

## **Financial Consumer Protection Regime in Malaysia:**

### **Assessment of the Legal and Regulatory Framework**

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**Abstract** This paper examines the status of the legal and regulatory framework for consumer protection in Malaysia, an emerging economy. Using leximetrics and notions of incomplete law, the paper explores the financial consumer protection regime in the country by examining two aspects of the legal framework: the legal infrastructure and typology of laws. The Malaysian legal framework for financial consumer protection is assessed in light of the good practices identified in international guidelines issued on the themes by OECD and the World Bank. The results highlight the complementary nature and different roles that laws, regulations and supporting institutions play in achieving a comprehensive financial consumer protection framework in the country.

**Keywords:** Financial consumer protection . Malaysia . leximetrics . OECD guidelines for good practices.

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Since the lack of safeguards to protect consumers were among the weaknesses in the global financial crisis (GFC) of 2007-2009, there has been renewed interest in establishing a robust regime to enhance financial consumer protection. While multilateral organizations such as the OECD and World Bank have come up with guidelines and standards on financial consumer protection (FCP) at the international level, several countries have instituted legal and regulatory changes at the national level. Examples of national level initiatives to protect financial consumers include the enactment of laws such as the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 in the United States, the Financial Services Act 2012 in the United Kingdom, and the setting up of specific public institutions such as the Consumer Financial Protection Bureau in the former and Financial Conduct Authority in the latter.

In line with the legal, regulatory and institutional developments, a large body of literature examining different aspects of financial consumer protection has appeared in the aftermath of the crisis. While some studies explore the theoretical underpinnings of regulations related to protecting consumers, others examine institutional developments.<sup>2</sup> In the latter category, several studies have appeared on the newly created Consumer Financial Protection Bureau in the United States (Acharya and Richardson, 2012; Braucher, 2012; Graham, 2010; Kennedy et. al., 2012; Levitin, 2012-2013; Mierzewski et.al, 2010; Worrell, 2010-2011; Zywicki, 2013) and the approaches taken to protect financial consumers in the United Kingdom (Akinbami, 2010; Consumer International, 2013).

Although a large body of literature on legal and regulatory issues of financial consumer protection (FCP) in developed economies exists, studies examining its status in emerging and developing countries are relatively scant. An exception is a

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<sup>2</sup> Theoretical studies include Gerding (2009) who investigates the link between consumer protection and systemic risks and Braucher (2012) who examines behavioural economics to justify coming up with an anti-abuse regulatory framework to avoid ‘tricks and traps’ by financial institutions. Haim (2013) identifies the incentives of financial institutions to develop complex products to maximize profits and proposes an appropriate regulatory response to protect the consumers.

World Bank study that examines the status of consumer protection and financial literacy in nine emerging markets (Rutledge, 2010). Given the meagre literature on this contemporary issue for developing countries, this paper aims to evaluate the status of the legal framework for FCP in Malaysia, an emerging economy. Legal architectural issues are discussed from two perspectives. First, the typology of law that uses Hudson's (2009) classification of finance laws that separates them into three tiers which are substantive law, specific statutes for the financial sector, and regulations enforced by a statutory regulatory body. Second, the legal infrastructure identified by Pistor and Xu (2003) that constitutes laws, regulators and dispute resolution institutions. After outlining the key features of international FCP guidelines developed by the OECD (2011) and World Bank (2012), the paper assesses the legal framework of Malaysia that governs FCP in light of international guidelines. Leximetrics, which is a systematic method to measure the status of law and legal institutions, is used to provide a quantitative appraisal of the Malaysian FCP regime in the country.

This paper is organised as follows. Section 2 identifies the key features on financial consumer protection regimes by providing a brief overview of the existing literature. Section 3 provides a methodological overview of the study by discussing leximetrics and then presenting the elements of legal infrastructure and typology of laws. Section 4 evaluates the status of the FCP regime in Malaysia in light of the international guidelines. The last section concludes the paper.

### **Financial Consumer Protection Regimes: Background and Overview**

The failure of the market to protect the interests of financial consumers was exemplified in the subprime lending crisis of 2007 which saw some financial institutions operating in a predatory manner in pursuit of commercial gains at the expense of consumers (Mayer et al., 2014: p. 521). The GFC also revealed other weaknesses in the consumer protection regimes such as inadequate transparency and disclosure of various risks, opacity of products sold, and a failure to protect consumers (Akinbami, 2011; Avgouleas, 2009; Worrell, 2010). The need to protect consumers is a concern for regulators as it is not only appropriate to shield consumers from fraudulent practices but also because it is considered moral and ethical to do so (Harvey and Parry, 1992: p. 13). Aside from moral reasons, there are economic justifications to regulate financial institutions and markets. One key issue relates to

establishing appropriate information rules so that consumers can make informed decisions (Howells, 2005). Insufficient information and fraudulent practices can lead to erosion in consumer confidence which can result in less participation in the financial sector (Cartwright, 2001: p. 38; Cartwright, 2004: p. 1).

