RETHINKING THE INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION IN AN ERA OF FINTECH: THE NIGERIAN CASE

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DECLARATION

I, **ALBERT CHRIS PUJA**, declare that this study titled '**RETHINKING THE INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION IN AN ERA OF FINTECH: THE NIGERIAN CASE**' is my original work and that all other works used or quoted have been indicated and acknowledged as complete references. This study has not been submitted to any University, College or other institution of learning for any academic or other awards.

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This Doctor of Laws (LLD) thesis has been submitted for examination with the approval of the Supervisor and Co–Supervisor.

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DEDICATION

I dedicate this work to the ladies who hold my heart:

my wife, ***Sia***, and

daughter, ***Imani***

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KEYWORDS

Financial regulation

Financial system

Fintech

Fintech firms

Fintech regulation

Institutional structure

Regulation

Sectoral model

Twin peaks model

Unified model

ACRONYMS AND ABBREVIATIONS

AFM	Authority for the Financial Markets
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investment Commission
BCBS	Basel Committee on Banking Supervision
Bigtech	Big technology company
BoE	Bank of England
CAC	Corporate Affairs Commission
CAC	Corporate Affairs Commission
CBDC	Central Bank Digital Currency
CBN	Central Bank of Nigeria
DNB	Dutch Central Bank
EFCC	Economic and Financial Crimes Commission
FCA	Financial Conduct Authority
FCCPC	Federal Competition and Consumer Protection Commission
FGoN	Federal Government of Nigeria
FIC	Financial Intelligence Centre
FIG	Fintech and Innovation Group
Fintech	Financial technology
FintechNGR	Nigeria Fintech Association
FIRS	Federal Inland Revenue Service
FSA	Financial Services Authority
FSCA	Financial Sector Conduct Authority
FSCF	Financial Sector Contingency Forum
FSCR	Financial System Council of Regulators
FSIC	Financial Sector Inter–Ministerial Council
FSOC	Financial Stability Oversight Committee
FSRCC	Financial Services Regulation Coordination Committee
GFC	Global financial crisis
IAIS	International Association of Insurance Supervisors

ICPC	Independent Corrupt Practices Commission
IFWG	Intergovernmental Fintech Working Group
IOPS	International Organisation of Pension Supervisors
IOSCO	International Organisation of Securities Commissions
MAS	Monetary Authority of Singapore
MoF	Federal Ministry of Finance
NAICOM	National Insurance Commission
NCR	National Credit Regulator
NDIC	Nigerian Deposit Insurance Corporation
NDPB	Nigeria Data Protection Commission
NDPC	Nigeria Data Protection Commission
NITDA	National Information Technology Development Agency
NPF	Nigeria Police Force
NSE	Nigerian Stock Exchange
PA	Prudential Authority
PENCOM	National Pension Commission
Regtech	Regulatory technology
SARB	South African Reserve Bank
SEC	Securities and Exchange Commission
Suptech	Supervisory technology
Techfin	Technology finance company
UK	United Kingdom
US	United States of America
$	Dollars
₦	Naira
€	Euros

TABLE OF CONTENTS

ABSTRACT

The study explores why and how to adapt the institutional structure of financial regulation to address the risks, changes, and regulatory challenges that arise from financial technology (Fintech). Drawing on authoritative literature and practical examples from various jurisdictions, including South Africa, the United Kingdom, Indonesia, and Singapore, the study identifies crucial requirements for an effective institutional structure to regulate Fintech. These requirements are used as a benchmark for evaluating Nigeria's existing institutional structure and proposing reforms for the country. The argument presented in the study suggests that instead of a complete overhaul, Nigeria should prioritise introducing piecemeal reforms to rectify the deficiencies in its current institutional structure. However, the study also proposes that an overhaul of the existing institutional structure could be explored in the long run if the proposed piecemeal reforms do not extend the desired results. Overall, the study contributes to the literature on the institutional aspects of financial regulation, Fintech regulation, and regulatory coordination.

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. GENERAL INTRODUCTION

In recent decades, financial technology, or Fintech as it is more commonly called, has permeated various financial systems, including that of Nigeria. Fintech involves the application of technology to finance. This application is typically accompanied by innovation and disruption in various forms in the financial system. Fintech has brought unprecedented innovation and improvement to financial services. It has made financial services faster, cheaper, transparent, and even more accessible to those previously unserved or underserved by the financial system.

However, Fintech is not solely characterised by positive aspects or impacts. It has its dark and challenging side. Fintech carries the potential to introduce new risks to the financial system and amplify existing ones. Additionally, it can introduce changes to the financial system and generate regulatory challenges. These changes and challenges can cause regulatory failure and inefficiencies if comprehensive regulations, sound supervisory practices, and an effective institutional structure of financial regulation are not in place.

This study discusses these changes, risks, and regulatory challenges that originate from Fintech and assesses the effectiveness of Nigeria's current institutional structure of financial regulation for addressing them. As its other objective, the study proposes practical legal and policy measures for improving Nigeria's institutional structure to be more effective for regulating Fintech and undertaking financial regulation generally.

The study proceeds on the premise that Nigeria's institutional structure, which is designed with separate regulators for the banking, securities, insurance, and pension sectors (i.e., the sectoral model), may have inadequacies for regulating Fintech. This perception of inadequacies arises from the consideration that the structure was not developed in the context of developments that have emerged in the financial system over the years, especially Fintech. Notably, there are certain Fintech institutional arrangements that are crucial for Fintech regulation that have not been introduced into the institutional structure. Additionally, some Fintech institutional arrangements that have been implemented are not organised in a way that allows for their benefits to be fully optimised.

A central argument of the study is that, in the face of Fintech developments, the lessons from previous financial system developments, such as the emergence of financial conglomerates and the 2007–2008 global financial crisis, resonate clearly. This lesson is simply that the institutional structure of financial regulation must not remain stagnant but should dance in rhythm with the new landscape. The study further argues that efforts to align the institutional structure with Fintech must go hand in hand with reforms addressing deficiencies in the structure for financial regulation generally. Additionally, the study advocates for these reform initiatives to be both cost–efficient and supportive of an integrated institutional structure.

The study advances conceptual frameworks on the requirements for the effectiveness of the institutional structure for financial regulation in general and Fintech regulation in particular. These frameworks are applied to assess and identify the possible gaps undermining the effectiveness of Nigeria's institutional structure in both areas of financial regulation and Fintech regulation. A notable gap identified is the lack of adequate legislative provision and mechanisms for regulatory coordination among financial regulators, as well as between financial and non–core financial regulators. These and other gaps have led (and continue to lead) to various setbacks, including regulatory duplication, inconsistencies, arbitrage, weak consumer protection, and coordination failures. The study uses South Africa as a case study to draw lessons on improving Nigeria's legislative framework for regulatory coordination.

The recommendations of the study are rooted in the choice between whether Nigeria should: (1) change from the current sectoral model to an entirely different model, or (2) retain the current model but introduce necessary reforms to address the gaps that contribute to its ineffectiveness for financial regulation generally and Fintech regulation specifically. The study argues in favour of the second reform option. It sets out the piecemeal reforms that can be introduced to the current structure to improve its effectiveness for financial regulation in general and Fintech regulation in particular.

The second approach is favoured over changing to a new model because it is more economical, quicker, and less complex to implement. It also entails less disruption to the regulatory environment. In short, it is deemed more contextually fitting for Nigeria. However, the study also proposes that there may be a need to change the institutional structure in the long run. It identifies the circumstances and factors that may necessitate and justify changing to another type of structure. It additionally explores the alternative model and other key considerations that policymakers and regulators should take into account when exploring the structural change. Overall, the study contributes to the literature on the institutional aspects of financial regulation, Fintech regulation, and regulatory coordination.

With this backdrop, the ensuing section presents the background and context of the study. A key focus of the section is to provide a foundational understanding of certain concepts relevant to the study, which are still discussed in greater detail in subsequent chapters. These concepts are financial regulation, the institutional structure of financial regulation, rethinking the institutional structure of financial regulation, Fintech and Fintech regulation.

1.2. BACKGROUND AND CONTEXT

1.2.1. Financial regulation and the role that the institutional structure plays in its implementation

Financial regulation incorporates the 'regulation' and 'supervision' of financial institutions and other components of the financial system.[1] Regulation and supervision can be differentiated, even though they are sometimes used interchangeably.[2]

Regulation entails the establishment of rules by the legislature, government regulatory bodies, or self–regulatory organisations, within which financial institutions must operate.[3] These rules, which are also called regulation, cover a wide range of issues, including the establishment, operations, and acquisition of financial institutions.[4] Once these rules are in place, supervision comes into play.

Supervision involves the ongoing task of monitoring, inspecting, and examining financial institutions to ensure they adhere to established rules and operate in a safe and sound manner.[5] It also involves imposing sanctions and penalties when infractions of rules are established against financial institutions.

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1 Moosa IA *Good regulation, bad regulation: The anatomy of financial regulation* (2016) 3.

2 Lastra RM 'The governance structure for financial regulation and supervision in Europe' (2003) 10 *Columbia Journal of European Law* 49.

3 See Botha E & Makina D 'Financial regulation and supervision: Theory and practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal* 27.

4 Board of Governors of the Federal Reserve System *The federal reserve system: Purposes and functions* (Reports and Studies 2415, 2016) 74.

5 Board of Governors of the Federal Reserve System (2016) 74.

Essentially, although distinct, regulation and supervision are complementary activities.[6] However, in this study, the term 'regulation' is used in a broad sense to incorporate 'supervision.' Nonetheless, in some specific instances, the term 'supervision' may be used to indicate that the intent is to deal with or speak of the application, monitoring, and enforcement of rules (that is, regulation).

The implementation of financial regulation is shaped and underpinned by various facilitators. These facilitators are referred to in this study as the 'frameworks for financial regulation.' The frameworks for financial regulation fall into at least four broad categories:[7]

(1) First, the 'policy objectives of financial regulation' which constitute the goals that the government seeks to achieve by regulating the financial system. These objectives include promoting micro and macro stability, protecting consumers, ensuring the competitiveness of the financial system, preserving market integrity, and combating financial crimes;

(2) Secondly, the 'regulatory frameworks of financial regulation' which relate to the rules and requirements that financial institutions should comply with;

(3) Thirdly, the 'supervisory frameworks of financial regulation' that establish the tools, techniques, practices and methods of regulatory oversight of financial institutions; and

(4) Finally, the 'institutional structure of financial regulation' (or the 'institutional structure' for short), along with its governing legal framework(s), which is the main focus of this study.

The institutional structure embodies the number, objectives, functions and powers of the financial regulators established to regulate financial institutions and other components of the financial system like market infrastructures, financial markets, and financial instruments.[8] Additionally, the institutional structure incorporates the mechanisms employed for coordination, communication, and cooperation among

[6] Board of Governors of the Federal Reserve System (2016) 74.

[7] See Taylor M 'The search for new regulatory paradigm' (1998) 49(3) *Mercer Law Review* 795; Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 312–331.

[8] See Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 4.

different financial regulators, which is simply referred to in this study as 'regulatory coordination.'[9]

The financial regulator(s) that constitute the institutional structure notably undertake macro–prudential regulation (or systemic regulation), micro–prudential regulation, conduct of business regulation, and competition regulation.[10] These financial regulators include central or reserve banks, deposit insurance authorities, securities commissions, insurance commissions, prudential authorities, conduct authorities, and pension commissions.

However, apart from the financial regulators that makeup the institutional structure, there are other institutions or bodies that play crucial roles in defining the broader institutional setting for financial regulation. These include lawmakers or parliament, non–core financial regulators,[11] self–regulatory organisations (SROs), the minister and ministry of finance, and the judicial system.[12]

The institutional structure is defined by its model, which can interchangeably be referred to as the design, arrangement, or architecture.[13] Each model has its unique

9 See Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 4.

10 Micro–prudential regulation focuses on the safety and soundness of individual financial institutions. Macro–prudential regulation, on the other hand, deals with the stability of the financial system as a whole. Conduct of business regulation deals with protecting consumers and promoting market integrity while competition regulation aims to ensure that there is appropriate competition in the financial system and that anti-competition practices are watched against. See Tuch AF 'Conduct of business regulation' in Moloney N, Ferran E & Payne J (eds) *Oxford handbook of financial regulation* (2014) 538; Galati G & Moessner R 'Macroprudential policy–A literature review' (2013) 7(5) *Journal of Economic Surveys* 846–878.

11 The non–core financial regulators include regulatory bodies responsible for data protection, consumer protection, competition policy, telecommunications, tax, and financial intelligence, among others.

12 See Rao R *Self–regulation in financial markets – Looking back and looking ahead* (Keynote Address Delivered at the 17th FEDAI Annual Conference at Cairo, Egypt, 2023) 4–5; Hayward P 'The financial sector–The responsibilities of the public agencies' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 182–185.

13 See Montanaro E *Central banks and financial supervision*; *New tendencies* (Financialisation, Economy, Society and Sustainable Development, Working Paper Series No. 134, 2016) 4 (referring to it as architecture). Also see Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 7 (referring to it as design).

strengths and limitations.[14] In addition to other hybrid models, there are three dominant models for the institutional structure that are used by countries around the world.[15]

First, there is the 'sectoral model' which is generally structured with separate financial regulators for the banking, securities, insurance, and pension sectors.[16] Notably, under the sectoral model, the type or legal status of a financial institution (such as a bank, insurance company, securities firm, or pension firm) determines: (1) the particular 'sectoral' financial regulator that is tasked with regulating the financial institution from both micro–prudential and conduct of business angles, and (2) the scope of the permissible business activities of the financial institution.[17] The sectoral model is also called the institutional, silos, sectional, or traditional model.[18]

The second dominant model is the 'unified model.' This model is designed with one financial regulator overseeing the micro–prudential and conduct of business regulation of all (fully unified model) or most (partially unified model) financial institutions.[19] The third and final model is the 'twin peaks model.' This model is designed by separating

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14 See Pellerin S, Walter JR & Wescott P 'The consolidation of financial regulation: Pros, cons, and implications for the United States' (2009) 95(2) *FRB Richmond Economic Quarterly* 121–160; Buttigieg CP 'The institutional models for financial supervision: An analysis' 2013 *The Accountant* 12–16.

15 See Buttigieg CP 'The institutional models for financial supervision: An analysis' 2013 *The Accountant* 12–13; Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 103–104; Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 1; Nhavira JD, Mudzonga E & Mugocha E *Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options* (Zimbabwe Economic Policy Analysis and Research Unit, 2013) 3.

16 See Buttigieg CP 'The institutional models for financial supervision: An analysis' 2013 *The Accountant* 12–13; Montanaro E *Central banks and financial supervision*; *New tendencies* (Financialisation, Economy, Society and Sustainable Development, Working Paper Series No. 134, 2016) 7.

17 See National Treasury *A safer financial sector to serve South Africa better* (National Treasury Policy Document, 2011) 29; Montanaro E *Central banks and financial supervision*; *New tendencies* (Financialisation, Economy, Society and Sustainable Development, Working Paper Series No. 134, 2016) 7.

18 See Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 6; Nhavira JD, Mudzonga E & Mugocha E *Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options* (Zimbabwe Economic Policy Analysis and Research Unit, 2013) 14.

19 See Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 4; Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 4.

prudential regulation from the conduct of business regulation and establishing separate financial regulators for these regulatory functions.[20]

It is useful to acknowledge that a fourth model — called the 'functional model' — is also commonly identified in literature.[21] Under the functional model, regulatory jurisdiction over a financial institution is determined by focusing on the activity being undertaken by the institution. The focus shifts from the legal status or type of the institution, as is the case with the purely sectoral model.[22] Therefore, for example, insurance services would be overseen by an insurance regulator, regardless of whether banks were providing the services.[23]

Conversely, in a purely sectoral model, the banking regulator should be responsible for overseeing the insurance activities of a bank.[24] Nonetheless, it has been observed that, in practice, the functional model is seldom adopted in isolation, especially because it focuses on conduct of business regulation and does not combine this role

20 Montanaro E *Central banks and financial supervision*; *New tendencies* (Financialisation, Economy, Society and Sustainable Development, Working Paper Series No. 134, 2016) 12.

21 See Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 151; Group of Thirty *Structure of financial supervision: Approaches and challenges in a global marketplace* (2008) 15–17; Han M 'Twin peaks regulation after the global financial crisis: A reform model for China?' (2017) 8(3) *Asian Journal of Law and Economics* 2.

22 However, it is good to note that some commentators define the sectoral model more broadly as one in which financial institutions are regulated by reference to the sector in which they operate or the products they offer or business in which they engage. See Godwin A, Guo L & Ramsay I *Is Australia's 'twin peaks' system of financial regulation a model for China?* (Centre for International Finance Regulation Working Paper No.074, 2016) 5.

23 Lumpkin S *Supervision of financial services in the OECD Area* (2002) 13.

24 See Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 251, explaining that under the sectoral model, once a financial institution, such as a bank, is licensed to undertake banking activities, it remains subject to the defined regulatory oversight of the banking regulator even if the institution extends its activities beyond the originally defined limits of banking activities.

with prudential oversight.[25] As opposed to being a standalone model, the functional model is used to complement other models, especially the sectoral model.[26]

Llewellyn confirms that the effectiveness and efficiency of financial regulation are intricately linked to the design of the institutional structure.[27] This connection arises because the design of the institutional structure can influence the clarity of regulatory roles, determine the cost of regulation, and help avoid regulatory conflicts. Additionally, it can mitigate regulatory underlap, overlap, and arbitrage.[28]

Llewellyn further observes that the design can influence the degree of clarity consumers have on which regulatory body they can approach to address their complaints against erring financial institutions.[29] It is conceded that these insights from Llewellyn underscore the imperative for policymakers and regulators to prioritise and carefully address institutional design issues.

This section has extended a basic understanding of the institutional structure and how it can be designed or modelled. Building on this understanding, the next section

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25 See Lumpkin S *Supervision of financial services in the OECD area* (2002) 14 (explaining that 'the most obvious shortcoming of a purely functional approach would be that the solvency position of an institution as a whole could be obscured, as no single regulator would exercise prudential oversight of the institution in its entirety). Also see Denton SJ *The institutional structure of financial regulation in the UK: The final reforms?* (unpublished LLB thesis, University of Surrey, 2017) 10 (similarly explaining that 'functional regulation is primarily concerned with consumer protection and not prudential supervision. Prudential regulation is difficult to undertake on a functional basis, because prudential regulation is inherently concerned with the safety and soundness of financial institutions; not the functions they undertake. This approach therefore may not be suitable in practice as firms must be regulated at the functional and institutional levels'). Further see Taylor M 'Institutional structures of regulation' in Caprio G (ed) *Handbook of safeguarding global financial stability* (2013) 474; Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 11.

26 For example, apart from adopting consolidated supervision, the functional model can be infused into the sectoral model to mitigate the risks associated with financial conglomerates. Additionally, under the sectoral model, the regulation of securities activities typically follows a functional approach. Further, a functional approach can be used for setting up the departmental or organisational structure of a financial regulator that has oversight over more than one class or type of financial institution. See Lumpkin S *Supervision of financial services in the OECD Area* (2002) 14; Labonte M *Who regulates whom? An overview of the U.S financial regulatory framework* (Congressional Research Service Report 44918, 2020) 6; Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 37–38.

27 The author explains that the 'effectiveness' of regulation relates to whether the objectives of regulation are met, while the 'efficiency' of regulation envisages whether the objectives of regulation are met in an efficient way and without imposing unnecessary costs on consumers and regulated firms. See Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 11–16.

28 Llewellyn DT (2006) 16.

29 Llewellyn DT (2006) 16.

discusses how previous financial system developments influenced countries to rethink the design of their institutional structure. This discussion is undertaken to conceptualise what rethinking the institutional structure of financial regulation entails.

1.2.2. Rethinking the institutional structure in response to developments in the financial system: Experience from the past

One of the major characteristics of the financial system is that it is dynamic. The structure, operation, functioning, participants and other aspects of the financial system are not static. Instead, they are subject to changes caused by developments in the financial system and the broader economy.[30]

The developments that occasion changes in the financial system take various forms, including technological advancements, innovation in financial services and products, and financial convergence.[31] The development can also be a crisis that impacts the financial system, such as the 2007–2008 global financial crisis (GFC) or the more recent 2019 Coronavirus (Covid–19) crisis.[32]

However, apart from the foregoing developments, which can often be abrupt, changes in the financial system can also be deliberately engineered through policy, legal and regulatory reforms.[33] For example, financial conglomerates[34] can abruptly emerge due to developments like intensified competition in the financial system. However, they can also be deliberately promoted through financial modernisation. As explained by Schooner and Taylor, financial modernisation is the process of removing restrictions in regulatory frameworks that confine or constrain financial institutions to specific financial service business lines.[35]

30 Organisation for Economic Co–operation and Development *Policy framework for effective and efficient financial regulation: general guidance and high–level checklist* (OECD Policy Framework, 2010) 7.

31 Organisation for Economic Co–operation and Development (2010) 7.

32 Guillén A 'Coronavirus crisis or a new stage of the global crisis of capitalism?' (2020) 9(3) *Agrarian South: Journal of Political Economy* 356–367.

33 Organisation for Economic Co–operation and Development *Policy framework for effective and efficient financial regulation: general guidance and high–level checklist* (OECD Policy Framework, 2010) 7.

34 A financial conglomerate is 'any group of companies under common control whose exclusive or predominant activities consist of providing significant services in at least two different financial sectors (banking, securities, insurance).' See Basel Committee on Banking Supervision *The supervision of financial conglomerates* (Report by the Tripartite Group of Bank, Securities and Insurance Regulators, 1995) 13.

35 Schooner HM & Taylor M 'United Kingdom and United States responses to the regulatory challenges of modern financial markets' (2003) 38(317) *Texas International Law Journal* 318.

Historically, the institutional structure in many countries around the world followed the sectoral model, with separate financial regulators having responsibilities for the banking, securities and insurance sectors.[36] However, over the years, a considerable number of countries have changed their institutional structure from the sectoral model to the unified model or the twin peaks model. Further, as seen in the case of the United Kingdom, some countries are also transitioning from the unified model to the twin peaks model.[37] The twin peaks model has gained traction, especially after the GFC.[38] Countries such as South Africa and the United Kingdom have embraced this model in the aftermath of the GFC.[39]

Despite the trend towards unified and twin peaks models, results from a 2018 Bank for International Settlements (BIS) survey, covering 80 jurisdictions, indicate that the sectoral model remains the predominant model, as it is used in half of the surveyed jurisdictions.[40] The survey indicates that the sectoral model is the most commonly applied model in all regions except Europe.[41] Insightfully, also, the survey does not record any jurisdiction transitioning from the unified or twin peaks model to the sectoral one.[42]

An important question that comes up is, why are countries changing their institutional structure? The trend to the unified model and twin peaks model has been mainly associated with two major financial system developments: the emergence of financial conglomerates and financial crisis.[43] Countries that have retained their sectoral model

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[36] Mwenda KK 'Legal aspects of unified financial services supervision in Germany' (2003) 4(10) *German Law Journal* 1009–1010; Botha E & Makina D 'Financial regulation and supervision: Theory and practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal* 27–36.

[37] Han M 'Twin peaks regulation after the global financial crisis: A reform model for China? (2017) 8(3) *Asian Journal of Law and Economics* 9–11.

[38] World Bank 'Bank/non–bank integration and supervisory integration' available at *https://www.worldbank.org/en/publication/gfdr/gfdr–2016/background/nonbank–financial–institution* (Accessed on 29 December 2022).

[39] Schmulow A 'Financial regulatory governance in South Africa: The move towards twin peaks'(2017) 25 (3) *African Journal of International and Comparative Law* 393–417.

[40] Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 8.

[41] Calvo D, Crisanto JC & Hohl S et al (2018) 8.

[42] Calvo D, Crisanto JC & Hohl S et al (2018) 9.

[43] See Carmichael J 'Making the structural decision: Australia's approach to regulatory reform' in Carmichael J, Fleming A & Llewellyn D (eds) *Aligning financial supervisory structures with country needs* (2004) 96–99; Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 2–3; Taylor C, Almansi AA & Ferrari A *Prudential regulatory and supervisory practices for Fintech: Payments, credit and deposits* (2019) 3; Madero D & Lumpkin

despite these and other financial system developments have commonly introduced piecemeal reforms to the model.

These piecemeal reforms include: (1) improving financial stability oversight, (2) introducing new functions to existing or new bodies, and (3) strengthening the legislative provisions and mechanisms for regulatory coordination.[44] It is also common for countries to adopt consolidated supervision to enhance regulatory oversight of financial conglomerates.[45] As such, a distinction can be drawn between each model in its original state and the state of the model after the introduction of piecemeal reforms to address gaps in its original state.[46]

A discernible basis for countries reforming their institutional structure, whether through completely overhauling it or by implementing piecemeal reforms to enhance the existing structure, is the acknowledgment that developments in the financial system can strain the structure.[47] Specifically, financial system developments strain the existing structure through the changes they bring about in the system, the risks they produce or intensify, and the regulatory challenges they generate, rendering it

S *A review of the pros and cons of integrating pension supervision with that of other financial activities and services* (International Organisation of Pension Supervisor Working Paper No 1, 2007) 9.

44 Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 9; Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016).

45 Ufort L *The Nigerian financial system and the role of Central bank of Nigeria* (CBN Training Centre, Lagos No 3, 2004) 12; Olorunshola *JA Financial system regulation in Nigeria: Theoretical framework and institutional arrangements* (CBN Training Centre, Lagos No. 3, 2004) 12; Gummi MU 'Financial regulations and the Nigeria's banking sector' (2015) 3(11) *Journal of Research in Business and Management* 11.

46 Lumpkin S *Supervision of financial services in the OECD Area* (2002) 3 (nothing for example, that the sectoral model 'may or may not be accompanied by consolidated supervision').

47 Group of Thirty *Structure of financial supervision: Approaches and challenges in a global marketplace* (2008) 12.

ineffective for financial regulation.[48] There is, therefore, a need to continuously rethink the institutional structure in response to financial system developments.[49]

From the discussions in this section and for the purpose of this study, rethinking the institutional structure accommodates two key aspects. The first aspect entails appraising the current institutional structure to determine whether it is still effective for addressing the changes, risks, and regulatory challenges posed by financial system developments. Secondly, if it is ineffective in addressing the changes, risks, and regulatory challenges, to determine the suitable and proportionate reforms to the structure to improve its effectiveness.

It is further noted that two broad options exist for reforming the institutional structure to improve its effectiveness for financial regulation. One option is to change the institutional structure by switching from one model to another. Alternatively, instead of changing the structure, the existing structure can be retained. However, this retention would be accompanied by implementing necessary piecemeal reforms to address the gaps undermining the structure's effectiveness. Alongside these options, consideration can be given to recruiting additional staff and improving the supervisory capacity of financial regulators.[50]

This process of reforming or adapting the institutional structure or other frameworks for financial regulation to align with developments in the financial system is also conceptualised as 'regulatory modernisation.' As defined by Schooner and Taylor,

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48 For example, the emergence of financial conglomerates can contribute to concentration within the financial system. They can also pose systemic risk to the financial system by creating interconnections and interdependencies across different parts of the financial system. Additionally, financial conglomerates are associated with various risks, including regulatory arbitrage, contagion, multiple gearing, and problems arising from unregulated services or members of this group. Furthermore, regulatory challenges arise from financial conglomerates as a result of the need to oversee a complex web of activities across multiple subsidiaries and business lines. Financial conglomerates generally necessitate consolidated approaches to supervision and/or integrated institutional models. See Lumpkin S *Supervision of financial services in the OECD Area* (2002) 10; Falkena H, Bamber R & Llewellyn D et al *Financial regulation in South Africa* (SA Financial Sector Forum, 2001) 7; Borio C, Claessens S & Tarashev N *Entity–based vs activity–based regulation: A framework and applications to traditional financial firms and big techs* (Financial Stability Institute Occasional Paper 19, 2022) 2.

49 Gakeri JK 'Financial services regulatory modernization in East Africa: The search for a new paradigm for Kenya' (2011) 1(16) *International Journal of Humanities and Social Science* 172 (submitting that institutional structure's design should 'be appraised continuously to ensure that they remain relevant and dynamic').

50 Dordevic L, Ferreira C & Kitonga M *Strengthening bank regulation and supervision: National progress and gaps* (2021) 33; Carmichael J *The framework for financial supervision: Macro and micro issues* (BIS Policy Paper, 1999) 141–147.

regulatory modernisation is 'the process of reforming the organization and practices of financial regulation to mirror the economic realities of today's financial services sector.'[51]

Having clarified what rethinking the institutional structure entails in this section, the next section turns to explain the meaning of Fintech and highlight other key developments in Fintech. This discussion is particularly crucial as it clarifies how the term 'Fintech' should be understood within the context of, and as used in, this study. Notably, the section illustrates that Fintech represents a defining era of technological advancement and adoption within the financial system, making it impossible to overlook. To borrow from the title of one book, Fintech is the 'DNA' of today's finance.[52]

1.2.3. Fintech: The recent development defining financial systems

In addition to the emergence of financial conglomerates, the globalisation of financial services, the growth of derivative markets, the GFC, and the Covid–19 crisis, Fintech is another development that has significantly shaped the financial system of most countries over the past two decades.[53]

The very first problem we encounter with Fintech is that there is no agreed–upon definition of the term in literature, even though the term's initial usage can be traced back as far as 1972.[54] Authors have provided diverse definitions, ranging from considering Fintech as a technology, an innovation, an idea, a company, or even an industry. Moosa highlights examples of definitions reflecting these different angles of viewing Fintech in recent book *Fintech: A revolution or a transitory hype?*[55]

For the purpose of this study, the definition of Fintech from the Financial Stability Board (FSB) is relied upon. The definition is one of the most referenced in literature and offers insights into Fintech's main characteristics.[56] According to the FSB, Fintech is:

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51 Schooner HM & Taylor M 'United Kingdom and United States Responses to the Regulatory Challenges of Modern Financial Markets' (2003) 38(2) *Texas International Law Journal* 318.

52 Gupta P & Tham TM *Fintech: The new DNA of financial services* (2019).

53 Amstad M 'Regulating Fintech: Ignore, duck type or code' in Fatás A (ed) *The economics of Fintech and digital currencies* (2019) 91.

54 Schueffel P 'Taming the beast: A scientific definition of Fintech' (2016) 4(4) *Journal of Innovation Management* 32–54.

55 Moosa IA *Fintech: A revolution or a transitory hype?* (2022) 9–10.

56 Mărăcine V, Voican O & Scarlat E 'The digital transformation and disruption in business models of the banks under the impact of Fintech and bigtech' (2020) 14(1) *Proceedings of the International Conference on Business Excellence* 295 (confirming that the FSB definition is the most widely adopted). For other studies that have adopted the FSB's definition see, Schindler J

> Technologically enabled financial innovation that could result in new business models, applications, processes, products, or services with an associated material effect on financial markets and institutions and the provision of financial services [emphasis added].[57]

It is observed that FSB's definition suggests that Fintech go beyond the mere integration of technology into finance. In addition, Fintech drives innovation. The innovation induced by Fintech manifests through new models of providing financial services, financial products and services, market players, and financial infrastructures.[58] In turn, these innovations can disrupt or challenge various facets of the financial system, including the financial regulatory landscape (which incorporates the institutional structure).[59] Accordingly, Fintech has the main characteristics of innovation and disruption, which can come with both opportunities and challenges.[60]

There is a frequent reference to the 'Fintech sector' or 'Fintech industry' in literature, including in this study.[61] However, it has been usefully clarified in the *Kalifa Review of United Kingdom Fintech* that Fintech is more than just a niche within financial services

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Fintech and financial innovation: Drivers and depth (Finance and Economics Discussion Series No. 081, 2017) 2; Basel Committee on Banking Supervision *Sound practices implications of Fintech developments for banks and bank supervisors* (BIS Paper, 2018) 8; Hornuf L, Klus MF & Lohwasser TS 'How do banks interact with Fintech startups? 2021 *Small Business Economics* 1506.

57 Financial Stability Board *Financial stability implications from Fintech: Supervisory and regulatory issues that merit authorities' attention* (FSB Report, 2017) 7. For similar definitions see Jackson HE & Tahyar ME *Fintech law: The case studies* (2020) 1; Bangko Sentral NG Philipinas *Financial inclusion in the Philippines* (2018) 8; Lawack VA & Puja AC 'Introduction: Setting the scene for the discourse on Fintech law and regulation in Africa' in Lawack VA (ed) *Fintech Law and Regulation: An African perspective* (2023) 10.

58 Feyen E, Natarajan H & Saal M *Fintech and the future of finance: Market and policy implications* (2023) 16.

59 See Didenko A 'Regulating Fintech: lessons from Africa' (2018) 19 *San Diego International Law Journal* 315 (submitting that 'Fintech, like any new financial, technological and legal reality, is inherently disruptive for any system of law').

60 It should be acknowledged that the innovative and disruptive effects of Fintech vary from one Fintech activity to the other, with some posing more regulatory challenges than others. Further see Moosa IA *Fintech: A revolution or a transitory hype?* (2022) 14, where the author points out that, apart from innovation and disruption, Fintech is also associated with other characteristics like enhanced services as well as non or not–fully regulated ventures. Also see Lawack VA & Puja AC 'Introduction: Setting the scene for the discourse on Fintech law and regulation in Africa' in Lawack VA (ed) *Fintech Law and Regulation: An African perspective* (2023) 2.

61 See Moro–Visconti R 'Fintech valuation' in *Startup valuation: From strategic business planning to digital networking* (2021) 245 (defining Fintech as 'an industry composed of diversified companies that use technology to make financial services more efficient').

or a sub–sector of the financial system.[62] Instead, it represents a technological revolution that is changing the way that finance is conducted.

Fintech has generally radically transformed how people make and receive payments, save, invest, manage risk and raise capital from what it used to be before the GFC.[63] Financial services have shifted from manual to digital, and there is now a common reference to digital financial services (DFS) .[64] Fintech is driving DFS.[65]

Between 2010 and the end of 2019, more than US$165.5 billion was invested in Fintech globally, a period Imerman and Fabozzi call the 'Fintech revolution.'[66] Africa and Asia are predicted to lead the rest of North America, Latin America and Europe in adopting fintech–related services and products.[67] This is justified because 'the lack of infrastructure in developing countries leaves room for innovation that would not find success in overbanked and heavily entrenched economies in the West.'[68]

Technology has a lengthy history of application and adoption in the financial system, spanning over 150 years.[69] However, it is widely contended that the current era of

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62 See Kalifa Review of UK Fintech (2021) 3 available at *https://assets.publishing.service.gov.uk/media/607979c7d3bf7f400f5b3c65/KalifaReviewofUKFintech01.pdf* (Accessed on 19 October 2023).

63 See also Cantú C & Ulloa B *The dawn of Fintech in Latin America: Landscape, prospects and challenges* (Bank for International Settlements, BIS Papers No 112, 2020) 3; Organisation for Economic Co–operation and Development *Financial markets, insurance and private pensions: Digitalisation and finance* (2018) 9.

64 See Feyen E, Frost J & Gambacorta L et al *Fintech and the digital transformation of financial services: Implications for market structure and public policy* (BIS Paper 117, 2021) vi (defining DFS as 'financial services which rely on digital technologies for their delivery and use by consumers.' Further notes that Fintech 'is also broadly used to denote the ongoing wave of new DFS').

65 Lawack VA & Puja AC 'Introduction: Setting the scene for the discourse on Fintech law and regulation in Africa' in Lawack VA (ed) *Fintech Law and Regulation: An African perspective* (2023) 3.

66 See Imerman MB & Abbozzo FJ 'Cashing in on innovation: A taxonomy of Fintech' (2020) 21(3) *Journal of Asset Management* 167. See also Cantú C & Ulloa B *The dawn of Fintech in Latin America: Landscape, prospects and challenges* (Bank for International Settlements, BIS Papers No 112, 2020) 5.

67 Nonetheless, London and New York are currently the leading Fintech hubs globally. See Menat R 'Why we're so excited about Fintech' in Chishti S & Barberis J *The Fintech book: The financial technology handbook for investors, entrepreneurs and visionaries* (2016) 10–11; Upeika–Apoga R & Thalassinos EI 'Ideas for a regulatory definition of Fintech' (2020) 8(2) *International Journal of Economics and Business Administration* 137; Baba C, Batog C & Flores E et al *Fintech in Europe: Promises and threats* (IMF Working Paper 20/241, 2020) 5–6.

68 Menat R 'Why we're so excited about Fintech' in Chishti S & Barberis J *The Fintech book: The financial technology handbook for investors, entrepreneurs and visionaries* (2016) 10–11.

69 For a discussion on the historical development of Fintech see, Arner DW, Barberis J & Buckley RP 'The evolution of Fintech: A new post–crisis paradigm' (2015) 47 *Georgetown Journal of International Law* 1271–1320; Setiawan K & Maulisa N 'The evolution of FinTech: A regulatory approach perspective' (2020) 130 *Advances in Economics, Business and Management*

technological advancement and adoption in the financial system, under the umbrella of Fintech, differs significantly from previous periods.[70] Brummer and Yadav assert in this regard that Fintech is not merely 'a new iteration of the long–standing story of innovation in finance.'[71] They go on to identify three major ways in which Fintech differs from previous eras of technological innovations and adoption in the financial system. First, Fintech activities collect more data and gather qualitatively different data from previously untapped sources like social media, websites, and digital metadata. Secondly, Fintech activities do not rely solely on the internet but also on other automated and increasingly self–learning operational systems. Finally, unlike previous innovations that were captured under the centralised structure of the financial system, certain Fintech activities aim to break free from this centralised structure.

A significant tipping point for Fintech's growth was the global financial crisis.[72] However, aside from the GFC, the recent Covid–19 crisis has also played a role in accelerating the growth of Fintech.[73] As social distancing measures limited or restricted physical interactions, there was an increased reliance on digital connectivity. The Covid–19 crisis highlighted the vulnerabilities and limitations of traditional finance, which heavily depends on face–to–face interactions and brick–and–mortar outlets to provide financial services. It also emphasised the importance of Fintech activities, as they enable seamless and contactless interactions between consumers and financial service providers.[74]

Research 218–225; Arner D, Buckley R & Charamba K et al 'Governing Fintech 4.0: Bigtech, platform finance and sustainable development' (2022) 27(1) *Fordham Journal of Corporate and Financial Law* 1–72.

70 Fintech Regulatory Aspects Working Group *Key aspects around financial technologies and regulation policy report* (Centre for Latin American Monetary Studies, 2019) 10. See also Gray A & Leibrock M *Fintech and financial stability: Exploring how technological innovations could impact the safety & security of global markets* (DTCC, White Paper to Industry, 2017) 3.

71 Brummer C & Yadav Y 'Fintech and the innovation trilemma' (2019) 107 *Georgetown Law Journal* 242.

72 As Menant puts it, the 'birth and rise of Fintech is deeply rooted in the financial crisis, and the erosion of trust it generated.' See Menat R 'Why we're so excited about Fintech' in Chishti S & Barberis J *The Fintech book: The financial technology handbook for investors, entrepreneurs and visionaries* (2016) 10.

73 Amankwah–Amoah J, Khan Z & Wood G et al 'Covid–19 and digitalization: The great acceleration' (2021) 136 *Journal of Business Research* 602; Fu J & Mishra M 'The global impact of Covid–19 on Fintech adoption' 2020 *Swiss Finance Institute Research Paper* 20; Candy C, Robin R & Sativa E et al 'Fintech in the time of Covid–19: Conceptual overview' (2022) 3(3) *Jurnal Akuntansi, Keuangan, dan Manajemen (Jakman)* 253.

74 See Feyen E, Frost J & Gambacorta L et al *Fintech and the digital transformation of financial services: Implications for market structure and public policy* (BIS Paper 117, 2021) 1 citing Auer R, Cornelli G & Frost J *Covid–19, cash, and the future of payments* (BIS Bulletin No. 3, 2020),

Fintech's development cannot also be isolated from the broader fourth industrial revolution (4IR). The 4IR marks a significant phase in human development driven by remarkable technological advancements comparable to those seen in earlier industrial revolutions. The first industrial revolution saw the use of water and steam power for mechanisation, the second industrial revolution involved harnessing electric power for mass production, and the third industrial revolution was marked by automated production through electronics and information technology.[75]

The 4IR builds upon the digital revolution of the third industrial revolution. It is characterised by the integration of technologies that blur the boundaries between the physical, digital, and biological spheres. Key technologies shaping the 4IR, such as artificial intelligence, big data, the internet of things, cloud computing, and blockchain, constitute the enabling technologies of Fintech. According to Mpofu, these technologies are being adopted in the financial sector to enhance the delivery of financial services and promote digital financial inclusion.[76]

An overview of Fintech and an understanding of how it is reshaping the financial system has been extended in this section. The following section turns to highlight some justifications and considerations for rethinking the institutional structure in response to Fintech.

1.2.4. Rethinking the institutional structure in response to Fintech: The why and how

The 'regulation of Fintech' or 'Fintech regulation' is used in this study to specifically refer to the framework of policy objectives, regulations, supervisory approaches, as well as the various institutional bodies that govern Fintech activities and firms. Fintech regulation is a specialised regulatory area within the broader domain of financial regulation, similar to banking regulation, securities regulation, insurance regulation, and so on.

and Auer R, Cornelli G, & Frost J *Rise of the central bank digital currencies: drivers, approaches and technologies* (BIS Working Paper No. 880, 2020).

75 Schwab K 'The Fourth Industrial Revolution: what it means, how to respond' available at https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ (Accessed on 1 December 2023).

76 Mpofu FY 'Fintech, the Fourth Industrial Revolution Technologies, Digital Financial Services and the Advancement of the SDGs in Developing Countries' (2023) 6(1) *International Journal of Social Science Research and Review* 533.

The Bali Fintech Agenda of 2018, prepared by the International Monetary Fund (IMF) and World Bank Group (WBG), is of a lesser status than the various international supervisory standards developed for banking, securities, pension, and insurance.[77] Nonetheless, it is one of the most authoritative international policy reports on Fintech. In it, the IMF and WBG recommend 12 policy guides to assist countries in responding to Fintech.[78] Drawing from the Bali Fintech Agenda, it can be said that Fintech regulation serves two main broad policy objectives.

The first objective is to unlock the benefits of Fintech. Fintech is hailed for its potential to make financial services faster, cheaper, more reliable, and even more inclusive to those initially unserved or underserved.[79] It can also contribute to the stability of the financial system.[80] The other objective of Fintech regulation is to mitigate the risks of Fintech. Fintech is dreaded for its potential risks to consumers, micro–stability, fair competition, market integrity, and, more broadly, the stability of the financial system.[81] Additionally, Fintech brings changes to the financial system, such as disintermediation

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77 These international standards include the Basel Committee on Banking Supervision's (BCBS) Core Principles for Effective Banking Supervision; the International Organization of Securities Commissions' (IOSCO) Objectives and Principles of Securities Regulation; the International Association of Insurance Supervisors' (IAIS) Insurance Core Principles, and Common Framework for the Supervision of Internationally Active Insurance Groups; and the International Organization of Pension Supervisors' (IOPS) Principles of Private Pension Supervision.

78 These guides are that countries should (1) Embrace the promise of Fintech; (2) Enable new technologies to enhance financial service provision; (3) Reinforce competition and commitment to open, free, and contestable markets; (4) Foster Fintech to promote financial inclusion and develop financial markets; (5) Monitor developments closely to deepen understanding of evolving financial systems; (6) Adapt regulatory frameworks and supervisory practices for orderly development and stability of the financial system; (7) Safeguard the integrity of financial systems; (8) Modernise the legal frameworks to provide an enabling legal landscape; (9) Ensure the stability of domestic monetary and financial systems; (10) Develop robust financial and data infrastructure to sustain Fintech benefits; (11) Encourage international cooperation and information sharing; and (12) Enhance collective surveillance of the international monetary and financial system. See International Monetary Fund & World Bank Group *The Bali Fintech Agenda: A blueprint for successfully harnessing Fintech's opportunities* (IMF Policy Paper, 2018) 7–9.

79 Expert Group on Regulatory Obstacles to Financial Innovation *Report on thirty recommendations on regulation, innovation and finance* (2019) 10.

80 Financial Stability Board *Financial stability implications from Fintech: Supervisory and regulatory issues that merit authorities' attention* (FSB Report, 2017) 16–17 (highlighting the potential of Fintech to enhance financial stability through fostering decentralisation and diversification of financial services, enabling greater efficiency in delivering financial services, reducing information asymmetries, and improving transparency as well enhancing access to and convenience of financial services).

81 According to the FSB, Fintech poses potential threat to the stability of financial system by generating both micro–financial and macro–financial risks. The FSB, however, concludes that although Fintech can potentially have an adverse systemic impact, there is no evidence of such an impact at present. See Financial Stability Board *Financial stability implications from Fintech: Supervisory and regulatory issues that merit authorities' attention* (FSB Report, 2017) 17–21.

and cross–industry and regulator integration.[82] It equally presents regulatory challenges that can trigger regulatory failure and inefficiencies.[83]

It is submitted that the institutional structure and other frameworks for financial regulation in most jurisdictions were designed prior to and without the foresight of Fintech developments. This oversight has left financial systems vulnerable to the various risks, changes and regulatory challenges associated with Fintech developments. Reinforcing this point, Brummer and Yadav observe that 'applying traditional regulatory strategies to new technological ecosystems has proved conceptually difficult.'[84] In another paper co–authored by Brummer and Goffin, they demonstrate that Fintech challenges the underlying precepts of existing regulatory approaches and frameworks.[85] According to them, there is a need for the 'fresh thinking' (or, as this study terms it, a 'rethinking') of the frameworks for financial regulation to facilitate the sustainable development of the Fintech sector.

The IMF and WBG suggest in the Bali Fintech Agenda that it is important to rethink these frameworks in response to Fintech because Fintech has enabled new services, products, and service providers that the current frameworks for financial regulation may not have yet captured.[86] They note that the 'orderly development and stability of the financial system' requires adapting the frameworks for financial regulation to these new services, products and service providers.[87]

Rethinking the intuitional structure in response to Fintech is also imperative to avoid a situation like the GFC, which partly resulted from outdated institutional structures being

[82] Omarova ST 'Technology v technocracy: Fintech as a regulatory challenge' (2020) 6(1) *Journal of Financial Regulation* 87–95.

[83] See Alliance for Financial Inclusion *The supervision of Fintech in the African region* (African Financial Inclusion Policy Initiative, Regional Policy Framework, 2023) 11–14. See also Yang YP & Tsang CY 'Regtech and the new era of financial regulators: Envisaging more public–private–partnership models of financial regulators' (2018) 21(2) *University of Pennsylvania Journal of Business Law* 361; Amstad M *Regulating Fintech: Objectives, principles, and practices* (Asian Development Bank Institute Working Paper Series No. 1016, 2019) 1–5.

[84] Brummer C & Yadav Y 'Fintech and the innovation trilemma' (2019) 107 *Georgetown Law Journal* 242. For similar views, see Yadav Y 'Fintech and international financial regulation' (2020) 53(3) *Vanderbilt Journal of Transnational Law* 1109–1146; Bromberg L, Godwin A & Ramsay I 'Fintech sandboxes: Achieving a balance between regulation and innovation' (2017) 28(4) *Journal of Banking and Finance Law and Practice* 314–336.

[85] Brummer C & Gorfine D *Fintech: Building a 21st–century regulator's toolkit* (Milken Institute Center for Financial Markets, 2014) 1–14.

[86] International Monetary Fund & World Bank Group *The Bali Fintech Agenda: A blueprint for successfully harnessing Fintech's opportunities* (IMF Policy Paper, 2018) 8.

[87] International Monetary Fund & World Bank Group (2018) 8.

used in various jurisdictions.[88] Furthermore, the GFC regulatory reforms neither envisaged nor confronted the changes, risks and regulatory challenges that Fintech presents.[89] Essentially, it is submitted that a new paradigm for the institutional structure is required to address the peculiarities of Fintech.

Mueller acknowledges that reforming the institutional structure and other frameworks for financial regulation to align with Fintech is not an easy task.[90] However, the author insists that it is crucial that it is done. The author urges that:

> The pace of technological change necessitates a rethinking of current regulatory structures, no matter the various trials and tribulations that officials will face in attempting to evolve decades–old frameworks to reflect the present–day financial services industry and the innovations coming from within and outside of the market.[91]

Having highlighted why it is necessary to rethink the institutional structure in response to Fintech, the question that follows is, what does this intervention entail?

It is useful to start by mentioning that it is same institutional structure that is used to regulate the broader financial system (i.e., to undertake financial regulation generally) that is also employed to regulate Fintech (i.e., to undertake Fintech regulation). Reinforcing this point, Bains and Wu explain that some jurisdictions adopt an all–in–one integrated authority for Fintech regulation.[92] Others follow a twin peaks model, involving separate prudential and conduct of business regulators. Additionally, some countries entrust the responsibility to sector–specific regulators to regulate the Fintech activities within their sectoral jurisdiction (i.e., the sectoral model). The authors also observe that the existing institutional structure a country is using provides the base for

88 Generally, see Stiglitz JE 'Lessons from the global financial crisis of 2008' (2010) 23(3) *Seoul Journal of Economics* 321–339; Akinbami F 'The global financial crisis: Causes, effects and issues to consider in the reform of financial regulation (2010) 11 *International Finance Review* 167–190; Ahmad NH 'Global financial crisis: lessons learned' (2010) 17 *International Journal of Molecular Sciences* 51–61.

89 Magnuson W 'Regulating Fintech' (2018) 71(4) *Vanderbilt Law Review* 1167.

90 Mueller J *Fintech: Considerations on how to enable a 21st century financial services ecosystem* (Milken Institute Center for Financial Markets, 2017) 12.

91 Mueller J (2017) 12.

92 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 14.

monitoring Fintech developments, responding to the challenges they generate, and generally regulating Fintech.[93]

However, it must also be acknowledged that certain developments in the financial system may necessitate the introduction of specific institutional arrangements to the institutional structure, in order to better address the risk, changes and challenges posed by these developments.[94] In the case of Fintech, some observable 'Fintech institutional arrangements' that regulators are introducing into their institutional structure to better address the risks, changes and challenges posed by it include:[95]

(1) Fintech regulation coordinating bodies: These are bodies established to ensure effective regulatory coordination between financial regulators, non–core financial regulators, and other government stakeholders of the Fintech ecosystem in dealing with Fintech matters. These bodies play a crucial role in harmonising regulations, addressing overlaps, and filling regulatory gaps that may originate from Fintech developments.

(2) Fintech units: Recognising the unique challenges and opportunities presented by Fintech, many regulatory authorities are establishing dedicated units or departments within their organisational structure. These units are tasked with understanding Fintech, monitoring its development, assessing new risks arising from it, and adapting regulatory and supervisory frameworks to it. Fintech units generally help bridge the gap between technology–enabled innovative financial services and traditional regulatory approaches.

(3) Regulatory sandbox: A regulatory sandbox is a framework set up by a regulator that allows Fintech firms and other innovators to conduct live experiments in a controlled environment under the regulator's supervision. This approach enables firms to test new products, services, and business models without immediately being subjected to the full suite of regulatory requirements. Likewise, the arrangement allows regulators to better manage and understand risks associated with new business models and products. A regulatory sandbox

93 Bains P & Wu C (2023) 14.

94 For example, the emergence of financial conglomerates has necessitated countries using the sectoral model to introduce financial regulation coordination bodies into their institutional structure. These bodies primarily serve as a forum to facilitate regulatory coordination between various 'sectoral' financial regulators.

95 These are discussed further in Chapter 3.

is particularly useful for testing products and services that do not fit neatly into existing regulatory frameworks.

(4) Innovation hub: This is a virtual or physical platform where regulators and Fintech innovators (from startups to established financial institutions) engage with each other. The central purpose of an innovation hub is to provide a forum where regulators can extend non–binding guidance to Fintech firms around regulatory expectations and compliance. The hubs support Fintech firms in navigating the regulatory landscape, thereby encouraging more informed and regulatory compliant financial services.

(5) Innovation accelerators: These are programmes or initiatives led by regulatory bodies designed to support the rapid development and scaling of innovative Fintech solutions and firms. Accelerators provide resources like mentorship, networking opportunities, and, in most cases, funding to Fintech firms. They also offer guidance on regulatory compliance, helping start–ups to scale their innovations in a way that aligns with regulatory requirements.

(6) Fintech one–stop–shop: This concept involves providing a single point of contact with various regulatory bodies for Fintech firms seeking to enter the market. It serves as a comprehensive resource for information, guidance, and advice on regulatory requirements and, very importantly, processing licences. The goal of the shop is to streamline the process for Fintech firms to get their products and services to market more efficiently and compliantly. It is particularly beneficial for Fintech start–ups that may lack the resources to engage separately with different regulatory bodies.

(7) Stakeholder advisory bodies: These are collaborative forums or committees that include a diverse range of stakeholders involved in the Fintech ecosystem. Members might include representatives from Fintech firms, traditional financial institutions, consumer advocacy groups, technology experts, academics, think tanks, and regulatory bodies. The primary purpose of these advisory bodies is to facilitate open dialogue and shared understanding among different stakeholders. Stakeholder advisory bodies ensure that the voices of various interest groups are considered in the regulatory process, thereby promoting Fintech policies and regulations that are well–rounded, especially in terms of

reflecting the realities of the market, technological advancements, consumer needs, and potential risks.

(8) Co–regulation through the use of SROs: Co–regulation refers to a collaborative model where regulatory oversight is shared between government regulatory agencies and industry–led SROs. In a co–regulatory framework, SROs operate under the broader umbrella of government/public regulation. This arrangement leverages the expertise of industry insiders, while still maintaining overall public accountability and protection through governmental oversight. The use of SROs in the Fintech space allows for more responsive and specialised regulation. Additionally, it can reduce the regulatory burden on the government regulatory bodies while still ensuring that the industry operates within certain agreed–upon standards and safeguards.

Bains and Wu contend that in introducing these Fintech institutional arrangements, efforts should also be channelled to address the deficiencies of the institutional structure in terms of undertaking financial regulation generally. As they argue it:

> The first step to improving supervisory monitoring of Fintech should also be through strengthening existing supervisory structures. Where existing supervisory structures are unable to monitor Fintech developments effectively, the first step of action should be fixing and improving these structures. Poor supervisory practices in broader regulated financial services, including banks, are also likely to be weak in delivering on the broader objective of monitoring and responding to Fintech risk…Creating new institutional arrangements for Fintech regulation is unlikely to fix underlying issues and could create new risks or amplify existing ones.[96]

It is observed that the insights provided by Bains and Wu extend the foundational understanding that there are two main institutional aspects of Fintech regulation. One aspect relates to the institutional structure for financial regulation in general. The other aspect pertains to the Fintech institutional arrangements that can be integrated into the institutional structure. Further, Bains and Wu highlight the need for countries to

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96 Bains P & Wu C (2023) 15.

understand the dynamics of their institutional structure not only as it relates to financial regulation, but also in the specific context of Fintech.[97]

In addition to this foundational understanding, two other crucial points can be derived from Bains and Wu's profound submission regarding rethinking the institutional structure in the context of Fintech. First, the integration of Fintech institutional arrangements into the institutional structure is not a panacea for rectifying the gaps that undermine the effectiveness of the institutional structure for financial regulation generally. Correspondingly, Fintech institutional arrangements, even if well–designed, may struggle to deliver optimal outcomes if inadequacies plague the broader institutional structure within which they operate. Secondly, efforts to improve the institutional structure for regulating Fintech specifically cannot be isolated from the broader institutional aspect of financial regulation. Efforts to improve the institutional structure for regulating Fintech, including through introducing Fintech institutional arrangements, must, therefore, be accompanied by addressing aspects of the structure that undermine its effectiveness for financial regulation generally.

It is observed that it is only more recently that studies investigating Fintech within the context of the institutional structure of financial regulation have started to emerge. A 2019 IMF Fintech Note by Taylor, Wilson and Holttinen et al titled *Institutional Arrangements for Fintech Regulation and Supervision*, stands out as one of the pioneering works on the subject.[98] This Fintech Note is a follow–up to the Bali Fintech Agenda, with a particular focus on the institutional aspects of Fintech regulation.[99] It surveys ten jurisdictions to highlight how they are using and reforming their different institutional structures to regulate Fintech.[100]

An inescapable point raised in the 2019 IMF Fintech Note is that policymakers across jurisdictions are concerned about whether their existing institutional structure is

97 It is submitted that this understanding is especially crucial because each model brings its own set of strengths and weaknesses. These strengths and weaknesses may invariably have negative and positive implications on how well Fintech is regulated within a country.

98 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 1–7. The subsequent Fintech Note published by the IMF on the institutional aspects of Fintech regulation is Bains P & Wu C *Institutional arrangements for Fintech regulation: Supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023).

99 Taylor C, Wilson C & Holttinen E et al (2019) 3.

100 Kenya was the only African country surveyed. The other jurisdictions surveyed are France, Hong Kong SAR, Japan, Malta, United Arab Emirates, United Kingdom, Singapore and Switzerland.

effective for regulating Fintech or needs reform.[101] This concern is quite understandable in light of Parenti's observation that Fintech challenges traditional 'institutional arrangements in the financial sector by adding complexities to an already complex environment.'[102]

This study uses Nigeria as a case study to contextualise and investigate this policy consideration of whether the current institutional structure is effective for regulating Fintech. It also explores the institutional arrangements and other reforms that need to be introduced into the institutional structure to improve its effectiveness for Fintech regulation.

Nigeria is an ideal case study for this discourse because it is one of the leading Fintech markets in the African continent, alongside Egypt, South Africa, and Kenya.[103] Most types of Fintech activities and firms that have emerged in other parts of the world can also be observed in Nigeria's financial system.[104] Between 2014 and 2019, Nigeria's Fintech sector received more than US$600 million in funding.[105] The revenue of the country's Fintech sector is projected to reach US$543 million in 2022 from US$153 million in 2017.[106]

Further, among other accolades, Nigeria is the first country in Africa and second in the world (after the Bahamas) to launch a central bank digital currency (called the 'e–Naira') that is fully open to the public.[107] It is also the biggest crypto assets market in

101 Taylor C, Wilson C & Holttinen E et al (2019) 3.

102 Parenti R *Regulatory sandboxes and innovation hubs for Fintech: Impact on innovation, financial stability and supervisory convergence* (Study for the Committee on Economic and Monetary Affairs, European Parliament, 2020) 8.

103 PwC *Report on changing competitive landscape: Fintech and the banking in Nigeria* (2020) 6.

104 See Kola–Oyeneyin E, Kuyoro M & Olanrewaju T *Harnessing Nigeria's Fintech potential* (McKinsey & Company, 2020) 4, summarising that 'a youthful population, increasing smartphone penetration, and a focused regulatory drive to increase financial inclusion and cashless payments, are combining to create the perfect recipe for a thriving Fintech sector'). Further see Nwosu CP, Oji–Okoro I & Anih OD *Fintech development in Nigeria: Lessons from other jurisdictions* (Central Bank of Nigeria Occasional Paper No. 76, 2022) 19–26 (discussing the historical development of Fintech in Nigeria and highlighting some notable Fintech firms and activities that have emerged).

105 Kola–Oyeneyin E, Kuyoro M & Olanrewaju T *Harnessing Nigeria's Fintech potential* (McKinsey & Company, 2020) 4.

106 Nigerian Communications Commission *Emerging role of data and Fintech in the development of digital economy* (NCC Research Study, 2021) 9.

107 Ree J 'Five observations on Nigeria's central bank digital currency' available at https://www.imf.org/en/News/Articles/2021/11/15/na111621–five–observations–on–nigerias–central–bank–digital–currency (Accessed on 26 September 2023).

Africa.[108] The choice of Nigeria as a case study is also motivated by the need to address the perceived problems within the country's institutional structure for financial regulation in general and fintech regulation in particular. These problems are explored in the next section.

1.3. PROBLEM STATEMENT

Nigeria's current institutional structure of financial regulation significantly mirrors the defining features of the sectoral model, in that, there are separate regulators overseeing the banking, securities, insurance and pension sectors.[109] In particular, five key national or federal financial regulators have been established under separate financial sector laws, each with core responsibilities as follows:

(1) The Central Bank of Nigeria (CBN) is established under the Central Bank of Nigeria Act 7 of 2007 (CBN Act). It is responsible for ensuring monetary stability, promoting macro–stability, and regulating banks and other financial institutions (OFIs), including finance companies, bureau de change and payment service providers. CBN also oversees the foreign exchange market, the payment system, and the issuance of Nigeria's legal tender currency.

(2) The Nigeria Deposit Insurance Corporation (NDIC) is established under the Nigeria Deposit Insurance Corporation Act 33 of 2023. It supports the financial stability efforts of the CBN by overseeing deposit insurance matters and managing failed insured financial institutions. NDIC insures the deposit liabilities of deposit–taking CBN–licensed financial institutions and guarantees payments to depositors if these insured institutions fail or are unable to pay depositors.

(3) The Securities and Exchange Commission (SEC) is established under the Investment and Securities Act 29 of 2007. SEC is responsible for regulating the capital market and overseeing securities exchanges, capital market operators, issuing houses, and other entities involved in capital market operations.

(4) The National Insurance Commission (NAICOM) is established under the National Insurance Commission Act 1 of 1997. NAICOM is the regulatory body for the

[108] Chainalysis 'Cryptocurrency penetrates key markets in sub–Saharan Africa as an inflation mitigation and trading vehicle' *https://www.chainalysis.com/blog/africa–cryptocurrency–adoption/* (Accessed on 23 September 2023).

[109] Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 28.

insurance industry, overseeing insurance companies, insurance brokers and other actors in the insurance sector. However, it is important to note that NAICOM does not regulate health insurance companies, as this falls under the jurisdiction of the National Health Insurance Authority (NHIA).[110]

(5) The National Pension Commission (PENCOM) is established under the Pension Reform Act 4 of 2014. It regulates the pension sector and the contributory pension scheme in both the public and private sectors. PENCOM additionally undertakes the micro–prudential and conducts business regulation of pension firms like pension fund administrators and custodians.

Another key body within Nigeria's institutional structure is the Financial Services Regulation Coordination Committee (FSRCC). The FSRCC is formally established under section 43 of the CBN Act. It serves to facilitate regulatory coordination among the regulators and for them to address some of the challenges that are inherent in a multi–registration institutional structure like Nigeria's.[111] The members of the FSRCC have entered a multilateral memorandum of understanding (MoU) to guide the sharing of information among themselves.[112]

Notably, while the CBN, NDIC, SEC, NAICOM and PENCOM are all federal or national regulatory bodies, in the State sphere of government, designated government offices oversee financial services offered by moneylenders and cooperative societies under State Laws.[113]

The federal government of Nigeria has long aimed for the country's financial system 'to be the safest and fastest–growing financial system amongst emerging markets.'[114]

110 s 1 of the National Health Insurance Authority Act, 2021.

111 The FSRCC has representatives from the CBN, NDIC, SEC, NAICOM, PENCOM, Corporate Affairs Commission (CAC), Federal Ministry of Finance (MoF), Nigerian Exchange Group (NGX), Nigeria Commodities Exchange (NCX), and the Federal Inland Revenue Service (FIRS). The objectives of the FSRCC include coordinating the supervision of financial institutions, particularly conglomerates, reducing regulatory arbitrage and inconsistencies, bridging information gaps regulatory authorities, deliberating on issues of common concerns, and promoting safe and efficient practices by financial institutions. See ss 43 & 44 of the Central Bank of Nigeria Act.

112 Ogunleye GA 'Financial safety net reform in Nigeria' in LaBrosee JR, Olivares Caminal R & Single D *Managing risks in the financial system* (2011) 437.

113 See for example, the Co–operatives Societies Law of Lagos State, 2015 and Moneylenders Law, Cap. M7, Laws of Lagos State of Nigeria, 2003.

114 See generally Kama U & Adigun M *Financial Inclusion in Nigeria: Issues and Challenges* (CBN Occasional Paper 45, 2013) 20–23; Ajakaiye O & Tella S *Financial Regulation in low–income countries: Balancing inclusive growth with financial stability –The Nigerian case* (ODI Working Paper 409, 2016) 5.

Understandably, achieving such a vision requires an effective institutional structure alongside comprehensive regulatory frameworks and sound supervisory practices. Sadly, Nigeria's latest Financial Sector Assessment Program (FSAP) mentions that some gaps and weaknesses define the country's regulatory and supervisory frameworks of the financial system.[115]

Further, concerns have been raised that the FSRCC has not been active in pursuing its objectives and mitigating the challenges it has been established to address.[116] Additionally, commentators have noted numerous gaps in Nigeria's institutional structure, with some calling for the country to change to alternative models.[117]

There are also common patterns of countries introducing Fintech institutional arrangements to their institutional structure to align with Fintech developments in their jurisdiction. For example, in 2016, South Africa established a Fintech regulation coordinating body known as the Intergovernmental Fintech Working Group (IFWG).[118] The IFWG notably administers a centralised innovation hub, regulatory sandbox, and innovation accelerator programmes for the various regulatory bodies. It also facilitates regulatory coordination between financial and non–core financial regulators in dealing with Fintech regulatory issues.

Equally, to enable tailored and dedicated attention to Fintech, the South African Reserve Bank (SARB) established the Fintech Unit within this organisational structure in 2017. Similarly, the Bank of Ghana (BoG) established its Fintech unit, called the

115 International Monetary Fund *Nigeria: Financial sector stability assessment* (IMF Country Report No. 13/140, 2013) 9.

116 International Monetary Fund *Technical note on crisis management and crisis preparedness frameworks* (IMF Country Report No. 13/143, 2013) 12; Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 36–64; Sanusi LS *The Nigerian banking Industry: What went wrong and the way forward* (BIS Review 49/2010) 6.

117 See Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 312–331 (arguing that Nigeria adopts the twin peaks model). Also see Adetiloye KA 'The role of single financial services regulation and the Central Bank of Nigeria–A vision 2020 expectation' 2008 *Lagos Journal of Banking, Finance & Economic Issues* 223–235 (proposing that Nigeria adopts the unified model). Further see Ogunleye GA 'Financial safety net reform in Nigeria' in LaBrosee JR, Olivares Caminal R & Single D *Managing risks in the financial system* (2011) 435 (nothing that inherent in Nigeria's institutional structure 'are regulatory overlaps and arbitrage opportunities for market operators').

118 For the regulatory and institutional developments in South Africa, see generally Lessambo FI *Fintech regulation and supervision challenges within the banking industry: A comparative study within the G–20* (2023) 283–288.

Fintech and Innovation Office, in 2020.[119] Other countries, like Indonesia, have established regulatory frameworks that support using SROs to regulate Fintech activities.[120] It has also been advised that governments should establish a Fintech one–stop–shop to simplify access to regulatory information and the process for applying for licences for their Fintech firms.[121]

The benefits of these various institutional arrangements in supporting the effective Fintech regulation and growth of the Fintech sector have been acknowledged in literature.[122] However, some of them have not yet been introduced in Nigeria. Specifically, as of the writing of this thesis, the CBN, which regulates most Fintech activities in Nigeria, has not reported establishing a Fintech unit within its organisational structure. Only the NDIC and SEC have incorporated dedicated Fintech units into their organisational structure, aligning themselves with similar practices observed in other jurisdictions.

Additionally, there is currently no Fintech regulation coordinating body, which will likely undermine smooth regulatory coordination between financial and non–core financial regulators when dealing with Fintech matters. Further, no Fintech one–stop shop is established in the country, meaning that Fintech firms providing cross–sectoral services must engage with each regulator separately for licensing purposes.

Equally, there are areas, such as the regulation of moneylenders, where the use of SROs can be explored, but this has not been done yet. Finally, the different financial regulators are establishing and operating their innovation hub and sandbox programmes independently, rather than following an integrated approach like South Africa's IFWG.

The absence of these Fintech institutional arrangements in Nigeria raises pertinent questions: Is it important for Nigeria to adopt them? Will the failure to adopt them have

119 Alliance for Financial Inclusion *The supervision of Fintech in the African region: A case study of Ghana* (African Financial Inclusion Policy Initiative Case Study, 2023) 5.

120 Gladden M 'Authority of Asosiasi Fintech Pendanaan Bersama Indonesia (AFPI) in determining the amount of loan interest rates limit in peer–to–peer lending (P2P lending) business activities' (2020) 478 *Advances in Social Science, Education and Humanities Research* 742–747.

121 TheCityUK *Fintech in Kenya: Towards an enhanced policy and regulatory framework* (2022) 40.

122 Alliance for Financial Inclusion *The supervision of Fintech in the African region* (African Financial Inclusion Policy Initiative, Regional Policy Framework, 2023) 23–24.

repercussions? What considerations should guide the implementation of these arrangements if they are deemed beneficial?

Omarova cautions that the changes that Fintech brings to the financial system and the challenges arising from these changes require more than just filling regulatory gaps or rewriting specific regulations to align with the emerging new reality.[123] What is clear from Omarova's submission is that responding to Fintech developments requires more than reforming the regulatory frameworks. It is submitted in this regard that reform initiatives in response to Fintech should also extend to addressing the areas of misalignment between the institutional structure and Fintech developments.

Nigeria's current institutional structure and most of the legal frameworks underpinning it were established in a markedly different environment than exists today, especially with various emerging Fintech activities and firms. In other words, they were not developed within the context of today's Fintech or digital financial services era. Therefore, the problem or danger is that the structure and its supporting legal frameworks may not adequately accommodate the changes, risks and regulatory challenges that accompany Fintech. This misalignment could undermine the effectiveness of the institutional structure for regulating Fintech and meeting other goals of financial regulation in today's digital financial services landscape.

Accordingly, as Nigeria's Fintech sector continues to grow, it is important to assess if the institutional structure under which the sector is regulated remains effective. Further, necessary and proportionate reforms should be implemented in areas where gaps are found. The next section sets out the research questions and objectives that serve as guiding principles for this study, along with the approach employed to address them.

1.4. CENTRAL RESEARCH QUESTION, SUB–QUESTIONS, AND AIMS OF THE STUDY

The central question posed by this study is: How can Nigeria's institutional structure of financial regulation be reformed to better address the changes, risks, and regulatory challenges associated with Fintech? Within this central question, the following sub–questions arise:

[123] Omarova ST 'Technology v technocracy: Fintech as a regulatory challenge' (2020) 6(1) *Journal of Financial Regulation* 107.

(1) To what extent does the design of the institutional structure influence the overarching objectives of efficient and effective financial regulation?

(2) What requirements are essential for the effectiveness of the institutional structure for financial regulation generally?

(3) What requirements are essential for the effectiveness of the institutional structure for regulating Fintech specifically?

(4) What noteworthy reforms have been introduced to Nigeria's institutional structure in response to developments in the financial system, including in relation to Fintech?

(5) To what extent does Nigeria's current institutional structure demonstrate effectiveness in the broader context of financial regulation, and how well does it cater to the peculiarities of Fintech?

Based on the problem statement and central research question posed, this study's objectives are mainly two–fold. The first objective is to evaluate the effectiveness of Nigeria's institutional structure for regulating Fintech, particularly in terms of whether it caters to the changes, risks, and regulatory challenges posed by Fintech. The second objective is to propose appropriate legal and policy reforms that Nigeria can implement to enhance the effectiveness of its institutional structure for regulating Fintech.

To assess the effectiveness of Nigeria's current institutional structure for regulating Fintech, it is necessary to evaluate it against established pre–conditions or requirements for such effectiveness. This raises the question of which requirements will be used for the assessment in this study? Unhelpfully, the IMF and World Bank Group's Bali Fintech Agenda does not specify any principles or requirements that could be used to assess the effectiveness of the institutional structure for regulating Fintech. The 12 principles it provides are not specific to the institutional aspects of Fintech regulation.[124] Additionally, no other policy document or study is known to have

[124] International Monetary Fund & World Bank Group *The Bali Fintech Agenda: A blueprint for successfully harnessing Fintech's opportunities* (IMF Policy Paper, 2018) 7–9.

articulated a set of criteria that can be used for this assessment and the basis upon which the criteria have been developed.[125]

However, it must be acknowledged that there are insights from existing literature that can be relied upon to develop the requirements for assessing the effectiveness of the institutional structure for Fintech regulation. For example, Taylor, Wilson and Holttinen et al emphasise the importance of clear regulatory mandates, effective coordination, and adaptive institutional arrangements for mitigating Fintech's challenges to the institutional structure.[126] Likewise, Koonprasert and Mohammad highlight the need for regulators to evaluate their organisational or departmental structure to assess whether it sufficiently supports regulating Fintech developments.[127]

As previously contended in Section 1.2.4, the regulation of Fintech, or Fintech regulation, represents a specialised domain within the broader scope of financial regulation. Complementarily, the jurisdiction of financial regulators over Fintech activities and firms typically aligns with the mandates already defined within the institutional structure for implementing financial regulation generally. If the existing institutional structure is ineffective for financial regulation, it is highly likely to be ill–suited for regulating Fintech. In this sense, efforts to improve the institutional structure for Fintech regulation specifically need to start with addressing its gaps in terms of financial regulation in general.

It is opined that all the foregoing points emphasise that a discussion on the requirements for the effectiveness of the institutional structure for regulating Fintech cannot be undertaken in isolation from the broader context of financial regulation. Another takeaway is that the requirements that are essential for the effectiveness of the institutional structure for financial regulation in general can provide a solid foundation for formulating the structural requirements that apply to Fintech regulation

125 Apart from the Bali Fintech Agenda, some other studies have identified principles for regulating Fintech. For example, in Amstad M *Regulating Fintech: Objectives, principles, and practices* (Asian Development Bank Institute Working Paper Series No. 1016, 2019) 5–6, the principles of legal certainty, technology neutrality, and proportionality are outlined. Another source is McQuinn A, Guo W & Castro D *Policy Principles for Fintech* (Information Technology & Innovation Foundation Paper, 2016) 1–52, where the authors identify ten principles. Additionally, Eggers WD, Turley M & Kishnani P *The future of regulation: Principles for regulating emerging technologies* (Deloitte Insights, 2019) 11–18, prescribes five principles.

126 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 9.

127 Koonprasert T & Mohammad AG *Creating enabling Fintech ecosystems: The role of regulators* (Alliance for Financial Inclusion Special Report, 2020) 6.

specifically. Building upon this understanding, the study follows a three–staged approach to assess the extent to which Nigeria's current institutional structure is effective for regulating Fintech and identify areas that may require improvement. These stages are summarised as follows.

The first stage involves advancing a conceptual framework on the requirements for the effectiveness of the institutional structure for financial regulation generally.[128] These requirements are drawn by investigating the strengths and limitations of the different models for the institutional structure (sectoral, unified, and twin peaks models), and the measures for addressing the limitations of each model. They are also drawn from some principles in the various international supervisory standards that are relevant to the institutional structure of financial regulation.[129] Further, the study integrates other requirements advanced in literature.

The second stage involves using the framework emerging from the first stage as the basis for developing another conceptual framework on the requirements for the effectiveness of the institutional structure for regulating Fintech specifically.[130] In developing the second framework, the study draws insights from available literature that have discussed Fintech within the specific context of the institutional structure.[131] It also draws insights from notable institutional reforms introduced by various jurisdictions to their institutional structure in response to Fintech.[132]

The third and final stage entails assessing the effectiveness of Nigeria's current institutional structure through the lens of the conceptual frameworks from the first and second stages to identify areas that require improvement. The significance of this study and its contribution to literature are discussed next.

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128 The is covered in Chapter 2.

129 This includes principles related to cooperation among financial regulators, as well as principles related to the financial regulator having its assigned policy objectives specified by legislation, being independent, and having necessary regulatory and enforcement powers.

130 This is covered in Chapter 3.

131 This is covered in Chapter 3.

132 The methodology for drawing these proposals is explained in Section 1.7 below.

1.5. SIGNIFICANCE OF THE STUDY

In November 2022, the Financial Inclusion Steering Committee (FISC), which the CBN Governor chairs, launched the National Fintech Strategy (NFS).[133] The NFS sets out a vision for Nigeria to be a 'leading inclusive digital and Fintech ecosystem out of Africa.'[134] Fintech is defined in the policy document as 'technologically enabled financial innovations that extend the reach, usage, and governance of financial services.'[135] It is submitted that this definition of Fintech in the NFS reflects the recognition of Fintech as a catalyst for not only enhancing access to financial services but also improving the regulatory regime.

The NFS acknowledges that Nigeria's Fintech sector is thriving but mentions that the sector needs to be further enabled for sustainable growth and global competitiveness.[136] Part of the measures identified to support the growth of the Fintech sector is enhancing regulatory coordination among various regulatory bodies. It also proposes establishing Fintech units within the organisational structures of financial regulators.[137]

Notably, also, the Fintech Roadmap Committee, set up by the SEC, issued a report titled *The future of Fintech in Nigeria*, which, among other proposals, identifies the need for a harmonised regulatory agenda to position Nigeria as a leading Fintech hub in Africa.[138] The report proposed the establishment of a centralised committee comprising all regulators whose functions impact the Fintech sector (i.e., a Fintech regulation coordinating body). This committee would be tasked with formulating and endorsing policies and regulations pertaining to Fintech in the country.[139]

However, both the NFS and the Fintech Roadmap Committee's report lack an extensive exploration of the justification as well as the legal, policy and operational

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133 The National Fintech Strategy is available at https://www.afi–global.org/wp–content/uploads/2022/12/CBN–National–Fintech–Strategy–2023.pdf (Accessed on 15 July 2023).

134 National Fintech Strategy (2022) 2.

135 National Fintech Strategy (2022) 2.

136 National Fintech Strategy (2022) 7.

137 National Fintech Strategy (2022) 37.

138 The report is available at https://sec.gov.ng/wp–content/uploads/2020/09/Report–of–the–Fintech–Roadmap–Committee–of–the–Nigerian–Capital–Market_–October–14–2019.pdf (Accessed on 15 July 2023).

139 Securities and Exchange Commission *The future of Fintech in Nigeria* (Report by the Fintech Roadmap Committee, 2020) 32–33.

considerations for implementing the proposed institutional reforms. This study is, therefore, timely as it extensively examines these considerations. It proposes suitable reforms to both the internal and external aspects of Nigeria's institutional structure to enhance its effectiveness for regulating Fintech and undertaking financial regulation in general.

The originality of this study further enhances its significance.[140] The study distinguishes itself from other research efforts in two key aspects. First, it is the first study of its kind conducted within the Nigerian context, thereby filling a critical research gap and opening the door for future investigations in this area. Secondly, this study takes a unique approach by extensively analysing Fintech regulation through the lens of the institutional structure of financial regulation. It presents frameworks that not only identify but also justify the requirements that are imperative for the effectiveness of the institutional structure for financial regulation generally and Fintech regulation specifically. These frameworks contribute to theoretical development and serve as a practical guide for policymakers and regulators seeking to design and implement sound institutional reforms in the always–evolving financial system.

In all, the various discussions in the study make it a valuable contribution to the academic and policy discourse on the institutional aspects of Fintech regulation, financial regulation and regulatory coordination. The next section turns to establish the scope of the study, providing a clear delineation of its boundaries.

1.6. DELIMITATION OF THE STUDY

Given the word limit and the imperative not to detract from the objectives and themes of the study, several delineations shape the scope of the study. First, as highlighted in Section 1.2 above, financial regulation encompasses various regulatory aspects and frameworks. However, the purpose of this study is not to discuss Fintech in the context of all these regulatory aspects and frameworks – the study centres on the institutional aspects of Fintech regulation.

Secondly, the study focuses on the sectoral, unified and twin peaks models of designing the institutional structure but occasionally refers to other models where necessary. Thirdly, the study highlights the risks that Fintech poses, including in

140 See Evans D, Gruba P, & Zobel J *How to write a better thesis* 3ed (2011) 72 (providing a valuable framework for assessing the significance of a thesis).

relation to consumer protection, fair competition, market integrity, financial crimes, and financial stability. However, it does not delve into the most suitable legal and regulatory approaches for dealing with each of these risks. Importantly, the study also discusses the institutional aspects of Fintech regulation from a domestic or national perspective as opposed to an international context.

Furthermore, the study highlights the various Fintech activities in Nigeria and the frameworks for their regulation. However, it neither extensively discusses these frameworks nor assesses their appropriateness. In addition, there are numerous enablers, often referred to as supervisory capacity, which, if possessed by financial regulators, would greatly assist them in regulating and supervising financial institutions more effectively.[141]

Conducting a holistic analysis to determine if the financial regulators in Nigeria comprising the CBN, NDIC, SEC, NAICOM, and PENCOM meet all these enablers would be impractical. Therefore, given the central focus and objectives of the study, the attention will be on assessing the extent to which the financial regulators formally meet the following components of supervisory capacity:

(1) Whether they are assigned clear policy objectives that they are mandated to achieve under their governing laws.[142]

(2) If they possess adequate powers and regulatory independence under their governing laws to issue subsidiary legislation.[143]

(3) If there is an adequate legislative framework and mechanisms to facilitate effective regulatory coordination between the financial regulators.[144]

The focus on the foregoing areas is also hinged on the consideration that other equally crucial aspects of supervisory capacity, including regulatory independence and accountability, have been discussed by extant literature.[145]

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141 These enablers or components of supervisory capacity are listed in Chapter 2 (in Section 2.5.5).

142 This issue is discussed because without defined objectives, there can be confusion about what the regulators are supposed to achieve as they regulate Fintech.

143 This issue is discussed because regulatory independence helps ensure that the regulatory frameworks for Fintech can be updated quickly in response to emerging challenges and the evolving Fintech landscape.

144 This issue is being discussed because effective regulatory coordination ensures that there are no gaps or overlaps in the oversight of Fintech activities and firms.

145 See for example, Uche CU 'Does Nigeria need an independent central bank? (1997) 1 *African Review of Money Finance and Banking* 141–158; Ahmed AB & Bello M 'Regulatory failures and

Further, the study considers whether the policy objectives assigned to the financial regulators encompass aspects of both micro–prudential and conduct of business regulation. It also evaluates if the the organisational structure of the regulators accommodates departments specifically responsible for micro–prudential and conduct of business regulatory functions.

Finally, areas for further research are identified in the concluding chapter of the study, highlighting other aspects of the study's delimitations and offering potential directions where other researchers could extend the scope of the study. A description of the methodological framework employed in the study is presented next.

1.7. METHODOLOGY OF RESEARCH

The study employs a desktop methodology, involving a structured review and analysis of relevant primary and secondary literature sources on financial regulation and Fintech regulation. The study also adopts an interdisciplinary approach, drawing from concepts and theories in the discipline of economics to enhance its analysis of financial regulation.

Further, the study adopts the doctrinal legal research methodology, which is a methodology that involves analysing and interpreting legal texts, such as statutes and case laws.[146] The goal of the doctrinal methodology is to understand how the law operates in practice and to identify any ambiguities or inconsistencies in the law that may need addressing.[147]

This study employs the doctrinal methodology to address the questions of whether Nigeria's financial regulators: (1) are assigned clear policy objectives that they are mandated to achieve under their governing laws, (2) have adequate powers and regulatory independence under their governing laws to issue subsidiary legislation,

the collapse of the capital market in Nigeria: Aligning responsibilities with accountability' *Journal of Law, Policy and Globalization* 167–184; Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 36–64.

146 Gawas VM 'Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development' (2017) 3(5) *International Journal of Law* 128–129.

147 Hutchinson T & Duncan N 'Defining and describing what we do: Doctrinal legal research' (2012) 17(1) *Deakin Law Review* 83–119. See also Akpomudje O *Legal regulations of the capital market in Nigeria: Analysis and prospects for reform* (unpublished PhD thesis, Lancaster University, 2017) 34; Smits JM *What is legal doctrine? On the aims and methods of legal–dogmatic research* (Maastricht European Private Law Institute, Working Paper No. 06, 2015).

and (3) have an adequate legislative framework to facilitate effective regulatory coordination among themselves.

Additionally, this study employs the deductive methodology. Deductive methodology, also known as theory testing methodology, is a research approach that involves formulating a hypothesis and then devising a research strategy to test the said hypothesis.[148] The formulated hypothesis is subjected to testing to determine if it is supported before drawing conclusions and deriving implications[149]

In applying the deductive methodology to this study, the study advances conceptual frameworks (the hypothesis), suggesting the requirements that are essential for the effectiveness of the institutional structure for financial regulation generally and regulating Fintech specifically. The study thereafter applies the frameworks as well as the results from the doctrinal analysis to assess Nigeria's current institutional structure to confirm if they offer explanations for its shortcomings and to highlight areas requiring improvement.

For the purpose of exemplifying how different Fintech institutional arrangements may be implemented, the study embraces an approach that could be referred to as 'snapshot analysis.'[150] This approach is taken in place of conducting an extensive comparative study or focusing on one or two specific jurisdictions through case studies. The choice of employing the snapshot analysis instead of detailed comparative or case study approaches arises from Fintech's dynamic and complex nature.

Countries are experimenting with different institutional reform measures in response to Fintech, and no single jurisdiction can claim to have implemented all requisite reforms for a comprehensive institutional regime. Therefore, a flexible approach, like

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148 Wilson J *Essentials of business research: A guide to doing your research project* (2010) 7; Wapmuk SE *Banking regulation and supervision in Nigeria: An analysis of the effects of banking reforms on bank performance and financial stability* (unpublished PhD thesis, University of Salford, 2017) 92.

149 Snieder R & Larner K *The art of being a scientist: A guide for graduate students and their mentors* (2009) 16.

150 In research methodology, 'snapshot' is generally used to suggest that an aspect of research is not extensive. See Mohajan HK *Qualitative research methodology in social sciences and related subjects. Journal of economic development, environment and people* (MPRA Paper No. 85654, 2018) 12; Thompson R 'Reporting the results of computer–assisted analysis of qualitative research data' (2002) 3(2) *Forum: Qualitative Social Research* 1.

the snapshot analysis, which allows for identifying common reform trends across multiple jurisdictions, proves very advantageous.

However, to draw lessons on how to improve the legislative framework for Nigeria's regulatory coordination regime, the study draws insights from a specific case study: South Africa. The following considerations underpin the choice of South Africa. First, both countries are situated in Africa. Their geographical proximity and comparable economic strengths offer a relatable context for exploring lessons.[151]

Another rationale stems from their historical links to the British Empire. English law has influenced the legal systems of both countries. The national laws of both countries are also presented as Parliamentary Acts, which is a common format of laws for most countries whose legal systems have historical connections to English law. This format makes it easier to transplant legislative provisions from one jurisdiction to the other.

South Africa's recent adoption of the twin peaks model — an institutional structure design that heavily relies on effective regulatory coordination to be successful — is another motivation for choosing it.[152] South Africa is the latest country to adopt the twin peaks model, allowing it to learn from the experiences of earlier countries that adopted the model, such as Australia, the Netherlands, and the United Kingdom.[153] This arguably puts South Africa in an advantageous position to develop a robust regulatory coordination framework, drawing from the cracks in earlier frameworks of other countries.

However, it is important to clarify that the objective is not to directly compare the legislative frameworks for regulatory coordination between Nigeria and South Africa, especially given that both countries have different institutional structures. Instead, the

151 Nigeria and South Africa are often ranked among the top three economies in Africa. See 'Top 5 economies in Sub–Saharan Africa to watch out for in 2023, according to IMF' available at https://www.africanews.com/2023/02/02/top–5–economies–in–sub–saharan–africa–to–watch–out–for–in–2023–according–to–imf// (Accessed on 11 September 2023).

152 In South Africa's implementation of the twin peaks model, the South African Reserve Bank (SARB) oversees financial stability or macro–prudential regulation. The Prudential Authority, which operates within the SARB, handles the micro–prudential regulation of financial institutions and market infrastructures. Finally, the Financial Sector Conduct Authority is responsible for regulating the conduct of business regulation. See Van Niekerk MG & Phaladi NH 'Digital financial services: Prospects and challenges' (2020) 23(1) *Potchefstroom Electronic Law Journal* 9–10.

153 See Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 103–131; Schmulow A *Twin peaks: A theoretical analysis* (CIFR Paper No. WP064, 2015) 19–26.

aim is to draw lessons on the strengths and weaknesses inherent in South Africa's legislative framework. These lessons can then be tailored to align with Nigeria's unique socio–economic conditions and institutional structure, thereby ensuring a contextually appropriate application.

The next section presents an outline the of the study, highlighting the issues discussed in the subsequent chapters and the logical progression of the study.

1.8. CHAPTER OUTLINE

In addition to this introductory chapter, the study is organised with the following five other chapters:

Chapter 2: Requirements for the effectiveness of the institutional structure for financial regulation in general

This chapter presents the theoretical framework of the study. It discusses the meaning of financial regulation, the frameworks for financial regulation, and the various models for the institutional structure more extensively than was covered in the introductory chapter. A central aspect of this chapter is advancing a conceptual framework that outlines the requirements essential for the effectiveness of the institutional structure for financial regulation in general. The chapter goes further to explore the broad options for incorporating these requirements into the institutional structure, along with the considerations for adopting any of the options.

Chapter 3: Fintech and the institutional structure of financial regulation: Towards achieving synchronisation

This chapter expands the understanding of Fintech activities, their enabling technologies and Fintech firms than was covered in the introductory chapter. Additionally, building upon the conceptual framework advanced in Chapter 2, this chapter advances a conceptual framework on the requirements for the effectiveness of the institutional structure for regulating Fintech specifically. The chapter further considers the possible strengths and limitations (in theory) of the sectoral, unified, and twin peaks model for regulating Fintech, as well as suggestions for addressing the limitations.

