8; NCR "The Credit Industry Forum" Circular 11 of 2013 October 2013, available at https://bit.ly/2VvG8WM (accessed on July 2018 and on file with author) ("NCR Circular 11 of 2013").

118 Ss 40(1) 40(3) 44(1) 44(2) of the NCA.

119 See para 4 2 *infra*.

120 See Roestoff *et al* 2009 *PELJ* 255; para 4 6 *infra*.

121 Ss 48(3) and 48(6) of the NCA. I focus on the conditions imposed by the NCR but there are mandatory conditions attached to each registration (s 50(2) of the NCA).

need to abide by, nor that it can exceed the allowed boundaries of the legislation or counter the provisions of the NCA (or any other Act of Parliament for that matter).[122] However, the imposition of conditions of registration upon a prospective registrant, as well as the contents thereof, is within the discretion of the NCR even though the applicable section is worded in a manner that suggests that the incorporation of conditions of registration into the registration process is one of negotiation between the NCR and the registrant.[123] Section 48(3) allows the NCR to set forth "any conditions" pertaining to the prospective registrant's successful registration – the NCR is deemed to "propose" the conditions to the prospective registrant. This discretion is limited only by the aims and prospects of the NCA and the extent to which the NCR is able to formulate a rationale for the conditions.[124]

Generally, section 48(3) highlights four aspects that the NCR should consider when contemplating conditions of registration in respect of a particular application. These are broadly classified as the outcomes and rationales of the NCA, the context of the specific application, rationalisation of the imposition of conditions of registration, and a selection of three statutory provisions.[125] Additional factors are to be contemplated where the prospective registration is in respect of a debt counsellor and the NCR has to view the application within the context of "the applicant's education, experience and competence relative to any prescribed standards".[126] Considerations of reasonability and justifiability are only expressly made applicable in this section to conditions in terms of which the scope of application would potentially expand to include "an associated person".[127] Upon objection by the prospective registrant, the NCR may or may not change the conditions, as the NCR is the authority to "finally determine" the applicable conditions subject to consideration of the feedback received from the registrant.[128] However, section 59 allows a registrant recourse to the National Consumer Tribunal to "review . . . [the] decision" – in this case the decision would be the imposition of the conditions of registration against which the registrant objected.

The NCR imposes "general" and "specific" conditions of registration on a registrant.[129] An example of a "general condition" is observance of the law that pertains to debt review.[130] An example of a specific condition, relevant for the upcoming discussion, is the following: "The Debt Counsellor will comply and conduct its business in accordance with Debt Counsellor's Code of Conduct for

122 Non-compliance with conditions of registration has severe consequences as it is a ground for de-registration of the registrant – see s 57(1)(a) of the NCA.

123 S 48(3) and 48(5) of the NCA.

124 S 48(3); see also s 12(1)(d) and 12(1)(f)(i) of the NCA.

125 S 48(3) of the NCA.

126 S 48(2) of the NCA.

127 S 48(4)(a) of the NCA.

128 S 48(6)(b) of the NCA.

129 NCR *Conditions of registration and code of conduct* (2011) (signed by JS van Wyk and on file with author) paras A and B ("NCR *Conditions and code*"); *NCR v Hewitt* [2016] ZANCT 7 (7 January 2016) ("*Hewitt*") paras 12.1.3–12.1.5; *NCR v Bnglan Trading CC t/a Bnglan Cash Loans* [2018] ZANCT 71 (9 April 2018) par 21 ("*Bnglan*"). See also Van Heerden and Renke "Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1)" 2014 *THRHR* 614 629 and fn 160 161.

130 *Bnglan* para 21.

Debt Review as approved by the National Credit Regulator and as it may be amended from time to time".[131]

4 3 Codes of Conduct

The NCA does not specifically refer to codes of conduct for debt counsellors.[132] Sections 48(1)(b) and 48A of the NCA refer to a code of conduct for credit providers but this code must be "prescribed" by the Minister of Trade and Industry.[133] Nevertheless, the NCR prescribed a code of conduct for debt counsellors and incorporated compliance as a condition of registration in the past.[134] The code of conduct incorporates the following statement:

> "Further, I acknowledge that it is necessary to support the implementation of measures introduced by the National Credit Regulator (NCR) to ensure that as many debt review cases as possible are brought to a successful conclusion. . . . I commit myself to implement the provisions of this Code and any processes adopted as guidelines of the NCR to give effect to these objectives."[135]

4 4 Guidance to the industry

The NCR is mandated to issue "explanatory notices" and "opinions" on its understanding of the NCA. However, the "opinion" so issued is not considered binding.[136] The wording of section 16(1)(b)(i) is also limited – the "explanatory notices" pertain to NCR's internal processes and the "non-binding opinion" is in respect of the "interpretation" of a "provision" in the NCA. In order to deal with "interpretation or application", the matter can be referred to the judiciary in terms of section 16(1)(b)(ii).