The need to protect financial consumers becomes more important as financial markets become complex and financial products and transactions entail serious, long term financial consequences (Micklitz et al., 2010: p. 371). On the demand side, increase in consumer autonomy in sophisticated financial markets can be a cause for alarm when consumers are oriented towards “present consumption” and lack the cognitive capabilities to make sound financial decisions (Campbell *et al.*, 2011: p. 91). In the absence of FCP regulations, the behavioural characteristics of consumers coupled with the complexities of modern financial products leave consumers handicapped in dealing with financial service providers (FSPs), particularly for those coming from poor and low income groups (BCBS, 2015). Thus, consumer protection regulation is justified as it can contribute to distributive justice in situations where bargaining powers in the market are unequal (Cartwright, 2001: p. 28).

The aftermath of the GFC saw an overhaul in financial regulations that included specific focus on safeguarding financial consumers. At the global level, initiatives were taken by the OECD and World Bank to develop guidelines and principles related to financial consumer protection. The *G20 High Level Principles on Financial Consumer Protection* published by the OECD in October 2011 (hereafter OECD 2011) was prepared in response to the desire of the G20 Finance Ministers and Central Bank governors to develop common principles on consumer protection.<sup>3</sup> A more detailed guideline entitled *Good Practices for Financial Consumer Protection* was published by the World Bank in 2012 (hereafter WB 2012). It was mainly developed as a diagnostic tool to assess the legal and regulatory regimes related to the

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<sup>3</sup> OECD 2011 has 10 broad principles to serve as a guide in enhancing financial consumer protection. These are recognising financial consumer protection as central to a legislative and supervisory framework, giving a mandate to oversight bodies responsible for financial consumer protection, the equitable and fair treatment of consumers, the prohibition of fraud and exploitation, the importance of disclosure and transparency, enhancing financial education, and finally effective dispute resolution.

consumer protection of different countries. While WB 2012 guidelines cover specific issues related to different financial sectors such as banking, insurance and the securities markets, it outlines some common good practices that apply to all financial consumers.<sup>4</sup>

Based on the academic and regulatory literature, the key features of a sound FCP regime can be presented under the following five themes.

1. *Legislative Empowerment and Supervisory Framework:* There is a need for a legal and regulatory framework for instituting an environment for protecting financial consumers. This would entail specific laws and regulations related to consumer protection that applies to organizations supplying different financial services. WB 2012 identifies legal institutions for consumer protection as the first item in its good practices and OECD 2011 requires that FCP should be an integral part of a country's legal, regulatory and supervisory framework.

Another aspect of the legal and regulatory framework is the legislative empowerment to form governmental bodies to ensure that consumer interests are protected (Consumer International, 2013: p. 2). Accordingly, OECD 2011 stresses the need for an oversight body to ensure that the legal and regulatory mandates are fulfilled. WB 2012 identifies the establishment of specific prudential supervisory bodies for consumer protection as a key component of good practices. This would require setting up institutions that enforce the protection of consumers, having a regulatory oversight body responsible for ensuring that the laws and regulations are applied, and requiring institutions to redress any violations. While some countries may have an oversight body that is a part of an existing regulatory institution, it must have a clear mandate with a separate reporting structure to maintain credibility and to avoid conflicts of interest (Rutledge, 2010: p. 18).

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<sup>4</sup> World Bank (2012) common good practices have 39 items under 10 sections that touch on consumer protection institutions, disclosure and sales practices, customer accounts, privacy and data protection, dispute resolution, guarantee schemes and insolvency, financial literacy and competition issues. An overview of the academic and regulatory literature indicates that a consumer protection framework would have five key broad components.

2. *Information Disclosure and Protection:* Information and transparency is an important aspect of the consumer protection framework. Information asymmetry between the consumers and FSPs gives the latter the upper hand in dealings and results in the inequality of bargaining powers. Further, consumers are not able to make rational finance decisions without having access to adequate and relevant information. To ensure the optimal amount of information, regulations should aim to cover two features: the first is mandatory disclosure to protect the welfare of customers and the second is to control the supply of false or misleading information (Ogus, 1994: p. 121).

A key component of international standards is requiring information disclosure and transparency to reduce information asymmetry and assist consumers to make informed financial decisions. OECD 2011 emphasizes disclosure and transparency and requires providing relevant and accurate information to consumers on the one hand and the protection of consumer data and privacy on the other hand. Similarly, WB 2012 includes issues related to clear and objective information on products and prohibits providing any misleading information. Furthermore, FSPs are required to ascertain the customer's practical understanding of products and the associated risks and whether the product meets the customer's investment objectives and risk appetite.

3. *Fair Treatment of Financial Consumer:* In pursuing commercial goals, financial institutions should strive to act honestly and fairly when engaging consumers to ensure that fraudulent practices are not employed in the course of business. Other than ensuring that financial consumers are treated fairly in the course of dealings, there should be a clear prohibition of fraudulent practices as FSPs tend to abuse loopholes in the regulatory regime (Mayer et al., 2014 :p529). A regulatory framework should explicitly prohibit unfair and deceptive practices by FSPs (Rutledge, 2010: p.21) and FSPs should face criminal consequences when acting contrary to the economic interests of consumers (Cartwright, 2001: p. 157). Both OECD 2011 and World Bank 2012 have guidelines that emphasize the equitable and fair treatment of consumers and the protection of consumer assets against fraud and misuse.