Chapter 4: Overview of Nigeria's financial system, the Fintech sector and institutional structure of financial regulation

This chapter discusses three main issues to set the background for assessing the effectiveness of Nigeria's institutional structure through the lens of the conceptual frameworks advanced in Chapter 2 and Chapter 3. First, it provides an overview of Nigeria's financial system and the developments within its Fintech sector. Secondly, it discusses Nigeria's current institutional structure, along with a clear delineation of the regulatory jurisdiction of the financial regulators that constitute the structure. It also highlights key non–core financial regulators that contribute to financial regulation and Fintech regulation. Further, the chapter highlights significant reforms that have been implemented that impact the institutional structure. Finally, the chapter identifies reforms to improve the supervisory capacity of the CBN, SEC, NAICOM and PENCOM in the specific area of issuing subsidiary legislation.

Chapter 5: Effectiveness of Nigeria's current institutional structure for financial regulation in general and Fintech regulation in particular

This chapter builds on the background provided in Chapter 4 and applies the insights gained from Chapters 2 and 3 to the context of Nigeria. Specifically, it examines the effectiveness of Nigeria's current institutional structure (and the laws supporting the structure) for financial regulation generally and Fintech regulation specifically. The chapter goes further to explore a broad reform strategy by considering whether, in response to the identified gaps that undermine the effectiveness of Nigeria's current institutional structure for both Fintech regulation and financial regulation, policymakers and regulators should either: (1) change from the current sectoral model to an entirely different model; or (2) retain the existing model but introduce necessary reforms to plug the gaps that undermine its effectiveness. The chapter notably also uses South Africa as a case study to draw lessons on improving Nigeria's legislative framework for regulatory coordination.

Chapter 6: Recommendation and conclusion

This final chapter summarises the key findings and arguments of the study, presents the recommendations derived from the research, and provides concluding remarks. It also highlights areas for future research.

CHAPTER 2: REQUIREMENTS FOR THE EFFECTIVENESS OF THE INSTITUTIONAL STRUCTURE FOR FINANCIAL REGULATION IN GENERAL

2.1. CHAPTER INTRODUCTION

It was noted in Chapter 1 that the institutional structure will potentially have inadequacies for regulating Fintech if it is ineffective for regulating the broader financial system (i.e., undertaking financial regulation generally).[154] It was also indicated that insights on the requirements for the effectiveness of the institutional structure for financial regulation in general can provide the foundation for developing those that specifically apply to Fintech regulation.[155] This begs the question: What are the requirements for an effective institutional structure for financial regulation? This is one of the two sub–research questions that this chapter addresses.[156]

The chapter discusses the arguments presented by proponents of the public interest theory, free markets, and private interest theory to unmask the justifications and potential flaws of financial regulation. It critiques these arguments and, in doing so, draws various principles that shape the arguments presented throughout the rest of the study. These principles include efficient, proportional, collaborative and adaptive regulation.

The chapter further demonstrates that for a country's institutional structure to be effective for financial regulation, it should, at a minimum, incorporate four key attributes. It should be: (1) adaptable to developments in the financial system where it is deployed, (2) comprehensive in mitigating the regulatory challenges that it is specifically vulnerable to, (3) efficient in terms of not exacerbating the direct and indirect cost of regulation, and (4) facilitative of the specialisation of financial regulators in overseeing financial sectors and regulatory functions. Additionally, the chapter explores the options and considerations for incorporating these requirements into the institutional structure of a country.

154 See Chapter 1, Section 1.2.4.

155 See Chapter 1, Section 1.4.

156 The other sub–question relates to determining the extent to which the design of the institutional structure contributes to effective and efficient financial regulation.

Ultimately, this chapter provides the theoretical framework against which discussions and arguments in the subsequent chapters will be developed and analysed.[157] The chapter contributes to the ongoing debate on financial regulation reforms by systematically analysing the requirements for an effective institutional structure. It extends useful proposals to policymakers and regulators in establishing institutional regimes that are fit for purpose in a constantly evolving, complex, and interconnected financial system.

The rest of the chapter is organised as follows. Section 2 extends an understanding of financial regulation, explaining its sub–concepts of regulation and supervision. The various frameworks that underpin financial regulation are discussed in Section 3. Section 4 discusses two competing theories of regulation that are relevant to this study. Section 5 examines the requirements that are imperative to facilitate the effectiveness of the institutional structure for undertaking financial regulation. In Section 6, the broad options for reforming the institutional structure to facilitate its effectiveness are discussed, while Section 7 concludes.

2.2. UNDERSTANDING THE CENTRAL ASPECTS OF FINANCIAL REGULATION: REGULATION AND SUPERVISION

The financial system is the backbone of every economy, facilitating and enabling virtually all economic activities that take place within the economy.[158] As some authors observe:

> The financial system influences who can start a business and who cannot, who can pay for education and who cannot, who can attempt to realise one's economic aspirations and who cannot.[159]

157 The theoretical framework can be thought of as the roadmap for developing the arguments for a study that is drawn from a foundational review of existing theories and concepts that are relevant to the study. The necessity for a theoretical framework is premised on the understanding that knowledge is built on knowledge. See Kivunja C 'Distinguishing between theory, theoretical framework, and conceptual framework: A systematic review of lessons from the field' 7(6) (2018) *International Journal of Higher Education* 46–47; Billsberry J 'Desk–rejects: 10 top tips to avoid the cull' 38(1) (2014) *Journal of Management Education* 4.

158 See Delimatsis P 'Financial innovation and prudential regulation: The new Basel III rules' (2012) 46(6) *Journal of World Trade* 1309 (defining the financial system as 'the set of markets, intermediaries, and infrastructures through which households, corporations, and governments obtain funding for their activities and invest their savings').

159 Demirgüç–Kunt A & Levine R 'Finance and inequality: Theory and evidence' 1(1) (2009) *Annual Review of Financial Economics* 287.

The financial system performs the functions of facilitating financial intermediation, payment clearance and settlement, resource transfer, risk management, and price establishment. It also addresses information asymmetry and agency problems.[160] Further, it is widely argued that the development of a country's financial system can contribute to economic growth.[161]

However, the financial system can be dynamic, complex, and interconnected. It is also susceptible to various risks, such as systemic, liquidity, operational, and misconduct risks, which can significantly affect the financial system and the broader economy. Financial regulation is one of the policy instruments available to the government to intervene in the financial system.[162] It can be used to influence the operation of the financial system and the conduct of market participants so as to mitigate the system's inherent risks and ensure that it functions properly.[163]

According to Davies and Green, financial regulation is the process of 'regulating and supervising financial institutions themselves, and the traded markets within which they operate.'[164] Similarly, Degirmenci defines financial regulation as a 'form of regulation

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160 See Merton RC & Bodie Z 'A conceptual framework for analyzing the financial environment' in Dwight BC, Kenneth A & Froot, SP et al (eds) *The global financial system: A functional perspective* (1995) 3–31. Also see Armour J, Awrey D & Davies PL et al *Principles of financial regulation* (2016) 75–80.

161 However, a counterargument exists, suggesting that economic growth drives the development of the financial system, not the other way around. Advocates of this perspective contend that the financial system reacts to economic development, adapting to changing demands from the real sector. For more discussion on these differing viewpoints, both of which fall under the ambit of the theory of the finance–growth–nexus, see Robinson J 'The generalization of the general theory' in *The rate of interest, and other essays* (1952) 86; Demirgüç–Kunt A 'Finance and economic development: The role of government' in Berger A, Molyneux P & Wilson J ed *The Oxford Handbook of Banking* (2010) 729–730; Zhuang J, Gunatilake, HM & Niimi Y et al *Financial sector development, economic growth, and poverty reduction: A literature review* (Asian Development Bank Economics Working Paper Series No. 173, 2009) 2–3.

162 Organisation for Economic Co–operation and Development *Policy framework for effective and efficient financial regulation: general guidance and high–level checklist* (OECD Policy Framework, 2010) 20 (defining policy instrument as tools that government use to achieve its goals or objectives). See also See van der Waldt G 'Government interventionism and sustainable development' 8(2) (2015) *African Journal of Public Affairs* 35.

163 Other policy instruments are (1) moral suasion; (2) guarantee schemes and safety nets; (3) government lending; (4) direct subsidies and grants; and (5) government ownership and control. These other policy instruments are usually used alongside financial regulation. See Organisation for Economic Co–operation and Development *Policy framework for effective and efficient financial regulation: general guidance and high–level checklist* (OECD Policy Framework, 2010) 22; Armour J, Awrey D & Davies PL et al *Principles of financial regulation* (2016) 75.

164 Davies H & Green D *Global Financial regulation: The essential guide* (2008) 10.

or supervision of financial markets and institutions.'[165] To better capture the essence of these definitions, it is necessary to further explain the two key sub–concepts they embody, namely 'regulation' and 'supervision.'

2.2.1. Regulation

The definition and understanding of 'regulation' vary considerably.[166] Adeeko explains that there is a lack of uniformity in the understanding and definition of regulation because the concept traverses many disciplines, such as economics, law, and political science.[167] He notes that each scholar attempts to define regulation from the perspective of their specialty.[168]

Llewellyn provides an extensive definition of regulation that is tailored to the subject or topic of financial regulation.[169] The renowned Professor defines it as:

> A body of specific rules or agreed behaviour, either imposed by some government or other external agency or self–imposed by explicit or implicit agreement within the industry, that limits the activities and business operations of financial institutions.[170]

Adeeko commends Llewellyn's definition of regulation for being multidimensional and functional.[171] He explains that the definition encompasses both public and private aspects of regulation and is free of institutional bias.[172]

It is observed that Llewellyn's definition of regulation is 'multidimensional' because, to economists, regulation only qualifies as such if it emanates from and is enforced by the government (public regulation). For example, Meier defines regulation as 'any attempt by the government to control the behaviour of citizens, corporations, or sub

165 Degirmenci A 'What is financial regulation and why is it important?' available at https://www.leasinglife.com/news/industry–news/what–is–financial–regulation/ (Accessed on 7 February 2023)

166 Koop C & Lodge M 'What is regulation? An interdisciplinary concept analysis' (2017) 11(1) *Regulation & Governance* 95–108 (discussing the various definitional issues and perspectives on the concept of regulation).

167 Adeeko OA *The law and policy of financial regulation and deregulation of Nigerian banking system* (unpublished PhD thesis, University of Warwick, 1998) 22.

168 Adeeko OA (1998) 22.

169 Llewellyn DT *The regulation and supervision of financial institutions* (1986) 9.

170 Llewellyn DT (1986) 9.

171 Adeeko OA *The law and policy of financial regulation and deregulation of Nigerian banking system* (unpublished PhD thesis, University of Warwick, 1998) 22.

172 Adeeko OA (1988) 22.

government.'[173] Similarly, Pera defines regulation as 'a broad term used to define the various ways in which the government may intervene directly in the working of the market to influence the allocation of resources.'[174]

Paccess and Bergh explain that regulation by non–public actors (private regulation) is omitted in the definitions of regulation from economists because, for them, 'regulation is often a synonym for government intervention in markets.'[175] He also observes that economists usually distinguish between contracts and regulations.[176] Contracts are considered a private discipline of transactions enforced by courts, while regulation is a public discipline of transactions enforced by governments.[177]

This study adopts Llewellyn's multidimensional definition of regulation, which recognises the public and private character of regulation. Coglianese and Mendelson identify the following four key elements of regulation that are useful in simplifying an understanding of the concept: regulator, target, command, and consequences.[178] Each of these elements is briefly explained.

The 'regulator' describes the authority that issues regulation.[179] Based on the authority responsible for issuing and enforcing regulations, two distinct types of regulatory regimes can be identified: public regulation and private regulation. Public regulation refers to rules issued and enforced solely by government. It is also called state regulation or government regulation. Public regulation consists of primary laws issued by the legislature and subsidiary laws issued by government regulatory authorities based on delegated authority from the legislature. Further, public regulation often embodies command and control.

Madise explains that the command and control style of regulation is 'associated with rigidity, heavy handedness or rules–based regulation and statutory law backed

173 Meier KJ *Regulation: Politics, bureaucracy, and economics* (1985) 7.

174 Pera A 'Deregulation and privatization in an economy–wide context' (1989) 12(2) *OECD Economic Studies* 165.

175 Pacces AM & Van den Bergh RJ 'An introduction to the law and economics of regulation' in *Encyclopedia of Law and Economics* (2011) 3.

176 Pacces AM & Van den Bergh (2011) 3.

177 Pacces AM & Van den Bergh (2011) 3.

178 Generally, see Coglianese C & Mendelson E *Meta–Regulation and self–regulation* (Penn Law School Public Law and Legal Theory Research Paper No. 12–11 2010).

179 Coglianese C & Mendelson E (2010) 3.

enforcement.'[180] This is not far from Leal's explanation that command and control regulation involves 'rule setting that generates obligations to accomplish and sanctions in case of not achieving the determined criteria set.'[181] Leal adds that this type of regulation is framed to determine standards and obligations that must be followed and reflects the direct intervention of the state in regulation.

Private regulation, on the other hand, incorporates regulation that is issued and enforced by self–regulatory organisations (SROs), such as a group of firms in a particular industry or a professional association.[182] SROs engage in private regulation through either 'self–regulation' or 'co–regulation.'

Self–regulation is sometimes used interchangeably or broadly to encompass co–regulation. For example, Madise highlights co–regulation as a form of self–regulation and identifies other forms of self–regulations to comprise enforced self–regulation and consensual self–regulation.[183] Leal, on his part, comments that 'depending on the author and on the point of view, self–regulation is also called' co–regulation.[184]

However, for the purpose of this study, self–regulation is distinguished from co–regulation, adopting the approach advanced in a paper by the Organisation for Economic Co–operation and Development.[185] Specifically, in self–regulation, SROs independently establish rules and codes of conduct that guide the behaviour and actions of their members.[186] They are also responsible for monitoring and enforcing these rules and codes without relying on explicit legislative support.[187] Self–regulation by SROs is based on the contract between the members of the SRO and also emphasises the autonomy of the industry in setting its own standards.

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180 Madise S *The regulation of mobile money: Law and practice in sub–Saharan Africa* (2019) 120.

181 Leal AP 'Collaborative regulation: Which is the role of the regulator in collaborative regulation?' (2021) 13(1) *Law, State and Telecommunications Review* 42.

182 Knight B *Fintech: Who regulates it and why it matters* (Milken Institute Center for Financial Markets, 2016) 7.

183 Madise S *The case of regulation of mobile money in Malaŵi: law and practice* (unpublished PhD thesis, University of Warwick, 2017) 5.

184 Leal AP 'Collaborative regulation: Which is the role of the regulator in collaborative regulation?' (2021) 13(1) *Law, State and Telecommunications Review* 50.

185 Organisation for Economic Co–operation and Development *Alternatives to traditional regulation* (2006) 24–35 available at https://www.oecd.org/gov/regulatory–policy/42245468.pdf (Accessed on 9 September 2023).

186 Organisation for Economic Co–operation and Development (2006) 34.

187 Organisation for Economic Co–operation and Development (2006) 34. Also see Muraközy B & Valentiny P 'Alternatives to state regulation: Self–and co–regulation' in Valentiny P, Kiss FL & Antal–Pomázi K (eds) *Competition and regulation* (2015) 54–95.

Co–regulation, on the other hand, involves collaborative efforts between the government and SROs in issuing, monitoring, and enforcing regulations. In essence, the government grants legislative backing to SROs for rule issuance, monitoring, and enforcement, resulting in a form of 'regulated self–regulation.'[188] It has also been observed that 'co–regulation involves some sort of legal underpinning and can therefore be described as self–regulation with a legislative backstop.'[189]

Moving to the other elements of regulation, the 'target' is the individual or firm that is mandated to comply with the command prescribed by the regulator in the regulation.[190] The 'command' refers to what the regulation requires the target to do or refrain from doing.[191] Finally, the 'consequence' can be the sanction the target will face for failing to comply with the regulation's command or a reward the target may receive for complying.[192]

Mwenda highlights yet another key element of regulation which Coglianese and Mendelson may have missed out.[193] This element is that the regulator must have the authority or legal backing to issue the regulation. It is conceded that this is a crucial element. Understandably, if a regulation is issued without authority, its enforceability can be challenged. Such legal authority can be derived from legislation or contract, depending on whether the regulation in question is private or public.

2.2.2. Supervision

Oyetayo writes that the concept of 'regulation' inherently assumes the presence of a regulator or regulatory agency that is tasked with two key activities.[194] The first relates to establishing rules, while the second pertains to ensuring compliance with the rules that are in place. Pan complements this perspective by noting that while regulation is the 'legislative' function of making regulations, supervision is the 'executive' function

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188 Organisation for Economic Co–operation and Development *Alternatives to traditional regulation* (2006) 35.

189 Organisation for Economic Co–operation and Development (2006) 35.

190 Coglianese C & Mendelson E *Meta–Regulation and self–regulation* (Penn Law School Public Law and Legal Theory Research Paper No. 12–11, 2010) 3.

191 Coglianese C & Mendelson E (2010) 4.

192 Coglianese C & Mendelson E (2010) 5.

193 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 5. See also Mwenda KK *The legal aspects of banking regulation: common law perspectives from Zambia* (2010) 3.

194 Ajibo KI 'Risk–based regulation: The future of Nigerian banking industry' (2015) 57(3) *International Journal of Law and Management* 202.

of applying regulation.[195] However, it is important to clarify that regulatory and supervisory roles over a particular subject matter may sit with the same or different authorities.[196]

Supervision entails at least three key activities.[197] The first activity is licensing, which can be seen as type of approval that allows a person or firm to engage in an activity under certain conditions. Licensing is used to control entry and continued participation in the financial system. To issue or renew licences, regulators would typically evaluate the fitness of applicants, examining factors such as their financial health, expertise, and business plans.

The second activity is monitoring. Monitoring relates to assessing, auditing, inspecting, or investigating a regulated firm to ensure that it adheres to the terms of its licence and complies with relevant regulations. Reporting requirements are also a part of monitoring, as regulated firms are often required to provide regular reports on their activities and operations.

The last activity is enforcement. Enforcement involves determining if a regulated firm has violated regulations and, if the violation is established, responding to it through obtaining undertakings from the defaulting firm, requiring corrective actions, issuing directives, imposing penalties, or even revoking licences.[198] The imposition of sanctions can take different approaches based on the applicable legal framework.

In some cases, regulators have the inherent powers to impose sanctions directly if a breach has been determined, while in others, the matter might be referred to external bodies such as courts, tribunals, arbitrators, or ombudsmen. These external bodies make judgments on whether a breach has occurred and determine the appropriate sanctions. Similar to regulation, public or private sector actors can also undertake supervision.

As already mentioned in Chapter 1, in this study, regulation is used broadly to include supervision. However, supervision may be used to specifically indicate that the

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195 Pan EJ 'Understanding financial regulation' 4 (2012) *Utah Law Review* 1941.

196 This is especially true for subsidiary laws as well as co–regulation and self–regulation regulatory frameworks. The institutions that issue these instruments often also implement them.

197 See Rawlings P, Georgosouli A & Russo C *Regulation of financial services: Aims and methods* (Queen Mary University of London, Centre for Commercial Law Studies, 2014) 42.

198 Oni SA 'Regulation and supervision of financial institutions: The Nigerian experience' (2012) 50(4) *Economic and Financial Review* 108.

intention is to deal with or speak of the ongoing monitoring and enforcement of regulation.

The regulation of financial systems is primarily driven by financial regulators, and these are the public authorities that make up the institutional structure of financial regulation. However, there are other regulators (referred to as 'non–core financial regulators' in this study) with responsibilities for data protection, technology, consumer protection, anti–competition, and financial intelligence. These non–core financial regulators are likewise involved in financial regulation, albeit to a lesser extent than financial regulators.

To conclude the discussion on the meaning of regulation and supervision in this section, the regulatory environment in which financial institutions operate is multifaceted. Some aspects of the regulatory setting can be established by contract (self–regulation), and others backed by law (public and co–regulation). Further, the regulatory environment can have three notable configurations: one that is fully government–driven (public regulation), another in which the government and private actors collaborate (co–regulation), and the last instance in which there is no government involvement (self–regulation). However, it can be observed that most financial systems tend to be more subject to public regulation than private regulation. The specific regulatory functions performed by financial regulators in implementing financial regulation are discussed next in Section 2.2.3.

2.2.3. Key regulatory functions under financial regulation

Financial regulators perform many functions in regulating the financial system, four of which stand out, especially for the purpose of this study.

The first function is ensuring the stability of the financial system as a whole.[199] This function is called macro–prudential regulation or systemic regulation. Macro–prudential regulation considers systemic risks that could arise from interconnectedness and interdependencies within the financial system.[200] It involves

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199 Osinski J, Seal K & Hoogduin ML *Macroprudential and microprudential policies: Toward cohabitation* (2013) 5.

200 Ekpu V *Micro–prudential vs Macro–prudential approaches to financial regulation and supervision* (2016) 9; Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 9.

measures to prevent or mitigate the buildup of systemic risks that could lead to widespread financial crisis.

Some factors that are used to assess the systemic significance of a financial institution are its size, degree of leverage, and interconnectedness with the rest of the financial system.[201] Safeguarding the economy against systemic risk, according to Herring and Santomero, is what sets financial regulation apart from other types of regulation.[202]

The second function is micro–prudential regulation, which deals with ensuring the safety and stability of each financial institution.[203] It involves monitoring and regulating the operations of financial institutions to prevent them from taking excessive risks that could lead to their failure. This regulation also focuses on maintaining the integrity of market infrastructures such as payment systems.[204]

Third, there is the conduct of business regulation, which is concerned with the behaviours and practices of financial institutions in their dealings with customers.[205] It covers areas such as information disclosure, the competency, honesty and integrity of financial institutions and their employees as well as fair business and marketing practices. Conduct of business regulation aims to protect consumers and investors, ensure ethical and professional standards, and prevent abusive or misleading practices.[206]

Market integrity is an important concept within the scope of conduct of business regulation. Market integrity involves preventing the financial system from being exploited for illegal or criminal activities. By maintaining market integrity, regulators

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201 Brunnermeier M, Crockett A & Goodhart CA et al *The fundamental principles of financial regulation* (Geneva Reports on the World Economy No. 11, 2009) 25.

202 Herring RJ & Santomero AM *What is optimal financial regulation* (The Wharton Financial Institutions Center Working Paper No. 00–34, 1999) 2.

203 Osinski J, Seal K & Hoogduin ML *Macroprudential and microprudential policies: Toward cohabitation* (2013) (2013) 5.

204 See Lawack V 'The legal and regulatory framework of mobile banking and mobile payments in South Africa' 7(4) (2012) *Journal of International Commercial Law and Technology* 321 (explaining that if the payment system is not adequately protected against credit, liquidity, and settlement risks, it could trigger damaging disruptions not only to the financial system and its participants but also to the broader economy).

205 Goodhart C, Hartmann P & Llewellyn DT et al *Financial regulation: Why, how and where now?* (1998) 5–6.

206 Tuch AF 'Conduct of business regulation' in Moloney N, Ferran E & Payne J (eds) *Oxford handbook of financial regulation* (2014) 538.

work to prevent fraud, market manipulation, and other illicit activities that could undermine the trust and credibility of the financial system.[207]

Finally, there is competition regulation, which is implemented to ensure that there is adequate competition in the financial system and that anti–competitive practices are avoided. In addition to safeguarding consumers from monopolistic prices, competition regulation aims to harness market forces to improve the efficient allocation of resources both within the financial system and the broader economy.[208] The frameworks that guide the implementation of financial regulation are discussed next.

2.3. THE FRAMEWORKS FOR FINANCIAL REGULATION

Financial regulation does not operate in a vacuum. The implementation of financial regulation is shaped by and undertaken within the context of an interconnected web of numerous frameworks — the frameworks for financial regulation, as this study tags them. Drawing from Akinbami and Ngwu's[209] taxonomy as well as Taylor's,[210] this study classifies and discusses the frameworks for financial regulation under four headings as follows:

(1) Policy objectives of financial regulation,

(2) Regulatory frameworks of financial regulation,

(3) Supervisory frameworks of financial regulation, and

(4) Institutional structure of financial regulation, which is the main focus of this study.

207 These activities include insider trading, market manipulation, front running, money laundering, cyberattacks, terrorism financing, and personal data violation. See Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 27; Austin J 'What exactly is market integrity: An analysis of one of the core objectives of securities regulation' 8 (2017) *William & Mary Business Law Review* 219.

208 Herring RJ & Santomero AM *What is optimal financial regulation* (The Wharton Financial Institutions Center Working Paper No. 00–34, 1999) 8.

209 Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 313 (refers to the frameworks as the 'elements of regulation' and observes that they comprise policy objectives of financial regulation, regulatory framework, institutional structure, supervisory approach, and enforcement approach).

210 Taylor M 'The search for new regulatory paradigm' (1998) 49(3) *Mercer Law Review* 793 (refers to the frameworks as the 'regulatory paradigm' and observes that they comprise the policy objectives of financial regulation, institutional structure, and supervisory technique).

2.3.1. Policy objectives of financial regulation

The policy objectives of financial regulation describe the outcomes or goals that financial regulation seeks to achieve.[211] Amstad submits that the policy objectives of financial regulation take shape from the various forms of market failure that necessitate financial regulation.[212] However, apart from taking shape from the various forms of market failure, it is noted that the policy objectives of financial regulation also tally with the main functions performed by financial regulators.

The following policy objectives of financial regulation have traditionally been identified: to promote micro and macro stability, to protect consumers, to ensure the competitiveness of the financial system, to preserve market integrity, and to prevent financial crimes.[213] Sometimes, a trade–off between policy objectives may be necessary. This trade–off is especially required if the promotion of one objective jeopardises the achievement of another. In such cases, regulators can seek a middle ground such that the risks of promoting an objective are minimised while the benefits are maximised. However, the overreaching policy objective of financial regulation is to ensure financial stability, and as Wymeersch observes, all other objectives serve as bridges to achieving financial stability.[214]

It is important that the policy objectives of financial regulation are captured in primary legislation. The legislation outlining the policy objectives should also designate the regulator with the mandate to achieve them.[215] Specifying the policy objectives in legislation helps in holding regulators accountable.[216] It also provides a basis for assessing if regulation is good or successful.[217] For financial regulation to be good or

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211 Llewellyn DT *The economic rationale for financial regulation* (FSA Occasional Paper 1, 1999) 8.

212 Amstad M *Regulating Fintech: Objectives, principles, and practices* (Asian Development Bank Institute Working Paper Series No. 1016, 2019) 1.

213 Goodhart C, Hartmann P & Llewellyn D et al *Financial regulation: Why, how, and where now?* (1998) 6; Madero D & Lumpkin S *A review of the pros and cons of integrating pension supervision with that of other financial activities and services* (International Organisation of Pension Supervisor Working Paper No 1, 2007) 6.

214 Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 242.

215 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 147.

216 Abrams RK & Taylor MW (2002) 147.

217 Organisation for Economic Co–operation and Development *Policy framework for effective and efficient financial regulation: general guidance and high–level checklist* (OECD Policy Framework, 2010) 8.

successful, it must be effective and efficient. Financial regulation is effective if the policy objectives of financial regulation are achieved.

On the other hand, financial regulation is considered efficient if the policy objectives are achieved effectively without incurring excessive costs.[218] The cost of financial regulation is broadly grouped into two: direct cost and indirect cost.[219] Direct costs are those needed to sustain the activities and operations of financial regulators. These costs are easier to determine since they can be budgeted.[220] On the other hand, indirect costs relate to costs incurred by regulated firms to comply with regulations.[221]

2.3.2. The regulatory framework of financial regulation

The regulatory framework embodies the set of regulations that govern financial institutions and markets. According to Mwenda, the regulatory framework typically consists of: (1) primary laws enacted by lawmakers or Parliament, (2) secondary legislation by regulators pursuant to enabling primary laws, (3) principles, rules, and codes issued by regulators, and (4) guidance or policy directives issued by regulators.[222]

Further, in line with the broad definition of financial regulation adopted in Section 2.2.1 above, the regulatory framework incorporates the rules that SROs issue and enforce on financial institutions that are their members. As noted, SROs may issue and enforce regulations either through self–regulation or co–regulation.[223]

In designing regulations, a central consideration is whether they should be rules–based or principles–based. Allen explains that the rules–based approach involves the regulator specifying in great detail 'all of the legal dos and don'ts, so that (ideally) the regulated will know in advance what to do in each situation.'[224] The principle–based

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218 Organisation for Economic Co–operation and Development (2010) 8.

219 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002)147.

220 Abrams RK & Taylor MW (2002) 147.

221 Abrams RK & Taylor MW (2002) 147.

222 See Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 55. Also see World Bank and International Monetary Fund *Financial sector assessment: A handbook* (2005) 223.

223 See Chapter 2, Section 2.2.1.

224 Allen J 'Rules–or principles–based regulation factors for choosing the best language strategy' (2015) 56(3) *Canadian Business Law Journal* 375.

approach, on the other hand, is less prescriptive and more objective–based. This is drawn from Black's explanation that the principle–based approach involves:

> moving away from reliance on detailed, prescriptive rules and relying more on high–level, broadly stated rules or principles to set the standards by which regulated firms must conduct business.[225]

Decker makes an important clarification about rules–based and principles–based regulation.[226] The author says that regulation is rarely 'purely' rules–based or principles–based, and combining both approaches is common. Therefore, it is more appropriate to classify a regulatory framework as 'more rules–based' or 'more principle–based.'

There are pros and cons to both the rules–based and principle–based approaches. The principles–based approach, for example, is thought to lack certainty and predictability while encouraging flexibility and adaptability.[227] On the other hand, the rules–based approach ensures certainty and predictability while falling short of flexibility and adaptability.[228] Further, rules–based regulations are thought to be less expensive for regulated firms to comply with than principle–based regulations.[229]

For regulations that govern financial institutions and markets to be sound, they must be comprehensive. The comprehensiveness of regulations entails that it should be free of gaps that allow firms, products or activities that should be regulated to go unregulated (or underregulated). Additionally, it should remain current and adaptable to the legitimate evolution of the financial system.[230] The regulatory framework will also be sound if it is not excessive and duplicative.

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225 Black J *Principles–based regulation: Risks, challenges, and opportunities* (Presentation at the Banco Court, Sydney, 2007) 3.

226 Decker C *Goals–based and rules–based approaches to regulation* (Department for Business, Energy and Industrial Strategy Research Paper 8, 2018) 5.

227 Didenko A 'Regulating Fintech: lessons from Africa' (2018) 19 *San Diego International Law Journal* 338 (explaining that the principle–based regulation can 'add flexibility to address future changes in technology. Second, it can be used as an interim regulatory method, while the corresponding Fintech rules are being developed').

228 Rawlings P, Georgosouli A & Russo C *Regulation of financial services: Aims and methods* (Queen Mary University of London, Centre for Commercial Law Studies, 2014) 36.

229 Pan EJ 'Understanding financial regulation' 4 (2012) *Utah Law Review* 1919–1920.

230 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 149.

2.3.3. The supervisory framework of financial regulation

The supervisory framework consists of various techniques, processes and practices that regulators use to license financial institutions, monitor their compliance with, and enforce those regulations. It incorporates on–site inspections of financial institutions, off–site monitoring of their financial activities, consolidated supervision, compliance reporting, and ad hoc information requests.

Additionally, the supervisory framework involves establishing risk–based assessments, capital adequacy requirements, and stress testing to ensure that financial institutions maintain sufficient liquidity and solvency to withstand potential shocks to the financial system.[231] Further, the supervisory framework can include unique approaches like the 'mystery shopper' technique.[232] This approach involves sending independent observers, posing as customers, to evaluate the quality of customer service provided by financial institutions. This helps identify potential issues from a customer's perspective.

There are certain facilitators, referred to as supervisory capacity, that are necessary for regulators to discharge their supervisory roles and, by extension, support the success of financial regulation. Financial regulators should have the necessary supervisory capacity, which includes the following elements:[233]

(1) Regulators should have clear and objectively stated responsibilities in their governing legislation.

(2) Regulators should have adequate legal powers and authority to discharge their regulatory and supervisory mandate. This includes the powers to issue and

231 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 7.

232 Mazer R, Gine X & Martinez C *Mystery shopping for financial services: What do providers tell, and not tell, customers about financial products?* (Consultative Group to Assist the Poor Technical Guide, 2015) 2.

233 Carmichael J *The framework for financial supervision: Macro and micro issues* (BIS Policy Paper, 1999) 141–147; Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 26; Taylor MW *Twin peaks: A regulatory structure for the new century* (Centre for the Study of Financial Innovation Paper No. 20 1995) 11; Taylor MW 'The road from "twin peaks" –and the way back' (2009) 16 *Connecticut Insurance Law Journal* 64 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 147.

revoke licences, issue and modify regulations, gather information, conduct audits, and impose sanctions.[234]

(3) Regulators should be independent[235] but accountable.[236]

(4) Regulators should have adequate resources, including personnel, work tools and funding, to carry out their duties.

(5) Regulators should have the necessary expertise of the financial sectors they oversee and the regulatory functions they are required to perform.

(6) Regulators should effectively communicate, coordinate and collaborate with each other, an area that is discussed in greater detail in this study.

(7) Regulators should have a sound regulatory culture, including a culture of integrity, professionalism, and commitment to public interest.

(8) Regulators should have a coherent regulatory philosophy.

(9) Regulators should be flexible to evolve and adapt to the changing financial landscape and emerging risks.

Most of the foregoing elements of supervisory capacity align with the principles outlined by the Basel Committee on Banking Supervision's Core Principles for Effective Banking Supervision, 2012. They can also be found in IOSCO's Objectives

234 Carmichael J *The framework for financial supervision: Macro and micro issues* (BIS Policy Paper, 1999) 147; Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 147.

235 The independence of regulatory bodies broadly connotes that regulators are able to discharge their functions and operate without undue interference or directives from both the government and other interest groups. There are various dimensions of independence, including regulatory, supervisory, institutional, and budgetary independence. See Quintyn M & Taylor MW 'Should financial sector regulators be independent?' available at https://www.imf.org/external/pubs/ft/issues/issues32/index.htm (Accessed on 9 September 2023); Quintyn M & Taylor MW *Regulatory and supervisory independence and financial stability* (IMF Working Paper, WP/02/46, 2002); Madise S *Developing an independent regulatory framework for the financial sector in Malaŵi* (unpublished LLM thesis, University of the Western Cape) 19–24.

236 See Hüpkes EH, Taylor MW & Quintyn MG *Accountability arrangements for financial sector regulators* (IMF Economic Issues 39, 2006) 2, where the authors highlight the various accountability arrangements and observe that "[a]ccountability is not synonymous with control. It entails a network of complementary and overlapping oversight mechanisms and control instruments under which no one actually controls the independent agency, yet the agency remains 'under control." The authors go on to explain that regulatory bodies can be accountable to the executive, Parliament, judiciary and even industry stakeholders.

and Principles of Securities Regulation, 2017, as well as other international supervisory standards.

2.3.4. The institutional structure of financial regulation

Wymeersch posits that once the objectives of financial regulation have been identified, a key issue that arises for consideration is how the institutional structure of financial regulation for achieving these objectives will be designed.[237] For the purpose of this study, it is suggested that the institutional structure of financial regulation can be best explained in terms of at least three key aspects:[238] (1) numerical aspect, (2) internal aspect, and (3) external aspect.

The 'numerical aspect' of the institutional structure relates to the number of financial regulators established by law to regulate financial institutions. The number of financial regulators can vary from one (monolithic or fully unified model) to multiple regulatory authorities (sectoral model, twin peaks model, and partially unified model). It is the number of financial regulators that will determine if there will be a need to distribute regulatory powers. As discussed further in Section 2.5 below, different options can be applied to determine this distribution of power. The distribution can be based on the type or legal status of the financial institution being regulated, functional criteria, or regulatory objectives.

On the other hand, the 'internal aspect' of the institutional structure centres on mainly regulatory jurisdictional issues like: (1) the type and scope of powers granted to a financial regulator, (2) the policy objectives that the financial regulator is mandated to pursue, and (3) the entities and activities that fall under the regulatory authority of the financial regulator. These issues are usually defined in the governing law of a financial regulator. The internal aspect also encompasses the administrative and operational aspects of a financial regulator. This relates to issues such as the organisational

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237 Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 250.

238 This is drawn from the explanation of the concept from the following studies: Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 4; Hayward P 'The financial sector–The responsibilities of the public agencies' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 187; Petschnigg R *The institutional framework for financial market policy in the USA seen from an EU perspective* (European Central Bank Occasional Paper Series No. 35, 2005) 8; Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 4.

structure of the financial regulator, budget and funding sources, staffing, and decision–making processes.

If a particular financial regulator oversees more than one type of financial service or financial institution, there are two broad options that may be followed in designing its departmental or organisational structure. As explained by Mwenda, one option is the functional approach.[239] In this approach, a department is established to oversee all the financial services within the regulator's jurisdiction without segregating them based on the type of institution offering them. The other approach is the silos approach. Under this approach, separate departments are set up to oversee specific types of financial services under the financial regulator's jurisdiction, with no department encroaching into another's domain.

Finally, the 'external aspect' of the institutional structure captures how financial regulators cooperate, communicate, and coordinate with each other as well as jointly undertake regulatory and supervisory functions. These various activities are simply referred to in this study as regulatory coordination. It is submitted that regulatory coordination is especially pertinent if there is more than one financial regulator overseeing the financial system. However, it is important to also clarify that regulatory coordination is not only required among financial regulators. It is also necessary between financial regulators and non–core financial regulators, as well as between financial regulators and policymakers like the Ministry of Finance.[240]

Effective regulatory coordination is very crucial, as weak or ineffective coordination can erode the very foundation of the financial regulatory system.[241] In recognition of its importance, regulatory coordination is emphasised in the various international financial supervisory standards. These standards include:

(1) Principle 3 of the Basel Committee on Banking Supervision's (BCBS) Core Principles for Effective Banking Supervision.[242]

239 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 37–38.

240 Mensah S, BeInye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 96.

241 HM Treasury *Financial services future regulatory framework review call for evidence: Regulatory coordination* (2019) 4.

242 The principle requires that laws, regulations or other arrangements should provide a framework for cooperation and collaboration with relevant domestic authorities and foreign supervisors. These arrangements should reflect the need to protect confidential information.

(2) Principles 13 and 14 of the International Organisation of Securities Commissions' (IOSCO) Objectives and Principles of Securities Regulation.[243]

(3) Principle 25 of the International Association of Insurance Supervisors' (IAIS) Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups.[244]

(4) Principe 7 of International Organisation of Pension Supervisors' (IOPS) Principles of Private Pension Supervision.[245]

It is suggested that there are at least three identifiable mechanisms or bases for regulatory coordination.[246] First, regulatory coordination can be mandated by legislation. This could involve legislation directing financial regulators to coordinate, specifying areas of coordination, and setting out actions that need to be taken by regulators toward coordination.[247] These actions include convening meetings at prescribed intervals, sharing information, and developing joint standards or regulations.

Secondly, regulatory coordination can be implemented through a memorandum of understanding (MoU) signed between financial regulators. The MoU can address issues such as areas of coordination, fee sharing, dispute resolution, and information exchange.[248] The signing of MoUs between financial regulators may be one of the actions toward coordination that may be mandated by legislation. The legislation may also provide for the specific matters to be specified in the MoU and require that it

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243 Principle 13 stipulates that regulators should have authority to share both public and non–public information with domestic and foreign counterparts while principle 14 requires regulators to establish information sharing mechanisms that set out when and how they will share both public and non–public information with their domestic and foreign counterparts.

244 The principle stipulates that insurance supervisors should cooperate and coordinate with other 'supervisors and relevant authorities to ensure effective supervision of insurers operating on a cross–border basis.'

245 The principle provides that 'Pension supervisory authorities should consult with the bodies they are overseeing and cooperate with other supervisory authorities domestically and international.' It is further explained that 'Cooperation should be for both efficiency purposes (avoiding overlaps and promoting economies of scale and scope) as well as promoting pro–active preventative measures (e.g., tackling financial crime).'

246 Generally, see Van Niekerk G & Van Heerden C 'The importance of a legislative framework for cooperation and collaboration in the twin peaks model of financial regulation' (2020) 137(1) *South African Law Journal* 108–144; Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 103–131.

247 Godwin A, Howse T & Ramsay I (2017) 117.

248 Godwin A, Howse T & Ramsay I (2017) 118.

should be periodically reviewed and made publicly available. However, even in the absence of a legislative mandate to enter MoUs, financial regulators can voluntarily initiate and sign MoUs for regulatory coordination.

MoUs for regulatory coordination are typically non–binding on the regulators and unenforceable.[249] However, despite being unenforceable, nothing precludes financial regulators from being required by legislation or even as part of the Parliamentary accountability process to show their compliance with MoU terms.[250] This is especially useful to ensure that the MoU is taken seriously by the financial regulators.

The third and final mechanism for regulatory coordination is through establishing a coordinating body.[251] These coordinating bodies are sometimes called Committees[252] or Councils[253] and usually consist of senior representatives from different financial regulators. It is also common for a representative from the Treasury or Ministry of Finance to be on the financial regulation coordinating body. This representation is especially useful to ensure synergy between financial regulators and policymakers. The coordinating body serves as a platform for regular meetings, information–sharing, and joint initiatives to address cross–sectoral or regulatory issues.[254]

Like in the case of MoUs for regulatory coordination, the financial regulation coordinating body may be established by legislation or without such legislative backing.[255] Apart from the formality or informality of the body, there are conflicting aspects of how the coordinating body may be established. The coordinating body may have a specialised or general mandate. It is observed that a common specialised

249 Godwin A, Howse T & Ramsay I (2017) 119.

250 As discussed in Chapter 5, South Africa's legislative framework for regulatory coordination contains such accountability provisions.

251 Godwin A, Howse T & Ramsay I (2017) 120.

252 Examples include Nigeria's Financial Services Regulation Coordinating Committee and United Kingdom's Financial Policy Committee.

253 Examples include Australia's and New Zealand's Council of Financial Regulators (CFR). Another example is United States of America's Financial Stability Oversight Council (FSOC) as well as South Africa's Financial System Council of Regulators (FSCR).

254 Camacho AE & Glicksman RL 'Functional government in 3–D: A framework for evaluating allocations of government authority (2014) 51(19) *Harvard Journal on Legislation* 56–57.

255 Camacho AE & Glicksman RL (2014) 56; Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 121.

mandate is for the body to focus on financial stability, while the general mandate will look beyond financial stability and cover other issues.[256]

Further, the coordinating body may be established within a financial regulator, such as the United Kingdom's Financial Policy Committee established under the Bank of England. Alternatively, and which is often the case for most jurisdictions, the coordinating body may be established as an independent and standalone body outside of any financial regulator. Additionally, the coordinating body may have only permanent members or may distinguish between different types of members.[257]

Generally, regulatory coordination can follow a 'hard law' or 'soft law' approach.[258] It is considered hard law based if the regulatory coordination mechanism is defined by legislation and carries binding obligations. This is also called the 'statute–based' approach.[259] The hard law approach can manifest in legislation setting out a specific duty of regulators to coordinate, establishing the coordinating body, and mandating the entering of agreements between financial regulators that impose binding obligations.[260]

On the other hand, regulatory coordination is soft law-based if the coordination mechanism is mainly persuasive and not legally binding.[261] It is also referred to as the 'informal approach.'[262] An example of the soft law approach is if the financial regulation

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256 For example, the United Kingdom's Financial Policy Committee is specifically responsibility for financial stability oversight. See Godwin A, Howse T & Ramsay I (2017) 121.

257 For example, as discussed in Chapter 4, Nigeria's coordinating body for financial regulation has both permanent members and observer members.

258 See Karmel RS & Kelly CR 'The hardening of soft law in securities regulation' (2008) 34(3) *Brooklyn Journal of International Law* 884, in which the authors explain that soft law 'is nonbinding standards and principles of conduct' while hard law 'is statutes, regulations, and treaties and is binding.' Soft law can sometimes become 'hardened' when 'it is incorporated into statutes, regulations, and even treaties.' Also see Aleem YA 'Soft law: The optimal legal framework for global financial regulation' (2022) 9(1) *Emory Corporate Governance and Accountability Review* 7–8. Further see Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 124–125.

259 Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016) 39.

260 Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 124.

261 Godwin A, Howse T & Ramsay I (2017) 124.

262 Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016) 39.

coordinating body is not established by statute or regulators voluntarily enter non–binding MoUs without being required to do so by legislation.

The regulatory coordination regime may also reflect a combination of both hard law and soft law approaches. This will be the case if, for example, there is a legislative duty on the regulators to enter an MoU, but the terms of the MoU do not give rise to a binding and enforceable obligation. Another example is if there is a discretionary obligation for financial regulators to coordinate under legislation.[263]

There are advantages and disadvantages to both the hard law and soft law approaches. On the disadvantages, Godwin, Howse, and Ramsay observe that the soft law approach may not provide transparency and certainty in regulatory coordination, given the lack of explicit guidance. Conversely, the hard law approach may lead to a 'tick–the–box' mentality on regulatory coordination while discouraging coordination through other non–prescribed means.[264]

The International Monetary Fund (IMF) points to the respective advantages of the approaches by noting:

> A 'soft law' approach…provides a way for regulators to respond in a significantly more timely way to market change and innovation than may be possible under 'hard law' regulation. A move to 'hard law' on the other hand, provides industry with certainty, reduces opportunities for inconsistent application and interpretation and allows for other regulatory approaches (including rules about product governance) to be applied.[265]

Godwin, Li and Ramsay submit that the suitability or success of the hard law or soft law approach depends on the regulatory culture as well as the peculiarities of the jurisdiction where it was adopted.[266] In the words of the trio:

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263 Godwin A, Howse T & Ramsay I (2017) 125.

264 Godwin A, Howse T & Ramsay I (2017) 125.

265 International Monetary Fund *Financial sector assessment program update – Technical note – Securities markets regulation and supervision report* (2013) 20 cited in Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 124.

266 Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016) 39.

> Whether an approach is successful may depend more on the culture of the regulators than on the specific mechanism through which they cooperate. It may also depend on the regulatory practice in the relevant jurisdiction and whether a prescriptive approach is favoured over an informal, soft law approach.[267]

Godwin, Howse and Ramsay suggest that the expectations of a given jurisdiction may influence the choice between the hard law and soft law approach. In a jurisdiction where detailed and precise legislation governs every action of statutory bodies, it may be most appropriate to adopt the hard law approach.[268]

Apart from the pros and cons associated with the hard law and soft law approaches, it is observed that none of the three mechanisms discussed is proven to guarantee that regulators will actually coordinate effectively among themselves. What may be useful, therefore, is understanding the intricacies of each approach and mechanism and then tailoring them to the specific regulatory culture and needs of a jurisdiction. The next section identifies other institutional bodies that support financial regulation in addition to financial regulators.

2.3.5. Other important institutional bodies that support financial regulation

Besides the financial regulators that constitute the institutional structure, there are other institutions that play crucial roles in defining the broader institutional setting or regime for financial regulation. The first of these institutions is the Treasury or Ministry of Finance, which develops policies, initiates new or revised financial sector laws, allocates resources, and fosters regulatory cooperation. The Ministry of Finance is usually also at the forefront of reform initiatives for the institutional structure of financial regulation. Secondly, some non–core financial regulators contribute immensely to ensuring that policy objectives around consumer protection, anti–competition, market integrity, anti–money laundering, and counter–financing of terrorism are achieved.

Another crucial institution is the judicial system. The judicial system performs many functions that support the functioning of the financial system. Importantly, it provides an avenue for resolving disputes between private actors in the financial system on the

267 Godwin A, Li G & Ramsay I (2016) 40.

268 Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 125.

one hand and between private actors and public actors.[269] The judicial system also provides checks and balances against the arbitrary exercise of powers by regulators.[270] It can further contribute to the success of financial regulation and the overall growth of the financial system by applying and enforcing regulations impartially, predictably, and timeously.[271]

SROs represent another key institution that contributes to financial regulation. These bodies can complement the role of government regulators, both financial and non–core financial regulators, by providing specialised regulation in specific areas of the financial system. The theoretical underpinnings for governments adopting financial regulation are discussed in the ensuing section.

2.4. THE RATIONALE FOR FINANCIAL REGULATION

An understanding of what financial regulation entails and the frameworks that guide its implementation have been extended in Sections 2.2 and 2.3 above. It is now worth asking why financial regulation is necessary or justified. To put it differently, why do governments regulate the financial system? Theoretically, the question is captioned as 'What is the rationale (or reason) for financial regulation?'[272]

Amstad suggests that as a pre–condition for shaping financial regulation to be good (and to succeed), it is important to clarify why it is necessary.[273] As a starting point, it is good to highlight that scholars are divided on whether it is prudent and necessary for the government to intervene in the financial system and other markets through regulation. Madise writes in this regard that:

> Regulation as a topic usually attracts a bipolar reaction depending on where one is standing with regard to the market. Either, there is no regulation at all or there is a degree of regulation. However, no regulation in itself is a form of regulation.[274]

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269 World Bank & International Monetary Fund *Financial sector assessment: A handbook* (2005) 9.

270 World Bank & International Monetary Fund (2005) 9.

271 World Bank & International Monetary Fund (2005) 9.

272 Llewellyn DT *The economic rationale for financial regulation* (FSA Occasional Paper No. 1, 1999) 8 (explaining that the rationale for financial regulation means why the regulation of the financial system is necessary or justified based on economic criteria).

273 Amstad M *Regulating Fintech: Objectives, principles, and practices* (Asian Development Bank Institute Working Paper Series No. 1016, 2019) 1.

274 Madise S *The regulation of mobile money: Law and practice in sub–Saharan Africa* (2019) 117.

Generally, on the one hand, some scholars argue in favour of the regulation of markets by the government. The arguments in favour of the regulation stem from the premise that markets are susceptible to failure, or as it is technically called, 'market failure.' As Armour, Awrey and Davies et al explain, regulation is necessary if there is a problem that needs to be addressed and if no problem exists, it is needless.[275] To reproduce their words:

> The standard starting point of economics for regulation is 'if it ain't broke, don't fix it.' In other words, if there is no clear evidence of a failure of markets, do not interfere with them.[276]

Market failure does not mean that a market is not functioning at all.[277] Instead, it is a term used by economists to describe a situation where scarce resources are not optimally or efficiently allocated in the economy.[278] Specifically, market failure in the financial system occurs when the system fails to allocate resources efficiently and generate optimal outcomes for the economy.[279] Some of the main causes of market failure in the financial system include:[280] information asymmetry,[281] systemic risks or the risk of contagion,[282] moral hazard,[283] and unfair competition.[284]

Generally, the proponents of government regulation view regulation as the most suitable policy instrument for addressing both potential and actual causes of market

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275 Armour J, Awrey D & Davies PL et al *Principles of financial regulation* (2016) 115.

276 Armour J, Awrey D & Davies PL et al (2016) 115.

277 Cunningham S *Understanding market failures in an economic development context* (2011) 13

278 Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 5.

279 Ekpo VU *Financial stability: The role of regulation and supervision* (2015) 19; Carmichael J *The framework for financial supervision: Macro and micro issues* (BIS Policy Paper, 1999) 143.

280 See generally Armour J, Awrey D & Davies PL et al *Principles of financial regulation* (2016) 121–126; Amstad M *Regulating Fintech: Objectives, principles, and practices* (Asian Development Bank Institute Working Paper Series No. 1016, 2019) 1; Carmichael J *The framework for financial supervision: Macro and micro issues* (BIS Policy Paper, 1999) 143; Davies H & Green D *Global Financial regulation: The essential guide* (2008) 22.

281 This refers to the situation where one party in a financial transaction has access to more information than the other and this leaves the person with less information being unable to make informed decision.

282 Systemic crisis entails that because of the interconnectedness of the financial system, the failure of one financial actor or a group of actors can have an adverse impact on the rest of the financial system and even the broader economy.

283 Moral hazard refers to a situation where parties involved in financial transactions are motivated to be less risk averse because they are insulated from the full consequences of their actions.

284 Unfair competition denotes business practices that create an unequal playing field, leading to distorted market outcomes. It can take many forms, such as price fixing, false advertising, predatory pricing, or the abuse of a dominant market position like monopoly or oligopoly.

failure.[285] They argue that government regulation or intervention in markets is a necessity, even if it is a necessary evil.[286] Additionally, they contend that people should not be exposed to the full tyranny of the market and find government regulation not only tolerable but also desirable.[287]

On the other hand, some scholars contend that the regulation of markets by government is needless. Proponents against government regulation of markets are popularly called 'free marketeers.'[288] Free marketeers dislike the regulation because they do not like any form of government intervention and prefer to feel the full power of the market.[289] It should be emphasised that the proposition of free marketeers is not that there should not be any regulation. Indeed, while they are preaching against government regulation, they are in the end canvassing for markets to self–regulate.

Some of the notable arguments canvassed by free marketeers as to why government regulation is needless are as follows.[290] First, there is no market failure that warrants regulation, and even if it exists, it does not warrant regulation because the market can cure its own failure and imperfections. Secondly, government regulation may not, in practice, solve market failure; even if it does, it can only do so by imposing costs that exceed the costs of the original problem. Thirdly, government regulation imposes a wide range of costs which consumers ultimately pay. Fourthly, moral hazards may arise when regulation is imposed. Lastly, there is the potential of government regulation also failing, that is, regulatory failure.

Centrally, free marketeers argue that markets are more efficient when they are allowed to operate without government interference, and that government regulation can lead to inefficiencies and higher costs for consumers.

285 See Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 5 (noting that some scholars have observed that government regulation is 'one of the methods of achieving efficiency in the allocation of resources when a market failure is identified.')

286 Moosa IA *Good Regulation, bad regulation: The anatomy of financial regulation* (2016) 1.

287 Moosa IA (2016) 1.

288 McMurtry J 'The contradictions of free market doctrine: Is there a solution? 16(7) (1997) *Journal of Business Ethics* 645–662.

289 Moosa IA *Good Regulation, bad regulation: The anatomy of financial regulation* (2016) 1.

290 Llewellyn DT *The economic rationale for financial regulation* (FSA Occasional Paper No. 1, 1999) 7.

There are two notable competing theories that attempt to explain the necessity for regulating markets: public interest theory and private interest theory.[291] These two theories come under what is dubbed the 'economic theories of regulation.'[292] According to Posner, the economic theories of regulation aim to rationalise why governments intervene in markets using regulation and other policy instruments such as subsidies and taxes.[293] The economic theories of regulation also help in explaining whether, in practice, the regulation and supervision of markets benefit the public or private interests.[294] An overview of the theories and some of the criticisms against them are discussed below:

2.4.1. Public interest theory

Renowned English economist Arthur Cecil Pigou is credited with being the first to develop the public interest theory, also called the 'helping hand theory.'[295] The public interest theory is predicated on the following assumptions.[296]

First, markets are extremely fragile and prone to failure and imperfections, such as monopolies and negative externalities, if they are left unregulated. Secondly, governments are benign and can, through regulation, correct potential, and actual market failure. Thirdly, government regulators have sufficient information and enforcement powers to promote the public interest. Fourthly, government regulators are benevolent and aim to pursue the public interest. Lastly, government regulation is costless; it comes at zero transaction costs.[297]

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291 Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 2.

292 Den Hertog JA (2010) 2.

293 Posner RA 'Theories of economic regulation' (1974) 5(2) *The Bell Journal of Economics and Management Science* 336.

294 Llewellyn DT *The economic rationale for financial regulation* (FSA Occasional Paper No. 1, 1999) 8.

295 See Djankov S, La Porta R & Lopez–de–Silanes F et al 'The regulation of entry' (2002) 118(1) *The Quarterly Journal of Economics* 2, where the authors in citing Arthur Cecil Pigou's groundbreaking book titled *The Economics of Welfare* comments that '[Pigou's] public interest theory of regulation holds that unregulated markets exhibit frequent failures, ranging from monopoly power to externalities. A government that pursues social efficiency counters these failures and protects the public through regulation.

296 For a detailed discussion on these assumptions, see Shleifer A 'Understanding regulation' (2005) 11(4) *European Financial Management* 439–451. Also see Posner RA 'Theories of economic regulation' (1974) 5(2) *The Bell Journal of Economics and Management Science* 342; Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 2.

297 See Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 5–6 (nothing that

Against these assumptions, the public interest theory centrally propounds that government regulation is necessary and aims to protect, benefit, and promote public interest.[298] The criticisms against the public interest theory are based chiefly on scepticism about the validity of its underlying assumptions, and in fact, some of its assumptions have been invalidated by empirical research.[299] The following criticisms against the public interest theory stand out.[300] First, the theory is criticised for exaggerating the extent of the failure and imperfections that markets could suffer.

Secondly, the theory is criticised for failing to acknowledge that competition, private ordering, and the courts can adequately address the causes of market failure, thus rendering regulation unnecessary.[301] Thirdly, it is argued that even if competition, private ordering, and the courts cannot adequately address market failures, government regulation is not any better. This is because government regulators are incompetent, corrupt, and captured, so regulation would make things even worse. And lastly, the public interest theory is criticised for assuming that regulation is effective and cheap to implement, when, in reality, this may not be the case.

It has been observed that although discussions about 'public interest' are found in academic literature across disciplines like law, politics, and economics, its origins can

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the more comprehensive view of the public interest theorists is that, while government regulation does not come at zero cost, the cost of government regulation is comparatively more advantageous than the cost of no regulation).

298 See Hantke–Domas M 'The public interest theory of regulation: Non–existence or misinterpretation?' (2003) 15(2) *European Journal of Law and Economics* 165.

299 See Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 18 (documenting how empirical research has invalidated the hypothesis of the public interest theory that government regulation is always efficient and effective).

300 For a detailed discussion on these criticisms see Shleifer A 'Understanding regulation' (2005) 11(4) *European Financial Management* 440–443; Moosa IA *Good regulation, bad regulation: The anatomy of financial regulation* 7; Hantke–Domas M 'The public interest theory of regulation: Non–existence or misinterpretation?' (2003) 15(2) *European Journal of Law and Economics* 165; Etzioni A 'The capture theory of regulations–revisited' (2009) 46 *Society* 319–323; Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010)18–21; Llewellyn DT *The economic rationale for financial regulation* (FSA Occasional Paper No. 1, 1999) 7.

301 See Shleifer A 'Understanding regulation' (2005) 11(4) *European Financial Management* 440, where the author contests the confidence in the views that competition, private orderings, and the courts alone can adequately cater to market failures. With particular reference courts, the author notes that more often than not courts are 'highly inefficient, politically motivated, slow, and even corrupt.'

be traced back to case law instead of academic scholarship.[302] For example, in the United States, the idea of 'public interest' first entered judicial discussions in 1877 through the case of *Munn v Illinois*.[303] In this case, the United States Supreme Court upheld the constitutionality of extending state regulations to private industries if their activities were shown to affect public interests. Similarly, in England, the notion of public interest was first brought up in the case of *Allnutt v Inglis.*[304] The court decided that although a private company operated as a licensed monopoly, it was still obligated to set prices that aligned with the public interest.

2.4.2. Private interest theory

Nobel Laureate, George Stigler, is credited for leading the development of the private interest theory.[305] The private interest theory proceeds on the assumption that regulators do not have sufficient information with respect to cost, demand, quality and other dimensions of firm behaviour. They can, therefore, only imperfectly, if at all, promote the public interest when controlling firms or societal activities.[306]

Another notable assumption of the theory is that capitalist private firms pursue their own interest, which may or may not include elements of the public interest.[307] It is further assumed that in pursuing their interest, these capitalist private firms may 'capture' regulation.[308] Regulatory capture represents a situation where regulatory agencies become dominated by the industry or private firms that they are regulating such that the agencies no longer act in the public interest but to promote the interest of private firms.[309]

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302 See Udofa K *Evaluating the viability of cryptocurrencies within the legal regime for electronic payments in English law* (PhD thesis, University of Sheffield, 2020) 85 citing Held V *The Public Interest and Individual Interest* (1970) 32.

303 *Munn v Illinois* 94 U.S. 113 (1877) cited in Udofa K (2020) 86.

304 *Allnut v Inglis* 12 East 530 (1810) cited in Udofa K (2020) 86.

305 The central proposition of Stigler is that 'as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.' See generally, Stigler GJ 'The theory of economic regulation' (1971) 2(1) *Bell Journal of Economics and Management Science* 3–21.

306 Posner RA 'Theories of economic regulation' (1974) 5(2) *The Bell Journal of Economics and Management Science* 342; Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 22.

307 Borges MR 'Regulation and regulatory capture' *World Academy of Art and Science* (2017) 4.

308 Posner RA 'Theories of economic regulation' (1974) 5(2) *The Bell Journal of Economics and Management Science* 342; d Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 2.

309 Dal Bó E 'Regulatory capture: A review' (2006) 22(2) *Oxford Review of Economic Policy* 203.

The private interest theory also runs on the assumption that regulation is an efficient mechanism of redistributing wealth to more efficient groups.[310] Flowing from these assumptions, the private interest theory centrally propounds that regulation exists to serve the interest of private firms and not the interest of the public.[311]

The private interest theory has similarly been criticised for the inaccuracy of some of its assumptions. In particular, the hypothesis that regulation benefits mostly private interest has been invalidated by empirical research.[312] The private interest theory is also criticised for downplaying the extent to which other interest groups, particularly consumers, can capture regulation.[313] The private interest theory has also been criticised for being incomplete because it does not explain the basis for some of its conclusions.[314]

In light of the potential shortcomings of financial regulation exposed by the free marketeers and public interest theorists, the following section highlights some considerations for ensuring that financial regulation is good or successful and does not fail.

2.4.3. Towards good or successful financial regulation

For the financial system to smoothly perform its functions and possibly contribute to the development of the economy, it must be well–functioning. Taivan and Nene note in this regard that a well–functioning financial system is the 'lifeblood of any economy in the world.'[315] Echoing similar views, Herring and Santomero observe that 'a well–functioning financial system makes a critical contribution to economic performance by

310 Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 28.

311 Shleifer A 'Understanding regulation' (2005) 11(4) *European Financial Management* 441; Hantke–Domas M 'The public interest theory of regulation: Non–existence or misinterpretation?' (2003) 15(2) *European Journal of Law and Economics* 165.

312 Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 29.

313 Posner RA 'Theories of economic regulation' (1974) 5(2) *The Bell Journal of Economics and Management Science* 335–358.

314 Den Hertog JA *Review of economic theories of regulation* (Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series 10–18, 2010) 22.

315 Taivan A & Nene G (2016) 82. Also see Herring RJ & Santomero AM 'What is optimal financial regulation?' in Gup BE *The new financial architecture, banking regulation in the 21st century* (2000) 52.

facilitating transactions, mobilizing savings and allocating capital across time and space.'[316]

A well–functioning financial system is characterised by some key elements. It is efficient, liquid, competitive, transparent, stable, protective of consumers, and closely integrated with the real economy.[317] Additionally, a well–functioning financial system has sound financial institutions, promotes diversification, is adaptable, and encourages equal access to financial services for all participants. If the financial regulatory functions discussed in Section 2.2 above are successfully performed, they can help facilitate some of these ingredients of a well–functioning financial system.

It is conceded that the public interest theory turns a blind eye to the reality that financial regulation can be flawed, hampering it from contributing to some of the elements of a well–functioning financial system. This is a reality that the proponents of free markets and private interest theory commendably expose. It is acknowledged that the government's adoption of financial regulation as a policy instrument does not guarantee immunity against market failure. This is particularly true when financial regulation itself fails.

As postulated by Baldwin, Cave and Lodge, financial regulation may be considered to have failed if regulatory bodies 'do not produce (at reasonable cost) the outcomes that are stipulated in their mandates.'[318] In simpler terms, for financial regulation not to be considered a failure, it must be effective and efficient.

The term 'regulatory failure' is also used to describe the failure of financial regulation. It signifies a situation where regulation either facilitates market failure or is ineffective in remedying the market failure it was established to address.[319]

Financial regulation can fail — that is, be ineffective and inefficient — for various reasons or regulatory challenges. Some of these challenges can be drawn from the

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316 Herring RJ & Santomero AM *What is optimal financial regulation* (The Wharton Financial Institutions Center Working Paper No. 00–34, 1999) 2.

317 For a detailed list and discussion on these elements see Organisation for Economic Co–operation and Development (2010) 9–10; World Bank & International Monetary Fund *Financial sector assessment: A handbook* (2005) 15–20.

318 Baldwin R, Cave M & Lodge M *Understanding regulation: Theory, strategy, and practice* 2 ed (2012) 69.

319 Carman J & Harris R 'Public Regulation of marketing activity, (Part III): A typology of regulatory failures and implications for marketing and public policy' 6(1) (1986) *Journal of Macromarketing* 51–64. See also Wolf C 'A theory of non-market failure: Framework for implementation analysis' 21(1) (1979) *Journal of Law and Economics* 43–70.

arguments of the private interest theorists and free marketeers. In particular, financial regulation may falter due to the following regulatory challenges:

(1) The regulator is captured (regulatory capture);

(2) There is regulatory overlap,[320] and it results in negative consequences like regulatory duplication, regulatory inconsistency, and regulatory arbitrage;[321]

(3) There is coordination failure;[322]

(4) There is insufficient or under–regulation. This means that the existing regulatory measures and oversight mechanisms are insufficient to address risks effectively;

(5) There is excessive or over–regulation, in that the applicable regulation is beyond what is required considering the market failure or risk regulated. Regulations can also be excessive if they are duplicative (regulations from more than one regulator on the same economic activity);[323]

(6) If regulators do not have adequate resources, such as funding, expertise, or personnel, to effectively discharge their obligations; and

(7) If the frameworks for financial regulation do not keep pace with the ever–changing financial system.[324]

It is noted further that there are other factors outside the financial system that can still cause the failure of financial regulation. These external factors include economic

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320 Regulatory overlap simply describes a situation whereby the same or comparable financial institution, instrument or activity is under the regulatory jurisdiction of multiple financial regulators. It has been defined more technically as a situation in which 'multiple legal rules are jointly applied to the same set of conduct to correct the same market failure.' See See Turk MC 'Overlapping legal rules in financial regulation and the administrative state' 54(3) (2020) *Georgia Law Review* 800.

321 Regulatory duplication is when two or more regulatory bodies duplicate each other's efforts. Regulatory inconsistency happens when different regulatory bodies have conflicting rules on the same subject matter, and regulatory arbitrage refers to regulated firms taking advantage of differences in regulations to reduce regulatory costs or gain a competitive advantage.

322 Coordination failure describes a situation in which regulatory intervention does not occurs or where such intervention is inadequate because of the inability of regulatory authorities to effectively work together to oversee and regulate financial markets and institutions. This can occur when there are competing interests or conflicting objectives among different regulatory agencies, or when there is a lack of communication or information sharing between them. See Ahdieh RB 'Coordination and conflict: The persistent relevance of networks in international financial regulation' (2015) 78(4) *Law and Contemporary Problems* 75.

323 Leverty JT 'The cost of duplicative regulation: Evidence from risk retention groups' 79(1) (2012) *Journal of Risk and Insurance* 105–128.

324 Baxter LG 'Adaptive financial regulation and Regtech: A concept article on realistic protection for victims of bank failures' (2016) 66 *Duke Law Journal* 594.

conditions, geopolitical events, societal changes, and crises. Additionally, the risk of financial regulation failing is intensified if the financial system becomes complex and is rapidly changing. These factors may make it more challenging for financial regulators to discharge their functions effectively.

However, it is submitted that the reality that financial regulation is susceptible to fail does not mean that the government should abandon it, and markets should be left to only self–regulate as free marketeers suggest. Moosa rightly points out that to follow this argument of the free marketeers is similar to suggesting that the police force should be disbanded because there are some corrupt cops.[325] This perspective also aligns with the wisdom in the idiom that 'do not throw the baby out with the bathwater.' Essentially, the idea that this study is propagating is that addressing vulnerabilities or failures in financial regulation is the way to go, rather than discarding it as a whole.

It is further submitted that the arguments of the free–marketeers and private interest theory, in fact, do more than exposing the shortcomings of financial regulation. From the arguments, some steps can be inferred that can be taken to ensure that financial regulation is sound. To put this submission in context, the potential of regulatory capture calls for 'increasing checks and balances, diversity of thought, diffusion of decision–making power, and public transparency' to ensure that financial regulation is capture–resistant.[326]

Likewise, the risks of coordination failure are to be avoided by establishing bodies or other sound mechanisms to facilitate effective regulatory coordination between financial regulators. Regulatory coordination is especially crucial in circumstances where there are numerous regulatory actors, such that the overlaps are almost unavoidable. There are three other key 'financial regulation soundness' requirements that can be inferred from the arguments of the free–marketeers and private interest theory. These requirements are as follows:

2.4.3.1. Efficient and proportional regulation

The understanding that regulation can be inefficient emphasises the importance of evaluating the cost and benefits of any proposed regulation before it is adopted for

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325 Moosa IA *Good Regulation, bad regulation: The anatomy of financial regulation* (2016) 9.

326 Calabria M 'Preventing regulatory capture' available at *https://www.theregreview.org/2016/06/23/calabria–preventing–regulatory–capture/* (Accessed on 11 September 2022).

implementation. In addition, the regulatory environment should not be excessive or duplicative.

Ideally, there should be proportionality in financial regulation. Proportionality in financial regulation demands tailoring regulatory requirements to the size, complexity, risk profile, and systemic importance of financial institutions.[327] Given the diverse nature of financial institutions in terms of their scale, business models, and risk exposure, the principle recognises that a 'one–size–fits–all' approach may be inappropriate.

Proportionality often involves a risk–based approach to regulation.[328] This means that institutions deemed to pose higher risks to the stability of the financial system are subject to more stringent regulatory requirements, while those with lower risk profiles are subject to relatively lighter regulatory burdens. Another goal of proportionality is to prevent smaller and less risky institutions from being disadvantaged by excessive regulatory burdens, as this will undermine their ability to compete.

2.4.3.2. Collaborative regulation

The complexity of the financial system and possibility that public regulators may be resource constrained to effectively regulate the system makes a case for why private actors (like SROs) should be incorporated in the regulatory setting. This point has been justified in literature under the frameworks of collaborative regulation and new governance theory.

According to Leal, collaborative regulation envisages broad participation in solving collective regulatory problems.[329] It involves cooperation and the sharing of regulatory responsibility among private, public and non–government institutions. This approach tries to achieve far more collective goals and engage stakeholders to coordinate, adjudicate and integrate the objectives and interests of multiple actors. The author adds that collaborative regulation could allow for more responsive, legitimate and effective results than the traditional strict approaches.

327 Intellidex *Proportionality in banking regulation and supervision: A study of South African banks* (Research Report, 2022) 11–12.

328 Ajibo KI 'Risk–based regulation: The future of Nigerian banking industry' (2015) 57(3) *International Journal of Law and Management* 201–216.

329 Leal AP 'Collaborative regulation: Which is the role of the regulator in collaborative regulation?' (2021) 13(1) *Law, State and Telecommunications Review* 40–69.

Ruggie explains that the new governance theory is based on the premise that the government cannot do 'all the heavy lifting required to meet most pressing societal challenges' on its own; as a result, the government must rely on the capacities of non–state and private actors.[330] Lobel clarifies that it is necessary turn to these non–state and private actors because society has reached 'a new degree of complexity which renders a central control–and–command structure impossible.'[331]

Pan acknowledges that the new governance theory is relevant to financial regulation.[332] He explains that the theory is relevant because of the difficulties that financial regulators now face with regulating 'complex financial products and following fast–moving market developments.' A similar point is canvassed by Zeranski and Sancak who argue that relying solely on financial regulators to regulate the financial system is an impractical approach in practice.[333] They emphasise the need for public regulators to delegate some of their regulatory powers to other actors. The authors cite two reasons why such delegation is crucial.

The first reason is that financial regulators lack the capacity to effectively regulate all financial markets, institutions, and activities on their own. The sheer complexity and diversity of the financial system makes it virtually impossible for a single entity to possess the comprehensive knowledge and resources needed for such extensive regulation. Secondly, it is neither appropriate nor feasible for financial regulators to directly supervise every individual activity, institution, or market. Given the vast scope of the financial landscape, direct supervision would be a monumental task, burdening regulators and impeding their ability to respond swiftly and efficiently to emerging challenges.

Leal tries to draw a link between collaborative regulation and the new governance theory.[334] To reproduce the author's words, the new governance theory is 'intrinsically

330 Ruggie JG 'Global governance and new governance theory: Lessons from business and human rights' (2014) 20 *Global governance* 8–9.

331 Lobel O 'The renew deal: The fall of regulation and the rise of governance in contemporary legal thought' (2004) 89(2) *Minnesota Law Review* 357.

332 Pan EJ 'Understanding financial regulation' 4 (2012) *Utah Law Review* 1897–1948.

333 Zeranski S & Sancak IE 'Digitalisation of financial supervision with supervisory technology (Suptech)' (2020) 8 *Journal of International Banking Law & Regulation* 309–329.

334 Leal AP 'Collaborative regulation: Which is the role of the regulator in collaborative regulation?' (2021) 13(1) *Law, State and Telecommunications Review* 40–69.

linked to collaborative regulation because both provide a framework based on participative actions among state agents and other stakeholders.'[335]

It is submitted that collaborative regulation, and the new governance theory are selling the same product under different trademarks. Without going into the debate of whether they are different or the same, the message they preach is clear: private actors like SROs can be helpful in augmenting the regulatory efforts of public regulators.

In instances where SROs can be explored, co–regulation is usually more favoured over self–regulation.[336] This preference is primarily due to co–regulation having government's legislative backing of the SROs which may help in curbing their excesses. Expressing the distrust for self–regulation, one author wittily likens it to 'allowing the inmates to run the asylum.'[337] Another writer comments that self–regulation is easier for companies to evade it.[338]

Omarova acknowledges these criticisms against the use of self–regulation for financial regulation but stresses that, in light of the increasing complexity of financial systems, public regulation alone cannot sustain the system.[339] To make a case for self–regulation Omarova advances the concept of 'embedded self–regulation' which the author admits builds on the new governance literature.[340] The concept advocates that self–regulation can be improved through the government establishing a strong and effective regulatory framework that defines the key objectives of SROs and also monitors them.[341] Omarova contends that self–regulation will be more successful and socially beneficial to the financial system if it is firmly embedded with government

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335 Leal AP (2021) 45.

336 On the advantages and disadvantages of both co–regulation and self–regulation, see generally: O'Sullivan KPV & DJ Flannery 'A discussion on the resilience of command–and–control regulation within regulatory behaviour theories' (2011) 1(3) *Risk Governance and Control: Financial Markets and Institutions* 15.

337 Moosa IA *Good regulation, bad regulation: The anatomy of financial regulation* (2016) 4.

338 Muraközy B & Valentiny P 'Alternatives to state regulation: Self–and co–regulation' in Valentiny P, Kiss FL & Antal–Pomázi K (eds) *Competition and regulation* (2015) 54–89.

339 Omarova ST 'Wall Street as community of fate: Toward financial industry self–regulation' (2011) 159 *University of Pennsylvania Law Review* 411–492. Also see Omarova ST 'Rethinking the future of self–regulation in the financial industry' (2010) 35 *Brooklyn Journal of International Law* 665–706.

340 Omarova ST 'Wall Street as community of fate: Toward financial industry self–regulation' (2011) 159 *University of Pennsylvania Law Review* 417.

341 Omarova ST (2011) 419.

oversight.[342] The author observes that embedded self–regulation is an organic supplement to government regulation, rather than an alternative to it.[343]

It is observed that Omarova's concept of 'embedded self–regulation' appears to go beyond merely requiring legislative backing for the establishment of SROs, which is a central feature of co–regulation. Instead, it underscores the importance of SROs having clear mandates and being subject to continuous monitoring by public regulators to ensure that they fulfil their assigned mandates.

Similarly, Knight acknowledges that self–regulation can be more responsive to emerging risks in the financial system. He does, however, recommend that the government police SROs. According to the author, SROs must be policed to avoid becoming tools of incumbents against competition or innovation.[344]

Both of these scholarly views from Omarova and Knight align with Principle 9 of the International Organisation of Securities Commissions' Objectives and Principles of Securities Regulation, 2017, which specifies that:

> Where the regulatory system makes use of Self–Regulatory Organi[s]ations (SROs) that exercise some direct oversight responsibility for their respective areas of competence, such SROs should be subject to the oversight of the Regulator and should observe standards of fairness and confidentiality when exercising powers and delegated responsibilities.

To sum it all, private regulation can be used to complement (not substitute) the regulatory efforts of public regulators (including financial regulators). However, necessary checks, through 'embedded self–regulation' or 'policing of SROs' should be put in place to achieve the desired outcome of incorporating SROs in the regulatory setting.

2.4.3.3. Adaptive regulation

The dynamic nature of the financial system has already been emphasised in Chapter 1.[345] One of the many lessons from the global financial crisis (GFC) is that regulatory

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342 Omarova ST (2011) 419.

343 Omarova ST (2011) 474.

344 Knight B *Fintech: Who regulates it and why it matters* (Milken Institute Center for Financial Markets, 2016) 25.

345 See Chapter 1, Section 1.2.2.

practices and the frameworks for financial regulation should keep pace with the developments in the financial system. By and large, for financial regulation to not fail, it needs to be adaptive.

As espoused by Baxter, adaptive regulation is an approach to regulation that recognises the constantly changing nature of the regulatory environment and seeks to adapt to those changes.[346] It involves a deep understanding of the structure and dynamics of the market being regulated, identifying, and monitoring the basic conditions for market resilience, and using regulatory tools to promote continued stability and manage risk.

The discussion in Section 2.3 has briefly touched on some requirements that are imperative for the effectiveness of the various frameworks for financial regulation. Notably, the section underscored the importance of effective regulatory coordination between financial regulators, non–core financial regulators, and policymakers like the Ministry of Finance. This Section 2.4 has gone further to identify general guides for pursuing the success of financial regulation, including efficient, proportional, collaborative, and adaptive regulation. It useful to note that these guides underscore the various arguments canvassed in the rest of this study.

With this context, the next section turns to consider a central aspect of this chapter. It examines the requirements that should be embellished in the institutional structure to facilitate its effectiveness for financial regulation in general.

2.5. AN EFFECTIVE INSTITUTIONAL STRUCTURE FOR FINANCIAL REGULATION: A CONCEPTUAL FRAMEWORK

Llewellyn explains that an effective institutional structure for financial regulation is generally one that facilitates efficient and effective financial regulation.[347] As the author puts it, '[t]he ultimate criterion for devising a structure of regulatory agencies [institutional structure] must be the effectiveness and efficiency of regulation.'[348]

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346 Baxter LG 'Adaptive regulation in the amoral bazaar' 128(2) *South African Law Journal* (2011) 264–226.

347 Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 16.

348 Llewellyn DT (2006) 16.

Lumpkin similarly submits that in designing the institutional structure, a central goal should be to establish a structure that:

> ensures the safety of the financial system as a whole and allows other objectives of supervision (e.g., investor and consumer protection) to be attained efficiently and effectively.[349]

The foregoing submissions provide a general guide for what an effective institutional structure should achieve: it should facilitate effective and efficient financial regulation. However, there is still a need to uncover the more specific prerequisites or requirements that can enable the institutional structure in promoting the effectiveness and efficiency of financial regulation. This section is dedicated to exploring these specific requirements.

Two lenses for assessing these requirements are proposed. The first lens is referred to as the 'intrinsic effectiveness requirements.' It involves considering how factors directly related to the institutional structure, in terms of its numerical, internal, and external aspects, can impact the effectiveness and efficiency of financial regulation. Specifically, under this lens, the strengths and limitations of the sectoral, unified, and twin peaks models are assessed to show how they respectively facilitate or impede effective and efficient financial regulation.

Additionally, the measures for addressing the limitations of each model are identified. In this sense, a distinction can be drawn between each model in its original state and the state of the model after the introduction of piecemeal reforms to address gaps of its original state. Further, the first lens involves drawing insights from other specific requirements advanced by extant literature that are then incorporated into the requirements advanced by the study.

The second lens involves considering how other frameworks for financial regulation interact with the institutional structure to influence its effectiveness, referred to as the 'peripherally associated effectiveness requirements.' The second lens is especially important to consider because the institutional structure is not the sole framework for financial regulation. Instead, it is part of a network of frameworks that include the policy objectives of financial regulation, regulatory frameworks, and supervisory frameworks.

[349] Lumpkin S *Supervision of financial services in the OECD Area* (2002) 4.

2.5.1. Sectoral model

The sectoral model follows the 'institutional approach.'[350] This entails that the type or legal status of a financial institution determines the regulator that will be responsible for overseeing the activities of such institution from both micro–prudential and conduct of business angles.[351]

In practice, the sectoral model involves establishing separate financial regulators for different financial sectors like banking, insurance, securities and even pension. For this reason, it is also considered a fragmented approach to designing the institutional structure.[352]

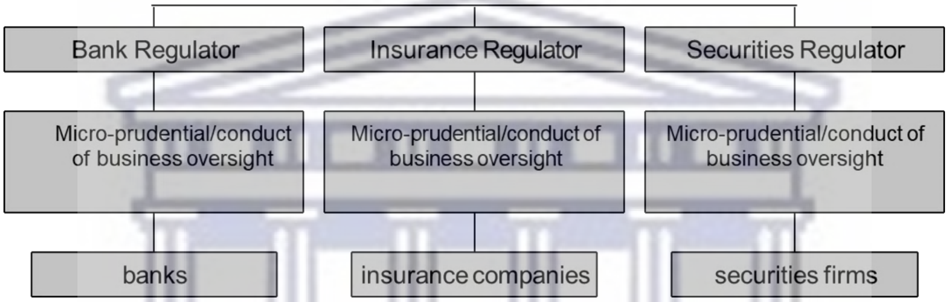

Figure 1: Sectoral model[353]

Under the sectoral model, the regulator of each sector of the financial system will develop their approach, techniques, and practices, preventing other regulators from intervening in their field of competence.[354] If a financial institution's licence permits engagement in additional ancillary activities alongside its main business, both the primary and ancillary services will fall within the purview of the same sectoral regulator,

350 Nhavira JD, Mudzonga E & Mugocha E *Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options* (Zimbabwe Economic Policy Analysis and Research Unit, 2013) 14.

351 Nhavira JD, Mudzonga E & Mugocha E (2013) 14; Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 251.

352 Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 15.

353 Developed by author.

354 Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 4; Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 252.

even if the ancillary services are identical or similar to those overseen by a different sectoral regulator.[355]

In most countries using the sectoral model, including Nigeria, Zimbabwe, Uganda, Kenya, and Ghana, the central bank serves as the micro–prudential and conduct of business regulator for banks. The central banks typically also oversee financial macro–prudential or systemic regulation.[356]

The sectoral model, including by reason of its fragmented architecture, can present some potential benefits in facilitating effective financial regulation.[357] First, it allows financial regulators to specialise in specific sectors, and this may facilitate regulators to have a deeper understanding (expertise) of sector–specific risks and respond quickly to market developments. Secondly, the model acknowledges the distinct features of different sectors of the financial system. This can help financial regulators develop regulatory and supervisory approaches that are unique to the needs of each sector, avoiding a one–size–fits–all approach.

Thirdly, implementing the sectoral model may be straightforward, given that regulators concentrate on their designated sectors. Fourthly, firms operating under a sector–specific regulator can benefit from reduced compliance complexity and costs since they will be engaging with a specific sectoral regulator.[358] Further, the sectoral model

355 See Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 104 (affirming that under the sectoral model 'the relevant regulator supervises all activities undertaken by the institution that fall within the scope of financial regulation, irrespective of the market or sector in which the activities take place, and the institution is normally regulated by one regulator alone'). See also Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 4.

356 See Lempere S *Consumer protection in the Kenyan financial sector: A Case for a twin peaks model of financial regulation* (unpublished LLM thesis, University of the Western Cape, 2019) 27; Kamukama M *Adopting the twin peaks model as a consumer protection mechanism in the financial sector: The Ugandan perspective* (unpublished LLM thesis, University of the Western Cape, 2015) 12.

357 See Akujuobi NE, Anyanwu GI & Eke CK 'Regulatory framework and bank operations in Nigeria: A VECM approach' (2021) 16(1) *International Journal of Development and Management Review* 151; Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 'Financial market regulation and supervision: How many peaks for the Euro Area' 28(2) (2003) *Brooklyn Journal of International Law* 463–493; Wilcox JA 'The increasing integration and competition of financial institutions and of financial regulation' in Kensinger J (ed) *Research in Finance* (2005) 1; Group of Thirty *Structure of financial supervision: Approaches and challenges in a global marketplace* (2008) 35.

358 However, these benefits may only arise if the financial institution's activities are strictly confined to only one sector.

can facilitate easier comparisons between sectors and regulators, allowing policymakers to identify areas for improvement. The model may also encourage regulatory competition among the sectoral regulators, which can lead to better performance.[359]

The sectoral model is, however, also associated with certain potential limitations which have been extensively discussed in literature.[360] One major limitation is that it does not account for financial convergence within the financial system.[361] The sectoral model is based on the idea of segregated provision of financial services, where a financial institution engages in only one line of financial activity.[362] This notion becomes flawed when there is financial convergence, which can manifest through the emergence of financial conglomerates that deliver financial services that cut across more than one sector or regulator.[363]

Financial conglomerates come in various types, including pure financial conglomerates, universal banks, and financial holding companies.[364] Lumpkin identifies different risks associated with financial conglomerates, such as regulatory arbitrage, contagion, multiple gearing, and issues arising from unregulated services or

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359 For discussions on the benefits of regulatory competition, see Li X 'Economic analysis of regulatory overlap and regulatory competition: The experience of interagency regulatory competition in China's regulation of inbound foreign investment (2015) 67(4) *Administrative Law Review* 685–750.

360 See Brown EF 'E Pluribus Unum–Out of many, one: Why the United States needs a single financial services agency' (2005) 14(1) *University of Miami Business Law Review* 28–51; Podpiera R & Čihák M 'Is one watchdog better than three? International experience with integrated financial sector supervision' (2006) 56 *Czech Journal of Economics and Finance* 56; Van Lelyveld I & Schilder A 'Risk in financial conglomerates: Management and supervision' *Brookings–Wharton Papers on Financial Services* (2003) 158; Group of Thirty *Structure of financial supervision: Approaches and challenges in a global marketplace* (2008) 24; Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 251.

361 Financial convergence denotes the trend and process whereby different financial services, products, and markets become more interconnected and integrated. See Van den Berghe L & Verweire K 'Convergence in the financial services industry' (2001) 26(2) *The Geneva Papers on Risk and Insurance* 262.

362 For example, banks will provide only banking services, insurance companies will focus on insurance business, and so on.

363 Van den Berghe L & Verweire K 'Convergence in the financial services industry' (2001) 26(2) *The Geneva Papers on Risk and Insurance* 262.

364 A pure financial conglomerate is a financial conglomerate that combines the production and distribution of all financial products and services in a single corporate entity, with all activities supported by a single pool of capital. A universal bank undertakes commercial banking and investment activities in one corporate entity, with other financial services especially insurance, carried out in wholly owned by separately capitalised subsidiaries. A financial holding company is a single holding company that holds most or all of the shares of separately incorporated and capitalised subsidiaries. Lumpkin S *Supervision of financial services in the OECD Area* (2002) 9.

members within this group.[365] The author confirms that a purely sectoral model is unsuitable for overseeing financial conglomerates. Lumpkin suggests that financial conglomerates generally require consolidated approaches to supervision and/or institutional models that are more integrated, such as the unified model or the twin peaks model. Lumpkin's point aligns with another observation: the sectoral model lacks a financial regulator with a 360–degree overview of all activities of a financial institution that may cut across multiple sectors.[366]

The sectoral model may be expensive to implement because multiple financial regulators have their separate infrastructure, administration, and support systems. These factors increase direct costs, which may have downstream effects on regulated firms and consumers. Compliance for regulated firms can also be more challenging due to inconsistent and duplicated regulatory environments fostered by the sectoral model, leading to a higher indirect cost of regulation.

Additionally, while the model allows financial regulators to specialise in specific sectors, there is the potential risk that regulators may not evenly balance their roles of micro–prudential and conduct of business regulation over the sectors under their oversight. Depending on the priorities of a specific regulator, either micro–prudential or conduct of business may receive more attention, potentially leading to gaps in oversight.

Finally, the sectoral model can result in unhealthy competition among financial authorities. Regulators may relax requirements to attract more firms under their jurisdiction, leading to a 'race to the bottom.' Additionally, there is the possibility of inter–agency rivalry between financial regulators, which may result in coordination failure.

Most of the above–identified drawbacks of the sectoral model are closely linked to its fragmented design. To overcome these challenges, integration or defragmentation of the sectoral model is necessary. It is noted that this integration can be achieved through various institutional, regulatory, and supervisory measures.

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365 Lumpkin S *Supervision of financial services in the OECD Area* (2002) 10.

366 Group of Thirty *Structure of financial supervision: approaches and challenges in a global marketplace* (2008) 34.

Institutional integration measures involve achieving more cohesion between the regulators or minimising their numbers. It suggested that this integration can take various forms. The first is quasi–institutional integration, where sectoral regulators retain their separate legal identities and existence, but a body or other mechanisms for regulatory coordination are established. Institutional integration can also be achieved by merging the sectoral financial regulators into either the unified or the twin peaks model, which are generally considered to have a more integrated architecture.

