

THE REGULATION OF MOBILE MONEY IN MALAWI

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INTRODUCTION

Mobile money describes the use of mobile phones to pay bills, remit funds, deposit cash, and make withdrawals using e-money issued by banks and non-bank providers such as telecommunication companies. This service currently exists in over 80 developing countries and is growing rapidly, particularly in Africa. It is enabling many people without access to financial services—known as the unbanked—to access an increasing range of financial services, from payments, to savings and loans.

Mobile money enables customers to use e-money, which is issued by an ‘e-money issuer’—usually a telecommunication company but sometimes a bank. While precise terminology tends to vary across countries and literature, e-money is typically defined as a type of stored value instrument or product that: (i) is issued on receipt of funds; (ii) consists of electronically recorded value stored on a device such as a server, card, or mobile phone; (iii) may be accepted as a means of payment by parties other than the issuer; and (iv) is convertible back into cash.¹ The concepts of stored value and convertibility distinguish e-money from credit cards, retail gift cards, airtime, and other payment instruments that are not readily convertible. Customers can make payments and transfers by sending short message service (SMS) mobile notifications to each other. E-money accounts are credited when e-money is received from others and debited when payments are made. Customers convert their cash for e-money at cash merchants, which tend to be retail outlets such as shops and petrol stations. These customers can then use this e-money to make payments to each other and can later convert any remaining balance on their e-money account for cash.²

Mobile money was launched in Kenya in 2007, and has grown very rapidly throughout many

developing countries, particularly in Africa. Between 2007 and 2013, mobile money grew from nothing to a thriving sector with 219 live mobile money services with 61 million active accounts in 84 countries.³ In the month of June 2013, mobile money customers performed 431 million transactions totalling \$7.4 billion.⁴ There are more registered mobile money accounts than bank accounts in nine countries and there are now 886,000 registered agents.⁵

Mobile money creates novel regulatory challenges because it enables a variety of non-banks to perform functions traditionally provided by banks. In particular, mobile network operators (MNOs) are increasingly providing payment services with little direct involvement of banks. Retail outlets such as shops and petrol stations are serving as 'cash merchants' that enable customers to convert their cash for e-money and vice versa, a conversion function traditionally provided by bank branches or automatic teller machines (ATMs). Prudential regulation is generally designed for traditional banking institutions and therefore cannot be easily applied to these non-banking service providers because they do not intermediate deposits. This raises the question of how mobile money service providers should be regulated.

Regulatory frameworks need to respond to mobile money in two particular ways. First, regulators need to take an 'enabling approach', which involves a variety of activities that aim to help mobile money to grow safely. For example, in designing mobile money-related policy and regulation, a regulator should work closely with government departments (particularly those that relate to finance and development), regulators from other sectors (particularly telecommunications), and the mobile money sector.

Second, regulators need to adopt a 'proportionate approach' when designing regulation. This means the costs of regulation to the regulator, market participants, and consumers should be proportionate

¹ Claire Pénicaut & Arunjay Katakam, *State of the Industry 2013: Mobile Financial Services for the Unbanked*, GSMA 16 (Feb. 2014), http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2014/02/SOTIR_2013.pdf.

to the benefits and risks of mobile money. A proportionate approach aims to guard against overly burdensome regulation that may stifle the development of this sector.

This article explores the challenges of translating an enabling proportionate regulatory approach into actual regulatory practices and substantive rules, using Malawi as a case study. In doing so, the article aims to enrich our understanding of how we can design effective regulatory frameworks for mobile money.

The article is in five parts. Part 1 introduces mobile money and the research surrounding the enabling approach and proportionate regulation. Part 2 of this article provides background on mobile money in Malawi. From there the article examines the practical challenges Malawi has faced in using an enabling approach and implementing proportionate regulation. Part 3 examines Malawi's efforts at using an enabling approach, focusing on co-ordination among regulators and between regulators and industry, regulatory mandates, and understanding and building consumer demand for mobile money. Part 4 explores Malawi's efforts to (i) implement proportionate regulation in relation to the use of agents, (ii) apply a risk-based approach to implementing anti-money laundering/countering the financing of terrorism (AML/CFT), (iii) protect customers' funds, and (iv) regulate partnerships between MNOs and banks. Part 5 concludes by explaining how Malawi's experiences enrich our understanding of how regulators can use best practice approaches such as an enabling approach and proportionate regulation to design effective regulatory frameworks for mobile money.

I. MOBILE MONEY—A NEW FRONTIER OF FINANCIAL SERVICES

A. *The Promise of Mobile Money: Tackling Financial Exclusion*

Mobile money is an important tool for poverty reduction because it offers a means of addressing the impasse that exists between banks and poor households. Many banks do not find it economically attractive to make banking infrastructure and financial services available in poor communities.² This is

² Claire Alexandre, Ignacio Mas and Daniel Radcliffe, *Regulating New Banking Models That Can Bring Financial Services to All*, 54(3) *CHALLENGE* 116, 118 (2010).

because high transaction costs relative to small transaction value sizes make it unprofitable for banks to service this population.³ Similarly, poor people can be reluctant to access formal financial services due to the inconvenience and high cost involved in accessing these services relative to the more local and informal alternatives they have traditionally used, as well as issues of mistrust of formal banking institutions.⁶

For this reason, around 2.5 billion adults are currently excluded from the formal financial system and are subject to ‘financial exclusion’.⁷ This group tends to be described as the ‘unbanked’.⁸

Providing the unbanked with access to financial services, known as ‘financial inclusion’, is now recognised as an important mechanism for alleviating poverty and promoting a country’s broader economic development.⁹ Financial inclusion aims to provide the unbanked, and low-income households and business more generally, with a range of financial services that they can use to smooth their consumption and insure themselves against ‘economic shocks’, such as illness, accidents, theft, and unemployment.⁴ An economic shock can be severely detrimental to the unbanked’s already precarious financial position, making it more difficult for them to move out of poverty. In many developing countries, economic shocks can take a wide variety of forms beyond traditional financial or economic crises; they can also be health-related emergencies, crop failures, livestock deaths, and farming-equipment expenses.¹⁰ Financial inclusion also aims to assist the unbanked and low-income groups to save and borrow which in turn can enable them to invest in education and asset-generating activities, such as enterprises.¹¹

Proponents of mobile money argue that by using this service, particularly in its payments form, poor households can shift away from informal to formal financial services and reduce their reliance on cash.¹² Furthermore, once customers begin using mobile money, they can move from payments to accessing a range of other financial services such as deposits and loans. Early evidence of usage patterns

³ *Id.*

of mobile money services provides credence to this view; however, many schemes are still in their infancy.¹³ For example, tentative evidence from Africa suggests that customers are beginning to use e-money as a form of savings by storing their cash with a mobile money provider (Provider).¹⁴ Customers can later withdraw that money from the Provider in a manner similar to withdrawing money from a bank.

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Customers are also using mobile money to access regular savings and loans provided by banks, primarily through partnerships between MNOs and banks or microfinance institutions (MFIs) (MNO-bank/MFI partnerships).⁶ A particularly well-established MNO-bank/MFI partnership operates in Kenya between Safaricom (a Vodafone subsidiary), which provides a mobile money product called 'M-Pesa', and the Commercial Bank of Africa (CBA).⁷ Collectively, Safaricom and CBA provide 'M-Shwari'.¹⁵ This product works in the following way: M-Shwari customers can access savings by transferring funds from their mobile money account with Safaricom to a linked bank deposit provided by CBA.⁸ Customers can also access loans through M-Shwari as Safaricom stores information on the payment history of customers of its M-Pesa product, and determines a credit score based on that history.¹⁶ The CBA then uses this score to assess the creditworthiness of customers¹⁷ and to provide loans to customers deemed creditworthy.⁹ 'Good' borrowers are also able to graduate and access larger loan facilities.¹⁸ Similar

⁶ Examples are provided in subsequent paragraphs.

⁷ Vodafone Media, *Safaricom Launches M-Shwari - Offering Interest and Loans - On M-Pesa*, VODAFONE (Nov. 2012), <http://www.vodafone.com/content/index/media/vodafone-group-releases/2012/m-shwari.html>> .