4. *Complaints and Redress:* There should be efficient and effective mechanisms in place to redress complaints and disputes. Although consumers have the option of going to court in case of mal-practice, engaging in litigation with large corporations is not a viable option for consumers as it is troublesome, costly and burdens are vastly disproportionate (Harvey, 1992: p.14). Since consumers are reluctant to seek justice if redress is complicated and expensive to obtain, complaints and redress avenues must be affordable, convenient and effective (Rutledge, 2010: p27-31). Therefore, alternative dispute resolution institutions such as tribunals and financial ombudsman schemes are highly encouraged as they are efficient, affordable, and less formal (Thomas and Frizon, 2012: p10).

There are the two avenues for effective dispute settlement concerning financial consumer claims: the first is internal at the institution level and the second is redress obtained from an external independent body (Cartwright, 2004: p72). Both OECD 2011 and WB 2012 require having an affordable and efficient dispute resolution mechanism with effective enforcement powers. WB 2012 requires financial institutions to have clear procedures for handling customer complaints and to provide access to affordable and efficient public dispute resolution mechanisms that include a financial ombudsman.

5. *Financial Literacy:* The consumer protection framework must entail a demand side element of educating the consumers through financial literacy programs. The financial literacy and awareness aspect of financial consumer protection is vital as, even if information was supplied, it would be worthless if the consumer is not able to understand and take advantage of such information. Behavioural finance literature shows that consumers can be lazy, ignorant, uninterested or incapable of utilising the information available to them (Micklitz et. al., 2010: p372). As such, there must be adequate financial literacy and awareness initiatives conducted through convenient channels in a simple and comprehensible manner to educate the consumers so that they are able to understand and utilise information provided to achieve the best financial outcome (Huston, 2010: p. 296-361). OECD 2011 requires the provision of broad-based financial education and information to consumers. Similarly, WB 2012 identifies good practices under the heading of financial

literacy and consumer empowerment, which includes the development of programs that provide financial education and enhance the literacy of the broader population using different delivery mechanisms.

### **Assessment of the FCP Regime in Malaysia: Methodological Framework**

Assessment of the financial consumer protection regime in any jurisdiction would require evaluating the legal and regulatory framework in light of the guidelines provided by international multilateral institutions. One way to evaluate the legal and regulatory framework is to use leximetrics which is a “systematic quantitative methodology” (Cooter and Ginsburg, 2003: 2) and includes a “quantitative measurement of law” (Buchanan et. al, 2014: 5; Lele and Siems, 2007: 18).

Leximetrics involves deriving indices by first selecting relevant variables that serve as the benchmark and then coding the laws and regulations and evaluating them in light of the former. A simple way to quantify the laws would be to use a binary coding method in terms of the presence or absence of the variables in the relevant laws and assigning a score of “1” for the former and “0” for the latter.<sup>5</sup> The index is estimated by adding the scores, and it provides an estimate of the overall status of legal institutions relative to the benchmark.

While pioneering work on legal and regulatory institutions using leximetrics was initiated by economists working in the law and finance field, legal scholars found their approaches to be partial and lacking in objectivity. Armour et al (2009), Lele and Siems (2007) and Siems (2008) assert that the method used to estimate the status of legal institutions in the law and finance literature has national biases. For example, eight variables used to develop an index of shareholder protection in LaPorta et al (1998) is criticised to have a US bias (Armour et al, 2009; Lele and Siems, 2007). National biases can be avoided by considering variables developed by global multilateral, standard-setting bodies as a benchmark. Since the focus of this article is on the financial consumer protection regime in Malaysia, the legal and regulatory framework in the country is evaluated in light of the G20/OECD’s *High Level Principles on Financial Consumer Protection* and the World Bank’s guidelines on

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<sup>5</sup> While most of the empirical ‘law and finance’ literature use binary classifications, legal scholars such as Armour et al (2009), Lele and Siems (2007) and Siems (2008) also suggest using non-binary (fractional) coding.



*Good Practices for Financial Consumer Protection*, both published in the aftermath of the GFC.

Another weakness identified in applying leximetrics in the law and finance literature is the narrow focus on a few variables to construct the indices. Armour et al (2009), Lele and Siems (2007) and Siems (2008) assert that measurements of legal institutions should be comprehensive to capture their complete strength and status. For example, Buchanan et al (2014:3) contends that assessing corporate governance by examining corporate law only is too narrow since it ignores a firm's status as an "economic organization that is structured by a number of legal institutions" such as employment and fiscal laws. Similarly, shareholder protection is not only linked to company law but also other legal institutions such as "contract law, civil procedure and questions of legal effectiveness" (Lele and Siems, 2007: 22).