The NCR has been joined in some proceedings to present its views as *amicus curiae* – such as in the case of *Sebola*[137] where compliance with section 129 was scrutinised by the Constitutional Court. The court may be approached by the NCR on its own initiative for a declaratory order in terms of section 16(1)(b)(ii) of the NCA.[138] Members of the consumer-credit industry have also sought declaratory orders and the NCR joined as a party to the proceedings.[139] In the given examples, where a substantive matter or a declaratory order brings the NCR before a court, it was mostly a reasoned presentation of the NCR's preferred perspective that was evaluated by the court against arguments of other interested parties.[140] In contrast with the NCR's own published works, the outcome of the court proceeding would be binding in line with the rules of precedent of South African law.[141]

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131 NCR *Conditions and code* para B.2 p 3.

132 Zerbst "New Credit Industry Codes of Conduct: The National Credit Regulator responds" *FANews* (2013-06-26), available at https://bit.ly/2tGDSQw (accessed on 7 January 2019) – the interviewee also stated that there are counsellors who do not adhere to the codes.

133 Ss 48(1)(b) and 48A read with s 1 of the NCA.

134 NCR 2011 *Conditions and code* para B.2 p 3.

135 NCR *Debt counsellors' code of conduct for debt review* 2013 paras 1.2 1.3, available at https://bit.ly/2TmGi5d.

136 S 16(1)(b)(i) of the NCA.

137 *Sebola v Standard Bank of South Africa* 2012 5 SA 142 (CC) ("*Sebola*").

138 See, eg, *Nedbank*.

139 See *Van der Hoven Attorneys v National Credit Regulator* (10918/2015) order given by Jansen J on 25 May 2015 (GNP).

140 See, eg, *Sebola* paras 25–28; *Nedbank* 299ff.

141 Otto "The South African legal system and its history" in Nagel *et al Commercial law* (2015) 16–17.

4 5 Circulars

The NCR utilises circulars as a formal channel of communication to keep registrants informed of developments in the industry, decisions by the NCR and other aspects that are of importance.[142] The circulars are written documents that contain information or instructions that the targeted registrant group is expected to note and, where applicable, comply with the contents thereof.[143]

Apart from reminding registrants of their duties in terms of the NCA, such as compliance with statutory reporting duties[144] and yearly payment of fees regarding a registrant's registration with the NCR,[145] the circulars are utilised to communicate the availability of guidance on complying with the relevant legislative provisions.[146] In this regard, guidelines issued by the NCR can be accompanied by a circular creating awareness among registrants of the availability of explanatory documents, as well as the behaviour expected from role-players in response to the content.[147] These documents are instructive with regard to clarification and management of the practical difficulties pertaining to compliance and other challenges, for example, in respect of the debt review process.[148]

I indicated above that the NCR requires adherence to its circulars and its guidelines.[149] The following extract from the 2015 withdrawal guidelines, aptly summarises the view of the NCR in respect of the status of its guidelines:

> "[N]ote that amendments to the Act, its regulations or case law supersede provisions made in these guidelines and will when necessary be amended. . . . Credit Providers, Credit Bureaus and Debt Counsellors are requested to comply by

142 Available at https://bit.ly/2tLWDIM.

143 See, eg, the wording of NCR "Debt Review Task Team Agreements of 2010 guidelines" Circular 2 of 2015 January 2015, available at https://bit.ly/2BYGluh ("NCR Circular 2 of 2015"); NCR "Voluntary debt mediation" Circular 13 of 2014 November 2014, available at https://bit.ly/2UgaUm2; NCR "Assessment findings on Voluntary Debt Mediation Solution" Circular 6 of 2012 August 2012, available at https://bit.ly/2TcpTkR ("NCR Circular 6 of 2012").