⁸ *Id.*

⁹ Simone di Castri, *Tiered Risked-Based KYC: M-Shwari Successful Customer Due Diligence*, GSMA (Jul. 8, 2013), <http://www.gsma.com/mobilefordevelopment/tiered-risk-based-kyc-m-shwari-successful->

partnerships exist in Ghana, Tanzania, and Malawi.¹⁹

B. The Regulatory Challenge: An Enabling Approach and Proportionate Regulation

As an area that currently operates largely outside the regulatory protections of traditional banking services, mobile money generates a variety of risks which raise the question of how the sector should be regulated. For example, in May 2012, it emerged that employees of Telco MTN Uganda had stolen around \$3.5 million from an account used to store cash which had been incorrectly sent through its mobile money service.²⁰ Further, in January 2014, Safaricom blacklisted 140,000 users after they defaulted on their M-Shwari loans.²¹ As mobile money continues to grow, mobile money providers will hold ever larger amounts of customers' funds. The loss of such funds will have a greater impact on the local economy and cause increased economic hardship to individual mobile money account holders, undermining the objective of broadening financial inclusion. It may also increase the costs of using mobile money services as losses will be passed on to customers, which may also undermine its use in banking the unbanked.

Existing financial system and banking regulations are unlikely to be directly appropriate to mobile money systems because they are aimed at financial institutions, particularly banks, rather than the MNOs and cash merchants that are central to mobile money. Two concepts have been identified as particularly important to developing the effective regulation of mobile money.

1. An Enabling Approach

The first is an enabling approach in relation to regulatory objectives and activities. In established banking markets, regulators are in general required to monitor and reduce risks caused by the activities of banks and other financial service providers.¹⁰ In contrast, in many countries in which mobile money is operating, regulators are also assigned the objective of extending banking and financial services to poor

customer-due-diligence.

households, particularly the unbanked, or, in other words, of promoting financial inclusion.¹¹ This regulatory objective is becoming increasingly common: regulators and central banks in over 60 countries have either a dedicated financial inclusion strategy, financial inclusion as part of their institutional mandate, or a dedicated financial inclusion unit in their regulatory institution.²² Examples include Malaysia, Nigeria, Brazil, and India.²³ The mandate of financial inclusion is usually aligned with and pursued in tandem with efforts to achieve financial stability, integrity, and consumer protection because they are seen as complementary objectives.¹²

In order to promote financial inclusion, regulators are encouraged to engage in an ‘enabling approach’ to designing regulatory arrangements that are required for mobile money to develop. This differs from the traditional role of regulators, particularly central banks.²⁴ An enabling regulatory approach aims to permit market players to explore different outsourcing arrangements and products in order to provide an environment in which innovation and growth are encouraged.²⁵ An example of an enabling approach to regulation involves a regulator—particularly a banking regulator or central bank—extending its mandate to include mobile money and then working with government ministries, the mobile money sector, and regulators from other sectors, particularly telecommunications, to build understanding of the sector and to foster consumer demand for mobile money.¹³ As Alfred Hannig, the Executive Director of the Alliance for Financial Inclusion, an organisation consisting of regulators from 90 countries, noted in November 2013, this changing role of central banks, particularly in emerging countries, is “reshaping the approach of central banking”.²⁶

¹³ Pierre-Laurent Chatain et al, *Protecting Mobile Money Against Financial Crimes: Global Policy Challenges and Solutions*, WORLD BANK 112 (2011), <https://openknowledge.worldbank.org/bitstream/handle/10986/2269/600600PUB0ID181Mobile09780821386699.pdf?sequence=1,...>

2. *Proportionate Regulation*

The second issue relates to the substantive content of the regulation. Generally, a proportionate approach is encouraged, in which “the costs to the regulator, the institutions, and the consumers are proportionate to the risks being addressed, taking into consideration as well the anticipated benefits”.²⁷

Proportionate regulation is seen as crucial for markets in the early stages of development where innovation and growth in financial services and products promise greater financial inclusion. A proportionate approach to regulation is important in enabling banks, MNOs, and cash merchants to work together to serve poor households on a profitable basis in these markets and to expand services.²⁸

C. *Malawi: Implementing an Enabling Approach and Proportionate Regulation*

Malawi provides a useful case study of a country seeking to implement these approaches. The mobile money sector in Malawi is relatively new as it was launched only in early 2012, and Malawi is therefore facing the same market and regulatory challenges that are confronting other countries.¹⁴ In doing so, regulators in Malawi, particularly the Reserve Bank of Malawi (RBM), have adopted an enabling approach and proportionate regulation. Malawi’s experiences in the development of the mobile money sector and its regulation therefore provide insight into the practical challenges involved in implementing this approach.

This paper draws on a broader study that examined the mobile money market and its regulation in Malawi.¹⁵ Link to Study might be good (currently at endnote 32). This study’s objective was to assist the

¹⁴ See Claire Alexandre and Lynn Chang Eisenhart, *Mobile Money as an Engine of Financial Inclusion and Lynchpin of Financial Integrity*, 8 WASH. J.L. TECH. & ARTS 285, 296 (2013) for a discussion of number of the pressing market and regulatory challenges in mobile money.

¹⁵ Jonathan Greenacre, Louise Malady & Ross Buckley, *The Regulation of Mobile Money in Malawi Project Report*, (Mar. 2014), http://www.clmr.unsw.edu.au/sites/default/files/attached_files/the_regulation_of_mobile_money_in_malawi_project_report.pdf [hereinafter *Malawi Report*].

development of an enabling legal and regulatory environment for market players and end-users in Malawi's mobile money space, thereby encouraging that space to grow and develop. Link to study would be good here. To do so, the study undertook desk-based research which followed methodology established by the Consultative Group to Assist the Poor (CGAP) for its Branchless Banking Diagnostic Template (CGAP Template).²⁹ The research team updated the CGAP Template to reflect recent policy developments on mobile money regulation and to focus on four specific issues being examined by the authors' broader international mobile money research project.³⁰

The study also reviewed existing reports detailing recommendations for mobile money in Malawi. Link might be good here to study. These reports included: USAID, *Scaling Usage of Mobile Money to Boost Financial Inclusion in Malawi: Summary Action Plan* (November 2011); USAID, *Demand for Mobile Money Services: Survey Results and Report* (November 2011); and FinMark Trust, *Mapping the Retail Payment Services Landscape: Malawi* (October 2012).³¹

Fieldwork was also undertaken in order to understand Malawi's 'local context', including its regulatory approach and reasons for any departure from internationally accepted norms. Fieldwork was undertaken from 5—22 December 2013 which involved interviews with staff at the RBM, the Ministry of Finance, MFIs, MNOs, researchers, regulatory and policy coordinating groups, and development partners. The study's report was publically released on 4 July 2014.³²

II. BACKGROUND ON MALAWI

Landlocked in southeast Africa, Malawi's population is almost 17 million,³³ 85 percent of which live in rural areas.³⁴ Malawi also has a young population: about 65 percent of the population is aged under 24 years.³⁵ The country has relatively high literacy levels: 74.8 percent of the population (age 15 and over) can read and write.³⁶ Malawi's Human Development Index value for 2012 was 0.418 (placing Malawi in the 'low human development' category), ranking 170 out of 187 countries and territories.³⁷ The country's Gross National Income per head is \$320.³⁸ Around 90 percent of the population is involved in agriculture,³⁹ and foreign aid comprises just over a quarter of total Gross Domestic Product (GDP).⁴⁰ Around three quarters of the population live below the international severe poverty line (\$1.25/day).⁴¹

Life expectancy is low (around 53 years), infant mortality is high (77 in 1000), and there are limited health care resources (just over one hospital bed per 1000 people).

It is estimated that 81 percent of Malawians do not have access to an account at a formal financial institution⁴² and statistics suggest that Malawi has limited financial infrastructure.¹⁶ In 2012, penetration of banking infrastructure per 100,000 adults was as follows:

- Bank branches: 1 (166 in the country);
- Automatic teller machines (ATMs): 1.9 (300);
- Post offices: 2.4 (380); and
- Agents: 12.6 (around 2,000).⁴³

Cash remains the most dominant form of payment mechanism and remittances were an important source of income for many Malawians.¹⁷ Popular remittance methods were the Malawi Postal Corporation's (MPC) FastCash service or through minibus drivers for domestic remittances.⁴⁴ FastCash is a domestic and international remittance service which also includes bill payments.¹⁸ In 2012, the MPC had an extensive network of 330 branches throughout Malawi.⁴⁵

This limited formal financial infrastructure and reliance on basic remittance channels indicates that mobile money could be embraced by many Malawians as an alternative means of accessing formal financial services. From a strategic, policy perspective for expanding financial inclusion, consideration may need to be given to how the mobile money infrastructure will be established and become viable alongside existing infrastructure such as that operated by the MPC for FastCash.