The comprehensiveness of the legal institutional framework for a financial consumer protection regime in this article is assessed by examining two legal, architectural aspects. The first element is the legal infrastructure (Armour et al., 2009) or macro-structure of law (Siems, 2005) that relates not only to laws but also regulatory and law-enforcement institutions and mechanisms. Pistor and Xu (2003) identify three key components of a legal infrastructure that deal with the incompleteness of law. The first component is the enacted statutes and laws that specify relevant formal rules. Since laws are usually written vaguely and in general terms not covering all aspects of actions in a comprehensive way, they are inherently incomplete. The incompleteness of laws requires the allocation of residual law-making and enforcement powers to other institutions. Legal systems vest powers to regulators and courts to complete the laws. Thus, the second component of the legal infrastructure is the regulators who play a proactive role with their law-making and supervisory powers. Not only do they develop rules ex-ante, but they also ensure their compliance through supervision ex-post. The final component of the infrastructure constitutes the courts and other dispute-resolution institutions acting as reactive ex-post law enforcers in response to the initiation of legal proceedings by a party.<sup>6</sup> The key themes of international FCP guidelines of the OECD and World Bank are used as a benchmark in this article and

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<sup>6</sup> In common law countries, courts also play a role in completing the law in terms of law-making through their judgments. For a discussion see Tetley (2000).

provide a comprehensive framework to assess the overall legal institutional status of FCP.

The second aspect of the legal architectural framework relates to the typology of finance laws. Armour et al. (2009) and Lele and Siems (2007) assert that when examining a variable within a jurisdiction, it does not matter functionally which law or regulation addresses it. Since a variable can be covered in any of the laws or regulations, its assessment would require examining a wider range of legal rules. Hudson (2009) identifies three tiers of laws/regulations applicable for the financial sector which can be used to assess FCP regimes. At the first level, substantive laws are general in nature and also affect financial transactions. This would include a general consumer protection law that applies to all consumers including those from the financial sector. The second tier constitutes specific statutes related to the financial sector such as banking, insurance and securities laws. These laws would cover specific issues related to protecting financial sector consumers. Finally, financial institutions also abide by regulations that are formulated and enforced by a statutory regulatory body that can also entail rules related to FCP. Examining different laws and regulations as stipulated in the typology is important to capture a complete picture of the legal institutional framework from a functional perspective of law.

### **Legal Institutional Regime for FCP in Malaysia: An Assessment**

Using leximetrics to assess the legal institutional framework for FCP in Malaysia would require first identifying a benchmark and then assessing the broader legal institutional framework in light of the best practices identified in it. As indicated above, this study uses OECD's *G20 High Level Principles on Financial Consumer Protection* (OECD 2011) and the World Bank's guidelines on *Good Practices for Financial Consumer Protection* (WB 2012). The laws and regulations that govern FCP in Malaysia in light of Hudson's typology of laws are identified below.

1. Substantive law—the Consumer Protection Act 1999 [Act 599] (hereafter CPA 1999): General consumer protection in Malaysia is governed by the Consumer Protection Act 1999 which is administered by the Ministry of Domestic Trade, Co-operatives and Consumerism of Malaysia. This legislation is for the general protection of consumers applicable to all goods

and services except as it expressly excludes. The consumer protection mechanism under this act includes an advisory body and provides for consumer tribunals where disputes can be addressed.

2. Specific financial statutes—the Financial Services Act 2013 [Act 758] (hereafter FSA 2013): The new FSA 2013 came into force on 30 June 2013 by repealing the Banking and Financial Institutions Act 1989 [Act 372], parts of the Insurance Act 1996 [Act 553], the Payments Systems Act 2003 [Act 627], and the Exchange Control Act 1953 [Act 17]. FSA 2013 governs the banking and insurance industry, the payments system, and foreign exchange matters. The Act is hailed as a comprehensive legislation with the primary aim of promoting financial stability and to ensure, among other things, the fair, responsible, and professional business conduct of financial institutions. It also strives to protect the rights and interests of financial consumers (BNM 2015a: p. 103).
3. Various regulatory guidelines: The financial industry is regulated by the Central Bank of Malaysia (Bank Negara Malaysia or BNM) which was established under the Central Bank of Malaysia Act 1958 (repealed under the Central Bank Act 2009, CBA 2009). As a statutory body wholly owned by the Government of Malaysia, it is mandated to oversee and regulate the financial sector and conduct of monetary policy and to ensure financial stability (BNM, 2014a). BNM has the power to issue regulations and guidelines for the industry as provided under Sections 65 and 66 of CBA 2009.

Given the above, the legal institutional framework for FCP in Malaysia is then assessed in light of 11 elements under five key themes in the OECD 2011 and WB 2012 guidelines.

#### A. Legislative Empowerment and Supervisory Framework

Two key elements of this theme are legislative recognition and the existence of oversight bodies for financial consumer protection.

##### *A.1. Legislative Recognition*

Principle 1 of WB 2012 recommends that laws should provide clear rules regarding consumer protection in financial services. Similar calls are made in Principle 1 of OECD 2011 that recommends financial consumer protection be made an integral part

of the legal, regulatory and supervisory framework. In Malaysia, CPA 1999 and FSA 2013 are enacted as federal legislations which are positioned as the highest laws in the country with regards to consumer protection and the operations/governance of financial institutions respectively. Both laws are mandatory in nature and impose criminal liabilities for the failure of compliance, which shows the importance placed on protecting financial consumer interests.