144 NCR "Annual Compliance Report" Circular 4 of 2014 (on file with author).

145 NCR "DC annual registration renewal fees" Circular 10 of 2012 November 2012, available at https://bit.ly/2EpqNQv.

146 See, eg, NCR Circular 2 of 2015 (referring to NCR Guideline 1 of 2015); NCR "Credit providers circular on submission of the Assurance Engagement Report for non-audited credit providers" Credit providers circular 2 of 2010 September 2010, available at https://bit.ly/2TcqenD; NCR "Credit providers circular on submission of the Compliance Report" Credit providers circular 1 of 2010 September 2010, available at https://bit.ly/2IIjwAF.

147 See NCR Circular 2 of 2015; NCR "Proposed process for end balance differences" Circular 4 of 2015 January 2015, available at https://bit.ly/2NBV7vn. Other guidelines published are: NCR "Guideline for the submission of credit information in terms of regulation 19(13) of the National Credit Act, 34 of 2005, as amended" Guideline 3 of 2017 3 November 2017, available at https://bit.ly/2NBYJxm; NCR "Guideline for credit providers and credit bureaux in respect of debt that is on-sold" Guideline 1 of 2017 4 April 2017, available at https://bit.ly/2VvfNYN.

148 See NCR Circular 2 of 2015; NCR Guideline 1 of 2015; NCR Circular 6 of 2012.

149 See NCR "New debt counsellor fees" Circular 1 of 2018 February 2018, available at https://bit.ly/2VoSwYk; NCR Circular 2 of 2015; NCR "Guidelines for the withdrawal from debt review" Guideline 2 of 2015 February 2015 3, available at https://bit.ly/2GS1dHy ("NCR Guideline 2 of 2015").

consistently applying these guidelines. Non-compliance with these guidelines should be reported to the NCR."[150]

4 6 Case studies

When the broader interactive scheme of conditions of registration, codes of conduct and NCR guidelines is considered, the contents of the documents overlap in order to coerce compliance. In this manner, the NCR can require the registrant to behave in a manner that is not sanctioned by the legislation and, in the absence of court intervention confirming or clarifying the matter, the registrant is at risk of penalty by the NCR in the case of non-compliance.[151] For example, the Task Team Guidelines propose that its content be incorporated into codes of conduct and state that these codes can be referenced in a registrant's conditions of registration.[152] Non-compliance with the conditions of registration can result in deregistration as per section 57(1)(a) of the NCA. I find that the registration function of the NCR therefore is a means through which the NCR has exercised some regulatory authority because non-compliance with a guideline could also cause the registrant to disobey its codes of conduct and subsequently its conditions of registration.

The practical effect of the NCR's course of action results in the behavioural modification of the regulatory landscape – for example, the distribution of payments by a debt counsellor as sanctioned by regulation 11 to the NCA is preempted by the condition of registration that debt counsellors make use of payment distribution agents.[153] This prohibition of a function authorised by regulation via a condition attached to a debt counsellor's registration, was confirmed in *Bornman v National Credit Regulator*[154] and more recently by the National Consumer Tribunal in *Hewitt*.[155]

In *Bornman*, the Supreme Court of Appeal further confirmed that the debt counsellor had to comply with the debt counselling fee guidelines.[156] Fees are a matter not supported by any specific provision of the NCA because the NCA only provides for a threshold for an application fee.[157] Notwithstanding the Supreme Court of Appeal's support of the fee guidelines, the courts do not seem to be consistent when it comes to the NCR's guidelines – even where they do not contradict a direct regulatory provision but provides for practical matters not

150 See, eg, NCR Guideline 2 of 2015 3.

151 See, eg, NCR Guideline 1 of 2015 Annexure A ("Proposed debt review process enhancements and conduct provisions"), which provides *inter alia* that the debt counsellor should refer a repayment plan to the credit providers prior to approaching the magistrates' court – see para 2.3.5. See also NCR *Conditions and code* para B.2 p 3 and para 4 3 *supra*. See See Barnardt "Open letter to National Credit Regulator" 12 April 2016, available at https://bit.ly/2IYbp3l, ("Barnardt 'Open letter'") in respect of certain guidelines issued by the NCR such as end balance variations and debt counsellor fees.

152 NCR Guideline 1 of 2015 para 3.1.4 (covering report).

153 NCR "Finsense circular" Circular 12 of 2013 November 2013 (on file with author); Kelly-Louw "Consumer credit" in 8 *LAWSA* (2014) para 141 "The debt counselling payment and payment distribution system"; Van Zyl in *Guide* fn 141a.

154 [2014] JOL 31367 (SCA) (*"Bornman"*) paras 22 23. See also fn 161.