A. *Telecommunication Infrastructure & Mobile Phone Penetration*

Four operators — Bharti Airtel (Airtel), Telekom Networks Malawi Limited (TNM), Access

¹⁶ FinMark Trust, *Mapping the Retail Payment Services Landscape: Malawi*, FINMARK TRUST 8-9 (Oct. 2012), http://www.finmark.org.za/wp-content/uploads/pubs/RPSRegional_Report_MMZZ133.pdf, .

¹⁷ *Id* at 36.

¹⁸ *Id* at 9.

Communications Limited (ACL), and Malawi Telecommunications Limited (MTL) — offer fixed and mobile telephone services in Malawi.⁴⁶ Estimates suggest that approximately 90 percent of the population is covered by a mobile signal, and mobile penetration is around 33 percent, of which 45 percent is rural based and 55 percent urban based.⁴⁷ While mobile penetration rates are much lower than in many other countries,⁴⁸ the rate is higher than the percentage of people who have access to formal financial services (19 percent).¹⁹ This suggests that mobile phones could be used as an access point by much of the population for formal financial services, thereby increasing financial inclusion. However, the scope for this to occur may in reality be constrained by the fragility of mobile networks in Malawi's rural areas, and high tariffs on internet and mobile phone services.⁴⁹

B. Mobile Money Providers in Malawi

At the time of writing, mobile money was being provided by two MNOs: Airtel and TNM.²⁰ Airtel launched Airtel Money (or 'Khusa M'manja') on 29 February 2012.⁵⁰ Airtel Money provides payment services including: cash in and out, remittances, top-ups for airtime, and insurance.⁵¹ International non-government organisations such as Save the Children and the World Food Program have used Airtel mobile money to distribute cash subsidies to Malawian families. TNM, a mobile company, launched TNM Mobile Money on 2 May 2013.⁵² TNM Mobile Money enables remittances, bill payments, cash in and out, top-ups for airtime, salary payments, and insurance.⁵³

Data suggests that around 10 percent of total mobile phone users in Malawi use or have mobile money accounts.⁵⁴ Airtel and TNM are now partnering with banks and MFIs to add greater depth to mobile money product offerings and to leverage existing agent networks established by banks and MFIs (MNO-bank/MFI partnerships).²¹ These partnership initiatives should lead to further growth in mobile

¹⁹ *Id* at 9.

²⁰ Lewis Kalasawa, Fifth Annual African Consumer Protection Dialogue Conference: Mobile and Cyberthreat Issues (Sept. 2013), at 6.

²¹ Greenacre, Malady & Buckley, *supra* note 16, at 13.

money in Malawi. In such partnerships, customers with a mobile money account with the MNO and a deposit account with the partner bank or MFI are able to transfer money between these accounts.²² For example, Airtel operates such a partnership with Opportunity Bank, an MFI.²³ TNM is piloting such a partnership with First Merchant Bank.²⁴ A number of international organisations are active in helping to extend the reach of mobile money in Malawi, such as the Mobile Money for the Poor (MM4P), US Agency for Development (USAID), the World Bank, and Family Health International 360 (FHI 360).⁵⁵ For example, the USAID-funded Mobile Money Accelerator Program provided by FHI 360 plans to pilot a service providing teacher payments through mobile money.²⁵

C. Challenges to Growth

Both MNOs are encountering challenges in expanding their mobile money services, particularly in rural areas.⁵⁶ Low levels of financial literacy have been identified as a key issue for MNOs when selecting and training agents.²⁶ This, along with other well documented issues⁵⁷ which are commonly experienced in building agent networks in emerging countries, has led to MNOs committing considerable resources to the building of agent networks.²⁷ This situation may have restricted the MNOs' expansion of agent networks in Malawi.

Challenges faced by MNOs in expanding the customer base for mobile money services include low levels of financial literacy and limited trust.²⁸ Many Malawians in rural areas have never used banks

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id* at 14.

²⁷ *Id.*

²⁸ *Id.*

and consequently do not sufficiently trust financial services to take up mobile money.²⁹ The absence of a national identification system can also make it difficult for MNOs and agents to comply with know your customer (KYC) requirements for the unbanked.³⁰ Additionally, MNOs find it difficult to establish profitable business models with customers who often have very small incomes, and there is a relatively low penetration rate of mobile phones.³¹ As noted above, only around a third of Malawians have a mobile phone.³² Finally, limited infrastructure in remote rural areas means that some Malawians may need to travel long distances simply to charge their phones, which reduces the convenience that mobile money may be otherwise able to offer.³³

D. Regulators Involved in Mobile Money

The regulation of mobile money involves a number of government bodies and regulators. In Malawi, the RBM is the lead regulator for mobile money and is now focused on developing and formalising the overarching regulatory framework for the mobile money sector.³⁴ The Ministry of Finance (MOF) is involved in the strategic policy development for mobile money as part of its broader role in improving financial inclusion in the country.³⁵ A range of other regulators in Malawi are also exploring and developing regulatory responses to the mobile money market, including regulators from the following sectors: telecommunications, competition, consumer protection, and anti-money laundering and countering the financing of terrorism.³⁶

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Kalasawa, *supra* note 21, at 4.

³³ Greenacre, Malady & Buckley, *supra* note 16, at 14.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 14-15.

RBM has a mandate to promote and oversee Malawi's national payments system,⁵⁸ and it is under these auspices that it is responsible for overseeing the mobile money sector.³⁷ The Payments Department at the RBM takes the lead in the supervision and regulation of the sector.³⁸ It also takes the lead on coordinating efforts for RBM with a number of other regulatory institutions as described below (see Policy and Regulatory Coordination). The Bank Supervision Department of the RBM is involved in mobile money through its contribution to the work of the E-Banking Task Force.³⁹ It is also considering regulatory responses to the growing number of MNO-bank/MFI partnerships.⁴⁰ The Micro-finance and Capital Markets Department (RBM-MF/CM Department) is involved in developing consumer demand for mobile money.⁴¹

By promoting financial sector development and financial inclusion, the MOF has contributed to the growth of mobile money. RBM's focus on developing an enabling regulatory framework to encourage the use of mobile money aims to give effect to the MOF's goals for financial inclusion. These goals are contained in several strategic policy documents, which are discussed in Part 2.6, below.

There are also several other regulators involved in the operation of mobile money in Malawi. The Malawi Communications Regulatory Authority (MACRA) regulates the postal, telecommunications, and broadcasting sectors.⁴² It is responsible for administering the *Communications Act 1998*.⁴³ An MNO needs a licence from MACRA under this Act in order to provide mobile money services.⁵⁹ The Financial

³⁷ Reserve Bank of Malawi Act 1989, section 4(e) (RBM Act): as amended by the Reserve Bank of Malawi Act 2010.

³⁸ Greenacre, Malady & Buckley, *supra* note 16, at 15.

³⁹ *Id.*; *Communications Act 1998* § 3.

⁴⁰ Greenacre, Malady & Buckley, *supra* note 16, at 15.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Intelligence Unit (FIU) is an autonomous central national agency reporting directly to the Minister of Finance.⁴⁴ The FIU has wide ranging powers in relation to combating money laundering and terrorist financing.⁶⁰ The Competition and Fair Trading Commission (CFTC) examines competition and consumer protection issues and its role may become more prominent in mobile money in response to MNO-banks/MFI partnerships.⁴⁵

E. Regulatory Coordination

There are significant efforts directed towards coordinating regulatory approaches for mobile money in Malawi. These coordinated efforts support Malawi's move towards establishing an enabling legal and regulatory environment for mobile money. The coordinated regulatory approaches led by RBM are evidenced through industry bodies such as the National Payments Council (NPC) and through RBM's internal intra-departmental task force, the E-Banking Task Force. RBM, along with other regulators, industry players, and donor partners also facilitates coordination between regulators and industry through the Mobile Money Consultative Group (MMCG).