Being a general legislation for overall consumer protection, the CPA 1999 does not make specific reference to financial consumer protection. The FSA 2013, however, devotes a whole Part (Part VIII) to consumer protection under the heading of “Business Conduct and Consumer Protection”. The explicit dedication of a part with 19 sections under five divisions in the FSA 2013 for financial consumer protection shows the sound legal foundation towards this cause. Though BNM does not provide separate exclusive guidelines on financial consumer protection, provisions exist in its various existing guidelines.

#### *A.2. Dedicated Oversight Body*

Items 3 and 4 of WB 2012 and Principles 1 and 2 of OECD 2011 call for a strong supervisory framework which includes having a dedicated oversight body to govern issues of financial consumer protection. In Malaysia, Section 73 of the CPA 1999 mandates the creation of the National Consumer Advisory Council to advise and raise awareness on general consumer protection issues. The FSA 2013 does not require the creation of a separate governing body for financial consumer protection. Currently, this function is dealt with by the Consumer and Market Conduct (CMC) department within the regulatory body, BNM, which has a mandate to oversee market practices and ensure that it does not threaten consumer interests. As a department within BNM, it is able to gain intelligence and use shared resources to better identify the market trends that pose a risk to consumers (AFI, 2011). In a restructuring that took place in 2013, the surveillance and supervisory functions of the CMC department were strengthened to address issues such as scams and the inappropriate selling of products and also to increase financial awareness more effectively (BNM, 2014a: 89).

#### **B. Information Disclosure and Protection**

Information and transparency in the financial sector can be discussed under two broad categories: first, information disseminated to consumers, and second, information

obtained from consumers. Whereas B1 and B2 below deal with the former, B3 and B4 relate to the latter.

### *B.1. Product/Service Information*

Several items in WB 2012 deal with product and service information which include providing the following: a short statement clearly stating key terms and conditions in plain language (Item 8); a written copy of general and specific terms of conditions regarding the product (Item 9); and adequate training on the complexity of products to staff directly dealing with customers (Item 14). Principle 4 of the OECD states that vital information such as risks, benefits and terms of the products must be provided to the consumer. It also requires all promotional materials to be accurate, understandable and not misleading, and all material information that enables the ease of comparison between products should be provided.

In Malaysia, Section 10, Part II of CPA 1999 provides for the disclosure of truthful information and prohibits making false or misleading representation with regards to goods or services. Contravention of any provisions of Part II by an individual is an offence that is punishable by fines or imprisonment.<sup>7</sup> Article 123 of FSA 2013 stipulates that BNM should specify standards relating to transparency and disclosure requirements to ensure that information provided to financial consumers is accurate, clear, timely and not misleading. Article 128 refers to disclosure. In 2010, BNM issued Guidelines on Product Transparency and Disclosure (BNM, 2010a) that mandates every product to have a product disclosure sheet providing a concise summary of the terms of the product, the risks associated and the consumers' obligations. BNM (2010a) requires all documents to be in plain language and to be translated into the national language, Bahasa Malaysia. Additional consumer related information such as avenues for complaint and consumer education agencies are also highlighted in the product disclosure sheet to ensure that consumers are aware of their rights and options and are aware of where they may seek guidance if required.

### *B.2. Conflict of Interest*

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<sup>7</sup> Section 25 of CPA 1999 stipulates that contravening Part II and II of the act is an offence punishable with up to one hundred thousand ringgit in fines or three years imprisonment for the first time and an increase of up to a fine of two hundred and fifty thousand ringgit or six years imprisonment.

A key issue in consumer protection concerns the information provided to consumers in relation to the duty of disclosure in situations of conflict of interest. While there is no specific item in the general good practices of WB 2012 on conflicts of interest, Principle X, related to the Securities Sector, addresses the issue for securities intermediaries and investor advisers. Principle 6 of OECD 2011 suggests that financial institutions should try their utmost to avoid conflicts of interest and Principle 4 requires informing consumers if they exist. In cases where it cannot be avoided, mitigation steps must be taken by making proper disclosure, having internal conflict management mechanisms, and acting in the best interests of consumers.

Though CPA 1999 in Malaysia does not make specific reference to conflicts of interest, Section 47 of FSA 2013 stipulates that BNM make regulations that ensure “integrity, professionalism and expertise in the conduct of the business, affairs and activities of an institution” (FSA, 2013, Part V, 47,1,b). The section also authorises BNM to come up with standards dealing with “related party transactions” which includes activities that create conflicts of interest. Accordingly, BNM issued the Guidelines on Related Party Transactions in 2013 (BNM, 2013b) that requires all related party transactions to be disclosed in the financial statements of FSPs.