On the other hand, regulatory integration measures aim to harmonise regulations and supervision across different sectors of the financial system while also retaining the separate legal identities and existence of the various sectoral regulators. One such measure is complementing the sectoral model with the functional model, where regulatory jurisdiction is determined by the specific activity performed by a financial institution.[367] This harmonises regulations for similar activities, regardless of the institution's legal form.[368] Specifically, the functional model is incorporated into the sectoral model to account for the interconnected nature of the financial system, where: (1) different types of financial institutions can perform similar activities, and (2) financial institutions can combine the similar activities very differently.[369]

Another regulatory integration measure is for the sectoral financial regulators to develop joint regulations or standards.[370] Additionally, a lead regulator can be designated to oversee a specific regulatory function that cuts across two or more sectors. A lead regulator is particularly useful for overseeing financial conglomerates through consolidated bank supervision. Consolidated bank supervision is an approach to assessing the overall strength of a banking group together with an assessment of the impact on a bank of the operations of other parts of the group to which it belongs.[371]

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367 Gibson E, Lupo–Pasini F & Buckley RP 'Regulating digital financial services agents in developing countries to promote financial inclusion' 2015 *Singapore Journal of Legal Studies* 41.

368 Wymeersch E 'The structure of financial supervision in Europe: About single financial supervisors, twin peaks and multiple financial supervisors' (2007) 8(2) *European Business Organization Law Review* 259.

369 Borio C, Claessens S & Tarashev N *Entity–based vs activity–based regulation: A framework and applications to traditional financial firms and big techs* (Financial Stability Institute Occasional Paper 19, 2022) 2.

370 Lumpkin S *Supervision of financial services in the OECD Area* (2002) 5.

371 See Bank of England 'Consolidated supervision of institutions authorised under the Banking Act 1979' (Bank of England Quarterly Bulletin, 1986) 85. See also Ekpu VU & Nwafor CN *Consolidated supervision of banks and financial conglomerates* (2014) 8.

It is further suggested that in order to ensure a balanced focus on both micro–prudential and conduct of business regulation, the governing laws of the sectoral regulator should explicitly outline responsibilities for these two regulatory functions. Additionally, the organisational or department structure of sectoral regulator should accommodate the functions. It is suggested that there could be separate but cross–functional departments/units responsible for prudential and conduct of business regulatory roles. This entails that each department/unit should focus on a specific regulatory function. However, there should be adequate measures to ensure communication, coordination, and collaboration between these departments/units.

Finally, sharing administrative and support resources, such as information technology (IT) systems, communication networks, and office facilities, can lead to significant cost savings under the sectoral model.[372] Financial regulators can jointly invest in these resources, spreading the financial burden more evenly among them.

Apart from the benefits of improving economies of scale, it is suggested that shared services arrangement can facilitate better coordination among sectoral regulators. However, clear agreements and protocols are essential to govern shared services arrangement effectively. These agreements should outline the roles and responsibilities of each regulator, cost–sharing mechanisms, dispute resolution processes, and data security and privacy considerations.

Further, periodic assessments of the shared services arrangement should be conducted to evaluate its effectiveness, identify areas for improvement, and ensure that it continues to meet the needs and objectives of the regulators. The shared services arrangements should also adhere to all relevant legal and regulatory requirements, including data protection, procurement rules, and any other applicable legal requirement.

2.5.2. Unified model

The unified model follows an 'integrated approach' in that it seeks to minimise or consolidate the number of financial regulators involved in overseeing the micro–

372 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 169.

prudential and conduct of business regulation of financial institutions.[373] It is especially designed to accommodate the financial convergence that may arise in the financial system.

There are two approaches to achieving integration or consolidation under the umbrella of the unified model. First, there is the fully integrated approach in which a single or mega financial regulator has micro–prudential and conduct of business regulation responsibility for all financial institutions.[374] This mega regulator can be the central bank or separate from it. Mwenda calls this approach the 'fully unified model'[375] and this term will be adopted going forward in this study.

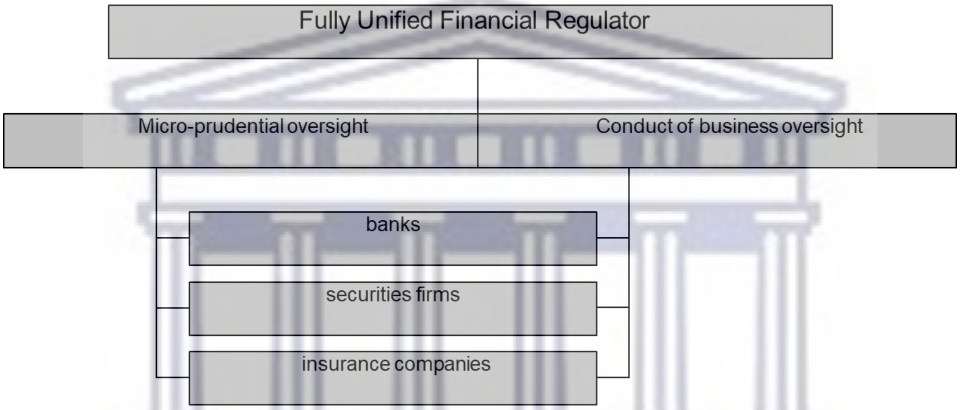

Figure 2: Fully unified model[376]

The second approach is the partially integrated approach, where a financial regulator combines the regulation of two or more sectors.[377] For example, banking and insurance regulatory responsibilities are combined in a single authority, but there is a separate authority for the securities sector.[378] The partially unified regulator can be the central bank or separate from it. Mwenda describes it as the 'partially unified model'[379]

373 Nhavira JD, Mudzonga E & Mugocha E *Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options* (Zimbabwe Economic Policy Analysis and Research Unit, 2013) 14.

374 Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 4.

375 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 38.

376 Developed by author.

377 Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 4.

378 Ferran E (2014) 4.

379 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 38.

but it has been described elsewhere as the two–agency model.[380] Mwenda's description will be used going forward in this study.

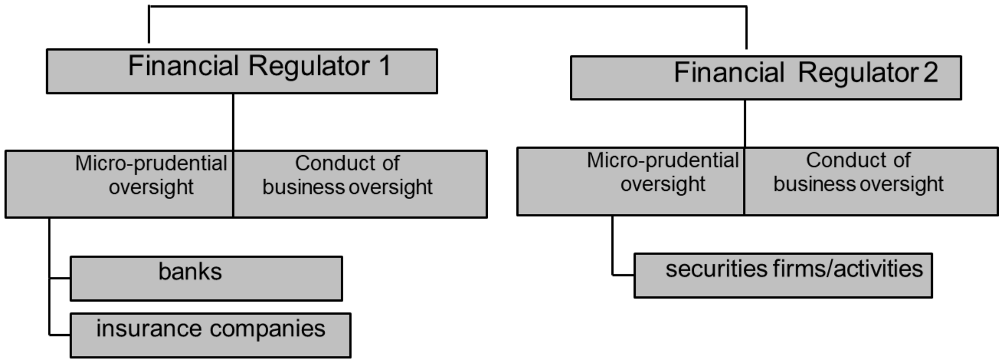

Figure 3: Partially unified model[381]

The current institutional structure in use in Egypt reflects the partially unified model as the financial regulatory regime is housed in two main regulatory authorities: The Central Bank of Egypt (CBE) and the Egyptian Financial Supervisory Authority (EFSA).[382] The CBE regulates banks, in addition to maintaining financial stability and driving the country's monetary policies.[383] On the other hand, the EFRA is the regulatory authority for all non–banking financial institutions in Egypt.[384]

Egypt changed to the partially unified model from the sectoral model. In transitioning to the partially unified model, the EFRA, which was established under Law No. 10 of 2009, replaced the Egyptian Insurance Supervisory Authority (EISA), the Capital Market Authority (CMA), and the Mortgage Finance Authority (MFA).[385] Notably, as can be noted from Egypt's case, the EFRA, which is the partially unified regulator, is separate from the central bank.

The fully unified model is also called the 'single peak model' or the 'FSA model.' It is called the FSA model because it was popularised by the erstwhile Financial Services

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380 Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 4.

381 Developed by author.

382 Ghebrial F *Financial inclusion in Egypt: Challenges and opportunities* (unpublished Masters in Public Administration thesis, American University in Cairo, 2019) 38.

383 Ghebrial F (2019) 38.

384 Ghebrial F (2019) 38.

385 See Central Bank of Egypt 'Annual Report 2008/2009' available at https://www.cbe.org.eg/-/media/project/cbe/listing/research/annual-report/annualreport2008-2009.pdf (Accessed on 5 December 2024).

Authority (FSA) in the United Kingdom.[386] However, the United Kingdom has since moved away from the unified model to the twin peaks model. At the time when the United Kingdom followed the unified model, FSA, the mega regulator, was separated from the central bank (Bank of England). The FSA was responsible for micro–prudential and conduct of business regulation of all financial institutions but shared macro–prudential oversight with the Bank of England and Treasury.[387]

Although the United Kingdom popularised the unified model, Singapore has had a longer and more successful history of using this institutional structure since 1984.[388] Unlike under the United Kingdom's erstwhile unified model, where the mega regulator was separate from the central bank, Singapore's mega regulator consolidates all functions. The Monetary Authority of Singapore, which is Singapore's mega financial regulator, plays all the roles of the central bank, prudential regulator, and conduct of business regulator.

The fully unified model has various potential advantages, some of which counter the possible limitations of the sectoral model in achieving effective and efficient financial regulation. In particular, the fully unified model has been associated with the following potential benefits: (1) suitability for regulating financial conglomerates, (2) facilitating economies of scale and scope, (3) eliminating overlaps and ensuring consistent regulation, and (4) promoting the accountability of the financial regulator.[389]

On the other hand, the partially unified model retains some elements of sectoral specialisation, allowing for focused oversight and expertise within specific financial sectors. However, it also introduces a level of coordination and integration among regulatory bodies to reduce the limitations inherent in a purely sectoral approach. The partially unified model may generally facilitate economies of scale as well as minimise the risks of regulatory overlap and coordination failures better than the sectoral model.

386 Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 10.

387 Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 29.

388 Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 156.

389 See Briault C *The rationale for a single national financial services regulator* (FSA Occasional Paper Series No. 2, 1999). Also see Madero D & Lumpkin S *A review of the pros and cons of integrating pension supervision with that of other financial activities and services* (International Organisation of Pension Supervisor Working Paper No 1, 2007) 8.

In this sense, it can be said that the model tries to strike a balance between the sectoral model and the fully unified model.

However, both the fully and partially unified model have their limitations. The following limitations can be observed with the fully unified model looking at how they are designed. First, financial systems can be complex and multifaceted, and it may be challenging for a single regulator to oversee all aspects of the system effectively. While the unified model may be suited for addressing the integrated nature of the financial system, it may fail in addressing the unique differentiation between different sectors of the system to the same extent as the sectoral model or even partially unified model.

Secondly, a single financial regulator may not have the same level of expertise or diverse range of viewpoints as one in which there is more than one financial regulator. Third, a single regulator may be subject to conflicts of interest when dealing with numerous sectors and policy objectives of financial regulation. The financial regulator may not evenly discharge prudential and conduct of business regulation functions and may be more focused on one at the expense of the other.[390] It has been noted in this respect that one of the reasons for the failure of the United Kingdom's fully unified regulator, the FSA, was because the FSA 'over–invested in promoting consumer protection, seemingly at the expense of other goals.'[391] Finally, the mega financial regulator may become more bureaucratic and inflexible than the smaller 'sectoral' financial regulators.

Given these identified shortcomings of the fully unified model, efforts must be made to ensure that the financial regulation is not over–generalised to facilitate its effectiveness. Over–generalisation is used here to indicate regulatory intervention that may not be sufficiently tailored to the specific needs of the different sectors of the financial system and objectives of financial regulation. This can lead to a one–size–fits–all approach that may not address the unique challenges facing the different parts of the financial system and its regulatory needs.

390 Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 23; Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 480.

391 Armour J, Awrey D & Davies PL et al *Principles of financial regulation* (2016) 11.

One way to avoid over–generalisation and promote specialisation in the unified model is to create specialised units within the single regulator that are focused on specific sectors of the financial system. In essence, the internal aspect of the institutional structure should be tailored to the unique needs of the different sectors of the financial system.

Further, to ensure that one regulatory function does not suffer at the expense of the other, each regulatory function must be clearly defined and assigned to specialised units within the single regulator. The performance of the units in achieving the regulatory function must be regularly monitored and evaluated to identify areas for improvement. An alternative to these measures is to adopt the twin peaks model.

As it relates to the partially unified model, while it holds the potential to improve upon the shortcomings of the sectoral model, it does not completely eliminate its vulnerabilities. Some of the limitations that are associated with the sectoral model, such as potential regulatory gaps, inconsistencies, and difficulties in managing cross–sectoral issues, might persist to some extent within the model.

The partially unified model can be improved with similar measures to the sectoral model. This includes exploring the various institutional and regulatory integration measures discussed earlier. Additionally, shared services arrangement can be used to facilitate economies of scale with the partially unified model.

2.5.3. Twin peaks model

Apart from the partially unified model, some commentators consider the twin peaks model as another form of a partially integrated approach to designing the institutional structure.[392] However, unlike the partially unified model, which may be designed using an 'institutional approach' like the sectoral model, the twin peaks model follows a 'regulation by objectives' approach. This simply entails that the regulatory jurisdiction of financial regulators is structured along the lines of the policy objectives or regulatory functions they are mandated to oversee.[393]

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392 Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 5; Han M 'Twin peaks regulation after the global financial crisis: A reform model for China? (2017) 8(3) *Asian Journal of Law and Economics* 3.

393 Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 4.

In particular, the twin peaks model is organised by separating micro–prudential regulation from the conduct of business regulation and establishing a separate financial regulator for each of these regulatory functions. Accordingly, regardless of the legal form of a financial institution or its activities, it will be subject to financial regulators with these separate mandates.[394]

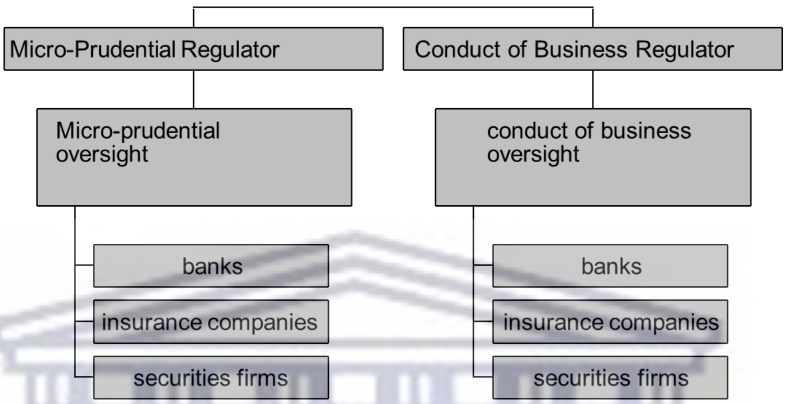

Figure 4: Twin peaks model[395]

Under the model, the same regulator may be tasked with micro–prudential and macro–prudential regulation or different regulators will be established for each of these functions. In this regard, there are at least three identifiable iterations of the twin peaks model as can been drawn from various jurisdictions that employ this model.[396]

In one approach, the obligations for both micro and macro–prudential regulation are placed with the central or reserve bank, while another regulator is responsible for conduct of business regulation. The Netherlands follows this approach.[397] In the Netherlands, the two peaks of the model are the Dutch Central Bank (DNB) and the Authority for the Financial Markets (AFM). DNB is responsible for prudential regulation (both micro and macro aspects), while the AFM is responsible for conduct of business regulation.

394 For a detailed discussion on these three options and their respective pros and cons, see Godwin A, Howse T & Ramsay I 'A jurisdictional comparison of the twin peaks model of financial regulation' (2017) 18(2) *Journal of Banking Regulation* 103–131. Also see Schmulow A *Twin peaks: A theoretical analysis* (CIFR Paper No. WP064, 2015) 19–26.

395 Developed by author.

396 Ferran E *Institutional design for financial market supervision: The choice for national systems* (University of Cambridge Faculty of Law Research Paper No. 28/2014, 2014) 4.

397 Van Hengel M, Hilbers P & Hilbers P et al 'Experiences with the Dutch twin peaks model: Lessons for Europe' in Kellermann A, de Haan J & de Vries F (eds) *Financial supervision in the 21st century* (2013) 185–199.

The second approach is similar to the first, save that a subsidiary body is established within the central or reserve bank to perform micro–prudential regulation of financial institutions while the central bank undertakes macro–prudential regulation. This is the approach currently in use in South Africa.[398] In South Africa's adoption of this approach, the South African Reserve Bank (SARB) is charged with macro–prudential regulation. The Prudential Authority (PA) performs micro–prudential regulation. Although the Prudential Authority has a separate legal identity, it is under the SARB. The Financial Sector Conduct Authority (FSCA) is responsible for conduct of business regulation.

The third approach of organising the twin peaks model has three financial regulators with separate responsibilities for macro–prudential regulation, micro–prudential regulation, and conduct of business regulation. Australia, which has the longest experiences of adopting the twin peaks model, follows this last approach.[399] The Reserve Bank of Australia (RBA) undertakes macro–prudential regulation; micro–prudential regulation sits with the Australian Prudential Regulation Authority (APRA), while the Australian Securities and Investment Commission (ASIAC) performs conduct of business regulation.

The United Kingdom presents yet another unique approach to implementing the twin peaks model.[400] Two bodies have been established within the Bank of England (BoE) to respectively oversee micro and macro–prudential regulation. The Financial Policy Committee (FPC) is responsible for macro–prudential regulation, while the Prudential Regulation Authority (PRA) oversees the micro–prudential regulation of all deposit–taking institutions, insurers, and investment banks. The BoE also oversees financial market infrastructure like central counterparties (CCPs), systematically important payment systems, and central securities depositories.

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398 Godwin A, Howse T & Ramsey I 'Twin peaks: South Africa's financial sector regulatory framework' (2017) 134(3) *South African Law Journal* 665–702; Qumba MF 'A comparative analysis of the twin peaks model of financial regulation in South Africa and the United Kingdom' (2022) 139(1) *South African Law Journal* 78–113; Van Niekerk G & Van Heerden C 'Twin peaks: The role of the South African central bank in promoting and maintaining financial stability' (2017) 80(4) *Journal for Contemporary Roman–Dutch Law* 636–656.

399 Godwin A & Ramsay I *Twin peaks–The legal and regulatory anatomy of Australia's system of financial regulation* (Centre for International Finance Regulation Working Paper No.074, 2015) 1.

400 HM Treasury *Financial services future regulatory framework review call for evidence: Regulatory coordination* (2019) 8–9.

On the other hand, the Financial Conduct Authority (FCA) is a separate and standalone authority that has responsibility for the conduct of business regulation. Additionally, there is the Payment Systems Regulator (PSR) which is the economic regulator of the payment systems, and the Pension Regulator (PR) which regulates work–based pension schemes.

The twin peaks model is credited for its potential of merging the benefits of other design options while also catering adequately for conflicts that may exist between prudential and conduct of business regulation.[401] Unlike in both the unified and sectoral models, with the twin peaks model, there is less risk of one aspect of regulation overpowering the entire regulatory landscape. This is especially the case because, under the twin peaks model, each regulator has 'dedicated objectives and clear mandates to which they are exclusively committed.'[402]

The separation of objectives helps to avoid potential conflicts of interest that could arise from a single super–regulator overseeing all aspects of regulation. It also helps to promote a specific regulatory culture tailored to the needs of each regulatory function, preventing conflicting cultures within a single regulatory body.

Further, similar to how the sectoral model facilitates specialisation and expertise over sectors of the financial system, the twin peaks model facilitates these goals in terms of regulatory functions and objectives of financial regulation. The twin peaks model can potentially lead to more efficient regulation, as each agency can focus on its specific area of responsibility and avoid duplication of efforts.

Another significant potential benefit of the twin peaks model is that, in the same way as the unified model, it is suitable for adapting the financial regulatory regime to financial conglomerates and dealing with their various risks.[403] The twin peaks model may allow for more flexibility and adaptability, as each financial regulator can focus on its specific area of responsibility and adjust its regulations as needed.

Lastly, the twin peaks model can provide increased accountability as each agency can be held responsible for its own regulatory function/objective. Despite the seeming

401 Uddin G, Monehin AO & Osuji E 'Strengthening financial system regulation: The Nigerian case' (2020) 9(4) *International Journal of Management, Economics and Social Sciences* 295.

402 Godwin A 'Introduction to special issue–the twin peaks model of financial regulation and reform in South Africa' 11(4) (2017) *Law and Financial Markets Review* 151.

403 Godwin A (2017) 151.

advantages of the twin peaks model over both the sectoral model and unified model, the institutional structure is not without its own limitations that can undermine effective and efficient financial regulation.[404]

First, the twin peaks model may be vulnerable to the risk of coordination failure. The risk of coordination failure may be intensified if the twin peaks model is designed such that the central bank that is responsible for macro–prudential regulation is separate from the financial regulators with responsibility for micro–prudential regulation and conduct of business regulation. In such a situation, there will technically be three peaks thereby intensifying the need, scope, and difficulty of regulatory coordination.

Closely linked to this first point, the twin peaks model may also be vulnerable to overlaps and gaps of oversight if the responsibilities of the financial regulators are not well defined or there are regulatory aspects that are left unassigned to a specific peak. There can be a thin line between functions that relate to micro–prudential and conduct of business regulation, especially as both functions ultimately aim to ensure financial stability. These functions can overlap in certain respects. However, the twin peaks model is generally less susceptible to the risk of overlap than the sectoral model.

Furthermore, the twin peaks model could also burden and increase the compliance regime since, as in some instances, regulated firms would have to engage with more than one financial regulator if they have both micro–prudential and conduct of business compliance obligations. Also, the twin peak model may theoretically be more expensive to operate compared to the fully unified model, given the existence of separate agencies with their own infrastructure and support systems.

However, as in the case of the sectoral model and unified model, these theoretical shortcomings of the twin peaks model are not without remedy. Regulatory overlap under the twin peaks model can be avoided by clearly defining and separating the responsibilities of the financial regulators constituting the model.[405] It may also be useful to designate a lead regulator in cases where there is overlap. Other regulatory harmonisation measures like the development of joint regulation can additionally be used to avoid duplication and inconsistencies in cases where overlaps exist.

404 Godwin A (2017) 151.

405 Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016) 59.

To avoid this risk of coordination failure, it may be useful to adopt all or any of the regulatory coordination mechanisms, including setting up a financial regulation coordinating body and signing MoUs for regulatory coordination.[406] Regulatory coordination is especially pertinent for addressing areas where the responsibilities of regulators overlap or underlap.[407]

Further, as suggested for the sectoral model, improved economies of scale can be achieved with the twin peaks model by implementing shared services arrangement. Additionally, to address the potential complexity of compliance for regulated firms, it can be helpful to provide guidance and resources that assist firms in understanding the functioning of the model better. The next section streamlines the requirements that should be embellished within the institutional structure to improve its effectiveness for financial regulation.

2.5.4. Articulating the intrinsic effectiveness requirements

While a few scholars, like Schmulow, argue the superiority of a specific model, [408] most observe that no model is the best.[409] Additionally, empirical evidence shows that countries have been successful and unsuccessful with the various models.[410] Further, there is no pure example of any model.[411] This is because even when two jurisdictions adopt 'the same' model, there will often be differences in the design of the models as well as other frameworks for financial regulation that support the models.

Most scholars have concluded that the suitability of the design option of institutional structure is significantly influenced by uniquely local factors applicable to a

406 Godwin A, Li G & Ramsay I (2016) 59.

407 Mensah S, BeInye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 9.

408 Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 172 (concluding that the twin peaks structure offers 'what the evidence strongly suggests is the best and most optimal regulatory architecture').

409 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 3; Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 26.

410 Mensah S, BeInye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 96.

411 Montanaro E *Central banks and financial supervision*; *New tendencies* (Financialisation, Economy, Society and Sustainable Development, Working Paper Series No. 134, 2016) 7; Group of Thirty *Structure of financial supervision: Approaches and challenges in a global marketplace* (2008) 22; Schmulow A *Twin peaks: A theoretical analysis* (CIFR Paper No. WP064, 2015) 19–26.

jurisdiction.[412] It is also argued that there is no single institutional structure of financial regulation that may be optimal on a one–size–fits all basis for all jurisdictions.[413]

In the circumstance, it is useful to establish a set of generic requirements that should be incorporated into the design of any institutional structure that a country may be using (be it a sectoral model, unified model, or twin peaks model) for it to be effective for financial regulation.

The issues analysed in Sections 2.5.1 to 2.5.3 above in terms of the strengths and limitations of the various models, as well as the possible measures for addressing the limitations, have been done to elicit these generic requirements. From the analysis, it is submitted that for the institutional structure to be effective for financial regulation, it should, at the minimum, reflect the following four requirement:

2.5.4.1. It should be adapted to the developments in the financial system

Some of the limitations of the sectoral model are attributable to its lack of alignment with significant changes in the financial system, particularly the integrated nature of the system due to the emergence of financial conglomerates. The business model for delivering financial services projected by the design of the sectoral model is one in which there are well–defined boundaries or perimeters for the financial services that a financial institution may undertake. For example, a bank will provide only banking services, an insurance company will focus solely on insurance services, and so on.

However, due to increased competition and financial modernisation initiatives,[414] there is now the phenomenon of financial conglomerates. This is a model for delivering financial services in which a financial institution's activities may span across banking, insurance, securities, pension, and even other non–regulated services. With the emergence of this model, which blurs the lines between different financial services, the sectoral model is said to be 'based on a business model that, to a large extent, no

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412 Montanaro E *Central banks and financial supervision*; *New tendencies* (Financialisation, Economy, Society and Sustainable Development, Working Paper Series No. 134, 2016) 7; Group of Thirty *Structure of financial supervision: Approaches and challenges in a global marketplace* (2008) 22.

413 Group of Thirty (2008) 22.

414 As explained in Chapter 1, financial modernisation is the process of removing the legal and regulatory frameworks that confine or constrain financial institutions to specific financial service business lines.

longer exists'[415] or, as a popular saying in Nigeria goes, the model can be said to be 'sleeping on a bicycle.'

Generally, the financial system is constantly evolving, and as it does so, the design of the institutional structure must also adapt to keep pace. Adapting the institutional structure to the developments in the financial system suggests making changes to both the internal and external aspects of the structure to reflect the changing landscape of the system. This is necessary because an outdated design of the institutional regime may not adequately address new changes or risks or address them in a manner that is consistent with the evolving landscape.

Additionally, changes in the financial system may require new approaches for monitoring and mitigating risks. For example, increasing integration in a financial system that uses the sectoral model necessitates either quasi–consolidation or integrating the model by adopting the unified model or the twin peaks model. There is also the option of adopting consolidated bank supervision, which is a form of regulatory integration measure, to better oversee the risks of financial conglomerates to which a bank is a part of.

According to Lumpkin, it is ideal that the institutional structure should be 'flexible, adaptable both to changes in the business practices of regulated entities and in the structure of the financial system (including domestic and international components), and will take into account the effects of supervision on competition.'[416] Likewise, Abrams and Taylor contend that the 'institutional structure of regulation should reflect, at least to some degree, the structure of the industry it is called upon to regulate.'[417]

In clarifying what should be the focus in reforming the institutional structure to the developments in the financial system, Kremers, Schoenmaker and Wierts observe that what is important is to establish an institutional structure 'that accommodates market developments, and not steer market developments in one particular direction or

415 Group of Thirty (2008) 34.

416 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 147; Flamee M & Windels P 'Restructuring financial sector supervision: creating a level playing field (2009) 34(1) *The Geneva Papers on Risk and Insurance–Issues and Practice* 13.

417 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 153.

another.'[418] They argue that this is because the task of financial regulators is not to predict market developments, but rather to create an 'infrastructure that is robust to different kinds of development such as the bundling or unbundling of financial activities.'[419]

In addition to the principle extended by Kremers, Schoenmaker and Wierts above, other principles can be drawn from other sources regarding considerations for changing or reshaping the institutional structure.[420] First, the necessity and form of reforms to be implemented should be determined by and proportionate to the risks created by the developments in the financial system. In other words, the severity of the risks should inform the level of reform required to address them. For example, if a financial system development poses a high risk to financial stability, then the reform needed to mitigate that risk should be more extensive than the reform required to mitigate a lower–risk development. This resonates with the concept of proportional regulation discussed in Section 2.4.3 above.

The second principle is that the reforms must facilitate the containment and mitigation of the risks posed by the developments in the financial system. Thirdly, and closely related to the second principle, any reforms implemented must be capable of preserving and maximising the benefits of the developments. Overall, these principles suggest that in changing or reforming the institutional structure, there is a need to strike a balance between risk mitigation and the preservation of benefits.

2.5.4.2. It should be comprehensive by addressing the regulatory challenges that it is vulnerable to

Depending on its design, the institutional structure can be susceptible to various regulatory challenges that could lead to the failure of financial regulation. For instance, it has been observed that the sectoral and partially unified models are prone to regulatory overlap, increasing the risks of regulatory inconsistency, duplication, and

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418 Kremers J, Schoenmaker D & Wierts P *Cross–sector supervision: which model?* (Brookings–Wharton Papers on Financial Services 2003) 227.

419 Kremers J, Schoenmaker D & Wierts P (2003) 227.

420 International Monetary Fund & World Bank Group *The Bali Fintech Agenda: A blueprint for successfully harnessing Fintech's opportunities* (IMF Policy Paper, 2018) 7; Kremers J, Schoenmaker D & Wierts P *Cross–sector supervision: which model?* (Brookings–Wharton Papers on Financial Services 2003) 227; Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 153; Lumpkin S *Supervision of financial services in the OECD area* (OECD financial market trends) 81.

arbitrage. They also intensify the risk of coordination failure. The twin peaks model is also vulnerable to overlaps and coordination failure. On the other hand, the fully unified model may be at risk of over–generalising financial regulation.

Accordingly, the institutional structure should be comprehensive, incorporating safeguards to address the diverse regulatory challenges it is vulnerable to, which can undermine financial regulation. Kremers and Schoenmaker's reference to the need for the institutional structure to facilitate synergies and avoid conflicts in dealing with policy objective projects this requirement of the institutional structure being comprehensive.[421] This requirement can also be gleaned from the argument by Mensah, Belnye and Anane–Antwi et al that an effective institutional structure is one that can facilitate:[422]

(1) effective coordination among regulatory agencies,

(2) coordination between regulatory agencies and the government through the Ministry of Finance,

(3) a balanced approach covering prudential regulation and market conduct regulation, and

(4) a reputation for regulatory discipline, demonstrated through a focus on risk and a strong stance against defaulters.

2.5.4.3. It should be efficient

The institutional structure can be deemed efficient if it facilitates achieving the policy objectives of financial regulation with minimal resources and the least amount of friction or unintended consequences. It is suggested that an efficient institutional structure should ideally result in cost savings, both in terms of direct costs for financial regulators and indirect costs for regulated firms. The question that arises is: how can this be achieved?

Lumpkin writes that there is likely a connection between the institutional structure and the cost associated with it, even though the exact nature of this relationship is not

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421 Kremers JJ & Schoenmaker D *Twin peaks: Experiences in the Netherlands* (London School of Economics and Political Science Special Paper 196, 2010) 3.

422 Mensah S, Belnye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 96.

clearly understood.[423] The author observes that while increasing the number of supervisory agencies may not proportionally double the cost, practical considerations suggest that some increase is inevitable due to factors like departmental overhead and fixed costs. Lumpkin notes that, on the other hand, reducing the number of regulatory agencies does not necessarily guarantee a corresponding reduction in costs. While it might lead to efficiency gains by eliminating overlapping duties or capitalising on economies of scale, it is not a certainty that fewer agencies would automatically result in lower costs for supervisory activities.

Results from the empirical research conducted by Podpiera and Čihák indicate that while few regulators may reduce the administrative cost for infrastructure, it may not significantly reduce staffing costs.[424] From these points, it is observed that reducing the number of financial regulators (by adopting the unified model or twin peaks model) or improving collaboration between them can help reduce the direct cost of regulation. In particular, improved regulatory coordination among financial regulators can reduce direct costs by avoiding duplicated regulatory efforts.

Additionally, centralising resources, through shared services arrangements, can reduce the direct cost of financial regulation by preventing duplication in spending on infrastructure and support systems. On the other hand, the design of the institutional structure can reduce the indirect cost of regulation if it eliminates inconsistent and duplicative regulatory compliance obligations for regulated firms. The integration of the institutional structure can help avoid inconsistent and duplicated regulations.

One of the specific areas where South Africa's financial regulators are mandated to cooperate and collaborate is to 'minimise the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities.'[425] What can be drawn from this particular requirement is that legislation can be used to encourage practices that promote efficiency within the institutional structure.

423 Lumpkin S *Supervision of financial services in the OECD Area* (2002) 5.

424 Podpiera R & Čihák M 'Is one watchdog better than three? International experience with integrated financial sector supervision' (2006) 56 *Czech Journal of Economics and Finance* 102.

425 See s 76(1)(e) of the Financial Sector Regulation Act.

2.5.4.4. *The organisational structure of the financial regulators should promote specialisation*

While specialisation relates to a regulatory body focusing on a specific sector or aspect of regulation, expertise signifies a regulator's deep understanding of its regulatory roles and functions. Apart from experience, training and continuous learning, a regulator can gain expertise through specialisation. In this sense, it can be argued that specialisation and expertise reinforce each other. The twin peaks model, partially unified model, and sectoral model were all applauded for facilitating specialisation in engaging with sectoral differences as well as differences in dealing with different policy objectives of financial regulation.

On the other hand, the fully unified model has been identified to be susceptible to resulting in the over–generalisation of financial regulation which could undermine specialisation and expertise. To this end, it has been earlier suggested that the internal organisation of the single regulator should have specialised units that can develop competence in dealing with sectoral differences and ensuring that qual attention is paid to both prudential and conduct of business regulation requirements. Also, it has been observed that to prevent the uneven discharge of prudential and conduct of business regulation functions under the sectoral and partially unified models, the organisational structure should include distinct yet interconnected departments or units for these functions.

Generally, the organisational structure of financial regulators should enable them to have specialisation and develop the necessary expertise to carry out their responsibilities effectively. Financial regulators should possess the requisite knowledge, skills, and experience to understand and deal with the complexities of the financial system and make informed decisions regarding its regulation. Financial regulators can be better positioned to achieve their goals if they operate within an institutional structure that promotes specialisation and expertise.

Legislation can explicitly propose the establishment of specialised regulatory units within the organisational structure of financial regulators. For example, section 14 of Nigeria's Investment and Securities Act provides that the Securities and Exchange Commission (SEC) 'may establish specialised departments for the purpose of regulating and developing the Nigerian capital market.

To conclude, drawing from the four requirements enumerated above, it is submitted that the suitability of the institutional structure for any jurisdiction is not necessarily associated with whether it is designed as the sectoral model, unified model, or twin peaks model. Rather, what is ideal is that any model that a country is using should, at the very least, conform to the four requirements for effectiveness highlighted above.[426] The next section considers other requirements, in addition to the effectiveness of the institutional structure, that are imperative for the success of financial regulation.

2.5.5. Peripherally associated effectiveness requirements

The preceding section has established the four requirements that should be entrenched within the institutional structure for it to be effective for undertaking financial regulation. However, does it mean that once these requirements are incorporated in a country's institutional structure, it will guarantee effective and efficient financial regulation?

This question is crucial because policymakers may only be inclined to reform the design of their institutional structure to meet the specified requirements if such a design can have a significant impact on attaining effective and efficient financial regulation. So, what have scholars said about the inquiry?

In a 2003 journal article, Mwenda posits that the institutional structure's design is a 'second–order issue' when it comes to securing effective and efficient financial regulation.[427] According to Mwenda, the more critical and fundamental concern lies in the effective implementation of financial regulation, specifically in terms of supervisory capacity, the quality of supervision, and the soundness of the regulatory frameworks that underpin the regulatory process.[428]

Mwenda reiterates his viewpoint in his landmark book on the legal aspects of a unified regulator, published by the World Bank in 2006.[429] Correspondingly, Carmichael, in a paper from 2003, contends that while '[m]ore appropriate structures may help but,

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426 Similar argument is reached in Mensah S, Belnye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 96.

427 Mwenda KK 'Legal aspects of unified financial services supervision in Germany' (2003) 4(10) *German Law Journal* 1009–1031.

428 Mwenda KK (2003) 1009–1010.

429 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 38.

fundamentally, better regulation comes from stronger laws, better–trained staff and better enforcement.'[430]

Equally, Masciandaro and Quintyn, in their 2008 publication, reaffirm that the design of the institutional structure should be viewed as a secondary concern.[431] They contend that what truly matters is the governance of financial regulators and the quality of regulations, and the supervisory process. While they acknowledge that the institutional structure is not unimportant, they suggest that these other factors outweigh its impact.[432]

However, it is worth noting that some scholars oppose the notion that the institutional structure's design is a second–order issue. Podpiera and Čihák, for one, argue that it would be 'too simplistic' to conclude that the design of the institutional structure is a second–order issue.[433] They contend that the institutional structure's design can significantly impact the degree to which some of the elements of supervisory capacity may be attained.

Calvo, Crisanto and Hohl et al also point out that a well–designed (or effective) institutional structure contributes to the effective implementation of financial regulation.[434] They note that this contribution is achieved by exploiting synergies across functions and mitigating conflicts of interest, such as those potentially arising between micro–prudential, macro–prudential, monetary policy and consumer or investor protection. The authors further contend that a well–designed institutional structure contributes to strengthening the ability of financial regulators to prevent financial crises and mitigate their impact.[435]

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430 Carmichael J Australia's *approach to regulatory reform* (Paper given at World Bank Regulation Conference, 2003) cited in Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 42.

431 Masciandaro D & Quintyn M *Helping hand or grabbing hand? Politicians, supervision regime, financial structure and market view* (IMF Working Paper No. 08/47, 2008) 6.

432 Masciandaro D & Quintyn M (2008) 6.

433 Podpiera R & Čihák M 'Is one watchdog better than three? International experience with integrated financial sector supervision' (2006) 56 *Czech Journal of Economics and Finance* 106.

434 Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 22.

435 Calvo D, Crisanto JC & Hohl S et al (2018) 22.

Like Mwenda, Abrams and Taylor submit at the onset of their book chapter that the institutional structure's design is a second–order issue.[436] They note that what is fundamental for the success of the financial regulatory regime is maintaining and enhancing supervisory capacity and the effectiveness of supervision.

However, Abrams and Taylor go on to qualify their submission by noting that in circumstances where the institutional structure's design is fully integrated, it could:[437] (1) assist in the elimination of gaps in regulatory coverage, (2) enable the effectiveness of supervision by making the monitoring of regulated firms much easier, and (3) facilitate cost saving based on shared infrastructure, administration, and support systems. They add that the design of the institutional structure could be a matter of 'fundamental concern' to the extent that it can assist in maintaining and enhancing supervisory capacity and the effectiveness of supervision.[438] This qualification by Abrams and Taylor suggests that under some exceptional circumstances, the institutional structure's design can qualify as a first–order issue.

In a more recent book chapter authored by only Taylor, he accepts that the design of the institutional structure can aid in achieving some of the elements of supervisory capacity.[439] He confirms that the design of the institutional structure can help in: (1) ensuring that the regulatory regime is comprehensive, (2) reducing the direct cost of regulation, thereby impacting the adequacy of resources, and (3) facilitating coordination and collaboration among regulators.

Taylor goes further to state that the institutional structure's design 'is not a mere distraction from more urgent issues as is sometimes suggested.' He submits that even if the institutional structure's design 'is not a sufficient condition for ensuring effective regulation, then it is surely a necessary one.'[440] In essence, Taylor is saying that even if the design of the institutional structure is not the only determinant of the success of financial regulation, it is a significant contributor to this outcome.

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436 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 147.

437 Abrams RK & Taylor MW (2002) 148–149.

438 Abrams RK & Taylor MW (2002) 148.

439 Taylor MW 'Regulatory reform after the financial crisis: Twin Peaks revisited' in Haung RH & Schoenmaker D (ed) *Institutional structure of financial regulation: Theories and international experiences* (2015) 12.

440 Taylor MW (2015) 13.

Llewellyn offers yet another insightful perspective that while the significance of the institutional structure should not be exaggerated, its importance should not be underestimated either.[441] Contextualising how the significance of the institutional structure should not be underestimated, Llewellyn observes that the design is 'important and not a minor administrative matter.'[442] He also notes that institutional structure's design 'has significance which is greater than simple bureaucratic tidiness.'

What can generally be observed is that earlier studies commonly indicated that the design of the institutional structure holds secondary significance. Or as they put it — a second–order issue. However, recent studies lean towards the claim that the institutional structure's design bears greater significance than merely a secondary role. Additionally, some authors have seemed to have shifted their stance over time from the second–order issue argument to the institutional structure's design holding more significance. The importance of the design of the institutional structure can further be unearthed by analysing the role the design plays in the context of other frameworks for financial regulation.

2.5.5.1. Policy objectives of financial regulation

Policy objectives of financial regulation provide a sense of direction by specifying what must be achieved. However, no matter how robust or extensive these objectives may be, they hold little value if not documented in legislation and implemented through supervision. The institutional structure's design has a bearing on policy objectives to the extent that it dictates how the objectives will be assigned to different financial regulators.

How the objectives of financial regulation are assigned to financial regulators could impact the ease with which they are achieved. A well–designed or effective institutional structure can provide ease for achieving the policy objectives of financial regulation

441 Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 13. See also Taylor MW 'Regulatory reform after the financial crisis: Twin Peaks revisited' in Haung RH & Schoenmaker D (ed) *Institutional structure of financial regulation: Theories and international experiences* (2015) 14 (sharing similar views by noting that 'although the institutional structure of regulation is not the only –or the most important –factor in ensuring regulatory effectiveness, neither is it the irrelevance as is sometimes alleged').

442 Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 11–14.

by:[443] (1) providing clarity of responsibility for particular aspects or objectives of regulation, (2) helping to avoid conflicts that could arise between different policy objectives, and (3) creating certainty about the regime under which consumers can be protected. Conversely, a poorly designed institutional structure could complicate the attainment of the policy objectives by creating a potential conflict of interest in dealing with the objectives.

2.5.5.2. Regulatory frameworks of financial regulation

The regulatory framework sets out the rules and laws that financial regulators are required to enforce in the financial system. The design of the institutional structure can influence whether there will be regulatory overlap. Although some benefits are associated with regulatory overlap, it is nevertheless commonly acknowledged that it poses numerous challenges.[444]

Regulatory overlap can lead to inconsistent regulations. Inconsistent regulations, in turn, may foster regulatory arbitrage — a situation in which firms exploit inconsistencies or loopholes in regulatory frameworks to operate with less scrutiny. One significant risk of arbitrage is that it can undermine the stability of the financial system. It can undermine financial instability by creating incentives for financial institutions to engage in high–risk activities that are not fully regulated or supervised. Regulatory arbitrage can also create a competitive advantage for some financial institutions over others, resulting in an uneven playing field.

Regulatory overlap can also engender regulatory duplication, resulting in the wastage of resources and creating a confusing, unpredictable, and uncertain regulatory environment.[445] The existence of overlaps could further lead to unnecessary jurisdictional conflicts between financial regulators.[446] When such conflicts arise and financial regulators fail to collaborate and coordinate appropriately, it can result in a

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443 Llewellyn DT (2006) 11–16.

444 It has been noted that allowing multiple regulators to work within the same area promotes policy innovation by facilitating experimentation and productive competition. It has also been emphasized that regulators with overlapping jurisdictions can compete with each other and learn from each other's experimentation. This competition is enhanced to the extent that different agencies adopt different viewpoints and perspectives. See Aagaard TS 'Regulatory overlap, overlapping legal fields, and statutory discontinuities' 29 (2011) *Virginia Environmental Law Journal* 292.

445 Aagaard TS (2011) 286–289.

446 Kang Y, Schmulow A & Godwin A 'China's long march towards the twin peaks model of financial regulation' (2022) *Law and Financial Markets Review* 13–14.

case of coordination failure. This failure, in turn, may lead to gaps in oversight and regulation, undermining the effectiveness of financial regulation or rendering it inefficient.[447] In a nutshell, how the institutional structure is designed could create risks for regulatory inconsistency, duplication, arbitrage and even coordination failure.

2.5.5.3. Supervisory framework of financial regulation

The supervisory framework is at the centre or heart of financial regulation, and it also extends to the supervisory capacity of financial regulators. No matter how sound the regulatory framework and policy objectives of financial regulation may be, if these frameworks are not implemented through supervision, they will be as good as if they never existed. Driving this point home, Moosa observes that Bernie Madoff, the man credited for orchestrating the largest Ponzi scheme in history, managed to swindle his clients, not because of the absence of appropriate regulation but because sound supervision was lacking.[448]

However, it is good to acknowledge that supervision does not operate in a vacuum; the design of the institutional structure influences how supervision is undertaken. In particular, the design of the institutional structure determines the allocation of responsibilities and powers among different financial regulators and how they interact with one another.

An institutional structure whose design is integrated can improve the coordination and cooperation between regulatory agencies, leading to more effective monitoring and enforcement of regulations. For example, if the institutional structure's design has clear lines of authority and well–defined responsibilities for each regulator, it can reduce confusion and duplication of efforts, leading to more efficient monitoring and enforcement.

On the other hand, if the design is fragmented, lacks clear lines of authority, or has overlapping responsibilities, it can lead to confusion and conflicting enforcement actions, undermining the effectiveness of supervision. Additionally, as earlier

447 See Centre for Analysis of Risk and Regulation 'Managing regulatory failure' available at *http://www.lse.ac.uk/accounting/Assets/CARR/documents/Regulators–Forum/4.pdf* (Accessed 11 September 2022); RB Ahdieh 'Coordination and conflict: The persistent relevance of networks in international financial regulation' (2015) 78(4) *Law and Contemporary Problems* 75.

448 Moosa IA *Good regulation, bad regulation: The anatomy of financial regulation* (2016) 3.

specified, the design of the institutional structure can facilitate achieving some of the elements of supervisory capacity.

From the engagement with scholarly debates and various issues discussed above, it is submitted that the institutional structure's design is significant in the scheme of the frameworks for financial regulation. This is because it influences, shapes, and directs how the other frameworks may be implemented.

The institutional structure's design particularly determines how regulations for the financial system are created and how they are implemented and enforced through supervision. It also influences the ease with which the policy objectives of financial regulation are achieved. Furthermore, four key points can be summarised concerning the importance of the institutional structure's design.

First, the design of the institutional structure does not guarantee the effectiveness or efficiency of financial regulation. Arguing otherwise will amount to exaggerating the significance of the institutional structure's design. Apart from the effectiveness of the institutional structure's design, other conditions are necessary for the success of financial regulation. These include (1) the effectiveness of the other frameworks for financial regulation, (3) the availability of necessary supervisory capacity, and (2) the good quality of actual supervision. Accordingly, ensuring the effectiveness and efficiency of financial regulation is holistic as against a fragmentary intervention.

Secondly, although the design of the institutional structure does not guarantee the effectiveness or efficiency of financial regulation, it nevertheless contributes to or facilitates these objectives. The third point is that in the same way that the design of the institutional structure can facilitate the success of financial regulation, it can also make these objectives challenging to achieve. Lastly, and closely connected to the third point, the design of the institutional structure can either optimise or deoptimise the effectiveness of other frameworks for financial regulation.

To conclude, it is argued that even if the institutional structure's design does not qualify as the most important consideration in shaping the effectiveness and efficiency of financial regulation, it is one of the very important considerations when striving for these objectives. The relevance of the institutional structure in shaping the effectiveness and efficiency of financial regulation is therefore more than just a second–order issue.

The institutional structure's design is just as important as other frameworks for financial regulation and requirements for effective and efficient financial regulation. Accordingly, ensuring the effectiveness and efficiency of financial regulation is a holistic as against a fragmentary intervention, which incorporates various considerations.

Having emphasised the significance of the institutional structure's design in financial regulation, the next section delves into the options for achieving an effective design for the institutional structure and the implications of each option.

2.6. CONSIDERATIONS FOR REFORMING THE INSTITUTIONAL STRUCTURE TOWARDS INTRINSIC EFFECTIVENESS

From the discussions on the options for addressing the limitations of the sectoral model, unified model and twin peaks model in Sections 2.5.1 to 2.5.4, it becomes clear that there are at least two broad approaches that countries can explore to reform or modernise their institutional structures to make it more effective. These two options and the considerations for adopting either of them are discussed below:

2.6.1. Changing the institutional structure: From one model to another

The first approach involves changing from one type of institutional structure to another. For example, because the United Kingdom fared poorly against the GFC while using the unified model, it changed its institutional structure to the twin peaks model in the aftermath of the GFC.[449]

Notably, regulatory reform or modernisation efforts for institutional structures in recent decades have witnessed countries changing from the sectoral model to the unified or the twin peaks model.[450] Further, there have been cases of countries like the United Kingdom changing from the unified model to the twin peaks model. However, no

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449 Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 158–165.

450 Mensah S, BeInye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 11; Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 4; Čihák M & Podpiera R 'Integrated financial supervision: Which model?' (2008) 19(2) *The North American Journal of Economics and Finance* 135; Melecky M & Podpiera AM *Institutional structures of financial sector supervision, their drivers and emerging benchmark models* (MPRA Paper No. 37059, 2012) 4.

record exists of any country changing its institutional structure from the twin peaks or unified model to the sectoral model.[451]

Monkiewicz suggests that changing from the sectoral model to the unified or twin peaks model requires at least three main levels or aspects of integration.[452] First is institutional integration, which relates to unifying regulatory authorities. This process may entail internal shake–ups, including eliminating some interfering organisational units or adding others to cover new responsibilities. The second aspect is technical integration, which involves the unification or convergence of the supervisory toolkits used, such as models, processes and policies. Lastly, there is organic integration, which includes unifying the regulatory rules, principles and standards, thus providing a single legal framework.

Pellerin, Walter and Wescott discussed the factors that motivate and justify countries to transition from the sectoral model to the unified or twin peaks model.[453] These include to: (1) take advantage of economies of scale made possible by the consolidation of regulatory agencies, (2) eliminate the apparent overlaps and duplication that are found in a decentralised regulatory structure, (3) improve accountability and transparency of financial regulation, and (4) better adapt the regulatory structure to the increased prevalence of conglomerates in the financial industry.

Monkiewicz adds that changing the institutional structure could stem from the underwhelming performance of the current fragmented institutional design, particularly in the wake of a financial crisis or the prevalence of excessive fragmentation.[454] The author also notes that such change may reflect the appetite of countries to emulate reforms employed in their oversee benchmarking jurisdictions.

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451 Mensah S, Belnye F & Anane–Antwi et al *A comprehensive financial sector regulatory framework study for Ghana* (Department for International Development, 2018) 11; Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 8.

452 Monkiewicz J 'Integrated, consolidated or specialized financial markets supervisors: Is there an optimal solution?' (2007) 32(1) *The Geneva Papers on Risk and Insurance–Issues and Practice* 146–157.

453 Pellerin S, Walter JR & Wescott P 'The consolidation of financial regulation: Pros, cons, and implications for the United States' (2009) 95(2) *FRB Richmond Economic Quarterly* 121–160.

454 Monkiewicz J 'Integrated, consolidated or specialized financial markets supervisors: Is there an optimal solution?' (2007) 32(1) *The Geneva Papers on Risk and Insurance–Issues and Practice* 157–158.

Apart from the lack of consensus on the best model for the institutional structure, the debate on whether it is advisable for a country to change its institutional structure is similarly unsettled.[455] Gakeri, for example, cautions that changing from the sectoral model to other alternative models may not be the best option for all African countries.[456] According to him, most developed countries have moved away from the sectoral model due to the growing number of financial conglomerates in their financial systems.

Gakeri acknowledges that while it might be optimal to regulate financial conglomerates using the unified and twin peaks models, numerous financial conglomerates do not exist in most African countries. He suggests that instead of changing their institutional structure, African countries should prioritise finding ways of making their sectoral model more responsive to the needs of the financial system. A key learning point from Gakeri's argument is that conditions specific to a jurisdiction (especially the state of the development or changes in the financial system) should guide the choice of whether to change from the sectoral model to another model.

Schmulow reinforced Gakeri's view in some way. Schmulow spoke highly of the twin peaks model, stating it is 'the best form of regulatory architecture.'[457] However, he goes on to caution that having the twin peaks model does not guarantee against a financial crisis. Schmulow refers to the Netherlands, which did not fare as well as Australia during the GFC, although both countries were using the twin peaks model.

Llewellyn's[458] view on the subject is not very far from that of Gakeri, and Schmulow, cited above. According to him, it is an illusion to believe that there is a single, superior institutional structure of financial regulation that applies to all countries.[459] He notes further that it is an illusion to think that any institutional structure is perfect, nor does it guarantee effective and efficient regulation and supervision of the financial system. He

455 See Chapter 2, Section 2.5.5.

456 Gakeri JK 'Financial services regulatory modernization in East Africa: The search for a new paradigm for Kenya' (2011) 1(16) *International Journal of Humanities and Social Science* 161–172.

457 Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 172; see also Schmulow A 'Who will be doing what under South Africa's new 'twin peaks' model' (2018) 10 *Finweek* 35.

458 Llewellyn DT *Institutional structure of financial regulation and supervision: The basic issues* (Paper presented at World Bank Seminar on Aligning Supervisory Structures with Country Needs, 2006) 7.

459 Llewellyn DT (2006) 7.

cautions that changing the institutional structure should never be considered 'a panacea or substitute for effective supervision.'[460] He maintains that the best institutional structure of financial regulation for a country depends on the structure of the country's financial system.

The United Kingdom's experience can be used to reinforce the point made by Llewellyn. In its efforts toward regulatory modernisation, the United Kingdom moved away from the sectoral model to the unified model, with the Financial Services Authority (FSA) as the mega regulator of the financial system.[461]

It has been suggested that the move to the unified model was perhaps rushed and may not have been well thought through.[462] This suggestion may be vindicated, given that the United Kingdom and its fully unified model poorly weathered the GFC.[463] In the aftermath of the GFC, the United Kingdom changed from the unified model to the twin peaks model following the passage of the Financial Services Act of 2012; this institutional structure has served it well ever since.[464]

Abrams and Taylor propose that before considering the complex option of changing to the unified or twin peaks model, policymakers should consider rectifying any shortcomings in their existing institutional structure.[465] They argue that changing the institutional structure will not guarantee the effective supervision of the financial system. Other studies also point to the need for countries to tread cautiously in their attempt to change to the unified or twin peaks model, given the risks and challenges

460 Llewellyn DT (2006) 7.

461 Davis H 'Integrated regulation in the United Kingdom and the lessons for others' in Carmichael J, Fleming A & Llewellyn D (eds) *Aligning financial supervisory structures with country needs* (2004) 238.

462 Carmichael J *The framework for financial supervision: Macro and micro issues* (BIS Policy Paper, 1999) 95.

463 Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 158.

464 Schmulow AD (2015) 158.

465 Abrams RK & Taylor MW 'Issues in the unification of financial sector supervisor' in Enoh C, Martson D & Taylor M (eds) *Building strong banks through surveillance and resolution* (2002) 147–149.

accompanying such a complex initiative.[466] Monkiewicz refers to these risks and challenges as 'potential hazards.'[467]

Notably, changing the institutional structure requires significant reforms to the regulatory framework, establishing new regulatory bodies and unifying technology, regulatory culture and philosophy. These activities can be costly and time–consuming. Other risks and challenges of changing the institutional structure include the risk: (1) of the change not being amenable to the political environment and the lack of political will to see to its implementation; (2) that regulation may deteriorate during the phase of transition; (3) that critical information will be lost; (4) of organisational disruption occasioned by staff existing, due to increased uncertainty that comes with such change; (5) of the new legislative regime being captured by interest groups; (6) of delays in completing the transitioning; and (7) of the new institutional structure struggling to be stable.

Mwenda advises that countries should address issues of reforming their institutional structure of financial regulation by having regard to 'their own economic, institutional, and political circumstances.'[468] He adds that in a country that has pressing financial and economic issues, these should be dealt with first before changing the institutional structure. He further acknowledges that some countries may not even have enough financial resources and well–trained human capital to implement an overhaul of the institutional regime.

From the literature reviewed and various arguments from scholars, it is submitted that when the existing institutional structure reveals shortcomings, the first point of call should not be to change the institutional structure. Instead, it may be more appropriate to explore reforms to address the gaps that are undermining the effectiveness of the institutional structure for conducting financial regulation. For example, instead of

466 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 48–53; Čihák M & Podpiera R 'Integrated financial supervision: Which model?' (2008) 19(2) *The North American Journal of Economics and Finance* 135; Taylor MW & Fleming 'An integrated financial supervision: Lessons of Scandinavian experience' 2000 *Finance & Development* 42; Podpiera R & Čihák M 'Is one watchdog better than three? International experience with integrated financial sector supervision' (2006) 56 *Czech Journal of Economics and Finance* 102.

467 Monkiewicz J 'Integrated, consolidated or specialized financial markets supervisors: Is there an optimal solution?' (2007) 32(1) *The Geneva Papers on Risk and Insurance–Issues and Practice* 160.

468 Mwenda KK *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 89.

changing from the sectoral model to the unified model to confront the emergence of financial conglomerates, a country could first explore (1) consolidated bank supervision and other regulatory integration measures, and (2) quasi–institutional integration through establishing a financial regulation coordinating body.

2.6.2. Retaining and enhancing the existing institutional structure

The second regulatory modernisation option involves improving the existing institutional structure through legal, regulatory, operational and institutional reforms to fill the gaps that make it ineffective without changing it. Godwin, Li and Ramsay describe this approach as 'enhancing the status quo.'[469]

The United States of America notably took this second approach following the GFC. Instead of changing its sectoral model as the United Kingdom did with its unified model, the Dodd–Frank Wall Street Reform and Consumer Protection Act was passed in 2010. The Act established two additional regulatory authorities: the Consumer Financial Protection Bureau (CFPB) and the Financial Stability Oversight Council (FSOC).[470]

The interventions implemented through the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 may have overcome some of the shortcomings of the country's sectoral model. Yet, some critics have insisted that it has not been optimal in dealing with all the inadequacies of the institutional structure.[471] These critics suggest that the reform has complicated the institutional regime; they insist that a change of the institutional structure is what is needed.

Generally, this second approach of modernising or reforming the institutional structure tends to be faster, cheaper and less complex when compared to changing the institutional structure. However, similar to the first option, this second approach also

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469 Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016) 20.

470 Calvo D, Crisanto JC & Hohl S et al *Financial supervisory architecture: What has changed after the crisis?* (FSI Insights on Policy Implementation No. 8, 2018) 30.

471 See generally Wilmarth Jr AE 'The Dodd–Frank Act: A flawed and inadequate response to the too–big–to–fail problem' (2010) 89 *Oregon Law Review* 951–1058; Baily MN, Klein A & Schardin J 'The impact of the Dodd–Frank Act on financial stability and economic growth' (2017) 3(1) *The Russell Sage Foundation Journal of the Social Sciences* 20–47; Gordon JN & Muller C 'Confronting financial crisis: Dodd–Frank's dangers and the case for a systemic emergency insurance fund' (2011) 28(1) *Yale Journal on Regulation* 151–212; Omarova ST 'Technology v technocracy: Fintech as a regulatory challenge' (2020) 6(1) *Journal of Financial Regulation* 75–124.

does not guarantee that all shortcomings of the institutional structure will be eliminated; the need to change the institutional structure may still arise.

It is submitted that if (1) reshaping the existing structure will not or does not (after implementation) address the gaps that make it ineffective, and (2) the gaps have negative implications for the smooth functioning of the financial system, development and its stability, it may be justified to explore changing the structure.

However, changing the institutional structure's design does not need only to be driven by the desire to avert risks or to respond to a crisis that exposes the weakness of the institutional structure. Changing the institutional structure's design can be justified to pursue a developmental agenda for the financial system and economy at large. This can be done if the changes are aligned with broader policy goals and are based on sound economic analysis. Importantly, in changing the institutional structure policymakers and regulators should ensure that there are necessary resources and capacity to implement the reform.

Generally, when changing the institutional structure is justified, it is imperative to examine the available options critically and thoroughly to arrive at the best choice for a country. Such examination is necessary to avoid the situation the United Kingdom found itself in with the unified model it first adopted before subsequently adopting the twin peaks model. In addition, it is important to consider the challenges, costs and risks associated with changing the institutional structure and find ways to mitigate them. Further, it is crucial that the decision to implement a structural change is supported by sufficient financial resources, technical capacity, and political will to ensure the successful execution and completion of the reform process.

2.7. CONCLUSION

This chapter has presented an understanding of financial regulation, what it involves, and the frameworks that drive its implementation. It has also explored how to ensure that financial regulation does not fail but succeeds. Among other requirements, it highlights that regulation needs to be capture–resistant, efficient, collaborative, proportional, and adaptive to support effective and efficient financial regulation. The need for effective regulatory coordination between regulatory authorities was also emphasised.

The chapter has further undertaken a systematic analysis of the requirements imperative for the soundness of the institutional structure for financial regulation. From the analysis, the chapter extends useful proposals to policymakers in establishing institutional regimes that are fit for purpose in a constantly evolving, complex, and interconnected financial system.

The chapter argues that the effectiveness of the institutional structure in contributing to effective and efficient financial regulation is not necessarily associated with whether it is designed or modelled as the sectoral model, unified model, or twin peaks model. Rather, an effective institutional structure for any country should, at the very least, embody the attributes of adaptability, comprehensiveness, efficiency and specialisation. These four requirements are conceptualised as the intrinsic effectiveness requirements.

The chapter explains that these four requirements can be achieved by either introducing piecemeal reforms to the existing structure or changing from the existing institutional structure to an entirely different model. However, it is further submitted that, due to various considerations, including the time, risks, complexity, and cost of changing the institutional structure, it may be better to prioritise piecemeal reforms when seeking to improve the effectiveness of the institutional structure.

The chapter emphasises that, for financial regulation to be successful, the effectiveness of the institutional structure needs to be complemented by the effectiveness of other frameworks for financial regulation. In addition, regulators should possess the necessary supervisory capacity. Lastly, supervision, which involves the actual application, monitoring, and enforcement of compliance with regulations, must be robust. These are considered peripheral effectiveness requirements, highlighting that an effective institutional structure serves as a means to an end, rather than the end itself.

The chapter maintains that while the design of the institutional structure may not be the most critical factor in shaping the effectiveness and efficiency of financial regulation, it is a crucial consideration when striving for these objectives.

As noted in Chapter 1, understanding the requirements that make the institutional structure effective for financial regulation generally is the first step in developing the requirements that apply specifically to the regulation of Fintech. Building on the four intrinsic effectiveness requirements from this chapter, the next chapter examines the requirements for the effectiveness of the institutional structure for regulating Fintech more specifically.

CHAPTER 3: FINTECH AND THE INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION: TOWARDS ACHIEVING SYNCHRONISATION

3.1. CHAPTER INTRODUCTION

The previous chapter advanced the attributes of adaptability, comprehensiveness, efficiency and specialisation that can facilitate the effectiveness of the institutional structure for financial regulation generally.[472] This chapter builds on these four requirements to draw the requirements that are necessary for the effectiveness of the institutional structure for Fintech regulation specifically. The question to be addressed is, therefore: How can the institutional structure be adaptive, comprehensive, efficient, and specialised in the context of Fintech?[473]

To answer this question, the chapter examines the following issues associated with Fintech and explores the institutional requirements that are needed to address them: (1) the changes that Fintech brings to the financial system,[474] (2) the regulatory challenges posed by Fintech,[475] (3) the cost of regulating Fintech,[476] and (3) the complexity of regulating Fintech.[477]

From discussing these issues, the chapter demonstrates that Fintech requires an integrated institutional structure rather than a fragmented one. In addition, Fintech requires other specific institutional arrangements that serve various purposes to be introduced to the institutional structure. This includes a Fintech regulation coordinating body, Fintech units, innovation hubs, regulatory sandboxes, a Fintech one–stop–shop, and a stakeholder advisory body. The chapter further argues that Fintech amplifies the need to leverage self–regulatory organisations (SROs) to complement the regulatory efforts of public regulators. These various requirements, together with the conceptual framework presented in Chapter 2, are used to identify areas for improvement within Nigeria's institutional structure in Chapter 5.

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472 See Chapter 2, Section 2.5.4.

473 This is the third sub–research question of the study.

474 This issue relates to the requirement on adaptability.

475 This issue relates to the requirement on comprehensiveness.

476 These issues relate to the requirements on efficiency.

477 These issues relate to the requirements on specialisation.

In addition to broadening the understanding of Fintech, the significance of the discussion in this chapter lies in the fact that research examining Fintech within the context of the institutional structure of financial regulation is still in its early stages. Furthermore, some dominant viewpoints advanced in extant literature on the subject have not been interrogated. Responding to this, the chapter not only highlights salient viewpoints that have been canvassed in literature, but also presents alternative perspectives to some of these viewpoints. This is done to deepen the debate on the subject.

Following this introduction, Section 2 highlights key operational aspects of Fintech, along with its opportunities and challenges. Sections 3, 4, 5 and 6 respectively delve into the changes that Fintech brings to the financial system, the regulatory challenges posed by Fintech, the cost of regulating Fintech, and the complexity of regulating Fintech. Each of these issues is discussed to derive the reforms they necessitate to the institutional structure. Building on the discussions in Sections 3, 4, 5, and 6, Section 7 streamlines the requirements that are crucial for the effectiveness of the institutional structure for regulating Fintech. Section 8 undertakes a theoretical assessment of the potential strengths and limitations of the sectoral model, unified model, and twin peaks model for regulating Fintech while Section 9 concludes.

3.2. OVERVIEW OF FINTECH ACTIVITIES AND FIRMS

Before discussing the requirements for aligning the institutional structure with the peculiarities of Fintech, this section provides an overview of key Fintech–related services and products, their enabling technologies, and the firms offering these services and products. Additionally, it discusses the opportunities and risks associated with Fintech.

It was explained in Chapter 1 that Fintech embodies two main features: innovation and disruption.[478] Fintech broadly entails the application of technology to finance.[479] However, the term is more narrowly associated with the unique array of financial

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478 See Chapter 1, Section 1.2.3.

479 See Allen F, Gu X & Jagtiani J 'A survey of Fintech research and policy discussion' 2021 *Review of Corporate Finance* 259. Also see Gimpel H, Rau D & Röglinger M 'Understanding Fintech start–ups–A taxonomy of consumer–oriented service offerings (2018) 28(3) *Electronic Markets* 245.

services and products, commonly called Fintech activities.[480] These activities are provided by firms, often called Fintech firms, that heavily rely on technology not only for their regular business operations but also as a fundamental point for consumers to access their services.[481]

There is a lack of clarity and consensus on the exact financial services and products that qualify as Fintech activities and those that do not.[482] This study, however, adopts the taxonomy of Fintech activities incorporated in the Fintech tree conceptual framework developed by Ehrentraud, Ocampo and Garzoni et al.[483]

The Fintech tree framework simplifies the multifaceted aspects of Fintech into three main areas. First, the financial services or products that are technologically enabled and qualify as Fintech activities. Secondly, the technologies that enable the provision of these Fintech activities (enabling technologies). And thirdly, the government measures and initiatives that support the development of Fintech activities and the use of enabling technologies. These measures and initiatives are denoted as the policy enablers of Fintech.

As depicted in Figure 5, the Fintech activities, denoted by the leaves in the Fintech tree framework, include digital banking, equity crowdfunding, loan crowdfunding, robo–advice, digital payment services, E–money services (incorporating mobile money), insurance technology (Insurtech), and crypto assets (also called cryptocurrencies). Apart from these, other frequently acknowledged Fintech activities are digital or online lending, Peer–to–peer (P2P) invoice finance, pension technology (Pensiontech), and central bank digital currencies (CBDCs).[484] These various Fintech

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480 Financial Stability Board *Financial stability implications from Fintech: Supervisory and regulatory issues that merit authorities' attention* (FSB Report, 2017) 7.

481 See Feyen E, Frost J & Gambacorta L et al *Fintech and the digital transformation of financial services: implications for market structure and public policy* (BIS Paper 117, 2021) vi, where the authors explain that Fintech firms is one that specialises in offering digital financial services (DFS) to consumers or enables other providers to offer DFS. The authors further note that while many Fintech firms are relatively new to the financial sector, others are by now well–established.

482 Bogusz CI & Andersen JV 'The boundaries of Fintech: Data–driven classification and domain delimitation' in Stylianou K, Iacovides K & Lundqvist M (eds) *Fintech competition law, policy, and market organisation: Swedish studies in European law volume* (2023) 17 (explaining that this lack of clarity stems from 'a question whether Fintech is just an instance of digital technologies being used to deliver (new) financial services, or if there is something more to the phenomenon.')

483 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 6.

484 See Lee I & Shin YJ 'Fintech: Ecosystem, business models, investment decisions, and challenges' (2018) 61(1) *Business Horizons* 35–46; Leong K & Sung A 'Fintech (financial

activities are explained in Chapter 4 and used to simplify an understanding of the regulatory regime for Fintech in Nigeria.

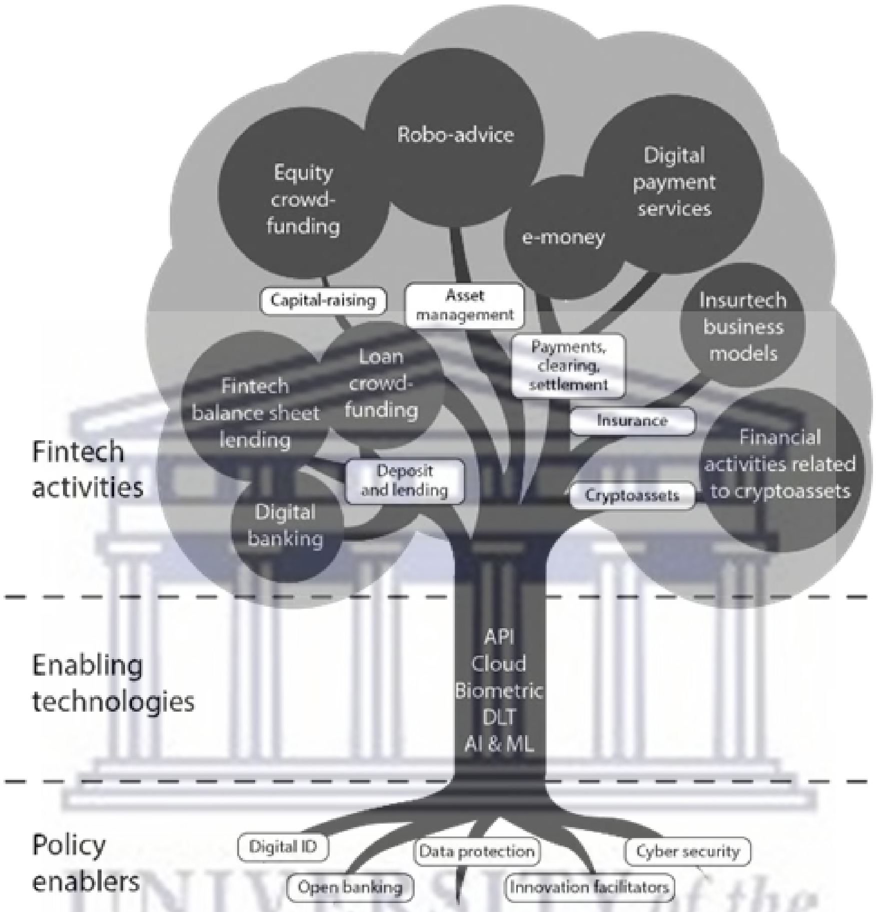

Figure 5: Fintech tree conceptual framework[485]

The branches in Ehrentraud, Ocampo and Garzoni et al's Fintech tree illustrate that Fintech activities span various facets of financial services. These areas include capital raising, deposit and lending, asset management, payments, clearing, settlement, and insurance.

What is central to the various Fintech activities is that they are supported by technology. According to Ehrentraud, Ocampo and Garzoni et al technology is the 'backbone' of Fintech activities.[486] This explains why the authors place technology at

technology): What is it and how to use technologies to create business value in Fintech way?' (2018) 9(2) *International Journal of Innovation, Management and Technology* 74–78.

485 Ehrentraud J, Ocampo DG & Garzoni L et al (2020) 7.

486 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 6.

the trunk of the Fintech tree framework, highlighting how it supports Fintech activities (the leaves).

Some of the technologies that enable Fintech activities include blockchain,[487] Artificial Intelligence (AI),[488] Machine Learning (ML),[489] Application Programming Interface (API),[490] Internet of Things (IoT),[491] Cloud Computing,[492] Big Data,[493] cryptography,[494] and biometric technology.[495] These technologies are sometimes considered the innovative, new, sophisticated or digital technologies that enable Fintech activities.[496] However, besides them, there are other older technologies like mobile telephones and the internet that also support Fintech activities.[497]

The firms that undertake Fintech activities can be brought under the following three broad categories: (1) Fintech startups, (2) technology finance companies/big technology companies (Techfins/Bigtechs), and (3) incumbent or traditional financial institutions.[498] In the past, the terms 'Fintech firms' and 'Fintech companies' were used

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487 A decentralised and secure digital ledger technology that records and verifies transactions across multiple computers, ensuring transparency and immutability.

488 AI involves the simulation of human intelligence processes by machines, often involving tasks like learning, reasoning, problem–solving, and decision–making.

489 ML is a subset of AI that enables systems to learn from data and improve their performance without explicit programming.

490 API constitute a set of rules and protocols that allow different software applications to communicate and interact with each other, enabling seamless integration and data exchange.

491 IoT is more of a concept that actually a technology. It can be considered as a network of interconnected physical devices and objects (such as sensors, appliances, vehicles) embedded with technology that enables them to collect and exchange data.

492 CC involves the delivery of computing services (such as storage, processing power, software) over the internet, allowing users to access resources remotely and on–demand.

493 BD is used to refer to large volumes of structured and unstructured data that are too complex to be processed by traditional data management tools, often requiring advanced analytics for insights.

494 These are techniques for secure communication through the use of codes and mathematical algorithms to safeguard information.

495 These are dentification and authentication methods based on unique physical or behavioural characteristics of individuals, such as fingerprints, facial recognition, or voice patterns.

496 Asian Development Bank *Fintech policy tool kit for regulators and policy makers in Asia and the pacific* (ADB Research Paper, 2022) 8.

497 Mobile phones serve as ubiquitous devices that facilitate transactions, transfers, and payments through mobile banking applications, mobile wallets, and mobile money services. On the other hand, the internet enables online banking, digital lending, crowdfunding, and investment platforms, among others.

498 See Knewtson HS & Rosenbaum ZA 'Toward understanding Fintech and its industry' (2020) 46(8) *Managerial Finance* 1048 (defining Fintech firms as firms that primary use sophisticated technological solutions in their business model, to provide a financial product or financial service). See also Kola–Oyeneyin E, Kuyoro M & Olanrewaju T *Harnessing Nigeria's Fintech potential* (McKinsey & Company Report, 2020) 1 (defining Fintech as 'technological innovation in the

interchangeably with or restrictively to refer to only Fintech startups.[499] However, they are now commonly used more broadly to include traditional financial institutions and Techfins.[500]

Fintech startups, also commonly called Fintechs, are entrepreneurial ventures that identify areas where traditional financial institutions perform poorly or do not perform at all due to regulatory hurdles or a lack of focus on digital customer services.[501] They develop technology–enabled financial services solutions to address these issues with the goal of selling the solution directly to customers or to incumbent firms. Alternatively, they may position themselves for acquisition by another firm.

In comparison to traditional financial institutions and Techfins, Fintech startups tend to be smaller, dispersed and have a more focused scope of service offerings.[502] Additionally, they are typically quicker in adapting to market trends and customer needs compared to traditional financial institutions. According to a report by Boston Consulting Group, there are about 32,000 Fintech startups operating globally.[503] The same report states that in 2021, Fintech startups accounted for about 9 per cent of the total valuations within the global financial services sector. Further, their public valuations reached an impressive US$1.3 trillion.

However, it must be clarified that the term 'startups' in Fintech startups does not necessarily mean that these firms are small in terms of operations, financial strength, or market reach. Some so–called FinTech startups have scaled significantly, achieving the status known as 'unicorns,' which refers to companies valued at US$ one billion

prevailing model of delivering financial services, covering different types of players (incumbents, startups, technology companies, etc.) and an array of business models (B2B, B2C, etc').

499 Evans J & Browning S *Fintech: A guide to financial technology* (House of Commons Library, Briefing Paper, No. 9150, 2021) 4.

500 See Knewtson HS & Rosenbaum ZA 'Toward understanding FinTech and its industry' (2020) 46(8) *Managerial Finance* 1048 (defining Fintech firms as firms that primarily use sophisticated technological solutions in its business model, to provide a financial product or financial service).

501 Zetsche DA, Buckley RP & Arner DW et al *From Fintech to Techfin: The regulatory challenges of data–driven finance* (EBI Working Paper Series, 2017) 9.

502 Magnuson W 'Financial regulation in the bitcoin era' (2018) 23(2) *Stanford Journal of Law, Business and Finance* 163.

503 Boston Consulting Group *Global Fintech 2023: Reimagining the future of finance* (2023) 4.

or more.[504] Fintech startups that have achieved such a level of growth can also be more fittingly called 'Fintech scaleups.'

Techfins/Bigtechs operate in technology–based business areas, including telecommunications (e.g., Vodafone, Airtel, MTN, Safaricom), search engines (e.g., Google), e–commerce platforms (e.g., Amazon, Alibaba), and social media services (e.g., Meta, Twitter/X).[505] These companies leverage the data generated by their existing customer base from these businesses to expand into the financial services sector.[506] Unlike Fintech startups and traditional financial institutions, which start with financial services from the onset, Zetsche, Buckley and Arner explain that Techfins/Bigtechs 'start with technology and data and add financial services to their value–chain.'[507] They are increasingly involved in providing Fintech–related services in areas such as payment solutions, credit extension, insurance, and savings.[508] They engage in these services either alone or through collaborations with Fintech startups and traditional financial institutions.

Traditional or incumbent financial institutions, that have been operating in the financial sector for decades before the emergence of Fintech startups and Techfins/Bigtechs, are also increasingly being involved in Fintech activities.[509] For instance, mobile money services are popularly offered by mobile network operators (Telco–led model).[510] However, traditional banks (Bank–led model) can also offer these services through collaborating with mobile network operators.[511]

504 Cocheo S 'What is a 'Fintech unicorn'? (And why should banks care?)' available at *https://thefinancialbrand.com/news/Fintech–banking/what–is–a–Fintech–unicorn–and–why–should–banks–care–134422/* (Accessed on 21 August 2023).

505 O'Hanlon S, Chishti S & Bradley B et al *Fintech for dummies* (2020) 21; Zetsche DA, Buckley RP & Arner DW et al *From Fintech to Techfin: The regulatory challenges of data–driven finance* (EBI Working Paper Series, 2017) 9;.

506 Zetsche DA, Buckley RP & Arner DW et al (2017) 9.

507 Zetsche DA, Buckley RP & Arner DW et al (2017) 9. See Özyıldırım C 'The differences Between Fintech and Techfin' *https://www.halkbank.com.tr/en/about–halkbank/discover/The–Differences–Between–Fintech–and–TechFin.html* (Accessed on 21 August 2023).

508 Carstens A *Big tech in finance and new challenges for public policy* (SUERF Policy Note Issue No. 54, 2019) 1–4.

509 World Bank Group *How regulators respond to Fintech: Evaluating the different approaches – Sandboxes and beyond* (2020) v; Madir J 'Introduction–What is Fintech?' in Madir J (ed) *Fintech: Law and regulation* (2019) 4.

510 Madise S *The regulation of mobile money: Law and practice in sub–Saharan Africa* (2019) 5.

511 Madise S (2019) 5.

Generally, traditional financial institutions have realised the need to adopt technology in their operations to remain competitive in today's digital financial landscape. They are also collaborating with Fintech startups and Techfins to leverage their technology and business models to provide enhanced digital services to their customers.

Fintech is the hottest topic in finance today.[512] Part of the reason for this is because of the opportunities that Fintech, through the various Fintech activities, enabling technologies, business models and Fintech firm, present. These benefits are particularly relevant for developing countries like Nigeria.[513]

Fintech offers a notable advantage in enhancing financial inclusion for individuals and small and medium–sized enterprises (SMEs) who are typically excluded by the formal segment of the financial system.[514] As some countries make financial inclusion a legislative objective for their financial regulators, the importance of Fintech becomes even more elevated.[515] For example, South Africa's Financial Sector Regulation Act 9 of 2017 explicitly incorporates financial inclusion as one of the objectives that the law aims to achieve.[516] The Act also mandates the Prudential Authority and Financial Sector Conduct Authority to respectively support and promote financial inclusion.[517]

Beyond financial inclusion, Fintech has the potential to enhance the efficiency of financial services. Traditional finance typically suffers from inefficiencies such as high transaction costs and slow processing times. Fintech has the potential to enhance the

512 Omarova ST 'New tech v new deal: Fintech as systemic phenomenon' (2019) 36(2) *Yale Journal on Regulation* 735.

513 For these advantages, generally see Vučinić M 'Fintech and financial stability potential influence of Fintech on financial stability, risks and benefits' (2020) 9(2) *Journal of Central Banking Theory and Practice* 43–66; Ryu HS *Understanding benefit and risk framework of Fintech adoption: Comparison of early adopters and late adopters* (Proceedings of the 51st Hawaii International Conference on System Sciences, 2018) 3864–3873; Expert Group on Regulatory Obstacles to Financial Innovation (2019) 10; Sahay MR, von Allmen MUE & Lahreche MA *The promise of Fintech: Financial inclusion in the post Covid–19 era* (2020) 19.

514 According to the World Bank, financial inclusion means that 'individuals and businesses have access to useful and affordable financial products and services that meet their needs – transactions, payments, savings, credit, and insurance –delivered in a responsible and sustainable way.' See https://www.worldbank.org/en/topic/financialinclusion/overview (Accessed on 3 September 2022).

515 Hassouba TA 'Financial inclusion in Egypt: The road ahead' 2023 *Review of Economics and Political Science* 2 (observing that financial inclusion is 'one of the most important and widespread financial concepts since the global financial crisis 2008').

516 s 7(1)(f) of the Financial Sector Regulation Act.

517 s 34(1)(e) & s 58(1)(e) of the Financial Sector Regulation Act.

efficiency of financial services by streamlining processes, reducing costs, and improving the speed and convenience of financial transactions.

Furthermore, Fintech can foster competition within financial systems. In some developing countries, the financial system may be dominated by a few players, often traditional banks. This can limit consumer options and foster uncompetitive costs for financial services. Fintech activities like mobile money, digital banking, and peer–to–peer finance platforms introduce competition in the financial system. They do this by providing alternative choice for consumers and lowering cost of financial services.

The International Monetary Fund (IMF) and the Word Bank Group (WBG) emphasise in the Bali Fintech Agenda that Fintech has the potential to promote economic growth and alleviate poverty by enhancing financial development, inclusion, and efficiency.[518] They encourage countries to adopt measures to fully unlock the advantages of Fintech. According to the IMF and WBG, these advantages include expanding access to financial services, promoting financial inclusion, strengthening financial markets, and enhancing cross–border payment.

In the past countries competed to be financial centres and financial hubs. Today, countries are competing to become Fintech hubs.[519] To achieve this goal, countries are adopting various policy measures to nurture the growth of their Fintech sector. These measures are highlighted by Ehrentraud, Ocampo and Garzoni et al in their Fintech tree framework.[520] They include establishing national broadband networks, digital identity systems, and legal frameworks for data protection and cybersecurity.

518 International Monetary Fund & World Bank Group *The Bali Fintech Agenda: A blueprint for successfully harnessing Fintech's opportunities* (IMF Policy Paper, 2018) 7.

519 Rupeika–Apoga R & Thalassinos EI 'Ideas for a regulatory definition of Fintech' (2020) 8(2) *International Journal of Economics and Business Administration* 137.

520 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 10.

Other measures include adopting open banking[521] and innovation facilitators like innovation hubs,[522] regulatory sandboxes,[523] and innovation accelerators.[524]

However, although Fintech offer numerous benefits to consumers, the financial system, and the broader economy, it also carries inherent risks that can compromise the policy objectives that financial regulation aims to achieve and maintain.[525] These risks will particularly materialise if the regulatory challenges associated with Fintech, such as regulatory underlap, arbitrage, inconsistency, duplication, and coordination failure, are not mitigated.

One of the most significant concerns with Fintech is consumer protection.[526] As Fintech activities often involve collecting and processing the personal and financial data of consumers, they raise consumer protection concerns in the areas of data privacy and cybersecurity.[527] Financial crime is another major risk associated with Fintech as some Fintech activities can be exploited for tax evasion, money laundering and even terrorist financing.[528]

Fair competition can also be undermined by the activities of Fintech startups and Techfins.[529] As these Fintech firms operate in regulatory grey areas, they may have

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521 Open banking is a regulatory initiative that requires traditional financial institutions, especially banks, to securely share the data of financial consumers in their custody to third–party companies (like Fintech firms) usually through APIs.

522 This is a platform through which Fintech firms can engage with the financial regulator as well as with each other to share information and experiences.

523 Regulatory sandboxes allow innovators to test their products and services in a controlled environment under the oversight of a regulator before they are fully launched to the public.

524 These are programmes that provide Fintech firms with access to expertise, funding, and other resources to help them to rapidly develop and scale innovative ideas and products.

525 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 4.

526 Magnuson W 'Financial regulation in the bitcoin era' (2018) 23(2) *Stanford Journal of Law, Business and Finance* 175–180

527 See Al Duhaidahawi HMK, Zhang J & Abdulreza MS et al 'Analysing the effects of Fintech variables on cybersecurity: Evidence from Iraqi Banks' (2020) 9(6) *International Journal of Research in Business and Social Science* 123–133. Also see Beebeejam A 'Privacy laws in the context of Fintech industry in Mauritius: A comparative study' (2019) 3(3) *International Journal of Law, Humanities & Social Science* 23–37.

528 Faccia A, Moşteanu NR & Cavaliere LPL et al *Electronic money laundering, the dark side of Fintech: An overview of the most recent cases* (Proceedings of the 2020 12th International Conference on Information Management and Engineering, 2020) 29–34; Sulieman DM & Salleh F 'Anti–money laundering risk posed by mobile money services in Sub–Saharan Africa' (2020) 7(11) *Journal of Critical Reviews* 568–571

529 For an extensive discourse on the competition issues that arise with Fintech, see Carmona AF, Lombardo AG & Pastor RR et al *Competition issues in the area of financial technology* (Study Requested by the European Parliament's Committee on Economic and Monetary Affairs, 2019) 48–79.

an unfair advantage over traditional financial institutions that are subject to more stringent regulations. This could result in an uneven playing field and lead to market distortions.

Further, while Fintech can facilitate financial inclusion, the pace of digitisation associated with it can create the danger of some consumer groups being left behind.[530] This risk is especially pronounced in countries where there is low digital literacy or underdevelopment of the underlying infrastructure for digital financial services. Tok and Heng write about the 'dark side' of Fintech which according to the authors, includes the risk of Fintech excluding certain vulnerable groups in society as well as fostering algorithmic biases, and predatory lending practices. They list the vulnerable groups that can be excluded by Fintech to include women, the aged, the poor, and minority groups.[531] Tok and Heng further observe that the Covid–19 crisis has increased the use of digital financial services, and this could exacerbate the risks of exclusion, algorithmic biases, and predatory lending practice associated with Fintech. The authors further claim that individuals without access to digital payments or deposit accounts may be excluded from government support delivered through government–to–person (G2P) payments.

Finally, Fintech poses a risk to financial stability.[532] This risk stems from the interconnectedness of Fintech startups and Techfins/Bigtechs with traditional financial institutions because they collaborate.[533] Further, new Fintech developments might become systemic due to network effects arising from the provision of financial services by Fintech startups and Techfins/Bigtechs.[534]

Generally, the various risks of Fintech make it necessary for policymakers and regulators to ensure that their financial regulatory frameworks are adapted to Fintech.

530 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 9.

531 Tok YW & Heng D *Fintech: Financial inclusion or exclusion?* (IMF Working Paper No. 22/80, 2022) 8.

532 The following papers discuss the systemic risk posed by Fintech ST Omarova 'Fintech and the limits of financial regulation: A systemic perspective' in I Chiu & D Deipenbrock (eds) *Routledge Handbook of Financial Technology and Law* (2021) 44–61; Wonglimpiyarat J 'Fintech banking industry: A systemic approach' (2017) 19(6) *Foresight* 590–603; Franco L, Garcia AL & Husetovic V et al *Does Fintech contribute to systemic risk? Evidence from the US and Europe* (ADBI Working Paper 1132, 2020) 3–5.

533 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 4.

534 Bains P & Wu C (2023) 4.

This alignment is not only crucial for managing the potential risks that Fintech poses but also for unlocking the potential opportunities it presents.[535]

With this background, Sections 3.3 to 3.6 examine the requirements that are necessary for aligning the institutional structure with essential aspects of Fintech, while Section 3.7 provides a summary of the requirements derived for the examination. These requirements are determined by considering the changes that Fintech brings to the financial system, the regulatory challenges posed by Fintech, as well as the cost and complexity of regulating Fintech.

3.3. CHANGES OCCASIONED TO THE FINANCIAL SYSTEM BY FINTECH

Taylor, Wilson and Holttinen et al emphasise the need for the institutional structure to be adapted to Fintech to facilitate mitigating the challenges posed by Fintech.[536] It is submitted that a clearer understanding of how the institutional structure should adapt to Fintech can be drawn by considering the changes that Fintech introduces to the financial system.