The NPC consists of RBM and a range of banks and finance companies.⁶¹ It is designed to encourage cooperation in modernising Malawi's payments systems by providing a forum for the exchange of ideas.⁴⁶ The E-Banking Task Force is an intra-departmental group made up of the following RBM departments: banking, payments, internal audit, information and communication, exchange control, and debt management.⁴⁷ This Task Force was formed to regulate and guide the mobile payment services sector, and it played a key role in developing the initial guidelines for mobile money: the *Mobile*

⁴⁴ *Id.*

⁴⁵ *Id* at 16.

⁴⁶ For membership list of NPC see Bank for International Settlements (BIS), *The Payment System in Malawi*, BANK FOR INTERNATIONAL SETTLEMENTS 63, <http://www.bis.org/cpmi/paysys/malawi.pdf>.

⁴⁷ Greenacre, Malady & Buckley, *supra* note 16, at 16.

Guidelines.⁴⁸ The MMCG is an external inter-agency group made up of a variety of regulators, donors, banks, and the two MNOs.⁶² MMCG aims to strengthen the use of mobile money in Malawi by facilitating and incorporating the views of a variety of stakeholders (policy, regulatory, and market) into regulation and policy objectives for mobile money.⁴⁹ The MMCG is also involved in a variety of other issues including: financial literacy education, pilot programs for government to person (G2P), and social cash transfers.⁵⁰ In January 2014, it was announced that a study would be conducted into the MMCG which would explore moving the MMCG from an institution funded by USAID to an autonomous body.⁶³

A number of other informal and formal mechanisms are also used by regulators in Malawi to establish coordinated efforts with respect to mobile money development. For example, the RBM Payments Department coordinates with the MOF to ensure that its payments system development is consistent with MOF's broader strategies for the financial system.⁶⁴ A Memorandum of Understanding (MOU) operates between RBM, the MOF, and MACRA which states that all three institutions will have input into mobile money regulation.⁵¹ Additional MOUs operate between RBM and MACRA, and RBM and FIU.⁵² The FIU is responsible for compliance with AML/CFT regulations.⁶⁵ A further MOU between the CFTC and MACRA was signed in 2013.⁵³ This MOU establishes a framework for technical cooperation and interaction between the two organisations in the enforcement of anti-competitive behaviour, unfair trading practices, mergers and acquisitions, and market studies in the telecommunications sector.⁶⁶

At the time of writing, regulators in Malawi were exploring additional opportunities to coordinate

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id* at 17.

⁵² *Id.*

⁵³ *Id.*

efforts on mobile money. For instance, the CFTC was also planning to enter into an MOU with RBM by June 2014 to provide a framework for cooperating and enforcing consumer welfare issues in the financial sector.⁵⁴ Further, the CFTC plans to engage with the Ministry of Information and Civic Education to better understand this Ministry's plan to enact draft legislation to deal with mobile and cyber issues.⁵⁵

F. Strategic Development for Mobile Money

A number of strategic policy documents are used by RBM and the MOF to outline the roadmap for both payments system development and financial inclusion which directly affect the development of the mobile money sector in Malawi. These documents are useful to clarify for all stakeholders the policy objectives of regulators and proposed strategic developments for the financial system in Malawi.

These documents include:

- The Malawi National Payment System Vision and Strategy Framework for the Period 2009 to 2013 (Payment System Vision for 2009-2013);⁶⁷
- The draft Malawi National Payment Systems Vision and Strategy Framework for the Period 2014 to 2018 (Payment System Vision for 2014-2018);⁶⁸
- The Malawi National Strategy for Financial Inclusion 2010-2014 (Financial Inclusion Strategy for 2010-2014);⁶⁹ and
- The RBM's draft July 2013 to December 2016 Planned Strategy (RBM Strategy for 2013-2016).⁷⁰

The focus of these documents is largely on developing strategies and policies to support the move from cash-based payments to an increased use of electronic payment channels with the objective of providing the unbanked and under-banked with increased access to formal financial services.⁵⁶

Underscoring the Malawi Government's commitment to move from cash-based payments to electronic

⁵⁴ *Id.*

⁵⁵ *Id.* at 18.

⁵⁶ *Id.*

channels was the announcement by the MOF on 1 July 2013 that it was joining the Better Than Cash Alliance (BTCA).⁷¹ Malawi is also in the process of establishing a national switch which will provide a switching platform for internet banking, remittances, and mobile money transactions.⁷² This switch will enable mobile money customers to make payments across mobile money schemes and to depositors of Malawi's 11 commercial banks. All banks and MNOs will be able to join the switch with the intention that retail payments systems will eventually move towards being interoperable.⁵⁷

G. Main Regulatory Framework for Mobile Money

At the time of our country study, the *Mobile Guidelines* predominantly regulated mobile money in Malawi.⁷³ The *Mobile Guidelines* specify that MNOs are able to provide mobile money in Malawi and they set out the requirements that MNOs are expected to adhere to in doing so.⁵⁸ Legislative and regulatory changes are being proposed in Malawi to further develop the mobile money market and to broaden financial inclusion. The proposed legislation is the *Payments Systems Bill 2013 (Payments Bill)* and the proposed regulations are the draft *Reserve Bank (E-Money) Regulations, 2014 (E-Money Regulations)*.⁷⁴

The *Payments Bill* will provide greater clarity on RBM's oversight arrangements for mobile money and also for Malawi's payments systems and payments system providers more broadly, thereby bringing Malawi into line with international best practice in this area.⁷⁵ The draft *E-Money Regulations* set out regulatory arrangements for e-money including the approval and licensing of entities and their agents, issuing and storing the underlying funds which e-money represents, and operating the payment systems involved in the transfer of the e-money.⁷⁶ The regulations do not specify the type of institution which can provide mobile money, but instead take an activity-focused approach: any entity providing e-money is captured by the regulations.⁵⁹ In this way, the *E-Money Regulations* will cover all entities

⁵⁷ *Id* at 19.

⁵⁸ *Id*.

⁵⁹ *Id*.

providing mobile money, including banks and non-banks.⁷⁷ The *E-Money Regulations* will replace the existing *Mobile Guidelines*.⁷⁸ At the time of writing (March 2014), it was expected that the *E-Money Regulations* would be under consideration by the MOF and then mandated and gazetted by the Minister of Finance, pursuant to the *RBM Act*.

H. Additional Regulations Pertaining to Mobile Money

Mobile money activities in Malawi are also governed by the following additional regulations:

- The Money Laundering Proceeds of Serious Crime and Terrorist Financing Act 2006 (AML/CFT Act) and the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Regulations 2011 (AML/CFT Regulations) — mobile money providers are defined as financial institutions (i.e. money transmission services) under the AML/CFT Act.⁷⁹
- The Communications Act 1998 (Communications Act) — an MNO must be licensed by MACRA under this legislation in order to undertake the activity of providing mobile money.⁶⁰
- The Competition and Fair Trading Act 2000 (Competition Act) applies to commercial activity in Malawi, potentially also including MNO-bank/MFI partnerships.⁶¹
- The Banking Act 1989 (Banking Act) — banks are required to obtain approval from RBM before engaging in MNO-bank/MFI partnerships.⁶²
- The Consumer Protection Act 2003 — MACRA administers this legislation. It includes provisions outlining customers' redress mechanisms and specifies that contracts governing financial transactions shall be interpreted, implemented, and

⁶⁰ *Id* at 20.

⁶¹ *Id*.

⁶² *Id*.

enforced: (a) in good faith, (b) consistent with the instrument embodying the contract between the parties, and (c) in a manner consistent with the laws governing or regulating financial transactions.⁸⁰ As Malawi further develops its legislative and regulatory framework for mobile money, it is expected that this legislation will be applied more directly to the mobile money sector.⁶³

This paper will now examine the practical challenges that Malawi has faced in using an enabling approach and implementing proportionate regulation. For each issue it will examine the following: ‘best practice’, defined as broad themes in the research on the topic in question; ‘in practice’, defined as Malawi’s existing approach; ‘analysis’, which sets out views and recommendations on how Malawi could further strengthen its efforts in the mobile money sector in line with international best practice; and conclusions on how Malawi’s experience can be drawn on to better identify the practical challenges of implementing an enabling approach and/or proportionate regulation in the mobile money sector.