### *B.3. Data Protection*

Principle 8 of OECD 2011 requires FSPs to protect consumer data and privacy and put in place mechanisms for the type of data to be collected, processed, and disclosed to third parties. The Privacy and Data Protection Section (Items 20-25) of WB 2012 include requirements to protect the confidentiality and security of consumer data, keep updated information, and oversee credit registries and bureaus. While CPA 1999 does not address this issue, Malaysia enacted the Personal Data Protection Act 2010 [Act 709] (PDPA) which regulates the collection, recording, holding or storing of personal data and the carrying out of any operation on personal data for commercial transactions.<sup>8</sup> The general rule is that consent must first be obtained prior to dealing

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<sup>8</sup> For discussion on data protection under PDPA see the following webpages:

<http://skrine.com/new-laws-to-protect-personal-data;>

[https://www.mda.org.my/announcement/personaldata/20140106/PersonalDataProtectionAct2010.pdf;](https://www.mda.org.my/announcement/personaldata/20140106/PersonalDataProtectionAct2010.pdf) <http://www.pdp.gov.my/index.php/en/akta-709/latar-belakang>

with one's personal information. Since banks and insurance companies are "Data User" under the PDPA, they must obtain consent from customers (Data Subject) to deal with the customer's personal information by incorporating a standard consent clause in their documentation and also display PDPA notices on their websites.

Furthermore, Section 133 of FSA 2013, entitled Secrecy, requires financial institutions to guard consumer information and not disclose it to any party to restrict its misuse or the illegal sharing of consumer information, unless in cases required by law. BNM's Guidelines on Data Management and MIS Framework 2012 (BNM 2012b) does not explicitly address consumer data protection but states that FSPs should consider privacy protection policies in dealing with data.

#### *B.4. Know Your Customer*

Customer service can be enhanced by gathering information from consumers on their preferences and ability to understand risks and thus ascertain what product best suits their needs and financial capabilities. Principle 6 of OECD 2011 specifies that FSPs should train staff to enable them to gather information and understand the consumers' needs and capabilities to avoid selling unsuitable products. Similarly, item 7 of WB 2012 requires financial institutions to gather sufficient information on the needs and capacity of customers before recommending a specific financial product or service.

There is no reference on using information to better serve the customers in both the CPA 1999 and the FSA 2013. BNM issued guidelines entitled *Introduction of New Products* (BNM, 2014b) and *Introduction of New Products for Insurance Companies and Takaful Operators* (BNM, 2014c) which require FSPs to develop and implement internal customer suitability assessment mechanisms to ensure that products are marketed to customers according to their suitabilities. Article 11.4 of BNM (2014b) requires that FSPs institute suitability procedures to gather sufficient knowledge about customers to ascertain that they have a sound understanding of the features and risks of the products, meet their financial objectives, and have a product consistent with their risk appetite. Similarly, BNM (2014c) has a section on "Consumer suitability assessments" under Business Conduct Requirements that require insurance companies to seek sufficient knowledge about consumers to judge their understanding of a product and the associated risks and appropriateness of the product in meeting their investment objectives and risk appetites.

## C. Fair Treatment of Financial Consumers

### *C.1. Prohibition of Fraudulent Conduct*

The international standards affirm that FSPs should not engage in fraudulent activities and uphold the concept of the equitable and fair treatment of consumers. Principle 7 of OECD 2011, entitled “protection of consumer assets against fraud and misuse”, maintains that there must be relevant information, control and protection mechanisms to protect consumer assets against fraud and misuse. Similarly, WB 2012 has clear indications on the fair treatment of consumers such as the prohibition of fraudulent sales practices (Item 10), informing the customers of any changes in the fees and charges (Item 16), and prohibiting financial institutions from employing abusive debt recovery and collection practices (Item 19).

Section 9 of CPA 1999 prohibits misleading or deceptive conduct in relation to goods or services, with noncompliance resulting in a fine not exceeding MYR 100,000 or imprisonment for a term not exceeding three years, or both. In 2010, the unfair contract term provision was included as Part IIIA of the CPA 1999 to protect consumers in situations of inequality of bargaining power and to prevent the imposition of unfair contract terms in standard contracts that are detrimental to consumers (Singh, 2012: pcxxvi). Section 124 (1) of FSA 2013 stipulates that FSPs shall not engage in prohibited business conduct as identified in Schedule 7, which includes the misleading and deception of consumers; exerting undue pressure or influence; or threatening to use harassment, coercion or physical force in relation to financial products or services. Failure to comply with the prohibition is punishable with imprisonment up to five years and a fine not exceeding MYR 10 million (Section 124 [4]). Furthermore, BNM has issued an updated concept paper “Prohibited Business Conduct” dated 15 July 2016 that identifies activities that are forbidden for financial institutions (BNM 2016).

### *C.2. Responsible Business Conduct*

As ensuring the fair treatment of consumers should be adopted at all stages of operations, provisions require ensuring that business practices are carried out with the consumer’s interests in mind. Item 2 of the WB 2012 guidelines stipulates the development of sector-specific codes of conduct that are monitored by statutory agencies or self-regulatory bodies. Principle 3 of OECD (2011) entitled “equitable



and fair treatment of consumers” and Principle 6 includes prudent business conduct requiring “working in the best interest of consumers” to be an objective of FSPs.