155 Para 12.1.4.

156 Paras 22 23.

157 Sch 2 item 2 of the regs to the NCA. The courts referred to in this article did not support the NCR's work based on the latter's general mandate of regulating the credit industry but referred (or searched for) specific provisions mandating the contested behaviours.

dealt with in the NCA. In *Firstrand Bank Limited v Barnard*,[158] the court took issue with the provision in the debt restructuring order that sought to have the fees for services rendered by the debt counsellor and legal team paid first and prior to payment in terms of the restructured debt payments to creditors.[159] The court found that the prioritisation of the counsellor and attorney's fees over that of the creditors was legally unsanctioned.[160] However, the court did not refer to the NCR's Fee Guidelines for Debt Counsellors or the NCR's preferred information technologies, which mandated debt counsellors to structure repayments in this manner.[161] Michelle Barnardt was the debt counsellor in the *Barnard* case and voiced her concerns in an open letter to the NCR after the court ruled that her debt restructuring order was not in line with the NCA – even though she complied with the guidelines prescribed by the NCR.[162] She was aggrieved by the "computer based debt restructuring programs" that were mandated for use by debt counsellors, and which generated her disastrous proposal.[163]

In this regard, Van Heerden and O'Reilly comment as follows:

> "The court in *Barnard* made it clear that the debt counsellor's attempt to have payment of her debt counselling costs and fees preferred over payment of amounts owing to creditors was not sanctioned by the NCA as section 86(7)(c)(ii)(bb) simply does not permit such a subordination . . . However, when one has regard to the debt counsellor's fee guidelines issued by DCASA as set out above, it appears that these guidelines at least attempt to give some preference to the payment of the debt counsellor's restructuring fee to be fully recovered from the first instalment that the consumer has to pay . . . In any event, the exact status of the guidelines, although endorsed by the National Credit Regulator, is unclear but be that as it may, it is submitted that the debt counselling industry cannot use its fee guidelines to effect a preference which the Act does not permit."[164]

Notwithstanding the fact that these types of fees are not credit debts to which section 86 applies,[165] the *Barnard* case was further brought to court by two South African banks: Firstrand and Nedbank. These credit providers form part of the Banking Association of South Africa,[166] which is a member of the Consumer Industry Forum.[167] The Consumer Industry Forum re-evaluated the Task Team Agreements, *which include the standardised drafting of debt review applications.*[168] The re-evaluated industry rules were subsequently adopted and published by the NCR as "voluntary non statutory measures" in order to be implemented by the industry, with the instruction that non-compliance should be reported to

158 (A801/2014) [2015] ZAGPPHC 1109 (11 August 2015) ("*Barnard*").

159 Para 31. See Van Heerden and O'Reilly "Debt restructuring, partisan debt counsellors, costs and other important debt counselling issues. An appraisal of the legal position in view of *Firstrand Bank v Barnard* 2015 JDR 1614 (GP)" 2016 *THRHR* 632 640; Van Heerden in *Guide* para 11.3.3.2(e).

160 *Barnard* para 32.

161 See NCR "Debt counselling fee guidelines" 2011, available at https://bit.ly/2SEm5DO; NCR "Payment of debt counsellor fees" Circular 6 of 2016 March 2016 ("NCR Circular 6 of 2016"), available at https://bit.ly/2H9QYO4.

162 See Barnardt "Open letter".

163 *Ibid.*

164 Van Heerden and O'Reilly 2016 *THRHR* 632 648 649.

165 Boraine and Delport "Insolvency" in Nagel *et al Commercial law* (2015) 502.

166 See https://bit.ly/2NBAAqX.

167 NCR Circular 11 of 2013 1.

168 NCR Circular 2 of 2015; NCR Guideline 1 of 2015 Annexure E.

the NCR.[169] The credit providers' disapproval[170] of the orders (which would logically include the fee-related order) in the *Barnard* case is reminiscent of the conduct reported in 2009 by the University of Pretoria Law Clinic:

> "Although it was agreed to in the work streams that court applications would not be opposed on these grounds, it seems that credit providers use these loopholes in the Act to their benefit as the debt review cases can then not be heard on its true merits. . . . The use of different software packages and non-adherence to work stream agreement formulas influence the contents and scope and eventual acceptance of rejection of proposals."[171]