III. ENABLING APPROACH

A. *Coordination among Regulators and between Regulators and Industry*

1. *Best Practice*

As mobile money involves a range of market players, it engages a number of regulators with different regulatory responsibilities. Cooperative efforts among regulators are therefore essential to ensure consistent and coordinated policy approaches and the smooth implementation of legislative and regulatory initiatives. For these reasons it is important for a country to have mechanisms in place for effective cooperation between regulators.⁸¹

Cooperation and coordination will be most effective when it draws upon the relative strengths of different regulatory agencies. Local context will determine which regulator takes the lead role and which responsibilities other regulators assume; an assessment of the capacity of various regulatory agencies to fulfill their designated roles should therefore be conducted. Training and education should be arranged

⁶³ *Id.*

where necessary to develop expertise and expand capacity. Specific regulatory approaches will also have implications for how cooperation between regulators proceeds. For example, if the regulatory framework is based on an entity-focused approach, there may be a tendency for regulators to operate on a silo-type basis which reflects their own areas of expertise, rather than taking a holistic, risk-based approach to developing regulation. This can potentially lead to an unequal playing field for the different entity types being regulated, creating problems such as disproportionate regulation or regulatory arbitrage. In contrast, an activity-focused, risk-based regulatory approach will encourage cooperation between regulators to develop a level playing field for the different entities involved in the same activity of providing mobile money products and services.

A regulatory framework developed through consultation with industry offers scope to be more responsive to new market players and technological innovations. Regulators adopting this approach may find it easier to assess the potential impact of proposed regulatory changes through engagement with industry stakeholders. Regulators who actively engage new players in the policy development process will also be able to keep pace more readily with developments in this innovative sector of the payments system. This engagement will be beneficial for regulators, market players, and the end-users as industry players can highlight risks for the regulators and identify how they will mitigate them; regulators may also be better prepared to respond to consumer confidence issues or concerns on system stability risks.

2. *In Practice*

In Malawi, regulators from a range of areas such as banking, payments, telecommunications, as well as competition and consumer protection are involved in coordinating the oversight approach for mobile money. Industry players are also actively involved in contributing to the strategic direction of the mobile money market. These coordinated efforts support Malawi in moving towards an enabling legal and regulatory environment for mobile money.

As has been discussed above, RBM is the lead regulator for the sector while the MOF is involved

in strategic policy development as part of its broader role in improving financial inclusion.⁶⁴ RBM leads coordination efforts through industry bodies such as the NPC and the MMCG, and through an internal cross-departmental task force, the E-Banking Task Force.⁸² There is also considerable cooperation occurring between regulators and government bodies using informal and formal mechanisms such as MOUs.⁸³ For example, RBM has encouraged the development of mobile money in order to give effect to MOF's vision of extending financial services to the unbanked expressed in its *Financial Inclusion Strategy for 2010-2014*.⁶⁵ At the time of writing, regulators in Malawi were exploring additional opportunities to coordinate efforts on mobile money.⁸⁴ The MMCG provides an example of a forum which coordinates activities of donor partners, regulators, and industry in order to promote the expansion of mobile money.⁸⁵

Malawian regulators also make use of a number of strategic policy documents which outline roadmaps for payments system development and financial inclusion, which are directly relevant to the development of the mobile money sector in Malawi.⁶⁶ The focus of these documents is largely on developing strategies and policies to support the move from cash-based payments to an increased use of electronic payment channels, with the objective of providing the unbanked and under-banked increased access to formal financial services.⁶⁷ This objective was further underscored by the Malawi Government's

⁶⁴ *Id* at 23.

⁶⁵ See Ministry of Finance: Financial Sector Development Unit: Economic Affairs Division, *The Malawi National Strategy for Financial Inclusion 2010-2014* (Jan. 2010), <http://www.finance.gov.mw/fspu/index.php/financial-sector-laws/strategy-documents/49-2010-2014-national-strategy-for-financial-inclusion/file>.

⁶⁶ See Reserve Bank of Malawi, *Malawi National Payment System Vision and Strategy for the Period 2014 to 2018* (Dec. 2013); Reserve Bank of Malawi, *July 2013 to December 2016 Planned Strategy*.

⁶⁷ Reserve Bank of Malawi, *Malawi National Payment System Vision and Strategy for the Period 2014 to 2018*, *supra* note 67, at 7; Reserve Bank of Malawi, *July 2013 to December 2016 Planned Strategy*, *supra*

membership of the BTCA which was announced on 1 July 2013.⁸⁶

3. *Analysis*

RBM's oversight framework for mobile money, as detailed in the proposed *E-Money Regulations*, uses an activity-focused, risk-based approach which will encourage the various regulators with responsibility for the mobile money sector (e.g. RBM, CFTC, MACRA, FIU) to work together on strategic and policy development in the sector.⁸⁷

RBM's existing intra-departmental coordination on mobile money issues, and electronic banking more generally, should contribute positively to equipping regulators involved in the supervision and oversight of mobile money with the technical knowledge that they need to discharge these functions effectively. In particular, the supervision and regulation of mobile money requires expertise from both payments systems oversight and banking supervision functions because mobile money products sit between deposit taking activities and payments system transfer services.⁶⁸ Consequently, coordination mechanisms between these two functions within the RBM are essential to building and maintaining regulatory capacity for mobile money. The E-Banking Task Force should therefore further the achievement of this objective. Existing approaches to inter-regulatory cooperation will also contribute positively to capacity development. In order to further strengthen the capacity of RBM as lead regulator, this co-operation should be encouraged.

Assistance from development partners should include training on the oversight and supervision of mobile money. Regional groups such as the African Mobile Phone Financial Services Policy Initiative (AMPI),⁸⁸ and the UN's Economic Commission for Africa (ECA) may be well placed to provide

note 67, at 1.

⁶⁸ See the wider discussion about whether mobile money should be regulated as a deposit. See Alliance for Financial Inclusion, *Regulatory Approaches to Mobile Financial Services in Latin America*, ALLIANCE FOR FINANCIAL INCLUSION 5-7 (Apr. 2012) http://www.afi-global.org/sites/default/files/publications/afi_lac_special_report_en_annex_low_res.pdf.

assistance and support on targeted regulatory policies.⁸⁹ The United Nations Conference on Trade and Development (UNCTAD) has helped the East African Community to prepare guidelines on electronic transactions, electronic signatures and authentication, data protection and privacy, consumer protection, and computer crime.⁹⁰ The MM4P has also undertaken extensive collaboration with RBM, resulting in such efforts as the study from which this paper is drawn.⁶⁹ Ongoing support from MM4P could further contribute to building regulatory capacity.

With regard to the proposed draft *Payments Bill* and *E-Money Regulations*, training sessions with relevant stakeholders could be used to raise awareness and understanding of the implications of the new regulatory environment. For example, preliminary training sessions could focus on ensuring a consistent understanding of key terminology used in the new regulatory framework. Further training sessions could then focus on how to implement the *E-Money Regulations* and ensure ongoing compliance.

As noted above, industry players are actively involved in contributing to the strategic direction of the mobile money market in Malawi through industry bodies such as the NPC and the MMCG. Although there are clear benefits to this, regulatory bodies need to ensure that industry players are not relied on to *guide* policy development; rather, industry dialogue should centre on *feedback* and *discussion* on policy development in order to avoid potential conflicts of interest and regulatory capture.⁹¹ Regulators therefore need to distinguish between their role in promoting payments system development and in their regulation, and ensure that mechanisms are in place to address any potential conflict of interest in this area.

B. Regulatory Mandates

1. Best Practice

One of the best means for promoting cooperation between agencies is the establishment of strong regulatory mandates that are clear, consistent, and transparent. The responsibilities of different agencies should be discrete and clearly delineated, with well-defined roles for leadership and coordination. Terminology should remain consistent across different documents and regulatory instruments, and

⁶⁹ Greenacre, Malady & Buckley, *supra* note 16.

underlying concepts should be defined in a way that is technology-neutral in order to ensure mandates are general enough to accommodate future innovation. Roadmaps for future regulatory activity should be developed and shared between agencies to ensure that new developments can be accommodated within existing frameworks.