Magnuson confirms that Fintech has brought about significant changes across various aspects of the financial system. These changes are reflected in the modifications to how banking services are delivered, methods of raising capital, and the very concept of money itself.[537] The author proposes that these changes necessitate a comprehensive 'reconceptualization of financial regulation in an era of technology–enabled finance.'[538] Magnuson's proposal aligns with Zeidy's observation that, as Fintech alters financial service attributes and market structures, financial regulation must adapt to remain effective.[539]

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535 See He MD, Leckow MR & Haksar MV et al *Fintech and financial services: Initial considerations* (2017) 14. See also Reddy E & Lawack V 'An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies' (2019) 31(1) *South Africa Mercantile Law Journal* 2.

536 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 1–9.

537 Magnuson W 'Regulating Fintech' (2018) 71(4) *Vanderbilt Law Review* 1167.

538 Magnuson W (2018) 1167.

539 Zeidy IA *the role of financial technology (Fintech) in changing financial industry and increasing efficiency in the economy* (Common Market for Eastern and Southern Africa Special Report, 2021) 13.

Omarova discusses the changes that Fintech has occasioned in the financial system more extensively than Magnuson did.[540] The eminent scholar identifies and extensively discusses five key areas of changes, which are summarised as follows. First, Fintech has contributed to the expansion and diversification of the financial system. This is evidenced by the increasing number, variety, and interconnectedness of financial service providers, financial products and services, and consumers of such offerings. Secondly, Fintech has facilitated finance to be faster and more cost–effective. Thirdly, Fintech has transformed the nature of financial decision–making by placing computer programming and technical data analysis at the core of this process. The fourth change is that Fintech has resulted in reduced transparency and manageability within the financial system. Lastly, Fintech is blurring the legal and regulatory lines separating various global financial systems, and boundaries among different segments of financial markets. Likewise, it is tying financial systems to non–core financial sectors of the economy.

From the changes discussed by Omarova, at least three key areas with implications for the institutional structure can be identified. The first area pertains to decentralisation and disintermediation within the financial system. The second area relates to the blurring of industry and regulatory boundaries. The third area concerns the emergence of a new ecosystem of financial services providers, consumers and other industry stakeholders, which is simply the Fintech ecosystem.

An overview of the changes and the specific institutional arrangements they necessitate are discussed in the following Sections 3.3.1 to 3.3.3.

3.3.1. Decentralisation and disintermediation

The financial system has traditionally been centralised, meaning that financial institutions in the system are under government regulation.[541] Financial regulators rely on these institutions as gateways or points of control to protect consumers and maintain financial stability.[542]

540 Omarova ST 'Technology v technocracy: Fintech as a regulatory challenge' (2020) 6(1) *Journal of Financial Regulation* 87–95.

541 For a detailed discussion on the meaning of centralisation in the financial system see generally Rejeb A, Rejeb K & Keogh JG 'Centralized vs. decentralized ledgers in the money supply process: A SWOT analysis' (2021) 5(1) *Quantitative Finance and Economics* 40–66.

542 Knight B *Fintech: Who regulates it and why it matters* (Milken Institute Center for Financial Markets, 2016) 3.

However, Fintech activities, such as crypto assets (or cryptocurrencies as they are more commonly called) that utilise blockchain, have the potential to bypass the centralised structure of the financial system.[543] While these decentralised Fintech activities can lead to a more transparent and accessible financial system, they also pose significant challenges. Notably, the anonymity and pseudonymity provided by decentralised Fintech activities can be exploited for money laundering, terrorist financing, tax evasion, and other illicit purposes.

Closely related to decentralisation, Fintech has led to more disintermediation in the financial system. Traditionally, financial intermediation was facilitated by institutions such as banks, insurance companies, securities firms, and pension funds.[544] Fintech has caused disintermediation — the exclusion or bypassing of the traditional intermediaries — by creating solutions that connect lenders and borrowers directly.[545] Fintech enables peer–to–peer services in the areas of debt financing, equity financing, and even insurance.

According to Lehmann, in the context of Fintech, disintermediation means that 'new technologies reduce the number of middlemen that are necessary to conduct a financial transaction.'[546] He argues that Fintech establishes direct contact between the consumer and the financial service. He uses the example of cryptocurrency to explain this concept. Unlike traditional fiat currencies, cryptocurrency operates without a central issuing authority, allowing users to transfer it directly without relying on any firm.

It is observed that a potential benefit of Fintech disintermediation is that it can facilitate access to credit and other financial services for consumers who may not have been able to obtain these services through traditional intermediaries. Furthermore, such services come at a lower cost as the fees and overheads charged by traditional intermediaries are eliminated. Other benefits of Fintech disintermediation include

543 Lehmann M 'Global rules for a global marketplace? – Regulation and supervision of Fintech providers' (2020) 38(1) *Boston University International Law Journal* 124.

544 See Armour J, Awrey D & Davies PL et al *Principles of financial regulation* (2016) 75. Also see Goldsmith RW *The flow of capital flow in the post–war economy* (1965) 28.

545 Brummer C & Gorfine D *Fintech: Building a 21st–century regulator's toolkit* (Milken Institute Center for Financial Markets, 2014) 4–6; Lehmann M 'Global rules for a global marketplace? – Regulation and supervision of Fintech providers' (2020) 38(1) *Boston University International Law Journal* 124.

546 Lehmann M 'Global rules for a global marketplace? – Regulation and supervision of Fintech providers' (2020) 38(1) *Boston University International Law Journal* 124.

increased competition, faster and more efficient transactions, and greater transparency in financial transactions.

However, if Fintech activities that result in disintermediation are not subject to oversight, like services offered by traditional intermediaries, they can create gaps that enable risks to the policy objectives of financial regulation. It is submitted that the risks associated with the decentralisation and disintermediation of the financial system by Fintech highlight the need for a comprehensive regulatory response in two major ways.

First, the regulatory framework for Fintech must be comprehensive, in that no Fintech activity or firm should go unregulated. Countries are pursuing a comprehensive regulatory framework for Fintech through the following main options.[547]

(1) existing regulations are being applied to Fintech activities without introducing new regulations;

(2) specific regulations are being developed for Fintech activities, which may involve the issuance of new regulations or amendments to existing ones; and

(3) some financial regulators are implementing regulations to explicitly prohibit certain Fintech activities, especially cryptocurrencies.

However, it is possible for financial regulators to respond to a Fintech activity by leaving the activity unregulated. Further, regulators are striving to improve their capacity to oversee Fintech activities by adopting supervisory technology (Suptech). Suptech refers to the use of technology by regulatory authorities to supervise regulated firms and ensure their compliance with regulation.[548]

Zeranski and Sancak observe that Suptech has the potential to enhance the supervisory capabilities of financial regulators.[549] This is because it enables them to digitalise cumbersome processes, use analytics tools, and protect the financial system from potential crashes and crises caused by Fintech activities.

As regulators are deploying Suptech for their supervisory functions, the regulated Fintech firms are increasingly using regulatory technology (Regtech) solutions.

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547 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 10.

548 Arner DW, Barberis J & Buckey RP 'Fintech, Regtech, and the reconceptualization of financial regulation' (2016) 37(3) *Northwestern Journal of International Law & Business* 381.

549 Zeranski S & Sancak IE 'Digitalisation of financial supervision with supervisory technology (Suptech)' (2020) 8 *Journal of International Banking Law & Regulation* 309–329.

Regtech simply involves regulated firms adopting technology to manage and simplify compliance with regulations.[550]

The growth of the Fintech sector has been described as being 'fast and furious.'[551] Given the sector's fast–paced evolution, it may be necessary to introduce changes to regulatory frameworks frequently. It is submitted that these changes can be achieved more quickly and easily through subsidiary legislation from financial regulators, rather than relying on primary legislation (laws passed by lawmakers or Parliament). The process for enacting primary legislation is typically lengthier and more cumbersome than that for subsidiary legislation. Subsidiary legislation is also more cost–efficient to introduce.

Further, it is crucial that financial regulators have unrestricted authority to formulate, issue, amend, and revoke subsidiary regulations under their enabling or governing legislation. In other words, they should have rule–making powers, and the exercise of these powers should be exempt from political interference and other unnecessary restrictions (regulatory independence).[552]

Apart from regulatory independence, it is also important for the regulator to have adequate powers to implement the regulations they have issued without undue interference (supervisory independence). These two aspects of independence will enable financial regulators to respond quickly to emerging challenges and opportunities in the Fintech sector. Quintyn and Taylor maintain that:

> Regulators who are able to set these rules independently are more likely to be motivated to enforce them. They are also 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.[553]

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550 See Butler T & O'Brien L 'Understanding RegTech for digital regulatory compliance' in in Lynn T, Mooney JG & Rosati P (eds) *Disrupting finance: Fintech and strategy in the 21st century* (2019) 85; Yang YP & Tsang CY 'Regtech and the new era of financial regulators: Envisaging more public–private–partnership models of financial regulators' (2018) 21(2) *University of Pennsylvania Journal of Business Law* 361.

551 Anan L, Krivkovich A & Nadeau M et al *Fintechs: A new paradigm of growth* (McKinsey & Company Paper, 2023) 1.

552 See Chapter 2.

553 Quintyn M & Taylor MW 'Should financial sector regulators be independent?' available at https://www.imf.org/external/pubs/ft/issues/issues32/index.htm (Accessed on 9 September 2023).

However, to ensure transparency and accountability in the process of rulemaking by financial regulators, it is useful that proposed regulations are published for public comments. These comments will then be considered by the regulator before finalising the regulatory framework. This public engagement mechanism aligns with the notion of collaborative regulation discussed in Chapter 2.[554] It helps to ensure that regulators are able to gain valuable insights from the public in developing regulations and makes the rulemaking process more democratic.

Further, drawing from the discussion on proportional regulation in Chapter 2, it is important that the regulatory requirements imposed on Fintech firms are proportionate to their risk profile and characteristics. It is observed that over–regulating Fintech firms, especially in their early stages, could stifle innovation and undermine the growth of the Fintech sector. Regulators should aim for the right balance between not inhibiting innovation, but also ensuring that the operations of Fintech firms do not engender risks to consumers, market integrity and financial stability.

The second aspect of comprehensiveness pertains to the regulatory strategy used to capture all Fintech firms within the regulatory net, as well as to monitor and enforce their compliance with the Fintech regulatory frameworks. In this regard, there are two broad options for regulatory strategy.[555] One option is public regulation, in which public or government regulators set and enforce regulations. The other option is private regulation, which involves SROs setting and enforcing regulations. The two are often used together, especially for securities regulation.

As explained in Chapter 2, SROs set and enforce regulations within the framework of either co–regulation or self–regulation.[556] In co–regulation, there is legislative backing for the establishment of SROs and their powers to issue and enforce rules and standards on their members. However, no such legislative backing exists under self–regulation.

Before the global financial crisis (GFC), there was widespread confidence in the effectiveness of private regulation. In fact, SROs used to dominate the regulatory

554 Chapter 2, Section 2.4.3.

555 Pan EJ 'Understanding financial regulation' 4 (2012) *Utah Law Review* 1897–1948.

556 Chapter 2, Section 2.2.1.

landscape in countries like the United Kingdom.[557] However, the GFC exposed significant weaknesses in private regulation. The crisis revealed that private regulation has limitations in containing risky behaviours, addressing conflicts of interest, and ensuring overall financial stability.[558]

It is commonly argued that the failure of SROs to effectively oversee and curb the risky practices of their members contributed to the GFC. For example, in a policy document from South Africa's National Treasury, it is pointed out that:

> The idea that the financial sector can successfully regulate itself has lost credibility in the aftermath of the crisis [GFC]. Even if individual financial institutions are able to improve risk management practices, regulators must proactively monitor changes in systemic risk.[559]

It is observed that GFC highlighted the need for proactive regulatory mechanisms to monitor and manage systemic risks that could have far–reaching impacts on the economy. This has led to a re–evaluation of regulatory strategies, with public authorities/government regulators taking on a more dominant role in shaping the institutional structure of most financial systems.

However, amid the risks, changes and regulatory challenges ushered in by Fintech, it becomes crucial to consider whether SROs can assist in facilitating the comprehensive regulation of Fintech firms. In other words, should the institutional structure expand to include more SROs being used for regulating Fintech firms?

Knight highlights the many advantages of relying on public regulation (and regulators) to regulate Fintech.[560] First, it can create a certain and predictable regulatory environment for Fintech to thrive. Additionally, public regulation can be used to impose both civil and criminal penalties on defaulters, thereby providing a robust enforcement

557 Gilligan G 'Historical touchstones in the regulation of the financial services sector: The evolution of financial services regulation' (1992) 1(1) *The International Journal of Regulatory Law & Practice* 63; Rawlings P, Georgosouli A & Russo C *Regulation of financial services: Aims and methods* (Queen Mary University of London, Centre for Commercial Law Studies, 2014) 8–24.

558 Brummer C & Yadav Y 'Fintech and the innovation trilemma' (2019) 107 *Georgetown Law Journal* 306; Born B 'Deregulation: A major cause of the financial crisis' (2011) 5 *Harvard Law & Policy Review* 231; Lehmann M 'Global rules for a global marketplace? –Regulation and supervision of Fintech providers' (2020) 38(1) *Boston University International Law Journal* 132.

559 National Treasury *A safer financial sector to serve South Africa better* (National Treasury Policy Document, 2011) 13.

560 Knight B *Fintech: Who regulates it and why it matters* (Milken Institute Center for Financial Markets, 2016) 5.

regime. Furthermore, the process of lawmaking for public regulations is often democratic and transparent, involving a wide range of private and public stakeholders. This can ensure that the regulatory framework for Fintech is balanced in that it is developed by considering the views and interests of all relevant stakeholders.

Nevertheless, it is submitted that while public regulation is indispensable for Fintech regulation, it should not be the exclusive regulatory strategy employed. Fintech has added to the complexities of the financial system. It has also increased the challenges and burdens that regulators face in achieving the policy objectives of financial regulation. Additionally, regulatory authorities might face constraints or limitations in resources, including personnel, funding, and expertise, that may hinder their capacity to effectively regulate Fintech. Given these issues, there is a compelling case for regulators and policymakers to explore how SROs can complement (not replace) public regulators in overseeing Fintech firms.

Several specific justifications support the exploration of SROs for regulating Fintech firms.[561] First, SROs may better understand their activities than financial regulators. This insight equips them to formulate tailored and well–informed regulations on Fintech activities. It also gives them an advantage in knowing and identifying the risks associated with their activities, especially at the micro–level.

Secondly, private regulatory schemes are easily adaptable to changes in the business environment.[562] SROs, being closely connected to the industry, may be faster in adjusting regulations to accommodate new developments. This adaptability is advantageous in ensuring that regulations are not outdated or enable underlap.

Thirdly, the cost of following private regulation is considered lower than the cost for following public regulation.[563] Fourthly, self–regulation is not typically territorially limited and can therefore be used on a global scale.

Finally, unlike traditional financial institutions which are often concentrated, some Fintech firms (especially Fintech startups) are usually disaggregated and dispersed.

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561 For a general discussion on the advantages of self–regulation, see International Organization of Securities Commissions (IOSCO) *Model for effective regulation* (2000) 1–14.

562 Lehmann M 'Global rules for a global marketplace? –Regulation and supervision of Fintech providers' (2020) 38(1) *Boston University International Law Journal* 118–156.

563 For other advantages see Brummer C & Yadav Y 'Fintech and the innovation trilemma' (2019) 107 *Georgetown Law Journal* 304.

The disaggregated and dispersed nature of Fintech startups may make it challenging for only financial regulators to oversee their activities adequately. As such, SROs may be useful in complementing the inadequacy of financial regulators.

Koonprasert and Mohammad propose that regulatory authorities should work closely with Fintech associations.[564] They note that these Fintech associations aim to promote cross–industry cooperation and usually comprise various actors in a country's Fintech ecosystem. These actors include incumbent financial institutions, Fintech startups, and financiers. The authors propose that these associations can play a vital role in representing the interests of the industry, acting as SROs, implementing codes of conduct, and working towards eliminating 'fly–by–night' operators.[565]

However, the adoption of private regulation (especially self–regulation) for regulating Fintech should be done with caution. As earlier highlighted, SROs have faced criticisms related to conflicts of interest. This conflict of interest stems from their financial ties to the very industries they regulate. Private regulation can also be captured. Private regulation may be captured if Fintech firms create regulations that only serve their interests or deliberately ignore risks arising from the activities of their members. Striking a balance between industry insight and impartial oversight is therefore crucial.

Omarova's recommendation on 'embedded self–regulation' and Knight's similar point on 'policing SROs' discussed in Chapter 2 are useful for dealing with these issues of conflict of interest and regulatory capture. It is also useful to institute mechanisms and frameworks for rewarding SROs that adhere to their regulatory objectives and sanctioning those that default on their objectives.[566]

Further, to ensure that SROs are useful in capturing Fintech firms in the regulatory net, it may be useful to make it mandatory for the firms to join these SROs as a prerequisite for licensing. This mandatory membership also fosters a sense of

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564 Koonprasert T & Mohammad AG *Creating enabling Fintech ecosystems: The role of regulators* (Alliance for Financial Inclusion Special Report, 2020) 14.

565 The term 'fly–by–night' is used to refers to individuals or businesses that operate in a hasty, unreliable, and often unscrupulous manner. They may engage in fraudulent activities, provide poor–quality products or services, or abruptly disappear after taking advantage of customers or investors. They typically prioritise short–term gains over sustainable business practices and fail to uphold ethical standards or regulatory requirements.

566 Magnuson W 'Regulating Fintech' (2018) 71(4) *Vanderbilt Law Review* 1221–1222 (explaining some ways that government can incentivise Fintech firms to engage in efficient self–regulation).

collective responsibility, ensuring that all Fintech firms under a specific SRO are committed to holding their members accountable as well as adhering to a consistent set of sector–specific standards.

Additionally, there is a need for caution on the regulatory functions assigned to SROs. One of the aspects of Fintech that has been discussed is its potential impact on financial stability. Private regulators cannot replace public regulators in addressing the systemic risks posed by Fintech. As Pan rightly observes, only government regulators are positioned to comprehensively monitor the overall condition of the financial system.[567]

A public regulator with a 360–degree view of the entire financial system is best suited for systemic regulation. Nonetheless, it is important to acknowledge that the effectiveness of systemic regulation depends on the synergy between micro–regulation and systemic regulation. Risks that can trigger systemic instability often surface during micro–regulation, before becoming evident in a systemic assessment. Therefore, while SROs may not be well–suited for systemic regulation in the Fintech sector, they can play a valuable role in supporting systemic regulation through micro–regulation.

Another regulatory function that may not be ideal for the public regulator to assign to the SRO is licensing. Licensing serves as a gatekeeper, ensuring that those entering the market have the necessary integrity, competence, and capacity to participate in the market. Any lapses in the licensing process could result in unqualified or unscrupulous firms gaining access to the market. Even if these firms are eventually removed from the market by revoking their licence, they might inflict damage and erode trust in the industry before their expulsion.

Public regulators are accountable to the public and entrusted with a broader mandate to safeguard the interests of all stakeholders, especially public interest. Given these and other considerations, they are better positioned to handle the role of licensing. Unlike SROs, which might be influenced by industry–specific concerns or conflicts of interest, public regulators are more likely to maintain the integrity of the licensing process.

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567 Pan EJ 'Understanding financial regulation' 4 (2012) *Utah Law Review* 1897–1948.

It is submitted that the role of SROs in Fintech regulation should mainly involve ongoing monitoring of the compliance of their members with regulatory requirements. They should also be mandated to promptly report cases of non–compliance to the public regulator for necessary enforcement actions. Additionally, SROs can contribute to consumer education, provide training for their members, and serve as a channel for submitting consumer complaints. It could also be beneficial for SROs to include consumer representatives as well as public regulator representatives on their boards to ensure a balanced representation of interests and prevent industry interests from dominating other concerns.

Indonesia serves as a practical example of how SROs can be used to complement the efforts of public regulators in overseeing Fintech firms. This has been particularly explored by the Asian country for the regulation of peer–to–peer (P2P) lending.[568] In response to the rapid growth of its P2P market and the need to safeguard the interests of borrowers and lenders alike, the Indonesia Financial Services Authority (Otoritas Jasa Keuangan) issued Regulation No. 77/POJK.01/2016.[569]

The Regulation No. 77/POJK.01/2016 covers requirements regarding licensing, interest rates and penalties, compliance, billing procedures, loan terms, customer complaint handling, and restrictions on access to personal data.[570] Notably, it also requires operators of P2P platforms to join an SRO designated by the Indonesia Financial Services Authority.[571]

In 2019, the Indonesia Financial Services Authority confirmed the appointment of the Indonesian Joint Funding Fintech Association (Asosiasi Fintech Pendanaan Bersama Indonesia) as an SRO that operators can join.[572] The Indonesian Joint Funding

568 As previously explained, P2P lending involves unsecured direct loans between lenders and borrowers through online platforms without the intermediation of traditional financial institutions.

569 See generally Solihati KD, Rizki M & Sari N 'The role of the government to improve financial literacy in efforts to prevent the use of illegal online loans' (2023) 21 *KnE Social Sciences* 670–687; Sugeng S, Tobing CI & Fajarwati R 'Indonesian Fintech: Business ecosystem and regulation' (2020) 5(2) *Diponegoro Law Review* 277–295; Subagiyo DT, Gestora LR & Sulistiyo S 'Characteristic of Illegal online loans in Indonesia' (2022) 3(1) *Indonesia Private Law Review* 69–84.

570 Gladden M 'Authority of Asosiasi Fintech Pendanaan Bersama Indonesia (AFPI) in determining the amount of loan interest rates limit in peer–to–peer lending (P2P lending) business activities' (2020) 478 *Advances in Social Science, Education and Humanities Research* 742.

571 Gladden M (2020) 743.

572 Gladden M (2020) 743.

Fintech Association performs various functions vital to implementing and achieving the objectives of Regulation No. 77/POJK.01/2016.[573]

The code of conduct issued by the Indonesian Joint Funding Fintech Association sets the maximum limit for interest rates that can be charged on P2P lending platforms. However, some commentators have contested the legality of the association setting the maximum limit for loan interest rates. Gladden argues in this regard that the authority to set the maximum limit for loan interest rates rests exclusively with the Indonesia Financial Services Authority.[574] He further argues that the applicable laws do not permit the Indonesia Financial Services Authority to delegate this function to another body.

The Indonesian experience highlights several key considerations for policymakers and regulators interested in exploring the use of SROs to complement the responsibilities of public regulators in regulating the Fintech sector. These considerations include the following.

First, policymakers should consider the establishment of SROs tailored to specific Fintech activities. These associations, like the Indonesian Joint Funding Fintech Association, can focus on regulating and representing the interests of participants within specific segments of Fintech (such as P2P lending). This allows for targeted oversight and specialised expertise in regulating those activities.

Secondly, it is crucial to provide SROs with clear mandates and responsibilities. This includes defining their roles in setting standards, enforcing codes of conduct, monitoring compliance, and reporting defaults or misconduct to the public regulator. Clear mandates can help ensure transparency and accountability in the regulatory efforts of SRO.

Thirdly, the financial regulator should not delegate to the SRO a mandate that can, by law, only be directly performed by the regulator. The legality of an SRO's actions can be called into question if it is given a mandate that unjustifiably encroaches on the regulatory powers of the financial regulators. This can lead to legal challenges and

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573 It conducts public education campaigns, provides certifications for risk management, and enforces a mandatory code of conduct for P2P lending activities. Furthermore, the association maintains an online registry of registered lenders and operates a consumer complaint centre. It reports all identified cases of misconduct in business practices by members to the Indonesia Financial Services Authority for appropriate action.

574 Gladden M (2020) 742–747.

uncertainties that might undermine the credibility and effectiveness of the SRO–regulatory option.

Fourthly, public regulators should establish clear mechanisms for communication and reporting between SROs and the regulators. This includes defining channels for information exchange and reporting cases of non–compliance or misconduct. Effective communication fosters collaboration and enables prompt action when regulatory issues arise before they produce systemic effects.

Lastly, regulators may consider establishing incentives and sanctions to ensure SROs fulfil their mandates effectively. Incentives can encourage SROs to meet regulatory goals. On the other hand, sanctions can be imposed when SROs fail to meet their responsibilities, holding them accountable for any shortcomings and promoting adherence to regulatory standards.

3.3.2. Cross–industry and regulator convergence

Historically, financial conglomerates have been the primary institutional drivers of financial convergence within the financial system.[575] Notably, the convergence caused by financial conglomerates largely occurred within the financial system by blurring the demarcation between financial activities and institutions. Financial conglomerates intensified the need for regulatory coordination between financial regulators operating under institutional structures with multiple regulators. The choice of countries to change to either the unified model or twin peaks model has also been motivated by the emergence of financial conglomerates, among other considerations.[576]

Fintech has spurred various forms of integration not only within the financial system but also beyond it. In particular, Fintech is knitting the financial system with other sectors of the economy, including telecommunications, E–commerce, healthcare, agriculture, and transportation, among others. Further, Fintech intensifies issues around data protection, cybersecurity, digitalisation, competition, financial crimes, and

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575 Van den Berghe L & Verweire K 'Convergence in the financial services industry' (2001)26(2) *The Geneva Papers on Risk and Insurance. Issues and Practice* 173–183;

576 Di Giorgio G & Di Noia C *Financial regulation and supervision in the Euro Area: A four–peak proposal* (The Wharton Financial Institutions Centre, Working Paper Series No. 01–02, 2001) 2–3; Taylor C, Almansi AA & Ferrari A *Prudential regulatory and supervisory practices for Fintech: Payments, credit and deposits* (2019) 3; Madero D & Lumpkin S *A review of the pros and cons of integrating pension supervision with that of other financial activities and services* (International Organisation of Pension Supervisor Working Paper No 1, 2007) 9.

consumer protection which are also often within the purview of non–core financial regulators.[577]

Fintech is generally blurring the boundaries between financial regulator and non–core financial regulators.[578] Ahern explains that:

> Regulatory landscapes for [F]intech are multilayered. Often there is a domestic fragmented approach to [F]intech regulation with division among a variety of codes policed by individual sectoral regulators such as financial services and data protection regulators.[579]

Madise highlights two broad possible options for addressing the complexities of regulating Fintech activities which typically involve the participation of multiple financial and non–core financial regulators.[580] The first option is to establish a separate regulatory agency with specialist units within it responsible for performing most of the functions that the financial and non–core financial regulators separately perform with respect to the Fintech activity. Franck points to Dubai's Virtual Assets Regulatory Authority which is responsible for regulating virtual assets, virtual assets service providers and virtual assets activities as an example of such a separate regulatory authority for a Fintech activity.[581]

The second option Madise highlights is to improve how different financial and non–core financial regulators work together in regulating the Fintech activity. This option, among other things, demands improving regulatory coordination and addressing the inefficiencies in the supervisory capacity of the various regulators. Franck suggests that this option is more likely to be adopted because existing regulatory bodies may be reluctant to relinquish their regulatory powers to a new regulatory authority.[582]

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577 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 46.

578 Lai KP & Samers M 'Towards an economic geography of Fintech' (2021) 45(4) *Progress in Human Geography* 720–739.

579 Ahern D 'The role of sectoral regulators and other state actors in formulating novel and alternative pro–competition mechanisms in Fintech' in Stylianou K, Iacovides K & Lundqvist M (eds) *Fintech competition law, policy, and market organisation: Swedish studies in European law volume 17* (2023) 324.

580 Madise S *The regulation of mobile money: Law and practice in sub–Saharan Africa* (2019) 322–325.

581 Franck J 'Enforcing Fintech competition: Some reflections on institutional design' in Stylianou K, Iacovides K & Lundqvist M (eds) *Fintech competition law, policy, and market organisation: Swedish studies in European law volume 17* (2023) 287.

582 Franck J (2023) 286.

Madise acknowledges that both options have their advantages and disadvantages.[583] Establishing a separate agency would require a legislative process that demands time, resources, political will, and extensive consultations. Additionally, the agency would need funding for staff recruitment and operational costs. There is also a risk of industry capture if proper accountability and transparency measures are not in place. However, the separate agency approach offers the benefit of comprehensive, specialised, and expert regulation of the Fintech activity.

On the other hand, the second option may result in a less coherent regulatory framework, potentially leading to challenges in regulatory coordination and a lack of focused attention on regulating the Fintech activity. However, it is a more cost–effective, quicker, and easier–to–implement approach that is also less disruptive to the regulatory environment. Madise concludes that the first option is the more ideal option for mobile money regulation.[584] This opinion is built into his recommendation for Malaŵi to establish an autonomous mobile money regulatory unit within the Central Bank of Malaŵi. Madise proposes that the autonomous agency should have its own staff allocation and governance structure.

When the broader range of other Fintech activities is considered, especially in countries where there are traces of these activities, the suitability and feasibility of adopting the first option of establishing a separate agency for a Fintech activity diminishes. The reason for this is that the first option could entail establishing a separate agency for every other Fintech activity that is considered to be as complex to regulate as mobile money or virtual assets. This will not only require huge resources and significant time to implement but will also result in a very complex institutional setting with too many regulatory bodies.

Without going into the debate of whether other Fintech activities may be deserving of a separate agency like mobile money and virtual assets, it is submitted that, in the context of all Fintech activities, policymakers and regulators should prioritise the second option. To wit, they should improve regulatory coordination and address gaps in the supervisory capacities of the various financial and non–core financial regulators involved in regulating Fintech activities.

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583 Madise S *The regulation of mobile money: Law and practice in sub–Saharan Africa* (2019) 332–337.

584 Madise S (2019) 338–341.

Furthermore, as discussed in Sections 3.6 and 3.7 below, it is ideal for regulators to establish dedicated Fintech units within their organisational structures. This ensures that all the Fintech activities under their oversight receive dedicated and specialised attention. This recommendation aligns with Madise's recommendation for Malawi. They both suggest establishing dedicated regulatory units for Fintech while using existing regulators.

The recommendations, however, also differ in some respects. Madise's recommendation suggests a regulatory unit for a specific Fintech activity. This study, however, suggests one unit for all the Fintech activities within the oversight of a financial regulator. It must, however, be acknowledged that Madise's recommendation is premised on a focus on mobile money regulation. To the contrary, this study looks at Fintech regulation generally, of which mobile money regulation is only a component.

Generally, Fintech calls for increased regulatory coordination at three broad levels: within the various departments or units of a financial regulator; among different financial regulators; and between financial regulators and non–core financial regulators.[585] Efforts and measures must be channeled to ensure regulatory coordination at all these three levels.

Regulatory coordination between financial and non–core financial regulators is particularly imperative to address the cross–industry and regulatory issues arising from Fintech activities. It is important for a holistic regulatory approach as well as to avoid duplicative and inconsistent regulations by financial and non–core financial regulators in their regulation of Fintech firms. This coordination can also help to avoid coordination failure and facilitate a robust enforcement regime covering both financial and non–financial aspects of the operations of Fintech firms.[586]

Taylor, Wilson and Holttinen et al mention that most countries have established bodies or mechanisms to facilitate regulatory coordination among financial regulators (that is,

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585 See Koonprasert T & Mohammad AG *Creating enabling Fintech ecosystems: The role of regulators* (Alliance for Financial Inclusion Special Report, 2020) 16 (explaining that Fintech activities tend to 'fall under multiple purviews within and across regulatory bodies, making it difficult for any entity to bear sole responsibility for supervision or authorization. Regulators should encourage cross functional collaboration in their organizations among relevant departments, divisions or teams').

586 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 46.

financial regulation coordinating bodies).[587] However, similar arrangements for regulatory coordination between financial and non–core financial regulators (that is, Fintech regulation coordinating body) are often not in place. The authors recommend that a Fintech regulation coordinating body could help foster domestic coordination. As the authors capture it:

> Coordination across multiple arms of government and regulatory agencies (financial and non–financial), is needed in Fintech, which often generates novel complexities from new firms, products, and activities that lie outside the current regulatory perimeter.[588]

The Fintech Regulatory Aspects Working Group also makes a similar recommendation that:

> Cooperation across multiple regulatory authorities becomes more important since fintech innovations are relevant not only for financial regulators, but also for authorities in charge of consumer protection, AML–CFT, cybersecurity, data protection, taxation, or competition policy.[589]

Drawing from the explanation by Taylor, Wilson and Holttinen et al, it is suggested that there are at least three possible options for establishing a Fintech regulation coordinating body, each with its potential advantages and drawbacks that are discussed below.

The first option is to have the Fintech regulation coordinating body established as a standalone body independent from the financial regulation coordinating body. This approach ensures a dedicated focus on Fintech issues as regulators coordinate. It also prevents potential conflicts that may arise when Fintech issues are subsumed within the broader financial regulation scheme. However, maintaining separate coordinating bodies for financial regulation and Fintech may lead to administrative duplications and cost inefficiencies. Setting up a new body from scratch will also require significant time and resources.

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587 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 5.

588 Taylor C, Wilson C & Holttinen E et al (2019) 6.

589 Fintech Regulatory Aspects Working Group *Key aspects around financial technologies and regulation policy report* (Centre for Latin American Monetary Studies, 2019) 8.

Furthermore, this standalone approach isolates Fintech regulation from the broader financial regulatory scheme and neglects the intersection between Fintech and the financial system. As clarified in Chapter 1 (Section 1.2.3), Fintech represents a technological revolution reshaping the financial landscape, rather than just a niche within financial services or a sub–sector of the financial system.

The second option is to establish the Fintech regulation coordinating body as a sub–committee of the Financial regulation coordinating body. Similar to the first option, this option also allows for dedicated focus on regulatory coordination on Fintech–specific issues. At the same time, this approach has the benefit of capitalising on the synergy between Fintech regulation and financial regulation, unlike the first approach. It ensures that Fintech considerations are interlaced into the broader financial regulation scheme.

Generally, integrating Fintech considerations into the broader regulatory landscape fosters a holistic approach. Unlike the standalone approach, this option leverages existing structures, making it faster and easier to implement. However, this second approach may similarly duplicate administrative processes and could be cost–inefficient. The financial regulators, in particular, will be stretched as they will be required to engage both in the Fintech regulation coordinating body and the financial regulation coordinating body. There could also be challenges reconciling conflicting interests and priorities between Fintech and other broader financial regulation issues.

The third option involves expanding the Financial regulation coordinating body's responsibilities to include regulatory coordination functions related to Fintech without setting up a dedicated sub–committee as in the second option. This approach ensures that regulatory coordination is centralised under a single coordinating body. An obvious advantage of this approach is that it optimises existing resources and eliminates the cost associated with setting up and maintaining a new body. It is also easier to implement than the first two options.

However, a major downside to this third option is the risk that it may not allow a specialised focus on Fintech issues. Regulatory coordination oversight might occur, with Fintech issues not receiving the attention they require. Additionally, there is the potential for conflicts of interest or priority in addressing Fintech issues and broader financial regulation issues.

Generally, a thorough assessment of the advantages and disadvantages of each option is crucial in selecting the most appropriate approach for a Fintech regulation coordinating body. Nonetheless, there is a common trend of countries adopting the first option and South Africa is one these countries. South Africa currently follows the first option through its establishment of the Intergovernmental Fintech Working Group (IFWG).[590]

The IFWG was established in 2016 and has the mandate of understanding the growing role of Fintech and innovation in South Africa's financial system.[591] It additionally has the mandate of exploring how regulators can more proactively assess emerging risks and opportunities in the Fintech market. The IFWG fits the first option because it has not been established as a working group under the Financial System Council of Regulators, which is South Africa's financial regulation coordinating body.

The IFWG has both financial and non–core financial regulators as members. These members are the National Treasury, Financial Intelligence Centre (FIC), Financial Sector Conduct Authority (FSCA), National Credit Regulator (NCR), South African Reserve Bank (SARB), South African Revenue Service (SARS), and Competition Commission. There are two notable regulators, whose regulatory roles can be argued are relevant to Fintech regulation, but they are currently not members of the IFWG. These regulators are the Information Regulator, which is charged with data protection regulation,[592] and the National Consumer Commission, which is in charge of consumer protection.[593]

IFWG operates the Innovation Hub, which houses three main functions. First, the Hub has a Regulatory Guidance Unit, which offers non–binding guidance to innovators in addressing inquiries that they have regarding the policy landscape and regulatory

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590 Relevant information about the Intergovernmental Fintech Working Group used in this study have been accessed on *https://www.resbank.co.za/content/dam/sarb/quick–links/Fintech/IFWG%20Frequently%20asked%20questions%20–%20updated.pdf* (Accessed on 27 April 2023).

591 s 79(2) of the Financial Sector Regulation Act provides that the object of the Council is to facilitate co–operation, collaboration, and consistency of action between the institutions represented in the Council and s 80(2) of the Act empowers the Council to establish working groups or subcommittees. This is discussed further in Chapter 5.

592 The Information Regulation is established under the Protection of Personal Information Act 4 of 2013.

593 The National Consumer Commission is established under the Consumer Protection Act 68 of 2008.

requirements. The Regulatory Guidance Unit is a central entry point for market innovators and helps eliminate the need for innovators to contact multiple regulators.

Secondly, the Hub has a Regulatory Sandbox which allows successful applicants to test their products or services that do not fit into existing regulations under the oversight of the relevant regulators. Lastly, the Innovation Hub has an Innovation Accelerator that provides a collaborative and exploratory environment for regulators to work together with other stakeholders of the financial system on emerging innovations.

The IFWG has also been involved in the publication of various position papers that not only provide clarity on various aspects of Fintech but have also formed the basis for legislation. For example, the IFWG's position paper on the treatment of crypto assets served as the basis for recognising crypto assets as a financial product under the Financial Advisory and Intermediary Services Act.[594]

South Africa's IFWG highlights the valuable role that the Fintech regulation coordinating body can play in promoting consistency and harmonisation of the regulatory response to Fintech not only between financial regulators but also between financial and non–core financial regulators. Additionally, the body can contribute to regulators better understanding the Fintech landscape and developing informed regulatory frameworks for the Fintech sector.

Further, South Africa's experience with the IFWG highlights several issues that policymakers and regulators could consider when establishing a Fintech regulation coordinating body. Some of the issues are identified as follows.

One crucial consideration is whether one or more Fintech regulation coordinating bodies should exist. In South Africa's case, the IFWG is currently the sole coordination body for Fintech. Taylor, Wilson and Holttinen et al admit that regulatory coordination between financial regulators and non–core financial regulators may be more challenging than between financial regulators, given the trade–offs between multiple policy goals.[595] They suggest that for regulatory coordination between financial and

594 This is discussed further in Chapter 5.

595 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 5.

non–core financial regulators to be successful, it should follow a 'whole of government' approach.'

What is clear from the suggestion of Taylor, Wilson and Holttinen et al is that there should be a single or unified Fintech regulation coordinating body regime, a point this study also concedes to. This suggestion is particularly helpful given that multiple coordination bodies can lead to fragmentation and duplication of efforts. However, while there should be a centralised Fintech regulation coordinating body, sub–groups or sub–committees can be established within the body to deal with specific tasks.

Apart from ensuring that a unified approach is followed in establishing the Fintech regulation coordinating body, policymakers and regulators also need to consider whether the body should be formally or informally established. The formal approach involves creating the coordination body through an Act of Parliament or subsidiary legislation. This formal approach provides the coordinating body with legitimacy and formal recognition. However, establishing a formal coordination body can also be time–consuming and resource–intensive, and there may be legal or political hurdles that may need to be scaled.

On the other hand, the informal approach, which is what South Africa's IFWG follows, involves creating a coordination body without a formal legal status. This approach is less resource–intensive and more flexible, allowing the ease of adapting the body to meet the requirements of changing circumstances. However, an informal coordinating body may be constrained in terms of clear legal backing to coordinate across multiple regulatory bodies. For the informal approach to work, there must be willingness and commitment on the part of the regulatory bodies.

Another key issue that requires consideration is the membership of the Fintech regulation coordinating body. Ideally, the Fintech regulation coordinating body should draw membership from all financial regulators. It should also comprise non–core financial regulators whose regulatory functions are relevant to Fintech. This includes non–core financial regulators responsible for telecommunications, digitalisation, consumer protection, competition, data protection, cybersecurity, and financial intelligence.

Apart from public regulatory bodies, it may also be useful for the Fintech regulation coordinating body to be able to co–opt SROs and other actors like academics, think tanks universities and industry experts. These non–public regulatory actors are especially useful for certain types of tasks like research, policy development, and commenting on draft legislation.

Additionally, policymakers and regulators must clarify the functions of the coordinating body. Expectedly, the coordination body should facilitate communication and information–sharing among regulators and ensure consistency in regulatory approaches within and across industries. There may also be functions around conducting research on Fintech and publishing position papers, proposing Fintech regulations, and driving schemes aimed at promoting the growth of the Fintech sector.

Finally, policymakers may have to decide whether to integrate the Fintech regulation coordinating body into the existing Financial regulation coordinating body. Taylor, Wilson and Holttinen et al suggest that countries could leverage the pre–existing agreements and protocols of the Financial regulation coordinating body for laying the groundwork for the Fintech regulation coordinating body.[596] As earlier mentioned, integration can help to avoid duplicating coordinating bodies, while a standalone Fintech regulation coordinating body may allow for greater independence and focus on Fintech–specific issues.

As can be drawn from the above, there are various trade–offs in addressing the issues that relate to setting up the Fintech regulation coordinating body. The suitability of any approach will mainly depend on the specific jurisdiction of implementation. Each approach can present its own advantages and challenges. Policymakers and regulators need to carefully consider their regulatory landscape, institutional capacities, and the nature of their Fintech ecosystem.

3.3.3. Regulatory engagement and collaboration with the Fintech ecosystem

There are various firms that facilitate or support Fintech firms (Fintech startups/scaleups, Techfins, and traditional financial institutions) to deliver services to consumers.[597] These enablers of Fintech activities include providers of Regtech

596 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 5.

597 See Ernst and Young *Fintech startups in Sub–Saharan Africa: An overview of market developments and investment opportunities* (EY Global, 2019) 3.

solutions, data analytics firms and payment infrastructure providers such as Mastercard, Fiserv, and First Data.[598]

Fintech firms and these facilitator firms are a key component of the Fintech ecosystem, which, according to Siddiqui and Rivera, 'includes all the stakeholders which directly or indirectly impact Fintech.'[599] Other stakeholders of the Fintech ecosystem include financiers (private equity firms, venture capitalists, banks), government bodies, financial consumers, and academic institutions.[600] Lee and Shin emphasise the importance of a stable and collaborative Fintech ecosystem for fostering the growth of the Fintech sector.[601]

Apart from addressing the institutional requirement of facilitating coordination between financial regulators and non–core financial regulators, there are two other institutional requirements that arise in relation to the Fintech ecosystem. The first requirement relates to simplifying how Fintech firms can enter the market and obtain licences to operate. The second requirement involves facilitating engagements and collaboration between regulators and industry stakeholders, especially in developing Fintech regulatory framework. This two areas are discussed below.

3.3.3.1. Innovation hub, innovation accelerator, regulatory sandbox, and Fintech one–stop–shop

There are various institutional arrangements that simplify how Fintech firms enter the market and obtain necessary licensing or approval to deliver their Fintech solution. These arrangements comprise the following: innovation hub, innovation accelerator, regulatory sandbox, and Fintech one–stop–shop. Each of these arrangements is briefly explained.

The International Organisation of Securities Commissions defines an innovation hub as a platform through which Fintech firms can engage with the regulator, as well as

598 See Madir J 'Introduction–What is Fintech?' (2019) 3.

599 Siddiqui Z & Rivera CA 'Fintech and Fintech ecosystem: A review of literature' (2022) 12(1) *Risk Governance and Control: Financial Markets & Institutions* 64.

600 See Lee I & Shin YJ 'Fintech: Ecosystem, business models, investment decisions, and challenges' (2018) 61(1) *Business Horizons* 37. See also Siddiqui Z & Rivera CA 'Fintech and Fintech ecosystem: A review of literature' (2022) 2(1) *Risk Governance & Control: Financial Markets & Institutions* 64.

601 Lee I & Shin YJ (2018) 37.

with each other, to share information and experiences.[602] In essence, innovation hubs provide an institutionalised platform for regulators and Fintech firms to interact. According to Parenti, through innovation hubs, regulators can offer non–binding guidance to Fintech firms on issues related to compliance with regulatory frameworks, licensing or registration requirements, and other supervisory expectations.[603] Innovation hubs can, therefore, be very useful for Fintech firms in navigating the complex regulatory landscape of the Fintech sector and networking with other participants of the Fintech ecosystem.

Innovation hubs are also known as innovation offices, units, or facilitators, and according to Bains and Wu, they are usually the first step for regulators introducing Fintech–specific institutional arrangements.[604] Innovation hubs can operate virtually or physically. Innovation hubs are different from innovation accelerators.

Innovation accelerators are programmes that provide Fintech firms with access to expertise, funding, and other resources to help them to quickly scale innovative ideas and products.[605] Unlike innovation hubs, accelerators are often short–term, fixed–duration and cohort–based programmes. Innovation accelerators also tend to focus more on offering access to investment opportunities to startups.[606]

On the other hand, regulatory sandboxes are innovation facilitators that allow Fintech firms to test their products and services in a controlled environment under the oversight of a regulator before they are fully launched to the public.[607] The controlled environment is characterised by entry requirements, specific testing plan, some

602 International Organization of Securities Commissions *The use of innovation facilitators in growth and emerging markets* (IOSCO Paper, 2022) 5.

603 Parenti R *Regulatory sandboxes and innovation hubs for Fintech: Impact on innovation, financial stability and supervisory convergence* (Study for the Committee on Economic and Monetary Affairs, European Parliament, 2020) 19.

604 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 22.

605 See International Organization of Securities Commissions (2022) 6. Also see Bondarenko TG, Zhdanova OA & Klimova N 'Multi–criteria mechanism for selecting projects by Fintech accelerators' (2019) 79 *Advances in Economics, Business and Management Research* 6–10; Harris JL 'Bridging the gap between 'Fin' and 'Tech': The role of accelerator networks in emerging Fintech entrepreneurial ecosystems' (2021) 122 *Geoforum* 174–182.

606 Alaassar A, Mention AL & Aas TH 'Facilitating innovation in Fintech: A review and research agenda' (2023) 7(1) *Review of Managerial Science* 37. See also Alaassar A, Mention AL & Aas TH Ecosystem dynamics: Exploring the interplay within fintech entrepreneurial ecosystems' (2022) 58(4) *Small Business Economics* 2157–2182.

607 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 55.

degree of regulatory lenience and operating safeguards.[608] Regulatory sandboxes provide a way for Fintech firms to test their products without being subject to the full regulatory requirements. This allows Fintech firms to experiment with new ideas, while also providing regulators with an opportunity to understand how these new products and services work.

The United Kingdom's Financial Conduct Authority (FCA) launched the first regulatory sandbox in June 2016, and since then, more than 95 sandboxes have been launched or are in preparation worldwide.[609] According to the FCA, regulatory sandboxes can help reduce the time and cost of introducing innovative services and products to the market.[610] They add that sandboxes can improve innovation, enable greater access to finance for innovators, and allow financial regulators to work with innovators to ensure that their solutions have adequate consumer protection safeguards. Parenti clarifies that innovation hubs do not monitor the development of Fintech activities as closely as regulatory sandboxes.[611]

It is observed that the model of institutional structure being used in a jurisdiction could influence how innovation hubs and regulatory sandboxes may be established and operated. Countries with multiple regulators (sectoral model, partially unified and twin peaks model) are more likely to have more than one innovation hub and regulatory sandbox programme. Each regulator may have its own hub/sandbox, catering to the specific needs of their respective sectors or regulatory roles. This decentralised approach allows for establishing hubs/sandboxes that align with the peculiarities of each sector or regulatory requirement.

Conversely, countries that follow a fully unified regulatory model, would likely adopt a unified regime for the innovation hub and sandbox programme. This centralised approach can help to provide a single access point for Fintech firms, even for their cross–sectoral solutions.

608 Parenti R *Regulatory sandboxes and innovation hubs for Fintech: Impact on innovation, financial stability and supervisory convergence* (Study for the Committee on Economic and Monetary Affairs, European Parliament, 2020) 9.

609 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 27.

610 Financial Conduct Authority *Regulatory sandbox* (FCA Paper, 2015) 2–3.

611 Parenti R *Regulatory sandboxes and innovation hubs for Fintech: Impact on innovation, financial stability and supervisory convergence* (Study for the Committee on Economic and Monetary Affairs, European Parliament, 2020) 19.

It is contended that while having multiple innovation hubs and regulatory sandbox regimes may promote sector–specific focus, it can also lead to additional costs and administrative complexities. Each hub and sandbox require resources, staff, and infrastructure to operate effectively. The coordination and communication between multiple regulators overseeing these entities can also be challenging. Furthermore, Fintech firms seeking to operate across different sectors or develop cross–sector solutions may face difficulties navigating different regulatory frameworks and engaging with multiple regulators.

To tackle these challenges, it may be helpful, especially in countries with multiple financial regulators, to explore some form of integrated or centralised approach to establishing and operating innovation hubs and sandboxes. Bains and Wu suggest that this can be achieved through: (1) establishing a centralised inter–agency innovation hub or sandbox programme, and (2) linking the separate innovation hub and sandbox programmes of the different financial regulators through a single point of entry or other open lines of communication.[612]

South Africa adopts a model more aligned with the first option. Its innovation hub and the regulatory sandbox programmes are collaborative efforts involving various regulatory authorities under the umbrella of the IFWG. Specifically, the regulatory sandbox operates on a cohort–based model, functioning as a 'first–responder network' with a core team from the Financial Sector Conduct Authority (FSCA) and the South African Reserve Bank (SARB) overseeing the progress of each participant and connecting them with subject matter experts.[613]

In contrast, the approach taken by the Hong Kong Special Administrative Region for its regulatory sandbox programme aligns more closely with the second option. Different financial regulators have established separate regulatory sandboxes accessible through a single–entry point. Authorised banks interested in testing new Fintech solutions can engage with the Hong Kong Monetary Authority. The Securities and Future Commission's sandbox allows both licensed firms and startups to conduct tests of securities solutions, while the Insurance Authority permits authorised insurers to engage in testing. For firms aiming to pilot cross–sectoral Fintech products, they

612 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 26–29.

613 Bains P & Wu C (2023) 26–29.

must apply to the most relevant sandbox. In this scenario, the responsible regulator assumes the role of the primary contact, facilitating communication with other relevant agencies.[614]

Finally, a Fintech one–stop–shop (OSS) is a virtual or physical institutional arrangement that houses all relevant regulatory authorities for Fintech.[615] Specifically, the OSS offers Fintech firms a single or central point of contact for all Fintech–related information, as well as for applying for and obtaining relevant regulatory licensing and approvals. The Fintech OSS addresses complexities surrounding the establishment of Fintech firms, allowing for the coordination and centralisation of licensing requirements and processes, leading to increased efficiencies in firm establishment.[616]

The Fintech OSS differs from an innovation hub because an innovation hub typically provides non–binding guidance for market entry and does not process licensing applications. However, the Fintech OSS notably processes licence applications and also provides information. In this sense, the Fintech OSS can also double as the innovation hub.

There are various options for establishing a Fintech OSS.[617] It can be set up as a standalone government office or housed within the Financial regulation coordinating body. Alternatively, it can be integrated into an existing one–stop–shop like the one typically operated by a country's investment promotion commission.

A Fintech OSS is especially crucial for jurisdictions that operate under the sectoral model. The involvement of numerous financial regulators under this framework can create a complex regulatory environment for Fintech firms, especially those engaging in activities that span multiple sectors.

According to the Alliance for Financial Inclusion, in some countries in Africa, it may be permissible for a Mobile Network Operator (MNO) to offer loans, micro–insurance, and

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614 Bains P & Wu C (2023) 26–29.

615 TheCityUK and PwC *Fintech in Kenya: Towards an enhanced policy and regulatory framework* (2022) 40. Available at https://www.thecityuk.com/media/zbzc1lor/fintech–in–kenya–towards–an–enhanced–policy–and–regulatory–framework.pdf (Accessed on 8 October 2023).

616 A Fintech OSS significantly improves customer experience and collaboration between Fintech firms and regulators through an enhanced, all–in–one service that is speedy, engaging, responsive, and integrated.

617 United Kingdom Department for Business and Trade *Recommendations for the implementation of the National Fintech Strategy in Nigeria* (2023) 17. Available at https://www.thecityuk.com/media/hrnph15g/recommendations–for–the–implementation–of–the–national–fintech–strategy–in–nigeria.pdf (Accessed on 8 October 2023).

micropension products within their E–Money platform.[618] In such cases, the MNO would be required to interact, directly or indirectly, with four different authorities: the central bank, insurance regulator, pension regulator, and the telecommunications authority. Similar to integrated innovation hub and regulatory sandbox programmes, a Fintech OSS can help address challenges faced by Fintech firms due to a fragmented institutional structure.

3.3.3.2. Stakeholder consultation platforms

It has previously been noted that a stable and collaborative Fintech ecosystem is crucial for supporting the growth of a country's Fintech sector. A key aspect of collaboration within the Fintech ecosystem is between regulators and industry stakeholders. This collaboration becomes particularly vital in the formulation of regulations governing Fintech activities.

In practice, regulators employ various approaches to ensure the active participation of industry stakeholders in the initiation and development of regulations affecting the Fintech sector. One approach involves conducting public consultations on proposed regulations. Another method is to publish draft regulations for public comments. Alternatively, regulators may establish stakeholder advisory bodies, which contribute to specific regulatory frameworks or engage across different projects.

The third option is exemplified by the Innovation Advisory Group (IAG) established by the United Kingdom's Financial Conduct Authority (FCA) in 2023.[619] The IAG is not established through legislation but informally through a Terms of Reference (ToR) issued by the FCA.[620] The ToR is subject to periodic reviews and updates by the FCA at least annually and at other intervals whenever necessary.[621]

According to the ToR, the IAG was established with the broad objective of offering guidance and input into the work program of the Innovation Department of the FCA.[622] However, it is also provided that other divisions or departments of the FCA may be

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618 Alliance for Financial Inclusion *The supervision of Fintech in the African region* (African Financial Inclusion Policy Initiative, Regional Policy Framework, 2023) 12.

619 Financial Conduct Authority 'Innovation Advisory Group' available at *https://www.fca.org.uk/firms/innovation/engagement/iag* (Accessed on 8 October 2023).

620 The ToR is available at *https://www.fca.org.uk/publication/documents/iag–terms–of–reference.pdf* (Accessed on 8 October 2023).

621 See s 10 of the ToR.

622 See s 1.1 of the ToR.

invited by the Chair of the IAG (FCA's Head of Innovation) to bring issues to the group, to seek their guidance and views.[623] The specific activities or functions of IAG include:[624]

(1) Providing input and feedback on specific topics and initiatives brought for discussion by the FCA.

(2) Notifying FCA of areas of interest or concern related to innovation in financial services.

(3) Offering opinions on the prioritisation of industry issues or areas for exploration.

(4) Disseminating information from the FCA to their respective members, stakeholders, and relevant networks, including event invitations, recent publications, and major announcements.

The ToR, however, clarifies that these functions are not exhaustive and that the Chair of the IAG and the members of the IAG can agree on additional functions from time to time.[625] It also clarifies that the role of the IAG is advisory in nature.[626] The views and input of members of the IAG are provided to the FCA on a voluntary basis and do not give rise to any obligations on the FCA. The group is also not empowered to make any decisions on behalf of the FCA.

In addition to the Chair, the other members of the IAG are senior leaders from significant stakeholder groups, including trade bodies, accelerators, incubators, regional Fintech advocates, and academic experts.[627] These members are expected to advocate for the perspectives and interests of their industry and sector rather than solely representing their parent organisation.[628] The ToR provides that there will be both fixed and rotating members of the IAG.

Fixed members are to be appointed at the discretion and through direct invitation by the FCA where their expertise and experience align with the objectives of the IAG.[629] These fixed appointments will be for an initial period of two years and may be extended

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623 See s 2.4 of the ToR.
624 See s 2.1 of the ToR.
625 See s 2.2 of the ToR.
626 See s 1.3 of the ToR.
627 See s 3.2 of the ToR.
628 See s 3.4 of the ToR.
629 See s 3.5 of the ToR.

at the discretion of the Chair.[630] On the other hand, the appointment of the rotating members of the IAG is proceeded by periodic public calls by the FCA for interested persons to show interest that they to join the IAG.[631]

The rotating members are appointed at the discretion of the FCA taking into account technical expertise, knowledge, and experience, as well as ability to commit sufficient time to support the IAG. The ToR also indicates a preference for the rotating members to be appointed from organisations such as consultancies, incubators and accelerators, and academic institutions.[632] Rotating membership appointments will initially last for one year and can be extended at the discretion of the Chair of the IAG.[633]

The ToR provides that sub–groups can be established within the IAG to deliver specific tasks or work streams in support of the group's activities.[634] Similar to the broader group, the sub–groups are also to have fixed and rotating members. A person's membership of the IAG or the sub–group may be terminated by the Chair on account of misconduct, incapacity, or conflicting interest.[635] Members can also choose to leave the group voluntarily.

The IAG is required to convene approximately three times a year at planned intervals, with meetings scheduled well in advance.[636] Additionally, both the IAG and its sub–groups have the flexibility to hold additional ad hoc meetings as needed. The ToR emphasise that members of the IAG and its sub–group are obligated to ensure that they confidentially treat the information they receive or have access to in the course of their engagement in the IAG.[637]

Stakeholder advisory bodies, such as the United Kingdom's IAG, play a vital role as a bridge between regulators and the Fintech ecosystem. They provide a coordinated and centralised platform for engagement between regulators and the Fintech sector. These bodies can help ensure that regulators are well–informed about the needs,

630 See s 3.6 of the ToR.
631 See s 3.8 of the ToR.
632 See s 3.10 of the ToR.
633 See s 3.9 of the ToR.
634 See s 3.12 to 3.16 of the ToR.
635 See s 4 of the ToR.
636 See s 6 of the ToR.
637 See s 5 of the ToR.

challenges, and perspectives of industry stakeholders when formulating policies and regulations. Complementary to this, they provide a platform or mechanism for industry stakeholders to support and provide input to the policies, initiatives and regulatory interventions of regulators. Essentially, they assist to democratise the Fintech regulatory regime and processes.

Although stakeholder advisory bodies for Fintech serve various benefits, there are also risks to utilising these bodies. For example, there is the risk that the stakeholder advisory body could be unduly influenced by personal, professional, or stakeholder interests, leading to biased recommendations that do not necessarily serve the broader public interest. There is also the risk that the body could complicate the operations of regulators who now not only need to engage among themselves but also channel efforts, time, and resources to engage with the industry. There is, therefore, the need to ensure that the establishment of stakeholder advisory bodies is backed by necessary measures to mitigate these risks.

Some provisions in the ToR for the IAG have been clearly designed to mitigate some of these potential risks of stakeholder advisory bodies. This can be seen from the provisions on rotating membership, the diversity of the members who represent different interest groups, and the non–binding nature of the group's advice to the FCA.

The ToR notably also provides that, to prevent conflicts of interest and maintain impartiality, applications for rotating positions in the IAG will not be accepted from directly regulated financial firms, non–regulated firms expecting future authorisation, and technology vendors aiming to sell regulatory compliance solutions.[638] The ToR further obligates members to notify potential or actual conflicts of interest to the Chair or the Secretariat of the IAG as soon as they become aware of them.[639] The informal establishment of the IAG through the ToR instead of under legislation provides flexibility in seamlessly adjusting the framework for the IAG to adapt to developments and address identified challenges.

It is acknowledged that establishing a stakeholder advisory body for Fintech can have cost implications, as resources will need to be channelled by the financial regulator to administer the operations of the body. Additionally, it could stretch the human

638 See s 3.11 of the ToR.

639 See s 9 of the ToR.

resources of the financial regulator by requiring them to dedicate some of their staff to support the activities of the stakeholder advisory body for Fintech. Taking these considerations into account, regulators might explore alternative approaches.

This could involve conducting public consultations, releasing draft regulations for comments, or establishing advisory bodies on a case–by–case basis. These options allow for coordination among regulators and industry stakeholders without the prolonged financial and organisational commitments linked to a distinct advisory body, such as the IAG.

Whether policymakers choose a separate advisory body or explore other alternatives, the crucial factor is that the institutional structure should incorporate a platform that fosters engagement and collaboration between financial regulators and the Fintech ecosystem.

This Section 3.3 has specified the various requirements for adapting the institutional structure to the changes that Fintech influences on the financial system. The next Section 3.4 now turns to discuss the regulatory challenges posed by Fintech and the institutional requirements for addressing them.

3.4. REGULATORY CHALLENGES OF FINTECH

A major regulatory challenge that Fintech poses is regulatory underlap.[640] This occurs when there is no specific regulation for Fintech activities and firms that undertake them as well as when existing regulations are not applicable to Fintech activities and firms. Regulatory underlap can be a deliberate strategy on the part of the regulator, such as when the 'wait and see' or 'test and learn' regulatory approaches are used.[641]

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640 Pascual AG & Natalucci F 'Fast–moving fintech poses challenge for regulators' available at *https://www.imf.org/en/Blogs/Articles/2022/04/13/blog041322–sm2022–gfsr–ch3* (Accessed on 18 November 2023).

641 The 'wait and see' approach involves delaying regulating Fintech solution until they mature and the risks that they carry become more apparent. This approach allows regulators to gather more information about a Fintech solution before intervening with regulations. However, it can also result in a regulatory vacuum, which can create risks to consumer protection as well as macro and micro–stability. On the other hand, the 'test and learn' approach involves testing Fintech solutions in a controlled environment, with regulators monitoring and assessing their risks. This approach aims to provide a more proactive and adaptive regulatory framework, facilitating innovation while minimizing risks to the financial system. However, it requires significant regulatory resources and can also pose challenges in terms of defining the appropriate testing environment. See generally World Bank Group *How regulators respond to Fintech evaluating the different approaches–sandboxes and beyond* (World Bank Group Fintech Note 5, 2020) 52–53.

However, it can also occur due to a lack of resources or expertise on the part of regulators, or because they prioritise certain Fintech activities or firms over others.

Regulatory underlaps or even light–touch regulatory frameworks for Fintech firms could offer flexibility that reduces the cost of doing business and encourages innovation.[642] However, these regulatory environments leave risks to consumers, investors, and financial stability associated with activities of Fintech firms left unmitigated or inadequately mitigated, all of which undermines the success of financial regulation.[643] To avoid the risks posed by regulatory underlap, it is important to establish a comprehensive regulatory environment for Fintech, as discussed in the preceding section.[644]

Apart from creating regulatory overlaps between financial regulators and non–core financial regulators, Fintech can also intensify overlaps in institutional structures with multiple financial regulators. Fintech especially occasions regulatory overlap between financial regulators because it can blur the boundaries between different sectors of the financial system in various ways.[645] One way is that Fintech firms can offer various financial services, such as digital banking, payments, lending, investments, and insurance, through a single platform similar to financial conglomerates. Secondly, a Fintech activity can operate in different sectors of the financial system.[646] Lastly, like traditional financial services, identical or very similar Fintech activities can be performed by Fintech firms operating in different sectors of the financial system.

According to the Alliance for Financial Inclusion, the institution–oriented approach of financial sector laws in many jurisdictions, is not well suited for capturing the fluid range

642 The growth of most Fintech activities can be attributed to the absence of regulation. See Madise S *The regulation of mobile money: Law and practice in sub–Saharan Africa* (2019) 5 where the author defines 'light–touch' as a regulatory environment which is not strictly controlled or supervised.

643 Preece R 'What does good regulation look like?' available at *https://www.cfainstitute.org/–/media/documents/article/position–paper/what–does–good–regulation–look–like.pdf* (Accessed on 26 September 2022); Pascual AG & Natalucci F 'Fast–moving Fintech poses challenge for regulators' available at *https://www.imf.org/en/Blogs/Articles/2022/04/13/blog041322–sm2022–gfsr–ch3* (Accessed on 26 September 2022).

644 See Section 3.3.2.

645 He MD, Leckow MR & Haksar MV et al *Fintech and financial services: Initial considerations* (2017) 5–6.

646 For example, cryptocurrency can be used as a payment instrument in the banking and payment sectors. In the securities sector, cryptocurrency can be used as an investment vehicle, allowing individuals to buy and sell the digital asset on various cryptocurrency exchanges.

of activities of a Fintech firm.[647] For institutional structures with multiple financial regulators, overlapping jurisdiction between financial regulators can result in inconsistent regulations, duplication of regulatory efforts and create gaps that can be exploited for regulatory arbitrage. It can further create uncertainty for the financial regulator that has jurisdiction and also complicate the consumer–grievance process.[648]

Accordingly, similar to how financial conglomerates require an integrated institutional structure, Fintech also requires an institutional structure that is integrated, not fragmented.[649] As already discussed in Chapter 2, an integrated institutional structure can be achieved through institutional integration measures,[650] and regulatory integration measures.[651] On the other hand, the integration of the institutional setting between financial and non–financial regulators can be accomplished through the establishment of a Fintech regulation coordinating body.

Additionally, stakeholder advisory bodies and other consultative platforms can facilitate integration between financial regulators and the Fintech ecosystem. These various integration measures are essential for fostering a cohesive regulatory environment for Fintech regulation. The following Section 3.5 discusses the institutional requirements needed to avoid exacerbating the cost of regulating Fintech.

3.5. COST OF REGULATING FINTECH

According to Ehrentraud, Ocampo and Garzoni, the major challenges that regulatory authorities may encounter in regulating Fintech are having ‘<u>sufficient resources</u> and

647 Alliance for Financial Inclusion *The supervision of Fintech in the African region* (African Financial Inclusion Policy Initiative, Regional Policy Framework, 2023) 12.

648 United States Government Accountability Office *Financial technology: Additional steps by regulators could better protect consumers and aid regulatory oversight* (Report to Congressional Requesters, 2018) 40–48.

649 Clements R *Regulating Fintech in Canada and the United States: Comparison, challenges and opportunities* (University of Calgary, The School of Public Policy Publications, Volume 12(23), 2019) 6.

650 This first option for institutional integration is through quasi–institutional integration, whereby the various financial regulators retain their separate legal identities but establish a body or mechanism for regulatory co–ordination. Institutional integration could also involve consolidating the different sectoral regulators into the unified model or twin peaks model. See Chapter 2, Section 2.5.1.

651 Regulatory integration involves developing joint regulations, using functional regulation, and designating a lead regulator. See Chapter 2.

expertise to keep up with the speed of technological change, to understand novel business models and develop adequate policy responses [emphasis added].'[652]

Omarova on the other hand observes that while Fintech may be commonly viewed as a financial–market disruptor and a force of social progress, it also presents itself as a complex and politically thorny phenomenon.[653] From these submissions, it is clear that Fintech is not only complicated, but also expensive to regulate.

One of the reasons that Fintech is costly to regulate is because Fintech is because it is constantly evolving. What may have been considered a novel or disruptive Fintech innovation yesterday, may lose this character tomorrow. With the dynamic character of Fintech, regulators need to allocate significant resources, including for training and employing staff with expertise, towards understanding, monitoring, assessing and responding to Fintech developments.

The cost of regulating Fintech also stems from the need for regulators to channel resources toward developing new regulatory frameworks or modifying existing ones to address gaps that Fintech developments may have created. Further, regulators may also need to expend resources in establishing Fintech–specific institutional arrangements, such as Fintech units, innovation hubs, and regulatory sandboxes.

Finally, regulating Fintech can be costly due to the need for ongoing supervision to ensure that their activities remain compliant with regulatory requirements. Regulators may for this purpose also need to deploy resources to procure and operate supervisory technology (Suptech) solutions.

Ahern suggests that the cost and complexity of regulating Fintech is not a challenge for regulators alone; it is also a problem for Fintech firms.[654] As the author explains it, legacy regulatory landscapes, which are typically not built with Fintech activities in mind, can be 'complex and costly to navigate, sapping the time and resources, particularly of startups hoping to find a route to market.'

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652 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 46.

653 Omarova ST 'Technology v technocracy: Fintech as a regulatory challenge' (2020) 6(1) *Journal of Financial Regulation* 75–124.

654 Ahern D 'Regulatory lag, regulatory friction and regulatory transition as Fintech disenablers: Calibrating an EU response to the regulatory sandbox phenomenon' (2021) 22(3) *European Business Organization Law Review* 399–400.

The cost of regulating Fintech requires financial regulators to be prudent in deploying regulatory resources, which are often scarce, and adopting measures that help to avoid duplicating or wasting these scarce resources. Importantly, for the institutional structure to promote the efficient regulation of Fintech, it must be integrated and not fragmentary. It has been suggested that fragmentary institutional setting can 'increase costs, stifle innovation, and produce ineffective regulation.'[655]

The institutional structure should be integrated both among financial regulators as well as between financial and non–core financial regulators (through the Fintech regulation coordinating body). This will help to avoid the duplication of regulatory efforts which can lead to the wastage of scarce resources.[656] The next Section 3.6 highlights the institutional requirements for addressing the complexities of regulating Fintech.

3.6. COMPLEXITY OF REGULATING FINTECH

The factors highlighted in the preceding section that account for the resource–intensive requirement for regulating Fintech also explain why regulating it can be complex. The complexity of regulating Fintech also stems from the need for regulators to strike a balance between various goals and policy objectives of financial regulation.[657]

The policy trilemma theory advanced by Brummer and Yadav explains how striking this balance can be very complicated.[658] The policy trilemma theory is based on the premise that technological advancements in financial services exacerbate the trade–offs in achieving the objectives of financial regulation such that by pursuing certain policy goals, others may suffer. Summarily, Brummer and Yadav theorise that when faced with the policy objectives of providing clear rules, maintaining market integrity, and promoting innovation, regulators may only achieve one or two of these objectives, not all. The authors explain the reason for this as follows:[659]

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655 Clements R *Regulating Fintech in Canada and the United States: Comparison, challenges and opportunities* (University of Calgary, The School of Public Policy Publications, Volume 12(23), 2019) 6.

656 Some cost–effective options for establishing Fintech institutional arrangements are identified in Section 3.7 below.

657 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 46.

658 Brummer C & Yadav Y 'Fintech and the innovation trilemma' (2019) 107 *Georgetown Law Journal* 235–307.

659 Brummer C & Yadav Y (2019) 242.

> If regulators prioritise market safety and clear rulemaking, they do so through broad prohibitions, invariably inhibiting financial innovation. Alternatively, if regulators wish to encourage innovation and provide rules clarity, they must do so in ways that ultimately result in simple, low–intensity regulatory frameworks, increasing risks to market integrity and consumers. Finally, if regulators look to enable innovation and promote market integrity, they must do so through a complex matrix of rules and exemptions, raising compliance costs and disproportionately impacting smaller firms and upstarts.

Brummer and Yadav argue that the policy trilemma is especially relevant for the Fintech sector, which is characterised by rapid innovation, high levels of competition, and potential systemic risks. They suggest that policymakers should take a balanced approach that considers the potential benefits and drawbacks of each goal and should remain flexible in adjusting policies as the Fintech sector evolves.

According to Magnuson, a law tailored to the features of Fintech firms should include rules that establish the trade–off guidelines that both Fintech firms and regulators should apply in their decisions.[660] This suggestion is useful for facilitating the balancing act advocated by the policy trilemma theory.

The expertise of financial regulators is particularly crucial for overcoming the complexity of regulating Fintech.[661] It has been observed that regulators with limited expertise may find it challenging to understand Fintech and assess its implications for regulation.[662] It has further been confirmed that regulators in emerging and developing economies typically have limited resources, and technology–led innovation adds additional pressure on them.[663]

660 Magnuson W 'Financial regulation in the bitcoin era' (2018) 23(2) *Stanford Journal of Law, Business and Finance* 159–209.

661 Ehrentraud J, Ocampo DG & Garzoni L et al *Policy responses to Fintech: A cross–country overview* (FSI Insights on Policy Implementation No 2, 2020) 46.

662 UN Secretary–General's Special Advocate for Inclusive Finance for Development Fintech Working Group *Report on early lessons on regulatory innovation to enable inclusive Fintech: innovation offices, regulatory sandboxes and Regtech* (2019) 7.

663 UN Secretary–General's Special Advocate for Inclusive Finance for Development Fintech Working Group (2019) 7.

Financial regulators can develop the needed expertise for dealing with Fintech through experience, training, and continuous learning.[664] However, as explained in Chapter 2, financial regulators can also build expertise through specialisation. Financial regulators in many countries have adopted a common practice of establishing dedicated Fintech units or departments within their organisational structures to enhance specialisation.[665]

Taylor, Wilson and Holttinen et al indicate that the functions undertaken by the Fintech units encompass a range of activities, including:[666] serving as a primary point of contact for Fintech matters and outreach efforts, monitoring developments in the Fintech sector, conducting research and policy analysis; offering training and education to agency staff; exploring the application of Fintech to internal operations; managing sandbox and innovation hub programmes; supervising existing Fintech firms, facilitating inter–departmental coordination, and engaging in international coordination with other regulatory bodies.

One of the earliest efforts in establishing a Fintech unit can be observed in Singapore. In 2015, Singapore, which adopts the fully unified model under the Monetary Authority of Singapore (MAS), established the Fintech and Innovation Group (FIG).[667] The FIG operates under the regulatory framework and authority of the MAS. The FIG is responsible for developing regulatory policies and technology–based strategies to manage the risks of Fintech better and to enhance efficiency and strengthen the competitiveness of the country's financial system. The FIG has sub–units responsible for payments, technology infrastructures, testing innovation, Artificial Intelligence (AI), and sustainable finance.

Similarly, in 2017, the South African Reserve Bank (SARB) established the Fintech Unit within its organisational structure. This Fintech Unit has the general mandate of 'exploring the implications of Fintech innovation for the SARB and all the financial

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664 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 19.

665 Koonprasert T & Mohammad AG *Creating enabling Fintech ecosystems: The role of regulators* (Alliance for Financial Inclusion Special Report, 2020) 6.

666 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 4–5.

667 For further information on the FIG, see https://www.mas.gov.sg/who–we–are/Organisation–Structure/Fintech–and–Innovation (Accessed on 29 January 2023).

services in South Africa.'[668] The initial areas of focus for the Fintech Unit cover three main areas.

The first area is reviewing the approach to policy and regulation of crypto assets. Second, investigating innovation structures like innovation accelerators, innovation hubs, and regulatory sandboxes. Lastly, experimenting with the use of distributed ledger technology (DLT) in interbank clearing and settlement (Project Khokha).[669] Project Khokha which the SARB Fintech Unit led was recognised by the Central Banking Publications as the 'Best Distributed Ledger Initiative' of 2018.[670]

It is submitted that there are two critical considerations when establishing specialised units or departments for Fintech within the organisational structure of financial regulators. First, it is important to define the responsibilities of the units or departments, especially as these responsibilities will provide a basis for assessing if they are effective. It is suggested that the responsibilities should be designed to avoid overlaps with other units or departments within the regulator. Taylor, Wilson and Holttinen et al observe in this regard that the clarity of the mandates of the Fintech unit is very crucial in helping the unit to achieve its objectives.[671] They also mention that it is common practice to use Terms of Reference to establish the objectives of the Fintech unit.[672] The second consideration is that the composition of the units or departments in terms of staffing must be carefully considered to ensure that they are well–trained and build the necessary capacity to achieve their mandate.

Apart from setting up the Fintech units, another way to improve the expertise of financial regulators in dealing with Fintech is by setting up innovation hubs and regulatory sandboxes. According to Bains and Wu, innovation hubs can strengthen supervisory monitoring when correctly operationalised.[673] They emphasise that clear objectives, transparent eligibility criteria, and cross–organisational buy–in are integral

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668 South African Reserve Bank *Project Khokha: Exploring the use of distributed ledger technology for interbank payments settlement in South Africa* (2018) 16.

669 South African Reserve Bank (2018) 18.

670 Available at *https://www.resbank.co.za/en/home/publications/publication–detail–pages/media–releases/2018/8753* (Accessed on 21 August 2023)

671 Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 5.

672 Taylor C, Wilson C & Holttinen E et al (2019) 4–5 (nothing that such Terms of Reference have been published by the Fintech units in France, Japan, and the United Kingdom).

673 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 22.

to the success of an innovation hub.[674] The authors also observe that apart from strengthening monitoring and being a useful approach to deepening Fintech expertise, regulatory sandboxes can assist in initiating and deepening communication with Fintech firms and signal openness for innovation and competition.[675]

The next section highlights the institutional requirements derived from the analysis in Sections 3.3 to 3.6, as well as some considerations regarding whether to implement them.

3.7. CONSIDERATIONS FOR IMPLEMENTING INSTITUTIONAL REQUIREMENTS

The analysis presented in Sections 3.3 to 3.6 illustrates that Fintech, like earlier developments in the financial system, can introduce changes to the system. In particular, Fintech has decentralised the financial system, disintermediated traditional intermediaries, and blurred the boundaries of industries and regulators. Further, Fintech has given rise to a new ecosystem — the Fintech ecosystem.

The analysis also demonstrates that Fintech can engender various regulatory challenges, such as regulatory underlap, arbitrage, inconsistency, duplication, and coordination failure. If these challenges are not addressed, risks to consumer protection, market integrity, fair competition, as well as micro and macro stability could materialise. The analysis also confirms that regulating Fintech is both costly and complex. The analysis has gone further to identify certain institutional requirements that are imperative for Fintech regulation in light of the notion of adaptive regulation discussed in Chapter 2. Broadly, these requirements underscore the necessity for the institutional structure to be adaptable to the changes brought about by Fintech, comprehensive in addressing regulatory challenges posed by Fintech, facilitate efficient regulation of Fintech, and promote specialisation in regulating Fintech.

The institutional requirements derived from the analysis can be grouped into five main aspects as follows. The first aspect is an institutional arrangement that facilitates regulatory coordination between financial and non–core financial regulators. For this purpose, there is a need for a Fintech regulation coordinating body.

674 Bains P & Wu C (2023) 23.
675 Bains P & Wu C (2023) 27.

The second institutional arrangement relates to complementing the regulatory efforts of public regulators. For this purpose, there is a need to incorporate SRO into the regulatory setting, especially when public regulators are resource–constrained.

Thirdly, there is a need for institutional arrangements that facilitate engagement and collaboration between financial regulators and Fintech firms, as well as other stakeholders of the Fintech ecosystem. The institutional arrangements for this purpose are stakeholder advisory bodies, innovation hubs, regulatory sandboxes, as well as a Fintech one–stop–shop.

Fourthly, the institutional structure should be integrated between financial regulators. This can be achieved in either of two ways. The structure could be centralised through consolidating regulators under the unified or twin peaks model. The other option is for the regulators to remain decentralised but to be coordinating through various regulatory coordination measures.

The last institutional arrangement relates to improving the departmental or organisational structure of financial regulators to align with Fintech developments. For this purpose, there is a need for Fintech units to be established within the organisational structure of financial regulators.

The first, second, and third institutional arrangements are important for adapting the institutional structure to the changes that Fintech brings to the financial system. The fourth institutional arrangement is essential for ensuring that the institutional structure is efficient for regulating Fintech. Additionally, having a Fintech regulation coordinating body can facilitate efficient regulation of Fintech activities. The last institutional arrangement is crucial for enabling the specialisation and development of expertise among financial regulators in dealing with Fintech challenges. Regulatory sandboxes and innovation hubs can also assist financial regulators to better understand Fintech.

Having drawn the institutional arrangements that support Fintech regulation, the question that arises is whether it is imperative for a jurisdiction to implement all or some of the arrangements. Another closely connected question is when might be a good time for regulators to implement these Fintech institutional arrangements.

There are no reservations commonly observed in literature regarding the requirement to establish a Fintech regulation coordinating body.[676] However, some scholars have raised qualifications on the necessity and when to establish other Fintech institutional arrangements like Fintech units, innovation hubs, and regulatory sandboxes. The remaining part of this section turns to highlight these qualifications and offers the perspective of this study on them.

Koonprasert and Mohammad suggest that, before establishing a Fintech unit, regulators should assess their existing resources and organisational structure to ascertain if it is justified. If existing resources and departments effectively address the demands of Fintech regulation, regulators may find it more suitable to allocate additional resources to strengthen those existing departments.[677]

Koonprasert and Mohammad further contend that Fintech units may not be a top priority in jurisdictions where the Fintech sector is still nascent. This is because developing Fintech units demands significant financial resources and technical expertise. It also requires a comprehensive understanding of diverse business models, which necessitates time and experience to accumulate. In such cases of nascent Fintech markets, the authors suggest that regulatory authorities should prioritise promoting cross–functional coordination across various departments within the financial regulator.

Bains and Wu, on their part, differentiate between the existing institutional structure and Fintech institutional arrangements. The existing institutional structure encompasses the sectoral model, unified model, or twin peaks model, without incorporating the Fintech institutional arrangements such as Fintech units, innovation hubs, and regulatory sandboxes.[678]

Like Koonprasert and Mohammad, Bains and Wu suggest that in jurisdictions where Fintech activities remain limited or are predominantly undertaken by incumbent financial institutions, deploying Fintech institutional arrangements may be

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676 See for example, Taylor C, Wilson C & Holttinen E et al *Institutional arrangements for Fintech regulation and supervision* (International Monetary Fund Fintech Note No. 19/ 02, 2019) 9; Fintech Regulatory Aspects Working Group *Key aspects around financial technologies and regulation policy report* (Centre for Latin American Monetary Studies, 2019) 8.

677 Koonprasert T & Mohammad AG *Creating enabling Fintech ecosystems: The role of regulators* (Alliance for Financial Inclusion Special Report, 2020) 6.

678 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 15.

unnecessary.[679] They emphasise that in such cases, existing resources and infrastructure under the existing institutional structure can enable authorities to monitor new Fintech developments and identify risks.[680] The authorities can achieve these objectives all while saving time and costs associated with designing and implementing Fintech institutional arrangements.

Additionally, Bains and Wu assert that Fintech should be integrated into a regulator's regular duties, with a regulator expected to possess comprehensive knowledge of the implications of new technologies on financial markets.[681] They propose that the justification for implementing Fintech institutional arrangements may only arise when a jurisdiction is experiencing rapid growth and diversification of their Fintech sector.[682]

Koonprasert and Mohammad, as well as Bains and Wu, present very important considerations when establishing Fintech units and other Fintech institutional arrangements. A central aspect of their argument revolves around evaluating the size or level of growth of the Fintech market within a given jurisdiction. However, the authors do not clarify what constitutes a nascent Fintech market or a growing and diversified Fintech sector. Should it be determined by the number of Fintech firms operating in the jurisdiction? If so, what number qualifies as significant? Alternatively, should the market size be assessed by the valuation of Fintech firms, the investments in the sector, or the total revenue generated by the sector?

It is submitted that without answers to these questions, the proposals from Koonprasert and Mohammad, as well as Bains and Wu, do little in guiding regulators on when the time is right for the Fintech institutional arrangements to be implemented. It is further contended that it may be difficult to come up with a 'Fintech market size determination criteria' that may be applicable to all jurisdictions. What may be considered significant Fintech development in a developing country like Ghana or Nigeria may not necessarily be considered as such in other countries like the United States of America or the United Kingdom.

Further, Koonprasert and Mohammad offer valid points regarding resource evaluation and cross–functional coordination. However, their argument appears to undervalue

679 Bains P & Wu C (2023) 42.
680 Bains P & Wu C (2023) 42.
681 Bains P & Wu C (2023) 15.
682 Bains P & Wu C (2023) 42.

the importance of Fintech units in addressing the unique challenges of the Fintech sector. Fintech developments introduce novel technologies, business models, and risks that require dedicated attention and specialisation. Solely relying on existing departments might not offer the focused and specialised approach for effectively overseeing the complexities of Fintech activities.

Crisanto, Prenio and Singh et al acknowledge that while traditional financial capabilities remain core to financial supervision, there is an increasing importance of skills related to technology.[683] They note that such skills can be achieved by regulators by setting up dedicated units or functions within their organisational structure.

Additionally, the viewpoint presented by Koonprasert and Mohammad assumes that establishing Fintech units should be driven solely by financial investment and technical expertise. While these aspects are certainly crucial, they appear to disregard the potential advantages and synergies that Fintech units can bring, even in grooming technical expertise. It is submitted that Fintech units have the potential to attract and nurture talent as well as establish a clear mandate for Fintech regulation. The units can also signal a commitment to safeguard the interests of both consumers and industry participants, all of which contribute to public confidence in the Fintech regulatory environment.

On the other hand, while Bains and Wu's recommendation that countries should only establish Fintech institutional arrangement in response to the expansion of their Fintech market seems pragmatic. However, it could inadvertently foster a reactive, rather than proactive, regulatory response to Fintech. Indeed, this reactive approach is also projected by Koonprasert and Mohammad. Establishing Fintech institutional arrangements solely in response to Fintech market expansion might impede the financial regulator's ability to adequately address challenges and seize opportunities Fintech presents. A proactive approach that involves setting up Fintech institutional arrangements before Fintech market expansion is crucial to consider.

Initiating Fintech institutional arrangements before significant market growth ensures that the financial regulator is well–prepared when expansion eventually happens. This proactive approach recognises the potential for Fintech to transform the financial

683 Crisanto JC, Prenio J & Singh M et al Yong *Emerging sound practices on supervisory capacity development* (FSI Insights on Policy Implementation No. 46, 2022) 4–5.

landscape rapidly and unexpectedly. As was earlier mentioned in Section 3.3.1, the growth of Fintech can be fast and furious. Regulators can be ready to comprehend technology intricacies, monitor emerging risks, and quickly address regulatory challenges by having Fintech institutional arrangements in place. Such preparation is particularly vital in a fast–evolving digital landscape, where regulatory catch–up could lead to inadequate oversight and potential harm to the policy objectives of financial regulation.

It is submitted that the early establishment of Fintech institutional arrangements can contribute to enhancing overall regulatory effectiveness for existing Fintech activities. When regulators effectively understand and regulate the existing Fintech developments, it creates an environment conducive to advance the growth of the Fintech sector. A sound regulatory regime fosters investor and consumer confidence, attracting more participants to the market. This, in turn, accelerates innovation and competition, resulting in a more robust Fintech ecosystem.

It is further contended that waiting for significant Fintech market growth before taking regulatory action assumes that market size equates to complexity and disruption. However, the nature of technological disruption allows small, innovative startups to challenge established norms and traditional financial institutions at a fast pace. A proactive regulatory response acknowledges this potential and positions regulators to address emerging challenges effectively.

This study acknowledges a key point raised by Bains and Wu regarding the need for regulators to view Fintech as part of their broader responsibilities rather than a standalone discipline.[684] However, as exemplified by the implementation of Project Khoka by SARB's Fintech Unit and other similar projects by other Fintech units in other jurisdictions, certain areas will inevitably require specialised focus and attention.

Another important point to highlight is that specialised structures for Fintech can help limit the extent to which resources may need to be expended on Fintech training for staff. Without a specialised team, a structured training approach might be lacking, and even staff whose functions do not require engagement with Fintech might undergo training.

684 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 5.

Specialised units also offer an opportunity to retain staff interested in specialised areas. Ahern mentions that jurisdictions that have adopted the various Fintech–specific institutional arrangements 'develop a reputation for being pro–competition and for nurturing new market entrants.'[685] It has also been observed that a Fintech unit can be seen as the 'seed' for a jurisdiction that is fully devoted to regulating Fintech.[686]

It is submitted that the focus should perhaps be less on the size of the Fintech market when considering introducing Fintech institutional arrangements. Instead, emphasis should be on how to prioritise the implementation of the arrangements as well as cost efficient implementation measures.

In terms of priority, it is opined that Fintech units should be prioritised as they can establish the foundation for exploring and administering other arrangements. To put this in context, it will be ill–planned to establish an innovation hub or regulatory sandbox when there is no knowledgeable or specialised team that can address the inquiries of Fintech firms or undertake the testing of innovative solutions.

The Fintech regulation coordinating body is another institutional arrangement that should be prioritised. This body should especially take the front burner if it is intended that the innovation hub, regulatory sandbox, and Fintech one–stop–shop programmes should be housed under a centralised body.

Once these two foundational institutional arrangements (Fintech units and Fintech regulation coordinating body) are in place, other arrangements can be considered. Importantly, these other institutional arrangements, such as innovation hubs, regulatory sandboxes, and Fintech one–stop–shop programmes, should be implemented based on the emerging needs of the Fintech sector.

For example, there will be no need to establish an innovation hub where there are no prospective Fintech firms raising inquiries. Likewise, there will be no need for a sandbox when existing Fintech solutions can be accommodated within extant

685 Ahern D 'The role of sectoral regulators and other state actors in formulating novel and alternative pro–competition mechanisms in Fintech' in Stylianou K, Lacovides K & Lundqvist M (eds) *Fintech competition law, policy, and market organisation: Swedish studies in European law volume 17* (2023) 317.

686 Alliance for Financial Inclusion *The supervision of Fintech in the African region* (African Financial Inclusion Policy Initiative, Regional Policy Framework, 2023) 15.

regulatory frameworks or when there are no emerging innovative solutions that require testing.

Further, financial regulators should only turn to using SROs to complement their regulatory efforts when they are resource–constrained and cannot adequately oversee Fintech firms and activities themselves. SROs are particularly useful for Fintech activities that have a very large number of service providers, and these service providers are dispersed and not concentrated.

As it relates to the cost–effective options for implementing the arrangements, staffing various Fintech institutional structures with existing staff members should be prioritised over hiring new staff. Additionally, an integrated approach can be adopted for innovation hub, regulatory sandbox and innovation accelerator programmes in countries with multiple financial regulators. Further, there should not be different units or departments operating innovation hub and sandbox programmes. The Fintech unit can manage both innovation hub and sandbox programmes while also undertaking other tasks.