Rougier held that the NCA does not provide for a debt counsellor to "withdraw" from debt review.[172] The court noted that the debt counsellor's role is of a "statutory" nature and, in the absence of a procedure set out in the legislation that mandates the debt counsellor to fulfil this role, the debt counsellor cannot "withdraw" from debt review.[173] In doing so, the debt counsellor would be exceeding the boundaries set by the legislation for the functions of the counsellor.[174] However, guidelines on withdrawal processes had been drafted, which were subsequently amended after the *Rougier* judgment.[175] For purposes of this article, it must be noted that the court in *Rougier* decided on the substantive matter – which was the validity of withdrawal – and did not decide on the validity of the prescribed guidelines.[176]

After the judgment in *Rougier v Nedbank Limited*,[177] the NCR amended its processes to align the "withdrawal" processes with those circumstances allowed by the NCA and as per the court's reasoning – more specifically setting out the process to follow when section 71(1) of the NCA becomes applicable. The NCR indicated that the debt review process could be "withdraw[n]" or "terminate[d]" prior to the issuing of a Form 17.2.[178] The situation has resulted in quite an artificial attempt to circumvent a statutory *lacuna* – the "suspension" of the debt counsellor's services where the consumer does not cooperate but where the debt counsellor remains the counsellor of record.[179]

4 7 Comments

The case studies referred to in the previous paragraph show that adherence to the NCR's guidelines are not consistent, even though there are statutory prescriptions

169 NCR Circular 2 of 2015.
170 *Barnard* para 34.
171 Business Enterprises *The debt counselling process* (fn 116) 38 46 (see also 21–22). See Barnardt "Open letter" who also refers to the findings regarding compliance in this research.
172 [2013] ZAGPJHC 119 (28 May 2013) para 12 ("*Rougier*"); Van Heerden in *Guide* paras 11.3.3.2(h) 11.3.3.3.
173 *Rougier* para 12.
174 *Idem* paras 12 13.
175 NCR Guideline 2 of 2015 3.
176 However, see eg, *Less v Vosloo* 2018 JDR 0123 (KZP) para 12.1 (insofar as "guidelines" "are clearly guidelines and not specific procedures"); *Manamela v Du Plessis* 2017 JDR 1016 (GP) paras 3–4.
177 NCR Guideline 2 of 2015 3.
178 *Idem* 4.
179 *Idem* 5. See Van Heerden in *Guide* para 11.3.3.2(b) referring to the National Consumer Tribunal's stance that the counsellor should be "actively involved and participating in every aspect of the debt review process".

and voluntary acquiescence that create an expectation of compliance by industry role-players. In *Rougier* and *Barnard* the ultimate decisions of the courts were made without consideration of the industry guidelines issued and followed by the debt counsellors. The courts' attentions were also not drawn to the guidelines.

Ideally, the NCR should have been joined in the proceedings, or given the opportunity to intervene, because its procedures were one of the underlying causes of the complaints in *Barnard* and *Rougier*. One cannot but wonder at the lost opportunities in *Barnard* and *Rougier* to pronounce clearly on the legal status of the NCR's directives where compliance is mandated through conditions of registration, especially where the prescribed conduct does not contravene, but adds to, the NCA or its regulations. In addition, the position in light of the existing Supreme Court of Appeal decision in *Bornman* – which was decided in another context (deregistration) but still confirmed that a debt counsellor should comply with certain guidelines[180] – is perplexing. I do not see why the notion of compliance should differ in a case of deregistration as opposed to a case where a debt review proposal and the conduct of the debt counsellor are considered. *Rougier* was primarily determined (and followed) from the perspective of an *absence* – the NCA does not provide for a withdrawal procedure – linked to the requirements for action against a recalcitrant debtor set out in section 88.[181] In *Phaladi v Lamara*,[182] the Western Cape High Court considered the validity of the withdrawal guidelines issued by the NCR and found that some of the provisions therein did not accord with the provisions of the NCA. The court firstly reiterated that section 16(1)(b) of the NCA provides for non-peremptory directives and determined that the application process put forward by the NCR in its guiding notes was in any event not supported by the provisions of the Act *already in existence*.[183]

If the NCR had been joined in these proceedings or specific reference made to these guidelines in connection with the conditions of registration signed by registrants, it would have led to an opportunity to evaluate the mechanisms used to impose conduct-changing rules on regulatees and the allowed scope of the actual actions or rules of the NCR in this regard. The question therefore is twofold: whether the creation of a process to deal with challenges experienced in practice falls under the provisions of section 16 as an interpretation of legislation and, if so, whether section 16 – which provides for the non-peremptory nature of

180 Paras 22 and 23.

181 *Rougier* paras 12–17. Own emphasis.