2. *In Practice*

As has been outlined above, there are a range of regulators, government departments, and coordinating groups involved in mobile money policy and regulation in Malawi including: RBM, FIU, MOF, NPC, CFTC, and MMCG.⁷⁰ The RBM takes the lead role in the supervision and regulation of mobile money, primarily through its administration of the *Mobile Guidelines* and its role in coordinating groups such as the E-Banking Task Force, the MMCG, and the NPC.⁷¹ The RBM has assumed this role based on its broader mandate to regulate payments and promote the national payments system under the *RBM Act*.⁷² Two provisions of the *RBM Act* have been specifically used in relation to RBM's oversight of the mobile money sector: section 4(e) states that RBM shall be responsible for promoting a sound financial structure in Malawi, including payments systems, clearing systems, and adequate financial services;⁹² and section 56 states that the Minister of Finance may, after consultation with RBM, make regulations necessary for carrying out the objectives and purposes of the *RBM Act*, to give force or effect to its provisions or for its better administration.⁷³ The *E-Money Regulations* will initially be mandated and gazetted by the Minister of Finance, pursuant to this section of the *RBM Act*.⁷⁴

The RBM, in collaboration with the NPC, has also outlined a clear roadmap for payments system

⁷⁰ Greenacre, Malady & Buckley, *supra* note 16, at 14-18.

⁷¹ *Id* at 26.

⁷² This is established in the sentences that follow.

⁷³ The reference to § 56 of the *RBM Act* is sufficiently specific.

⁷⁴ This is a reference to § 56.

development in the draft document *Payment System Vision for 2014-2018*.⁷⁵ In it, the RBM's existing mandate is made clear from the outset. Section 1 states:

The RBM is mandated to promote and oversee the national payment system in the country. The mandate is entrenched in the RBM Act (1989) which empowers the RBM to *promote a sound financial infrastructure in Malawi, including payment systems, clearing systems and adequate financial services*. Based on this mandate, the RBM plays a leading role in transforming the country's NPS.⁹³

RBM proposes to provide a follow-up report on the strategies outlined in the *Payment System Vision for 2014-2018* using RBM's *Annual Payment Systems Report*.⁹⁴ The *Payment System Vision for 2014-2018* provides greater clarity, certainty, and transparency on the oversight framework for RBM for mobile money and payments systems more broadly.⁷⁶ It is also noteworthy that the vision and strategy is considered to be a shared responsibility of all stakeholders, and that consultation with stakeholders will occur through the NPC.⁷⁷

Plans are underway to clarify and strengthen RBM's mandate for conducting the oversight of the mobile money sector and payments systems more broadly using payments system legislation and the *E-Money Regulations*.⁷⁸ Payments system legislation provides transparency with respect to the oversight role of a central bank for payments systems and payments system providers, including new payments players such as mobile money providers, and can be designed to assist the central bank in meeting broader oversight objectives such as ensuring financial system stability. Payments system legislation is also a

⁷⁵ Reserve Bank of Malawi, *Malawi National Payment System Vision and Strategy for the Period 2014 to 2018*, *supra* note 67, at 11-14.

⁷⁷ Reserve Bank of Malawi, *Malawi National Payment System Vision and Strategy for the Period 2014 to 2018*, *supra* note 67, at 15.

⁷⁸ Greenacre, Malady & Buckley, *supra* note 16, at 27.

means of providing a level playing field for providers of payments services, as the legislation can be designed to be activity-focused rather than entity-focused. The enactment of payments system legislation for these reasons is now accepted as international best practice and supportive of promoting financial inclusion.⁹⁵

3. Analysis

The *Payment System Vision for 2014-2018* could be expanded to provide more detail on the proposed *Payments Bill* and the *E-Money Regulations*, both of which are in their final drafting stage.⁹⁶ In particular, the *Payment System Vision for 2014-2018* refers to the *Mobile Guidelines* as relevant to regulating and guiding the mobile payments market.⁷⁹ However, it is planned that these guidelines will be superseded by the *E-Money Regulations*.⁸⁰ This development could be reflected in the *Payment System Vision for 2014-2018*.

Further, a draft version of the *Payments Bill* refers to ‘mobile payments’, which appears to be referring to the same concept as ‘e-money’ as defined under the *E-Money Regulations*. The term ‘mobile payments’ can be more restrictive than the term ‘e-money’ and it is recommended that the terminology in the *Payments Bill* be made consistent with terminology used in the *E-Money Regulations*. This would provide clarity in regard to what RBM is overseeing, supervising, and regulating. Mobile payments generally refer to the payments access method — i.e. e-money (which represents an underlying stored value) or deposits which can be accessed via a mobile phone.⁸¹ However, it is primarily the activity of issuing the e-money (or stored value) which is being regulated and supervised. Stored value can be accessed and transferred using payment methods other than mobile phones (e.g. online access via the internet or via prepaid cards). Technological innovations will continue through time, resulting in the

⁷⁹ Reserve Bank of Malawi, *Malawi National Payment System Vision and Strategy for the Period 2014 to 2018*, supra 67, at 6.

⁸⁰ Greenacre, Malady & Buckley, supra note 16, at 28.

development of new possible access channels or payment methods which have not yet been contemplated. In so far as legislation and regulations are concerned with payments access methods, legislation and regulations should be designed to operate independently of the type of technology used. This can be done by focusing on the activity itself, not on the specific payment access method used.

The *Payments Bill* and the *E-Money Regulations* should therefore be drafted so as to capture the activity of issuing e-money, where that e-money represents an underlying stored value.⁹⁷ The *Payments Bill* may be an appropriate place to include such provisions regarding the issuance of stored value because this stored value is accessed using payment instruments and payment systems.⁹⁸ It is common practice to issue more detailed regulations with respect to stored value pursuant to the payments law.⁸²

Moreover, it is the authors' understanding that the intention is to pass the *E-Money Regulations* pursuant to the *Payments Bill* once it is enacted. We support this approach. However, we also understand that as an interim measure, the *E-Money Regulations* will be mandated pursuant to section 56 of the *RBM Act* because the *E-Money Regulations* may be ready for implementation prior to the *Payments Bill* being passed by Parliament. Should this be the case, consideration could be given to explaining these interim arrangements to all stakeholders by, for instance, providing details of these plans in the *Payment System Vision for 2014-2018*. This approach would clarify the path ahead for oversight arrangements for mobile money and stored value more broadly, and in particular would make it clear that RBM's regulatory mandate extends to include the oversight of mobile money.

Strong regulatory mandates will help to ensure the clear and coordinated development of mobile money regulation. Malawi's *E-Money Regulations* and *Payments Bill* are an important step in the furtherance of this aim. However, the draft provisions appear to contain inconsistent uses of certain important terms such as 'mobile money' and 'e-money'. This potentially creates a lack of clarity regarding RBM's mandate over mobile money. The Alliance for Financial Inclusion's (AFI) document, titled *Mobile Financial Services: Basic Terminology (2013)*, may be useful to reduce inconsistencies in

⁸² Greenacre, Malady & Buckley, *supra* note 16, at 29.

terminology.⁹⁹

C. *Understanding and Building Consumer Demand for Mobile Money*

1. *Best Practice*

While mobile money has been very successful in many countries, particularly Kenya and the Philippines, mobile money roll-outs in other developing countries have been characterised by low uptake and inactive users.¹⁰⁰ This situation may have occurred due to a focus on broadening accessibility (i.e. through developing agent networks and mass sign-ups of end-users) rather than understanding the needs of end-users. As a consequence, development partners are now encouraging a greater focus on the demand side of mobile money, i.e. understanding the needs of end-users.⁸³ To develop successful mobile money ecosystems, and digital financial services (DFS)¹⁰¹ ecosystems more broadly, it is recognised there is a need to go beyond ensuring these products are simply available, accessible, and affordable.⁸⁴ There is a need to ensure they have an effect, are used, and become sustainable.¹⁰²

Financial regulators can work with industry players to understand and build consumer demand so as to better identify which market developments need to be encouraged or facilitated through policy and regulatory changes. Problems have arisen when payment providers assume that the building of a network will in and of itself lead to sufficient consumer demand for mobile money, and regulators respond only to the immediate problem of how to regulate new types of entities rolling out new payments products and services.¹⁰³ By focusing on the need to understand and promote consumer demand, regulators will assist in avoiding those problems.

Regulators can assess a mobile money product's potential for promoting financial inclusion by

⁸³ Louise Malady and Ross Buckley, *Building Consumer Demand for Digital Financial Services: The New Regulatory Frontier* 8, (Aug. 2014),

http://www.clmr.unsw.edu.au/sites/default/files/attached_files/building_consumer_demand_for_digital_financial_services.pdf.

considering how well the initiative focuses on local context and the customer value proposition.

