

Digital Contracts and the protection of the vulnerable in financial services

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Project Description:

Financial service firms and services are becoming ever more embedded in the digital world. Bank branches are closing, mobile banking is increasing and the vulnerable are often being underserved by the industry.

Vulnerability comes in different forms, the FCA defines vulnerability as; “someone who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care” (FCA 2020). It is estimated that more “than 24 million people display one or more potential characteristic of vulnerability...with over one million [receiving debt advice last year”, (FCA, PR, 2020). With a growing number of people becoming indebted and the increase of online financial transactions, are the vulnerable able to understand the financial contracts that are on offer? Are digital contracts drafted to avoid exploitation of the vulnerable? With financial services becoming based more online this often excludes the vulnerable. Often consumers who are vulnerable also have poor capability skills such as digital skills, (FCA, 2020, p. 9-10).

Along with questions of digital exclusion, issues surrounding the readability of contracts, especially standard form contracts continue to pose problems. Contracts tend to be written in standard form, and appear in a multitude of circumstances, often without any real thought being given to legal obligations by the vulnerable. In situations where characteristics of vulnerability exist, the readability of contracts pose additional barriers, and compound other issues such as a lack of digital skills. Readability – taken to mean the complexities of words, texts, and sentences when assessed through readability formulas – is often compounded by the lack of Plain English (<http://www.plainenglish.co.uk/>) used in legal documents, and standard form contracts. Does the combination of these issues make contractual misunderstandings, and contractual exclusion more problematic for the vulnerable?

Distance financial services are regulated by the EU rules on distance marketing and provide consumer rights. Do these rights ensure that financial services contracts are appropriate for these 24 million consumers? Is the law ensuring that consumers are not entering into financial contracts which in turn leads to more consumer debt?

What happens when financial contracts change during the course of a term? The European Court of Justice decision in *KH v Sparkasse Sudolstein*, Case C-639/18 where the court was asked to interpret the meaning of distance contracts as set out in Article 2(a) of the Distance Marketing Directive (DMD) (2002/65/EC) and whether a change in contract would fall under the DMD 2002. What are the repercussions for the vulnerable?

Digital contracts offer consumers benefits as well, with new and innovative forms of finance. How can financial firms ensure inclusion for all? Where does the regulatory burden lay? What happens when consumers are not digitally included but financial services are solely digital? (FCA, OP, 2015, p. 38, 48).

Further legislation to consider is the Equality Act 2010 and in particular S20 which prevents consumers from being subject to unlawful discriminations due to certain protected characteristics. The section is anticipatory and as such requires firms to anticipate and put in place systems and controls which prevent discrimination.

The PhD welcomes appropriate forms of methodology which can be shown to investigate the students project meaningfully. Approaches such as qualitative and empirical will be considered.

About the Supervisors:

Dr Kim Barker is a Senior Lecturer in Law, with a supervisory experience across a range of commercial and contract law topics. Her research focuses on elements of digital contracting, along with regulation & control of online multi-user platforms including online environments (particularly online games and social media sites); and the intersection between user responsibility, platform provider responsibility and legal regulations. Kim has published and presented widely on issues associated with contractual and online regulation.

Dr Clare Jones is a Senior Law Lecturer in the Law and has significant supervisory experience in the field of banking and finance law, with a specialism research of financial exclusion. Her interests also lay in technology (virtual worlds and game play) and with emphasis on social justice. Clare has published research prolifically and has spoken nationally and internationally in these areas.

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The Financial Services (Distance Marketing) Regulations 2004

Distance Marketing of Financial Services Directive 2002/65/EC

Equality Act 2010