Another helpful cost–effective implementation consideration that emerges from the United Kingdom's experience is exploring how stakeholders can also be incorporated to use their resources to support the Fintech unit. As earlier mentioned in Section 3.3.3, the Innovation Advisory Group (AIG) was established in 2023 with the mandate of offering guidance and input into the work programme of the Innovation Department of the Financial Conduct Authority (FCA). The Fintech unit can also be the point of engagement and collaboration between the regulator and the stakeholder advisory group.

The next section conducts a comparative analysis of the potential strengths and limitations (in theory) inherent in the sectoral model, unified model, and twin peak model for regulating Fintech. Furthermore, the section suggests options for mitigating the limitations associated with each model to make them more aligned with the demands of Fintech regulation.

3.8. FINTECH REGULATION WITHIN VARIOUS MODELS OF THE INSTITUTIONAL STRUCTURE

3.8.1. Sectoral model

The regulation of Fintech using the sectoral model will typically involve having separate financial regulators for different Fintech firms that operate in various sectors of the financial system.[687] Fintech firms that offer services similar or comparable to those provided by traditional financial institutions will typically be subject to the same financial regulator as their traditional counterpart.[688]

Under the sectoral model, each financial regulator will likely focus on the Fintech activities and firms that operate in their sector instead of dealing with all sectors of the financial system as with the fully unified or the twin peaks model. This narrower scope of focus may make it easier for financial regulators to specialise and develop expertise for regulating the Fintech activities and firms in their sector. Such expertise and specialisation can help financial regulators better understand the unique risks and challenges facing their sectors and how best to address them.

Additionally, specialisation can aid financial regulators to respond quickly to Fintech developments within their sector since they are very conversant with the sector. As such, there is the likelihood of even development of the regulatory environment throughout all sectors of the financial system. Such an even regulatory development may arguably be more challenging to achieve with the unified and twin peaks models, given that the financial regulators under these models may prioritise certain Fintech activities over others. The sectoral model may also offer the benefits of regulatory competition when regulating Fintech.[689]

The sectoral model additionally accommodates the fact that while different Fintech activities can be delivered through one platform and be interconnected in other ways,

687 See Taylor C, Wilson C & Holttinen E et al (2019) 2 where the authors use Hong Kong SAR to exemplify how this model may be applied to regulate Fintech. They note that in Hong Kong SAR, the Hong Kong Monetary Authority (HKMA), regulates virtual banks while the Securities and Futures Commission (SFC) regulates the securities segment of Fintech. The Insurance Authority (IA) oversees Insurtech.

688 For example, a digital bank would likely be regulated by the regulator responsible for regulating banks and this is often the central bank. Similarly, a Fintech firm that offers Insurtech services would likely be overseen by the insurance regulator.

689 Knight B (2016) 22–23.

there are also differential elements between various Fintech activities.[690] Given the recognition of such differentiations, the sectoral model may have the potential to make it easier for financial regulators to develop Fintech regulations and adopt supervisory practices specific to their sector's needs and circumstances.

However, one possible limitation associated with using the sectoral model for the regulation of Fintech firms is its susceptibility for fragmentation. If a Fintech firm operates in many segments of the financial system, it will be required to engage with different financial regulatory bodies. As a result, navigating regulatory requirements might become more complicated and expensive for Fintech firms.

Additionally, the sectoral approach is prone to regulatory overlaps among financial regulators.[691] The presence of such overlap might potentially result in adverse outcomes, such as inconsistencies in regulatory measures, duplication of regulatory efforts, and arbitrage opportunities. The presence of many regulators within the sectoral model further introduces a heightened potential for disputes and inadequate coordination, hence increasing the likelihood of coordination failure in the regulation of Fintech.

The multiplicity of regulators under the sectoral model not only exacerbates the risks of regulatory inconsistency and coordination failure between financial regulators, but also between financial regulators and non–core financial regulators. The fully unified model and twin peaks models, which have fewer financial regulators, may allow for more seamless engagement with non–core financial regulators than the sectoral model.

These potential weaknesses of the sectoral model are reiterated in the assessment of the United States' current institutional structure (which mirrors the sectoral model) within the context of Fintech regulation by Omarova.[692] Omarova comments that the model is structurally compartmentalised along the rigid lines of product and entity while being 'predominantly technocratic in its philosophy and functional modalities.' She

690 For example, the regulatory and supervisory requirements for neobanks may differ from those for crowdfunding intermediaries or Insurtechs due to the different risks and business models involved.

691 For instance, the central bank may have authority over the use of cryptocurrency in the banking and payment systems, while the securities commission may have authority over cryptocurrency trading exchanges.

692 Omarova ST 'Technology v technocracy: Fintech as a regulatory challenge' (2020) 6(1) *Journal of Financial Regulation* 75–124.

observes that while the model enables and rewards bureaucratic specialisation, it 'is inherently limited in its ability to respond to the systemic challenges posed by Fintech.'[693]

To improve the effectiveness of the sectoral model for regulating Fintech, it is essential to establish sound legislative framework and robust mechanisms for regulatory coordination not only between financial regulators but also between financial regulators and non–core financial regulators.[694] It is also essential to establish clear roles and responsibilities for each regulator to minimise overlaps and potential conflicts. Furthermore, regulatory integration measures can be adopted to promote consistency and harmonisation of regulations for Fintech across sectors of the financial system.

3.8.2. Unified model

As explained in Chapter 2, there are two variants of the unified model, namely the fully unified model and the partially unified model. Under the fully unified model, a single or mega financial regulator has micro–prudential and conduct of business regulation responsibility for all financial institutions. In contrast, in the partially unified model, one financial regulator combines micro–prudential and conduct of business regulation of two or more sectors, while also having another regulator for another sector.

While under the sectoral model Fintech firms are subject to separate financial regulators based on the sector of the financial system that they operate in, under the fully unified model, all Fintech firms are under the oversight of a single regulator irrespective of their sectors of operations.[695] The fully unified model may, therefore be very useful in eliminating regulatory overlap and the negative consequences like regulatory inconsistency, duplication and arbitrage that may arise if there are multiple financial regulators.[696] Furthermore, the fully unified model may facilitate a simplified

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693 Omarova ST (2020) 71.

694 See B Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 20 submitting that regulatory coordination is particularly key when Fintech regulation is carried out by various sectoral supervisors.

695 See Taylor C, Wilson C & Holttinen E et al (2019) using Singapore as an examples to explain that under this model responsibilities for regulation of Fintech fall 'under one roof.'

696 See Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 20 confirming that the unified model is useful for addressing regulatory arbitrage issues when it comes to regulating Fintech.

regulatory compliance environment for Fintech firms since they have to engage with only one easily identifiable financial regulator.

However, the fully unified model may be challenged by the complexity of Fintech. For example, while the unified model may be suited for addressing the interconnection or diffusion of Fintech activities and firms, it may fail in addressing the unique differentiation between them to the same extent as the sectoral model. A single regulator may find it challenging to acquire specialised knowledge and expertise of Fintech activities in all sectors of the financial system. It may also prioritise the regulation of Fintech activities in some sectors over others, leading to regulatory gaps.

There is also concern that the mega regulator may become overly focused on one regulatory function at the expense of another. Furthermore, while the unified model eliminates the risk of regulatory inconsistency, regulatory arbitrage, and coordination failure related to financial regulators, it still necessitates collaboration between financial and non–core financial regulators. Buttressing this point, Didenko observes that:

> Even in jurisdictions where the regulation of financial services has been consolidated in the hands of a single regulator, communication and data protection matters are likely to have dedicated regulators that oversee the use of technology…Coexistence of parallel regulation systems creates an opportunity for businesses to seek regulatory arbitrage.[697]

To ensure that the fully unified model is effective for regulating Fintech, it will be helpful to create specialised units or departments in the single regulator dedicated to understanding and overseeing various aspects of Fintech, as Singapore has done with the Fintech and Innovation Group (FIG).[698]

Furthermore, it is critical to ensure that responsibilities for prudential and business conduct regulation for Fintech are distributed evenly. Additionally, a body should be established for regulatory coordination between the mega regulator and non–core financial regulators whose regulatory roles are relevant to Fintech.

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697 Didenko A ‘Regulating Fintech: lessons from Africa’ (2018) 19 *San Diego International Law Journal* 334.

698 See section 3.3.3.

With the partially unified model, more than one segment of Fintech, such as neo banking and Insurtech, may be under the oversight of one regulator while another regulator oversees the securities aspects of Fintech, including equity crowdfunding and crypto assets. Like the sectoral model, the partially unified model promotes sector–specific focus in dealing with Fintech, which can help address the unique challenges within each Fintech segment.

However, the partially unified model also has potential limitations in its application to Fintech regulation. The risk of regulatory overlap that the sectoral and twin peaks models are vulnerable to is also inherent in the partially unified model. The partially unified model can be improved with similar measures like the sectoral model as discussed above.

3.8.3. Twin peaks model

In using the twin peaks model to regulate Fintech firms, regulatory oversight will be split between two financial regulators, each with its specific mandate. One financial regulator will be responsible for prudential regulation, which involves overseeing the stability of Fintech firms. The other financial regulator will be responsible for conduct of business regulation, which involves protecting consumers and ensuring fair market practices.

Bains and Wu explain that in the twin peaks model, the conduct of business regulator often takes the lead in Fintech regulation because Fintech is often initially seen as raising more consumer/investor protection issues than prudential concerns.[699] However, prudential oversight is becoming more relevant, especially given the expansion of Techfins/Bigtechs into financial services in some jurisdictions and the rapid growth of multifunction crypto assets intermediaries in others.

The benefits of the twin peaks model for regulating Fintech firms stems from how the model streamlines the functions for prudential and conduct of business regulation. Under the twin peaks model, financial regulators have 'dedicated objectives and clear mandates to which they are exclusively committed.'[700] In this sense, the twin peaks

[699] Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 20.

[700] Godwin A 'Introduction to special issue–the twin peaks model of financial regulation and reform in South Africa' 11(4) (2017) *Law and Financial Markets Review* 151.

model has the potential of ensuring that Fintech firms are adequately regulated from both prudential and conduct of business perspectives.

Further, by having financial regulators that each have their specific area of focus, the twin peaks model ensures specialisation, and this can also help allow for expertise in the regulation of Fintech. Additionally, the partially integrated architecture of the model may help ensure that all Fintech firms are captured in the regulatory net, and the institutional regime is not fragmented like the sectoral model.

However, the twin peaks model may also have the risk of regulatory overlap, albeit not to the same extent as the sectoral model. There is, therefore, the need to clearly define the roles and responsibilities of each regulatory peak as it relates to Fintech.

Similar to the sectoral model, the financial regulatory 'peaks' may need to collaborate closely to address gaps resulting from a fragmentary institutional regime. As Bains and Wu observe:

> The twin peaks model requires for a greater degree of coordination between conduct and prudential supervision authorities. Effective coordination with clear mandates becomes key and could be assisted with interagency hubs or teams.[701]

Further, as has been suggested for both the sectoral and unified models, it is important to establish a Fintech regulation coordinating body for the twin peaks model as South Africa did with the Intergovernmental Fintech Working Group (IFWG).[702] The next section highlights the key points from the analysis in Sections 3.8.1 to 3.8.3.

3.8.4. Summary of comparative advantages and disadvantages of the various models for regulating Fintech

From the discussion in Sections 3.8.1 to 3.8.3, it is evident that the sectoral model, the unified model, and the twin peaks model all have inherent flaws that limit their effectiveness for regulating Fintech. The flaw common to all three models is that they are based on the outdated assumption that financial regulation is exclusively the domain of financial regulators. However, as earlier demonstrated, Fintech intensifies the significance and relevance of non–core financial regulators in financial regulation.

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701 Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 20.

702 See Section 3.3.3.

Hence, the need to establish a Fintech regulation coordinating body constituted of financial and non–core financial regulators.

Additionally, Fintech calls for entirely different institutional arrangements for facilitating the specialisation and expertise of regulators, including Fintech units, innovation hubs, and regulatory sandboxes. However, none of these arrangements are inherently built into the sectoral, unified, and twin peaks models.

Generally, while the sectoral model might have had fewer inadequacies in the past, the complexities and challenges of modern finance necessitated a rethinking of the model. The unified and twin peaks models are more recent design concepts than the sectoral model. They reflect the evolving nature of the financial system and the need for an adaptive institutional structure. But even so, the unified and twin peaks models have emerged in response to objectives that are not entirely Fintech–centred.

The unified model is a response to the increasing interconnectedness of financial institutions and markets, that is, financial convergence. On the other hand, the twin peaks model aims not only to respond to increasing financial convergence but also to adequately cater to prudential and conduct of business soundness.

When considering the comparative advantages of the various models, the twin peaks model appears to have the most advantages. This is because it streamlines financial regulators' prudential and conduct of business regulation functions while also ensuring that all Fintech firms are captured in the regulatory net. Conversely, the sectoral model has the majority of the comparative disadvantages. These disadvantages are mainly connected to its fragmented architecture, which may create regulatory overlap and compliance complexities for Fintech firms. Nevertheless, the sectoral model may foster specialisation and expertise in regulating Fintech.

The unified model (both fully unified and partially unified) falls between the twin peaks model and the sectoral model in terms of comparative advantages. It avoids some drawbacks of the sectoral model that are linked to its fragmented architecture. However, it does not match the benefits of the twin peaks model. The fully unified model could lead to over–generalising how Fintech is regulated, while the partially unified model is also vulnerable to the risks of overlap and coordination failure like the sectoral model.

Given that both the unified and twin peaks models have inadequacies, changing from the sectoral model to either of these models will not guarantee a fully effective institutional regime for regulating Fintech. Further reforms will still be necessary to tailor the overhauled institutional structure (whether unified or twin peaks) to the peculiarities of Fintech through introducing Fintech institutional arrangements.

Additionally, the ineffectiveness of the sectoral model (similar to those of the unified and twin peaks models) can be addressed through piecemeal reform measures. Therefore, when reforming the sectoral model to improve its effectiveness for regulating Fintech, it may be better to prioritise piecemeal reforms to the model instead of overhauling or changing it. This proposal aligns with the notion of proportionality discussed in Chapter 2.

3.9. CHAPTER CONCLUSION

This chapter aimed to contribute to a better understanding of Fintech and how it intersects with the institutional structure of financial regulation. The chapter finds that the sectoral, unified, and twin peaks models all have inherent weaknesses that undermine their effectiveness for regulating Fintech. It identifies various Fintech institutional arrangements that can facilitate the effective regulation of Fintech. These institutional arrangements include a Fintech regulation coordinating body, Fintech unit, innovation hub, innovation accelerator, regulatory sandbox, and Fintech one–stop–shop. The chapter also advocates for leveraging SROs to regulate dispersed and numerous Fintech startups when public regulators face resource constraints.

The chapter argues that Fintech units and a Fintech regulation coordinating body are fundamental and should be prioritised when implementing Fintech institutional arrangements. This is especially because these two Fintech institutional arrangements provide the foundation for the implementation of other institutional arrangements. The other Fintech institutional arrangements (like innovation hubs, innovation accelerator, regulatory sandboxes, and Fintech one–stop–shop) should be implemented based on the emerging needs of the Fintech sector.

The next chapter provides an overview of Nigeria's financial system and the current institutional structure. This overview addresses the background issues necessary for applying the frameworks discussed in this chapter and Chapter 2 to assess the effectiveness of Nigeria's current institutional structure in Chapter 5.

CHAPTER 4: OVERVIEW OF NIGERIA'S FINANCIAL SYSTEM, THE FINTECH SECTOR, AND INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION

4.1. CHAPTER INTRODUCTION

The requirements that can be used to assess the effectiveness of Nigeria's institutional structure for financial regulation generally and Fintech regulation specifically have emerged from the discussions in Chapters 2 and 3.[703] However, before turning to assess the effectiveness of Nigeria's institutional structure through the lens of these requirements, it is useful to first discuss Nigeria's institutional structure and track the notable reforms that have been introduced to the structure over the years.[704] Additionally, it is vital to provide an overview of Nigeria's Fintech sector and the regulatory landscape of Fintech activities in the country.[705]

This chapter addresses these issues to provide the necessary context for assessing the effectiveness of Nigeria's institutional structure in Chapter 5. The chapter shows that there is financial convergence in Nigeria's financial system, evident in the initial emergence of universal banks and, subsequently, financial holding companies. It also confirms that Nigeria's Fintech sector is experiencing impressive growth. Centrally, this chapter is significant for providing insights into the current state of affairs with the institutional aspects of financial regulation in Nigeria, as well as the country's regulatory landscape for Fintech.

The chapter is organised into seven further sections: Section 2 provides an overview of Nigeria's financial system and discusses developments in the country's Fintech sector. Section 3 explains how the Constitution of Nigeria serves as the foundation for financial regulation and gives a snapshot of Nigeria's current institutional structure. Section 4 outlines the jurisdiction of the financial regulators that make up Nigeria's current institutional structure, while Section 5 identifies some non–core financial regulators whose regulatory functions are relevant to both financial regulation and

703 See Chapter 2, Section 2.5.4; Chapter 3, Section 3.7.

704 This is necessary to gauge the current state of affairs in the institutional structure. It is also helps to preliminarily track areas in the institutional structure that may require improvement even before the more extensive assessment in Chapter 5.

705 Understanding the size, complexity, and dynamics of Nigeria's financial services landscape, including Fintech activities, is useful for justifying why policymakers should approach the regulation and supervision of the financial system with utmost seriousness.

Fintech regulation. In Section 6, notable reforms that have been introduced to Nigeria's institutional structure over the years are identified. Section 7 highlights the regulatory response to various Fintech activities, while Section 8 concludes the chapter.

4.2. OVERVIEW OF THE FINANCIAL SYSTEM AND DEVELOPMENT OF THE FINTECH SECTOR

As a background to discussing Nigeria's institutional structure of financial regulation, this section presents a brief overview of Nigeria's financial system and tracks the developments in the country's Fintech sector. It highlights the diverse range of Fintech activities and firms that have become integral to the Fintech sector. Additionally, the factors contributing to the growth of the sector are identified.

4.2.1. Overview of the financial system and Fintech sector

Various qualitative and quantitative studies have acknowledged the positive impact of Nigeria's financial system on the growth of the country's economy.[706] Similar to the pattern observed in many developing countries, Nigeria's financial system has a dualistic structure, encompassing a formal sector and an informal sector.[707] The formal sector comprises financial institutions, markets, and infrastructures that operate under the close regulatory and supervisory oversight of various regulatory authorities.[708]

On the other hand, the informal sector includes financial service providers that operate with minimal or no regulation, such as moneylenders, moneychangers, savings associations, and cooperative societies.[709] The informal sector plays a crucial role in providing access to credit and other financial services to households and micro, small

706 See for example, Akintola AA, Oji–Okoro I & Itodo IA 'Financial sector development and economic growth in Nigeria: an empirical re–examination' (2020) 58(3) *Central Bank of Nigeria Economic and Financial Review* 59; Ayadi FS 'Financial development, savings and economic growth in Nigeria' (2019) 43 *Savings and Development* 1–10.

707 Central Bank of Nigeria *The Nigerian financial system at a glance* (Monetary Policy Department of the Central Bank of Nigeria, 2017) 5–11; Adeusi SO, Azeez BA & Olanrewaju HA 'The effect of financial liberalization on the performance of informal capital market' (2012) 3(6) *Research Journal of Finance and Accounting* 64.

708 Sy MA, Maino MR & Massara MA et al *Fintech in sub–Saharan African countries: a game changer?* (2019) 1–2.

709 Central Bank of Nigeria *The Nigerian financial system at a glance* (Monetary Policy Department of the Central Bank of Nigeria, 2017) 11–13.

and medium–sized enterprises (MSMEs) that formal financial institutions have financially excluded.[710]

The International Monetary Fund (IMF) has described Nigeria's financial system as one that is diverse, large and interlinked with the international financial system.[711] Nigeria's financial system is largely dominated by the banking sector, a pattern commonly observed in many other African countries.[712] The banking sector accounts for more than 80 per cent of the financial system's assets and represents approximately 53.6 per cent of the country's GDP.[713]

While the banking sector is the biggest component of the financial system, the insurance sector is the least developed sector of the financial system. The insurance sector's assets account for less than 2 per cent of the country's GDP.[714] Insurance penetration remains relatively low, with only about 1 per cent of the adult population covered by insurance.[715]

Despite fluctuations, Nigeria's capital market has witnessed continued expansion in both traditional and emerging capital market assets like derivatives.[716] Notably, the Nigerian Exchange Group (NGX) ranks as the second–largest stock exchange in Africa after South Africa's Johannesburg Stock Exchange (JSE).[717]

The pension sector is also growing and currently comprises 19 pension fund administrators and three pension fund custodians.[718] It is noted that the introduction

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710 Babajide AA 'The relationship between the informal and formal financial sector in Nigeria: A case study of selected groups in Lagos Metropolis' (2011) 1(10) *International Journal of Research in Computer Application & Management* 24.

711 International Monetary Fund *Detailed Assessment of compliance of the Basel core principles for effective banking supervision* (IMF Country Report No. 13/143, 2013) 7–12.

712 Beck T, Maimbo SM & Faye I *Financing Africa: Through the crisis and beyond* (2011) 12.

713 International Monetary Fund *Detailed Assessment of compliance of the Basel core principles for effective banking supervision* (IMF Country Report No. 13/143, 2013) 4.

714 International Monetary Fund *Detailed assessment of observance of insurance core principles* (IMF Country Report No. 13/145) 4.

715 For the reasons for the poor penetration, see Hafiz UA, Salleh F & Garba M et al 'Projecting insurance penetration rate in Nigeria: An ARIMA approach' (2021)11(3) *Revista Geintec–Gestao Inovacao E Tecnologias* 63.

716 See Jalal–Eddeen F & Saleh ZJ 'Financial derivatives: The concepts, operations, and impact on the Nigerian economy' (2022) 9(1) *Open Access Library Journal* 1–10.

717 Ajakaiye O & Tella S *Financial regulation in low–income countries: balancing inclusive growth with financial stability –the Nigerian case* (ODI Working Paper 409, 2016) 4; Schoeman L '5 biggest stock exchanges in Africa' available at https://sashares.co.za/biggest–stock–exchanges–in–africa/ (Accessed on 3 November 2022*)*.

718 This is according to data from the National Pension Commission as of June 2023 available at https://www.pencom.gov.ng/pension–fund–administrators/ (Accessed on 7 July 2023).

of the contributory pension scheme in the private and public sectors has significantly enhanced the performance and sustainability of Nigeria's pension sector. The pension sector has become a vital source of long–term funding for the capital market and other sectors of the economy.

Turning to the Fintech sector, according to a study by Ndung'u, Nigeria, alongside South Africa and Kenya, are the three leading Fintech hubs in sub–Saharan Africa.[719] In another publication by PwC, it is noted that these three countries account for a larger portion of the over 400 Fintech startups operating in Africa.[720] Nigeria has, in all, emerged as one of the biggest Fintech markets in the African continent in terms of Fintech adoption, investment, and sector revenues.[721]

The evolution of Fintech in Nigeria can be associated with certain historical milestones. Notably, in 1987, National Cash Registers Plc installed the first Automated Teller Machine (ATM) for the Société Générale Bank of Nigeria, bringing a new level of convenience and accessibility to banking services.[722] The establishment of the Nigeria Inter–Bank Settlement System (NIBSS) in 1993 marked another crucial milestone in setting the stage for a faster, more robust, and digitalised payments and clearance system.

Another major milestone came in 1996 when a consortium of banks launched a project for electronic smart card accounts.[723] Additionally, the introduction of the global system for mobile communications (GSM) in the early 2000s further set the stage for the development of mobile and internet–based financial services in the country.[724]

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719 Ndung'u N *Fintech in sub–Saharan Africa* (WIDER Working Paper 2022/101, 2022) 8. See also Digital Banker Africa 'A look at the four African cities evolving as Fintech hubs' available at https://digitalbankerafrica.com/a–look–at–the–four–african–cities–evolving–as–Fintech–hubs/ (Accessed on 6 February 2022).

720 PwC *Changing competitive landscape: Fintech and the banking sector in Nigeria* (2020) 6.

721 See Flötotto M, Gold E & Jeenah U et al *Fintech in Africa: The end of the beginning* (McKinsey & Company, 2022).

722 For a discussion on the development of Fintech in Nigeria, see generally Alliance for Financial Inclusion & Central Bank of Nigeria *Sustaining an inclusive digital financial services (DFS) ecosystem during a global emergency* (AFI Case Study, 2020).

723 Onah EO, Ujunwa AI & Ujunwa A et al 'Effect of financial technology on cash holding in Nigeria' (2021) 12(2) *African Journal of Economic and Management Studies* 229.

724 Agbetiloye A 'Why Nigeria should ban the sales of phones with no charging bricks' https://venturesafrica.com/why–nigeria–should–ban–the–sales–of–phones–with–no–charging–bricks/ (Accessed on 7 July 2023).

Nigeria is currently home to over 200 Fintech startups, excluding traditional financial institutions and mobile network operators that engage in various Fintech activities.[725] Among the six African Fintech startups that have achieved unicorn status, three of them are Nigerian–based: Interswitch, Opay, and Flutterwave.[726] Nigeria also made history by becoming the first African country to launch a central bank digital currency (CBDC) known as the eNaira in 2021. The launch of the eNaira is driven by the objectives of increasing financial inclusion, facilitating remittances, and reducing the informality of payments.[727]

Generally, most Fintech activities that have emerged in other parts of the world have also gained significant traction in Nigeria. The Fintech Association of Nigeria, in collaboration with Ernst and Young Nigeria, conducted a survey highlighting the various segments of Nigeria's Fintech sector and the market share of the segments in the sector. The results of the survey are depicted in the graph below:

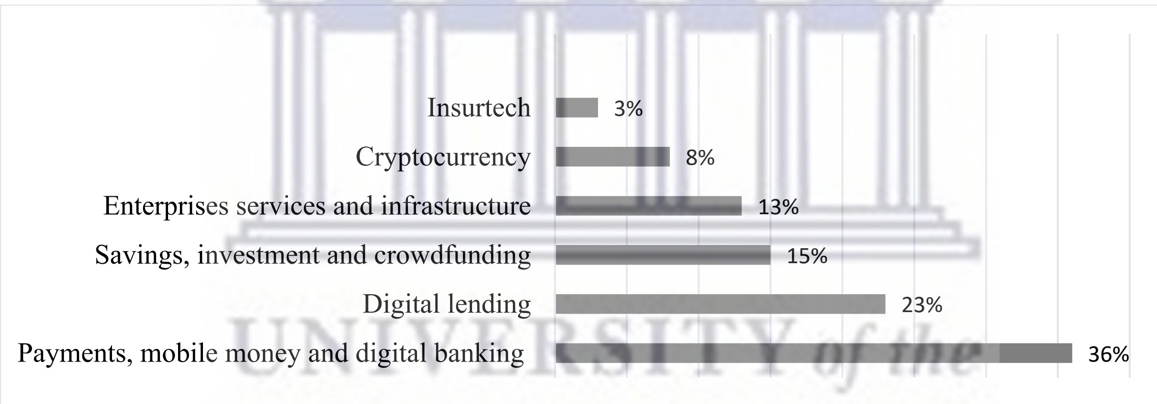

Figure 6: Fintech segments and their size[728]

725 See Kolade E 'Cybersecurity in Nigeria's financial industry: Enhancing consumer trust and security' available at _https://carnegieendowment.org/2022/05/13/cybersecurity–in–nigeria–s–financial–industry–enhancing–consumer–trust–and–security–pub–87123_ (Accessed on 7 July 2023); Nigerian Communications Commission (2020) 9; Babajide AA, Oluwaseye EO & Lawal AI et al 'Financial technology, financial inclusion and MSMES financing in the south–west of Nigeria' (2020) 26(3) *Academy of Entrepreneurship Journal* 4.

726 Welch EM 'Meet the Fintech's dominating Africa's unicorn list' available at _https://lucidityinsights.com/articles/meet–the–Fintechs–dominating–africas–unicorn–list_ (Accessed on 7 July 2023).

727 See Ree J *Nigeria's eNaira, one year after* (IMF Working Paper WP/23/104, 2023) 7. See also Wezel T, Ree J *Nigeria–fostering financial inclusion through digital financial services* (IMF Country Report No. 2023/094, 2023) 14.

728 Ernst & Young and Fintech Association of Nigeria 'Nigeria Fintech census 2020: Profiling and defining the Fintech sector' available at _https://assets.ey.com/content/dam/ey–sites/ey–com/en_ng/ey–Fintech–nigeria–census–final.pdf_ (Accessed on 7 July 2023). See also Financial Inclusion Steering Committee *National Fintech Strategy* (2022) 17–18.

4.2.2. Growth facilitators of the Fintech sector

The growth of Fintech in Nigeria can be attributed to various factors. The first of these factors is that Nigeria has a large youth population that is increasingly showing a liking for Fintech activities and technological solutions more generally.[729]

Secondly, Nigeria has a large unbanked population. It has been observed that more than 42 million adults living in rural areas in the country lack basic banking services.[730] A 2021 World Bank survey shows that only 45 per cent of Nigerian adults have bank accounts.[731] Another survey shows that nearly one in two adults do not use any formal financial services, and one in three Nigerian adults are completely financially excluded.[732]

The widespread use of mobile phones has also played a crucial role in the success of Nigeria's Fintech sector. Nigeria is said to have roughly 170 million mobile phone users based on subscriptions. 25 to 40 million of this number are smartphones, and by 2025, the number is projected to increase to about 140 million.[733]

Further, the growth of Fintech in Nigeria is also being driven by the government's policy objective to promote financial inclusion and a cashless economy. These objectives are captured in policy documents like the Payment Systems Vision 2020, launched in 2007,[734] the Cashless Policy of 2012,[735] and the Payment Systems Vision 2025.[736]

729 PwC *Report on changing competitive landscape: Fintech and the banking in Nigeria* (2020) 3.

730 Froeling M & Garcia A 'Agent banking helps close financial inclusion gaps in Nigeria' *https://blogs.worldbank.org/psd/agent–banking–helps–close–financial–inclusion–gaps–nigeria* (Accessed on 7 July 2023).

731 World Bank 'The global findex database 2021' *https://www.worldbank.org/en/publication/globalfindex/interactive–executive–summary–visualization* (Accessed on 7 July 2023).

732 Enhancing Financial Innovation and Access (EFInA) *Access to financial services in Nigeria 2020 survey* (2021) 44.

733 Agbetiloye A 'Why Nigeria should ban the sales of phones with no charging bricks' *https://venturesafrica.com/why–nigeria–should–ban–the–sales–of–phones–with–no–charging–bricks/* (Accessed on 7 July 2023).

734 Available at *https://www.cbn.gov.ng/icps2013/papers/NIGERIA_PAYMENTS_SYSTEM_VISION_2020%5Bv2%5D.pdf* (Accessed on 8 June 2023).

735 Central Bank of Nigeria 'Cash–Less FAQs –Central Bank of Nigeria' *https://www.cbn.gov.ng/cashless/Cash–Less%20FAQs.pdf* (Accessed on 8 June 2023).

736 Available at *https://www.cbn.gov.ng/Out/2022/CCD/PSMD%20vision%202025%20EDITED%20FINAL.pdf* (Accessed on 18 November 2023).

Notably, Nigeria was among the 20 developing countries that made financial inclusion commitments at the Global Forum of the Alliance for Financial Inclusion held in Riviera Maya, Mexico, in September 2011, commonly referred to as the Maya Declaration.[737] Nigeria committed to reducing the percentage of adults excluded from financial services from 46.3 per cent in 2010 to 20 per cent by 2020.[738]

Following its commitment, in October 2012, Nigeria launched its National Financial Inclusion Strategy (NFIS), which was subsequently revised in 2018. As defined by the 2018 NFIS, financial inclusion is achieved when adult Nigerians have easy access to a broad range of formal financial services that meet their needs at affordable costs.[739] The 2018 NFIS sets out the target of having 70 per cent of Nigeria's adult population financially included in the formal financial services sector and 10 per cent included in the informal sector by 2020.[740] It identifies various strategic initiatives, most of which are technology–driven, to achieve this target.[741]

Apart from the policies targeting financial inclusion and a cashless economy, in 2022, the Financial Inclusion Steering Committee (FISC), which is one of the institutional bodies set up to drive the implementation of the NFIS, issued the National Fintech Strategy (NFS).

The NFS sets out the vision of positioning Nigeria as a leading inclusive digital and Fintech ecosystem in Africa.[742] It defines two key strategic objectives.[743] The first is to develop Nigeria's Fintech ecosystem. The other objective of the NFS is to establish robust governance for Nigeria's Fintech ecosystem.

The NFS is said to align with the Alliance for Financial Inclusion Sochi Accord, which recognises that Fintech can be leveraged to drive financial inclusion.[744] It is projected that if the NFS is successful in achieving its goals, it will contribute to Nigeria's GDP

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737 Alliance for Financial Inclusion *National coordination and leadership structure* (AFI Survey Report, 2017) 35.

738 Alliance for Financial Inclusion *National coordination and leadership structure* (AFI Survey Report, 2017) 35.

739 National Financial Inclusion Strategy (2018) vii.

740 National Financial Inclusion Strategy (2018) vi.

741 See National Financial Inclusion Strategy (2018) 28–31.

742 National Fintech Strategy (2022) 28.

743 National Fintech Strategy (2022) 28.

744 National Fintech Strategy (2022) 8.

through job creation and productivity by building a healthy financial services ecosystem.[745]

Commendably, the NFS did not ignore earlier policy document efforts. Specifically, the NFS acknowledges the report titled *The future of Fintech in Nigeria* prepared by the Fintech Roadmap Committee set up by the Securities and Exchange Commission (SEC). The NFS also establishes the link between the recommendations in the two policy documents.[746]

There are other policy documents on various subjects that contribute to shaping the Fintech landscape. These include policies such as the National Digital Economy Policy and Strategy (2020–2030), 2019; the Nigerian National Cybersecurity Policy and Strategy, 2022; and the National Blockchain Policy, 2023.

Additionally, the recently enacted Nigeria Startup Act 32 of 2022, is envisioned to further support the Fintech sector's growth. Notably, the Nigeria Startup Act sets out a host of legal, institutional, and fiscal frameworks that seek to: (1) facilitate the development of startups, (2) create an enabling environment for startups to thrive, (3) provide for the development and growth of technology–related talents and (4) position Nigeria to become a leading technology hub in the African continent.[747]

A 'startup' is defined in the Nigeria Startup Act as a company that has not existed for more than 10 years and whose business involves creating, innovating, producing, developing, or adopting a unique digital technology innovative product, service, or process.[748] It is submitted that this definition is broad enough to include Fintech startups. Fintech startups are typically characterised by their focus on leveraging digital technologies to introduce novel services, products, business models, and processes within the financial sector.[749] This focus squarely aligns with the Act's emphasis on digital and technology–driven innovation. However, to capitalise on the various policy initiatives provided by the Nigeria Startup Act, individual Fintech startups must also meet the Act's age criteria, which limits eligibility to companies existing for not more than 10 years. It is observed that this requirement ensures that the benefits

745 National Fintech Strategy (2022) 2.
746 National Fintech Strategy (2022) 71–72.
747 s 1 of the Nigeria Startup Act.
748 s 47 of the Nigeria Startup Act.
749 See Chapter 3, Section 3.2.

of the Nigeria Startup Act are targeted towards emerging companies that are still in their developmental stages.

Some of the notable institutional initiatives of the Nigeria Startup Act, which should also interest Fintech actors, include the following:

(1) **National Council for Digital Innovation and Entrepreneurship (Council)**:[750] The Council is established as a body corporate with perpetual succession and a common seal. It is chaired by the President, with the Vice–President serving as the Vice–Chairman. Other key members include Ministers responsible for Communications and Digital Economy, Finance, Budget and National Planning, Industry, Trade and Investment, Science, Technology and Innovation, as well as the CBN Governor. Additionally, there are representatives from the Startup Consultative Forum, the Nigeria Computer Society, the Computer Professionals (Registration Council of Nigeria), and the Director–General of the National Information Technology Development Agency (NITDA), who act as the Secretary of the Council. The Council is responsible for many functions including, formulating and providing general policy guidelines related to the Act, offering overall directions for the harmonisation of laws affecting startups, approving the programmes of the Secretariat, and ensuring the monitoring and evaluation of the regulatory framework to promote startup development in Nigeria. The Council has the power to review policies and directives issued by Ministries, Departments, and Agencies (MDAs) that could impact the functioning, establishment, and investments in startups.[751]

(2) **Secretariat of the Council:** The Nigeria Startup Act provides that NITDA shall serve as the Secretariat of the Council and the Head of the Secretariat is the Director–General of NITDA. The Secretariat is assigned various responsibilities, including managing the process of startup labelling, establishing online platforms for information dissemination, collaborating with relevant government bodies and stakeholders to promote digital technology innovation, and ensuring the implementation of the National Digital Innovation, Entrepreneurship, and Startup Policy. Additionally, the Secretariat is tasked

750 See ss 3–8 of the Nigeria Startup Act.

751 See s 9 of the Nigeria Startup Act.

with entering partnerships with incubators and accelerators, maintaining a directory of startups, supporting research and development activities, fostering the growth of the private sector–led programs, promoting the commercialisation of local research, and developing mechanisms for pre–incubation and capacity building. The Secretariat also plays a role in establishing digital technology hubs, parks, and community enterprise hubs, fostering collaboration between startups and various investors, reviewing proposals, collaborating with educational institutions, advising the Council on startup–related issues, and undertaking other duties as required by the Council.

(3) **Startup Support and Engagement Portal:** The Nigeria Startup Act provides for the establishment of the Startup Portal by the Secretariat with the approval of the Council. The Startup Portal serves as a comprehensive platform designed to streamline and support the operations of 'labelled startups.' Its specific functions include facilitating the issuance of permits or licenses for startups, and establishing a communication hub between startups and various entities such as the federal government, private institutions, angel investors, venture capitalists, incubators, and accelerators. The portal also creates opportunities for startups to engage in beneficial challenges, programs, and initiatives like incubation and accelerator programs, pitch competitions, fellowships, and showcases.[752]

(4) **Startup Consultative Forum:** The Nigeria Startup Act provides that the Secretariat shall with the approval of the Council establish the Startup Consultative Forum, which is to be hosted within the Startup Portal. It serves as a platform for collaboration and information sharing within the Nigerian startup ecosystem. The Forum includes industry stakeholders and representatives from labelled startups, venture capitalists, angel investors, incubators, accelerators, and innovation hubs. Additionally, two civil society organisations engaged in promoting technology and innovation are also represented in the Forum. The Forum's key functions involve sharing information on qualifying startups, relevant incentives, and local capabilities, nominating representatives to the Council, deliberations on memoranda for

[752] See s 10 of the of the Nigeria Startup Act.

Council consideration, and discussing policy proposals pertinent to the Nigerian startup ecosystem.[753]

(5) **Startup Investment Seed Fund (Fund):** The purpose of the Fund includes providing financial support to labelled startups, offering early–stage finance based on the fund manager's recommendation and approval of the Council, and providing relief to technology laboratories, accelerators, incubators, and hubs. The Fund is to be managed by the Nigeria Sovereign Investment Authority. The Fund is intended to receive an annual allocation of not less than ₦10 billion from sources approved by the Council.[754]

Interestingly, the NFS is stated to have been initiated to be an enabler of the Nigeria Startup Act and other policy documents like the Payment Systems Vision 2025 and NFIS.[755] Apart from the Nigeria Startup Act, the Business Facilitation (Miscellaneous Provisions) Act 5 of 2022 is another legislation that is envisioned to create an enabling business environment for Fintech firms to thrive.[756]

With an overview of Nigeria's financial system and the Fintech sector provided in this section, this section extends an understanding of the country's current institutional structure of financial regulation.

4.3. CONSTITUTIONAL UNDERPINNINGS AND HISTORICAL DEVELOPMENT OF NIGERIA'S INSTITUTIONAL STRUCTURE OF FINANCIAL REGULATION

While it is seldom highlighted in literature, the Constitution of a country actually forms the cornerstone of financial regulation. This foundational role is often overshadowed by more direct and specific financial sector laws that apply to various financial services and institutions. However, it is the Constitution that sets the overarching legal framework within which all specific financial sector laws and policies are developed and implemented. The importance of the Constitution becomes even more unmistakable in countries that follow a federal systems of governance, as it is the

753 See s 12 of the of the Nigeria Startup Act

754 See s 19 of the of the Nigeria Startup Act.

755 National Fintech Strategy (2022) 7.

756 The Act aims to enhance the ease of doing business in Nigeria and eliminate bureaucratic hindrances and other bottlenecks to doing business in the country. The Act notably amended 21 business–related national Acts to address these issues. For an overview of the specific amendments introduced to various laws by the Act, see Uzoka NC & Aduma OC 'Ease of doing business: A critical examination of the Business (Miscellaneous Provisions) Facilitation Act 2023' (2023) 4(1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 14–23.

Constitution that defines the balance of legislative and regulatory authority between the central government and federating units.

In essence, while financial sector laws provide the necessary specifics and operational mechanisms for regulation, it is the Constitution that lays the bedrock for these laws. Along this line of reasoning, this section begins by explaining how the Constitution of Nigeria delineates legislative powers over financial services between the national and State spheres of government. Following that, the section identifies the financial regulators that constitute Nigeria's institutional structure, accompanied by a brief historical account of how these regulators emerged.

4.3.1. Constitutional underpinnings and the legal system

Nigeria's legal system has been significantly influenced by its history as a former colony of the British. As Sokefun and Njoku put it, Nigeria's legal system 'is essentially a colonial heritage which springs from British colonial rule.'[757] Specifically, Received English Law constitutes a source of law in the country. The components of this Received English Law are common law, doctrines of equity, and statutes of general application that were in force in England on 1 January 1900.[758]

Other sources of law in Nigeria are the Constitution, statutory laws at the Federal (Acts), State (Laws), and Local Government (Byelaws) spheres, Nigerian case law, customary law, and Islamic law, as well as treaties that have been domesticated.[759] The principles of judicial precedent and the hierarchical court structure are also fundamental components of the legal system. The Constitution creates both State and

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757 Sokefun J & Njoku NC 'The court system in Nigeria: Jurisdiction and appeals (2016) 2(3) *International Journal of Business and Applied Social Science* 1.

758 However, these sources of law can be overridden by Nigerian case law or statute law. For more detailed discussion on Nigeria's sources of law, see Omede PI *Transnational regulation, lenders' responses and the needs of consumer borrowers in Nigeria* (unpublished PhD thesis, University of Kent, 2019) 24–30; Alkali AU, Jimeta UA & Magashi AI et al 'Nature and sources of Nigerian legal system: An Exorcism of a Wrong Notion' (2014) 5(4) *International Journal of Business, Economics and Law* 1–10.

759 Treaties do not become a part of Nigerian law until they have been domesticated, which means that they have been enacted into law by the National Assembly. This is drawn from s 12(1) of the Constitution which provides that 'No treaty between the Federation [Nigeria] and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.' However, it should also be noted that s 254C (2) of the Constitution creates an exception to s 12(1) by providing that treaties dealing with labour-related matters that have been ratified but are yet to be domesticated by the National Assembly can be applied by the National Industrial Court.

Federal courts,[760] with the Supreme Court of Nigeria being the highest court in the judicial hierarchy.[761]

Nigeria is a federal state as affirmed in the Constitution of the Federal Republic of Nigeria, 1999 (as amended).[762] The federation is made up of 36 States and Abuja, which serves as the capital and seat of government of the federation. Nigeria is also a constitutional democracy.[763] Apart from entrenching constitutional supremacy, the Constitution embodies horizontal and vertical separation of power. Horizontally, the Constitution shares powers between the executive, legislature and judiciary,[764] while vertically, there is the separation of power between three spheres of government: Federal/National, State and Local Governments.[765]

The Constitution is the foundational basis for determining which sphere of government is responsible for legislating on and regulating different areas, including as it relates to financial services. The distribution of powers between the Federal/National and State legislative bodies is delineated through the Exclusive Legislative List and Concurrent Legislative List which are contained in the Second Schedule, Part 1 and Part 2 of the Constitution.

The Exclusive Legislative List specifies matters that only the national legislature, known as the National Assembly, can legislate on.[766] Apart from the items mentioned in the Exclusive List, the National Assembly is empowered to make laws for Abuja and laws to implement a treaty.[767] Further, item 68 of the Exclusive Legislative List contains

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760 In terms of ss 230–269 of the Constitution, the federal courts are the Supreme Court, Court of Appeal, Federal High Court, National Industrial Court, High Court of the Federal Capital Territory, Sharia Court of Appeal of the Federal Capital Territory, and Customary Court of Appeal of Federal Capital Territory. On the other hand, ss 270–284 of the Constitution provides for the following state courts: State High Court, Sharia Court of Appeal, and Customary Court of Appeal.

761 s 235 of the Constitution provides that 'Without prejudice to the powers of the President or of the Governor of a state with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.'

762 See ss 2,3, 4 & 298 of the Constitution. See also, Malemi E *The Nigerian constitutional law* (2012) 584.

763 s 1(1) of the Constitution provides that it is 'supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.' Further s 1(3) of the Constitution provides that 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.'

764 See ss 4, 5 & 6 of the Constitution.

765 See ss 2, 3 & 7 of the Constitution. Nigeria is currently constituted of 36 states, 768 local governments as well as Abuja, which serves as the Federal Capital Territory from which the national or federal government operates.

766 s 4(2) of the Constitution.

767 s 12(2) of the Constitution; s 299 of the Constitution.

a broad catch–all phrase, empowering both the National Assembly to legislate on 'any matter incidental or supplementary to any matter' mentioned in the Exclusive Legislative List.

On the other hand, the Concurrent Legislative List enumerates matters that both the National Assembly and State Houses of Assembly can make laws for.[768] Importantly, the Concurrent Legislative List states the specific matters that the National Assembly and State Houses of Assembly can respectively legislate on.[769]

If a specific matter is jointly assigned to the National Assembly and State Houses of Assemblies in the Concurrent Legislative List, and the National Assembly then makes a law on that subject matter, such a law will be deemed to have covered the field. Nigeria's Supreme Court clarified in the case of *Attorney–General of Lagos State v Eko Hotels Ltd and Anor* that, in such a situation of the field being covered: (1) if the State Law is inconsistent with the national Act, it will be void, and (2) if the State Law is consistent with the Act, it will be inoperative.[770] The inoperative law may be revived if the national Act is repealed.

Any subject not covered in the Exclusive Legislative List and not assigned to the National Assembly under the Concurrent Legislative List falls under the exclusive purview of the States as 'residual' legislative matters.[771] Additionally, if the National Assembly lacks constitutional authority to enact legislation on a specific subject, national/federal government agencies cannot issue subsidiary legislation on that subject.

Banking, exchange control, insurance, pension, and securities are all mentioned in the exclusive legislative list; hence why there are both national Acts and regulatory agencies for them.[772] This position differs significantly from other Federal States like the United States of America and Canada, where some areas of financial services such as banking, insurance, and securities are also within the legislative and regulatory purview of the States.[773]

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768 s 4(7) of the Constitution.

769 ss 4(4)(a) & 4(7)(b) of the Constitution.

770 *Attorney–General of Lagos State v Eko Hotels Ltd and Anor* (2017) LPELR–43713(SC).

771 s 4(7)(a) of the Constitution

772 See items, 6, 19, 24, 33 & 44 Second Schedule, Part 1 of the Constitution.

773 See Petschnigg R *The institutional framework for financial market policy in the USA seen from an EU perspective* (European Central Bank Occasional Paper Series No. 35, 2005) discussing

However, it must be noted that there are also areas of financial services that are within the legislative competencies of the States in Nigeria. Specifically, the Constitution recognises the powers of State Houses of Assembly to enact laws for the establishment of cooperative societies.[774] These cooperative societies typically offer services such as saving, investment, and lending to their members. Also, moneylending is not explicitly mentioned in the Constitution's Exclusive and Concurrent Legislative Lists. Consequently, it can be argued that it falls under the residual matters for the States to legislate on.[775]

It is observed that the explicit delegation of legislative powers in the Constitution provides a clear and straightforward framework for the exercise of authority by the National Assembly and State Houses of Assembly. However, challenges may arise in areas where powers have not been explicitly delegated, including when dealing with residual matters or 'any matter incidental or supplementary' to any of the matters explicitly designated for the National Assembly.

Except where there is case law settling the issue, where there is no explicit delegation of legislative powers, ambiguity and potential conflicts may emerge regarding which level of government holds legislative jurisdiction. This has indeed been the case with subjects like data protection, consumer protection, and competition regulation, which have not been explicitly assigned to either the National Assembly or State Houses of Assembly. There can be arguments on both sides that the National Assembly and State Houses of Assembly can legislate on them. Further, one can also argue that moneylending can be considered both a residual matter for the State House of Assembly and a matter that the National Assembly can legislate on as an extension of its exclusive legislative powers to regulate banking activities.

Unfortunately, Nigeria's Constitution does not provide guidelines for clarifying legislative powers in instances where they have not been explicitly delegated. It is

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the institutional structure of financial regulation in the US and nothing that the structure 'is characterised by a high institutional density, with both federal and state authorities responsible for financial sector regulation/ supervision.' See also Labonte M *Who regulates whom? An overview of the U.S financial regulatory framework* (Congressional Research Service Report No. 44918, 2023); Jackson JK *Canada's financial system: An overview* (Congressional Research Service Report No. 40687, 2009).

774 See item 32, Second Schedule, Part 1 of the Constitution.

775 For example, in Lagos State, which is the commercial hub of Nigeria, moneylending and the activities of cooperative societies are regulated by the Moneylenders Law of Lagos State, 2003 and the Cooperatives Societies Law of Lagos State, 2015.

opined that these guidelines can be based on various determinants, including whether the matter: (1) can be more effectively regulated by legislation enacted by the respective States, (2) requires uniformity across the nation, (3) is a cross–State matter, or (4) impacts the nation as a whole.[776] Additionally, the National Assembly could also be required by the Constitution to develop model laws that states should adopt as minimum standards when enacting their respective laws in matters that are better suited for State legislation, but also necessitate a certain level of consistency across the various states.

The next section provides an overview and historical development of Nigeria's current institutional structure of financial regulation.

4.3.2. Historical development and current model of financial

Nigeria's current institutional structure of financial regulation significantly mirrors the defining features of the sectoral model, with separate regulators for the banking, securities, insurance, and pension sectors.[777] Specifically:

(1) The banking sector falls under the regulation of the Central Bank of Nigeria (CBN),

(2) The Nigeria Deposit Insurance Corporation (NDIC) complements the role of the CBN by administering deposit insurance for financial institutions licensed by the CBN that are involved in deposit–taking activities and managing failed financial institutions.

(3) The securities sector is overseen by the Securities and Exchange Commission (SEC),

(4) The insurance sector is regulated by the National Insurance Commission (NAICOM), and

(5) The pension sector is under the purview of the National Pension Commission (PENCOM)

Notably, under the current institutional structure, the type or legal status of a financial institution is a major determinant of the activities that such an institution can undertake.

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[776] These determinants are drawn from s 146 of the South African Constitution, 1996.

[777] Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 28.

It also determines the sectoral regulator that will have oversight of its activities from both prudential and conduct of business angles.[778] However, Nigeria's institutional structure also incorporates elements of the functional model, especially in regulating securities activities.[779]

Nigeria's institutional structure has evolved alongside the growth and expansion of the country's financial system, rather than being the result of a deliberate effort to establish a sectoral model from the onset.[780] In the years following Nigeria's independence in 1960, the main financial regulators were the CBN which was established in 1958 and the Federal Ministry of Finance (MoF).[781]

Particularly, during the period from 1960 to 1965, both the CBN and the MoF shared the responsibility for bank regulation, with the CBN handling off–site supervision and the MoF conducting on–site supervision.[782] However, in 1966, the CBN assumed sole responsibility for bank regulation.

Further, in 1962, before the establishment of the SEC, the CBN established the Capital Issues Committee as a non–statutory ad–hoc committee operating under its authority.[783] The committee's main role was to process applications from companies seeking to raise capital from the capital market and recommend appropriate timing to prevent an overload on the market's capacity.

778 As an illustration, banks and finance companies, which are licensed by the CBN, provide non–recourse factoring services, a type of credit risk insurance typically provided by insurance companies. Nonetheless, banks and finance companies are not required to obtain an insurance licence from NAICOM in order to engage in non–recourse factoring. This is because non–recourse factoring is considered a permissible business activity for licensed banks and financial companies.

779 For example, the issuance of securities by banks to the public in Nigeria is regulated by the SEC, even though, from the perspective of legal status, banks are under the regulation of the CBN.

780 Oni SA 'Regulation and supervision of financial institutions: The Nigerian experience' (2012) 50(4) *Economic and Financial Review* 107 (observing that Nigeria's financial system has 'passed through various phases of developments, sometimes accompanied by far–reaching reforms in terms of regulatory architecture, ownership, structure, scope and depth of market').

781 The CBN was established under the Central Bank of Nigeria Ordinance of 1958. The Ordinance was subsequently amended by the Central Bank of Nigeria Act 79 of 1993, Central Bank of Nigeria Act 3 of 1997, Central Bank of Nigeria Act 37 of 1998, Central Bank of Nigeria Act 41 of 1991 as well as the current legal regime comprised under the Central Bank of Nigeria Act 7 of 2007.

782 Mordi CNO 'Institutional framework for the regulation and supervision of the financial sector' (2004) 28(1) *CBN Bullion* 25.

783 See generally, Akpomudje O *Legal regulations of the capital market in Nigeria: Analysis and prospects for reform* (unpublished PhD thesis, Lancaster University, 2017) 19–21.

Subsequently, the Capital Issues Committee evolved into the Capital Issues Commission under the Capital Issues Commission Act of 1973. The SEC later replaced the Capital Issues Commission following its establishment under the Securities and Exchange Commission Act 71 of 1979. Currently, the SEC is established under the Investment and Securities Act 29 of 2007.[784]

The NDIC was established as a product of the recommendations from a 1983 committee appointed by the Board of the CBN to assess the country's banking system.[785] This committee proposed the creation of a depositors protection fund, leading to the establishment of the NDIC in 1988.[786] According to the CBN, the establishment of the NDIC signified a 'shift in banking regulation away from bank bailout and imposed management of failed or failing banks towards protecting depositors.'[787]

Further, before establishing the Nigerian Insurance Supervisory Board, the MoF regulated the insurance sector.[788] The board was later replaced by the current insurance sector regulator, NAICOM, which was established in 1997.[789]

PENCOM is the youngest of all the financial regulators.[790] It was established in 2004 as part of efforts to address numerous challenges being faced in the administration of retirement benefits in the public sector.[791]

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784 The Investment and Securities Act 29 of 2007 repealed the Investments and Securities Act 45 of 1999.

785 For the history of NDIC, see Nigeria Deposit Insurance Commission 'NDIC history' available at https://ndic.gov.ng/about/ndic–history/ (Accessed on 7 June 2023); Anyanwu JC 'Deposit insurance in Nigeria: Benefits, costs, and operational strategies' (1991) 1 *Savings and Development* 67–77.

786 The NDIC was established pursuant to the Nigeria Deposit Insurance Corporation Act 22 of 1988. However, it is now currently established under the Nigeria Deposit Insurance Corporation Act 33 of 2023.

787 Central Bank of Nigeria *The Nigerian financial system at a glance* (Monetary Policy Department of the Central Bank of Nigeria, 2017) 17.

788 Aderibigbe JO 'An overview of the Nigerian financial system' (2004) 28(1) *CBN Bullion* 5.

789 NAICOM is established pursuant to the National Insurance Commission Act 1 of 1997.

790 Adetiloye KA 'The role of single financial services regulation and the Central Bank of Nigeria–A vision 2020 expectation' 2008 *Lagos Journal of Banking, Finance & Economic Issues* 229.

791 For an extensive discussion of the history of PENCOM, see generally, National Pension Commission 'historical background' available at https://www.pencom.gov.ng/historical–background/ (Accessed on 7 June 2023; Nafisat A 'Pension scheme in Nigeria: History, problems and prospects' (2015) 5(2) *Arabian Journal of Business and Management Review* 1–6; Etuk EU 'Unending Reforms of the Nigerian Pensions Act: The dilemma of the pensioners' (2022) 13 *Beijing Law Review* 265–277.

Generally, as Nigeria's financial system continued to expand, and economic activities increased, separate financial regulators were established for the different sectors. This has resulted in the current multi–regulator institutional structure. Presently, also, the MoF is not directly involved in the regulation of any financial sector. Instead, it maintains oversight functions over the various financial regulators, except for the CBN and PENCOM.[792] Further, the MoF oversees the control and management of public finance and prepares annual estimates of revenue and expenditure for the federal government. Additionally, it formulates policies on fiscal and monetary matters and ensures the internal and external value and stability of the Nigerian currency, among other functions.[793]

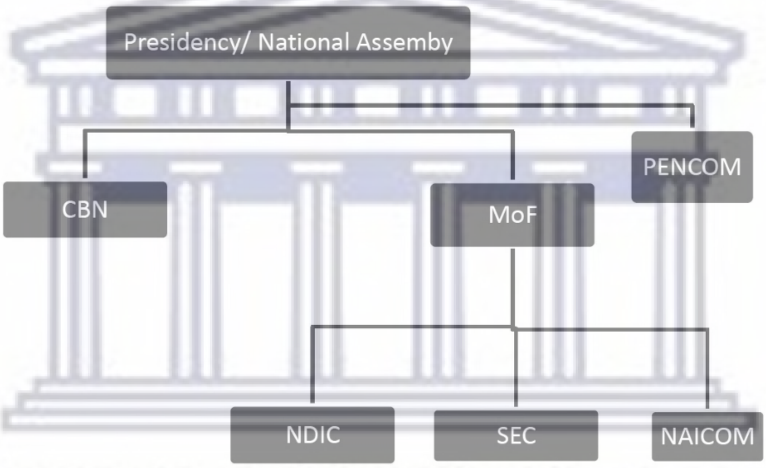

Figure 7: Current composition of Nigeria's institutional structure of financial regulation.[794]

Another key body within Nigeria's institutional structure is the Financial Services Regulation Coordination Committee (FSRCC). The FSRCC is formally established under section 43 of the CBN Act. It serves to facilitate regulatory coordination among the regulators and for them to address some of the challenges that are inherent in a multi–registration institutional structure like Nigeria's.[795]

792 Before 2007, the CBN was under the supervision of the Ministry of Finance. However, this position changed with the Central Bank of Nigeria Act 7 of 2007.

793 International Monetary Fund *Crisis management and crisis preparedness frameworks technical note for Nigeria* (IMF Country Report No. 13/143, 2013) 10.

794 Adapted from International Monetary Fund *Crisis management and crisis preparedness frameworks technical note for Nigeria* (IMF Country Report No. 13/143, 2013) 12; Central Bank of Nigeria (2017) 4.

795 The FSRCC has representatives from the CBN, NDIC, SEC, NAICOM, PENCOM, Corporate Affairs Commission (CAC), Federal Ministry of Finance (MoF), Nigerian Exchange Group (NGX),

4.4. STREAMLINING THE REGULATORY JURISDICTION OF THE FINANCIAL REGULATORS

Chapter 2 emphasised the need to specify the policy objectives that financial regulators are required to achieve in their governing or enabling laws. Furthermore, it was argued in the chapter that to facilitate financial regulators instituting a comprehensive regulatory regime for Fintech, they should have regulatory independence. This entails that the regulators should have powers to formulate, issue, amend, and revoke subsidiary regulations and not be unnecessarily hindered or subjected to political interference in exercising these powers. Drawing from the foregoing, this section offers a succinct overview of the governing laws of the CBN, NDIC, SEC, NAICOM, and PENCOM to specifically show: (1) the policy objectives that the laws explicitly delegate to the regulators to achieve, and (2) address if the laws grant the regulators regulatory independence.

4.4.1. Central Bank of Nigeria (CBN)

The establishment of the CBN is currently provided for under the Central Bank of Nigeria Act 7 of 2007 (CBN Act).[796] The Act provides in section 4 that the share capital of the CBN shall be solely held and subscribed by Nigeria's federal government. Additionally, the Act guarantees the independence of the CBN and sets out the policy objectives that it is mandated to achieve.[797] These objectives are outlined in section 2 of the CBN Act and constitute the following:

(1) ensuring monetary and price stability,

(2) issuing Nigeria's legal tender currency,

(3) maintaining external reserves to safeguard the international value of Nigeria's legal tender currency,

Nigeria Commodities Exchange (NCX), and the Federal Inland Revenue Service (FIRS). The objectives of the FSRCC include coordinating the supervision of financial institutions, particularly conglomerates, reducing regulatory arbitrage and inconsistencies, bridging information gaps regulatory authorities, deliberating on issues of common concerns, and promoting safe and efficient practices by financial institutions. See ss 43 & 44 of the Central Bank of Nigeria Act.

796 s 1(1) of the Central Bank of Nigeria Act provides that 'There is established for Nigeria a body known as the Central Bank of Nigeria.'

797 s 1(3) of the Central Bank of Nigeria Act specifies that to facilitate CBN to achieve its mandates as required under the Act and 'the Banks and Other Financial Institutions Act, and in line with the objective of promoting stability and continuity in economic management, the [CBN] shall be an independent body in the discharge of its functions.'

(4) promoting financial stability, and

(5) acting as the banker to the federal government as well as providing it with economic and financial advice.

One notable omission in section 2 of the CBN Act (and indeed the rest of the Act) is that it does not specify a consumer protection objective for the CBN. The World Bank spotted this gap in its review of Nigeria's legal regime for financial consumer protection.[798] It confirmed that the CBN does not have an explicit but an implicit mandate on consumer protection. The World Bank, however, recommended that good international practice suggests that financial regulators should have an explicit legal mandate for consumer protection.

The absence of an explicit consumer protection mandate for the CBN in the CBN Act has been partially addressed with recent amendments introduced in the Banks and Other Financial Institutions Act 5 of 2020 (BOFI Act). It provides that the Governor of the CBN has the power to issue regulations, guidelines and policies to its licensed institutions to ensure responsible conduct, protect the interest of consumers, promote competition and promote confidence and trust in the use of financial services.[799]

Apart from the objectives specified in section 2 of the CBN Act, the CBN is vested with many other regulatory roles. The CBN Act provides that the CBN shall have the responsibility of determining the exchange rate.[800] It also charges the CBN with regulating the payment system to promote and facilitate the payment, clearance, and settlement transactions to be efficient and effective.[801]

Further, the BOFI Act outlines other obligations of the CBN in relation to the prudential and conduct of business of regulation of banks and certain non–bank institutions. The

798 World Bank Group (WBG) *Diagnostic review of financial consumer protection: Key findings and recommendations* (World Bank Group Review, 2017) 5.

799 s 30(1) of the BOFI Act.

800 s 16 of the CBN Act. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 17 of 1995 is the principal legislation detailing CBN's regulatory powers of Nigeria's autonomous foreign exchange market.

801 s 47 of the CBN Act. For an overview of Nigeria's payment system and the key actors within the system, see Central Bank of Nigeria *The Nigerian payment system* (Understanding Monetary Policy Series No. 6, 2021).

non–bank financial institutions that the CBN is empowered to regulate are legislatively described as 'other financial institutions' (OFIs).[802]

To facilitate discharging its mandates, the CBN wields a range of powers granted to it under the CBN Act, BOFI Act and other relevant laws; it also has unfettered rulemaking powers.[803]

4.4.2. Nigeria Deposit Insurance Corporation (NDIC)

The NDIC supports the financial stability efforts of the CBN by overseeing deposit insurance matters and managing failed insured financial institutions in line with the Nigeria Deposit Insurance Corporation Act 33 of 2023 (NDIC Act). The NDIC Act repealed the NDIC Act 16 of 2006.[804] The NDIC Act is the most recently updated financial sector law after the BOFI Act, which was updated in 2020.

The NDIC Act specifies various public policy objectives for the NDIC.[805] The first of these objectives is to safeguard depositors by ensuring a systematic process of compensation in case of failures or the inability of insured institutions to pay depositors.[806] Additionally, the NDIC is to contribute to financial system stability through effective surveillance mechanisms as a key participant in the financial safety–net arrangement. Furthermore, the NDIC is required to enhance public confidence and stability in the financial system. It is to achieve this objective by establishing orderly exit procedures for failed insured institutions and, with CBN's concurrence, creating a framework for resolving failing insured institutions.

Apart from the policy objectives defined for the NDIC, the NDIC Act also sets out the specific functions of the corporation. The NDIC has the functions of guaranteeing deposit liabilities of CBN–licensed financial institutions, supervising these insured

802 The OFIs include firms that undertake the business of discount houses, bureau de change, finance companies, money brokerage, international money transfer, mortgage refinance, mortgage guarantee, financial holding, payment service providers, factoring, project finance, equipment leasing, debt administration, fund management, private ledger services, investment management, local purchases order financing and other such businesses that the CBN may designate. See s 56 of the BOFI Act.

803 See ss 33, 56 & 64 of the BOFI Act that deal with various aspects of the rulemaking powers of the CBN.

804 ss 1 & 98 of the Nigeria Deposit Insurance Corporation Act.

805 Generally, see s 2 of the Nigeria Deposit Insurance Corporation Act.

806 In the specific case of the inability of insured institutions to pay depositors, the NDIC is expected to only compensate depositors with the concurrence of the CBN. See s 2(a) of the Nigeria Deposit Insurance Corporation Act.

institutions in collaboration with the CBN to minimise the risk of failure, resolving failing insured institutions with the CBN's approval, and ensuring the swift, efficient, and organised liquidation of failed insured institutions in accordance with the provisions of the BOFI Act.[807]

According to section 4 of the NDIC Act, the NDIC is empowered to insure deposit liabilities and guarantee payments to depositors of insured institutions, subject to specified limits, in the event of revocation of an insured institution's licence or actual suspension of payments. Additionally, NDIC can assist insured institutions facing financial or technical difficulties to prevent damage to public confidence in the banking system.

The NDIC is also empowered to assist the CBN in formulating and implementing banking policies that ensure sound banking practices and fair competition among banks. Furthermore, the NDIC has the general authority to undertake various measures and activities necessary for achieving its public policy objectives. The NDIC has relevant powers to make and enforce regulations.[808]

Section 5 of the NDIC Act clarifies that only the NDIC is authorised to insure deposit liabilities or guarantee payments to depositors of insured institutions. A person or entity that violates this provision by insuring deposit liabilities or guaranteeing payments to depositors of the insured institution commits a crime and is liable to severe penalties specified in the Act.[809]

NDIC's regulatory roles are relevant for Fintech firms engaged in deposit–taking activities. This includes digital banks (operating with either microfinance or commercial banking licence), payment service banks,[810] and mobile money operators.[811]

807 Generally, see s 3 of the Nigeria Deposit Insurance Corporation Act.

808 s 96 of the Nigeria Deposit Insurance Corporation Act.

809 Individuals found guilty can be fined up to ₦10,000,000 and an additional ₦ 200,000 for each day of the offence, or face imprisonment for a maximum of five years, or both. Corporate bodies, on the other hand, can be fined up to ₦50,000,000 and an additional ₦1,000,000 for each day of the violation. In addition to these fines, individuals or entities in breach of this provision may also be required to forfeit to the Government of the Federation an amount equivalent to two times the cumulative premiums or other amounts collected in violation of the section.

810 s 4 of the Guidelines for Licensing and Regulation of Payment Service Banks.

811 s 21.0 of the Guidelines on Mobile Money Services.

4.4.3. Securities and Exchange Commission (SEC)

The Investment and Securities Act 29 of 2007 establishes the SEC as the apex regulatory authority responsible for overseeing the Nigerian capital market.[812] The Investment and Securities Act, in section 13, sets out a long list of functions for the SEC. These functions include:

(1) regulating investment and securities business;

(2) registering and regulating securities exchanges (such as the Nigerian Stock Exchange), capital trade points, futures, options and derivatives exchanges, commodity exchanges, and any other recognised investment exchange, securities depository companies, clearing and settlement companies, and custodians of assets and securities;

(3) regulating all offers of securities by public companies and registering the securities of public companies;

(4) registering and regulating both corporate and individual capital market operators;

(5) protecting the integrity of the securities market;

(6) protecting investors and maintaining fair and orderly markets, including through the establishment of a nationwide system for securities trading and trust scheme to compensate investors;

(7) keeping and maintaining a register of foreign portfolio investment;

(8) protecting the integrity of the securities market against all forms of abuses, including insider dealing;

(9) authorising and regulating cross–border securities transactions;

(10) promote investors' education and the training of all other intermediaries operating in the securities industry.

Section 118(1) of the Investment and Securities Act formerly provided that every merger, acquisition, or business combination between or among companies and partnerships shall be subject to the prior review and approval of the SEC. However,

812 The Investment and Securities Act 29 of 2007 repealed the Investments and Securities Act 45 of 1999.

this position of apex regulatory reviewer and approver of mergers, acquisitions and similar corporate restructuring transactions has been taken away from the SEC. It now sits with the Federal Competition and Consumer Protection Commission (FCCPC).[813] Section 165(1) of the Federal Competition and Consumer Protection Act 1 of 2018 repeals sections 118 to 128 of the Investment and Securities Act dealing with the SEC's powers to review and approve corporate restructuring transactions.

Unlike the CBN Act, which does not specify explicit consumer protection mandates for the CBN, the SEC has an explicit statutory mandate on consumer (investor) protection.[814] Notably, the Investment and Securities Act provides for the establishment of investor protection funds by securities exchanges or capital trade points to compensate investors for losses due to insolvency, bankruptcy, negligence of a dealing member firm, or defalcation by a dealing firm or its directors, officers, employees, or representatives.[815] The operation of the fund is subject to regulatory oversight of the SEC. Generally, the legislative mandates of the SEC highlight both micro–prudential and conduct of business aspects.[816]

Nwosu, Ajibo and Nwoke indicate that, in line with practices in other jurisdictions, self–regulatory organisations (SROs) like the Nigerian Stock Exchange (NSE) and industry associations play a significant role in carrying out specific regulatory functions within the securities sector and this complements the responsibilities of the SEC.[817] The regulatory framework ensures the SEC's oversight over SROs to optimise their performance. They add that public regulation translates into public enforcement, and this is further supported by private enforcement mechanisms. This combined approach serves to uphold market confidence and provides investors with the assurance that their investments will not be subject to expropriation or loss due to inadequate regulation.

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813 The FCCPC is discussed further in section 4.3.9.

814 ss 13 (i)(k)(v), 35(5) & 36 of the Investment and Securities Act.

815 ss 197 & 198 of the Investment and Securities Act.

816 See Nwosu EO, Ajibo CC & Nwoke U et al 'Legal and institutional frameworks for capital market regulation in Nigeria: Recasting the agendas beyond compliance–based regulation' (2021) 28(2) *Journal of Financial Crime* 450 (highlighting that the Investment and Securities Act as well as the subsidiary regulations made pursuant to the Act reflect the principles of the 'protection of investors; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk in the financial system').

817 Nwosu EO, Ajibo CC & Nwoke U et al (2021) 449.

In discharging its mandates, the SEC is granted extensive powers, including the powers to call for information from and inspect securities exchanges, capital market operators, and regulated entities; conduct inquiries and audits; levy fees and penalties; intervene in the management and control of troubled capital market operators; seal premises of illegal operators, and seek judicial orders to freeze assets derived from securities law violations.[818]

The SEC also has the power to issue rules and regulations, albeit with certain restrictions.[819] Notably, the SEC is obliged to engage in consultations with the Minister of Finance before it can make alterations to the provisions outlined in the Second Schedule to the Investment and Securities Act dealing with the meaning of investments and investment business.[820] Additionally, the SEC is also mandated to consult with stakeholders when exercising its rulemaking powers.[821]

Further, the Investment and Securities Act provides that the rules and regulations issued by the SEC will be considered as formally established fifteen days after the Minister of Finance receives them, unless the Minister, before the expiration of this fifteen–day period, directs their modification, amendment, or rescission.[822] This provision essentially suggests that all rules and regulations issued by the SEC are subject to some form of approval (or deemed approval) of the Minister.

It is acknowledged that the requirement for the SEC to consult with the Minister of Finance in making changes to the Second Schedule to the Investment and Securities Act may be useful in ensuring that changes made by the SEC are in alignment with broader economic and financial policies.

However, it is submitted that subjecting the rulemaking power of the SEC to the Minister's powers to modify, amend, and even rescind SEC rules and regulations undermines the regulatory independence of the SEC. This requirement should, therefore, be expunged from the Investment and Securities Act.[823]

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818 See s 13 of the Investment and Securities Act.

819 s 313(1)(a)(p) of the Investment and Securities Act.

820 s 313(1)(a) of the Investment and Securities Act.

821 s 313(2) of the Investment and Securities Act.

822 s 313(4) of the Investment and Securities Act.

823 See International Monetary Fund *Detailed assessment of implementation of IOSCO objectives and principles of securities regulation* (IMF Country Report No. 13/144, 2013) 19, where the IMF additionally suggests that to strengthen the independence of the SEC, the power of the Minister to issue directives to the SEC and the power of the Minister to exempt individuals from the

4.4.4. National Insurance Commission (NAICOM)

Insurance activities in Nigeria, excluding health insurance, are regulated by two main national Acts.[824] The first is the Insurance Act 1 of 2003, which governs the licensing and the operation of insurers, reinsurers, intermediaries, and other providers of insurance–related services.[825] The other law is the National Insurance Commission Act 1 of 1997, which establishes the NAICOM and charges it with the effective administration, supervision, regulation, and control of the insurance business in Nigeria.[826]

The legislative mandates of NAICOM cut across issues of both micro–prudential regulation and conduct of business regulation.[827] Specifically, the NAICOM is expected, among other functions, to licence insurance operators; establish standards for the conduct of insurance business in Nigeria; approve rates of insurance premiums; approve rates of commissions; regulate transactions between insurers and reinsurers in Nigeria and those outside Nigeria; protect insurance policyholders and beneficiaries and third parties to insurance contracts.[828] The NAICOM is also generally charged with administering and enforcing the Insurance Act.[829]

Similar to the SEC, NAICOM operates with certain limitations on its authority to issue subsidiary legislation. Specifically, while NAICOM can issue guidelines without any restrictions, its power to issue regulations is subject to approval from the Minister of Finance.[830] This regulatory constraint on NAICOM's rulemaking capabilities warrants

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application of the Investment and Securities Act should be expunged from the Act. The IMF highlights other legal and operational issues that need to be addressed to improve the functioning of the SEC.

824 International Monetary Fund *Detailed assessment of observance of insurance core principles* (IMF Country Report No. 13/145) 4.

825 The Insurance Act replaced the Insurance Act 2 of 1997.

826 s 6 of the National Insurance Commission Act.

827 According to Adetiloye KA 'The role of single financial services regulation and the Central Bank of Nigeria–A vision 2020 expectation' 2008 *Lagos Journal of Banking, Finance & Economic Issues* 229, the basis of regulation of the insurance companies by NAICOM include capital adequacy, investment of funds, and fair market practices in form of early and quick settlement of genuine claims.

828 s 7 of the National Insurance Commission Act.

829 s 86 of the National Insurance Act

830 s 64 of the National Insurance Commission Act provides that NAICOM 'may, with the approval of the Minister, make regulations for carrying into effect the provisions of this Act [emphasis added].' s 49(1)(b) of the National Insurance Commission Act provides that 'In addition to any of its powers under this Act, the Commission [NAICOM] may issue guidelines to insurance institutions.' As can be noted, the issuance of guidelines is not qualified with the requirement for the Minister's approval as is the case for the issuance of regulations.

reconsideration. The fast–paced evolution of the financial system, including the Fintech sector, necessitates that regulatory bodies like NAICOM possess the unimpeded authority to issue regulations by their enabling legislation.

It is appropriate that the qualifications currently present in the National Insurance Commission Act regarding NAICOM's powers to issue regulations should be expunged. Additionally, the National Insurance Commission Act should be amended to clarify that the guidelines issued by NAICOM have the force of law as concerns have been raised on the enforceability of the guidelines issued by NAICOM.[831] By addressing these two issues, NAICOM will have better regulatory independence to discharge its mandate.

4.4.5. National Pension Commission (PENCOM)

PENCOM was initially established under the Pension Reform Act 2 of 2004, but this Act was repealed and re–enacted through the Pension Reform Act 4 of 2014 (Pension Reform Act). The principal objects of the PENCOM are to:[832]

(1) enforce and administer the Pension Reform Act,

(2) coordinate, and enforce all other laws on pension and retirement benefits, and

(3) regulate and ensure the effective administration of pension and retirement benefits in Nigeria.

In connection with its objects, PENCOM performs numerous functions as mandated under the Pension Reform Act, including regulating and supervising the contributory pension scheme established under the Pension Reform Act; regulating the investment and administration of pension funds; and regulating pension fund administrators and custodians.[833] These functions accommodate both micro–prudential and conduct of business objectives.

831 International Monetary Fund *Detailed assessment of observance of insurance core principles* (IMF Country Report No. 13/145) 19 (observing that 'NAICOM has issued a number of significant prudential requirements in the form of guidelines, such as minimum capital, technical provisions; investment limits and risk management, although the AML/CFT requirements were issued in the form of regulations. NAICOM has taken the position that guidelines have the force of law, on par with regulations. The position has not yet been tested in courts. While the insurers have thus far complied with guidelines when prompted, it is nevertheless important to have legal certainty).

832 s 18 Pension Reform Act No. 4, 2014.

833 s 23 Pension Reform Act.

The contributory pension scheme established under the Pension Reform Act applies mandatorily to employers and employees in the public service at the Federal level, as well as those in the Federal Capital Territory, States, and Local Governments.[834] It also mandatorily applies to private–sector organisations that have fifteen employees or more.[835]

The Pension Reform Act further specifies that PENCOM will issue guidelines to oversee the provision of pension services to self–employed persons and private sector organisations that the contributory pension scheme does not mandatorily apply.[836] PENCOM has formulated the Guidelines for Micro Pension Plan, 2018, to fulfil this requirement.

PENCOM is granted extensive enforcement powers to facilitate the discharge of its functions and the attainment of its objects. These include the powers to request information from, impose administrative fines/sanctions on, and investigate the activities of pension fund administrators and pension fund custodians.[837] PENCOM is also empowered by section 155(1) of the Pension Reform Act to 'make regulations, rules or guidelines as it deems necessary or expedient for giving full effect to the provisions [emphasis added]' of the Act.

However, there is ambiguity on whether subsidiary instruments bearing the specific titles of 'rules' or 'guidelines' issued by PENCOM have the force of law. This uncertainty arises from Section 115(2) of the Pension Reform Act, which provides that 'The contravention of any regulation issued pursuant to any provisions of this Act shall constitute an offence and shall be punishable as prescribed in the particular regulations [emphasis added].'

The failure to expressly mention rules and guidelines in section 115(2) is suggestive that they may not have the force of law. As mentioned earlier, the regulatory framework for micro–pension, which Fintech firms are leveraging to render pension services, has been issued as guidelines. Accordingly, the Pension Reform Act should be amended to clarify that both rules and guidelines issued by PENCOM have the force of law,

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834 s 2(1) Pension Reform Act.

835 s 2(2) Pension Reform Act.

836 s 2(3) Pension Reform Act.

837 s 24 and ss 92–98 Pension Reform Act.

similar to how the Investment and Securities Act explicitly indicates that regulations or rules issued by SEC can prescribe penalties for default.[838]

4.5. KEY NON–CORE FINANCIAL REGULATORS

As highlighted in Chapters 1 and 3, apart from financial regulators (like the CBN, NDIC, SEC, NAICOM, and PENCOM), the institutional setting for financial regulation and Fintech regulation accommodates non–core financial regulators. This includes the regulators with responsibilities for consumer protection, competition regulation, technology and digitalisation, financial intelligence, data protection, and telecommunication. The non–core financial regulators in Nigeria that are responsible for these regulatory functions are discussed below:

4.5.1. Federal Competition and Consumer Protection Commission (FCCPC)

The FCCPC is an independent regulatory agency established by the Federal Competition and Consumer Protection Act 1 of 2018 (FCCP Act).[839] It replaces the Consumer Protection Council, previously established under the Consumer Protection Council Act, Cap C25, Laws of the Federation of Nigeria.[840]

The functions of the FCCPC can be grouped under three broad headings as follows.[841] First, the FCCPC is the apex regulator for approving mergers, acquisitions, and other similar corporate restructuring transactions.[842] This approval function was previously performed by the Securities and Exchange Commission (SEC) under the Investment and Securities Act before the enactment of the FCCP Act. Secondly, the FCCPC is responsible for initiating, administering, and enforcing competition policy. Thirdly, the FCCPC is responsible for initiating, administering, and enforcing consumer protection.

Section 105 of the FCCP Act provides that the FCCPC shall have concurrent jurisdiction with other National and State Government agencies that also oversee competition and consumer protection issues as part of their regulatory mandate.[843]

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838 s 313(7) of the Investment and Securities Act.

839 s 3 of the FCCP Act.

840 ss 1 & 165 of the FCCP Act.

841 See ss 17 & 18 of the FCCP Act for the functions and powers of FCCPC.

842 s 165 of the FCCP Act.

843 See s 105(1) of the Act which provides that 'The operation by an undertaking in an industry subject to the authority of a regulatory agency set by an Act of the National Assembly or the Laws of a State is sufficient to make such an undertaking a member of a regulated industry for the purpose of this Act.' Further see s 105(2) of the Act which provides that 'Insofar as this Act applies to an industry or sector of an industry that is subject to the jurisdiction of another government agency by the provisions of any other law, in matters or conducts which affects competition and

The section further confirms that within the concurrent jurisdiction regime, the FCCPC is the lead regulator and has precedence over the National and State Government agencies.

To mitigate the possible challenges arising from the overlap of functions, the FCCP Act mandates the FCCPC to negotiate agreements with all the other government agencies responsible for enforcing competition and consumer protection.[844] These agreements to be signed between the FCCPC and the government agencies are required to:[845] (a) identify and establish efficient procedures for managing areas of concurrent jurisdiction, (b) promote cooperation between the FCCPC and the government agencies, (c) preserve the coordinating and leadership role of the FCCPC, (d) provide for the exchange of information and the protection of confidential information, and (e) be published in the federal government gazette. The FCCP Act also provides mechanisms for addressing deadlock situations between the FCCPC and any government agency in finalising the agreement.[846]

In the context of the financial system, in line with section 105 of the FCCP Act, the FCCPC's regulatory functions and jurisdiction on corporate restructuring, competition, and consumer protection extend to firms regulated by the SEC, NAICOM, and PENCOM. However, there is a significant distinction concerning the FCCPC's jurisdiction in these areas over institutions licensed by the CBN. Specifically, the FCCPC does not share concurrent jurisdiction with the CBN for financial institutions licensed by the CBN. Instead, the CBN has exclusive jurisdiction over all three areas for its licensed institutions.

The exclusive jurisdiction of the CBN is derived from certain provisions of the Banks and Other Financial Institutions Act (BOFI Act). Before highlighting these sections, it is good to reiterate that the BOFI Act is one of the more recently updated financial sector laws (in 2020) alongside the NDIC Act (in 2023). Meanwhile, the FCCP Act was enacted in 2018.

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consumer protection, this Act shall be construed as establishing a concurrent jurisdiction between the Commission [FCCPC] and the relevant government agency, with the Commission having precedence over and above the relevant agency.

844 s 105(5) of the FCCP Act.

845 s 105(6) of the FCCP Act.

846 s 105(7)(8) of the FCCP Act.

Some of the sections of the BOFI Act from which the exclusive jurisdiction of the CBN can be drawn are as follows. First, section 65(1)(a)(b) of the BOFI Act states that the provisions of the FCCP Act shall not apply to functions, activities, products, transactions, and services of CBN–licensed institutions, as well as the CBN and its officers.[847]

From a harmonious interpretation perspective, section 65(1)(a)(b) is irreconcilable with section 2 of the FCCP Act, which defines the scope of application of the Act. According to section 2 of the FCCP Act, the Act applies to (1) all undertakings and all commercial activities within or having effect within Nigeria, (2) a body corporate or agency of government engaging in commercial activities, and (3) all commercial activities aimed at making a profit and geared towards the satisfaction of demand from the public. Further, section 105(2) of the FCCP Act provides that:

> Insofar as this Act applies to an industry or sector of an industry that is subject to the jurisdiction of another government agency by the provisions of any other law, in matters or conducts which affects competition and consumer protection, this Act shall be construed as establishing a concurrent jurisdiction between the Commission [FCCPC] and the relevant government agency, with the Commission having precedence over and above the relevant agency [emphasis added].

What is clear from the above provision is that the regulatory jurisdiction of the FCCPC will only arise if the FCCP Act is applicable. Therefore, the implication of section 65(1) of the BOFI Act is that the various provisions of the FCCP Act, concerning matters such as competition and consumer protection, will not apply to the CBN and its licensed institutions. Additionally, there is no basis for the FCCPC to share concurrent jurisdiction with the CBN on consumer protection and competition issues.

Further, section 65(2)–(4) of the BOFI Act specifies that for mergers, acquisitions, and other corporate restructuring transactions involving CBN–licensed financial institutions, the CBN, not the FCCPC, has jurisdiction over these transactions.[848] The

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847 The section reads as follows '65–(1) The provisions of the FCCP Act shall not apply to–(a) any function, act, financial product, or financial services issued or undertaking, and transaction howsoever described by a bank or other financial institutions licensed by the Bank; and (b) the Bank [CBN], the Governor [of the CBN], or other executive officer or staff of the Bank [CBN].'

848 The section reads: '65(2) Notwithstanding anything to the contrary in this Act but subject to subsection (3) of this section, sections 92 (1), (2) and (3), 94 and 98 of the FCCP Act shall apply

BOFI Act goes on to provide that the CBN shall exercise this jurisdiction in terms of sections 93(1)–(3), 94, and 98 of the FCCP Act, along with any additional rules and procedures prescribed by the Governor of the CBN for such arrangements.

While section 65(1) of the BOFI Act initially appeared to render the entire FCCP Act inapplicable to the CBN and its licensed institutions, sections 65(2)–(4) of the Act have preserved the applicability of specific provisions from the FCCP Act. However, in retaining these provisions, the BOFI Act specifies that the CBN, and not the FCCP, shall be responsible for enforcing the retained provisions.

Finally, Section 53 of the BOFI Act specifies that its provisions shall prevail over any provision in the FCCP Act (and other laws mentioned in the section) that is inconsistent with it. This provision essentially seeks to reinforce the superiority of the provisions introduced under the BOFI Act over the FCCP Act.

The legislative changes introduced by the BOFI Act mean that customers of financial institutions licensed by the CBN may not rely on the various statutory consumer rights specified in the FCCP Act.[849] Furthermore, these customers may not have the option to seek regulatory redress for consumer rights violations through the FCCPC. Such regulatory redress should be directed to the CBN. The CBN–licensed institutions are also by implication exempted from the civil and criminal sanctions outlined in the FCCP Act for breach of consumer rights.[850]

Apart from the inability to seek redress from the FCCPC, customers of CBN–licensed institutions may also be unable to have recourse to the Competition and Consumer Protection Tribunal established under the FCCP Act if dissatisfied with the decision of the CBN.[851] Section 47(2) of the FCCP Act provides a condition precedent before the

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to a merger, acquisition or other form of business combination which involves a bank, specialised bank or other financial institution. 65(3) All references to the Federal Competition and Consumer Protection Commission in sections 92 (1), (2) and (3), 94 and 98 of the FCCP Act, shall be deemed and construed as a reference to the Bank [CBN]. 64 (4) Notwithstanding anything to the contrary in this section, the Governor [of the CBN] may prescribe additional or other rules and procedures for mergers, acquisitions and other business combinations involving banks, specialised banks and other financial institutions.'

849 See ss 114–133 of the FCCP Act for these rights.

850 See ss 153, 154 & 155 of the FCCP Act.

851 The powers of the Tribunal include the power to hear appeals from or review any decision of the FCCPC taken in the course of implementing the FCCP Act, as well as decisions of any sector–specific regulatory authority on competition and consumer protection matters. See generally sections 39–58 of the FCCP Act for information on the functions, powers, composition, and other related issues regarding the activities of the Tribunal.

Tribunal can hear appeals from or review any decision of any sector–specific regulatory authority (like the CBN) on competition and consumer protection matters. This condition is that the decision must first be heard and determined by the FCCPC. The BOFI Act has eliminated the possibility of subjecting CBN's decision on competition and consumer protection issues to the FCCPC, rendering it unfeasible to achieve the condition precedent.

Some commentators have been highly critical of the numerous functions imposed on the CBN, suggesting that these obligations may have hindered the institution from focusing on and delivering its core mandate effectively. For example, Akinbami and Ngwu argue that the CBN is burdened with too many functions, a situation they deem potentially untenable for a single financial regulator to effectively fulfil.[852] They insist that the evolving and multifaceted nature of the financial system makes it unusual for a single regulatory body to oversee monetary policy, prudential regulation, and consumer protection simultaneously. Ogowewo and Uche are unequivocal in stating that the CBN has 'spectacularly failed' in its most vital function of promoting monetary stability.[853] Likewise, Ogba mentions that the CBN has consistently departed from its statutory mandates and functions.[854]

In light of these submissions, it becomes necessary to inquire whether it is suitable for the CBN to possess exclusive jurisdiction over corporate restructuring transactions, consumer protection, and competition matters for its licensed institutions as introduced by the BOFI Act, or if these responsibilities should be shared concurrently with the FCCPC, as initially envisaged by the FCCP Act. An examination of this question is beyond the scope of this study. However, it is observed that arguments can be made in favour of both exclusive and concurrent jurisdiction.