182 2018 JDR 0001 (WCC) paras 18 23 27 ("*Phaladi*").

183 Paras 18 23 26–27. Own emphasis. The Regulator's guidelines made provision for an application to be made in terms of s 87(1)(a) to have the consumer declared "not over-indebted", but the court held (paras 26 27): "Section 87(1)(a) provides for a *negative* response by the court to the application brought before it. It is to that provision that s 88(1)(b) effectively cross-references. The Act most certainly does not contemplate an application to the magistrates' court for a declaration that the consumer is not over-indebted. Any such declaration would require a *positive* response to an application for which the Act makes no provision. Once a debt review has been confirmed, whether by way of court order in terms of s 87(1)(b) or by voluntary debt re-arrangement in terms of s 86(8)(a), the only way to end its effect is in terms of s 71 read with s 88(1)(c) . . . In short, the NCA just does not make provision for the sort of application conjured in paragraph 4.2 of the Explanatory Note." Original emphasis. See also *Magadze v ADCAP, Ndlovu v Koekemoer* [2016] ZAGPPHC 1115 (2 November 2016) paras 5 10 12.

the Regulator's interpretations – still applies when the registrant agrees to the conditions of registration. Under circumstances where compliance with conduct rules was brought about through conditions of registration, it would probably include a justification of the lawfulness of the means used to compel compliance as well as the contents of the rules.[184] I agree with the contention that the NCR has to work within the boundaries set by the NCA,[185] but these judgments still do not address those aspects where the interpretation of the Regulator falls within the legislative parameters set, and compliance has been mutually agreed upon through acceptance of the conditions of registration.[186]

A problematic situation arises in respect of the conduct of debt counsellors, exacerbated by the NCR's stance on the *Barnard* and *Rougier* judgments, and the value and trust that can be placed in the solutions drafted to address practical challenges caused by the provisions of the NCA.[187] In response to *Barnard*, the NCR opined the following:

> "It is therefore the considered view of the NCR, as the custodian of the credit industry, that all debt counsellors are required to comply with the Fee Guidelines for Debt Counsellors, which were issued by the NCR in 2011 so as to ensure that the industry-agreed payment process is implemented uniformly throughout the debt counselling industry."[188]

The circular ends with the following paragraph:

> "Disclaimer: While the NCR has taken reasonable care to ensure the factual accuracy of this Circular, it cannot guarantee such accuracy especially with regards to future events. Accordingly, the NCR does not accept any liability for damages incurred by any party as a result of decisions or actions taken on the basis of information supplied in this Circular."[189]

The NCR has instructed the industry to disregard the court's judgment in favour of industry harmonisation.[190] The debt counsellor runs the risk of not finalising

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184 This last-mentioned aspect is reminiscent of the argument in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC). See, eg, para 49 where compliance with the rules of the Micro Finance Regulatory Council was considered.

185 See, eg, *Phaladi* paras 9 27.

186 S 48(6) of the NCA alludes to some form of consensual recognition of the conditions and provides for the prospective registrant to debate the imposition of certain conditions with the NCR. It also provides for recourse to the NCT through s 59 of the NCA. See Van Heerden in *Guide* para 11.3.3.2(j) who notes (and criticises same based on "prejudice" to creditors and varying practices in magistrates' courts) that "[i]t is submitted that where the parties to a credit agreement that is under debt review agree to vary the interest rate, there is no impediment to the magistrate capturing such agreed reduced interest rate in a debt restructuring order". This is the author's view notwithstanding that courts have held that the NCA does not allow a "unilateral" change to interest rates (*ibid*).

187 See Barnardt "Open letter". See also NCR Circular 11 of 2013 1–2: The forum consists of credit provider, debt counsellor, consumer and payment distribution agent organisations and NCR delegates. Individuals may submit contributions to this forum (*idem* 2).

188 NCR Circular 6 of 2016 1.

189 *Ibid*.