Emphasising these two aspects in mobile money initiatives will ensure players and products are being encouraged which deliver mobile money solutions that are useful and relevant for the under-banked and unbanked.¹⁰⁴

Customer demand surveys are a useful means of assessing specific customer requirements but care should be taken in interpreting the results of the demand studies. For example, survey results depend heavily on the precise questions asked, and may only offer a single point in time picture rather than an understanding of the longer run perspective. Customer perceptions are also important, such as perceptions of their existing access to financial services (formal and informal) and what they may consider valuable in a new service or product.¹⁰⁵

Regulators can encourage the development of successful and sustainable DFS ecosystems by encouraging and participating in efforts to build consumer demand. Such efforts include being an enabling regulator,¹⁰⁶ encouraging cash payments to be done electronically using mobile money or DFS, particularly government payments (such as G2P and person-to government (P2G)),¹⁰⁷ and facilitating financial literacy efforts which focus on incorporating end-users needs.¹⁰⁸ Developing open/interoperable/interconnected systems and acknowledging the importance of partnerships by allowing or enabling traditional and non-traditional players to partner will also assist in building consumer demand. Note that interoperability generally means that transfers of funds from one mobile account can be made to the mobile account of another service provider.⁸⁵ However, as will be explained below in Part 3.3, interoperability can also occur at the level of agents and SIM/handset.¹⁰⁹

2. *In Practice*

There have been various initiatives in Malawi which have contributed to understanding the needs of end-users both in terms of local context issues and the customer value proposition. In terms of local context, both the *National Strategy Document for 2014-2018* and the *RBM Strategy for 2013-2016*

consider many of the local issues which are important in building the mobile money ecosystem in Malawi. The *National Strategy Document* recognises the importance of focusing on interoperability issues and improving cash distribution/handling arrangements.⁸⁶ In terms of understanding the customer value proposition, user demand surveys have been undertaken including the *USAID Action Plan* which studied demand for mobile and branchless banking in Malawi.¹¹⁰ The *FinMark Report* notes that mobile money will directly compete with the existing domestic remittance service offered by the MPC product FastCash.¹¹¹ While there are many paths toward greater financial inclusion, consideration of the impact of policy changes on the various paths will be important. Both the *USAID Action Plan* and *FinMark Report* were undertaken before Airtel and TNM began providing mobile money in Malawi.⁸⁷ Updated consumer demand studies may be needed to determine how the new schemes meet end-user needs versus other methods of money transfer such as FastCash.

The accessibility and reliability of basic financial services still remains a fundamental challenge for many Malawians.⁸⁸ For regulators, this challenge will require attention alongside questions such as how well Malawians will use new DFS. These questions should include: can the instructions on the mobile phone be read? Can the phone be charged and so be a reliable access point? And do most adults have the means to own a phone?

There are a number of regulators and government departments focused on improving financial inclusion in Malawi, which has resulted in several initiatives aimed at increasing the uptake of financial services, including mobile money. For example, the RBM organised the country's first financial literacy week in December 2013.⁸⁹ The aim was to help Malawians learn about the benefits of budgeting, savings,

⁸⁶ Reserve Bank of Malawi, *Malawi National Payment System Vision and Strategy for the Period 2014 to 2018*, *supra* note 67, at 7, 9.

⁸⁷ Greenacre, Malady & Buckley, *supra* note 16, at 47.

⁸⁹ Greenacre, Malady & Buckley, *supra* note 16, at 47.

investing, and generally being aware of their rights in relation to financial products.⁹⁰ The RBM is considering developing the Financial Literacy Week through, for example, one day of financial awareness every quarter.⁹¹ MOF, the Malawi Institute of Education, and RBM have implemented a financial literacy syllabus into Malawi's secondary school curriculum and there are plans to introduce such programs at the tertiary level.⁹²

Further, the *RBM Strategy for 2013-2016* details several initiatives to promote the use of electronic payment systems. These include: implementing public awareness campaigns on payments systems to promote financial inclusion, conducting market based research and moral suasion to promote the affordability of payment services, and periodically assessing cost structures provided by payments systems operators.¹¹² The RBM had also shown an interest in encouraging the use of electronic payments systems for G2P.⁹³

Moreover, Malawi is on a path towards encouraging and facilitating interoperability. For example, as outlined in Part 2.6, it is building a national switch for retail payment systems. In a speech delivered by the Minister of Economic Planning and Development to the BTCA, the Honourable Ralph Jooma noted that the national switch "will provide a switching platform for internet banking, remittances, and mobile money transactions".¹¹³ Mr Jooma said: "we have decided to develop this as a shared payment services arrangement with the Bankers Association of Malawi so as to facilitate inter-operability and help ensure the volumes to make the investment viable".⁹⁴ Interoperability is identified as a policy objective in

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ From our discussions with RBM there was also interest in encouraging the use of electronic payment systems for G2P, as discussed in Greenacre, Malady & Buckley, *supra* note 16, at 47.

⁹⁴ Ralph Jooma, Inclusive Growth in Malawi and Digital Financial Inclusion (September 24 2013), available at <http://betterthancash.org/speech-delivered-by-hon-ralph-jooma-mp-minister-of-economic->

a number of RBM's regulatory and policy documents.¹¹⁴ While interoperability is identified as being required in the *Mobile Guidelines* this has not been enforced or pursued by RBM¹¹⁵ and at this stage, the two mobile money schemes in Malawi are not interoperable.⁹⁵ RBM's intention is for interoperability to be considered once the mobile money schemes are more established.⁹⁶ Under the proposed *E-Money Regulations*, agents will be required to operate on a 'non-exclusive basis'.¹¹⁶

3. Analysis

The benefit of providing financial services to the unbanked is a strong incentive for regulators to continue encouraging the development of successful mobile money ecosystems. Efforts and plans for understanding and building consumer demand therefore need to be continued. Although the sector is still in its nascent stage, without focusing on ensuring that mobile money systems meet consumer needs, the mobile money ecosystem may not gain traction and may fail to become well-established.

Further, the challenges presented by G2P must be more comprehensively understood. GSM Association's (GSMA) Mobile Money Unit has written about Airtel's experiences with G2P in Malawi (GSMA use the term G2P to refer to social transfers which may be funded by NGOs and donors in addition to government).¹¹⁷ GSMA emphasised that G2P may look attractive for providers and those making payments, however the business is challenging and "requires fully committed partnerships".¹¹⁸ CGAP has also recently released four case studies from Haiti, the Philippines, Kenya, and Uganda which examine the challenges in establishing mobile money based G2P payment systems.¹¹⁹

Statistical analysis could be undertaken on transaction behaviour related to Government welfare payments. Several issues ought to be investigated, including whether social payments are fully withdrawn

[planning-and-development-at-partnership-for-digital-financial-inclusion-a-driver-of-inclusive-growth.](#)

⁹⁵ Greenacre, Malady & Buckley, *supra* note 16, at 48.

⁹⁶ From discussions with RBM, as examined in Greenacre, Malady & Buckley, *supra* note 16, at 48, it is understood that the intention is for interoperability to be considered once the mobile money schemes are more established.

each time they are paid into recipients' bank accounts, whether data is available on the cost of cash distribution for these welfare payments, and how this might compare to the cost of distributing the payments through a mobile phone banking service. The location of existing cash-out points for social payments could be determined and consideration ought to be given to whether replacing or building on these cash-out points with mobile money agents' cash distributions points will lead to increased efficiencies.

It is imperative that interoperability be comprehensively considered in any initiative to further mobile money development. Interoperability can occur at many levels, such as: the mobile money platform (when a customer with an account from one Provider can send or receive money to or from the account of a customer with a different Provider); the agent (a customer can withdraw or deposit money at an agent of another Provider (or at independent agents); and the handset/SIM level (a customer can access his or her account using any phone with any SIM card).¹²⁰ The issue is therefore complicated by terminology and what type of interoperability is required. RBM could clarify what type or level of interoperability is to be aimed for in relation to mobile money schemes in Malawi. The intention of connecting mobile money systems to the national switch has been identified as a way of introducing interoperability. This initiative is in line with international developments in payments system infrastructure.¹²¹ Also under the proposed *E-Money Regulations*, agents will be prohibited from operating exclusively for any particular mobile money provider which will allow for interoperability at the user level.⁹⁷

Regulators can use an understanding of consumer demand to better appreciate which market developments need to be encouraged or facilitated through policy and regulatory changes. In doing so, regulators can facilitate the building of sustainable mobile money ecosystems and move closer to the goal of providing financial access for all. There have been various initiatives in Malawi which have contributed towards understanding the needs of end-users both in terms of local context issues and the

⁹⁷ § 26 states that 'Agents shall not be contracted by the E-Money Service Provider on an exclusive basis.'

customer value proposition.⁹⁸ There have also been many initiatives in building demand.