Exclusive jurisdiction for the CBN eliminates potential conflicts and confusion arising from overlapping mandates between the CBN and FCCPC. Additionally, the CBN can be argued to have more specialised knowledge and resources to handle these

852 Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 320.

853 Ogowewo TI & Uche C '(Mis) using bank share capital as a regulatory tool to force bank consolidations in Nigeria' (2006) 50(2) *Journal of African Law* 164.

854 Ukegbu O 'Autonomy is great to have but the CBN should not operate unchecked –Desmond Ogba' available at https://businessday.ng/news/legal–business/article/autonomy–is–great–to–have–but–the–cbn–should–not–operate–unchecked–desmond–ogba/ (Accessed on 23 September 2023).

responsibilities effectively than the FCCPC. Furthermore, the CBN already has established relationships with financial institutions, which can facilitate better engagement in addressing the regulatory functions.

On the other hand, concurrent jurisdiction can be justified on the basis that the numerous mandates of the CBN could undermine its capacity to prioritise and extensively discharge the functions. Concurrent jurisdiction also allows for a more comprehensive approach to consumer protection and competition by leveraging the CBN and FCCPC's expertise. Additionally, it leaves customers in a better position to enjoy the extensive consumer protection rights and redress opportunities specified in the FCCP Act.

It appears that the move to exclude the FCCP Act from applying to CBN–licensed financial institutions and to grant the CBN exclusive jurisdiction could have been influenced by recommendations from the World Bank. This recommendation emerged from a 2017 World Bank report. The report is an extensive diagnostic review of the institutional, legal, and regulatory regime for financial consumer protection for both bank and non–bank financial institutions regulated by the CBN.[855]

An interesting point to note is that the recommendation was made when the FCCP Act, now in place, was still the FCCP Bill. The World Bank observes in the report that the CBN is the most suitable institution to regulate and supervise financial consumer protection due to its focus on the financial sector and technical capacity. However, to avoid overlaps with other agencies, the CBN's mandate for financial consumer protection needs to be explicitly defined in the CBN Act and exclusive to the CBN.[856]

The World Bank further discusses the FCCP Bill, noting that the FCCPC has broad functions extending to all financial and non–financial products and services. The World Bank expresses concern that the FCCPC's broad focus and potential lack of technical capacity in financial matters may hinder effective regulation. The World Bank then suggests amending the FCCP Bill to exclude financial products and services.[857]

Additionally, the World Bank notes that 'in line with international good practice, financial consumer protection is better regulated and enforced by agencies specialised

855 See World Bank Group (WBG) *Diagnostic review of financial consumer protection: Key findings and recommendations* (World Bank Group Review, 2017).

856 World Bank Group (2017) vii.

857 World Bank Group (2017) 6–7.

for financial sector issues.'[858] It also adds that 'it is uncommon, and not in line with international guidance, for a general consumer protection regulator to have sole responsibility for financial consumer protection.'[859]

The World Bank, however, also envisioned a situation where the FCCP Bill is not amended to grant the CBN exclusive jurisdiction. It suggested that, in such a case, a robust Memorandum of Understanding (MoU) should be signed between the CBN and FCCPC to address regulatory coordination protocols.[860]

4.5.2. Nigeria Data Protection Commission (NDPC)

The NDPC was established under the Nigeria Data Protection Act 37 of 2023 (Data Protection Act) to regulate personal data processing activities, data processors, and data controllers.[861] Before the enactment of the Data Protection Act and the establishment of the NDPC, data protection issues were primarily handled by various sectoral regulators as an extension of their consumer protection functions.[862]

To address the multifaceted regime for data protection and fill the void of a generally applicable legislative framework on the subject, the National Information Technology Development Agency (NITDA) issued the Nigeria Data Protection Regulation (NDPR) in 2019.[863] NITDA additionally issued the NDPR Implementation Framework of 2020

858 World Bank Group (2017) vii.

859 World Bank Group (2017) 6.

860 World Bank Group (2017) 7.

861 According to s 2 of the Data Protection Act, the Act applies to: (1) data controllers and processors that are domiciled in, resident in, or operating in Nigeria, (2) data processing activities taking place within Nigeria, and (3) data controllers and processors that are not domiciled in, resident in, or operating in Nigeria but are processing the personal data of data subjects in Nigeria. As can be drawn from the third ground of application, the Data Protection Act has a 'long arm provision' in that it applies beyond the physical borders of Nigeria.

862 For example, the CBN has issued the Consumer Protection Regulation, 2020 which specifies data protection and privacy mandates on banks and non–bank financial institutions regulated by the CBN. CBN licensed institutions have the following obligations under the Consumer Protection Regulations: (a) safeguarding consumer information to maintain its privacy and prevent unauthorised access, (b) obtaining written consent from consumers for data processing, clearly stating the purpose of collecting the data and informing them of their right to withdraw consent, (c) refraining from transferring consumer data without their consent, except when legally obligated, (d) notifying consumers about any data exchanges with authorised third parties, (e) regularly reviewing data processing procedures to ensure compliance with the original consent basis, and (f) maintaining accurate and up–to–date consumer data.

863 NITDA is established under the National Information Technology Development Agency Act 28 of 2007. NITDA is the agency charged with overseeing the development of the information technology landscape in Nigeria.

and the Guidelines for the Management of Personal Data by Public Institutions of 2020.

NITDA issued the NDPR and the related frameworks relying on Section 6(c) of the National Information Technology Development Agency Act. This statutory provision empowers NITDA to develop guidelines for monitoring electronic data exchange and other electronic communication transactions.

Although there were various criticisms of NITDA's powers to regulate data protection as well as the legality of the NDPR itself, the framework was not annulled by any court. Notably, the Court of Appeal in the case of *Incorporate Trustees of Digital Rights Lawyers Initiative v National Identity Management Commission* took judicial notice of the NDPR.[864] The Court observed that the NDPR is one of the statutes giving effect to the right of privacy guaranteed under section 37 of the Nigerian Constitution. The said constitutional provisions read that 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.'

NITDA administered the Nigeria Data Protection Regulations from 2019 until it handed over to the Nigeria Data Protection Bureau (NDPB) in February of 2022.[865] It is the NDPB that has now metamorphosed into the NDPC. The enactment of the Data Protection Act and the establishment of the NDPC address two major limitations that define the NITDA data protection regime. The first limitation is that NITDA is not a standalone and independent data protection authority, whereas the NDPC is. Additionally, the NITDA regime was based on subsidiary legislation, while the current regime is supported by principal and subsidiary legislation.

However, recognising that significant efforts had to be made in the pre–Data Protection Act and NDPC era, the Act contains transitional provisions to ensure the validity and usefulness of those efforts are not undermined. Specifically, the Data Protection Act provides that all regulatory instruments issued (such as the NDPR) and actions taken by both NITDA and NDPB shall continue in effect as if they were made

864 *Incorporate Trustees of Digital Rights Lawyers Initiative v National Identity Management Commission* (2021) LPELR – 55623(CA).

865 The NDPB supposedly operated as a department within the NITDA as it was not created by any law.

or issued by the NDPC until they expire or are repealed, replaced, reassembled, or altered.[866]

Further, recognising that data protection issues are dealt with by other regulators and also covered in other legislation, the Data Protection Act includes a prevailing law provision. It provides that the Data Protection Act will prevail over any other law relating to data protection that is inconsistent with it.[867]

4.5.3. Nigerian Financial Intelligence Unit (NFIU)

The Nigeria Financial Intelligence Unit Act of 2018 (NFIU Act) establishes the NFIU. The NFIU is responsible for receiving, analysing, and disseminating financial intelligence information related to money laundering, terrorist financing, and other financial crimes.[868] Although the NFIU is institutionally domiciled in the CBN, the NFIU Act clarifies that the unit is independent and also operationally autonomous in discharging its duties.[869]

The establishment of the NFIU is based on global standards that promote the effective implementation of legal, regulatory, and operational measures to combat money laundering, terrorist, and proliferation financing as contained in the Financial Action Task Force (FATF) 40 Recommendations. The functions of the NFIU especially complement those of other security agencies like the Economic and Financial Crimes Commission (EFCC) and the Nigerian Police Force (NPF) that investigate and prosecute various financial crimes and cybercrimes.

4.5.4. Nigerian Communications Commission (NCC)

The NCC is established under the Nigerian Communications Act 19 of 2003 to regulate Nigeria's communications sector.[870] As earlier clarified in Section 4.4.1, the CBN is the sole regulator of mobile money services in Nigeria. However, the NCC plays other roles that support the operationalisation of mobile money services, including issuing unique shortcodes to mobile money operators and approving and approving

866 s 64 of the Nigerian Data Protection Act.
867 s 63 of the Nigerian Data Protection Act.
868 ss 2(1)(2) & 3 of the Nigeria Financial Intelligence Unit Act.
869 s 2(3) of the Nigeria Financial Intelligence Unit Act.
870 ss 3 & 4 of the Nigerian Communications Act.

telecommunication equipment types.[871] The NCC generally also oversees the regulation of value–added services. These services encompass all non–core telecommunications services that provide additional value to consumers beyond basic voice, text, and data communication.[872] NCC and the CBN have signed an MoU on implementing a payment system framework.[873]

In addition to the regulatory bodies identified above, there are other non–core financial regulators whose regulatory functions impact the activities of financial institutions and Fintech activities. These regulators include:

(1) Corporate Affairs Commission (CAC), which oversees business registration.[874]

(2) Financial Reporting Council (FRC), which is responsible for setting accounting and financial reporting standards. It also oversees corporate governance issues.[875]

(3) National Office for Technology Acquisition and Promotion (NOTAP), which is responsible for registering technology transfer agreements between foreign companies and Nigerian companies.[876]

(4) National Identity Management Commission (NIMC), which oversees and manages the registration, issuance, and verification of national identity numbers for Nigerian citizens and residents.[877]

(5) Federal Inland Revenue Service (FIRS), which is tasked with collecting and administrating federal taxes.[878]

As mentioned in Chapter 1, a distinction can be drawn between the model of the institutional structure in its original state and the state of the model after the introduction of piecemeal reforms in response to developments in the financial

[871] See s 7.1 of the Guidelines for Mobile Money Services and s 5 of the Central Bank of Nigeria Regulatory Framework for the Use of Unstructured Supplementary Service Data (USSD) for Financial Services in Nigeria.

[872] See Value Added Services Aggregator Framework, 2017.

[873] National Financial Inclusion Strategy (2018) 8.

[874] See Companies and Allied Matters Act 3 of 2020.

[875] See Financial Reporting Council of Nigeria Act 6 of 2011; Financial Reporting Council (Amendment Act) 42 of 2023.

[876] See National Office for Technology Acquisition and Promotion Act 70 of 1979.

[877] See National Identity Management Commission Act 23 of 2007.

[878] See Federal Inland Revenue Service (Establishment) Act 13 of 2007.

system.[879] Over time, Nigeria has witnessed the implementation of various reforms or reform proposals that have impacted its institutional structure of financial regulation. Chapter 5 discusses the institutional reforms in response to Fintech, while the next section outlines some notable reforms and reform proposals that predate the more recent initiatives in response to Fintech.

4.6. NOTABLE PRE–FINTECH REFORMS

4.6.1. Regulatory coordination legislative provision and mechanisms

The structural adjustment programme (SAP), which the federal government implemented in 1986 based on recommendations from the IMF and World Bank, is often credited with driving the expansion of Nigeria's financial system.[880] The SAP was generally marked by measures aimed at changing the structure of the Nigerian economy and policies to support the stabilisation of the economy.[881] The pre–SAP era, defined by extensive government ownership of banks, gave way to a liberalised and deregulated financial system with more private sector actors setting up banks and other non–core financial institutions.[882]

The SAP programme also led to the privatisation of several government–owned banks. These various developments necessitated the establishment of additional financial regulatory bodies to add to the CBN in overseeing the growing financial system, with the first being the NDIC, which was established in 1988, followed by the SEC.[883] In the subsequent years, the regulatory landscape saw the establishment of NAICOM and then PENCOM, which is the most recent addition among the financial regulators.

As the financial system expanded and the number of financial regulators within Nigeria's institutional structure increased, regulatory coordination became a pressing

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879 See Chapter 1, Section 1.2.2.

880 To buttress this, the number of banks grew from 41 in 1986 to 115 in 1996. See Agu CC *Understanding the ABC of the financial system* (Inaugural Lecture presented at the University of Nigeria, Nsukka, 2008) 17.

881 Tallroth NB 'Structural adjustment in Nigeria' (1987) 24(3) *Finance and Development* 20–22. For an enumeration of the specific measures, see Ahmed A 'The structural adjustment programme: The journey so far' (1987) 25(4) *CBN Economic and Financial Review* 25–28.

882 Fubara BA 'Structural adjustment programme and the Nigerian financial sector: A policy audit' (1988) 3(2) *Nigerian Management Review* 57–62; Briggs AP 'Capital market and economic growth of Nigeria' (2015) 6(9) *Research Journal of Finance and Accounting* 82.

883 Kanayo O & Michael EO 'Financial sector reforms in Nigeria: Issues and challenges' (2011) 6(6) *International Journal of Business and Management* 225.

issue that needed to be addressed. In Chapter 2, three mechanisms for regulatory coordination were identified.[884] These include: (1) a legislative mandate for financial regulators to coordinate, (2) the establishment of a regulatory coordinating body, and (3) the signing of a memorandum of understanding (MoU) for regulatory coordination. It was noted that the signing of MoU and the establishment of the coordinating body may or may not be mandated by legislation. These aspects of regulatory coordination are discussed in the context of Nigeria below.

4.6.1.1. Legislative mandate to coordinate

No financial sector law currently imposes an explicit obligation on the financial regulators comprising the CBN, NDIC, SEC, NAICOM, and PENCOM to collectively coordinate among themselves or specify the areas for such coordination. However, snippets of provisions that touch on regulatory coordination can be found in some financial sector laws. For example, section 36 of the BOFI Act provides that relevant government agencies must cooperate, render assistance, grant waivers, or forbearances as may be required by the Governor of the CBN to facilitate the resolution of a banking crisis by the CBN. A banking crisis is deemed to occur when two or more of the following conditions exist:

(1) When critically distressed banks control 12.5 per cent or more of the total assets in the banking sector.

(2) When 12.5 per cent or more of total deposits of the banking sector are at risk.

(3) When 12.5 per cent or more of the banking sector's total loans are non–non–performing.

(4) When 25 per cent or more of banks request liquidity support exceeding 50 per cent of the aggregate funds from the CBN's window or total interbank funds, or when they are suspended by their settlement banks for failing to meet clearing obligations.

The Governor of the CBN has the authority to modify or establish other conditions that may be used to determine the occurrence of a banking crisis. Relevant government agencies for the purpose of section 36 of the BOFI Act include the Ministry of Finance, Nigeria Deposit Insurance Corporation (NDIC), Corporate Affairs Commission (CAC),

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884 Chapter 2, Section 2.3.4.

Federal Inland Revenue Service (FIRS), and any other agency as determined by the Governor of the CBN.

The NDIC Act is another financial sector law that captures some areas of coordination. It specifically covers various aspects of coordination between CBN and NDIC. For example, section 89 of the NDIC Act outlines the cooperation and information–sharing requirements between the NDIC and CBN in the context of regulating and overseeing NDIC–insured institutions. The section: (1) provides that NIDC shall have access to examination reports conducted by the CBN, (2) mandates NDIC to provide examination reports and essential information to the CBN, (3) requires the CBN to share relevant information about licensed insured institutions with the NDIC, and (4) obliges the CBN to inform NDIC about any contraventions by insured institutions under the Act. The section also emphasises the need for cooperation between the NDIC and the CBN on matters concerning insured institutions.

The NDIC Act further specifies other provisions regarding cooperation between the CBN and NDIC on (1) supervising insured institutions, (2) resolution of failing institutions, (3) payments to depositors in the event of suspension of payment by an insured institution, (4) developing a framework for the resolution of a failing institution, and (5) formulating and implementing banking policies to ensure sound banking practice and fair competition among banks in the country.[885] Furthermore, the Board of Directors of the NDIC is composed of representatives from the CBN (CBN's Director of Banking Supervision) and SEC (SEC's Director–General).[886]

While these various regulatory coordination provisions are useful and address specialised areas or aspects of regulatory coordination, it is still imperative that there is a clear legislative mandate for all the financial regulators to coordinate as well as an indication of the possible areas for such coordination. Generally, it may be useful to explore all mechanisms of regulatory coordination so that if any mechanism fails or is ineffective, other mechanisms may be available to salvage the situation.

4.6.1.2. Regulatory coordinating body

A formal or statute–based coordinating body for financial regulation has been established in Nigeria under the name of the Financial Services Regulation

885 ss 2,3 & 4 of the NDIC Act.
886 s 7 of the NDIC Act.

Coordinating Committee (FSRCC). The FSRCC is established under Section 43(1) of the CBN Act to coordinate the supervision of financial institutions.

The origin of the FSRCC can be traced back to April 1994 when the CBN set up the Financial Services Coordinating Committee (FSCC).[887] The FSCC was not established under any law but informally. According to the CBN, the FSCC was established to 'address more effectively, through consultations and regular inter–agency meetings, issues of common concern to regulatory and supervisory bodies.'[888] The name of the FSCC was subsequently changed to the FSRCC. This change coincided with the initial formal establishment of the FSRCC under the Central Bank of Nigeria Act 37 of 1998 (which was repealed by the 2007 CBN Act). The Governor of the CBN inaugurated the FSRCC in May 1999.

The FSRCC serves as an important platform where the heads of designated regulatory bodies, predominantly financial regulators, convene to deliberate upon regulatory matters of concern. Specifically, the members of the FSRCC as presently specified in the CBN Act are:[889]

(1) The Governor of the CBN, who serves as the chairman of the committee.

(2) The Managing Director of the NDIC.

(3) The Director–General of the SEC.

(4) The Director–General of NAICOM.

(5) The Registrar–General of the Corporate Affairs Commission (CAC).

(6) A representative from the Federal Ministry of Finance (at least the rank of a director).

As can be noted from the above list, the Director–General of PENCOM is currently not included in the committee's membership in the CBN Act. A possible explanation for the omission is that PENCOM was established years after the FSRCC initially came into existence. However, it has been confirmed that the director–general of PENCOM has been admitted as a member of the FSRCC, albeit informally.[890] To formalise the

887 International Monetary Fund (IMF Country Report No. 13/143, 2013) 12.

888 International Monetary Fund (IMF Country Report No. 13/143, 2013) 12.

889 Section 43(2) of the CBN Act.

890 See International Monetary Fund *Financial sector stability assessment* (IMF Country Report 140, 2013) 3.

admission of the Director–General of PENCOM to the FSRCC, an amendment to the CBN Act is required.

Apart from the members of the FSRCC expressly specified in the CBN Act, certain bodies have been granted observer membership of the FSRCC.[891] These observer members are the Nigerian Exchange Group (NGX), Nigeria Commodities Exchange (NCX), and the Federal Inland Revenue Service (FIRS). It is important to clarify that the CBN Act does not specify any provision regarding such observer membership. In essence, there is no legislative backing for the admission of observer members to the FSRCC. The objectives of the FSRCC, as specified in the CBN Act, are as follows:[892]

(1) Coordinating the regulation and supervision of financial institutions, especially financial conglomerates;

(2) Reducing the opportunities for regulatory arbitrage, which results from inconsistent regulatory and supervisory standards amongst regulatory authorities in the economy;

(3) Deliberating problems experienced by any member in their relationship with any financial institution;

(4) Eliminating the information gap between any regulatory agency and any group of financial institutions;

(5) Articulating the strategies for the promotion of safe and efficient practices by financial institutions; and

(6) Deliberating on such other issues as may be specified from time to time.

The CBN serves as the secretariat of the FSRCC, although the CBN Act does not explicitly provide for the creation of a secretariat.[893] Further, the decisions of the FSRCC are taken on a consensual basis, and the committee has five subcommittees dealing with the following:[894]

(1) Financial Sector Soundness, which conducts surveillance over potential risks and recommends measures to avoid a systemic crisis (Chair: CBN).

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891 See International Monetary Fund (2013) 3.

892 s 44(a)–(f) of the CBN Act.

893 International Monetary Fund (2013) 13.

894 International Monetary Fund (2013) 13.

(2) Harmonisation and Coordination, which examines regulatory and supervisory standards, recommends joint supervision and enforcement, and capacity building (Chair: NDIC).

(3) Information Sharing, which identifies processes for information sharing (Chair: SEC).

(4) Legal and Enforcement, which identifies overlaps, gaps, conflicts, inconsistencies, and enforcement cooperation (Chair: CAC).

(5) Financial Market Development that identifies and recommends areas to improve the financial system (Chair: NAICOM).

As can be noted from the above list, the FSRCC does not currently have a sub–committee specifically dealing with Fintech or digital financial services. It is also important to note that the CBN Act does not provide for the establishment of sub–committees.

The 2012 National Financial Inclusion Strategy (NFIS) provides that the FSRCC will supervise the activities of the Financial Inclusion Secretariat (FIS).[895] The FIS is also required to report to the FSRCC, which, in turn, reports to the National Economic Council (NEC).[896] However, the 2018 NFIS changed this arrangement, assigning the responsibility of supervising the FIS activities to the Financial Inclusion Steering Committee (FISC).[897]

Further, the FISC, instead of the FSRCC, reports directly to the NEC. Nonetheless, the 2018 NFIS also mentions an annual reporting requirement from the FIS to the FSRCC.[898] Other functions assigned to the FSRCC towards implementing the NFIS are:[899]

(1) Coordinate initiatives across various regulatory bodies

(2) Give strategic direction on the implementation of the Strategy

(3) Secure buy–in from the government at the highest levels

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895 National Financial Inclusion Strategy (2012) x.

896 The members of the National Economic Council are the Vice President, Federal Ministry of Finance, Central Bank of Nigeria, and State Governors.

897 National Financial Inclusion Strategy (2018) x.

898 National Financial Inclusion Strategy (2018) ix.

899 National Financial Inclusion Strategy (2018) 53.

(4) Approve the review of targets for reporting and monitoring

(5) Take full responsibility for the implementation of the Strategy

(6) Approve the publication of an annual report on financial inclusion

It is also important to note that the 2012 and 2018 versions of the NFIS do not designate the FISC and FITC as sub–committees of the FSRCC.

The CBN Act is generally commendable for specifically enumerating the various objectives, and that the committee was not only given a broad mandate to achieve. It is opined that the enumeration of the functions of the FSRCC helps to leave less room for speculation about what the committee should or should not be doing.

It is also laudable that the CBN Act leaves the FSRCC's functions open–ended, allowing flexibility in including other necessary functions.[900] In this sense, although the CBN Act does not give the FSRCC an express mandate on issues like consumer protection or financial stability oversight, it may still be able to perform these functions.

However, the CBN Act does not state how additional functions will be assigned to the FSRCC or who will be responsible for such roles. Further, a notable drawback of the legal regime for the FSRCC is that the CBN Act does not provide for how the membership of the committee can be expanded. The implication of this is that the CBN Act would need to be amended by the National Assembly to recognise the admission of new members, as has been the case with the admission of the PENCOM.

Another drawback of the legal regime is that the CBN Act omits to specify the authority or person responsible for setting out the other issues that the FSRCC may consider or even how the issues will be determined. The CBN Act is also silent on who or how the activities of the FSRCC will be funded. In the same trend of omissions, the CBN Act does not specify how frequently the members of the FSRCC should meet.

Furthermore, while the FSRCC is charged with preventing regulatory inconsistency, which could lead to regulatory arbitrage, the CBN Act does not specify how this will be accomplished. In particular, no provisions in the CBN Act specify the mechanism for adopting a functional approach or designating a lead regulator in cases where regulatory functions overlap.

900 This is because s 44(f) of the Central Bank of Nigeria Act provides that the FSRCC shall deliberate on such other issues as may be specified from time to time.

Additionally, the CBN Act does not specify any accountability arrangement for the FSRCC, including in terms of requiring the committee to report on its activities or evaluating the progress of the committee in achieving its objectives. It submitted that addressing these various gaps will help to strengthen the legislative framework for the FSRCC and better position the committee to discharge its objectives.

Apart from the CBN Act, the only other financial sector law that mentions the FSRCC is the NDIC Act. As mentioned, the NDIC Act is Nigeria's most recently updated financial sector law. Section 37 of the NDIC Act empowers the NDIC, under the auspices of the FSRCC, to gather information from sectoral regulators about the activities of regulated entities concerning transactions with insured institutions.

Furthermore, this section states that if the obtained data indicates that an insured institution is at risk of insolvency, the NDIC, through the FSRCC, is authorised to investigate the business and financial status of the insured institution's subsidiaries, affiliates, and associated companies.

4.6.1.3. MoU for regulatory coordination

As discussed earlier, the Federal Competition and Consumer Protection Act 1 of 2018 (FCCP Act) explicitly mandates the entering and publication of agreements between the Federal Competition and Consumer Protection Commission (FCCPC) and other regulators, including financial regulators, with consumer protection and competition jurisdiction. This agreement is understandably required to facilitate regulatory coordination between the FCCPC and these other regulators on consumer protection and competition regulation matters. However, no similar provision is found in the CBN Act or the other financial sector laws regarding financial regulators signing and publishing MoUs for regulatory coordination.

Although not mandated by any financial sector law, it has been confirmed that the FSRCC members have, indeed, signed a multilateral MoU to facilitate the sharing of information between the regulators in the committee.[901] While commendable that the regulators took the initiative to sign an MoU even though not mandated by legislation,

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901 See International Monetary Fund *Financial sector stability assessment* (IMF Country Report 140, 2013) 23; Ogunleye GA 'Financial safety net reform in Nigeria' in LaBrosee JR, Olivares Caminal R & Single D *Managing risks in the financial system* (2011) 437.

it is submitted that the extant MoU regime for regulatory coordination in Nigeria suffers from some gaps.

First, the scope of regulatory coordination under the MoU is very restrictive, as it only relates to the sharing of information. The MoU should ideally cover numerous other important coordination issues, including financial stability oversight support, crisis management, joint enforcement, and infrastructure sharing, among others.

Further, the MoU has not been publicly made available. Also, there is no information available on whether the MoU entered into by the regulators has been periodically revised to align with recent developments in the financial system. These are issues that legislation can give direction on for the implementation of MoUs for regulatory coordination, especially as they facilitate transparency and accountability in such arrangements.

Additionally, as argued in Chapter 2, it is useful for financial regulators to be required by legislation or even as part of the Parliamentary accountability process to show their compliance with MoU terms. This is especially pertinent to ensure that the MoUs are taken seriously by the financial regulators. The next section discusses the reform of the institutional structure through the adoption of consolidated bank supervision and embedding a functional approach into the sectoral model.

4.6.2. Consolidated bank supervision and integration of a functional approach

As discussed in Chapter 2, consolidated bank supervision is a regulatory integration measure.[902] It is particularly useful for regulating financial conglomerates. Two major developments that led to the emergence of financial conglomerates in Nigeria and the subsequent adoption of consolidated bank supervision.[903]

The first development relates to Nigeria's implementation of the universal banking scheme through the Guidelines for the Practice of Universal Banking in Nigeria, 2000.[904] The Guidelines allowed banks holding a universal banking licence to engage

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902 Chapter 2, Section 2.5.1.

903 These developments are discussed in the preamble in the Draft Framework for the Consolidated Supervision of Banks released in 2007 available at *https://www.cbn.gov.ng/OUT/CIRCULARS/BSD/2007/BSD–DIR–CIR–07–V.1–11.PDF* (Accessed on 8 June 2023).

904 Guidelines available at *https://www.cbn.gov.ng/out/circulars/bsd/2000/bsd–10–2000.pdf* (Accessed on 8 June 2023).

in banking[905] and other non–core banking financial activities comprising capital markets and insurance business.[906] These non–core banking activities could be undertaken directly as part of the banking operations or indirectly through subsidiaries.[907]

The Guidelines was essentially a financial modernisation tool, which refers to the practice of lifting legal and regulatory restrictions that confine financial institutions to specific financial services or sectors.[908] According to the CBN, the universal banking scheme was introduced with twin objectives of: (1) removing imbalances in opportunities between commercial and merchant banks, and (2) strengthening the capacity of Nigerian banks to fund commercial and industrial activities.[909]

Commendably, the Guidelines had a clear framework for addressing the possibility of overlapping functions, which could lead to inconsistencies, duplication, and arbitrage. It provided that where a bank undertook other financial activities like insurance and securities business, the CBN would be the lead regulator and consolidated supervisor of such bank.[910]

The Guidelines also specified provisions that rendered Nigeria's institutional structure to have the elements of both the sectoral and functional models.[911] These provisions ensured that the legal form or type of a financial institution was not the sole determinant of the financial regulator with regulatory jurisdiction over such institutions, as is the case in a purely sectoral model.

The Guidelines require that the specific activities undertaken by a financial institution be taken into account to determine the financial regulators or regulators that will be charged with the regulation of the institution.[912] The Guidelines also reiterated the significance of the FSRCC by providing that:

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905 Section 1.0 of the Guidelines.

906 Section 2.0 of the Guidelines.

907 Section 3.3 of the Guidelines.

908 Schooner HM & Taylor M 'United Kingdom and United States responses to the regulatory challenges of modern financial markets' (2003) 38(317) *Texas International Law Journal* 318.

909 Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 40.

910 Section 4.0 of the Guidelines.

911 See Section 3.0 of the Guidelines.

912 To illustrate this, if a universal bank engages in insurance business alongside its core banking business, it would be subject to regulatory oversight from two separate regulators. NAICOM would regulate and oversee the bank's insurance business activities. At the same time, the CBN

> [Universal Banking] practice in Nigeria is expected to engender the emergence and existence of financial conglomerates and large banking groups, which will involve the different regulatory authorities in Nigeria – CBN, SEC, NAICOM, and CAC. Greater cooperation and coordination will therefore be expected among these regulatory authorities, particularly through the [Financial Services Regulation Coordinating Committee] of which the CBN is the Chairman.[913]

After almost ten years of operating, the universal banking scheme and the Guidelines was subsequently repealed through the Regulation on the Scope of Banking Activities and Ancillary Matters 3 of 2010.[914] The Regulation states in its preamble that the universal banking scheme was revoked for the following reasons: (1) it exposed banks to higher operating risks, (2) it increased the chances of depositors' funds being put into risky non–banking businesses, and (3) it heightened the risk to the financial system's stability.

The requirements of the Regulation on the Scope of Banking Activities and Ancillary Matters took effect on 14 May 2012.[915] Under the Regulations, banks were restricted to purely banking business.[916] Banks carrying out non–core banking financial activities directly as part of their banking operations under the universal banking scheme were mandated to desist from such activities.[917]

On the other hand, banks undertaking non–core banking activities through subsidiaries were to divest their interest in all such subsidiaries and focus solely on their licensed banking business.[918] Alternatively, they could use a non–operating financial holding company structure to retain their subsidiaries engaged in non–core

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would continue to regulate and oversee the bank's banking business operations as well as overall consolidated supervision.

913 Section 4.0 of the Guidelines.

914 The Regulations is available at *https://www.cbn.gov.ng/out/2010/circulars/bsd/cbn%20regulation%20on%20%20new%20banking%20model%20%20clean%20091110%20final.pdf* (Accessed on 24 September 2023).

915 Section 10 of the Regulation on the Scope of Banking Activities and Ancillary Matters.

916 The Regulation retained the definition of banking business under the Banks and Other Financial Institutions Act.

917 Section 4(1) of the Regulation on the Scope of Banking Activities and Ancillary Matters.

918 Sections 5(3) & 8 of the Regulation on the Scope of Banking Activities and Ancillary Matters.

banking financial services.[919] The Guidelines for the Licensing and Regulation of Financial Holding Companies of 2014 defines a financial holding company as:

> A company whose principal object includes the business of a holding company set up for the purpose of making and managing (for its own account) equity investment in two or more companies, being its subsidiaries, engaged in the provision of financial services, one of which must be a bank.[920]

The banking sector consolidation programme implemented by the CBN in 2005 is another development that has influenced consolidated bank supervision. As Lumpkin explains, financial convergence deals with various interfaces between different categories of financial service providers, while consolidation involves the combinations of financial service providers within the same institutional sector.[921]

The banking sector consolidation programme aimed to create a more resilient banking sector and to strengthen the universal banking scheme.[922] Under the programme, the CBN increased the minimum share capital of banks from ₦2 billion to ₦25 billion and recommended mergers and acquisitions for banks to meet the recapitalisation requirement by 31 December 2005.[923]

With the implementation of the banking sector consolidation programme, the number of banks was reduced from about 90 in 2005 to 24 by 2006, and by the end of 2011, there were 20 commercial banks, with ₦18.2 trillion assets and ₦12.5 trillion in deposits (about US$81 billion at that time), and one Islamic (non–interest) bank.[924]

Some of the outcomes of the banking sector consolidation programme include facilitating the emergence of bigger capitalised banks and increased competition in the banking sector. It also facilitated Nigerian banks to become internationally active, especially in the West African sub–region, Europe and America.[925]

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919 The licenced financial holding companies are Access Holdings Plc, FBN Holdings Plc, FCMB Group Plc, FSDH Holding Company, GTB Hold Co, Stanbic IBTC Holdings Plc. Available at https://www.cbn.gov.ng/supervision/Inst–HC.asp (Accessed on 4 November 2023).

920 s 2.1 of the Guidelines for the Licensing and Regulation of Financial Holding Companies.

921 Lumpkin S *Supervision of financial services in the OECD Area* (2002) 8.

922 Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 40.

923 Famuyiwa OL (2013) 40.

924 International Monetary Fund (IMF Country Report No. 13/143, 2013) 4.

925 s 1.1 of the Draft Framework for the Consolidated Supervision of Banks.

Following these two developments (the universal banking scheme and banking sector consolidation programme), financial conglomerates became well–established in Nigeria's financial system.[926] These financial conglomerates stressed the ineffectiveness of Nigeria's fragmented institutional regime in confronting:[927] (1) systemic risk or the risk of contagion, arising from the possibility that problems in one of the groups in the financial conglomerate might affect other groups, (2) the complex nature of banks, (3) regulatory arbitrage opportunities resulting from differing regulatory standards among the financial regulators for each of the subsidiaries in the group supervised on a solo basis by separate regulators.

Against these concerns, the adoption of consolidated bank supervision became imperative to augment the shortcomings of Nigeria's fragmented institutional regime.[928] Section 64 of the BOFI Act now provides for the powers of the CBN to undertake consolidated bank supervision. This statutory inclusion follows the recommendation by the IMF in the FSAP report that the CBN should be empowered by an Act of the National Assembly to undertake such supervision.[929]

The next section discusses the various institutional reforms that emerged in response to Nigeria's last major banking crisis.

4.6.3. Asset Management Company (AMCON) and proposal to change the institutional structure

Nigeria was among the countries whose financial system did not go unscathed during the GFC era, with the country suffering a banking sector crisis commonly called the 2008–2009 Nigerian banking crisis.[930] The 2008–2009 Nigerian banking crisis had its origins in the banking sector consolidation programme implemented between 2005–2006.[931]

926 s 1.2 of the Draft Framework for the Consolidated Supervision of Banks.

927 s 1.2 of the Draft Framework for the Consolidated Supervision of Banks.

928 s 1.3 of the Draft Framework for the Consolidated Supervision of Banks.

929 International Monetary Fund (IMF Country Report 140, 2013) 88.

930 Kama U & Adigun M *Financial Inclusion in Nigeria: Issues and Challenges* (CBN Occasional Paper 45, 2013) 7. Also see Musa BM, Ahmed I & Usman F 'The trends and implications of the global financial crisis on the Nigerian economy' (2016) 4(3) *Global Journal of Business and Social Science Review* 143.

931 International Monetary Fund *Crisis management and crisis preparedness frameworks technical note for Nigeria* (IMF Country Report No. 13/143, 2013) 7–8.

The consolidation programme was not accompanied by sufficient supervision to ensure that the capital of merged institutions was adequate. Further, from 2005 to the years leading up to the GFC, Nigerian banks fuelled a rapid credit expansion to the private sector.[932] They particularly invested their funds in the oil and gas sector and extended margin loans to borrowers to purchase domestic stock. These investments left the banking sector exposed to oil price swings and shocks in the Nigerian stock market.

In March of 2008, the country's stock market crashed, suffering a loss of US$ 60 billion in market capitalisation.[933] The stock market crash, combined with the rapid decline of oil and gas prices due to the GFC, affected the balance sheets of many systematically important banks in the country and rapidly increased their non–non–performing loan (NPL) ratios as margin investors and oil and gas operators were unable to service their debts.[934]

The former Governor of the CBN, Sanusi Lamido Sanusi, attributed the Nigerian banking crisis to eight main interdependent factors:[935] (1) macroeconomic instability caused by large and sudden capital inflows, (2) major failures in corporate governance at banks, (3) lack of investor and consumer sophistication, (4) inadequate disclosure and transparency about the financial position of banks, (5) critical gaps in regulatory framework and regulations, (6) uneven supervision and enforcement, (7) unstructured governance and management processes at the CBN, and (8) weaknesses in the business environment.

As the crisis unfolded, the Nigerian government recognised the need for immediate action to restore confidence in the banking sector and capital market. The CBN implemented a series of measures to address the root causes of the crisis and stabilise the financial system. The CBN injected ₦620 billion (about US$4.1 billion at that time)

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932 Ungersboeck P *The global financial crisis in Nigeria: AMCON's banking sector recapitalization* (Yale Program on Financial Stability, 2020) 1–2.

933 Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 36–64. See also Njiforti P 'Impact of the 2007/2008 global financial crisis on the stock market in Nigeria' (2015) 6(1) *CBN Journal of Applied Statistics* 49–68.

934 International Monetary Fund *Crisis management and crisis preparedness frameworks technical note for Nigeria* (IMF Country Report No. 13/143, 2013) 4.

935 Sanusi LS *The Nigerian banking Industry: What went wrong and the way forward* ((BIS Review 49/2010) 2–8. See also Egboro E 'The 2008/2009 banking crisis in Nigeria: The hidden trigger of the financial crash' (2016) 12(2) *British Journal of Economics, Management & Trade* 1–16.

of liquidity into the banking sector in the form of unsecured and subordinated debt and provided a guarantee of all interbank lending transactions, foreign credit lines, and pension deposits.

The CBN also replaced the management of eight banks and proceeded to take action against the ex–CEOs and directors. Commitments were also made to protect depositors and creditors against losses and that no bank would be allowed to fail. These measures stabilised the banking system and allowed the authorities time to design a strategy to resolve the intervened banks. There were other responses to the crisis that had institutional implications and are enumerated as follows.

First, the CBN established the Consumer and Financial Protection Department within its organisational structure to provide a platform through which consumers can seek redress.[936] Secondly, the Asset Management Corporation of Nigeria (AMCON) was established under the Asset Management Corporation of Nigeria Act 4 of 2010 to purchase the non–non–performing loan assets of banks and dispose of the assets to obtain the best achievable financial returns on them.[937]

Akinbami and Ngwu have argued that it was unnecessary to establish AMCON in the first place and that its functions should have been assigned to the existing NDIC instead.[938] They argue that 'the takeover and management of the assets of troubled deposit–takers function that should, rightly, be carried out by the deposit protection regulator.' According to them, establishing AMCON leads to 'unnecessary duplication and a waste of resources.'

Thirdly, the Presidential Steering Committee on Global Financial Crisis was set up to propose measures to restore confidence in the financial system and recommended the establishment of a unified regulator.[939] It was suggested that the unified regulator

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936 Kama U & Adigun M *Financial Inclusion in Nigeria: Issues and Challenges* (CBN Occasional Paper 45, 2013) 15.

937 s 4 of the Asset Management Corporation of Nigeria Act. See Ungersboeck P *The global financial crisis in Nigeria: AMCON's banking sector recapitalization* (Yale Program on Financial Stability, 2020), noting that that capital injection by the AMCON successfully helped to protect depositors and ensuring that affected banks continued their business.

938 Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 322.

939 Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 26. See also Musa BM, Ahmed I & Usman F 'The trends and implications of the global financial crisis on the Nigerian economy' (2016) 4(3) *Global Journal of Business and Social Science Review* 143–144.

will combine the regulation of the banking, securities, insurance, and pension sectors, while the CBN will be allowed to concentrate on its core functions of monetary policy implementation. However, this proposal has not been implemented to date.

Lastly, there were recommendations and commitments to strengthen regulatory coordination through the FSRCC.[940] These stemmed from the fact that the committee played little to no role in preventing and managing the Nigerian banking crisis. According to the IMF, the FSRCC did not meet for two years during the Nigerian banking crisis. Instead, the CBN primarily managed the crisis.[941] However, there have not been any legislative reforms to strengthen the capacity or functioning of the FSRCC, including as it relates to ensuring more frequent engagements between the members of the committee.

4.7. REGULATORY DEVELOPMENTS IN RESPONSE TO FINTECH

In addition to identifying the various forms of Fintech activities, Chapter 3 mentions that financial regulators can respond to Fintech through a variety of regulatory approaches.[942] These approaches include: (1) applying existing regulations to Fintech activities without introducing new ones; (2) developing tailored regulations for Fintech activities, which may involve the issuance of new regulations or amendments to existing ones; (3) implementing regulations to explicitly prohibit certain Fintech activities, and (4) leaving the Fintech activity unregulated. This section not only explains these Fintech activities but also discusses the regulators and regulatory approaches that have been adopted for them in Nigeria.

4.7.1. Mobile money

Mobile money is a mobile–based financial service solution that allows users to store value in the SIM cards of their mobile phones (mobile accounts) in the form of electronic money (E–money). This E–money can be used for various purposes, such as transferring funds to other users, making payments for goods and services, and converting it to physical cash. It can also be a store of value. Typically, mobile money

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940 Soludo CC 'Banking in Nigeria at a time of global financial crisis' available at https://www.cbn.gov.ng/out/publications/pressrelease/gov/2009/globalcrisis.pdf (Accessed on 10 June 2023).

941 International Monetary Fund *Crisis management and crisis preparedness frameworks technical note for Nigeria* (IMF Country Report No. 13/143, 2013) 12.

942 Chapter 3, Sections 3.2 & 3.3.

services are offered by mobile network operators (Telco–led model), although banks (bank–led model) can also provide the services.[943]

Uniquely, unlike in other jurisdictions like Kenya and Tanzania where the telecommunications regulator jointly regulates mobile money services with the central bank, in Nigeria, the CBN is the lone regulator of the service. Additionally, the regulatory frameworks for mobile money services do not allow for a telco–led model of mobile money services. These frameworks are namely, the Regulatory Framework for Mobile Money Services, 2021, and the Guidelines on Mobile Money Services, 2021. In particular, section 1.0 of the Regulatory Framework for Mobile Money Services provides that:

> The CBN recognizes the importance of Mobile Network Operators (MNOs) in the operations of mobile money services and appreciates the criticality of the infrastructure they provide. However, the telco–led model (where the lead initiator is an MNO), shall not be operational in Nigeria. Its exclusion will enable the CBN to have full control of monetary policy operations, minimise risks and ensure that the offerings of financial services are driven by organizations that have been licensed by the CBN to do so.

The Regulatory Framework for Mobile Money Services and the Guidelines on Mobile Money Services specify two models for mobile money services that can be operated in Nigeria.[944] The first is a bank–led model in which a bank or consortium of banks can be the lead initiators of the mobile money services. The other model is the non–bank model in which the lead initiator of the mobile money services is a corporate organisation specifically licensed by the CBN to provide mobile money services. Such a corporate organisation cannot be a deposit money bank, a national primary mortgage bank, a national microfinance bank or a mobile network operator (or its subsidiary).

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943 Lawack VA 'Mobile money, financial inclusion and financial integrity: The South African case' (2013) 8(3) *Washington Journal of Law, Technology & Arts* 317-346; Maurer B 'Regulation as retrospective ethnography: Mobile money and the arts of cash' (2012) 27(2) *Banking and Finance Law Review* 299-313.

944 See s 3 of the Regulatory Framework for Mobile Money Services, and s 5 of the Guidelines On Mobile Money Services.

4.7.2. Digital banking

Digital banking involves leveraging digital technology to provide banking services to customers through online platforms, mobile applications, and other electronic channels. In other words, it encompasses a wide range of financial activities that can be conducted electronically, without the need for physical presence at a traditional brick–and–mortar bank.[945] Digital banking extends beyond traditional banking services and encompass lifestyle services like ride–hailing, eHealth, EdTech, Telecoms, and Media, facilitated through partnerships and Application Programming Interface (APIs).[946] There are at least four types of 'digital banks' or providers of 'digital banking services' that can be distinguished.[947]

(1) Challenger banks: These banks have their own banking licence and compete with traditional banks by offering similar services. Essentially, challenger banks are Fintech startups or Bigtechs that have the added advantage of holding a banking licence.

(2) Neobanks: Unlike challenger banks, neobanks do not have their own banking licence. Instead, they partner with and leverage the banking licence of traditional banks to render bank–licensed services digitally. As such, customers of neobanks need an account with an existing licensed bank. Another unique feature of neobanks is that they operate exclusively through digital channels.

(3) Betabanks: Established as joint ventures or subsidiaries of existing banks, betabanks offer limited financial services under the umbrella of the parent bank's licence. They often serve as a means for traditional banks to enter new markets, targeting specific consumer bases, particularly tech–savvy millennials.

(4) Digitised incumbents banks: These are traditional banks undergoing total digital transformation to stay competitive. They acquire digital capabilities, competing

945 See Alvarez-Dionisi LE 'To Bot or Not to Bot? That Is the Question for Digital Banking' available at https://www.isaca.org/resources/isaca-journal/issues/2021/volume-4/to-bot-or-not-to-bot-that-is-the-question-for-digital-banking#2 (Accessed on 1 December 2023).

946 See Mothibi K & Rahulani A 'Digital Banking Trends in South Africa' available at https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Digital%20Banking%20Slides.pdf (Accessed on 1 December 2023).

947 See Mothibi K & Rahulani A 'Digital Banking Trends in South Africa' available at https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Digital%20Banking%20Slides.pdf (Accessed on 1 December 2023).

with digital challengers while categorising their customer base into digital and traditional segments.

The CBN is responsible for the prudential and conduct of business regulation of all banks in Nigeria, including the so–called ‘digital banks.’ Additionally, the NDIC is responsible for overseeing these banks’ deposit insurance. However, it is useful to mention that within Nigeria’s extant banking legislative framework, there is no specific licence for the various forms of digital banks. Therefore, the concept of a digital bank operates more as a banking business model.

The delivery of banking services using a ‘digital banking’ business model is commonly undertaken by banks licensed by the CBN as commercial or micro–finance banks. Digital banking services by these banks are under the purview of the CBN Act, BOFI Act, and the various regulations issued by the CBN. The CBN has also issued the Guidelines for the Regulation of Agent Banking and Agent Banking Relationships. The Guidelines empower firms like Fintech startups to act as agents of banks in rendering certain banking services with the approval of the CBN.

Apart from commercial banks and micro–finance banks, payment service banks can also adopt the digital banking business model for their banking services. The licensing of payment service banks is provided for under the Guidelines for Licensing and Regulation of Payment Service Banks of 2021. According to the Guidelines, the PSB framework has been introduced to improve financial inclusion. This will be achieved through the PSB deploying technology solutions to increase access to deposit products and payment services for small businesses, low–income households, and other financially excluded entities.

True to its financial inclusion objective, the PSB Guidelines provide that PSBs are to operate mostly in rural areas and unbanked locations, targeting financially excluded persons, with not less than 25 per cent financial service, as defined by the CBN from time to time. Licensed PSBs are authorised to:[948] accept deposits from individuals and small businesses; conduct payments, remittances, and inbound cross–border personal remittances services within Nigeria through various channels; sell foreign currencies from inbound cross–border personal remittances to authorised foreign

[948] s 4.1 of the Guidelines for Licensing and Regulation of Payment Service Banks.

exchange dealers; issue debit and prepaid cards, operate electronic wallets; offer financial advisory services; and invest in government securities.

However, there are also some services that PSBs are precluded from rendering. These prohibited activities include:[949] granting loans, advances, or guarantees whether directly or indirectly; accepting foreign currency deposits; insurance underwriting; and accepting closed scheme electronic value such as airtime as a form of deposit or payment.

Interestingly, although the subsidiary company of a mobile network operator cannot be licensed by the CBN to offer mobile money services, they can be licensed as a PSB. Other potential promoters of PSBs, according to the Guidelines, include: (1) banking agents; (2) retail chains; (3) postal service providers and courier companies; (4) mobile money operators that desire to convert their mobile money licence to a PSB licence; (5) switching companies; (6) Fintech firms; (7) financial holding companies; (8) any other entity on the merit of its application, subject to the approval of the CBN.[950]

4.7.3. Equity crowdfunding

Equity crowdfunding provides businesses with an alternative to traditional fundraising options through private equity firms, venture capitalists, angel investors, banks, private placements, initial public offerings, issuing corporate bonds and bootstrapping. It allows companies, particularly startups and small businesses, to raise capital by issuing and selling shares in their business to a large number of investors through online platforms.[951]

In line with its regulatory jurisdiction over both debt and equity capital market activities, the regulation of equity crowdfunding is within the jurisdiction of the SEC. As it did for robo–advisory, the SEC has also developed and issued a tailored regulatory framework for crowdfunding called the Rules on Crowdfunding in 2021.

The Rules on Crowdfunding apply specifically to crowdfunding arrangements involving raising funds from the public through an online portal in exchange for shares, debt securities, or other investment instruments approved by the SEC. In other words, it

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949 s 4.2 of the Guidelines for Licensing and Regulation of Payment Service Banks.

950 See s 5 of the Guidelines for Licensing and Regulation of Payment Service Banks.

951 See Bellefamme P, Lambert T & Schwienbacher A 'Crowdfunding: Tapping the right crowd' (2014) 29(5) *Journal of Business Venturing* 585-609; Wang H, Chen K & Zhu W 'A process model on P2P lending' (2015) 1(3) *Financial Innovation* 1-8.

does not apply to other forms of crowdfunding, including P2P lending, donation crowdfunding and reward crowdfunding.

Further, the Rules clarify that only micro, small and medium enterprises (MSMEs) that meet either of two criteria can raise funds from the public through a crowdfunding portal operated by a SEC–registered crowdfunding intermediary:

(1) MSMEs incorporated as a company in Nigeria with at least a two–year operating track record.

(2) MSMEs incorporated as a company in Nigeria with less than a two–year operating track record, but that have a strong technical partner with a minimum of two years of operating experience or have a core investor

4.7.4. Digital or online lending

Digital lending involves the practice of a lender providing loans or credit to borrowers through online platforms or mobile applications. This differs from peer–to–peer (P2P) lending, where the operator of the platform merely acts as an intermediary between lenders and borrowers and does not extend loans. In digital lending, the platform operator functions as the lender.[952]

The process of digital lending typically involves using technology to analyse a borrower's creditworthiness and ability to repay the loan, by reviewing credit history, income, employment status, and other relevant financial information. Banks can offer digital lending services as part of their broader digital banking service package. However, it is now more commonly offered by non–bank lenders like finance companies or moneylenders.

There are two notable regimes under which businesses can choose to offer lending services in Nigeria, whether through manual or digital platforms. The first option is to obtain any of the CBN licences that permit such lending services. Under the CBN Act and BOFI Act, the range of CBN–licensed firms that have lending as part of their permissible activities include commercial banks, microfinance banks, and finance companies.

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952 Stewart A, Yaworsky K & Lamont P *Demystifying digital lending: How digital transformation can help financial service providers reach new customers, drive engagement, and promote financial inclusion* (Accion Insights 2018) 10.

The second option involves operating as a moneylender with a moneylender's licence. The issuance of the moneylender's licence and the operations of moneylenders are regulated by the Moneylenders Law of each of the 36 States that make up the Nigerian federation. Further, as an incidence of the National Assembly being responsible for enacting laws for the Federal Capital Territory (Abuja), in Abuja, moneylending is regulated by the Moneylenders Act. The Moneylenders Laws of the various States and the Moneylender Act contain comparable provisions, albeit with minor adjustments and reorganisation of sections.

However, it must be emphasised that although moneylenders are issued licences by State regulators, they are still subject to the oversight of some national or federal regulators with respect to certain aspects of their operations. These regulators notably include the FCCPC in relation to consumer protection and anti–competitive practices as well as the NDPC in terms of processing personal data.

Apart from requiring moneylenders to be licensed, the Moneylenders Laws stipulate the formalities for loan contracts, set the rate of interest that can be charged depending on whether the loan is secured or unsecured, and contain other provisions designed to protect borrowers from exploitation.[953] The laws also define who a moneylender is. For example, section 1 of the Moneylenders Law of Lagos State, 2003 defines a moneylender to include:

> any person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business, whether or not he also possesses or owns property or money derived from sources other than the lending of money and whether or not he carries on the businesses as a principal or as an agent.[954]

The section goes further to exclude the following persons/entities from being considered moneylenders even though they may be engaged in the business of lending money: (1) Cooperative societies registered under the Cooperative Societies Law; (2) Companies empowered by special laws to lend money; (3) Companies

953 Omede PI *Nigerian consumer credit: Law, regulation and market insights* (2022) 116.

954 s 2 of the Moneylenders Law, Cap. M7, Laws of Lagos State of Nigeria, 2003. Similar definition can be found in s 31 of the Moneylenders Law, Cap. M7, Laws of Cross River State of Nigeria, 2004 and s 2 of the Moneylenders Act.

engaged in banking, insurance, or whose primary business object is not moneylending business; (4) Persons or companies exempted explicitly by the State Commissioner overseeing moneylending activities, and (5) Pawnbrokers licensed under the Pawn Brokers Law, provided the loans being provided by the pawnbroker does not exceed the maximum threshold specified. Notably, also, section 4 of the Moneylenders Law of Lagos State provides that apart from these excluded persons/entities, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed to be a moneylender until the contrary be proved.

The question of who qualifies as a moneylender is very important because carrying out the business of moneylending without the relevant licence is a crime.[955] Additionally, it is a crime for a moneylender to charge interest at a rate higher than the maximum threshold set by the Moneylenders Law.[956] These requirements imply that a moneylender who does not operate with the moneylender's licence or has charged an interest above what is prescribed by law cannot enforce repayment of debt against a borrower in court because the courts do not enforce illegal contracts.[957] Furthermore, as a general rule, moneylenders are required to commence an action for debt recovery in court within 12 months from the date the cause of action arose.[958]

In the case of *Ibrahim v Bakori and Anor*, the Court of Appeal held that a lender would be deemed a moneylender under the law if they consistently engage in the business of lending money to sustain a livelihood, seek profit, or achieve financial gain.[959] This decision of the Court Appeal aligns with a similar judgment in the English case of *Edgelow v Macelwee*, where the court clarified that sporadic loans to relatives, friends, or acquaintances, regardless of whether interest is charged, do not categorise someone as a moneylender. The crucial requirement is the presence of a systematic, repetitive, and continuous business of money lending for an individual to be considered a moneylender.[960]

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955 See s 6(b)(i)(ii) of the Moneylender Law of Lagos State

956 See s 16(1)(2) of the Moneylender Law of Lagos State.

957 See also *Kasumu v Baba Egbe* (1956) 3 ALL ER 266 at 2; *Gilbert Okonkwo v Nwankwo Okoro* (1962) ENLR 74 at 3*; Oyebode v Oloyede* (1999) 2 NWLR 592 at 523.

958 See s 32 of the Moneylender Law of Lagos State.

959 See *Ibrahim v Bakori and Anor* (2009) LPELR–8681 (CA).

960 *Edgelow v Macelwee* (1918) 1 KB 205 at 206.

The moneylender's licence obtained from a specific State confines the licence holder's moneylending business operations to that issuing State. However, technology can enable moneylenders to acquire a licence in one State and easily market their services and operate in another State where they do not hold a licence. Due to this and other reasons, the Moneylender Laws have been criticised for being outdated and out of tune with modern–day realities.[961]

4.7.5. Loan crowdfunding

Loan crowdfunding, which is also called peer–to–peer (P2P) lending, is an online credit–raising Fintech activity that is facilitated by the internet–based platforms other than traditional banks, that connect borrowers with lenders. Individual loan agreements are established directly between borrowers and lenders, without the P2P platform assuming risk or providing loans to the borrower.[962]

The report titled *The future of Fintech in Nigeria*, issued by SEC's Fintech Roadmap Committee, recommends that SEC should regulate equity crowdfunding, while CBN should regulate loan crowdfunding/P2P lending.[963] Although the SEC has issued a regulatory framework for equity crowdfunding, the CBN has not yet issued a regulatory framework for P2P lending.

Section 57(2)(a)–(j)*(i)–(viii)* of the BOFI Act, which enumerates the 'business of other financial institutions' regulated by the CBN, does not explicitly mention P2P lending platforms. However, section 57(2)(a)–(j)*(ix*) of the BOFI Act also suggests that the CBN may, from time to time, designate other businesses that qualify as part of the 'business of other financial institutions.' The CBN can leverage this provision to regulate P2P lending platforms.

It is opined that under the current legal landscape, a person habitually engaging in lending money through P2P platforms may fall under the definition of a moneylender under the Moneylenders Laws of States. However, it is also contended that a CBN regulatory framework for P2P lending could exempt P2P lenders from being captured under the Moneylenders Law. This is especially because, as noted earlier, the

961 Ekpo M, Alobo E & Enyia J 'Impediments to the development of a strong consumer credit system in Nigeria' (2018) 5(1) *World Journal of Social Science* 36–45.

962 Wang H, Chen K & Zhu W 'A process model on P2P lending' (2015) 1(3) *Financial Innovation* 1-8.

963 While the SEC has gone on to issue a regulatory framework for equity crowdfunding, the CBN is yet to issue the framework for loan crowdfunding.

Moneylenders Laws do not apply in instances where another law extends authorisation to a person or company to undertake the business of lending money.

To further contextualise this point, finance companies licensed by the CBN can undertake the business of lending money but are not required to obtain a moneylender's licence from States for this business.

4.7.6. Robo–advice

Robo–advice, also known as digital financial advice, represents a modern approach to investment management that leverages technology. Robo–advisors are digital platforms that deliver automated and algorithm–based financial planning services with minimal human oversight. These robo–advisors typically gather information from investors regarding their financial status and future objectives through an online questionnaire. Subsequently, they utilise this data to provide advice and/or execute automatic investments on behalf of the investors.[964]

The SEC is responsible for regulating robo–advisory services as part of its broader mandate under the Investment and Securities Act to oversee capital market operators that offer investment advisory services. The SEC has developed and issued a tailored regulatory framework for capital market operators that deploy robo–advisory platforms for rendering investment advice. It is called the Rule on Robo–Advisory Services, 2021.[965] The Rule applies to robo–advisory services alongside the Investment and Securities Act and other relevant regulations issues issued by the SEC.

As defined by the Rule on Robo–Advisory Services, robo–advisory services involve the provision of investment advice using automated, algorithm–based tools that are client–facing, with little or no human adviser interaction in the advisory process. The Rule includes provisions related to licensing requirements, algorithm testing, and bias mitigation among others. It also clarifies that the Investments and Securities Act and other regulatory frameworks issued by the SEC apply to robo–advisory services.

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964 See Phoon KF & Koh CC 'Robo-advisors and wealth management' (2018) 20(3) *Journal of Alternative Investments* 79-94. Also see Abraham F, Schmukler SL & Tessada J *Robo-advisors: Investing through machines* (World Bank Research and Policy Briefs, 2019) 2.

965 The Rules is available at *https://sec.gov.ng/wp-content/uploads/2023/04/Rules-on-Robo-Advisory-Services_Executed-30-August-2021.pdf* (Accessed on 7 July 2023).

4.7.7. Digital payments

Digital payment, also known as electronic payment, refers to the exchange of value between payment accounts facilitated by digital devices. It encompasses transactions conducted through bank transfers, mobile money platforms, and payment cards, which include credit, debit, and prepaid cards. Further, it represents a shift away from cash–based methods of payment toward instantaneous electronic transactions. Some of the digital payment solutions include gateway payment, digital wallets, Quick Response (QR) code payments, Near Field Communication (NFC) payments, biometric payments, and real–time gross settlement (RTGS), to mention a few.[966]

As earlier mentioned, the regulation of the payment system is one of the roles that is within the purview of the CBN in accordance with the CBN Act and BOFI Act. The CBN has issued various regulatory frameworks that impact the different digital payment options. These frameworks include the CBN circular on the new licence categorisation for the Nigerian payments system, 2020; Revised International Money Transfer Services Guidelines, 2014; Guidelines on Operations of Electronic Payment Channels, 2016; Regulation on Electronic Payments and Collections for Public and Private Sectors in Nigeria, 2019; Regulatory Framework for Use of Unstructured Supplementary Service Data (USSD) Financial Services, 2018; and Framework for Quick Response (QR) Code Payments, 2021 to mention a few.

4.7.8. Insurance technology (Insurtech)

Insurtech involves employing technology to improve efficiency and cost savings in underwriting, risk pooling, and claims management compared to traditional insurance service models.[967] Insurtech–based insurance services are within the regulatory oversight of NAICOM. NAICOM issued the Guidelines for Microinsurance Operations in Nigeria, in 2018. The Guidelines enable the establishment of mobile–based microinsurance offerings and promote financial inclusion by making insurance products more accessible to those in the informal segment of the economy. NAICOM has also issued a regulatory framework for insurance web aggregators, which are

[966] Bandura R & Ramanujam SR *Developing inclusive digital payment systems* (Center for Strategic and International Studies, 2021) 2-3.

[967] See generally Cortis D, Debattista J & Debono J et al 'Insurtech' in Lynn T, Mooney JG & Rosati P (eds) *Disrupting finance: Fintech and strategy in the 21st century* (2019) 71—84.

simply online platforms or websites that allow users to compare and purchase insurance policies from various insurance providers.[968]

4.7.9. Cryptocurrencies

Cryptocurrencies are digital assets that use cryptography for security and operate on decentralised networks, typically based on blockchain technology. Bitcoin, created in 2009, was the first cryptocurrency, and since then, numerous others have been developed, including Ethereum, Ripple, and Litecoin. Cryptocurrencies provide a pseudonymous alternative to traditional currencies, allowing for peer–to–peer transactions without the need for intermediaries like banks. Their value is influenced by market demand, and they are traded on various online platforms, known as cryptocurrency exchanges.[969]

Drawing from their statutory mandates under their enabling laws, both the CBN and SEC have regulatory jurisdiction over cryptocurrencies from different dimensions. CBN's regulatory jurisdiction over cryptocurrencies can specifically be linked to its mandates of regulating the payment system and issuing legal tender currency. It also draws from the CBN's power to oversee monetary policy and financial stability.

On the other hand, the SEC's jurisdiction over cryptocurrencies arises from its oversight functions over securities activities. Cryptocurrencies, in this context, can qualify as tradable securities. SEC can as such regulate platforms where cryptocurrencies are traded, firms that facilitate the trading, and the issuance of cryptocurrencies to the public to raise capital.

With the overlap of jurisdiction, it is evident that regulatory coordination between the CBN and SEC is imperative for the effective regulation of cryptocurrencies. Such coordination becomes particularly crucial to avoid regulatory inconsistencies and uncertainties in the legal regime for the regulation of cryptocurrencies. Nigeria initially lacked a coherent regulatory framework due to divergent approaches by the CBN and SEC, which have only recently been addressed.

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968 See Insurance Web Aggregators Operational Guidelines available at *https://proshareco.bluebooktech.com:44312/uploads/Others/News/1d1bd315-5191-4340-b992-d41361b35fe0.pdf* (Accessed on 1 December 2023).

969 See Härdle WK, Harvey CR & Reule RC 'Understanding cryptocurrencies' (2020) 8(2) *Journal of Financial Econometrics* 181-208.

In February 2021, the CBN issued a circular prohibiting all banks and 'other financial institutions' (OFIs) from dealing in cryptocurrencies or facilitating payments for cryptocurrency exchanges.[970] The circular required these institutions to identify and close all bank accounts used for trading cryptocurrencies. Despite CBN's prohibition, dealing in cryptocurrency did not exactly constitute a criminal offence in Nigeria, as no specific law explicitly prohibits and sets out a punishment for it.[971]

Meanwhile, the SEC released a statement on September 11, 2020 (approximately four months before the CBN's circular), affirming that cryptocurrencies can be considered tradable securities if they meet certain criteria. This was followed by the SEC issuing the Rules on Issuance, Offering Platforms, and Custody of Digital Assets in 2022.[972] The Rules provide for the regulation of exchanges (digital asset exchange) and persons (virtual asset service providers) that facilitate the trading of virtual assets. The Rules define virtual assets broadly, and such assets can include cryptocurrencies.[973]

Later on, in December 2023, the CBN issued the Guidelines on Operations of Bank Accounts for Virtual Assets Service Providers (VASPs).[974] The Guidelines provide guidance to financial institutions under CBN's regulatory purview regarding their banking relationship with SEC–licensed VASPs. The Guidelines clarify that it supersedes earlier notifications from the CBN that prohibited CBN–licensed institutions from providing services that facilitate cryptocurrency transactions. However, the Guidelines maintain that banks and OFIs are still prohibited from holding, trading, and/or transacting in cryptocurrencies on their account.

970 Available at https://www.cbn.gov.ng/Out/2021/CCD/Letter%20on%20Crypto.pdf (Accessed on 8 June 2023).

971 For further discussion on the legal status of cryptocurrencies in Nigeria and considerations for regulating them see Ukwueze F 'Cryptocurrency: Towards regulating the unruly enigma of Fintech in Nigeria and South Africa' (2021) 24 *Potchefstroom Electronic Law Journal* 1–38; Ukwueze FO 'The legal status and regulatory challenges of cryptocurrencies in Nigeria' (2021) 1(2) *International Journal of Interdisciplinary Business Strategy* 62–84; Ojo–Solomon RO 'The imperative of a legal regulation on cryptocurrencies in Nigeria' (2021) 8(4) *International Journal of Research and Analytical Reviews* 586–602.

972 The Rules is available at https://sec.gov.ng/rules–on–issuance–offering–and–custody–of–digital–assets_sec–nigeria–11–may–2022/ (Accessed on 7 July 2023).

973 The Rules define a virtual asset as 'a digital representation of value that can be transferred, digitally traded and can be used for payment or investment purposes.'

974 The Guidelines is available at https://www.cbn.gov.ng/Out/2024/FPRD/GUIDELINES%20ON%20OPERATIONS%20OF%20BANK%20ACCOUNTS%20FOR%20VIRTUAL%20Asset%20Providers.pdf (Accessed on 11 February 2023).

Centrally, the Guidelines on Operations of Bank Accounts for Virtual Assets Service Providers signifies a crucial step in harmonising the regulatory landscape of cryptocurrency in Nigeria and addressing the earlier inconsistencies between the CBN and SEC.

4.7.10. Peer–to–peer (P2P) invoice finance

Factoring is a form of asset–based financing in which a business assigns its accounts receivable, either through sale or as security, to a financial institution known as the factor, at a discounted rate. In return, the business receives immediate cash and other credit management services from the factor. These services include credit risk assessment, receivables collection, sales ledger management, and credit risk protection associated with the assigned accounts receivable.[975]

Like other financial services, factoring is also undergoing transformation through Fintech. Historically, the provision of factoring services involved a considerable amount of paperwork and manual processes. However, there is a growing shift from manual to digital platforms, such as websites and mobile applications, that enable businesses and factors to conduct factoring transactions faster, more seamlessly, and in larger volumes. Fintech adoption in factoring generally occurs in two ways.[976]

The first involves licensed factors (Fintech factors) automating their provision of factoring services to customers. These fintech factors typically establish web–based portals or mobile applications for suppliers to upload invoices for factoring. The automation also extends to the verification of the invoice, payment to the supplier, and debt collection. Secondly, intermediaries or brokers that are not themselves factors intermediate the provision of factoring services through digital platforms. In essence, factoring services are provided and accessed through P2P platforms. P2P platforms specifically for factoring services go by different names, such as invoice–trading platforms, electronic invoice marketplaces, or receivables exchanges

975 Puja AC *The role of legal and policy incentives in promoting factoring as a financing alternative for SMEs in Nigeria* (unpublished LLM thesis, University of the Western Cape, 2021) 3.

976 See Puja AC ‘Beyond legal, tax and regulatory interventions: Adopting fintech to promote factoring as a financing alternative for small to medium-sized enterprises (SMEs) in Africa’ in Lawack VA (ed) *Fintech Law and Regulation: An African Perspective* (2023) 409-445; Puja AC ‘Sustaining access to finance for Africa’s small and medium enterprises during and post covid-19 crisis: Factoring to the Rescue’ 2022 (36) *Speculum Juris* 387–409.

The CBN regulates the provision of factoring services by banks and finance companies in accordance with the BOFI Act and the Guidelines for Finance Companies, 2014. However, these laws do not precisely establish a legislative framework for factoring services. They primarily recognise factoring as a regulated financial activity that licensed banks and finance companies can offer. It is observed that the BOFI Act and the Guidelines for Finance Companies, 2014 provide a licensing framework for banks or finance companies that operate as Fintech factors.

As of the writing of this thesis, the CBN has not issued a specific licensing and regulatory framework for intermediaries of P2P invoice financing platforms. Similar to P2P lending, section 57(2)(a)–(j)*(i)–(viii)* of the BOFI Act, which enumerates the 'business of other financial institutions' regulated by the CBN, does not explicitly mention P2P invoice financing platforms. However, it is acknowledged that the CBN can, as an incidence of section 57(2)(a)–(j)*(ix)* of the BOFI Act, designate P2P invoice financing platforms as part of the 'business of other financial institutions' and, on this basis, license and regulate them.

4.7.11. Pension technology (Pensiontech)

Pensiontech is a subcategory of Fintech that specifically focuses on innovations and technological advancements within the pension and retirement industry. Pensiontech services are within the purview of the regulatory oversight of PENCOM. PENCOM has notably issued the Guidelines for Micro Pension Plan, 2018, which Fintech firms have capitalised to extend pension services to the informal sector of the economy.

4.7.12. Central bank digital currencies (CBDCs)

CBDCs are digital representations of a country's fiat currency issued by its central bank.[977] CBDCs aim to combine the benefits of cryptocurrencies, such as fast and cost–effective transactions, with the stability and trust associated with central bank–backed currencies. As an incidence of its powers to issue Nigeria's legal tender currency, the Naira, the CBN also oversees the issuance and regulation of Nigeria's CBDC called the 'e–Naira.' A tailored regulatory framework — Regulatory Guidelines

[977] Asian Development Bank *Fintech policy tool kit for regulators and policy makers in Asia and the pacific* (2022) 53.

on the e–Naira, 2021 — has been developed for the CBDC.[978] The Guidelines apply alongside other laws on issuing and using the Naira, including the CBN Act, BOFI Act and the Decimal Currency Act 21 of 1971.

4.8. CHAPTER CONCLUSION

This chapter has provided an overview of Nigeria's financial system and the developments in its Fintech sector. It discussed the country's current institutional structure of financial regulation, highlighting the legal frameworks that support it and the regulatory jurisdiction of the main financial regulators. The chapter also highlighted notable reforms that have impacted Nigeria's institutional structure of financial regulation over the years, as well as the regulatory response to Fintech.

The overview of Nigeria's financial system reveals its integrated nature especially manifested in the existence of financial holding companies. Additionally, the overview of the Fintech sector demonstrates its significant growth. The development of Fintech has led to the implementation of various Fintech institutional arrangements. There are also reform proposals focused on setting up Fintech units and enhancing institutional coordination structures and practice.

It has been noted in the chapter that the objectives of each regulator are set out in its enabling law. The objectives cover both micro–prudential and conduct of business issues. However, it is also observed that the CBN lacks an explicit consumer protection mandate. Further, the chapter notes that concerns have been raised about the CBN being overburdened with numerous functions, which negatively impact the optimal discharge of certain functions.

Additionally, the powers of NAICOM and SEC to issue regulatory instruments are constrained by certain powers and discretions granted to the Minister of Finance. Likewise, it has been observed that there is uncertainty regarding whether some subsidiary instruments issued by NAICOM (guidelines) and PENCOM (rules and guidelines) have the force of law. The Chapter has gone further to highlight the need for addressing these various gaps.

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978 Guideline is available at *https://www.cbn.gov.ng/Out/2021/FPRD/eNairaCircularAndGuidelines%20FINAL.pdf* (Accessed on 1 December 2023).

The discussion in the chapter also shows that Nigeria has implemented both institutional and regulatory integration measures to ensure a more integrated regulatory regime. For institutional integration, the country has established the FSRCC, a statutory financial regulation coordinating body, to drive regulatory coordination among the various sectoral regulators. As for regulatory integration, Nigeria has adopted consolidated bank supervision to oversee financial conglomerates with a banking component holistically. The chapter has also shown that there have been various regulatory reforms in response to Fintech.

With the background set in this chapter, the next chapter highlights some of the institutional reforms in response to Fintech. It also utilises the frameworks established in Chapters 2 and 3 to assess the effectiveness of Nigeria's institutional structure for financial regulation in general and Fintech regulation specifically. This assessment is undertaken to identify areas that need improvement, in addition to those already specified in this chapter, and to set out other reform considerations.

CHAPTER 5: EFFECTIVENESS OF NIGERIA'S CURRENT INSTITUTIONAL STRUCTURE FOR FINANCIAL REGULATION IN GENERAL AND FINTECH REGULATION IN PARTICULAR

5.1. CHAPTER INTRODUCTION

Chapter 2 introduced a conceptual framework outlining the requirements that are imperative for the effectiveness of institutional structure for financial regulation generally.[979] Building on these requirements, Chapter 3 advanced another conceptual framework on the requirements that can facilitate the effectiveness of the institutional structure for regulating Fintech more specifically.[980] Chapter 4 has gone further to provide an overview of the current state of Nigeria's institutional structure. It highlighted the financial regulators that make up the institutional structure, as well as the legislative framework and mechanisms for regulatory coordination among the regulators.[981]

These preceding chapters have provided context to this present chapter, which assesses the effectiveness of Nigeria's current institutional structure for financial regulation and Fintech regulation, through the lens of the requirements established in Chapters 2 and 3. This assessment is especially undertaken to identify possible areas that require improvement within Nigeria's institutional structure. These identified areas will provide the basis for the recommendations in Chapter 6, which is the study's concluding chapter.

From applying the conceptual frameworks, the study demonstrates that there are various gaps undermining the effectiveness of Nigeria's institutional structure for financial regulation in general and Fintech regulation specifically. A major gap is the inadequacy of the legislative provision and mechanisms for regulatory coordination among financial regulators and between financial regulators and non–core financial regulators. This and other identified gaps have led (and continue to lead) to various setbacks, including regulatory duplication, inconsistencies, arbitrage, weak consumer protection, and coordination failures. The chapter uses South Africa as a case study

979 See Chapter 2, Section 2.5.4.
980 See Chapter 3, Section 3.7.
981 See Chapter 4, Section 4.4-4.7.

to draw lessons on how to improve Nigeria's legislative framework for regulatory coordination.[982]

The assessment in this chapter is particularly invaluable for various reasons. Notably, while previous studies have analysed Nigeria's institutional structure within the broader context of financial regulation, very few studies have specifically focused on the regulation of Fintech.[983] Further, existing studies have emphasised the need to improve regulatory coordination in Nigeria.[984] However, no study is known to have gone a step further to explore the measures for improving the legislative framework for this regulatory coordination. The chapter addresses these gaps.

The chapter is structured into six sections. Section 2 assesses the effectiveness of Nigeria's institutional structure for financial regulation in general. Section 3 focuses on evaluating the effectiveness of Nigeria's institutional structure for regulating Fintech specifically. Section 4 explores the lessons that Nigeria can draw from South Africa's legislative framework for regulatory coordination. Section 5 outlines a broad reform strategy that policymakers should consider in addressing the shortcomings of Nigeria's institutional structure for financial regulation and Fintech regulation, while Section 6 concludes.

5.2. EFFECTIVENESS OF THE INSTITUTIONAL STRUCTURE FOR FINANCIAL REGULATION IN GENERAL

This section evaluates the effectiveness of Nigeria's current institutional structure for financial regulation in general using the conceptual framework advanced in Chapter 2. In particular, the section examines how well Nigeria's institutional structure has: (1) adapted to developments in the financial system, (2) overcome regulatory challenges

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982 The reasons for choosing South Africa as a case study have been highlighted in Chapter 1 (Section 1.7). Summarily the choice of South Africa is based on its geographic proximity and economic similarities to Nigeria, its connection to English law and the presentation of national laws as Parliamentary Acts similar to Nigeria, and its more recent adoption of the twin peaks model, offering potential for a more robust legislative framework for regulatory coordination by learning from earlier adopters like Australia, the Netherlands, and the United Kingdom.

983 See for example, Monye OF *Rethinking the legal and institutional framework for digital financial inclusion in Nigeria* (unpublished PhD thesis, University of Cape Town, 2020).

984 For some of these recommendations, see Monye OF *Rethinking the legal and institutional framework for digital financial inclusion in Nigeria* (unpublished PhD thesis, University of Cape Town, 2020) 196; Okwor FO 'Nexus between the Central Bank of Nigeria's regulatory framework and global economic crisis' 2020 *Bingham University Journal of Accounting and Business* 300; Ukwueze FO 'Cryptocurrency: Towards regulating the unruly enigma of Fintech in Nigeria and South Africa' (2021) 24(1) *Potchefstroom Electronic Law Journal* 21.

that the structure is vulnerable to, (3) facilitated efficient regulation, and (4) fostered the specialisation of regulators.

5.2.1. Adapted to financial system developments

As emphasised in Chapter 2, the financial system is not static, but in a constant state of evolution. As the financial system evolves, the design of the institutional structure and other frameworks of financial regulation must be adapted. This entails introducing necessary reforms, whether by overhauling the institutional structure or merely introducing piecemeal reforms to the existing structure, to reflect the changing landscape of the financial system.[985]

The discussion in Chapter 4 demonstrated that while Nigeria's institutional structure has never been overhauled, various piecemeal reforms have been implemented over the years to adapt the structure to financial system developments.[986] These different reforms can be summarised as follows.

First, as the financial system continued to expand and economic activities increased, additional financial regulators were established to have oversight over specific sectors. Until 1965, the Central Bank of Nigeria (CBN) and the Federal Ministry of Finance (MoF) were the main financial regulators for the financial system. However, as of 2004, there are now five main financial regulators comprising the CBN, Nigerian Deposit Insurance Corporation (NDIC), Securities and Exchange Commission (SEC), National Insurance Commission (NAICOM), and National Pension Commission (PENCOM).

Secondly, institutional and regulatory integration measures have been introduced to address the challenges associated with the multiplicity of financial regulators and the emergence of financial conglomerates in the financial system. For institutional integration, the Financial Services Regulation Coordinating Committee (FSRCC), has been established under the Central Bank of Nigeria Act (CBN Act). The FSRCC serves to facilitate regulatory coordination among the various sectoral financial regulators and other identified non–core financial regulators. As for regulatory integration, Nigeria has adopted consolidated bank supervision to oversee financial holding companies with a banking component holistically.[987]

985 See Chapter 2, Sections 2.5 & 2.6.
986 See Chapter 4, Section 4.6.
987 See Chapter 4.

Thirdly, in response to the 2008–2009 Nigerian banking crisis, which resulted in excessive non–performing loan assets in the banking sector, the Asset Management Corporation of Nigeria (AMCON) was established to purchase these assets from banks. Additionally, in response to the crisis, the CBN established a dedicated consumer protection department within its organisational structure to address consumer protection issues better.

While there have been commendable efforts to adapt Nigeria's institutional structure to financial system developments, it is submitted that there are still areas that require further attention to improve the adaptation. As shown from the discussion in Section 5.2.2 below, one area concerns improving the legislative framework and mechanisms for regulatory coordination to address the challenges resulting from Nigeria's multi–regulator structure.

Further, as drawn from the discussion in Section 5.3 below, there are certain Fintech institutional arrangements that are crucial for Fintech regulation that have not been introduced into the institutional structure. Additionally, some arrangements that have been implemented are not organised in a way that allows for their benefits to be fully optimised. The next chapter offers considerations and recommendations for addressing these gaps to better adapt Nigeria's institutional structure to financial system developments.

5.2.2. Shielded from regulatory challenges that the institutional structure is vulnerable to

As discussed in Chapter 2, regulatory challenges are factors that stand as obstacles or adversely impact the regulation and supervision of financial institutions.[988] Some of the challenges include:

(1) Regulatory overlaps in which two or more financial regulators have oversight over the same financial institution or service,

(2) Inconsistent regulation, where financial regulators issue conflicting directives or regulations over financial institutions or services,

[988] See Chapter 2, Section 2.4.3.

(3) Regulatory arbitrage, where providers of financial services exploit loopholes or differences between legal and regulatory requirements to come under less regulatory scrutiny and even take advantage of consumers,

(4) Regulatory gaps resulting where providers of financial services fall outside the regulatory or supervisory net, and

(5) Coordination failure whereby regulatory authorities are not adequately cooperating or coordinating between themselves, and this creates room for gaps, overlaps, or inconsistencies in the regulatory regime.

Further, it was established in Chapter 2 that all models for the institutional structure (sectoral model, unified model, and twin peaks model) are vulnerable to some form of regulatory challenge or the other.[989] The sectoral model, which is what Nigeria's current institutional structure is tailored after, is particularly vulnerable to regulatory overlap.[990] Although regulatory overlap may present some benefits, it can also produce negative consequences like regulatory duplication, inconsistency, arbitrage, and coordination failure. All of these challenges can hamper the effectiveness and efficiency of financial regulation.[991]

Apart from the adoption of consolidated bank supervision, the establishment of the FSRCC and the regulatory coordination legislative provisions for the committee under sections 43 and 44 of the CBN Act were intended to mitigate the challenges that can stem from Nigeria's multi–regulator institutional setting. The question that follows, therefore, is whether the FSRCC has been effective in mitigating the regulatory challenges that Nigeria's institutional structure is vulnerable to?

Studies assessing the FSRCC's effectiveness can be divided into two broad categories. The first category relates to studies that have discussed the FSRCC in the specific context of the 2008–2009 Nigerian banking crisis. The second category includes studies that have discussed the effectiveness of the FSRCC after the crisis and generally, to which this study belongs.

The studies that have discussed the FSRCC in the context of the 2008–2009 Nigerian banking crisis have mostly adjudged the committee to have been ineffective and

989 See Chapter 2, Section 2.5.
990 See Chapter 4, Section 4.3.
991 See Chapter 2, Section 2.5.5.

complicit in not preventing the crisis.[992] For example, Sanusi Lamido Sanusi, the former CBN Governor comments that there was poor coordination among the financial regulators and that '[i]n spite of the widespread knowledge of bank malpractice and propensity for regulatory arbitrage, the FSRCC, the coordinating body for financial regulators did not meet for two years during this time' of the crisis.[993]

In response to some of the perceived ineffectiveness of the committee prior and during the 2008–2009 Nigerian banking crisis, the IMF's Financial Stability Assessment Program (FSAP) report recommended the following reforms for the committee:

(1) Enhance the functioning of the FSRCC to strengthen macro–prudential and financial crisis management.

(2) Give the FSRCC an explicit financial stability mandate under the law.

(3) Enhance communication, cooperation, and information exchange among financial regulators under the committee.

(4) The FSRCC should meet more frequently.

It is sad to say that since 2013 when the IMF extended the above recommendations — about a decade now — no legislative reform has been introduced to strengthen the legal regime for the FSRCC under the CBN Act. Ogunleye says that one of the learning points for Nigeria from the 2008–2009 Nigerian banking crisis is that its institutional structure 'with multiple regulatory agencies requires effective inter–agency cooperation to minimise regulatory overlaps and arbitrage opportunities for market operators.'[994]

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992 International Monetary Fund (IMF Country Report No. 13/143, 2013) 12; Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 36–64; Mordi CN 'The Nigerian financial crisis: Lessons, prospects and way forward' (2010) 34(3) *CBN Bullion* 39; Adetiloye KA 'The role of single financial services regulation and the Central Bank of Nigeria–A vision 2020 expectation' 2008 *Lagos Journal of Banking, Finance & Economic Issues* 229; Balogun OO *A Review of the central bank's role as prudential regulator in Nigeria: An analysis of the case for a separate supervisory agency?* (unpublished LLM thesis, University of London, 2011) 60; Amaeshi K 'Are Nigerian financial authorities truly ready for sustainability?' available at https://www.gabv.org/opinions/kenneth–amaeshi–nigerian–financial–regulators–truly–ready–sustainability (Accessed on 8 June 2023).

993 Sanusi LS *The Nigerian banking Industry: What went wrong and the way forward* (BIS Review 49/2010) 6.

994 Ogunleye GA 'Financial safety net reform in Nigeria' in LaBrosee JR, Olivares Caminal R & Single D *Managing risks in the financial system* (2011) 439.

While the first category of studies is unanimous about the ineffectiveness of the FSRCC, more recent regulatory reports suggest that the committee is now more active than it may have been prior to and during the 2008–2009 Nigerian banking crisis. In particular, the December 2022 Financial Stability Report and the 2022 Annual Activity Report,[995] both issued by the CBN, highlight that the committee conducted regular meetings.

Additionally, the FSRCC took proactive measures to combat illegal fund operators, such as Ponzi schemes, by publishing notices and sensitising the public against their activities. Connectedly, the FSRCC developed a framework aimed at curbing the activities of illegal fund operators, outlining procedures for investigating illicit activities, closing down unlawful businesses, prosecuting promoters, and managing related complaints.

The reports further mention that the FSRCC Secretariat oversaw the consolidated supervision of five financial holding companies in Nigeria and their subsidiaries, employing a risk–based supervision approach. The CBN's 2022 Annual Activity Report, in particular, declares that the FSRCC 'maintained a harmonious collaboration among regulators during the period, to promote a safe, sound, and resilient financial system.'[996]

However, the inconsistent regulatory responses of the CBN and SEC to cryptocurrencies, as discussed in the preceding chapter, suggest that the relationship of regulators may not be as harmonious as the CBN has painted it. Other studies have also uncovered evidence of regulatory inconsistency, duplication, arbitrage, and coordination failure within Nigeria's financial regulatory regime.[997] Generally, although there have been improvements with the FSRCC, it still has some challenges.

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995 Central Bank of Nigeria *Financial Stability Report* (2022) 59; Central Bank of Nigeria *Annual Activity Report* (2022) 37–38.

996 Central Bank of Nigeria *Annual Activity Report* (2022) 37.

997 Chude NP & Izuchukwu CD 'The relationship between regulatory inconsistencies and Nigerian banking industry' (2014) 5(13) *Research Journal of Finance and Accounting* 67; Osemeke L & Adegbite E 'Regulatory multiplicity and conflict: Towards a combined code on corporate governance in Nigeria' (2016) 133(3) *Journal of Business Ethics* 431; see also OR Aziza 'Securities Regulation, Enforcement and Market Integration in the Development of Sub–Saharan Africa's Capital Markets' PhD thesis, University of Oxford, 2021) 233; Agbonkpolor T 'Risk management and regulatory failures in banking: Reflections on the current banking crisis in Nigeria' (2010) 11(2) *Journal of Banking Regulation* 146.

It is observed that the legislative framework for a particular subject matter can be criticised for being inadequate, ineffective, or efficient. It is noted that there is legislative inadequacy if a legislative framework on a subject matter does, in fact, exist, but it omits addressing crucial areas imperative for achieving the objectives of the framework. The inadequacy of the legislative framework may also arise if there is no legislative framework at all addressing the subject matter.

On the other hand, it is observed that the legislative framework is ineffective if it fails to achieve its intended explicit or implicit objectives. This is also described as 'legislative failure,' which Mousmouti defines simply as the 'mismatch between legislative objectives and results.'[998] According to the author, legislation may fail to meet its objectives due to three major failures.[999] The first is a failure in legislative design (the mechanism and rationale of the law). Secondly, failure in drafting (in the expression and communication of the law). And lastly, failure in implementation (in the application of the law). The author adds that legislative failure most commonly arises from a combination of these three factors.

As it relates to inefficiencies, it is opined that the legislative framework will be inefficient if the cost incurred by regulated firms to comply with the framework is excessive. In particular, the legislative framework may be inefficient if there are duplicated or conflicting frameworks on the same subject from different or the same regulator. Additionally, the legislative framework may be inefficient if the regulatory requirements in the framework are not proportional to the risk sought to be mitigated. Inefficiencies may also arise from overly complex and poorly drafted legislative provisions. Further, the legislative framework will be inefficient if the cost incurred by regulators to enforce the framework is excessive.

Drawing from the discussions in Chapter 4 and this chapter, Nigeria's legislative framework for regulatory coordination, especially as contained in the CBN Act, can be criticised for being both ineffective and inadequate. Specifically, it is ineffective because the framework has not been able to significantly mitigate the regulatory challenges that Nigeria's institutional structure is vulnerable to and also achieve its

998 Mousmouti M *Designing effective legislation* (2019) 149.
999 Mousmouti M (2019) 129–135.

explicitly specified objectives.[1000] This ineffectiveness may be attributed to the failure of the regulators constituting the FSRCC to undertake the required action, which is to effectively coordinate among themselves.