190 *Ibid*: "[T]he consequence of the judgment – which the NCR believes to be unintended in nature – is that the industry-agreed process, which culminated in the issuing of the Fee Guidelines by the NCR in 2011, has been subverted. As a final consideration, in the event that a high court in a different division disagrees with the North Gauteng High Court's reasoning in the *Firstrand Bank and Nedbank v Coetzee* case, a further unintended consequence would be that the debt counsellors who refer their applications to the magistrates' courts falling within the jurisdiction of that high court would be subject to a

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debt review matters through the magistrates' court because of non-compliance with a high court judgment.[191] Alternatively, the debt counsellor risks the cancellation of his or her registration due to non-adherence to the conditions of registration.[192]

Therefore, two arguments can be presented here. One, that where the registrant has accepted the conditions of registration, which the NCR is lawfully permitted[193] to make in terms of section 48 of the NCA, he or she has agreed to submit to the interpretations of the NCR and, in light of the court judgments, as long as it does not transgress the provisions of the NCA.[194] This would not preclude the registrant from challenging the validity of such an interpretation in terms of section 59 of the NCA or a court of law from dealing with the matter, whereafter the NCR would have to amend its views. Some courts have acknowledged the existence and authority of these guidelines,[195] whilst others have decided the matter with sole reference to the provisions in the NCA.[196] Two, processes developed for practical purposes, such as the debt review processes developed by the Task Team and other matters dealt with by the Credit Industry Forum, do not amount to interpretations of the NCA but are aimed at adhering to the provisions of the NCA in a meaningful way. The matter of withdrawal within the context of debt review illustrates this point. One could argue that the debt counsellor is compelled to bring the section 86 debt review application of the consumer to its logical conclusion[197] and then issuing a clearance certificate when the consumer meets the requirements set by law.[198] However, the practical steps provided for in the interim, such as annual reviews or using certain prescribed document formats to facilitate interaction with other role players,[199] are founded in the consensual undertaking via the conditions of registration.

I do not think that the court has given a definite pronouncement on the latter aspect and this viewpoint may go some way towards ameliorating the disharmonised interaction between the regulatory and judicial spheres.

5 COMPARATIVE ANALYSIS AND RECOMMENDATIONS

The need for preventative regulation has been identified by the National Treasury under the auspices of a comparative review of "outcomes based supervision":

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different fee payment process. The NCR is of the view that it could not have been the intention of the North Gauteng High Court to create such inconsistency."

191 See paras 4 4 and 4 7 (*Barnard*). See also Barnardt "Open letter" *inter alia* requesting formal recognition of fees by way of regulation.

192 S 57(1)(a) of the NCA.

193 This may very well be a "false" enhancement of its autonomy as the authority is not clearly founded in legislation – for shortcomings in respect of authority see Michelle Barnardt's open letter to the NCR (fn 162 *supra*).

194 See also Van Heerden in *Guide* para 11.3.3.3 (referring to *Rougier*) *re* delineation of the debt counsellor's authority by the NCA and the response of the NCR in this regard (see also para 4 7 *supra*).

195 *Bornman* paras 22 23 27.

196 *Rougier* para 12.

197 See Van Heerden and O'Reilly 2016 *THRHR* 633 for a summary of the primary function of a debt counsellor.

198 See ss 71 86 and reg 27 to the NCA.

199 See, eg, NCR Guideline 1 of 2015 para 10 p 26 (Annexure B) and Annexure E.

> "Until recently, market conduct regulators concentrated on setting conduct rules, periodically assessing financial institutions for compliance with these, and issuing fines for non-compliance. Rules were made in response to poor practices observed, which inevitably meant the regulator responded to poor conduct practices only after their relative prevalence. Moreover, institutions were only held to account once a rule was contravened, meaning that many customers had already suffered by the time of remedial regulatory action."[200]

In line with the above[201] and in contrast to the NCR, the FSCA is authorised to issue determinations that have the force of law and which can change the legal landscape insofar as behaviour of market participants is concerned.[202] The mandating legislation is very broad in respect of conduct standards and it is difficult to fathom an aspect that cannot be brought under the auspices of section 106 or 108 of the FSRA. As such, it is clearly endowed with independence insofar as regulatory authority is concerned.

The NCR's authority is limited to some indirect authority to amend the consumer-credit landscape through other means, such as the National Consumer Tribunal, the judiciary and the legislature.[203] An ostensible authority-enhancing provision is that of the new section 82(2), inserted by the National Credit Amendment Act of 2014: "The Minister *must, on recommendation of the National Credit Regulator*, make affordability assessment regulations."[204] Nevertheless, the aforementioned example is not indicative of true regulatory independence because regulatory autonomy refers to the NCR's ability to effect change without recourse to arduous political processes.[205]