While CPA 1999 in Malaysia does not have anything specific on responsible business conduct, Part VIII of FSA 2013 deals with Business Conduct and Consumer Protection. However, while specifying some general aspects covering business conduct, Articles 122-124 of FSA 2013 require regulators (Securities Commission and BNM) to coordinate and develop specific regulations. Accordingly, regulatory documents of BNM (2014b and 2014c) include sections on Business Conduct Requirements. Among others, the guidelines require that due regard should be given to “the interests of consumers in the development, marketing and sale of new products” and that the board must approve “policies and procedures that describe appropriate parameters and guidance for fair treatment of consumers” (BNM 2014c, p. 23).

#### D. Complaints and Redress

##### *D.1. Internal Mechanisms*

Since most complaints are in relation to products, having an internal complaints unit is the most convenient and fastest platform for a solution as it is directly handled by the FSPs that have all the necessary information. Principle 9 of OECD 2011 recommends that FSPs must have clear procedures and mechanisms for internal complaints handling that are transparent and accessible to consumers. Similarly, Item 25 of WB 2012 stipulates that financial institutions should have a designated contact point and clear procedures to handle complaints and develop internal dispute resolution policies and practices. The CPA 1999 and the FSA 2013 do not have provisions for internal complaints and dispute handling. However, BNM has made it mandatory for all banks in Malaysia in 2002 to establish a Complaints Unit as a channel to handle consumer complaints and resolve each case within two weeks (BNM, 2002). BNM (2014c, p.24) requires financial institutions to have an “effective system for resolving and monitoring consumers’ complaints, and ensuring that consumers are provided with information on where and how to lodge a complaint”.

##### *D.2. External Mechanisms*

Principle 9 of OECD 2011 specifies that an affordable, accessible, effective and efficient dispute resolution system dealing with consumer protection must be in place.

WB 2012 (Principles 26 and 27) requires having access to an affordable and efficient mechanism for dispute resolution by establishing an independent and impartial institution such as a financial ombudsman. The authoritative institution would resolve minor disputes and its decisions would be binding. CPA 1999 under Section 85 establishes the Tribunal for Consumer Claims where consumers can refer cases for a fee of MYR 5 (USD 1.13).<sup>9</sup> The awards from the tribunal are final, binding and have the same status as an order of the Magistrate Court (Singh, 2011, p. pcix). The FSA 2013 in Section 126 mandates that BNM establish a financial ombudsman scheme with the aim of the effective and fair handling of financial complaints and dispute resolution. It further states that a FSP must cooperate and provide information as required in settling a dispute and comply with the award granted under the ombudsman scheme. Furthermore, disputes referred to under the financial ombudsman scheme cannot be referred to the tribunal under the CPA 1999. While Malaysia has had a Financial Mediation Bureau since 2005, it was converted to the Ombudsman for Financial Services by the enactment of FSA 2013. Furthermore, a new bylaw, the Financial Services (Financial Ombudsman Scheme) Regulations 2015, was issued to specifically deal with the functions and role of a financial ombudsman in the country.<sup>10</sup> Accordingly, BNM issued a concept paper on the financial ombudsman (BNM, 2014d) and established the Ombudsman for Financial Services as a non-profit organization in October 2016 that acts as an alternative dispute and complaints resolution institution for financial consumers.

#### E. Financial Literacy and Awareness

World Bank 2012 has five principles (Principles 32-36) related to consumer empowerment and financial literacy targeted at consumers of all ages. The principles stipulate broad-based financial education and literacy programs provided by a wide range of organizations. Similarly, Principle 5 of OECD 2011 recommends that financial literacy and awareness should be increased by making it accessible through convenient channels and be presented in simple form to be understood by consumers. The CPA 1999 and the FSA 2013 do not have provisions on financial literacy.

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<sup>9</sup> Based on the exchange rate of 1 USD=4.43MYR (on February 2, 2017).

<sup>10</sup> See <http://www.bnm.gov.my/index.php?ch=57&pg=137&ac=490&bb=file> (in the Malay language).

However, BNM has played an active role in promoting financial literacy by establishing different institutions. *Agensi Kaunseling dan Pengurusan Kredit* (AKPK), or the Credit Counselling and Debt Management Agency, was established in 2006 to educate and promote prudent financial management. AKPK provides counselling and advice and offers free services on financial education and debt management programs to help individuals take control of their finances. Schemes such as *Pengurusan Wang Ringgit Anda* or Managing Your Money (POWER!) Programme under AKPK aim to educate consumers on practical financial topics such as managing cash flows, purchasing a house or a vehicle, and managing debts. It is a free program which is held throughout the year and is conducted in all the main languages spoken in Malaysia (AKPK, 2015). For prompt responses on financial issues and queries, consumers have the option of utilising BNM's TELELINK, a service operated by BNM to respond to queries from the public through telephone calls and emails (BNM, 2015b). BNM has also taken initiatives to develop different webpages to promote financial literacy and education.<sup>11</sup>

### **FCP Regime in Malaysia: Analysis and Summary**

The architectural components of the FCP regime of Malaysia can be assessed in terms of the typology of laws and the legal infrastructure. Table 1 shows the typology of laws related to FCP in Malaysia summarizing the status of laws and regulations in light of the international guidelines. It shows the compliance of different tiers of Malaysian laws and regulations with 11 elements of consumer protection good practices identified in the WB 2012 and OECD 2011 guidelines. Being substantive law and dealing with consumer protection in general, CPA 1994 addresses only five of the 11 elements identified in international guidelines. CPA 1999 does not cover the other elements since it is not specifically tailored to financial services.