On the other hand, the legislative framework is inadequate because there are identifiable gaps in the provisions on regulatory coordination in the CBN Act for the FSRCC. These gaps may have contributed to the ineffectiveness of the FSRCC in achieving the objectives of regulatory coordination in the CBN Act and addressing the various regulatory challenges. As discussed in Chapter 4, some of these gaps include:[1001]

(1) The CBN Act has a limited scope of mechanisms for regulatory coordination as it only provides for coordination under the FSRCC. It lacks a general mandate for financial regulators to coordinate and collaborate. It also does not provide for the establishment and periodic review of the memoranda of understanding (MoU) between financial regulators to define the scope, responsibilities, and modalities of regulatory coordination.

(2) The CBN Act does not provide a flexible way to expand the FSRCC membership. In particular, the Act needs to be amended to include new members legally and properly.

(3) The CBN Act omits specifying the authority or person responsible for setting out the additional issues that the FSRCC may consider or even how these issues will be determined.

(4) While the FSRCC is charged with preventing regulatory inconsistency, which could lead to regulatory arbitrage, the CBN Act does not provide general guidelines on accomplishing this objective.

(5) The CBN Act is silent on how the operations of the FSRCC will be funded.

(6) The CBN Act does not specify how frequently the members of the FSRCC are required to meet.

[1000] Some of these objectives, as specified in section 44 of the CBN Act, include reducing arbitrage, eliminating information gaps among regulators, and promoting safe, sound, and efficient practices by financial intermediaries.

[1001] See Chapter 4, Section 4.3.

(7) The CBN Act does not include accountability arrangements for the FSRCC, including in terms of mandating the FSRCC to issue reports about its activities or requiring periodic assessment to gauge how well the FSRCC is meeting its objectives.

Ogba offers an insightful analysis of the 2007 CBN Act, highlighting its history and areas for improvement. He notes that while the Act marks a considerable upgrade over the 1991 version of the Act, like any law, it is not a perfect legislation. As legal and financial experts continue to scrutinise the Act, Ogba points out that they have uncovered various shortcomings. Among these are the absence of a solid corporate governance structure, insufficient oversight, and the CBN's recurrent deviation from its stipulated roles and responsibilities. Ogba stresses that although the CBN Act has only been in place for 16 years, which is a relatively short period in the life of a statute, recent events and critiques suggest that it is timely to reevaluate and possibly revise the Act.[1002]

In addition to the areas for improvement highlighted by Ogba, it is submitted that another key aspect of the CBN Act that needs to be revisited is its provisions on regulatory coordination. It is submitted that addressing the legislative loopholes of the CBN Act on regulatory coordination can contribute to strengthening the FSRCC to play a better role in addressing some of the challenges inherent in Nigeria's multi–regulator institutional setting. In this respect, Section 5.4 below undertakes a review of South Africa's legislative framework for regulatory coordination to draw possible lessons for Nigeria. The lessons arising from the review are elaborated in the recommendations in the next chapter.

5.2.3. Facilitates efficient financial regulation

As explained in Chapter 2, the institutional structure may be considered efficient if it facilitates achieving the policy objectives of financial regulation with minimal resources, and with the least amount of friction or unintended consequence.[1003] An

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1002 Ukegbu O 'Autonomy is great to have but the CBN should not operate unchecked –Desmond Ogba' available at https://businessday.ng/news/legal–business/article/autonomy–is–great–to–have–but–the–cbn–should–not–operate–unchecked–desmond–ogba/ (Accessed on 23 September 2023).

1003 Chapter 2, Section 2.5.4.

efficient institutional structure should ideally lead to cost savings both in terms of direct costs for the financial regulators and indirect costs for the regulated firms.[1004]

It is noted that Nigeria's extant institutional structure does not also meet this assessment criteria as it is generally expensive to operate. The huge cost can largely be attributed to the fact that the different financial regulators have separate office infrastructure and support systems. The cost also stems from duplicating regulatory efforts to manage the same issue as well as inconsistencies in regulatory frameworks.

Akinbami and Ngwu describe Nigeria's current institutional structure as being 'wasteful' because it does not facilitate the prudent utilisation of scarce resources.[1005] The authors point to two ways in which the institutional structure is wasteful. First, the structure demands paying staff for separate regulatory institutions that will perform similar duties. Second, the multiplicity of regulators results in a situation where the best human resources skills are reserved for financial regulators with better remuneration packages, instead of the whole financial system.

Nigeria's duplicative financial regulatory regime also makes compliance with regulatory frameworks costly and tasking for regulated firms. The huge compliance cost has had the spiral effect of increasing the cost of accessing financial services in Nigeria. This is because the indirect cost of regulation borne by financial institutions is ultimately passed on to consumers.[1006] Another drawback of the duplicative regulatory environment is that it contributes to reduced compliance by firms and ineffective enforcement by regulatory authorities.[1007]

Drawing from discussions in previous chapters and this one, the following chapter provides considerations and recommendations to enhance the efficiency of Nigeria's institutional structure.

1004 Chapter 2, Section 2.5.4.

1005 Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 235.

1006 It appears that this situation has necessitated the CBN, for example, to issue the Guide to Charges by Banks, Other Financial and Non–Bank Financial Institutions, 2020. The Guide essentially sets a limit to what banks and other non–bank financial institutions under the CBN's regulation can charge consumers for their services.

1007 Osemeke L & Adegbite E 'Regulatory multiplicity and conflict: Towards a combined code on corporate governance in Nigeria' (2016) 133(3) *Journal of Business Ethics* 443.

5.2.4. Facilitating specialisation

It is opined that Nigeria's institutional structure manages to meet this last assessment requirement. This is especially because the structure allows financial regulators to focus on specific sectors. Furthermore, as discussed in Chapter 4, the various financial regulators have assigned specialised departments to oversee the micro–prudential and conduct of business aspects of their functions.[1008]

It is submitted that the sectoral focus and departmental structure of the financial regulators has the potential to enable them to have an in–depth understanding of the sector under their respective oversight and to respond more swiftly to sectoral needs. One of the advantages of the sectoral model for regulating Fintech, as discussed in Chapter 3, is that the model can facilitate an equal development of regulatory interventions across different sectors of the financial system. This has proven to be the case in Nigeria, where the CBN, SEC, NIACOM, and PENCOM have actively been involved in formulating and issuing Fintech–specific regulations as highlighted in Chapter 4.

However, it is also acknowledged that while the model promotes specialisation, it direly requires effective regulatory coordination so that the benefits of specialisation that it offers are fully optimised and not overshadowed by other flaws. Further, as discussed in Section 5.3 below, it is also important for financial regulators, especially the CBN, to incorporate Fintech units within their organisational structure to improve specialisation in dealing with Fintech.

Earlier studies have also commended the potential of Nigeria's institutional structure to facilitate specialisation. For example, Gummi commends Nigeria's current institutional structure for facilitating clarity of objective, focus, responsibility, and accountability in undertaking financial regulation.[1009] The author observes that, given the complexities of the financial system, it is difficult for a single regulator to strike a balance in effectively regulating the various subsectors of the system. The author continues by pointing out that the current institutional structure ensures that each sector of the financial system is placed with a specific financial regulator. This has the

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[1008] Chapter 4, Section 4.4.

[1009] Gummi UM 'Financial regulations and Nigeria's banking sector' (2015) 3(11) *Journal of Research in Business and Management* 5.

advantage of ensuring that the regulators are focused on their objectives for their sector and are held responsible in the event of any regulatory failure.

Likewise, Akujuobi and Anyanwu observe that Nigeria's current structure allows clarity of objective, focus, responsibility, and accountability.[1010] Because of the complexities associated with the financial system, it is difficult for a sole regulator to strike a balance between different objectives of regulating each subsector. Adopting the multiple–agency regulator model will ensure that the objectives of each agency are clearly and unambiguously specified. This will also keep each agency focused on its objectives and held responsible in the event of any regulatory failure. Similarly, Okwor observes that under Nigeria's current approach, there is no confusion about who does what.[1011]

Apart from potentially facilitating specialisation, it is also submitted that Nigeria's institutional structure of financial regulation can also be praised for fitting the country's socio–political environment. Nigeria is made up of numerous ethnic groups, with the dominant ethnic groups being the Igbos, Hausas, and Yorubas.[1012] The country has a long history of ethnic tension between these three and other ethnic groups, which partly contributed to the Nigeria–Biafra Civil War and numerous civil unrest.[1013]

Attempts to concentrate too much political power in one ethnic group are usually met with strong opposition. The current institutional structure allows for diversity in appointing the heads of the various financial regulatory bodies. Such diversity may be harder to achieve with the fully unified model, which only requires one head for the single or mega financial regulatory institution or even the twin peaks model.

This section 5.2.4 concludes the assessment of the effectiveness of Nigeria's institutional structure for financial regulation generally. The next section examines the effectiveness of the structure for Fintech regulation specifically.

1010 Akujuobi NE, Anyanwu GI & Eke CK 'Regulatory framework and bank operations in Nigeria: A VECM approach' (2021) 16(1) *International Journal of Development and Management Review* 152.

1011 Okwor FO 'Nexus between the Central Bank of Nigeria's regulatory framework and global economic crisis' 2020 *Bingham University Journal of Accounting and Business* 297.

1012 Ojo OV 'Ethnic diversity in Nigeria: A purview of mechanism for national integration' (2016) 7(3) *Afro Asian Journal of Social Sciences* 1.

1013 Adetiba TC *Ethnic conflict in Nigeria: A challenge to inclusive social and political development* (unpublished PhD thesis, University of Fort Hare, 2013) 4–7.

5.3. EFFECTIVENESS OF THE INSTITUTIONAL STRUCTURE FOR REGULATING FINTECH

This section assesses the effectiveness of Nigeria's current institutional structure for regulating Fintech using the framework advanced in Chapter 3. It specifically considers the extent to which Nigeria's institutional structure (1) incorporates a Fintech regulation coordinating body, (2) is integrated, (3) leverages self–regulatory organisations, (4) has a stakeholder advisory body, and (5) incorporates other key Fintech institutional arrangements like Fintech units, innovation hubs, and regulatory sandboxes.

5.3.1. Presence of a Fintech regulation coordinating body

As clarified in Chapter 3, Fintech has not only redefined traditional financial services but has also introduced a complex financial regulatory environment by intensifying the convergence of multiple industries and regulatory stakeholders.[1014] It was argued in the chapter that to ensure a multifaceted and holistic approach to dealing with this new landscape, establishing a Fintech regulation coordinating body becomes beneficial and imperative. Among other roles, the body facilitates regulatory coordination between financial and non–core financial regulators in dealing with Fintech regulatory matters.

Chapter 3 proposed three possible options for establishing the Fintech regulation coordinating body.[1015] First, the Fintech regulation coordinating body could be established as a standalone body from the financial regulation coordinating body, as South Africa has done with its Intergovernmental Fintech Working Group (IFWG) (Option 1). The second option is to establish the Fintech regulation coordinating body as a sub–committee of the financial regulation coordinating body (Option 2). The third option involves expanding the financial regulation coordinating body's responsibilities to include regulatory coordination functions related to Fintech without creating a sub–committee (Option 3).

Nigeria has not established a standalone Fintech regulation coordinating body with a comparable scale and clarity of objectives like South Africa's IFWG. It, therefore, follows that Nigeria has not adopted Option 1. However, it must be acknowledged that there are regulatory coordination bodies that have been established that provide a platform for coordination on other aspects that are also relevant to the Fintech

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[1014] Chapter 3, Section 3.3.

[1015] Chapter 3, Section 3.3.2.

ecosystem. One such body is the Financial Inclusion Steering Committee (FISC), established pursuant to the National Financial Inclusion Strategy (NFIS). Another body is the National Council for Digital Innovation and Entrepreneurship established under the Nigeria Startup Act. Specifically, as discussed in Chapter 4, the FISC provides for coordination on financial inclusion issues, while the Council deals with coordination for startup firm development issues.

The FSRCC does draw membership from both financial regulators and some non–core financial regulators. In particular, the non–core financial regulators whose roles are relevant to Fintech that currently have representatives on the FSRCC are the Corporate Affairs Commission (CAC), and the Federal Inland Revenue Service (FIRS). While the CAC is a main member of the FSRCC, the FIRS is an observer member of the committee. With these non–core financial regulators as members of the FSRCC, can it be said that Nigeria has a Fintech regulation coordinating body in terms of Option 2 or 3?

In terms of Option 2, as highlighted in Chapter 4, none of the current sub–committees of the FSRCC have a specific focus on Fintech or digital financial services. Further, although it can be argued that Option 3 may be applicable to Nigeria, there are two critical aspects that make the FSRCC fall short of an adequate Fintech regulation coordinating body in terms of Option 3. The first aspect is that there are some non–core financial regulators whose functions are very central to the regulation of Fintech and even financial regulation broadly, but they are not currently represented as members of the FSRCC. These excluded non–core financial regulators notably include:

(1) Nigerian Financial Intelligence Unit (NFIU),

(2) Nigerian Communications Commission (NCC),

(3) Federal Competition and Consumer Protection Commission (FCCPC),

(4) National Information Technology Development Agency (NITDA), and

(5) Nigeria Data Protection Commission (NDPC).

The recent regulatory conflict between the CBN and NDPC regarding certain provisions within the CBN's Customer Due Diligence Regulations of 2023, highlights the crucial significance of establishing a Fintech regulation coordinating body with comprehensive membership. The Regulations mandate CBN–licensed institutions to collect social media handles/addresses of customers as part of their customer due diligence procedures.[1016] Reacting to this requirement, the NDPC issued public statements requesting the CBN to expunge it from the Regulations. The NDPC hinged its request on the grounds that the provision contradicts the principles of data minimisation and purpose limitation enshrined in the Nigeria Data Protection Act.[1017]

The second reason the FSRCC is not an adequate Fintech regulation coordinating body is because the FSRCC is designed to oversee broader financial regulation issues. It is submitted that the committee's current mandates and subcommittee structures, as discussed in Chapter 4, lack the specificity to adequately cater to the peculiarities of Fintech.

It is submitted that the establishment of a comprehensive Fintech regulation coordinating body in Nigeria is crucial. Such a body would enable a whole–of–government approach, leveraging the expertise of both financial and non–core financial regulators to collaboratively address the multifaceted challenges entailed by Fintech. The body will facilitate cross–regulator engagement, harmonisation of regulatory efforts, and proactive identification of potential conflicts, such as the CBN–NDPC case mentioned above.

One of the strategic initiatives specified in the National Fintech Strategy (NFS) is to promote sectoral coordination across regulatory institutions.[1018] The NFS proposes that Fintech units of regulatory institutions should act as intermediary liaisons between regulatory institutions, harmonising regulatory frameworks and infrastructures, regulatory sandboxes, innovation hubs, industry engagement and outreach, and legislation. It also suggests establishing working groups to strengthen institutional communication.

This NFS proposal aligns with the recommendations in the report of the Fintech Roadmap Committee for the Nigerian Capital Market for a centralised coordinating

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1016 See 6 of the Central Bank of Nigeria (Customer Due Diligence) Regulations, 2023. The Regulation is available at *https://www.cbn.gov.ng/Out/2023/CCD/CBN%20Customer%20Due%20diligence%20Reg.%202023–combined.pdf* (Accessed 7 August 2023).

1017 See Omoruyi O "The 'crack' in CBN's social media handle requirement for KYC" available at *https://technext24.com/2023/06/28/social–media–as–cbns–kyc–requirement/* (Accessed 7 August 2023).

1018 National Fintech Strategy (2022) 37.

body for Fintech to be established.[1019] The committee suggested that the SEC should collaborate with other relevant regulators to establish a centralised committee. This committee's role would be to collectively formulate and ratify policies and regulations pertaining to Fintech. The report anticipates that such an approach will ensure a cohesive and coordinated approach that balances innovation, consumer protection, and market stability.

However, while the NFS and the report of the Fintech Roadmap Committee acknowledge the need for a Fintech regulation coordination body, they did not go further to discuss the considerations for establishing it. Drawing from discussions from previous and this chapter, the next chapter offers considerations and recommendations for establishing the Fintech regulation coordinating body.

5.3.2. Stakeholder advisory body and Fintech one–stop–shop

Given its focus on developing the Fintech ecosystem and improving regulatory governance for the ecosystem, the National Fintech Strategy (NFS) emphasises the need for collaboration between regulators and the Fintech ecosystem as part of the strategic objective. It proposes hosting a forum to facilitate engagements between regulators and industry practitioners, as well as the cross–pollination of knowledge.[1020]

The CBN and SEC have commonly issued draft regulations relating to Fintech activities and firms for public comments before finalising and issuing them for implementation. However, of all the financial regulators, the SEC has notably established and leveraged stakeholder advisory bodies for initiating and developing Fintech regulatory frameworks. Acknowledging the need for engagements between the regulator and industry stakeholders, in November 2018, the SEC inaugurated a stakeholder advisory body for Fintech called the Fintech Roadmap Committee for the Nigerian Capital Market.

According to the SEC, the Fintech Roadmap Committee was established with the mandates of:[1021] (1) producing a snapshot of the current status of Fintech developments in the Nigerian capital market, and (2) proposing a holistic plan for

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1019 Securities and Exchange Commission *The future of Fintech in Nigeria* (Report by the Fintech Roadmap Committee, 2020).

1020 National Fintech Strategy (2022) 46–50.

1021 Securities and Exchange Commission 'Frequently asked questions: SEC regulatory innovation' available at *https://sec.gov.ng/wp–content/uploads/2023/04/Frequently–Asked–Questions–on–SEC–Regulatory–Innovation_13423.pdf* (Accessed 7 July 2023).

facilitating and developing Fintech as a tool for deepening the capital market. It further confirms that the committee draws membership from Fintech firms, technology experts, capital market trade groups, regulators, banks, law firms, innovation hubs, and Fintech associations.

In realising its objectives, in 2019, the Fintech Roadmap Committee issued the report titled *The future of Fintech in Nigeria.*[1022] The report x–rays the current state of Fintech in Nigeria, highlighting the benefits, entry barriers, and regulatory hurdles faced by Fintech startups. The report also presented strategic recommendations aimed at positioning Nigeria as a leading Fintech hub in Africa. As mentioned in the preceding Section 5.3.1, one of the recommendations highlighted in the report is the need for a harmonised regulatory agenda.[1023]

Another notable recommendation from the report was that cryptocurrency should be classified as either a security or commodity but not a currency.[1024] It was also recommended that the SEC develop a regulatory framework for virtual financial assets. The report further suggested that the SEC should regulate equity crowdfunding while loan/peer–to–peer crowdfunding should be regulated by the CBN.[1025]

As a follow–up to the recommendations of the Fintech Roadmap Committee, in August 2019, the SEC established another stakeholder advisory body called the Blockchain and Virtual Financial Assets Framework Committee.[1026] The committee was set up to develop a framework to support innovation and regulation in blockchain and virtual financial assets in the capital market, recommend a suitable model for the classification of cryptocurrencies, and advise the SEC on approaches to regulating virtual financial assets, among other functions.[1027]

The activities of the Fintech Roadmap Committee and Blockchain and Virtual Financial Assets Framework Committee arguably supported the eventual development and

1022 Securities and Exchange Commission *The future of Fintech in Nigeria* (Report by the Fintech Roadmap Committee, 2020).

1023 Securities and Exchange Commission *The future of Fintech in Nigeria* (Report by the Fintech Roadmap Committee, 2020) 32–33.

1024 Securities and Exchange Commission (2020) 35.

1025 While the SEC has gone on to issue a regulatory framework for equity crowdfunding, the CBN is yet to issue the framework for loan crowdfunding

1026 Ukwueze FO ‘The legal status and regulatory challenges of cryptocurrencies in Nigeria’ (2021) 1(2) *International Journal of Interdisciplinary Business Strategy* 71.

1027 Ukwueze FO (2021) 71.

issuance of the Rules on Issuance, Offering Platforms, and Custody of Digital Assets, 2022 by the SEC. Another regulatory framework that they may have influenced is SEC's Rules on Crowdfunding, 2021.

The stakeholder advisory bodies established by the SEC seem to have been established for one–off projects. An alternative option will be to establish a standing stakeholder advisory body like the United Kingdom's Innovation Advisory Group (IAG) that may be called upon to act from time to time against establishing a new advisory body for each project.[1028] Further, unlike the case of the IAG, whose establishment is backed by publicly available Terms of Reference (ToR) that address various key issues pertaining to the stakeholder advisory body, similar ToRs have not been developed for the SEC bodies. This makes it challenging to assess if adequate measures have been taken to mitigate risks associated with using a stakeholder advisory body. There is also a lack of transparency regarding other key issues pertaining to the membership, proceedings, and overall operation of the committees.

Shifting the focus to Fintech one–stop–shop (OSS), Nigeria does not currently have a Fintech OSS. However, the need for a Fintech OSS has been acknowledged and recommended to the country as part of the initiatives that will support the implementation of the National Fintech Strategy. Particularly, the United Kingdom Department for Business and Trade (DBT), in advancing recommendations for the implementation of the National Fintech Strategy in Nigeria, identifies two justifications for the Fintech OSS.[1029] The first justification highlighted is the complexity of Nigeria's Fintech regulatory landscape. Secondly, the perceived lack of coordination among regulators. According to the DBT, establishing the Fintech OSS:

> will provide Fintech firms and innovators with a single access point for information and a unified approach to Fintech product approval. It will address complexities surrounding the establishment of Fintechs and allow for the coordination and centralisation of licensing requirements and processes (including capital requirements), leading to increased efficiencies in the establishment of firms.[1030]

1028 See Chapter 3.

1029 United Kingdom Department for Business and Trade *Recommendations for the implementation of the National Fintech Strategy in Nigeria* (2023) 40.

1030 United Kingdom Department for Business and Trade (2023) 40.

Generally, a Fintech OSS has the clear advantage of simplifying the process for applying for and obtaining licences for Fintech firms. If the Fintech OSS also plays the role of an innovation hub, it will tackle the confusion of Fintech firms not knowing where to look for guidance on a particular matter.

The DBT has suggested that the Fintech OOS can be housed within the FSRCC as currently chaired by the CBN.[1031] The DBT observes that the FSRCC has a secretariat that could be expanded to act as the Fintech OSS and cover all regulators involved in Fintech. It further notes that strong key performance indicators need to be created to ensure smooth operations of the Fintech OSS. However, the DBT identifies other options for housing the Fintech OSS as follows:

(1) The Fintech OSS could be housed in the Nigerian Investment Promotion Commission's (NIPC) Electronic One–Stop Investment Centre (e–OSIC), which brings together relevant government agencies to provide fast–tracked services to investors. The DBT however recommends that if this option is to be adopted, at least in the first two years of the operation of the Fintech OSS under NIPC, it should operate as a physical entity.

(2) The OSS could be established under the CBN and over time move under the Office of the Vice President (OVP), which is focused on economic development of Nigeria. Legislation would need to be created to protect the operational independence of the OSS and protect it from political instability.

(3) FSRCC could be strengthened by the appointment of an independent Chair and CEO, under which the Fintech OSS would be formed.

(4) A separate Fintech OSS entity could also be formed under the Federal Ministry of Finance (MoF).

It is submitted that the option of housing the Fintech OSS in the FSRCC appears to be the easiest to implement. All other options have unique merits but could present challenges in terms of coordination, legislative changes, or administrative complexities. Notably, the other options (excluding option 3) will still require the authority within which the OSS is established to co–opt and collaborate with the financial regulators, which may come with its challenges. However, these regulators

[1031] United Kingdom Department for Business and Trade *Recommendations for the implementation of the National Fintech Strategy in Nigeria* (2023) 40.

are already within the FSRCC and have an existing forum for engaging among themselves. Drawing from discussions from previous and this chapter, the next chapter offers other considerations and recommendations for establishing the stakeholder advisory bodies and the Fintech OSS.

5.3.3. Fintech units, innovation hubs, and regulatory sandboxes

It has been argued in Chapter 3 that regulators cannot rely solely on their understanding of traditional finance when supervising and developing regulatory frameworks for Fintech. Financial regulators must possess a deep understanding of Fintech activities, business models, and enabling technology to issue sound regulations and effectively supervise Fintech activities. In light of this, the chapter recommends establishing Fintech units, innovation hubs, and regulatory sandboxes to assist financial regulators in better understanding Fintech.

Notable strides have been achieved in adopting some of these Fintech institutional arrangements in Nigeria as of the writing of this thesis. To start with, as part of efforts to drive innovation of insurance products and services through digitalisation initiatives, NAICOM issued the Regulatory Sandbox Guidelines in 2023.[1032] The CBN has also established a regulatory sandbox under the Regulatory Framework for Sandbox Operation, 2021.[1033] The CBN's regulatory sandbox is a thematic type of sandbox because it mainly deals with innovative solutions to improve the payment system.[1034]

Apart from the regulatory sandbox, the CBN has also developed and issued regulatory frameworks for open banking. These frameworks are the Regulatory Framework for

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1032 The Guidelines is available at *https://storage.naicom.website/naicom/files/d5dce5f1b8fef9bc99bc01f022284deb.pdf* (Accessed on 3 September 2023).

1033 The Regulatory Framework *https://www.cbn.gov.ng/out/2021/ccd/framework%20for%20regulatory%20sandbox%20operations.pdf*

1034 Thematic sandboxes are primarily employed by regulatory authorities to concentrate the efforts of the Fintech community on targeted segments within financial services. These sandboxes enable alignment between the support offered by authorities and their own objectives. Their utility lies in nurturing innovation within specific financial domains, while also aiding the pursuit of public policy objectives like enhancing financial inclusion. See Bains P & Wu C *Institutional arrangements for Fintech regulation: supervisory monitoring* (International Monetary Fund, Fintech Note 2023/004, 2023) 45.

Open Banking, 2021,[1035] and Operational Guidelines for Open Banking, 2023.[1036] They have been issued in recognition of the role that access to customer data can play in facilitating the development of consumer–tailored Fintech activities, innovation, and competition in the financial system.

In line with practices observed in some jurisdictions, NDIC has established a dedicated Fintech unit within its organisational structure. The unit is called the Fintech and Innovations Unit and was established in January 2020. According to the NDIC, the Fintech and Innovations Unit is tasked with identifying potential disruptions and associated risks posed by Fintech and innovations in deposit insurance. It also focuses on employing Fintech for Early Warning Signals (EWS) and Prompt Corrective Action (PAC), identifying digital currency deposits for insurance coverage, devising supervisory measures for digital banks, and enhancing consumer protection measures pertaining to digital deposits through collaboration with other safety–net regulatory authorities.[1037]

The NDIC's approach to setting up the Fintech and Innovations Unit also deserves commendation for being an efficient approach. Instead of creating an entirely separate unit, which would have been more resource–intensive, the NDIC has integrated the Fintech and Innovations Unit within the existing Insurance and Surveillance Department. This approach allows the regulator to leverage the organisation's existing resources and expertise while still enabling a focused approach to Fintech–related matters.

Another financial regulator that has reportedly established a Fintech unit within its organisational structure is the SEC. The SEC's Fintech unit is called the Fintech and Innovation Office (FINO). According to the SEC, the FINO is established to facilitate

[1035] The Regulatory Framework is available at *https://www.cbn.gov.ng/out/2021/psmd/circular%20on%20the%20regulatory%20framework%20on%20open%20banking%20in%20nigeria.pdf* (Accessed on 8 June 2023).

[1036] As explained in Chapter 3, open baking involves the secure sharing of consumer data among various financial institutions and third–party providers through application programming interfaces (APIs). This data is shared to enable the development of innovative financial products and services while safeguarding customer data privacy and security. The Guidelines is available at *https://www.cbn.gov.ng/Out/2023/CCD/Operational%20Guidelines%20for%20Open%20Banking%20in%20Nigeria.pdf* (Accessed on 8 June 2023).

[1037] Nigeria Deposit Insurance Corporation 'NDIC establishes new unit on Fintech and innovation' available at *https://ndic.gov.ng/ndic–establishes–new–unit–on–Fintech–and–innovation/* (Accessed on 22 August 2023).

internal and external information dissemination, communication with innovators, and provide guidance on regulatory requirements. The office reviews submissions from Fintech firms and coordinates collaboration between operational departments of the SEC, which supervise and monitor capital market products and processes.[1038] The establishment of the FINO aligns with the expectations of section 14 of the Investment and Securities Act which provides that SEC 'may establish specialised departments for the purpose of regulating and developing the Nigerian capital market [emphasis added].'

In addition to the Fintech unit, SEC has established the FinPort Portal, which can be considered an innovation hub, to assist new and existing Fintech firms in understanding the regulatory requirements specific to the Nigerian capital market.[1039] The SEC has also established a Regulatory Incubation programme for Fintech firms operating or seeking to operate in the Nigerian capital market and has issued the Regulatory Incubation Guidelines of 2021 to guide the implementation of the programme.

The Regulatory Incubation programme is the SEC's equivalent of the CBN's regulatory sandbox. It provides basic requirements that allow potential capital market firms to operate under some prescribed basic but limited provisions for a specified period. The arrangement enables the SEC to supervise some new models of providing capital market services in a limited form before they become fully established.[1040]

Apart from NDIC and SEC, other financial regulators, including CBN, NAICOM, and PENCOM, have not reported setting up dedicated Fintech units within their organisational structures. They are, as such, currently addressing Fintech–related matters within existing organisational structures. While this approach allows for the incorporation of Fintech within a broader scope of financial regulation, it might not fully

1038 Securities and Exchange Commission 'Frequently asked questions: SEC regulatory innovation' available at *https://sec.gov.ng/wp–content/uploads/2023/04/Frequently–Asked–Questions–on–SEC–Regulatory–Innovation_13423.pdf* (Accessed 7 July 2023).

1039 FinPort 'Innovation and RinTech Portal'*https://sec.gov.ng/finport/* (Accessed on 4 November 2022).

1040 Information about the RI programme is available at *https://sec.gov.ng/circular–on–the–sec–regulatory–incubation–program/* (Accessed on 7 July 2023). The Guidelines for the programme is available at *https://sec.gov.ng/wp–content/uploads/2021/06/SEC–Regulatory–Incubation–Guidelines_18521.pdf* (Accessed on 7 July 2023) facilitate the depth of focus and development of expertise needed to regulate the Fintech sector effectively.

In a recently published CBN Occasional Paper, Nwosu, Oji–Okoro and Anih identify institutional knowledge gap as one of the challenges to Fintech regulation in Nigeria.[1041] The trio state that 'regulators lack the innovative and disruptive skills and tools to adequately measure and regulate Fintech startups that are constantly evolving.'[1042] Challenges like this justify why the financial regulators that are yet to establish Fintech units, especially the CBN, should explore establishing such units within their organisational structure.

It is submitted that establishing Fintech units goes beyond administrative enhancements; rather, it is necessary for capacity building. These units can help bridge the gap between the understanding of the traditional finance landscape and the intricacies of Fintech. This understanding is necessary for informed and tailored regulatory and supervisory interventions. The units can assist the CBN and other financial regulators to more easily specialise and develop the expertise needed for addressing the benefits and risks of Fintech.

It is good to mention that the National Fintech Strategy (NFS) also identifies the establishment of Fintech units within regulatory authorities as part of the institutional initiatives that are imperative for the NFS. The NFS envisions these Fintech units as being very relevant in serving as the intermediary liaisons between various regulatory institutions.[1043]

Additionally, it opined that it would be beneficial for the various regulators to explore a more centralised approach to operating the regulatory sandbox and innovation hub programmes instead of operating them in silos as currently obtainable. The need for a centralised approach becomes very understandable in light of the observation in a publication by Afriwise that:

> Even in Nigeria, many players in the Fintech industry do not know exactly which regulators and governing bodies they have to adhere to.

[1041] Nwosu CP, Oji–Okoro I & Anih OD *Fintech development in Nigeria: Lessons from other jurisdictions* (Central Bank of Nigeria Occasional Paper No. 76, 2022) 31–32.

[1042] Nwosu CP, Oji–Okoro I & Anih OD (2022) 32.

[1043] National Fintech Strategy (2022) 37.

> This means that companies may find themselves unaware of the regulations they must comply with, thereby risking hefty fines.[1044]

The NFS also acknowledges the need for a multi–sectoral sandbox programme.[1045] Drawing from discussions from previous and this chapter, the next chapter offers considerations and recommendations for financial regulators like the CBN establishing Fintech units within their organisational structure. It also offers considerations for operating the centralised innovation hub and regulatory sandbox programmes.

5.3.4. Utilisation of self–regulatory organisations (SROs) for regulating Fintech

Chapter 3 has underscored the significance of SROs complementing the roles of public regulators in overseeing Fintech activities, especially activities undertaken by numerous and dispersed Fintech startups. The use of SROs is especially imperative in circumstances where public regulatory bodies grapple with the challenge of resource constraints ranging from limited staff to expertise and financial resources, which could impede their capacity to oversee Fintech activities effectively. The Indonesian Joint Funding Fintech Association's role in regulating peer–to–peer (P2P) lending in Indonesia was used in the chapter to illustrate the potential advantages and considerations of harnessing SROs to govern Fintech activities.

Nigeria has experience in using SROs to complement public regulation in the financial system, especially within the securities market.[1046] Notably, SROs were identified to be very instrumental in implementing the now–discontinued universal banking scheme. Specifically, the Guidelines for the Practice of Universal Banking in Nigeria, 2000 provides in section 5 that:[1047]

> The involvement of the industry operators in the preparation of [universal banking] guidelines underline the need for the cooperation of the operators in the smooth operation of [universal banking] in Nigeria. In the same manner, the cooperation of Self–Regulatory Organisations (SROs) is a crucial tool for the effective regulation of UB

1044 Afriwise *Catch me if you can: How regulators will impact Africa's Fintech sector* (2021) 4.

1045 National Fintech Strategy (2022) 49.

1046 See Aziza OR *Securities regulation, enforcement and market integration in the development of sub–Saharan Africa's capital markets* (unpublished PhD thesis, University of Oxford, 2021) 217–224 (discussing the public and private regulatory design for the securities markets in Nigeria, South Africa, and Kenya).

1047 Guidelines available at https://www.cbn.gov.ng/out/circulars/bsd/2000/bsd–10–2000.pdf (Accessed on 8 June 2023).

> practice in Nigeria. Consequently, the CBN and the other regulators will continue to encourage the emergence and survival of, and cooperation among, SROs, under the Universal Banking system.

Further, the National Fintech Strategy (NFS) provides that the dynamic nature of Fintech necessitates exploring alternative regulatory instruments that are appropriate and fit for purpose such as market–based regulation, self–regulation or co–regulation.[1048] It is submitted that the challenges that have trailed the activities of firms using online platforms and mobile applications to provide digital lending services underscores the compelling urgency to explore the role that SROs can serve in overseeing Fintech activities.

Many service providers engaging in digital lending operate under the regulatory oversight of State regulatory bodies by obtaining moneylender licences. It is opined that regulation by the state regulators is mostly light–touch. As noted in Chapter 3, light–touch regulatory environments could offer flexibility that reduces the cost of doing business and this could allow for the growth of Fintech activities. This may explain why the digital moneylending ecosystem in Nigeria has continued to expand and many digital loan service providers are opting to come under the state regulatory regime. The moneylender licence option is generally cheaper and less complicated than operating with licences from the CBN.

However, it was also noted in Chapter 3 that light touch regulatory environments leave risks to consumers, associated with the activities of Fintech firms left unmitigated or inadequately mitigated. This has exactly been the case in Nigeria with moneylenders. Moneylenders have been accused of abusing customers through charging excessive interest rates in violation of the moneylenders laws. They also resort to defaming borrowers' characters and engaging in cyberbullying as part of their debt collection strategies.[1049]

No identifiable measures are reported to have been taken by the State moneylending regulators to curb these abuses and exploitative practices. The regulators appear to either lack the resources or technical know–how to address the issues. Usefully,

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[1048] National Fintech Strategy (2022) 36.

[1049] Popoola N 'Loan sharks devise underhand tactics, inflict pains on cash–strapped Nigerian borrowers' available at https://punchng.com/loan–sharks–devise–underhand–tactics–inflict-pains-on-cash-strapped-nigerian-borrowers/ (Accessed on 21 November 2023).

however, notable interventions have come from National/Federal regulators. For instance, NITDA (during its tenure of enforcing data protection before the emergence of the NDPC) imposed fines on digital lenders for breaches involving personal data.[1050]

Further, the Federal Competition and Consumer Protection Commission (FCCPC), in enforcing its regulatory powers on consumer protection, issued the Limited Interim Regulatory/Registration Framework and Guidelines for Digital Lending in 2022.[1051] Additionally, the FCCPC requested Google LLC (Play Store) and Apple Inc (App Store) to remove loan applications that violate consumers' rights on their platforms. Another intervention came by way of establishing the Inter–Agency Joint Regulatory and Enforcement Task Force (JRETF) consisting of the FCCPC, NITDA, and the Independent Corrupt Practices and Other Related Offences Commission (ICPC) to offer a cross–sectoral solution to the problem. Under the auspices of the JRETF, NITDA, FCCPC, and ICPC secured an order from the Federal High Court to conduct searches at the business premises of digital moneylenders in order to gather evidence for prosecuting erring lenders and preventing their continued illegal operations. Collectively, these interventions have helped to reduce the scale of the various breaches by the digital moneylenders.

Given the seeming inactivity of the State moneylending regulators and fragmented regulatory regime for moneylending, proposals for uniform and nation–wide measures have emerged. For example, Adewumi and Jolaosho advocate for the CBN to issue a framework similar to the Digital Credit Providers Regulations of 2022 issued by the Central Bank of Kenya.[1052] Likewise, Wezel and Ree, in an IMF–published paper,

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1050 The fines were issued pursuant to the Nigerian Data Protection Regulations, 2019.

1051 The Guidelines does not exactly introduce new consumer protection compliance requirements for digital lenders separate from what is contained in existing laws. It mainly specifies the information and documents that digital lenders must provide to be registered with the FCCPC. Additionally, it incorporates a declaration form to be signed by digital lending companies, committing to comply, among other things, with the Federal Competition and Consumer Protection Act, 2018, the Nigeria Data Protection Regulations, 2019, and the CBN Guidelines on Anti–Money Laundering and Combating the Financing of Terrorism. It is however good to mention that the Guidelines can only be enforced against money lenders that are licenced by state regulatory authorities and not CBN–licenced micro lending institutions. This is because as earlier noted, the CBN has been granted exclusive consumer protection and competition regulation over the institutions it licences. The Guidelines is available at *https://fccpc.gov.ng/wp–content/uploads/2022/08/LIMITED–INTERIM–REGULATORY_–REGISTRATION–FRAMEWORK–FOR–DIGITAL–LENDING–2022–1.pdf* (accessed on 2 November 2022).

1052 Adewumi TA & Jolaosho TO 'Legal and regulatory framework for digital credit providers in Nigeria: Lessons from Kenya's digital credit providers regulation' (2022) 6(1) *Strathmore Law Journal* 93–106.

suggest passing a national–level regulation for digital lending.[1053] They note that such framework should establish uniform oversight, safeguard cybersecurity, protect consumers, and prevent abusive practices that occur under State licensing and oversight regimes.

While these proposals are progressive, it is submitted that the constitutionality of introducing nationwide moneylending legislation, whether as a national Act or a regulation by the CBN, can be debated. This debate arises because moneylending is neither explicitly mentioned in the Exclusive Legislative List nor in the Concurrent Legislative List. In this situation, one argument can be that, since moneylending does not feature explicitly in these lists, it falls under the residual matters for state–level legislation. To further back this argument, even the BOFIA Act, which sets out the Other Financial Institutions (OFIs) that the CBN has the jurisdiction to regulate in addition to banks, does not specify the business of moneylending.[1054] This omission may have perhaps been underpinned by the understanding that moneylending business rests with the State legislative bodies and agencies.

The other side of the argument is that moneylending is an incidental matter that can be validly legislated on by the National Assembly, and by extension, the CBN can also issue subsidiary legislation on the subject, which will be nationally applicable. In this case, the national Act on moneylending will cover the subject on the matter. Another angle to the debate is that the Moneylenders Law of the various States themselves exempts its application to companies empowered by special laws to lend money. The national Act on moneylending or the CBN regulation on moneylending could, therefore, qualify as such a special law. However, such a law will not override the Moneylenders Law. They will exist side by side.

These various possible arguments justify the earlier proposal that the Constitution should introduce provisions to assist in determining which authority between the National Assembly or State Houses of Assembly can enact laws when a matter has not been explicitly delegated to either of them. This study advocates for the Constitution to centralise the regulation of moneylending businesses under the

1053 Wezel T & Ree J *Nigeria–fostering financial inclusion through digital financial services* (IMF Selected Issues Paper No. 020, 2023) 15.

1054 See generally s 57(1)–(7) of the Banks and Other Financial Institutions Act, which lists out the business of other financial institutions in respect of which the CBN has jurisdiction.

exclusive jurisdiction of the National Assembly and a national regulatory authority. The suggested national regulatory authority could be the CBN, and moneylending business could be included in the definition of 'other financial institutions' in the BOFI Act.

Fintech is transforming the moneylending industry by allowing moneylenders to reach a broader customer base beyond their licensed State. This increased mobility presents regulatory challenges, as traditional State–based regulations may become outdated and ineffective in overseeing the cross–border nature of digital moneylending. Centralising the regulation of the moneylending business ensures there is no room for discrepancies or inconsistencies in regulations that may arise if different states have varying regulatory frameworks. Furthermore, centralising the regulation of moneylending aligns with broader national policy objectives, such as promoting financial inclusion, fostering economic development, and safeguarding consumer interests.

A major consideration for proposing the CBN as the centralised regulator of moneylending business, rather than suggesting the creation of an entirely new national regulatory body, is its existing track record of experience in regulating microfinance institutions, including micro–finance banks and finance companies. The CBN possesses the expertise to monitor and enforce compliance with regulatory requirements, including licensing procedures, interest rate caps, consumer protection measures, and measures to combat predatory lending practices. Additionally, utilising the CBN instead of creating a new body helps to avoid duplicating Nigeria's already regulator–dense institutional regime.

Generally, the challenges that have trailed the practices of moneylenders buttress how differences in legal requirements can be exploited, not only for regulatory arbitrage but also to abuse consumers. The unique and complex environment of digital financial services, particularly as characterised by dispersed and numerous service providers, necessitates innovative and multifaceted regulatory strategies. Accordingly, given the resource constraints and technical know–how gap that may hamper State regulators in effectively overseeing moneylenders, the approach of using SROs to regulate the service emerges as a viable option.

Nigeria currently hosts several Fintech–based SROs, with the Fintech Association of Nigeria (FintechNGR) being a prominent example. The FintechNGR describes itself as 'a self–regulatory, not–for–profit and non–political organisation incorporated in Nigeria by the CAC and a member of the global body Global Fintech Hubs Federation.'[1055] The Association aims to foster the development of Nigeria's Fintech sector by providing a platform for facilitating the exchange of insights and information among various stakeholders. In 2020, FintechNGR teamed up with Ernst and Young Nigeria to issue the *Nigeria Fintech Census 2020*, a comprehensive resource that offers valuable insights into Nigeria's Fintech ecosystem.[1056]

Another association, whose focus is, in fact, on the business of moneylending, is the Money Lenders Association (MLA). The MLA is an association of licensed money lenders operating in the various states of Nigeria. Among other objectives, the association aims to advocate for ethical practices in the moneylending industry and strengthen the relationship between moneylenders and regulators.[1057]

SROs like FintechNGR and MLA can play a pivotal role in enhancing the regulatory landscape for Fintech activities by supporting public regulators through co–regulation. Drawing from discussions from previous and this chapter, the next chapter offers considerations and recommendations for using SROs to complement the regulatory efforts of State regulators of moneylending.

5.3.5. Integration within the current structure

In Chapter 3, it was argued that integration within the institutional structure is imperative for preventing regulatory inconsistency, duplication, arbitrage, and coordination failure, which are all inherent challenges in the Fintech landscape.[1058] The SEC has acknowledged that challenges such as regulatory underlap, duplication, and inconsistency threaten the growth of Nigeria's Fintech sector.[1059] The securities regulator observes that with these challenges, Fintech startups not only remain

1055 Information about the Association is available at *https://Fintechng.org/* (Accessed on 23 August 2023).

1056 The publication is available at *https://Fintechng.org/wp–content/uploads/2022/01/ey–Fintech–nigeria–census–final.pdf* (Accessed on 23 August 2023).

1057 Information about the MLA is available at *https://moneylenders.ng/about–us/* (Accessed on 23 August 2023).

1058 Chapter 3, Section 3.4.

1059 Securities and Exchange Commission *The future of Fintech in Nigeria* (Report by the Fintech Roadmap Committee, 2020) 20.

uncertain about the future of their innovations, but the regulator is also perceived as being ambivalent to technological innovation.[1060]

Consolidated supervision and the FSRCC have been introduced in Nigeria as part of the efforts to ensure an integrated regime for financial regulation. However, not only has the FSRCC exhibited inadequacies in overseeing financial regulation broadly, but it has also shown gaps in addressing Fintech matters specifically. A case in point is the initial conflicting stances that the CBN and the SEC took regarding cryptocurrencies, as discussed in Chapter 4.

It is submitted that the contrasting approaches initially taken by the CBN and SEC not only created confusion within the cryptocurrency market but also revealed the glaring gaps in regulatory coordination. This inconsistency is particularly concerning considering the existence of the FSRCC, in which both the SEC and CBN are members. It also underscores the need to strengthen the gaps in the legal regime governing the operation of the FSRCC and improve its accountability.

To back this submission, it is worth noting that during the same period when Nigerian regulators were at odds on the regulatory response to cryptocurrencies, South African authorities under the IFWG had a harmonious response to the Fintech activity.[1061] Specifically, the Crypto Assets Regulatory Working Group (CARWG) was formed in 2018 under the IFWG. The CARWG was given the mandate to formulate a comprehensive policy on crypto assets and Crypto Asset Service Providers (CASPs).[1062] The policy was to ensure the integrity and efficiency of financial markets, maintain financial stability, safeguard the rights and interests of customers and investors, combat illicit cross–border financial activities, and address risks associated with money laundering and terrorist financing.

1060 Securities and Exchange Commission (2019) 20.

1061 See Adam Z 'An overview of the regulation of cryptocurrency in South Africa' (2021) 15 *Pretoria Student Law Review* 370-386, discussing the regulatory issues arising from cryptocurrencies and how the regulatory environment in South Africa is responding to them. Also, see Reddy E & Lawack V 'An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies' (2019) 31(1) *SA Mercantile Law Journal* 1–28.

1062 Intergovernmental Fintech Working Group *Position paper on crypto assets* (2021) 11.

In January 2019, the CARWG of the IFWG released a document titled 'Consultation Paper on Policy Proposals for Crypto Assets.'[1063] The consultation paper outlined the perceived risks and benefits linked to crypto assets, explored various regulatory approaches, and presented initial recommendations to industry stakeholders. This paper served as a platform for industry participants and stakeholders to contribute their insights to the revised South African policy on crypto assets.

Subsequently, in April 2020, the CARWG of the IFWG published a position paper incorporating specific recommendations for establishing a regulatory framework for crypto assets, including proposed regulatory changes.[1064] Feedback received during this period was carefully considered by the CARWG of the IFWG and integrated into the 2021 version of the position paper.[1065] This position paper subsequently served as the foundation for classifying crypto assets as financial products under the Financial Advisory and Intermediary Services Act.[1066]

The Nigerian experience with the contrasting positions of the CBN and the SEC on cryptocurrencies is a clear reminder of the perils of a fragmented approach to regulating Fintech. It is submitted that an integrated approach is not a mere option but a necessity. It can help mitigate regulatory inconsistencies, curtail duplicative efforts, and prevent arbitrage opportunities. Additionally, and very importantly, it can facilitate the seamless coordination that is essential to the effective regulation of Fintech. The establishment of Fintech regulatory coordinating bodies, as seen in other jurisdictions like South Africa, underscores the useful roles such bodies can play in facilitating greater integration in regulating Fintech, not only between financial regulators, but also been financial and non–core financial regulators.

1063 The document is available at *https://www.resbank.co.za/content/dam/sarb/publications/media–releases/ad–hoc–news/2019/9037/CAR–WG–Consultation–paper–on–crypto–assets_final.pdf* (Accessed on 9 September 2023).

1064 The document is available at *https://www.treasury.gov.za/comm_media/press/2020/20200414%20IFWG%20Position%20Paper%20on%20Crypto%20Assets.pdf* (Accessed on 9 September 2023).

1065 See Intergovernmental Fintech Working Group *Position paper on crypto assets* (2021). The document is available at *https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf* (Accessed on 9 September 2023).

1066 The Notice declaring crypto assets as a financial product is available at *https://www.gov.za/sites/default/files/gcis_document/202210/47334gen1350.pdf* (Accessed on 3 September 2023).

Sections 5.2 and 5.3 have respectively assessed the effectiveness of Nigeria's institutional for financial regulation generally and Fintech regulation specifically. The discussion in both sections has highlighted gaps in the regulatory coordination regime. In light of this, the next section undertakes a review and analysis of South Africa's legislative framework for regulatory coordination to draw possible lessons for Nigeria.

5.4. THE LEGISLATIVE FRAMEWORK FOR REGULATORY COORDINATION IN SOUTH AFRICA AND LESSONS FOR NIGERIA

5.4.1. Overview of South Africa's institutional structure

As a background to discussing the legislative framework and mechanisms governing regulatory coordination in South Africa, this section provides a glimpse into the country's current institutional structure and the key regulatory actors within the structure.

South Africa currently follows the twin peaks model as its institutional structure. Historically, South Africa operated an institutional structure in which banks, insurers and the capital market were regulated separately, and it has been observed that during this era, regulation was typified by a lack of coordination.[1067] Even though it was recommended that a fully unified model should be adopted, South Africa subsequently transitioned to an institutional structure that mirrors the partially unified model.[1068]

Under the partially unified model regime, the South African Reserve Bank (SARB) was responsible for regulating banks and ensuring the stability and soundness of the banking system.[1069] On the other hand, the Financial Services Board (FSB) was in charge of regulating non–banking financial institutions and the securities market. From this partially unified structure, South Africa has transitioned to the twin peaks model.

1067 Schmulow A 'Financial regulatory governance in South Africa: The move towards twin peaks' (2017) 25(3) *African Journal of International and Comparative Law* 393–417; Rajendaran D 'Approaches to financial regulation and the case of South Africa' available at https://www.dvara.com/research/blog/2012/03/06/approaches–to–financial–regulation–and–the–case–of–south–africa/ (Accessed on 9 September 2023).

1068 See Botha E & Makina D 'Financial regulation and supervision: Theory and practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal* 32 describing the model at that time as being 'partially integrated.'

1069 See Swart L & Lawack–Davids VA 'Understanding the South African financial markets: an overview of the regulators' (2010) 31(3) *Obiter* 619–637, in which the authors extensively discuss the legislative framework of the financial regulators in the pre–twin peaks era.

South Africa's move to its current twin peaks model is legislatively established under the Financial Sector Regulation Act 9 of 2017 (FSR Act).[1070] The overarching objective of this Act is to secure a stable financial system in South Africa in the interests of financial customers and to support balanced and sustainable economic growth in the country.[1071] The Act inspires to achieve this objective by establishing regulatory and supervisory frameworks that promote financial stability, the safety and soundness of financial institutions, fair treatment and protection of financial customers, efficiency and integrity of the financial system, prevention of financial crime, financial inclusion, transformation of the financial sector, and confidence in the financial system.[1072]

Under South Africa's current institutional structure, the SARB is entrusted with two core mandates: firstly, safeguarding and improving financial stability, and secondly, in the event of a systemic event happening or looming, ensuring the restoration or preservation of financial stability.[1073] On the other hand, the Prudential Authority (PA), which is a juristic person operating within the SARB, is responsible for the micro–prudential regulation of financial institutions and market infrastructures to ensure their safety and soundness.[1074]

The PA's obligations also extend to protecting customers from the risk of financial institutions failing to meet their obligations to such customers, assisting in maintaining financial stability and supporting financial inclusion. Section 34(5) of the FSR Act instructively provides that the PA shall discharge its functions 'without fear, favour and prejudice.'

A separate juristic authority, the Financial Sector Conduct Authority (FSCA) has a mandate for the conduct of business regulation.[1075] It is the FBS from the partially unified era that has now transformed into the FSCA under the current twin peaks era.

The FSCA has the objectives of:[1076] (a) enhancing and supporting the efficiency and integrity of financial markets, (b) safeguarding the interests of financial customers by

1070 See also the National Treasury *A safer financial sector to serve South Africa better* (National Treasury Policy Document, 2011), which set out a review of the key South Africa's financial sector was facing and proposed the roadmap for adopting the twin peaks model.

1071 s 7(1) of the FSR Act.

1072 s 7(1)(a)(h) of the FSR Act.

1073 See s 11(1)(a)(b) of FSR Act.

1074 ss 33 & 34 of the FSR Act.

1075 ss 56–58 of the FSR Act.

1076 s 57(a)(c) of the FSR Act.

(i) advocating for fair treatment of financial customers by financial institutions, (ii) offering financial customers and prospective financial customers financial education programs and encouraging financial literacy to empower them to make informed financial decisions, and (c) assisting in maintaining financial stability.

The FSCA also has the function of cooperating with the Competition Commission in promoting sustainable competition in the provision of financial services and products, supporting financial inclusion and formulating and executing strategies and initiatives for financial education among the general public.[1077] The PA and FSCA started operating on 1 April 2018.[1078]

According to Van Niekerk and Van Heerden, the SARB can rightly be regarded as the apex peak in South Africa's current institutional regime, given that it has jurisdiction over financial stability oversight.[1079] They add that the current regime may more appropriately fit the description of a 'three–peak model' in light of the SARB, PA and FSCA. The authors also quickly point that apart from these three main financial regulators, there are other key financial regulators that define South Africa's regulatory landscape. This includes the National Credit Regulator (NCR), which is responsible for the regulation of the credit market, and the Financial Intelligence Centre (FIC), which is responsible for combating money laundering.[1080]

The FSR Act is generally commendable for recognising the necessity of both micro–prudential and conduct of business regulation to be in sync with macro–prudential regulation. This is evident in its requirement for the PA and FSCA to assist in maintaining financial stability as highlighted above. Further, the explicit mandate for the PA and FSCA on financial inclusion is also relevant in today's world, where Fintech can be leveraged to enhance access to financial services.

As defined by the FSR Act, financial inclusion means that 'all persons have timely and fair access to appropriate, fair and affordable financial products and services.'[1081] Van

1077 For an extensive list of all the functions of the FSCA see, s 58(1)(a)–(j) of the FSR Act.

1078 International Monetary Fund *Financial sector assessment program: Technical note on banking regulation and supervision* (IMF Country Report No. 22/184, 2022) 14.

1079 Van Niekerk G & Van Heerden C 'The importance of a legislative framework for cooperation and collaboration in the twin peaks model of financial regulation' (2020) 137(1) *South African Law Journal* 113.

1080 See National Credit Act 34 of 2005; Financial Intelligence Centre Act 38 of 2001.

1081 s 1(1) of the FSR Act.

Niekerk and Phaladi have argued that the FSCA is required to do more with regard to driving financial inclusion than the PA.[1082] They base their argument on the consideration that, while the FSR Act requires the FSCA to 'promote' financial inclusion, the PA is required only to 'support' it.

Magau confirms that financial education is not expressly defined in any statute that regulates the financial sector and consumer–related issues in South Africa.[1083] While the FSR Act may not have defined the term, the obligations it imposes on the FSCA with regard to consumer education are also very commendable. Financial literacy, and in particular, digital financial literacy, is very important for facilitating the adoption and use of Fintech activities and other digital financial services. Financial education is imperative for such literacy.

Not only do the governing laws of Nigeria's financial regulators fail to define what financial inclusion is, but they also lack an explicit financial inclusion mandate for the regulators, similar to what is outlined for the FSCA in the FSR Act. This absence is confirmed in Nigeria's 2018 National Financial Inclusion Strategy (NFIS), which highlights the lack of specific legislation or overarching regulation underpinning financial inclusion as a priority public policy. It is noted in the NFIS that this omission undermines the effective implementation of the NFIS.[1084]

Nonetheless, while an explicit financial inclusion mandate may be lacking in the governing laws of Nigeria's regulatory bodies, this mandate can be implied from some of the provisions of the governing laws.[1085] There is also the omnibus provision in the various governing laws that financial regulators can perform other functions that are incidental to those expressly mentioned.[1086]

1082 Van Niekerk MG & Phaladi NH 'Digital financial services: Prospects and challenges' (2020) 23(1) *Potchefstroom Electronic Law Journal* 10.

1083 Magau P 'The regulatory nexus between the promotion of financial education and financial inclusion in enhancing consumer protection in South Africa' (2023) 56(1) *De Jure Law Journal* 221.

1084 National Financial Inclusion Strategy (2018) 16.

1085 For example, s 2(3) of Pension Reform Act 4 of 2014 requires PENCOM to issue guidelines for pension services to self–employed persons and private sector organisations that the contributory pension scheme does not mandatorily apply to. It is opined that this provision is geared towards driving financial inclusion in pension services. Similar implicit financial inclusion mandates can be found in other governing laws.

1086 See for example, s23(j) of the Pension Reform Act 4 of 2014; s 7(i) of the National Insurance Commission Act 1 of 1997; s 13(dd) of the Investment and Securities Act.

Regarding financial education, it appears that only the SEC[1087] and PENCOM[1088] have a clear legislative mandate on consumer education. Although NAICOM is not explicitly mandated under the National Insurance Commission Act to undertake consumer education, it is required to extend funding for the training of insurance professionals.[1089] NAICOM is required to establish an education fund from which it will support the educational programmes of the Chartered Insurance Institute of Nigeria, the West African Insurance Institute and other like institutions that the Board of NAICOM approves.[1090]

With the background of South Africa's institutional structure in this section, the next section discusses the legislative provisions and mechanics for regulatory coordination between the regulators as provided in the FSR Act.

5.4.2. Overview of the regulatory coordination mechanisms

Acknowledging that regulatory coordination is imperative for the success of the twin peaks model, the FSR Act makes very extensive provisions regarding the mandate to coordinate and how such coordination should be implemented.

To simplify an understanding of South Africa's regulatory coordination regime as outlined in the FSR Act, it is good to distinguish between two interconnected aspects of the regime: (1) the subject matter of regulatory coordination that the Act streamlines, and (2) the bases/mechanisms for regulatory coordination provided in the Act.

The FSR Act captures two broad subject matters in respect of which regulatory coordination is required. The first subject matter is narrower, and it relates to regulatory coordination on financial stability matters.[1091] The second aspect of regulatory

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1087 s 13(s) of the Investment and Securities Act 29 of 2007.

1088 s 23(f) of the s 2(3) of the Pension Reform Act 4 of 2014.

1089 s 7(k) of the National Insurance Commission Act 1 of 1997.

1090 Ss 17 & 19 of the National Insurance Commission Act 1 of 1997.

1091 s 4(1) of the FSR Act provides that financial stability means that–(a) financial institutions generally provide financial products and financial services, and market infrastructures generally perform their functions and duties in terms of financial sector laws, without interruption; (b) financial institutions are capable of continuing to provide financial products and financial services, and market infrastructures are capable of continuing to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances; and (c) there is general confidence in the ability of financial institutions to continue to provide financial products and financial services, and the ability of market infrastructures to continue to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances. Section 4(2) provides that a reference in this Act to maintaining financial stability includes, where financial stability has been adversely affected, a reference to restoring financial stability.

coordination is broader and relates to cooperation and collaboration generally between financial sector regulators to support each other in achieving the objectives of financial sector laws.[1092]

On the other hand, three broad mechanisms or bases for regulatory coordination can be identified within the FSR Act. The first mechanism is established on the basis of a statutory mandate to the financial regulators to cooperate and coordinate with each other. The second mechanism is based on a Memorandum of Understanding (MoU) for regulatory coordination to be signed between the financial regulators. The third mechanism is based on financial regulation coordinating bodies, of which the financial regulators are members.

As explained below, each of these mechanisms has an aspect that is linked to the subject matter of financial stability or linked to the broader aspect of achieving the objectives of financial sector laws.

5.4.2.1. Statutory obligation to cooperate and collaborate

The FSR Act explicitly requires regulatory coordination, and financial sector regulators are obligated to collaborate in specific areas, which could be related to financial stability or the broader aspect of achieving the objectives of financial sector laws.

As it relates to financial stability, section 26 of the FSR Act mandates financial sector regulators to cooperate and collaborate with the SARB and among themselves to maintain, protect, and enhance financial stability.[1093] The financial sector regulators are also obligated to provide the SARB and the Financial Stability Oversight Committee with the necessary information and assistance reasonably requested of them to support maintaining or restoring financial stability.[1094] In addition, financial regulators must promptly inform the SARB of any potential risk to financial stability that comes to their attention and further collect information relating to financial stability from or about the financial institutions under their oversight.[1095]

While section 26 of the FSR Act relates to regulatory coordination on the subject matter of financial stability objectives, section 76(1) of the Act provides for coordination with

[1092] See s 1 of the FSR Act for the definition of financial sector laws.
[1093] Specifically, s 26(1)(a) of the FSR Act.
[1094] s 26(1)(b) of the FSR Act.
[1095] s 26(1)(c)(d) of the FSR Act.

regards to achieving the objectives of financial sector laws. Specifically, 76(1) of the FSR Act mandates cooperation and collaboration between financial sector regulators and the SARB in the execution of their responsibilities under financial sector laws, the National Credit Act, and the Financial Intelligence Centre Act. This involves mutual assistance and support to achieve their respective objectives, sharing information on shared concerns, striving for uniform regulatory strategies to tackle supervision and regulation challenges, and coordinating actions such as licensing, inspections, enforcement, information exchange, recovery, and reporting by financial institutions.

Section 76(1) also, notably, advocates for minimising the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities. It further encourages aligning consistent policy positions for presentation and negotiation at relevant local and international platforms. Further, section 76(2) of the FSR Act provides that financial sector regulators and the SARB must, at least annually as part of their annual reports, or on request, report to the Minister of Finance, the Cabinet member responsible for administering the National Credit Act and the National Assembly on measures taken to co–operate and collaborate with each other.

The obligation to cooperate and collaborate is not only placed on financial sector regulators, but it also extends to other organs of state. Section 28 of the FSR Act requires these other organs of state to consider the impact of their actions on financial stability while carrying out their responsibilities. Additionally, the section provides that they must provide support and information to the SARB and the Financial Stability Oversight Committee as needed to maintain and restore financial stability, in accordance with reasonable requests made by the SARB or the committee.

While section 28 of the FSR Act relates to cooperation by organs of state concerning financial stability, section 78 of the Act outlines a broader scope of cooperation. The section provides that an organ of state responsible for regulatory or supervisory roles concerning financial institutions should, whenever feasible, engage in consultations with the financial sector regulators and the SARB regarding its functions.

Section 78 further provides that if necessary, financial sector regulators or the SARB can formally ask such an organ of state, through written communication, to provide information on actions taken or intended concerning specified financial institutions.

Compliance with these information requests is obligatory, as long as it does not entail violating any laws by the organ of state.

5.4.2.2. Memorandum of understanding–based regime of coordination

As discussed in Chapter 4, Nigeria's legislative framework for regulatory coordination under the CBN Act does not stipulate any requirements for financial regulators to enter MoUs for regulatory coordination. However, regulators have entered a multilateral MoU for this purpose. To the contrary, the FSR Act explicitly provides for the signing, reviewing, and even publication of MoUs. It is opined that this second basis or mechanism for regulatory coordination under the FSR Act aims to flesh out the modalities for giving effect to the first. However, it should be noted that the FSR Act only mandates the signing of MoUs between financial regulators and not between financial regulators and other organs of state.

Similar to the first regulatory coordination mechanism, two regimes of MoUs can be identified, one that relates to financial stability and another that applies to the broader aspect of achieving the objectives of financial sector laws. As it relates to the first regime, section 27(1) of the FSR Act specifies that the financial sector regulators and the SARB must establish one or more MoUs outlining their collaboration, provision of assistance, and the fulfilment of their roles and obligations pertaining to financial stability (as covered in section 26 of the Act).

The MoUs are subject to periodic review and updates, occurring at least once every three years.[1096] After being entered into or revised, a copy of the MoU must be promptly given to the Minister of Finance and the Cabinet member responsible for consumer credit matters. Section 27(4) of the FSR Act goes on to provide that:

> The validity of any action taken by a financial sector regulator in terms of a financial sector law, the National Credit Act or the Financial Intelligence Centre Act is not affected by a failure to comply with this section or a memorandum of understanding contemplated in this section.

The second regime of MoUs deals with regulatory coordination to achieving the objectives of financial sector laws as required under section 76 of the FSR Act. In this respect, section 77(1) of the FSR Act mandates the financial sector regulators and the

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1096 s 84(2) of the FSR Act.

SARB to establish one or more MoUs to give effect to their obligations outlined in section 76 of the Act. Section 77(2) of the Act provides that if a financial sector regulator delegates a power or duty to another regulator, this delegation must be effected through an MoU. Section 77(3) contains a provision similar to section 27(4) of the FSR Act. It specifies that:

> The validity of any action taken by a financial sector regulator, the Reserve Bank or the Governor in terms of a financial sector law, the National Credit Act and the Financial Intelligence Centre Act is not affected by a failure to comply with this section or a memorandum of understanding in terms of this section.

Section 77(4) of the FSR Act provides that the MoUs entered in terms of section 77 must be reviewed at least once every three years and amended as necessary. Copies of these MoUs and any amendments must be given to the Minister and the Cabinet member overseeing the National Credit Act.[1097] Additionally, each MoU and its amendments must be published by both financial sector regulators and the SARB.[1098] As can be gleaned, while the MoU for financial stability are not required to be published, those for achieving the objectives of financial sector laws are required to be published.

The qualifications introduced in sections 27(4) and 77(3) of the FSR Act, both reproduced above, raise important questions about whether (1) there is a binding obligation on the regulators to enter into the MoUs, and (2) if such MoUs, when signed, create binding obligations for the regulators. If the sections are read or interpreted in isolation, it may be tempting to conclude that regulators have no binding obligation to sign the MoU.

However, if a contextual approach is taken that considers the provision being interpreted alongside other provisions in the section where the provision appears, the rest of the statute, as well as the purpose of the statute, then a different interpretation will emerge.[1099] In particular, it will be clear that there is a binding obligation on the regulators to enter into the MoU.

1097 s 77(5) of the FSR Act.

1098 s 77(6) of the FSR Act.

1099 See *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13, where Wallis JA, at paragraph 18, advances the ideal approach to interpretation by observing that 'The present state of the law can be expressed as follows. Interpretation is the process of

Additionally, it is obligatory for the regulators to comply with other requirements, including reviewing and depositing the signed MoU with the designated authorities. These binding obligations can be drawn from the use of the qualifier 'must' in sections 27(1)–(3) as well as section 77(1)(2)(4)(5)(6) that specify these various requirements. Further, the specificity with which the FSR Act sets out the timelines within which these requirements should be complied with also indicates their binding nature.

In terms of the binding nature of the signed MoU, it is acknowledged that the FSR Act does not explicitly state that the signed MoUs shall be binding on the regulators. However, while the regulators have the independence to negotiate the terms of the MoU, taking into account the expectations of the FSR Act, they are accountable for what they have signed. This accountability arises because the effectiveness of the coordination efforts of the regulators is subject to evaluation.

In particular, the FSR Act requires the independent evaluation of the regulatory coordination efforts of financial sector regulators against the MoUs signed by the regulators and other regulatory coordination mandates specified in the Act.[1100] Additionally, the financial regulators are required to report on their regulatory coordination efforts.[1101]

Van Niekerk and Van Heerden interpret sections 27(4) and 77(3) of the FSR Act to indicate that the MoUs signed by the regulators are not binding.[1102] The authors suggest that the non–binding nature of MoUs may have been:

attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

1100 s 86(1)(a) & (b) of the FSR Act.

1101 For example, s 76(2) of the FSR Act provides that financial sector regulators and SARB must, at least annually as part of their annual reports or upon request, report to the Minister, the Cabinet member responsible for administering the National Credit Act, and the National Assembly on measures taken to cooperate and collaborate with each other.

1102 Van Niekerk G & Van Heerden C 'The importance of a legislative framework for cooperation and collaboration in the twin peaks model of financial regulation' (2020) 137(1) *South African Law Journal* 141–142.

modelled on the Australian position with the current non–binding nature of MoUs between the various regulators, which has not passed muster with the Royal Commission.[1103]

Van Niekerk and Van Heerden raise concerns about sections 27(4) and 77(3) of the FSR Act, suggesting that these provisions may incentivize non–compliance with signed MoUs by regulators and erode the effectiveness of the MoUs.[1104] However, this study observes that the accountability provisions within the FSR Act could serve as safeguards against these risks.

Van Niekerk and Van Heerden also acknowledge the existence of provisions, such as section 18 of the FSR Act, that could be used to augment the ineffectiveness of the MoU regime.[1105] Given recent cracks in Australia's very soft law based regulatory coordination regime, they argue that specifying certain key aspects of coordination into legislation, rather than relying solely on non–binding MoUs, is the better way to go.[1106]

A key learning from Van Niekerk and Van Heerden's paper is that if MoUs are to remain non–binding, then every area of regulatory coordination that should ideally require enforceable commitments on the part of financial regulators should be detailed in legislation. Their paper also highlights the need for extensive regulatory coordination mechanisms. In such a setup, if any mechanism fails, another could be relied upon to salvage the situation.

5.4.2.3. Coordination through regulatory coordination bodies

The FSR Act provides for the establishment of dedicated bodies responsible for regulatory coordination, and this is currently the sole mechanism for regulatory coordination specified in the CBN Act for Nigeria. These regulatory coordination bodies established in the FSR Act understandably serve as a centralised platform to facilitate communication, cooperation, and coordination among various financial sector regulators and other authorities whose functions can impact financial regulation.

1103 Van Niekerk G & Van Heerden C (2020) 141.

1104 Van Niekerk G & Van Heerden C (2020) 141.

1105 The provision outlines the authority of the Governor of SARB to instruct a financial sector regulator to furnish the SARB with specified information needed for addressing impending or subsisting systemic crisis issues in terms of ss 14 & 15 of the FSR Act.

1106 Van Niekerk G & Van Heerden C (2020) 141–142.

Specifically, the FSR Act establishes four of these bodies, which have overlapping membership and, in themselves, do not possess formal powers or decision–making responsibilities.[1107] These bodies are the Financial Stability Oversight Committee (FSOC), the Financial Sector Contingency Forum (FSCF), the Financial Sector Inter–Ministerial Council (FSMC), and the Financial System Council of Regulators (FSCR). They are each discussed below:

(1) The Financial Stability Oversight Committee (FSOC)

The FSOC's primary objectives, as outlined in section 20(2)(a)(b) of the FSR Act, are to assist the SARB in its role regarding financial stability and to foster cooperation, collaboration, and coordinated actions among financial sector regulators and the SARB concerning financial stability matters.

Section 21(a)–(e) of the FSR Act further specifies the committee's functions, including serving as a platform for information exchange and discussions between representatives of the SARB and financial sector regulators about financial stability activities, making recommendations to the Governor regarding systemically important financial institutions, advising the Minister and the SARB on steps to promote or manage financial stability and crisis–related matters, making recommendations to other state entities, and performing any other duties prescribed by relevant legislation.

The membership of the FSOC, as stated in section 22(1) of the FSR Act, includes the Governor of the SARB, the Deputy Governor of SARB responsible for financial stability matters, the Chief Executive Officer of the PA, the Commissioner of the FSCA, the Chief Executive Officer of the National Credit Regulator, the Director–General of the National Treasury, the Director of the Financial Intelligence Centre, and up to three additional individuals appointed by the Governor.

These additional members serve for specified periods as determined by the Governor.[1108] The SARB is tasked with offering administrative support and necessary resources, including financial resources, for the committee's effective functioning and is required to maintain minutes of committee meetings as determined by the

1107 International Monetary Fund *Financial sector assessment program: Technical note on banking regulation and supervision* (IMF Country Report No. 22/184, 2022) 21–23.

1108 s 22(2) of the FSR Act.

Governor.[1109] The committee is obligated to convene at least every six months.[1110] The Act also goes further to outline the procedure of meetings for the committee.[1111]

(2) Financial Sector Contingency Forum (FSCF)

The mandate of the FSCF, as stated in section 25(2) of the FSR Act, is to support the Financial Stability Oversight Committee (FSOC) by identifying potential systemic risks and coordinating strategies, mechanisms, and structures to mitigate those risks. The composition of the forum, as outlined in section 25(3)(a)–(d) of the FSR Act, includes a Deputy Governor designated by the Governor as Chairperson, representatives from financial sector regulators, representatives from relevant state organs at the discretion of the Chairperson, and representatives from financial sector industry bodies and other pertinent entities as determined by the Chairperson.

The Act further specifies that the forum shall comprise a minimum of eight members.[1112] The forum is mandated by the Act to convene at least every six months and must follow operational procedures set by the Governor.[1113] The SARB is tasked with providing administrative and financial resources to ensure the effective functioning of the forum.[1114]

(3) The Financial Sector Inter–Ministerial Council (FSIC)

The FSIC is established with the purpose of promoting collaboration and cooperation among Cabinet members responsible for administering relevant financial sector regulations and supervision, by providing a platform for discussing shared concerns and matters of mutual interest, as stated in section 83(2) of the FSR Act. Its membership, outlined in section 83(3) of the Act, includes the Minister of Finance and Cabinet members overseeing consumer protection and consumer credit, health, and economic development.

Meetings of the FSIC are to be scheduled at times and locations determined by the Minister of Finance, as indicated in section 84(1) of the FSR Act. The meetings are

1109 s 23(1)(2) of the FSR Act.
1110 s 24(1) of the FSR Act.
1111 s 24(2)–(4) of the FSR Act.
1112 s 24(3) of the FSR Act.
1113 s 24(5)(5) of the FSR Act.
1114 s 25(6) of FSR Act

chaired either by the Minister or a Cabinet member designated by the Minister.[1115] The Minister of Finance is obligated to convene meetings upon the request of a council member, and a council member may nominate a Deputy Minister as an alternative representative for a specific meeting.[1116] Additionally, the Minister can invite non–council Cabinet members to attend meetings, and the conduct of meetings is governed by procedures established by the council.[1117]

The FSR Act requires the FSIC to commission an independent evaluation of the regulatory coordination efforts of financial sector regulators against the MoUs signed by the regulators and other statutory mandates specified in the Act every two years.[1118] However, there may be an additional independent evaluation at any other time on the initiative of the FSIC or at the request of a financial sector regulator.[1119] The evaluation report as well as FSIC's report on the contents of the evaluation are required to be submitted to Parliament.[1120]

(4) Financial System Council of Regulators (FSCR)

The primary objective of the FSCR is to facilitate cooperation, collaboration, and, where appropriate, consistency of actions among the institutions represented on the council.[1121] This purpose is achieved through the provision of a platform for senior representatives from these institutions to discuss and inform themselves about shared matters of interest. Of all the four regulatory coordination bodies in South Africa's regime, the FSCR is the body that is closest to Nigeria's Financial Services Regulation Coordinating Committee (FSRCC).

According to section 79(3) of the FSR Act, the members of the FSCR include the Director–General of the National Treasury; the Director–General of the Department of Trade and Industry; the Director–General of the Department of Health; the Chief Executive Officer of the Prudential Authority; the Commissioner of the Financial Sector Conduct Authority; the Chief Executive Officer of the National Credit Regulator; the Registrar of Medical Schemes; the Director of the Financial Intelligence Centre; the

1115 s 84(2) of the FSR Act.
1116 s 84(3)(4) of the FSR Act.
1117 s 84(5)(6)) of the FSR Act.
1118 s 86(1)(a) & (b) of the FSR Act.
1119 s 86(3) & (4) of the FSR Act.
1120 s 86(5) of the FSR Act.
1121 s 79(2) of the FSR Act.

Commissioner of the National Consumer Commission; the Commissioner of the Competition Commission; the Deputy Governor responsible for financial stability matters; and the head, however, described, of any organ of state or other organisation that the Minister may determine.

As can be seen from the above list, unlike Nigeria's case under which there is no representative from the consumer protection and competition authority in the FSRCC, there is such representation in the FSCR. Further unlike Nigeria's case in which the CBN Act would have to be amended to admit a new member to the FSRCC, this is not the case for the FSCR under the FSR Act. The FSR Act empowers the Minister of Finance to specify additional members that can join the FSCR.[1122]

Further, while the CBN Act does not specify how frequently the FSRCC must meet, the FSR Act states that the FSCR must meet at least twice a year or more frequently as determined by the Director–General of the National Treasury.[1123] The FSR Act further mandates the Director–General of the National Treasury to convene a meeting at the request of a member of the FSCR.[1124] The Act also provides that council members have the option to nominate senior officials from their respective institutions to act as alternatives with the concurrence of the Director–General.[1125]

The FSR Act mandates the FSCR to establish working groups or sub–committees to oversee the following matters:[1126] (1) enforcement and financial crime, (2) financial stability and resolution; (3) policy and legislation; (4) standard–setting; (5) financial sector outcomes, (6) financial inclusion; (7) transformation of the financial sector; and (8) any other matter that the Director–General of Treasury may determine after consulting the other members of the FSCR. This is possibly a way of streamlining how the objects of the FSCR are discharged.

However, it can be seen that the FSCR can have a working group or sub–committee dealing with financial stability despite these functions already residing with the Financial Stability Oversight Committee (FSOC) and the Financial Sector Contingency

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1122 s 79(3)(i) of the FSR Act.
1123 s 80(1) of the FSR Act.
1124 s 80(3) of the FSR Act.
1125 s 80(3) of the FSR Act.
1126 s 80(1)(a)–(l) of the FSR Act.

Forum (FSCF). As discussed further in Section 5.4.3 below, provisions like this make the legislative framework to be duplicative and overlapping.

When setting up any working group or subcommittee, the FSCR must determine the membership, Terms of Reference, and procedure of the working group or subcommittee.[1127] South Africa's Intergovernmental Fintech Working Group (IFWG) is not officially stated to have been established as a working group under the FSCR in terms of section 80 of the FSR Act. However, there is already statutory backing under the FSR Act for the IFWG to be accommodated as a working group under the FSCR.

Another area where the legislative framework for Nigeria's FSRCC differs from that of South Africa's FSCR is with regard to the provision of funding for the activities of the financial regulation coordinating body. The CBN Act does not provide for who or how the activities of the FSRCC will be funded. However, the FSR Act provides that the Financial Sector Conduct Authority (FSCA) shall be responsible for providing administrative support and other resources to facilitate the activities of the FSCR as well as its working groups and subcommittees.[1128] The administrative support of the FSCA extends to providing secretarial support by keeping all minutes of the meetings of the FSCR as well as its working groups and subcommittees.[1129]

The next section analyses the provisions of the FSR Act discussed in this section 5.4.2 to outline areas that may not be suitable for Nigeria to adapt to and those that are suitable for such adaptation.

5.4.3. Analysis of South Africa's regulatory coordination regime: The positive and the undesirable

South Africa's legislative framework for regulatory coordination, as outlined in the FSR Act, stands out for its robustness and specificity. There is little room for confusion regarding who should be coordinating and what objectives coordination should strive to achieve. The FSR Act even goes to great lengths to detail the modalities for implementing MoUs, which are typically considered as 'soft law' aspects of regulatory coordination.

1127 s 80(2) of the FSR Act.
1128 s 82(1) of the FSR Act.
1129 s 82(2) of the FSR Act.

In contrast to the CBN Act, which only establishes one mechanism for regulatory coordination through a financial regulation coordinating body (FSRCC), the FSR Act encompasses an extensive framework for regulatory coordination at multiple levels. Additionally, the FSR Act provides a clear directive for cooperation and collaboration among regulators and other authorities. In essence, regulatory coordination is not discretionary but a mandated function for the various financial sector regulators — a crucial aspect that is lacking in Nigeria's legislative framework under the CBN Act.

Furthermore, the FSR Act includes provisions to facilitate transparency and accountability in the regulatory coordination regime. This can be seen from the requirements for reporting on regulatory coordination efforts, as well as the periodic evaluation of regulatory coordination efforts. It is opined that these requirements, which are lacking in the CBN Act, are necessary to prevent the legislative provisions on regulatory coordination from becoming dormant or 'toothless bulldog' provisions.

However, this does not suggest that the framework is flawless, and it is useful to acknowledge that a perfect law may as well be a utopian goal. There are certain aspects of the legislative framework that raise valid concerns. It is opined that one major area of concern is the multiplicity of the regulatory coordination bodies and the duplicity of agreements that regulators need to sign on different subject matters.

Related to this concern is the fact that the regulatory membership and functions of these bodies overlap in some cases. For example, regulatory coordination on the subject of financial stability can occur within various bodies like the Financial Stability Oversight Committee (FSOC), the Financial Sector Contingency Forum (FSCF), and even the Financial System Council of Regulators (FSCR).

It is submitted that duplicative functions and multiple regulatory coordination bodies could lead to inefficiencies because it can be resource–intensive to maintain these various bodies, and the efforts of regulators can be duplicated on the same subject matter. The duplicative functions and multiple bodies can strain the resources of regulators and may lead to potentially diverting resources away from achieving the core mandates of the regulators. There is also the risk of potential redundancies as regulators may end up prioritising some bodies over others.

Additionally, there is the risk that regulators may become too focused on fulfiling engagements under the various bodies to which they belong rather than actually pursuing their core mandates. Regulatory coordination should serve as a means to enhance the effectiveness of regulatory agencies in fulfiling their core mandates. If the focus shifts too much toward coordinating activities and less on fulfiling these core mandates, it could potentially weaken regulatory oversight and enforcement.

It is further submitted that the multiplicity of coordination bodies and overlapping roles could also lead to challenges in maintaining clear lines of accountability. When multiple regulators and authorities are involved, it may be unclear which regulator or authority is ultimately responsible for addressing specific issues or failures, making it challenging for stakeholders to hold regulators accountable. Furthermore, the formal and detailed nature of the legislative framework could also potentially hinder adaptability.

Some of these concerns are also highlighted in the IMF's 2022 Financial Sector Assessment Program (FSAP) report for South Africa.[1130] According to the IMF, the framework is prescriptive, with a significant degree of overlapping membership among coordinating platforms and regulatory agencies. Given that South Africa has numerous bodies for regulatory coordination, the IMF points out that 'more is not always better.'[1131] It observes that the success of regulatory coordination does not depend on having more regulatory coordination bodies; instead, it hinges on 'how well it is focused, and on a clear and agreed allocation of responsibilities among the member agencies.'[1132]

The IMF also raises concerns that under South Africa's current prescriptive framework, there is the potential risk of regulators becoming overly fixated on meeting requirements and ensuring compliance with the formalities of regulatory coordination outlined in the FSR Act, at the expense of 'finding ways to cooperate effectively and efficiently.'[1133] This point by the IMF aligns with the submission by Godwin, Li and Ramsay that:

1130 International Monetary Fund *Financial sector assessment program: Technical note on banking regulation and supervision* (IMF Country Report No. 22/184, 2022) 21–23.

1131 International Monetary Fund (IMF Country Report No. 22/184, 2022) 22.

1132 International Monetary Fund (IMF Country Report No. 22/184, 2022) 22.

1133 International Monetary Fund (IMF Country Report No. 22/184, 2022) 22.

> Arguably, what is more important is not whether there is such a duty, but whether the duty is complemented by other processes and forums for dialogue to ensure that effective cooperation is achieved.[1134]

The resource implication or efficiency of South Africa's regulatory coordination regime also emerged in the IMF's review. According to the IMF, independent assessments of cooperation, evaluations upon request, and overlapping memberships, particularly between the FSOC and the FSCR, raise concerns about resource efficiency.[1135] The IMF also highlights the involvement of political actors (through the Financial Sector Inter–Ministerial Council), alongside a lack of clarity regarding evaluation criteria, which may provide an avenue for the politicisation of the process of evaluating the effectiveness of regulatory coordination.

Lastly, the IMF emphasises the necessity of transparency in the activities of the regulatory coordination platforms, suggesting that formal documentation and public disclosure of meeting discussions, particularly those of the Financial Stability Oversight Committee (FSOC) and the Financial Sector Coordinating Council (FSCR), could enhance accountability and prevent perceptions of inaction.[1136]

It is opined that the IMF's comments do not suggest that a hard law or formal approach to regulatory coordination is unsuitable. However, they underscore the need for a regulatory coordination regime to be efficient, avoid unwarranted duplication, ensure clarity of roles, and generally avoid excessive focus on compliance at the expense of meaningful cooperation between regulatory bodies. Another key point is the need to minimise the risks of political interference with the regime. The next section streamlines the lessons for Nigeria drawn from the analysis.

5.4.4. What lessons are there for Nigeria

In jurisdictions like Nigeria, where there is currently a poor culture of regulatory coordination, there is a strong justification for maintaining a regulatory coordination approach or framework that is more formal than soft law based. However, as has been emphasised, it is not enough to simply have a legislative mandate or other

1134 Godwin A, Li G & Ramsay I *Is Australia's "twin peaks" system of financial regulation a model for China?* (Centre for International Finance and Regulation Working Paper 102 Project E018, 2016) 39.

1135 International Monetary Fund (IMF Country Report No. 22/184, 2022) 22.

1136 International Monetary Fund (IMF Country Report No. 22/184, 2022) 23 mechanisms for regulatory coordination. Regulators should, ideally, also imbibe a culture of coordination.

It is opined that creating joint task forces, hosting regular meetings, and utilising shared facilities can help build such a culture. Training programmes can also enhance collaborative skills among regulatory staff, while incentives and recognition mechanisms can also motivate efforts toward coordination. Additionally, regulatory coordination regimes that cater to conflict resolution and incorporate accountability arrangements can also help instil the collaborative culture. Hüpkes, Taylor and Quintyn list the various forms of accountability arrangements for regulators to include the following:[1137]

(1) Ex ante accountability: This entails reporting and consultation with stakeholders before an agency takes action, such as discussing supervisory and regulatory policies in advance.

(2) Ex post accountability: After actions have been taken, this category involves reporting, typically through annual reports, to evaluate the outcomes and decisions made.

(3) Explanatory accountability: This requires providing reasons and explanations for the actions taken by the agency, ensuring transparency in decision–making.

(4) Amendatory accountability: It involves the responsibility of addressing grievances and rectifying policy or rulemaking defects, demonstrating a commitment to correcting mistakes.

(5) Procedural accountability: This pertains to the necessity of following specific processes and procedures during the decision–making and action–taking stages.

(6) Substantive (or functional) accountability: Regulatory and supervisory actions should align with the agency's objectives, ensuring that they are justified and serve the intended purpose.

(7) Personal accountability: This focuses on individual responsibilities within the agency, emphasising the delegation and execution of specific tasks.

1137 Hüpkes EH, Taylor MW & Quintyn MG *Accountability arrangements for financial sector regulators* (IMF Economic Issues 39, 2006) 6–7.

(8) Financial accountability: This involves presenting financial statements, ensuring that financial transactions and reporting are transparent and accurate.

(9) Performance accountability: It measures the extent to which the agency successfully meets its objectives, assessing the effectiveness and efficiency of its actions.

It is opined that regulatory coordination can especially be subject to Ex post accountability in terms of requiring financial regulators to periodically report on their coordination efforts under various mechanisms, including as mandated by legislation, under MoUs and pursuant to the coordinating body. Complementary to this, regulatory coordination can be subject to performance accountability in that financial regulators are evaluated to assess the extent to which they are meeting regulatory coordination objectives under the various mechanisms.

It is also opined that as opposed to regulators signing MoUs in silos with each other, a multilateral MoU can be signed with annexures detailing specific requirements that apply to the relationship between specific regulators. Just as countries can come together to negotiate and commit to overarching treaties and agreements on a global scale, there is no reason why financial regulators cannot do this within the same jurisdiction.

The collective signing of the multilateral MoU not only streamlines the process of entering MoUs but also indicates that collaboration is collective rather than isolated. In this respect it is very commendable that Nigeria's financial regulators under the auspices of the FSRCC have currently signed a multilateral MoU.

Generally, drawing from the investigations from the preceding sections, it is suggested that there are notable measures that could be implemented to facilitate the effectiveness of the body established to facilitate regulatory coordination. First, the objectives of the regulatory coordination should be clearly defined, and these objectives should be capable of being easily monitored and evaluated. Connected to this, there should be clarity about the role to be played by each financial regulator in achieving the various functions of the coordinating body.

Additionally, the coordinating body should have the resources, including funding and personnel, required to carry out its mandate effectively. Finally, the coordinating body should be flexible in adapting to changing circumstances in the financial system. Such adaptation may involve co–opting additional members or expanding the body's mandates, whether directly or through subcommittees based on financial system developments. It should likewise be adaptive in addressing gaps identified from the evaluation of the body's activities.

Summarily, drawing from South Africa's FSR Act, Nigeria's FCCP Act and other investigations in this section, Nigeria can improve the legislative framework for regulatory coordination under the CBN Act by taking the following measures:

(1) Broadening the mechanisms for regulatory coordination beyond the FSRCC to include a general legislative mandate for regulators to coordinate and the obligation to enter into MoUs that should be published and reviewed regularly.

(2) Providing for how the activities of the FSRCC will be funded and for the establishment of a secretariat for the committee.

(3) Allowing for the setting up of working groups or sub–committees under the FSRCC that will focus on specific issues and allocating specific roles to the financial sector regulators.

(4) Providing a flexible way to expand the membership and objectives of the FSRCC, which will not require amending the CBN Act.

(5) Specifying how frequently the members of the FSRCC (including working groups) should meet and also allowing for the designation of alternate members.