The NCR does not have the direct authority to change the legal landscape.[206] It has been instrumental in shaping the consumer-credit industry insofar as it has not neglected to address severe challenges, such as debt counselling, by implementing voluntary "obligatory" measures strengthened through indirect statutory authority.[207] The problem is that many of these interventions require a very specific interpretation of legislation and the judiciary has strengthened the non-binding nature of some of these interventions by omission.[208] Unfortunately, when it comes to the mechanism of conditions of registration, the courts have not pronounced on the authority of the NCR in a matter other than the continued registration of the debt counsellor as such.[209]

As such, it is imperative that the NCR be endowed with some binding guiding powers or that the courts be compelled to consider the instructions by the NCR to the industry, as well as industry commitments, when dealing with a matter where these instructions have been issued to the involved parties.[210] The

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200 Treasury *Market conduct policy* 92.
201 *Idem* 26 36–37.
202 Para 3 2 *supra*.
203 Paras 4 1, 4 4 *supra*.
204 Own emphasis.
205 Para 2 2 *supra*.
206 Para 4 *supra*.
207 *Ibid*.
208 *Ibid*.
209 *Ibid*.
210 See the similar recommendation by Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (LLD thesis UP 2012) 625–626 (albeit not in the context of regulatory independence but that of affordability assessments): "The

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disregard shown in *Barnard* has nullified progress in the consumer-credit sphere due to drafting of legislation that was too meek in endowing the NCR with proper authority.[211] The aforementioned position has remained after the establishment of the FSCA by the FSRA, notwithstanding the role of the NCR *vis-à-vis* the FSCA in the consumer credit sector.[212] The FSRA bestows prominence in respect of regulatory independence on the FSCA, especially when compared with the NCR. An amendment of the current position is necessary in order to enable the NCR, as the consumer-credit specialist regulator, to be able to hold its own against the FSCA within the scheme envisaged by the FSRA.[213]

Independence is a legitimate policy consideration where regulatory systems are concerned.[214] It can be strengthened in various ways and the endangerment thereof can affect sound supervision.[215] Although actual independence alone does not guarantee proficiency in regulation, it contributes to regulatory competence.[216]

I identified selected features of a regulator that would render it independent from international scholarship in this article.[217] Against this background, I assessed the South African regime in order to determine which features affect the independence of the FSCA and the NCA as statutory market conduct regulators of the consumer-credit industry.[218] Based on the aforementioned evaluation, the research project finds that there are shortcomings in respect of the NCR, especially when compared to the FSCA. The following recommendations are made to ameliorate the *status quo*:

The NCA must be amended to enable the NCR to issue binding rules in respect of conduct required from market participants.[219] Alternatively, the use of conditions of registration to bind registrants to guidelines should be juridically confirmed. In the absence of the aforementioned, one has to reconsider the value, and the legislative purpose, of the NCA's provisions in light of the practical implementation thereof and the clear distinction when it comes to other financial sector regulators such as the FSCA.

Section 16(1)(b)(i) must be enhanced to add the option of a ruling on the interpretation and application of the provisions of the NCA, similar to the provisions and safeguards set out in section 142 of the FSRA. This would be in

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powers of the National Credit Regulator must be revised and extended, not only authorising the Regulator to prescribe guidelines to credit providers in respect of evaluative mechanisms, etcetera which are binding on the latter, but also empowering the Regulator to directly take action against a credit provider who does not comply with such guidelines. A proactive instead of reactive approach to non-compliance must in other words be followed."

211 Para 4 6 *supra*.

212 Para 2 3 *supra*.

213 *Ibid*. I do not deal with this matter in detail but see Freeman and Rossi "Agency coordination in shared regulatory space" 2012 *Harvard LR* 1131 for an in-depth discussion of the influential factors that affect interacting agencies.

214 Para 2 1 *supra*.

215 Para 2 2 *supra*.

216 *Ibid*.

217 Paras 2 1, 2 2 *supra*.

218 Paras 3 4 *supra*.

219 See Quintyn *et al* 9.

addition to the ability to issue non-binding interpretations on a section of the NCA, or the ability to approach the court for a declaratory order on the interpretation or application of the NCA.[220] The legislation should further provide for a clear right to approach the court to challenge the interpretation and create precedent for further interpretations.[221] The NCR must be joined in litigious actions or given the opportunity to intervene where a rule, guideline or official arrangement is a source of contention.[222]

Lastly, the need for independence must be formally recognised by the legislature in respect of the FSCA. In this regard, the provisions of the NCA in section 12 can serve as a point of departure.

220 Para 4 4 *supra*.
221 See the position under the FSRA where the judiciary can overrule an interpretation ruling – para 3 2 *supra*.
222 Para 4 6 *supra*.