FSA 2013 deals with the financial sector and addresses two additional elements of international good practices of FCP: legal recognition of financial consumer protection, conflict of interest, and identifying aspects of responsible business

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<sup>11</sup> The websites include <http://www.bankinginfo.com.my/> for information on Islamic banking, <http://www.insuranceinfo.com.my/> for insurance, and <http://www.duitsaku.com/> which provides information on financial planning for children and the youth.

conduct. Both laws together, however, do not cover all the elements of good practices identified in the international guidelines. Specifically, the laws do not address knowing your customer, internal mechanisms to resolve complaints, and financial literacy and awareness issues. These gaps highlight the incompleteness of laws identified by Pistor and Xu (2013). While the gaps in the laws are filled by the regulatory guidelines of BNM, the regulations fulfil only nine elements of the international best practices on their own, leaving out a number of elements that are legal in nature.

[Insert Table 1 here]

The analysis also sheds light on the legal infrastructure of the FCP regime in Malaysia. Other than completing the gaps that are absent in the consumer protection laws, the regulator performs a proactive role of enforcing laws through the Consumer and Market Conduct department. Furthermore, different types of dispute resolution institutions exist to protect the consumers and ensure ex-post enforcement of FCP laws. While a Tribunal for Consumer Claims exists to resolve disputes for all consumers, the Ombudsman for Financial Services deals with specific cases related to the financial sector. There are other initiatives such as POWER! (managed by AKPK) and TELELINK and several webpages developed by BNM to promote financial education and literacy among the consumers. The results show that while each of the laws and regulations do not address all elements of international good practices, they play different roles and together they provide a comprehensive consumer protection legal regime in Malaysia.

## **Conclusion**

Recognizing the importance of protecting consumers in the aftermath of the GFC, initiatives have been taken at the international and national levels to introduce better FCP regimes. While several studies have examined consumer protection regimes in developed economies such as the United States and United Kingdom, this paper examines the status of the FCP regime in Malaysia. The status of the FCP regime is analysed by examining two architectural components of legal infrastructure and the typology of laws. The results show that while individual Malaysian laws and

regulations do not address all the 11 elements of good practices for FCP identified in the international guidelines, together they cover all the items. Specifically, when consumer protection laws do not address specific issues related to financial consumers, BNM plays the role of residual law-making by providing regulations that fill the gaps.

Unlike the USA and UK where independent regulatory bodies exist to regulate FCP, a department (Consumer and Market Conduct) within the BNM oversees issues related to consumer protection. Furthermore, institutions such as the Tribunal for Consumer Claims and Ombudsman for Financial Services are set up to settle disputes and enforce the laws related to FCP. Several programs for promoting financial education and literacy further contribute to realizing the social objectives of protecting financial consumers. The results show the diverse nature of the legal framework and the complementary nature and roles that laws, regulations and supporting institutions play in achieving a comprehensive FCP framework in Malaysia.

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**Table 1** Financial Consumer Protection Regime in Malaysia

Themes and Elements		INTERNATIONAL		MALAYSIA				
		WB 2012	OECD 2011	CPA 1994	FSA 2013	Laws	BNM	Laws & Regulations
<b>Legislative Empowerment and Supervisory Framework</b>								
A.1	Legislative Recognition	√	√	-	√	√	-	√
A.2	Oversight body	√	√	√	-	√	√	√
<b>Information and Transparency</b>								
B.1	Product information	√	√	√	√	√	√	√
B.2	Conflict of interest	√	√	-	√	√	√	√
B.3	Data protection	√	√	√ <sup>a</sup>	√	√	-	√
B.4	Know your Customer	√	√	-	-	-	√	√
<b>Fair Treatment of Financial Consumer</b>								
C.1	Prohibition of Fraudulent Conduct	√	√	√	√	√	√	√
C.2	Responsible Business Conduct	√	√	-	√	√	√	√
<b>Complaints and Redress</b>								
D.1	Internal Mechanisms	√	√	-	-	-	√	√
D.2	External Mechanisms	√	√	√	√	√	√	√
<b>Financial Literacy</b>								
E.1	Financial literacy and Awareness	√	√	-	-	-	√	√
<b>TOTAL</b>		11	11	5	7	8	9	11

a-While CPA 1994 does not have any specific data protection stipulations, Personal Data Protection Act 2010 (PDPA) covers data protection issues that apply to financial consumers also.