(6) Establishing accountability arrangements for the FSRCC as well as for other regulatory coordination mechanisms.

(7) Outlining some measures that financial regulators may explore for addressing issues arising from overlaps.

Having now assessed the effectiveness of Nigeria's institutional structure and identified the gaps within the structure for financial regulation generally and Fintech regulation specifically, the next section considers the broad reform strategy that policymakers and regulators can adopt to address the gaps. The section first starts with highlighting the reform strategy proposed by extant literature. Thereafter, the section sets out the strategy proposed by the study. The proposed strategy is fleshed out with more specific recommendations in the ensuing Chapter 6, which is the concluding chapter of the study.

5.5. DEFINING THE BROAD REFORM STRATEGY TOWARDS AN IMPROVED INSTITUTIONAL STRUCTURE FOR FINANCIAL REGULATION IN GENERAL AND FINTECH REGULATION IN PARTICULAR

5.5.1. Extant reform proposals

Three notable perspectives have emerged in literature on how Nigeria should respond to the inadequacies of its current institutional structure for financial regulation. The first perspective advocates for adopting the unified model. Under this perspective, there is a common reference to the United Kingdom's former unified regulator — the Financial Services Authority — as an example to draw lessons from when implementing the change. This view was especially dominant in the global financial crisis (GFC) era, with the Presidential Steering Committee on Global Financial Crisis also recommending this approach.

The committee proposed that the unified regulator will combine the regulation of the banking, securities, insurance, and pension sectors, while the CBN will be allowed to concentrate on its core functions of monetary policy implementation.[1138] In also supporting the adoption of the fully unified model, Adetiloye contends that the FSRCC provides the foundation to establish a unified model in Nigeria.[1139] The author suggests that the FSRCC can be transformed to become Nigeria's unified regulator. Adetiloye argues that the need for a single regulator is necessitated by the introduction of universal banking and implementation of the bank consolidation programme. The author comments that these developments integrated Nigeria's financial system through the influencing the emergence of universal banks and financial holding companies.[1140]

Apart from Nigeria implementing the universal banking scheme at that time, Adetiloye's proposal appears to have been greatly influenced by the dominant adoption of the unified model, including by the United Kingdom, which has historical colonial links to Nigeria. However, although financial holding companies still exist in Nigeria, the universal banking scheme has been disbanded in the country.

1138 Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 26. See also Musa BM, Ahmed I & Usman F 'The trends and implications of the global financial crisis on the Nigerian economy' (2016) 4(3) *Global Journal of Business and Social Science Review* 143–144.

1139 Adetiloye KA 'The role of single financial services regulation and the Central Bank of Nigeria–A vision 2020 expectation' 2008 *Lagos Journal of Banking, Finance & Economic Issues* 232.

1140 Adetiloye KA (2008) 232.

Additionally, since the GFC, there have now been more arguments in favour of the twin peaks model, which the United Kingdom itself has also transitioned to. Indeed, the second reform perspective advocates for Nigeria to adopt the twin peaks model.

The proposal for Nigeria to adopt the twin peaks model has become more prevalent post the GFC. Proponents, like Akinbami and Ngwu, acknowledge that each institutional structure has merits and demerits but contend that the strengths of the twin peaks make it the optimal institutional structure for financial regulation in Nigeria.[1141] They suggest that in structuring the twin peaks model, the Prudential Regulatory Authority of Nigeria (PRAN) should be established within the CBN to oversee prudential regulation. Another agency, the Financial Conduct Authority of Nigeria (FCAN), should then be created to regulate and supervise the conduct of the business aspects of all financial institutions. The duo's proposal for a separate conduct of business regulator was particularly premised on the inadequacies of the CBN in driving financial consumer protection given its numerous responsibilities.[1142]

It is important to mention that Akinbami and Ngwu's article was published in 2016, predating the establishment of the FCCPC in 2018, which possesses extensive competition and consumer protection powers. It is opined that in the current landscape with the FCCPC in place, the argument for the necessity of a separate conduct of business regulator to enhance financial consumer protection may not hold as much weight as it did before the establishment of the FCCPC. The FCCPC can play a very crucial role in complementing the roles and inadequacies of the financial regulators in addressing consumer protection issues, especially in the absence of a separate conduct of business regulator.

The third perspective demonstrates scepticism about changing the institutional structure and instead stresses addressing the gaps inherent in the existing structure. This perspective can be drawn from a paper by Arua. The author explores the potential

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1141 Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 311–331; Ngwu FN & Akinbami F 'Total restructuring of Nigeria's financial sector regulatory structure is overdue' available at https://businessday.ng/analysis/article/total–restructuring–of–nigerias–financial–sector–regulatory–structure–is–overdue/ (Accessed on 19 October 2023).

1142 Akinbami F & Ngwu FN 'Overhauling the institutional structure of financial regulation in Nigeria: The unfinished reform' (2016) 17(4) *Journal of Banking Regulation* 320.

for Nigeria to adopt the unified model in the context of the proposal by the Presidential Steering Committee on the Global Financial Crisis.[1143]

Arua submits that adopting a unified model for Nigeria can be rationalised on various grounds. This include strengthening the capacity to deal with universal banks/financial convergence and facilitating the harmonisation of regulatory standards and practices. Additionally, it can contribute to achieving economies of scale in monitoring different financial institutions. However, Arua also acknowledges that the adoption of the model presents challenges, such as problems of legal constraints, the departure of experienced personnel, and delays in integration. Other challenges are the lack of clarity in functioning, difficulty in coordination among supervisors in times of disturbance, excessive workload, and a single point of regulatory failure.

Arua observes that the success of the unified model is highly dependent on the strength of the pre–existing multiple financial regulators. He notes that if a blemish is spotted in the supervisory functions of the CBN, SEC, NAICOM, or PENCOM prior to consolidation into the unified model, such a blemish should be addressed before the consolidated body can function effectively.[1144] The author also suggests that since Nigeria's financial system was still recovering from the shocks of the GFC at that time, it may not be the best time to introduce an integrated supervisory regime separate from the central bank. Arua emphasises the need for Nigeria to extensively examine the pros and cons of the unified model before opting to adopt it.[1145]

A significant learning point from Arua's submission is that changing the institutional structure should not be viewed as a panacea for addressing the gaps in the current structure. Instead, the gaps in the current structure should be addressed as a step towards even potentially changing the current model. His submission also emphasises considering current challenges in the country when justifying whether or not to change the institutional model.

In 2008, when Arua's article was published, the major challenges that defined Nigeria's economy were the effects of the GFC and plummeting oil prices. However, the challenges confronting the nation today appear to surpass those of 2008. Since 2016,

1143 Arua A 'Integrated financial supervision for Nigeria: Emerging issues and challenges' (2008) 32(3) *CBN Bullion* 31.

1144 Arua A (2008) 29.

1145 Arua A (2008) 31.

Nigeria has suffered two economic recessions.[1146] Various factors, including an unstable political situation, the Covid–19 crisis, and the collapse of oil prices, contributed to the recession. Expectedly, these challenges have also left the country grappling with a high rate of unemployment.

Additionally, there are numerous other issues, including escalating poverty rate, insecurity resulting from the Boko Haram insurgency, banditry, and secessionist movements, as well as a worrisome devaluation of the Naira. In 2008, the exchange rate was approximately ₦117/$1. As of October 2023, it has depreciated drastically to an average of ₦1000/$1. The country is also struggling to finance its budget without relying heavily on loans, among other challenges.

Nigeria's current Minister of Finance, Mr. Wale Edu, recently observed in a press briefing that 'If we think back to when was the last time when the [Nigerian] economy was stable, when it was growing, when inflation was low, when the exchange rate was stable, and when interest rates were affordable; that period was about a decade ago.'[1147] It is evident that these current challenges render a comprehensive overhaul of the institutional structure, whether by adopting the unified model or the twin peaks model, less appealing and even less feasible.

Another scholar projecting this third perspective is Famuyiwa, who reviewed the legal and institutional problems of financial regulation in Nigeria in the context of the Nigerian banking crisis of 2008–2009.[1148] Famuyiwa submits that the setbacks the country faced during the crisis were mainly an account of the fact that Nigerian financial regulators operated under a framework that attaches little or no accountability consequences to institutional supervisory failure. Famuyiwa did not infer that changing the institutional structure would have prevented these challenges but contended that the crisis could have been prevented if regulatory accountability best practices had been implemented.

[1146] Chainalysis 'Cryptocurrency penetrates key markets in sub–Saharan Africa as an inflation mitigation and trading vehicle' https://www.chainalysis.com/blog/africa–cryptocurrency–adoption/ (Accessed on 23 September 2023).

[1147] Adoluju B 'Last time FX rate was stable was a decade ago' – Wale Edun speaks on the economy' available at https://www.thecable.ng/last–time–fx–rate–was–stable–was–a–decade–ago–wale–edun–speaks–on–the–economy (Accessed on 3 September 2023).

[1148] Famuyiwa OL 'The Nigerian financial crisis: A reductionist diagnosis' (2013) 2(1) *Journal of Sustainable Development Law and Policy* 36–64.

Famuyiwa contends that financial regulators in Nigeria should have collaborated more closely to investigate and prevent issues that could have facilitated sub–optimal performance or the foundering of the regulatory system. Additionally, financial regulators should have taken several intra–agency responsibilities to prevent regulatory failure and establish institutional culpability for regulatory failure. The author also suggests that financial regulators should have had sound governance and be answerable for the discharge of their duties and the use of resources. Famuyiwa's proposals draw attention to the need to improve both the internal and external aspects of Nigeria's institutional structure and to introduce mechanisms through which regulators can be held more accountable.

Famuyiwa observes that the inactivity of the FSRCC, including its failure to meet regularly leading up to the 2008–2009 Nigerian banking crisis, was one of the contributing causes of the crisis.[1149] He argues that this inactivity of the FSRCC has less to do with the CBN Act omitting to specify how and when the FSRCC should meet. According to the author, 'it would be a mere formality to cite this statutory omission as the reason why the FSRCC did not convene before the crisis.'[1150] Famuyiwa contends that the inactivity of the FSRCC was, in part, a failure of the CBN, who, according to the author, has an implicit statutory obligation to drive the activeness of the FSRCC. The author suggests that some of the issues that exacerbated the crisis would have been discovered if the CBN had played a better role in ensuring the FSRCC's activeness.[1151]

Famuyiwa's submission points to another possible angle of accountability for the FSRCC that was not highlighted in the earlier discussion in Section 5.4 above. As noted in the said section, the FSRCC can be made accountable by requiring it to report on its regulatory coordination activities (Ex post accountability). Additionally, accountability can be instilled by requiring the evaluation of the effectiveness of the FSRCC in achieving its objectives, alongside evaluating the effectiveness of other mechanisms for regulatory coordination (Performance accountability).

It can be inferred from Famuyiwa's submission that there is a seeming lack of responsibility or accountability to ensure that the FSRCC regularly meets and pursues

1149 Famuyiwa OL (2013) 61.
1150 Famuyiwa OL (2013) 61.
1151 Famuyiwa OL (2013) 61–62.

its objectives. Closely connected to this is the understanding that the CBN stands in a prime position to play the 'big brother' role in ensuring the FSRCC's activeness. Indeed, the former Governor of the CBN, Sanusi Lamido Sanusi, mentions that the uneven supervision and inadequate oversight, which played a major role in exacerbating the 2008–2009 Nigerian banking crisis, can be attributed to no one being accountable for regulatory coordination.[1152]

It is submitted that, instead of the current standalone regime of the FSRCC, there might be benefits in transforming the FSRCC into a committee housed within the CBN, similar to how the Monetary Policy Committee is in the CBN. Although the FSRCC should be within the CBN, it should remain independent and not operate as an extension of the CBN or be accountable to it. The primary purpose of suggesting housing it in the CBN is to ensure that the CBN takes a more active role in ensuring the FSRCC is active in meeting its objectives.

By extension, the CBN should serve as the secretariat of the FSRCC and accommodate the FSRCC's expenditures in its budget.[1153] The CBN should also periodically report on the regulatory coordination efforts and activities of the members of the committee. It is commendable to acknowledge that the CBN did, in fact, report on the FSRCC in its latest December 2022 Financial Stability Report and the 2022 Annual Activity Report.[1154] The next section sets out the study's proposed reform strategy.

5.5.2. Study's reform proposal

The three perspectives discussed in the preceding Section 5.5.1 fit into the two broad options for reforming the institutional structure to enhance its effectiveness, as outlined in Chapter 2. As noted, the first option is to change the current institutional structure to another model that is considered to better facilitate an effective institutional regime.[1155] For this option, another issue arises regarding the specific model to which a country should transition. The second option is to retain the existing structure and

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1152 Sanusi LS *The Nigerian banking Industry: What went wrong and the way forward* (BIS Review 49/2010) 7.

1153 The CBN is already currently the secretariat of the FSRCC.

1154 Central Bank of Nigeria *Financial Stability Report* (2022) 59; Central Bank of Nigeria *Annual Activity Report* (2022) 37.

1155 Chapter 2, Section 2.6.

instead focus on implementing pertinent legal, regulatory, institutional, and operational piecemeal reforms that can help improve its effectiveness.

It has been argued and maintained in both Chapters 2 and 3 that when the existing institutional structure exhibits shortcomings for both financial regulation and Fintech regulation, policymakers should consider implementing reforms to address the gaps causing the ineffectiveness of the current structure, instead of immediately changing the entire structure. However, it must also be acknowledged that the reform of the institutional structure of financial regulation is not a linear process or a one–off intervention. Instead, it is more appropriately an iterative one.

Piecemeal reforms, while a useful strategy for addressing gaps in the institutional structure more cost–efficiently and quickly compared to changing the structure, can still have their own challenges. They may fail to mitigate the issues they were introduced to address. Furthermore, institutional reforms may create new loopholes or risks, which can only be identified through ongoing assessment and monitoring.

Additionally, the financial system is dynamic and subject to rapid changes, including innovations in financial products, new market participants, and shifts in market dynamics. This dynamism necessitates continuous evaluations and adjustments to the institutional structure to ensure its ongoing effectiveness. This is the 'adaptive' aspect of regulation emphasised in Chapter 2.[1156]

Van Niekerk and Van Heerden capture the iterative nature of reforms to the institutional structure in the simplest and finest way possible. According to them, "Financial regulatory models should be 'living mechanisms' — moving with the times, adapting to changes, and capable of being corrected where they fail."[1157] Ultimately, even after introducing piecemeal reforms, it is crucial to continuously assess whether they are undermining or improving the effectiveness of the institutional structure.

Complementary to the above understanding, it has been argued in Chapter 2 that if piecemeal reforms introduced to improve the effectiveness of the existing structure fail to address the existing gaps, then a more extensive structural reform, involving

1156 Chapter 2, Section 2.4.3.

1157 Van Niekerk G & Van Heerden C 'The importance of a legislative framework for cooperation and collaboration in the twin peaks model of financial regulation' (2020) 137(1) *South African Law Journal* 142.

changing the institutional structure, might become necessary and justified.[1158] The change is especially necessary and justified if the gaps negatively affect the smooth functioning, development, and stability of the financial system. However, such a change should be approached with caution and thorough examination.

Consistent with the foregoing arguments, it is submitted that the short–term or immediate response to the shortcomings of Nigeria's institutional structure for financial regulation and Fintech regulation should be to retain the existing structure. The retention of the structure should be followed with addressing the key gaps undermining its effectiveness.

A major consideration for this strategy is that most of the shortcomings in Nigeria's financial regulatory regime are primarily due to weak supervision and gaps in the issuance of regulatory frameworks (regulatory duplication and inconsistency). It is submitted that these issues can be attributed to weaknesses in the operational and legal regime for regulatory coordination and cooperation. This argument gains more weight when considering that adequate and effective mechanisms for regulatory coordination are crucial for Fintech regulation and financial regulation. As such, a key consideration for reforming Nigeria's institutional structure is to strengthen regulatory coordination, both for financial regulation in general and Fintech regulation in particular.

There are also other considerations supporting why it is suggested that policymakers and regulators should prioritise reforming the existing structure instead of changing it as a short–term measure. First, all three institutional structure options (sectoral model, unified model, and twin peaks model) have inherent flaws limiting their effectiveness for both financial regulation and Fintech regulation. Notably, all the options are flawed for Fintech regulation because they are based on the outdated assumption that financial regulation solely falls under the purview of financial regulators. However, as demonstrated in the analysis in Chapter 3 and this chapter, Fintech requires an institutional structure that integrates both financial and non–core financial regulators.

Furthermore, Fintech calls for an entirely different institutional setup to facilitate the specialisation and expertise of regulators, including Fintech units, innovation hubs, and regulatory sandboxes. However, none of these Fintech institutional arrangements

[1158] Chapter 2, Section 2.6.

are inherently built into the sectoral, unified, and twin peaks models. The implication of this is that even after changing the institutional structure, there will still be a need to undertake further reforms in terms of introducing these Fintech institutional reforms.

Secondly, just as the sectoral model can be adapted to align with the peculiarities of financial conglomerates without changing it, the model can similarly be adapted to accommodate the unique characteristics of Fintech without the need for a complete overhaul. The third rationale is that changing the institutional structure carries significant risks and challenges; both Fintech regulation and financial regulation could face disruptions during the transition. Particularly, as it relates to Fintech, it is thought that uncertainty about institutional changes can interrupt or hinder investments and business expansion by Fintech firms. On the other hand, regulatory bodies may struggle or take time to adapt to their new mandates under the new institutional structure, potentially resulting in lapses in oversight or enforcement.

Likewise, the financial system as a whole could face uncertainties and other challenges as market participants and regulators adjust to the new institutional regime. The potential for negative economic impacts during this transition underscores the importance of considering the alternative approach of introducing piecemeal reforms to the existing structure to minimise these disruptions while achieving regulatory objectives.

Additionally, changing the institutional structure is a more lengthy, complex, and costly process than introducing piecemeal reforms to the existing structure. For instance, South Africa's transition to the twin peaks model was a lengthy process that spanned from 2007 until when the FSR Act was enacted on 21 August 2017.[1159] This represents an elapsed period of nearly ten years in between.

Schmulow observes that setting up the twin peaks model in South Africa costs an estimated sum of about ZAR 40 million (around US$2 million).[1160] He, however, immediately clarifies that 'this is a small amount of money when weighed up against

1159 See Van Niekerk G & Van Heerden C 'The importance of a legislative framework for cooperation and collaboration in the twin peaks model of financial regulation' (2020) 137(1) *South African Law Journal* 111–112; Van Niekerk MG & Phaladi NH 'Digital financial services: Prospects and challenges' (2020) 23(1) *Potchefstroom Electronic Law Journal* 9–10.

1160 Schmulow A "Explainer: who will be doing what under South Africa's new 'Twin Peaks' model" available at *https://www.bizcommunity.com/Article/196/512/177274.html* (Accessed on 9 September 2023).

the potential costs of a financial crisis.' Donnelly on the other hand estimates that the change to the twin peaks model will increase the budget of regulators in South Africa by almost 42 per cent.[1161]

What is clear from these estimations is that changing the institutional structure does not come cheap. It is also good to note that although Schmulow appears to justify the cost of implementing a change on the ground that it is less than the cost of a crisis, he points out in other papers that changing to the twin peaks model does not guarantee against a financial crisis.[1162]

Apart from the issue of cost, the lengthiness of implementing changes to the institutional structure comes with political risks. If the political party or government under which the reform was initiated is unable to conclude the process and a new political party or government comes into power, the process could be halted. These interruptions to the projects of predecessor political parties or governments are not uncommon in Nigeria.

Equally, as highlighted in the preceding Section 5.5.1, Nigeria is currently grappling with a multitude of social and economic challenges. In such a context, allocating resources for institutional restructuring may be an imprudent choice. Furthermore, a major institutional overhaul could introduce additional uncertainty and disruption into the already challenging environment. In all, aligning with the notion of 'proportionality' canvassed in Chapter 2,[1163] the proportional or commensurate reform initiative that is suitable in light of the current challenges undermining the structure and other considerations is not to change it.

Nonetheless, it is also acknowledged that introducing piecemeal reforms to the existing structure might not entirely eliminate all the challenges within the financial regulatory regime. They primarily have the potential to contribute to improving the institutional aspects of the regulatory regime, and this contribution can be marginal in some cases. The experiences of the United States, as highlighted in Chapter 2, and

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1161 Donnelly L 'Lofty expectations for twin peaks' available at https://mg.co.za/article/2018–05–11–00–lofty–expectations–for–twin–peaks/#:~:text=Implementing%20the%20twin%20peaks%20model,by%20regulators%2C%20say%20industry%20players (Accessed on 9 September 2023).

1162 Schmulow AD 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 172; see also Schmulow A 'Who will be doing what under South Africa's new 'twin peaks' model' (2018) 10 *Finweek* 35.

1163 Chapter 2, Section 2.4.3.

even Nigeria's with the piecemeal reforms that have been introduced over time, support this perception.

It is opined that applying piecemeal reforms to the institutional structure used in a complex and interconnected financial system is like repairing a broken cup with glue instead of replacing it. The glue may temporarily hold the cup together, but it will remain fragile and susceptible to damage depending on how it is handled. Consequently, as the sectoral model faces increased pressure, whether due to developments in the financial system or failures in the piecemeal reforms introduced to the institutional structure, it is likely to become less suitable for facilitating effective and efficient financial regulation.

As such, while retaining Nigeria's current model and addressing its shortcomings might be the immediate or short–term response, there may be compelling reasons to consider a potential transition to an alternative model in the long–term. The long–term is used here to refer to the period after the short–term strategy has been implemented.

This transition could be justified if the piecemeal reforms within the present structure fail to produce the expected results and if there are risks to financial stability and the development of the financial system. Additionally, aligning the institutional structure with broader developmental objectives might also necessitate changing the institutional structure. The structural change will be especially justified if Nigeria finds itself in a much better socio–economic condition than what currently obtains.

Based on the various points highlighted and arguments presented in this and preceding chapters, the next chapter, which also serves as the concluding chapter, will do the following. First, identify the piecemeal reforms that can be introduced to improve the effectiveness of Nigeria's current institutional structure which have emerged from the study. Secondly, recommend and provide justifications for the model (between the partially unified model, fully unified model, or twin peaks models) that may be more suitable for Nigeria to explore in the event that changing the institutional structure is justified.

5.6. CONCLUSION

The various risks inherent in the financial system, as well as its susceptibility to market failure, make it imperative for policymakers to continually rethink their current institutional structure and other frameworks of financial regulation. This entails assessing the frameworks to determine if they are still effective for regulating the financial system if they require reform, and how they should be reformed if the same is necessary. This chapter assessed the extent to which Nigeria's current institutional structure is effective for financial regulation broadly and Fintech regulation specifically by investigating the structure's compliance with the elements of effectiveness established in Chapters 2 and 3.

The assessment in the Chapter has revealed a host of gaps that undermine the effectiveness of the current structure for both financial regulation and Fintech regulation. These gaps are highly likely to result in, and in some instances, have already caused various setbacks in Nigeria's financial regulatory landscape. These setbacks include leaving room for regulatory arbitrage, consumer abuses, regulatory gaps, inconsistent regulations, duplicated regulatory efforts, and coordination failures.

The chapter also explored the broad reform strategy that Nigeria should explore to improve the effectiveness of its institutional structure for both financial regulation and Fintech regulation. It advocated prioritising the improvement of the current structure rather than opting for a complete overhaul as a short–term measure. However, the chapter also suggested that changing the institutional structure might be necessary if the implemented reforms fail to yield the desired results and if there are looming risks to the financial system.

The next chapter advances recommendations on implementing these two key aspects that form part of the broad reform strategy. It also provides a summary of the findings of the study, areas for further research, and final remarks.

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1. CHAPTER INTRODUCTION

This chapter marks the culmination of the study. Drawing upon the foundation laid in Chapter 1, this study is motivated by and rooted in the hypothesis that Nigeria's current institutional structure of financial regulation may have shortcomings that undermine its effectiveness for financial regulation generally and Fintech regulation in particular.[1164] The rationale behind this presumption is that the structure, along with its supporting legislative framework, was conceived during a different era than exists today. Having been established in a different era, it neither catered to nor anticipated the various developments that have subsequently emerged in the financial system, particularly Fintech developments. Consequently, the structure may fall short in addressing the changes, risks, and regulatory challenges associated with Fintech and may not be suited for regulating the financial system in today's highly digitalised financial services landscape.

To investigate this hypothesis, a central research question is posed by the study as follows: How can Nigeria's institutional structure of financial regulation be reformed to better address the changes, risks, and regulatory challenges associated with Fintech?[1165] Further, to address this central inquiry, the study sets out five sub–questions.[1166] These sub–questions are:

(1) To what extent does the design of the institutional structure influence the overarching objectives of efficient and effective financial regulation?

(2) What requirements are essential for the effectiveness of the institutional structure for financial regulation generally?

(3) What requirements are essential for the effectiveness of the institutional structure for regulating Fintech specifically?

1164 Chapter 1, Section 1.3.
1165 Chapter 1, Section 1.4.
1166 Chapter 1, Section 1.4.

(4) What noteworthy reforms have been introduced to Nigeria's institutional structure in response to developments in the financial system, including in relation to Fintech?

(5) To what extent does Nigeria's current institutional structure demonstrate effectiveness in the broader context of financial regulation, and how well does it cater to the peculiarities of Fintech?

Section 2 of this concluding chapter provides a summary of the key findings and arguments of the study as they relate to the five sub–research questions set out in Chapter 1. The recommendations stemming from this study are discussed in Section 3, and these recommendations invariably serve as responses to the central research question. Section 4 identifies potential areas for future research based on the findings and recommendations of the study. Finally, concluding remarks are extended in Section 5.

6.2. SUMMARY OF FINDINGS AND KEY ARGUMENTS

The first sub–research question is considered in Chapter 2, and it relates to investigating the impact or influence that the design of the institutional structure may have on the overall efficiency and effectiveness of financial regulation.[1167] The motivation behind raising and addressing this question is that policymakers may be more inclined to reform the design of their institutional structure to meet specified requirements if the design can significantly influence effective and efficient financial regulation.[1168] Conversely, they will be less inclined to channel their efforts towards matters regarding the design of the institutional structure if it holds little value in facilitating effective and efficient financial regulation.[1169]

From the analysis of this question, at least three views among scholars regarding the impact that the institutional structure's design may have on the overall efficiency and effectiveness of financial regulation emerge.[1170] According to one view, effective and efficient financial regulation primarily lies in supervisory capacity, the quality of

1167 As the study clarifies in Chapter 2 (Section 2.3.1), financial regulation is considered effective if the policy objectives of financial regulation are achieved and it is efficient if these policy objectives are effective achieved without excessive costs being imposed on both the regulator and regulated firms.

1168 Chapter 2, Section 2.5.5.

1169 Chapter 2, Section 2.5.5.

1170 Chapter 2, Section 2.5.5.

supervision, and the soundness of regulatory frameworks. These are considered the 'first–order issues.' This view sees the institutional structure's design as a 'second–order issue' when it comes to effective and efficient financial regulation. In other words, the institutional structure's design plays a secondary role compared to the first–order issues.

The second view challenges the idea that the institutional structure's design is a 'second–order issue,' insisting that its influence on effective and efficient financial regulation should not be underestimated. Proponents of this view contend that a well–designed institutional structure not only fosters synergies in dealing with regulatory functions but also contributes to crisis prevention and mitigation. They also argue that the design of the institutional structure can contribute to achieving and maintaining the necessary supervisory capacity. In particular, the design of the institutional structure can help in ensuring that the regulatory regime is comprehensive; reducing the direct cost of regulation and thereby impacting the adequacy of resources; and facilitating inter–agency coordination and collaboration.

The third view tries to balance the first two. The view suggests that while the significance of the institutional structure should not be exaggerated, its significance should likewise not be underestimated. The proponents of this view observe that the design of the institutional structure is important and not a minor administrative matter. Additionally, the institutional structure has significance greater than simple bureaucratic tidiness.

What jumps out from discussing the various views is that while older literature supports the first view, more recent literature supports the second and third views. This study leans in favour of the third view, especially as it balances the first two perspectives. However, before settling for the third view, the study examined the extent to which the design of the institutional structure influences other frameworks for financial regulation.[1171]

The results of the examination show that, as it relates to the policy objectives of financial regulation, a well–structured institutional structure facilitates the attainment of the policy objectives of financial regulation.[1172] It does this by clarifying

1171 Chapter 2, Section 2.5.5.
1172 Chapter 2, Section 2.5.5.1.

responsibilities, preventing conflicts between different objectives, and simplifying the regime for consumer protection. On the other hand, a poorly designed structure can hinder the achievement of policy objectives by engendering conflicts of interest in addressing these objectives.

In relation to regulatory frameworks, the way the institutional structure is designed can create overlaps, which may breed issues like regulatory inconsistency, duplication, and arbitrage.[1173] As it relates to supervisory frameworks, the study shows that the design of the institutional structure determines how supervision is carried out.[1174] A well–designed structure with clear authority lines and defined roles reduces confusion and duplication, resulting in more efficient and effective supervision. Conversely, a fragmented or overlapping design can cause confusion and conflicting actions, diminishing the effectiveness of supervision.

From engaging with these and other issues, the study draws three key points about the influence of the institutional structure's design to effective and efficient financial regulation.[1175] First, the design of the institutional structure alone does not ensure the effectiveness or efficiency of financial regulation. Arguing otherwise will amount to overestimating the significance of the institutional structure. Other factors, such as the effectiveness of other frameworks for financial regulation, sound supervisory capacity, and high–quality supervision, are equally essential for effective and efficient financial regulation.

Secondly, while the institutional structure's design does not guarantee effective and efficient financial regulation, it does contribute to and facilitate these objectives to a degree that cannot be overlooked. Denying this fact is to underestimate the significance of the institutional structure's design. Thirdly, just as the design of the institutional structure can facilitate effective and efficient financial regulation, it can also pose challenges or create gaps that stand as stumbling blocks to achieving these regulatory goals. These challenges will arise irrespective of how sound the other frameworks for financial regulation may be.

In all, it is submitted on this first research question that while the design of the institutional structure is not the sole determinant of effective and efficient financial

1173 Chapter 2, Section 2.5.5.2.
1174 Chapter 2, Section 2.5.5.3.
1175 Chapter 2, Section 2.5.5.

regulation, it remains a key factor in achieving these objectives. The relevance of the design of the institutional structure extends beyond a secondary role or 'second–order issue.' The design of the institutional structure is as important as other frameworks for financial regulation as well as factors that contribute to effective and efficient financial regulation. Accordingly, a holistic approach that considers all frameworks for financial regulation, including the institutional structure, is necessary to ensure effective and efficient financial regulation.

Chapter 2 additionally addresses the second sub–research question regarding the requirements that are essential for facilitating the effectiveness of the institutional structure for financial regulation generally.[1176] To draw these requirements, the factors that account for the strengths and weaknesses of the sectoral model, unified model, and twin peaks model are considered.[1177] Additionally, the possible measures for addressing the shortcomings of the various models are examined.[1178] From considering these two issues, it is submitted that the suitability of the institutional structure being used by a jurisdiction does not lie in whether it follows the sectoral model, unified model, or twin peaks model.[1179] Instead, it depends on the extent to which the institutional structure reflects the following four key factors.[1180]

First, the institutional structure should be adapted to or aligned with the developments in the financial system.[1181] Secondly, the institutional structure should incorporate institutions or regulatory features that shield against regulatory challenges that the structure is vulnerable to and that may cause financial regulation to fail.[1182] Thirdly, the institutional structure should be efficient in terms of reducing the direct and indirect costs of financial regulation.[1183] Lastly, the organisational structure of financial regulators should facilitate the specialisation of regulators in dealing with financial sectors and regulatory functions.[1184] However, this list is not intended to be exhaustive. It is, at best, a reflection of some of the minimum requirements.

1176 Chapter 2, Section 2.1.
1177 Chapter 2, Section 2.5.1 - 2.5.3.
1178 Chapter 2, Section 2.5.1 - 2.5.3.
1179 Chapter 2, Section 2.5.4.
1180 Chapter 2, Section 2.5.4.
1181 Chapter 2, Section 2.5.4.1.
1182 Chapter 2, Section 2.5.4.2.
1183 Chapter 2, Section 2.5.4.3.
1184 Chapter 2, Section 2.5.4.4.

The study explains that there are broadly two options for a jurisdiction to improve the effectiveness of its institutional structure, especially in terms of the structure incorporating the four requirements prescribed.[1185] The first option is to change from one model to another.[1186] The second option for meeting the requirements is to maintain the current model and implement piecemeal reforms to address its shortcomings.[1187] Alongside these two broad options, consideration could also be given to recruiting additional staff and strengthening the supervisory capacity of financial regulators.

The study examines which of the two broad options should be prioritised when gaps are identified in the existing institutional structure.[1188] It is argued that, given various considerations including time, risks, complexity, and cost of changing the institutional structure, it may be better to prioritise retaining and improving the existing model instead of changing to another model. However, it is further argued that there may be a strong case to explore changing the institutional structure if piecemeal reforms to the current structure fail to yield anticipated outcomes and the institutional regime is still marred by flaws that jeopardise the stability and development of the financial system. It may also be justified to change the institutional structure's design to pursue a developmental agenda for the financial system and economy, provided these changes are aligned with broader policy goals and are based on sound economic analysis.

When changing the institutional structure is justified and necessary, it is important to critically examine the available options to arrive at the best choice for a country. Additionally, it is crucial to consider the challenges, costs, and risks associated with changing the institutional structure and find ways to mitigate them. Importantly, the decision to undertake a structural change should be backed by the availability of adequate financial resources, technical capacity, and political will to see through the successful execution and completion of the reform.

Expanding upon the conceptual framework established in Chapter 2, Chapter 3 extends its inquiry to explore the requirements that are essential for facilitating the effectiveness of the institutional structure for regulating Fintech specifically, which is

1185 Chapter 2, Section 2.6.
1186 Chapter 2, Section 2.6.1.
1187 Chapter 2, Section 2.6.2.
1188 Chapter 2, Section 2.6.

the third research question.[1189] These requirements are drawn by examining the changes that Fintech brings to the financial system, the regulatory challenges posed by Fintech as well as the cost and complexity of regulating Fintech.[1190]

On the point of changes, the study finds that Fintech changes the financial system through decentralising it, causing the disintermediation of traditional intermediaries, and blurring the boundaries of industries as well as financial and non–core financial regulators.[1191] In relation to the regulatory challenges, the study confirms that Fintech presents numerous regulatory challenges, such as regulatory underlap, arbitrage, inconsistency, duplication, and coordination failure.[1192] If these challenges are not addressed, risks to consumer protection, market integrity, fair competition as well as micro and macro stability could materialise.

Further, the study confirms that Fintech is both costly and complex to regulate.[1193] Regulating Fintech proves to be costly and complex due to the constantly evolving nature of Fintech which necessitates significant resources for understanding, monitoring, and responding to Fintech developments. Costs also arise from the need to develop or modify financial regulatory frameworks, establish Fintech institutional arrangements, ensure ongoing supervision of Fintech, and investing to train and hire staff. The complexity of regulating Fintech also arises from the 'policy trilemma' which refers to the challenges regulators face in balancing different policy objectives of financial regulation.

From these issues discussed, the study identifies five requirements that are essential for facilitating the effectiveness of the institutional structure for regulating Fintech specifically.[1194] First, the institutional structure should include a Fintech regulation coordinating body to facilitate regulatory coordination between financial and non–core financial regulators. Secondly, the institutional structure should include institutional arrangements that facilitate engagements and collaboration between financial regulators and the Fintech ecosystem. These arrangements include innovation hubs, regulatory sandboxes, stakeholder advisory body, and Fintech one–stop–shop.

1189 Chapter 3, Section 3.1.
1190 Chapter 3, Section 3.1.
1191 Chapter 3, Section 3.3.
1192 Chapter 3, Section 3.4.
1193 Chapter 3, Sections 3.5 & 3.6.
1194 Chapter 3, Section 3.7.

Thirdly, when there are resource constraints challenges for financial regulators, the institutional setting should incorporate the use of self–regulatory organisations (SROs) to oversee the regulation of Fintech startups. The fourth requirement is that the institutional structure should be integrated to avoid fragmentation and enable a holistic and consistent regulation of Fintech activities. Lastly, financial regulators should have Fintech units within their organisational structure to promote specialisation and expertise in dealing with Fintech. Similar to the institutional requirements that apply to financial regulation generally, the institutional requirements prescribed for Fintech regulation are not intended to be exhaustive.

It is argued that Fintech units and the Fintech regulation coordinating body are fundamental and should be prioritised when implementing Fintech institutional arrangements. This is especially because these two Fintech institutional arrangements provide the foundation for the implementation of other institutional arrangements. The other Fintech institutional arrangements (like innovation hubs, innovation accelerator, regulatory sandboxes, and a Fintech one–stop–shop) should be implemented based on the emerging needs of the Fintech sector of a country. The Chapter also emphasises the need to adopt cost–efficient and integrated approaches when implementing Fintech institutional arrangements.

Chapter 4 examines the fourth sub–research question, focusing on noteworthy reforms introduced to Nigeria's institutional structure in response to developments in the financial system, including in relation to Fintech.[1195] An inquiry into this question was necessary to gauge the country's progress in terms of institutional reforms within the financial regulatory regime.[1196] Before considering the reforms, an overview of Nigeria's financial system and the developments in its Fintech sector was provided.[1197] The overview reveals that Nigeria's financial system is of a highly integrated nature, primarily due to the presence of financial holding companies. These companies have subsidiary companies operating across various sectors, including banking, insurance, securities and pension.[1198]

1195 Chapter 4, Section 4.1.
1196 Chapter 4, Section 4.1.
1197 Chapter 4, Section 4.2.
1198 Chapter 4, Section 4.2.1.

On the other hand, the overview of the Fintech sector demonstrates its significant growth, fuelled by factors such as the large unbanked population, increasing mobile penetration, and government policies aimed at driving financial inclusion and a cashless economy.[1199] The chapter further shows that before the more recent initiatives targeting Fintech, there were other reforms due to previous developments in the financial system that had implications for the institutional regime.[1200] These reforms include the:

(1) establishment of a statutory financial regulation coordinating body called the Financial Services Regulation Coordinating Committee (FSRCC),

(2) adoption of consolidated bank supervision and incorporation of a functional approach to the sectoral model,

(3) establishment of the Asset Management Corporation of Nigeria (AMCON), and

(4) establishment of a consumer protection department within the Central Bank of Nigeria (CBN)

The discussions in Chapter 4 also showed that there has been a policy proposal from the Presidential Steering Committee on the Global Financial Crisis to change the current sectoral model and adopt the unified model. However, this proposal has not been implemented to date.[1201]

Chapter 5 undertakes the analysis of the fifth and final sub–research question on — the assessment of Nigeria's institutional structure in terms of its effectiveness, not only within the broader context of financial regulation but also within the specific purview of Fintech.[1202] In addressing this last question, the study follows a deductive methodology to test the hypotheses proposed within the conceptual frameworks advanced in Chapters 2 and 3.[1203] As already stated, these frameworks propose some key or minimum requirements that are essential for facilitating the effectiveness of the institutional structure for financial regulation in general and regulating Fintech specifically.[1204]

1199 Chapter 4, Section 4.2.2.
1200 Chapter 4, Section 4.6.
1201 Chapter 4, Section 4.6.3.
1202 Chapter 5, Section 5.1.
1203 Chapter 5, Section 5.1.
1204 See generally, Chapter 2, Section 2.5.4; Chapter 3, Section 3.7.

The interrogation of this fifth and final sub–research sheds light on both strengths and weaknesses within Nigeria's institutional structure for both financial regulation and Fintech regulation, as evaluated against the conceptual frameworks. The study finds that, in terms of financial regulation, Nigeria's institutional structure makes efforts to align with some developments in the financial system.[1205] However, some gaps are evident, particularly as it relates to fully adapting the structure to Fintech, and there are gaps in the legislative framework for the FSRCC, which is the country's financial regulation coordinating body.[1206]

Despite the creation of the FSRCC to address regulatory challenges, persistent gaps in legal and operational aspects impede effective coordination, leading to issues such as regulatory duplication, inconsistency, arbitrage, and coordination failures.[1207] The present structure also falls short in minimising direct and indirect regulatory costs.[1208] However, on a positive note, the structure manages to encourage specialisation for financial regulation as each financial regulator is focused on only one sector.[1209]

As it relates to Fintech regulation, the study finds that Nigeria's current structure lacks a Fintech regulation coordinating body.[1210] Similarly, there is a necessity and justification to use SROs to complement the efforts of State regulatory authorities in regulating moneylenders, but this has not been done.[1211] There is also weak integration within the structure.[1212] Further, it is commendable that attempts have been made to establish some Fintech institutional arrangements.[1213] However, dedicated Fintech units within the organisational structure of financial regulators, such as the CBN, which is extensively involved in Fintech regulation, are notably missing. Connectedly, the financial regulators are operating their institutional arrangements in silos.[1214]

Ultimately, the study's findings on the fifth research question culminate in the conclusion that Nigeria's institutional structure evidence gaps for financial regulation

1205 Chapter 5, Section 5.2.1.
1206 Chapter 5, Section 5.2.1.
1207 Chapter 5, Section 5.2.1.
1208 Chapter 5, Section 5.2.3.
1209 Chapter 5, Section 5.2.4.
1210 Chapter 5, Section 5.3.1.
1211 Chapter 5, Section 5.3.4.
1212 Chapter 5, Section 5.3.5.
1213 Chapter 5, Sections 5.3.2 & 5.3.3.
1214 Chapter 5, Sections 5.3.2 & 5.3.3.

in general and Fintech regulation specifically.[1215] These gaps can result (and have indeed resulted) in various regulatory setbacks, including creating opportunities for regulatory arbitrage, duplication of regulatory efforts, weak consumer protection, inconsistencies of regulations, and overall coordination failure.[1216] Section 6.3 below offers recommendations to address these gaps.

To conclude this section, it is good to mention that the conceptual frameworks developed in Chapters 2 and 3 and applied to the final research question are invaluable for other researchers interrogating issues relating to the institutional structure of financial regulation.[1217] These frameworks offer a structured approach to assessing the effectiveness of the institutional structure used by different countries, especially as they can be flexibly used for country–specific contexts.

Researchers can use the frameworks to evaluate how well the institutional structure being used in a jurisdiction adapts to the evolving financial system and Fintech developments. Additionally, the requirements identified within the conceptual frameworks can serve as a guide for identifying areas for improving the design of the institutional structure to address the challenges within it. However, as noted earlier, the requirements articulated in each of the conceptual frameworks are not exhaustive. Therefore, researchers are encouraged to critique the requirements outlined in this study and propose additional requirements that could produce an even more comprehensive list of requirements.

6.3. RECOMMENDATIONS

The recommendations of the study are broadly predicated on a consideration of whether, in response to the identified gaps undermining the effectiveness of Nigeria's current institutional structure for financial regulation generally and regulating Fintech specifically, policymakers should either: (1) change from the current sectoral model to an entirely different model (such as the partially unified model, fully unified model or twin peaks model), or (2) retain the existing model but introduce necessary reforms to address the gaps that undermine its effectiveness. Either of these options could also involve recruiting additional staff and improving the supervisory capacity of financial regulators.

1215 Chapter 5, Sections 5.2 & 5.3
1216 Chapter 5, Sections 5.3.2 & 5.3.3.
1217 See generally, Chapter 2, Section 2.5.4; Chapter 3, Section 3.7.

For the reasons extensively discussed in Chapter 5, it is proposed that, as an immediate and short–term response, policymakers and regulators should adopt the second option of retaining the existing structure but addressing the gaps that contribute to its ineffectiveness.[1218] Summarily, among other reasons, this option is preferred because it is more economical, quicker, and less complex to implement. It also entails less disruption to the regulatory environment for both Fintech regulation and financial regulation. Further, the second option is the more proportional reform initiative, considering the gaps in the institutional structure sought to be addressed, risks, and the various considerations underscoring institutional reforms. Additionally, it is generally more contextually fitting for Nigeria, taking into account the current socio–economic landscape.

The reforms proposed by this study to enhance the effectiveness of Nigeria's current institutional structure for financial regulation, generally, and Fintech regulation specifically, are discussed in Sections 6.3.1 and 6.3.2 below. These reforms are designed to align with the requirements for the effectiveness of the institutional structure for financial regulation and Fintech regulation, as outlined in Chapters 2 and 3 of the study, within the Nigerian context.

6.3.1. Reforms in relation to financial regulation generally

6.3.1.1. Enabling the Nigerian Constitution to support financial regulation

Under the federal structure of government currently practiced in Nigeria, the effective regulation of the financial system is foundationally anchored in how the Constitution 'clearly' and 'appropriately' delineates the lawmaking powers related to financial services for the national and sub–national spheres. Therefore, there is a need to revisit the Constitution to ensure a clear and proper delineation of areas of financial services that the National Assembly and State Houses of Assembly can legislate on.

Except for cooperative societies, this study proposes that all other financial services (including moneylending business that is currently legislated for and regulated by the States) should fall under the exclusive jurisdiction of the National Assembly and, by extension, be subject to regulation by national regulatory authorities.[1219]

[1218] Chapter 5 , Section 5.5.2.

[1219] Chapter 4, Section 4.7.4

On a broader scale, the study also suggests amending the Nigerian Constitution to introduce guidelines for clarifying legislative powers in instances where they have not been explicitly delegated to either the National Assembly or State Houses of Assembly. It is proposed that these guidelines can be based on various determinants, including whether the matter: can be more effectively regulated by legislation enacted by the respective States, requires uniformity across the nation, is a cross–State matter, or impacts the nation as a whole. Additionally, the Constitution can empower the National Assembly to develop model laws that States should adopt as minimum standards when enacting their respective laws in matters better suited for State legislation but also necessitate a certain level of consistency across the country.

6.3.1.2. Balancing the micro–prudential and conduct of business regulatory functions

One of the numerous potential risks associated with the sectoral model, as discussed in the study, is the possibility that financial regulators may not effectively balance their roles in micro–prudential and conduct of business regulation.[1220] Depending on the priorities of a specific regulator, either micro–prudential or conduct of business regulation may receive more attention, potentially leading to oversight gaps.[1221] To address this risk, it is recommended that the various financial regulators in Nigeria (CBN, NDIC, SEC, NAICOM and PENCOM) should revisit their respective organisational structures to ensure that these regulatory functions receive adequate attention. It is advisable to have separate but cross–functional departments with specialised staff responsible for micro–prudential and conduct of business regulatory roles. This involves establishing distinct departments/divisions within the sectoral regulators, each tasked with micro–prudential and conduct of business regulation. However, this separation should be accompanied by adequate mechanisms for coordination, collaboration, and information–sharing between the micro–prudential and conduct of business departments/divisions.

6.3.1.3. Managing the numerous regulatory functions of the CBN

The Central Bank of Nigeria (CBN) is tasked with numerous regulatory roles. It is observed that the multitude of policy mandates assigned to the CBN could lead to

[1220] Chapter 2, Section 2.5.1.
[1221] Chapter 2, Section 2.5.1.

conflicts between regulatory functions or prioritising certain functions over others.[1222] Essentially, this can result in the CBN's inability to achieve the full spectrum of its designated policy objectives. Currently, the financial, operational, and staff resources of the CBN are depleted across multiple functions. If the CBN had fewer responsibilities, all these resources could be concentrated on those fewer functions.

It is noted that there are two possible options for addressing concerns about the numerous functions and lapses of the CBN in adequately paying attention to and discharging all of its mandates. The first option involves a more complex and resource–intensive approach, requiring the reallocation of some responsibilities from the CBN to another new regulatory body or existing body. This approach would alleviate the CBN's workload, allowing it to concentrate on more streamlined functions. The other option is to strengthen the CBN's internal capacity through staff training and recruitment.

It is proposed that the second option is a more viable short–term solution than the first. The complexities and potential challenges associated with reassigning roles to another regulator could lead to significant delays and uncertainties in the regulatory environment. In contrast, the second option can be more quickly implemented, allowing the CBN to focus on immediate improvements to its regulatory effectiveness. It is proposed that in the adoption of this second approach, the CBN can collaborate with other regulatory bodies to share the burden of overseeing regulatory functions that can be shared, particularly those related to financial stability oversight, financial crisis management, and consumer protection.

However, it is essential to acknowledge that in the long term, if the challenges of CBN's ineffectiveness persist, it may become necessary to explore more extensive structural adjustments, including the possibility of assigning some of the CBN's roles to an existing or new regulatory authority. Section 6.3.3 below discusses some considerations and proposals regarding this potential extensive structural change.

Finally, the Central Bank of Nigeria Act (CBN Act), which outlines the principal objectives of the CBN, does not specify consumer protection as one of its principal objectives. It is proposed that the CBN Act should be amended to give the CBN an explicit consumer protection mandate. This inclusion is necessary to ensure that there

1222 Chapter 4, Sections 4.4.1 & 4.5.1.

is no uncertainty regarding the CBN's obligation to promote consumer protection. It also provides a statutory basis for assessing the CBN's performance on consumer protection objectives.

6.3.1.4. Strengthening regulatory powers and independence of the supervisory capacity

Apart from regulatory coordination, another key area of supervisory capacity that was interrogated in this study is regulatory independence.[1223] To improve the supervisory capacity of financial regulators in the specific area of issuing regulations, the following recommendations are proposed:

(1) The powers of the Minister of Finance to approve as well as modify, amend, and rescind rules and regulations issued by the Securities and Exchange Commission (SEC) should be expunged from the Investment and Securities Act. This amendment will entrench the regulatory independence of the SEC and help ensure that political considerations and expediencies do not contaminate its regulatory efforts.

(2) Similar to the SEC, the powers of the Minister of Finance to approve regulations issued by the National Insurance Commission (NAICOM) should be expunged from the National Insurance Commission Act. This amendment will reinforce NAICOM's regulatory autonomy. Additionally, the National Insurance Commission Act should be amended to clearly state that guidelines and other subsidiary instruments issued by NAICOM possess the force of law. This amendment is required to avoid any uncertainties regarding the enforceability of these subsidiary instruments. The uncertainties come about because, unlike for regulations, the National Insurance Commission Act does not specify that guidelines require the Minister's approval.

(3) The Pension Reform Act should be amended to clarify that guidelines, rules, and other subsidiary instruments issued by the National Pension Commission (PENCOM) have the force of law. This amendment is necessary because guidelines and rules are not explicitly specified in the Pension Reform Act to attract penalties if contravened; only regulations are.

[1223] Chapter 4, Sections 4.4 & 4.8.

(4) Explicit legislative provisions and mandates concerning financial education and financial inclusion should be introduced into the governing laws of the financial regulators. Notably, financial regulators should not only be required to pursue financial inclusion and undertake financial education programmes. They should, in addition, be empowered to impose regulatory obligations on financial institutions regarding financial inclusion and financial education.

6.3.1.5. Improving the legislative regime for regulatory coordination

Nigeria's current institutional structure of financial regulation involves multiple financial regulators and non–core financial regulators. This multi–regulator structure has enabled regulatory overlap, inefficiencies, and challenges in achieving a unified and coherent approach to financial regulation. There is an urgent need to enhance regulatory coordination among the various financial and non–financial regulators to streamline regulatory efforts, reduce inefficiencies, and better address cross–sectoral issues.

Currently, the legislative provisions for regulatory coordination, as mainly comprised in sections 43 and 44 of the CBN Act, are both ineffective and inadequate for achieving these goals. It is, therefore, proposed that the CBN Act should be amended to improve the legislative framework for regulatory coordination between financial regulators and between financial regulators and non–core financial regulators. The following amendments are proposed:

(1) ***Making the FSRCC a committee of the CBN:*** The inactivity or ineffectiveness of the FSRCC may be attributed to the absence of a regulator that is accountable or responsible for ensuring that the committee is actively pursuing its objectives. It may, therefore, be valuable if one financial regulator assumes the 'big brother role' of housing and championing the activeness of the FSRCC. The FSRCC is the brainchild of the CBN. Further, as the regulator responsible for financial stability, the CBN should have interest in ensuring that the FSRCC is very active. In light of this, it is recommended that the FSRCC should be established as a committee within the CBN. However, in establishing the FSRCC as a committee of the CBN it is important the FSRCC retains its independence and is not accountable to the CBN. The accountability of the FSRCC should be a collective one, among the regulatory bodies constituting it.

(2) ***Legislative mandate to coordinate***: The only mechanism for regulatory coordination currently specified in the CBN Act is through the financial regulation coordinating body, which is the FSRCC. The problem with having only the financial regulation coordinating body as the basis for coordination is that if the representatives of the regulators in the FSRCC do not engage at the level of the body, there may not be another forum for salvaging weak regulatory coordination. It is, therefore, proposed that the CBN Act should be amended to expand the mechanisms or basis for regulatory coordination. The Act should introduce a general legislative mandate for financial regulators to cooperate and collaborate with each other. The areas that the financial regulators can be required to coordinate include, in pursuing their respective policy objectives, maintaining financial stability oversight, overseeing crisis management and resolution, consolidated supervision, and developing joint regulations and standards. Other areas are undertaking joint enforcement actions, sharing information, minimising the duplication of efforts and resources, attending international forums, and policy initiation.

(3) ***Mandate to enter a memorandum of understanding (MoU):*** Apart from the legislative mandate to coordinate, it is proposed that the CBN Act should be amended to mandate the financial regulators to enter a multilateral MoU with each other setting out the modalities for giving effect to the legislative mandate on regulatory coordination. The multilateral MoU should include annexures that will then set out specific regulatory coordination arrangements between specific financial regulators. Although the MoUs in themselves do not need to be binding, it should be stated in the CBN Act that the non–bindingness of the MoU does not negate the explicit regulatory coordination mandates of the regulators specified in the Act. Similar to the FCCP Act, it is important that the CBN Act specifies a timeline for the financial regulators to finalise the MoU and also incorporate mechanisms for dealing with any impasse on finalising the MoU. Further, there should be a requirement for the financial regulators to publish and periodically review the MoUs.

(4) ***Regulatory coordination mandate on non–core financial regulators***: The CBN Act should introduce a clear legislative mandate on non–core financial regulators whose functions are relevant to financial regulation to coordinate with

the financial regulators. The financial regulators and non–core financial regulators may also be required to enter MoUs to set out the modalities of their coordination.

(5) ***Membership of the FSRCC:*** Technically, the members of the FSRCC are not stated in the CBN Act to be the financial and non–core financial regulators represented in the FSRCC. Instead, it is the representatives that are members of the FSRCC. Additionally, the CBN Act does not provide for the ability of these representatives to appoint or designate alternates who can attend meetings in their stead. It is recommended that the Act should be amended to provide that the members of the FSRCC are the financial regulators and non–core financial regulators represented. Further, the representatives of these authorities in the FSRCC should be empowered to appoint alternates to attend meetings or discharge other roles on their behalf.

(6) ***Funding the activities of the coordination body:*** The CBN Act does not currently provide for who or how the operations of the FSRCC will be funded. It is recommended that given the CBN's role as the macro–prudential and consolidated bank supervisor, it should be responsible for funding the activities of the FSRCC. The CBN Act should also provide for the establishment of a secretariat for the FSRCC.

(7) ***Working groups:*** It is recommended that the CBN Act should be amended to provide for the powers of the FSRCC to establish working groups or sub–committees that will focus on key matters or aspects of financial regulation. The specific matters that the working groups may be set up to handle include, financial stability, crisis management and resolution, policy and legislation, enforcement, and financial technology/digital financial services. The FSRCC should be required to provide Terms of Reference specifying the members and mandates for any working group it establishes. It should be specified that it is not a requirement that a member of the working group must be from the authorities represented in the FSRCC. The FSRCC can co–opt members from the public sector, private sector, and academia.

(8) ***Expanding the membership and objectives of the FSRCC:*** Currently, the CBN Act would need to be amended for a new member to be admitted to the

FSRCC. The Act does not also clarify who or how the objectives of the FSRCC will be expanded. It is recommended that the CBN Act should be amended to provide for a flexible way to expand the membership and objectives of the FSRCC, which will not require amending the Act. For example, it can be provided that the members of the FSRCC can agree on the admission of new members as well as expanding the objectives of the committee. However, the Act should also specify the consideration for such admission and expansion.

(9) ***Meetings of the FSRCC and the working groups:*** The CBN Act does not currently specify how frequently the members of the FSRCC should meet. It is proposed that the Act should be amended to include the minimum number of times that members should meet as well as a general caveat that the financial regulators shall be required to meet more frequently as the circumstance demands. For example, during the times of financial crisis or other disturbances, the FSRCC or such other designated working group that is responsible for financial crisis management should meet as frequently as is needed until the problem has been addressed. The CBN Act should additionally require the FSRCC to establish Terms of Reference for their meetings to address issues including the chair of the meeting, secretary of the meeting, quorum of the meeting, and decision–making protocols.

(10) ***Accountability arrangement for regulatory coordination:*** The CBN Act does not currently specify any mechanism for holding financial regulators accountable for coordinating generally as well as under the FSRCC and the MoUs entered. It is proposed that the Act should be amended to include an obligation on the financial regulators to include in their annual reports the measures taken with regard to regulatory coordination. Further, the FSRCC should be required to engage the services of an independent firm to evaluate the regulatory coordination efforts of the financial regulators in terms of the different regulatory coordination mechanisms. The report of the firm should be submitted to the President, who shall, together with the Minister of Finance, be required to give policy directions on areas that require improvements. Additionally, the FSRCC should be required to issue annual reports on its activities and those of its different working groups.

(11) ***Conflict avoidance and resolution mechanisms:*** The CBN Act should be amended to outline various initiatives that regulators can explore in cases of potential overlaps and regulatory conflicts. These initiatives include providing for the designation of a lead regulator or requiring the development of joint regulations/standards.

(12) ***Legislatively provide basis for observer status members:*** The FSRCC currently includes certain members who have been granted observer status, such as the Nigerian Exchange Group (NGX), Nigeria Commodities Exchange (NCX), and Federal Inland Revenue Service (FIRS). However, this observer membership is not recognised by the CBN Act. To formalise this arrangement of admitting observer members, it is recommended that the Act should be amended to provide for it specifically. Additionally, the Act should clarify how observer members can be admitted and the limitations that apply to their FSRCC membership.

Finally, it is proposed that the Nigerian Financial Intelligence Unit (NFIU), Nigerian Data Protection Commission (NDPC), and Federal Competition and Consumer Protection Commission (FCCPC) should be added as members of the FSRCC.

6.3.1.6. Improving the efficiency of the institutional structure

In addition to improving regulatory coordination, it is recommended that implementing shared service arrangements while maintaining the financial regulators as separate legal entities can enhance economies of scale within Nigeria's institutional structure. Through a shared service arrangement, the financial regulators could, when feasible, collectively procure the use of the same infrastructure and specific support services instead of doing so independently. It is suggested that if the financial regulators are located in close physical proximity, such as within the same office building, it could foster a stronger culture of collaboration.

However, clear agreements and implementation protocols must be established to ensure that such shared service arrangements are effectively governed. These agreements should address issues relating to the responsibilities of each regulator, cost–sharing, procedures for resolving disputes, and concerns related to data security and privacy.

Additionally, it is crucial to conduct periodic assessments of the shared services arrangement to evaluate its effectiveness, identify areas for improvement, and ensure its ongoing alignment with the evolving needs of the regulators. Furthermore, the shared services arrangements should adhere to all relevant legal and regulatory requirements, including data protection, procurement rules, and other applicable laws.

6.3.1.7. Institute a procedure for continuous review of the soundness of the institutional structure of financial regulation

It is proposed that, apart from the assessment conducted under the Financial Sector Assessment Program (FSAP) by the IMF and World Bank, financial regulators should consider other options for consciously auditing the institutional structure and other frameworks for financial regulation. This is particularly important because the assessment by the IMF and World Bank under the FSAP does not occur regularly. For example, the last FSAP assessment for Nigeria took place nearly a decade ago, in 2013. The financial system is dynamic, and this dynamism necessitates continuous and regular evaluations and adjustments to the institutional structure and other frameworks for financial regulation to ensure their effectiveness. It is proposed that the review by Nigeria's financial regulators should be incorporated as part of the part of the CBN's financial stability report.

6.3.2. Reforms in relation to Fintech regulation specifically

6.3.2.1. Establishing a Fintech regulation coordinating body and updates to the National Fintech Strategy

It is proposed that Nigeria should establish a Fintech regulation coordinating body with the possible name of the Fintech Regulation Coordinating Committee (hereafter the 'Fintech Committee'). As discussed in Chapter 3, at least four key considerations underpin the establishment of a Fintech regulation coordinating body.[1224]

The first consideration relates to the establishment option for the Fintech Committee, which involves exploring whether: (1) the Fintech Committee should be established as a standalone body from the FSRCC, as South Africa has done with its Intergovernmental Fintech Working Group (IFWG), (2) the Fintech Committee should be established as a sub–committee of the FSRCC, or (3) the FSRCC's responsibilities

[1224] Chapter 3, Section 3.3.2.

should be expanded to include regulatory coordination functions related to Fintech without creating a sub–committee.

The three other considerations are (1) whether the Fintech Committee should be formally or informally established, (2) the membership of the Fintech Committee, and (3) the functions of the Fintech Committee. Suggestions for each of these considerations are explained below.

Regarding the option to be followed, it is proposed that the Fintech Committee should be established as a sub–committee of the FSRCC. Leveraging the established agreements, protocols, and structures of the FSRCC would streamline coordination efforts and reduce duplication of resources. However, ensuring that the Fintech Committee maintains sufficient autonomy and focuses on Fintech or digital finance matters is essential.

In terms of the formality of the Fintech Committee, considering the resource–intensive and time–consuming nature of formally establishing a Fintech regulation coordinating body through legislation, an alternative informal arrangement is proposed. An informal body would enable greater adaptability and flexibility in responding to developments in Nigeria's Fintech sector. It is proposed that the informal establishment of the Fintech Committee should be done under the National Fintech Strategy. Accordingly, the National Fintech Strategy (NFS) should be updated to recognise the need to establish the Fintech Committee and to actually establish it, with an indication of the members and functions of the Fintech Committee.

With regard to the membership of the Fintech Committee, similar to the institutional framework for the National Financial Inclusion Strategy (NFIS), the Fintech Committee should accommodate various groups of actors. These actors should include financial regulators; non–core financial regulators; government ministries, departments, agencies; industry associations, and technical advisors. The Fintech Committee should also have the ability to co–opt industry experts, think tanks, academics, law firms, and other private sector stakeholders to provide support in pursuing its mandate.

Specifically, the financial regulators, non–core financial regulators, and ministries envisioned to form part of the collaborative actors of the Fintech Committee are shown in the table below:

Financial regulators

- Central Bank of Nigeria
- Nigeria Deposit Insurance Corporation
- Securities and Exchange Commission
- National Pension Commission
- National Insurance Commission

Non-core financial regulators

- Corporate Affairs Commission
- Nigerian Financial Intelligence Unit
- Nigeria Data Protection Commission
- Federal Competition and Consumer Protection Commission
- Nigerian Communications Commission
- National Information Technology Development Agency
- National Identity Management Commission
- Federal Inland Revenue Service
- National Office for Technology Acquisition and Promotion
- Federal Inland Revenue Service

Ministries overseeing:

- Finance
- Communication
- Technology and digital economy
- Trade and investment

In terms of functions, a crucial function of the Fintech Committee should be that it should serve as the institutional body to drive the advancement of the objectives outlined in the National Fintech Strategy. Other functions of the body can include promoting effective communication and information sharing among regulators to ensure regulatory consistency. It can also contribute to developing well–informed Fintech regulations by conducting research, publishing papers, and driving initiatives for sector growth. Additionally, the Fintech Committee can house various Fintech institutional programmes, including an innovation hub, sandbox, stakeholder advisory body, and Fintech one–stop–shop. Further, the committee should be responsible for the ongoing review of the National Fintech Strategy.

It is acknowledged that although Nigeria does not currently have a tailored or specialised Fintech regulation coordinating body, there are other existing institutional bodies that provide a platform for coordination on other aspects that are also relevant to the Fintech ecosystem. One of the bodies is the Financial Inclusion Steering Committee (FISC), established pursuant to the NFIS, which provides for a platform coordination on financial inclusion issues. The other body is the National Council for Digital Innovation and Entrepreneurship (Council) established under the Nigeria Startup Act, which deals with technology start–up developmental issues.

Given the existence of these bodies, another possible option that can be explored is whether the roles of these bodies should be expanded to cover Fintech regulatory coordination concerns specifically. An obvious advantage of this expansion option lies in cost–efficiency through utilising existing resources. Leveraging the existing institutional arrangements can significantly reduce the overhead costs and administrative burdens associated with establishing an entirely new regulatory coordinating body. Furthermore, expanding the roles approach ensures cost–efficiency and enables quicker implementation, as Fintech regulation coordination issues can be built upon the foundation laid by the existing bodies.

The experience of setting up the institutional bodies for the NFIS also provides evidence that establishing a Fintech regulation coordinating body from scratch could entail some challenges. The FISC and FITC were inaugurated in January 2015, about 26 months after the NFIS was launched in October 2012. This significant delay has been attributed to the 'change of guard in the government and federal agencies in Nigeria.'[1225]

According to the Alliance for Financial Inclusion, the launch of the NFIS and the establishment of a fully staffed FIS should have occurred simultaneously.[1226] It further mentions that there was a lack of regular, appropriate, and sustained capacity building among all stakeholders.[1227] As a result, there was a lack of commitment and the necessary know–how required for implementing the NFIS.

However, it is proposed that there is no need to 'rock the boat' by expanding the roles of the FISC or the Council to cover Fintech regulatory coordination issues. There is the concern that expanding their roles will run the risk of diverting the focus of the bodies from the specific issues that they are already dealing with.

Separating the Fintech regulation coordinating body from these other existing bodies will allow for a clear delineation of responsibilities. It will also help to ensure that the various objectives involved are not diluted or conflicted. Accordingly, It is proposed that the FISC and FITC should focus on driving the objectives of the NFIS, the Council should centre on startup issues, and the Fintech Committee should concentrate on the objectives of the National Fintech Strategy and Fintech regulatory coordination issues.

However, it is further proposed that, while they should be separate, the work of these bodies should feed into each other. The bodies should maintain close collaboration

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1225 Alliance for Financial Inclusion *National coordination and leadership structure* (AFI Survey Report, 2017) 10.

1226 Alliance for Financial Inclusion (2017) 37.

1227 Alliance for Financial Inclusion (2017) 37.

and information–sharing mechanisms. To facilitate this, it is suggested that the FISC, FITC, as well as the Fintech Committee, should be subsumed as sub–committees of the FSRCC and have a reporting obligation to the FSRCC. Additionally, regulators should consider using the already established FIS to also serve as the secretariat for the Fintech committee, especially if the resources of the FIS can accommodate such a dual function. If not, then the secretariat of the FSRCC can simply also serve as the secretariat of the Fintech committee.

In the same vein, the National Fintech Strategy should be updated to address how the activities of the Fintech committee can be synced into the various initiatives of the Nigeria Startup Act. These initiatives, as discussed in Chapter 4, include the Startup Support and Engagement Portal, the Startup Consultative Forum, and the Startup Investment Seed Fund.[1228]

Finally, it is proposed that the National Fintech Strategy should be updated to categorise various Fintech activities and specify which regulatory authority will oversee the prudential and conduct of business regulations for firms engaged in these activities in accordance with extant laws. The Strategy should also identify the potential regulatory roles of various financial and non–core financial regulators in the Fintech sector. This will help ensure clarity in regulatory mandates.

6.3.2.2. Incorporating the use of self–regulatory organisations (SROs) for regulating moneylenders

It has been emphasised that a major justification for leveraging SROs to regulate Fintech activities is when public regulators are resource–constrained, and the Fintech activities in question are undertaken by dispersed and numerous Fintech startups.[1229]

The State regulatory authorities overseeing moneylenders engaged in digital lending appear to either lack the resources or technical know–how to address the myriad issues arising from the operations of these moneylenders. Additionally, the digital moneylending ecosystem in Nigeria continues to expand. Many digital loan service providers are choosing to operate under State regulatory regimes rather than obtaining licences from the CBN that typically subject them to more scrutiny.

[1228] Chapter 4, Section 4.2.2.
[1229] Chapter 3, Section 3.3.1.

In the absence of amendments to the Constitution placing moneylending business within the legislative competence of the National Assembly, it is proposed that the State regulatory authorities of the business should consider using SROs to complement their regulatory efforts. However, when adopting SROs for regulating moneylenders, it is essential to establish a regulatory framework as the foundation for such adoption. This framework should require firms engaging in moneylending to become members of designated SROs and comply with the standards issued by these SROs.

Also, the regulatory framework should clearly specify the objectives, functions, and powers of the SROs. These objectives and functions should align with the broader regulatory goals of the State regulator. Some objectives and functions that can be assigned to SROs include educating consumers, monitoring their members' compliance with regulatory requirements, reporting all cases of non–compliance to the public regulator, conducting training for their members, reporting their activities to the public regulator, regularly publishing information regarding the Fintech activities under their oversight, and funding their operations through contributions from members.

The SROs could also be required to establish a consumer complaint system and report all cases of complaints against members to the public State regulator. It is crucial to implement robust oversight mechanisms by the public regulator to monitor the regulatory activities of SROs and ensure they fulfil their regulatory obligations. This oversight should involve regular audits, reporting requirements, and transparency measures. Additionally, it is advisable that the SROs delegated regulatory powers adhere to strong corporate governance practices. This includes ensuring that the governing body of the SRO comprises representatives from various stakeholders, such as consumer advocates, independent experts, and even representatives from the public regulator. This diverse representation can prevent undue influence by any single group and mitigate the risk of capture.

Finally, SROs should only be given regulatory oversight obligations that are within their competence and appropriate for delegation. Notably, the licensing of service providers and pricing threshold for services are functions that the public regulator may need to retain. Generally, SROs should not be empowered to perform functions that the public regulator cannot delegate under the law. It may be necessary to amend the governing laws of public regulators to empower them to delegate their regulatory responsibilities to Fintech SROs.

6.3.2.3. Capacity building, staff recruitment and Fintech units

It is recommended that financial regulators, especially the CBN, which have not yet established dedicated Fintech units or departments within their organisational structure, should do so. However, in setting up such a department or unit, unlike the SEC, where the functions of its Fintech and Innovation Office seem limited to managing SEC's innovation hub programme, the Fintech unit can take on additional roles. These functions include, conducting research and policy analysis on Fintech, providing training and education to agency staff, exploring the application of Fintech to internal operations, managing sandbox programmes, supervising existing Fintech firms, facilitating inter–departmental coordination, and engaging in international coordination with other regulatory bodies.

Financial regulators can explore NDIC's cost–efficient approach to setting up their Fintech units. Instead of creating an entirely separate unit, which would have been more resource–intensive, the NDIC has integrated its Fintech and Innovations Unit within the existing Insurance and Surveillance Department. This approach allows the regulator to leverage the organisation's existing resources and expertise while still enabling a focused approach to Fintech–related matters. Additionally, to foster transparency and accountability, it is recommended that regulators implement routine public reporting on the activities of their Fintech units. Regular reporting would enhance stakeholders' understanding of the unit's initiatives, achievements, and contributions to the evolving Fintech landscape. This transparency not only promotes trust but also facilitates a shared understanding of the unit's regulatory efforts.

To ensure the necessary capacity to discharge their mandate, the staff of the Fintech unit should undergo continuous training. Their training should cover various aspects of Fintech, including Fintech activities, underlying technologies, and business models. To better manage budgetary concerns associated with external training, financial regulators can explore internal training, especially from more experienced or specialised staff of the Fintech unit. Financial regulators should also leverage free training from development institutions. It may also be necessary to recruit specialised staff for the Fintech unit to boost capacity, especially when such recruitment can be accommodated within available resources.

However, training should not be limited to only staff of the Fintech unit; it should be extended to staff from various other regulatory departments. This is necessary because traditional financial institutions are also adopting technology and using novel business models to deliver financial services. In fact, traditional financial institutions are considered a sub–category of Fintech firms.

6.3.2.4. Centralising the Fintech one–stop–shop, innovation hubs and regulatory sandbox programmes

It is proposed that, following a similar approach to the centralised Startup Support and Engagement Portal established under the Nigeria Startup Act, the Fintech innovation hubs of the regulators should be brought under one umbrella instead of being operated by the regulators in silos. It is suggested that the centralised virtual Fintech innovation hub should be established under the Fintech Committee. The Fintech units of the various financial regulatory institutions will be responsible for addressing inquiries relevant to their regulatory jurisdictions.

It is further proposed that the centralised Fintech innovation hub should double as a Fintech OSS. This way, not only will Fintech firms be able to access regulatory information from the hub, but they should also be able to utilise the platform for processing licence applications. It is also suggested that it will be important for the Fintech innovation hub to be linked to other hubs and OSS like the NIPC's Electronic One–Stop Investment Centre, as well as the Startup Support and Engagement Portal.

Apart from centralising the innovation hub, it is also proposed that the sandbox programmes of the various regulators should not be operated in silos; they should be interconnected. Given that financial regulators currently operate separate regulatory sandboxes, each governed by distinct frameworks, establishing a centralised sandbox under a single umbrella may prove challenging. Nevertheless, it is feasible to create a unified entry point for sandbox testing, particularly for Fintech activities that span multiple regulatory domains. This consolidated entry point can also be established within the Fintech Committee.

Generally, the more integrated approach of establishing the Fintech innovation hub and sandbox programmes offers several benefits. First, it helps to optimise the resources of the different financial regulators. Secondly, it facilitates cross–sectoral collaboration, enabling a more holistic approach to Fintech monitoring and regulation. With an integrated approach, it will be easier to identify cross–sector trends, risks, and issues that might be missed in separate innovation hub and sandbox programs. Thirdly, it provides an avenue for the regulators to learn from each other. Furthermore, an integrated approach will simplify market entry for Fintech firms that deliver activities that cut across multiple sectors. Lastly, integration enhances regulatory coherence and limits inconsistencies.

Another institutional initiative that can be centralised under the Fintech Committee is the stakeholder advisory body, taking a cue from the similar arrangement of the Startup Consultative Forum established under the Nigeria Startup Act. Sub–groups can then be formed to address specific objectives or the needs of each regulator. This approach is necessary to avoid duplication of efforts and ensure a consolidated regime for regulatory engagements between regulators and the Fintech ecosystem.

However, it is acknowledged that financial regulators would need to allocate resources and manpower to manage the operations of the stakeholder advisory body, whether it is centralised or established separately by each regulator. Given these issues, regulators have the option to explore other less complex options. These options include conducting public consultations, releasing draft regulations for comments, or establishing advisory bodies on a case–by–case basis. These options allow for coordination among regulators and industry stakeholders without the prolonged financial and organisational commitments linked to establishing a long–term advisory body.

Whether policymakers choose a separate advisory body or explore other alternatives, the crucial factor is that the institutional structure should incorporate a platform that fosters engagement and collaboration between financial regulators and the Fintech ecosystem. Generally, when considering stakeholder support, it is crucial for regulators to establish appropriate mechanisms to prevent the stakeholder advisory body from being captured by regulated firms. To ensure that an advisory body remains independent and effective in serving the public interest, several key strategies can be employed.

First, it is essential to establish a diverse composition within the advisory body, including a wide range of stakeholders beyond just regulated firms. This diversity brings various perspectives and reduces the risk of undue influence by any single interest group. Secondly, there should be term limits, rotations, and transparent disclosure of potential conflicts of interest among members. Thirdly, there should be regular evaluations, independent oversight, and legal safeguards to ensure checks and balances to maintain the body's independence and effectiveness. Importantly, the establishment of stakeholder advisory bodies should be backed by a Terms of Reference that addresses these various issues and also outlines the members, responsibilities, and other issues pertaining to the administration of the body.

6.3.3. Long–term reform consideration: Changing the institutional structure

The option of changing the institutional structure to another model is not entirely ruled out. In this regard, it is submitted that it may be necessary and justified for policymakers to consider changing the current institutional structure in the long term. This consideration becomes especially relevant if, after implementing the piecemeal reforms outlined in Sections 6.3.1 and 6.3.2 above, the institutional regime still exhibits significant flaws that pose risks to the stability, functioning, and development of the financial system.

Furthermore, changing the institutional structure could be deemed justifiable if Nigeria finds itself in a stronger and more stable economic position and there is a need to align the institutional structure with future developmental goals. Therefore, the rationale for changing the institutional structure is not solely rooted in the necessity to navigate or escape regulatory challenges that the existing structure is vulnerable to. Importantly, in changing the institutional structure, it is essential that there are adequate financial resources and capacity to implement the reform.

It is acknowledged that it may be too pre–emptive to determine the alternative model that Nigeria should switch to when changing the institutional structure is necessary and justified. This is because the more appropriate model should be determined by the various factors that exist at such a time when the structural overhaul is contemplated. However, it is suggested that the partially unified model is one model that policymakers and regulators should give keen attention to while also exploring other alternative models.

The partially unified model is particularly promoted on the premise of Nigeria still struggling with similar institutional inadequacies like it does presently, especially in terms of weak regulatory coordination for financial regulation and Fintech regulation. Under the proposed partially unified model (as shown in Figure 8), the NDIC should be subsumed as a department under the CBN. In addition to the deposit insurance role, the responsibilities of the CBN would be refocused on regulating banks, ensuring financial stability, implementing monetary policy, and overseeing the national payment system. However, the CBN's current regulatory oversight over other financial institutions (OFIs) should be withdrawn. The CBN's currently structured silos department that oversees OFIs will then be moved to form part of a new partially unified regulator to be established.

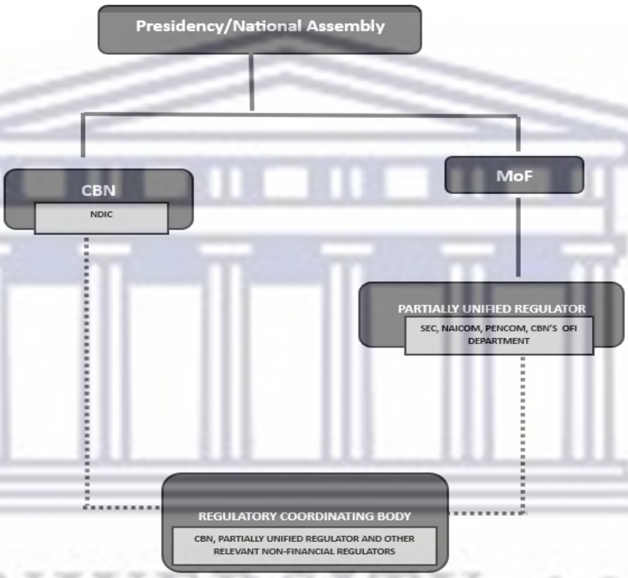

Figure 8: Proposed partially unified model[1230]

Apart from overseeing OFIs, the partially unified regulator would be responsible for supervising insurance companies, pension funds, and the securities market. Essentially, the formation of the partially unified regulator would involve consolidating various existing regulatory bodies, such as the SEC, NAICOM, PENCOM, and CBN's OFIs department. The consolidation of the SEC, NAICOM, PENCOM, and CBN's OFIs department relate to the institutional integration aspect of the reform.[1231] This aspect will require amending relevant financial sector laws. Notably, the following financial sector laws will need to be amended to reflect certain changes:

[1230] Developed by author.

[1231] See Chapter 2, Section 2.6.1.

(1) CBN Act to revise the membership of the FSRCC to reflect the partially unified regulator as a member and remove the regulators that will no longer exist following the reform.

(2) CBN Act, and Banks and Other Financial Institutions Act to restrict CBN's jurisdiction to only banks and specify that the partially unified regulator will have micro–prudential and conduct of business jurisdiction over non–bank financial institutions/other financial institutions.

(3) Investment and Securities Act to substitute SEC with the partially unified regulator.

(4) Insurance Act, and National Insurance Commission Act to substitute NAICOM with the partially unified regulator.

(5) Pension Reform Act to substitute PENCOM with the partially unified regulator.

These amendments can be achieved through an omnibus legislation that establishes the partially unified regulator, effects the necessary amendments to all impacted financial sector laws and specifies other relevant provisions pertaining to the new structure. This approach is similar to the one adopted by South Africa through the Financial Sector Regulation Act when adopting the twin peaks model.

Apart from institutional integration, there are two other aspects of the reform.[1232] There is technical integration, which involves the unification or convergence of the supervisory toolkits used, such as models, processes, and policies of the consolidated regulators. Lastly, there is organic integration, which includes unifying the regulatory rules, principles, and standards. It is also important to unify the regulatory culture and philosophy to align with the new structure.

Additionally, a financial regulation coordinating body would be established to facilitate effective regulatory cooperation, consisting of members from the CBN, the partially unified regulator, and other key non–core financial regulators. To cater to the needs of the Fintech sector under the new model, the partially unified regulator should have a separate department within its organisational structure dedicated to Fintech issues. Also, a sub–committee within the financial regulation coordinating body should focus on Fintech.

[1232] See Chapter 2, Section 2.6.1.

The partially unified model integrates of the benefits both the sectoral model and fully unified model. It retains some elements of sectoral specialisation, allowing for focused oversight and expertise within specific financial sectors. However, it also introduces a level of coordination and integration among regulatory bodies to reduce the limitations inherent in a purely sectoral approach. The partially unified model may generally facilitate economies of scale as well as minimise the risks of regulatory overlap and coordination failures better than the sectoral model. By striking a balance between the sectoral model and the fully unified model, the partially unified model is a better alternative to the fully unified model.

The preference for the partially unified model over the twin peaks model is based on the following factors that support its alignment and possible suitability within the Nigerian context. First, financial regulators in Nigeria have traditionally operated under an institutional structure that allows them to combine prudential and conduct of business regulation functions.

Transitioning to the twin peaks model, where financial regulators focus on only one aspect, could introduce operational complexities, especially at the early stages of its implementation. It is submitted that partially unified model preserves the ability of the regulators to capitalise on existing practices, specialisation and expertise.

Secondly and closely related to the first point, Nigeria's institutional structure has historically embraced regulation based on the type or legal status of the regulated firm and a functional approach, as opposed to following the prescripts of regulation–by–objectives approach inherent in the twin peaks model. In this sense, the partially unified model aligns better with Nigeria's historical approach of regulation. It is opined that this can facilitate a smoother transitioning and minimises the need for significant structural adjustments.

Thirdly, Nigeria's financial system is deeply interconnected. The sectors of banking, insurance, pensions, and securities are interwoven through financial holding financial conglomerates. The partially unified model is well–suited for such an integrated financial system. Fourthly and very importantly, the process of reorganising Nigeria's institutional structure into a partially unified model is likely to entail fewer complexities and costs compared to adopting the twin peaks model.

Consolidating existing regulators into a partially unified regulator is likely to be more straightforward than realigning them based on policy objectives/regulatory functions. Additionally, the unified model offers opportunities for fostering regulatory coordination and economies of scale, which are the major challenges that Nigeria's institutional structure is grappling with. Lastly, the influence of previous policy endorsements cannot be overlooked. As mentioned earlier, the Presidential Steering Committee on Global Financial Crisis endorsed the adoption of the unified model. Implementing a model close to what has previously received policy endorsement may be more feasible than introducing an entirely novel approach lacking such support.

However, it is acknowledged that reforming the institutional structure is not a linear process; it is, more appropriately, an iterative process. If the proposed partially unified model does not provide the needed results when implemented, there may be a further need to consider piecemeal reforms to the model. There may even be the further need reform the partially unified model in terms of adopting another model like the twin peaks model. If the twin peaks model is to be adopted, the CBN could be transformed into the prudential regulator while the partially unified regulator will be the market conduct regulator. As was done by South Africa and even the United Kingdom, it may generally be easier to transition from the partially unified model to the twin peaks model than from the sectoral model to the twin peaks model.

6.3.4. General reform implementation guide

The process of introducing reforms to the institutional structure, whether through piecemeal adjustments to the existing structure or transitioning to an entirely different structure, requires careful planning and execution. This process should commence with a thorough analysis of the existing structure, identifying its strengths, weaknesses, and areas for improvement. This analysis serves as the foundation upon which a comprehensive policy document can be developed.

The policy document plays a pivotal role in guiding the entire reform process. It should address various considerations, including the challenges, costs, and risks associated with restructuring the institutional structure. By anticipating potential obstacles, policymakers and regulators can devise effective strategies to mitigate these challenges. In essence, the policy document becomes a roadmap, outlining the objectives of the reform, the methodologies to be employed, and the safeguards put in place to ensure a smooth transition.

Further, it is suggested that instead of amending each of the financial sector laws separately to implement the legislative amendments proposed in Section 6.3.1, an omnibus legislation could be used. An omnibus legislation is one that is used to introduce amendments to multiple existing laws simultaneously. This approach streamlines the legislative process, preventing the need for piecemeal amendments and ensuring a cohesive implementation of reforms. The practice of using one legislation to effect amendments to various legislations is not foreign to Nigeria, as exemplified by the Business Facilitation (Miscellaneous Provisions) Act 5 of 2022. This particular legislation was used to amend as many as 21 laws.

6.4. AREAS FOR FURTHER RESEARCH

There are several potential areas for further research that can be identified from the findings, arguments and recommendations from this study. Notably, as earlier mentioned, research can be conducted to critique the conceptual frameworks advanced by the study. Research can also be undertaken to identify other requirements for the effectiveness of the institutional structure for both financial regulation and Fintech regulation that may not have been covered. Other areas are also follows:

(1) ***Quantitative research:*** This study is qualitative, and as such, some of the identified challenges and reform proposals may have been influenced by the author's subjective perspective. Quantitative research may, therefore, be conducted to gain insights into on–ground and stakeholders' views on the proposed regulatory reforms, their perceived advantages and concerns and suggestions for further improvement. The stakeholders contemplated include regulators (both financial and non–core financial regulators, as well as regulators at the State level), financial institutions, Fintech startups, academics, and industry experts.

(2) ***Effectiveness of the organisational structure of financial regulators:*** This study has shown that, on paper or formally, the financial regulators have specialised departments/units that deal with the micro–prudential and conduct of business aspects of their regulatory functions. Research could also be conducted to provide quantitative results on whether the current organisational structure of financial regulators has, in practice, guaranteed or produced a balanced focus

on micro–prudential and conduct of business regulatory functions or whether one of these aspects is being sidelined.

(3) ***Presence of necessary supervisory capacity:*** The study mainly focused on the adequacy of the rulemaking powers of the financial regulators and the effectiveness of regulatory coordination, and an assessment of these requirements showed several gaps. However, apart from sound rulemaking powers and regulatory coordination, there are other aspects of supervisory capacity. Research could be conducted to interrogate the adequacy of Nigeria’s legislative frameworks for addressing these other elements of supervisory capacity, including in relation to independence, accountability, regulatory culture and regulatory philosophy.

(4) ***Consumer protection in financial regulation:*** Research could be conducted to explore the impact of granting concurrent consumer protection jurisdiction to the CBN and the FCCPC. This research could assess the suitability or otherwise of such measures in safeguarding consumer interests. The study should also identify the challenges posed by such a regime of concurrent jurisdiction between the CBN and FCCPC and possible measures for addressing them.

(5) ***Regulatory sandboxes and innovation hubs:*** Research can be conducted to analyse the impact of harmonising regulatory sandboxes and innovation hubs of different financial regulators under a centralised body, as proposed by this study. The research could explore the suitability of such consolidation in enhancing regulatory efficiency, coordination and promoting the growth of Fintech. It could also make a determination of whether the innovation hubs and sandboxes are best left separately within each financial regulator as they currently exist.

(6) ***Consolidation of financial regulators:*** Research can be conducted to examine the implications, benefits and challenges of consolidating financial regulators to form a partially unified regulator, as proposed by this study or whether another model is better. Research could also delve into the practical steps required for successful consolidation, the potential impacts on regulatory effectiveness, and the legal and institutional changes needed to facilitate the transition.

6.5. FINAL REMARKS

Technological advancements have repeatedly proven to be an inevitable trend in our world. The manifestation of technological progress in today's financial system is now conceptualised under the umbrella of 'Fintech.' In the face of the rapidly evolving Fintech landscape, the lessons from previous financial system developments resonate clearly: the institutional structure and other frameworks for financial regulation must not remain stagnant. These frameworks must align with the new landscape.

This study has justified and emphasised the importance of rethinking Nigeria's institutional structure of financial regulation, considering the opportunities and challenges posed by Fintech and other developments in the financial system. The gaps identified by the study within Nigeria's current structure (along with its supporting legal frameworks) present significant opportunities for improvement. It is crucial for policymakers and regulators in the country to take proactive steps in implementing the reforms recommended by the study.

The proposed reforms will contribute to establishing a more resilient and adaptive institutional regime that supports the growth and development of Fintech in Nigeria. They will not only enable financial regulators to better regulate and supervise Fintech but will also create an enabling institutional environment for the Fintech sector to thrive. Furthermore, the proposals will help Nigeria enhance its financial regulatory regime and position itself as a leader in Fintech regulation on the African continent. This goal aligns with the vision outlined in the National Fintech Strategy and other policy documents.

Although the study has mainly focused on the Nigerian context, its implications and usefulness extend far beyond the country's borders. The findings and recommendations of this study can serve as a valuable reference for policymakers and regulators in other African countries dealing with challenges similar to Nigeria's in regulating Fintech and undertaking financial regulation. This is especially pertinent for African countries employing the sectoral model for designing institutional structures, a common approach in the region.

In all, as Fintech markets continue to evolve globally, it is essential for policymakers and regulators to adapt and develop effective institutional structures that can support unlocking the opportunities of Fintech and mitigating its risks.

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