These initiatives should be continued and developed in order to ensure that market players keep end-users' needs at the forefront of business decisions. Careful assessment of the challenges to be expected in roll-outs of G2P programmes are recommended and data analysis may assist in this assessment. On interoperability as a means of building consumer demand, further industry discussion should occur on the level and type of interoperability being considered. Interoperability is a term which can have many meanings and it is important for both the regulators and industry players to be clear about what type is being discussed in order to set clear goals for its achievement. Understanding and building consumer demand for mobile money initiatives should remain at the forefront of those focused on improving financial inclusion as this will contribute towards the establishment of sustainable and successful mobile money markets.

IV. PROPORTIONATE REGULATION

The following sections relate to the substance of regulation. As outlined above, research advocates for a proportionate approach to designing substantive rules on mobile money. This section examines the following four areas where substantive rules are required.

A. *Regulatory Arrangements for the Use of Agents*

1. *Best Practice*

Regulations governing the use of agents will become increasingly important in Malawi as the size of agent networks and the range of services available through mobile money platforms grow. In particular, the growing number of MNO-bank/MFI partnerships means that agents may provide a wider range of services through mobile phones. The low level of financial literacy in Malawi has been a key

⁹⁸ The National Strategy Document for 2014-2018 and the RBM Strategy for 2013-2016 consider many issues that are relevant to building Malawi's mobile money system. A variety of user demand surveys have been undertaken to understand the customer value proposition for mobile and branchless banking in Malawi, such as the USAID Action Plan.

issue for MNOs when selecting and training agents.⁹⁹ This, alongside other issues which are commonly experienced in building agent networks in emerging countries such as agent illiquidity and operational risk,¹²² has led to MNOs using considerable resources in building agent networks.¹⁰⁰ This situation may have restricted the MNOs' further expansion of agent networks in Malawi.¹²³ Liquidity risk such as cash-out constraints are a common issue because agents need to be able to meet customer demand for the physical cash.¹²⁴ Operational risks in Malawi arise as a result of agents being unable to perform tasks effectively due to low levels of financial literacy and high staff turn-over.¹⁰¹

Regulation should address these risks and pave the way for smoother expansion of agent networks and service offerings. This regulation should ensure that providers have discretion to determine how to grow their agent networks. However, reports of robbery of agents in Uganda and Tanzania and agent theft in Malawi suggest that discretion needs to be balanced with regulatory oversight, particularly to protect customers from loss.¹²⁵

2. *In Practice*

The *Mobile Guidelines* and proposed *E-Money Regulations* contain a variety of rules and regulations designed to reduce risks that arise from agent activity. The *E-Money Regulations* will replace the *Mobile Guidelines* and it is expected that these regulations will be mandated in 2014.¹⁰² The *E-Money Regulations* are more comprehensive than the *Mobile Guidelines* and apply to any entity providing e-money services, which includes mobile money.¹⁰³ Comments in this section on the regulatory

⁹⁹ Greenacre, Malady & Buckley, *supra* note 16, at 16.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 30.

¹⁰² *Id.* at 31.

¹⁰³ E-money service provider' is defined in E-Money Regulations, section 2 to mean 'a legal entity that accepts banknotes, coins or other means of payment in exchange for e-money, and facilitates the transfer of this e-money to make payments and transfers.' This means a bank or non-bank can be an e-money issuer

arrangements governing the use of agents focus on those arrangements as described in the proposed *E-Money Regulations*.¹²⁶ RBM, similar to other regulators involved in overseeing mobile money, views the use of agents as an outsourcing arrangement between the mobile money provider, referred to as an E-Money Service Provider (EMSP) in the *E-Money Regulations*, and its agents.¹⁰⁴ Therefore the *E-Money Regulations* focus on requirements and expectations of the EMSP with respect to its use of agents.¹⁰⁵ These rules include provisions to the effect that the MNO: is required to use a written contract with agents, is liable for the agents' actions, must conduct agent training, and must obtain certain details about the agent prior to signing-on the agent.¹²⁷

The *E-Money Regulations* are comprehensive in addressing the main risks arising from the use of agents. Provisions in the regulations focus on: managing agent illiquidity, operational risk, customer mistreatment, KYC/Customer Due Diligence (CDD) requirements, credit risk, and operational risk.¹²⁸ RBM does not directly regulate agents except for the following activities: monitoring and enforcing KYC for agents, intermittently inspecting agents, and reviewing monthly information on agent activity which MNOs provide to the RBM Payments Department.¹⁰⁶

3. *Analysis*

The *E-Money Regulations* appear to define an agent as an entity requiring the approval of RBM.¹⁰⁷ Approving individual agents may be an onerous task for a regulator and also for regulated

and so is obliged to confirm with agent rules in the regulations: see *E-Money Regulations*, § 19(1).

¹⁰⁴ § 2 of the *E-Money Regulations* defines “e-money service provider” as a legal entity that accepts banknotes, coins or other means of payment in exchange for e-money, and facilitates the transfer of this e-money to make payments and transfers.

¹⁰⁵ Part VI of the *E-Money Regulations* deals with agents.

¹⁰⁶ Greenacre, Malady & Buckley, *supra* note 16, at 31.

¹⁰⁷ *Id.*

entities.¹⁰⁸ RBM may therefore need to consider streamlining the approval process. For example, if regulated institutions confirm in writing to RBM that all of its agents operate under a contractual outsourcing agreement as specified in the *Guidelines*, and this agreement has been approved by RBM, then this could be considered as the agency arrangement being approved by the Bank. Streamlining the approval process is just one example of how the regulatory burden on regulated entities, agents, and RBM itself could be minimised in order to support the growth of mobile money.

As has been noted above, the *E-Money Regulations* apply to banks and non-banks providing mobile money, and so provide the same agency regulations for both types of institutions.¹²⁹ This service-based approach is highly desirable as it creates a level playing field between different types of service providers offering mobile money.¹³⁰ This may encourage banks to begin providing mobile money in Malawi, which will further help attain financial inclusion objectives. However, providers may require clarification on how the *E-Money Regulations* sit alongside the *Financial Services (Agent Banking) Regulations 2012 (Agent Banking Regulations)* (to Agent Banking Regulations)?¹⁰⁹ The *Agent Banking Regulations* apply to agents carrying on agent banking activities and specify additional requirements given the increased range of activities which agent banking encompasses compared to e-money activities.¹¹⁰ A policy statement to accompany the *E-Money Regulations* once they are mandated could provide such clarification for industry.

The *E-Money Regulations* prohibit agents from being contracted on an exclusive basis.¹¹¹ Some countries have been reluctant to regulate on this and are pursuing the same end through non-regulatory

¹⁰⁸ *Id.*

¹⁰⁹ *Financial Services (Agent Banking) Regulations 2012 (Agent Banking Regulations)*, <http://www.rbm.mw/documents/basu/Agent%20banking%20regulations.pdf>.

¹¹⁰ *Financial Services (Agent Banking) Regulations 2012 (Agent Banking Regulations)* § 3.

¹¹¹ § 26 states that ‘Agents shall not be contracted by the E-Money Service Provider on an exclusive basis.’

means or by requiring permission from the regulator if exclusive agreements are to be used.¹¹² While there is merit in prohibiting exclusive agent agreements, it is useful to assess the pros and cons of this approach, and to discuss with industry players their concerns about free riders versus network benefits.¹³¹

Good quality quantitative and qualitative background information is the backbone of good policy making. The *E-Money Regulations* include a number of reporting requirements, both regular reporting and event-driven reporting.¹¹³ These reports should enable RBM to compile and analyse statistics on the growth and use of mobile money agent networks in Malawi. It is recommended that plans for collating and analysing the information be considered alongside implementation of the *E-Money Regulations* to ensure all data needed is captured by the regulations.

The challenges the two MNOs are facing in building their agent networks indicates that market players need a degree of regulatory flexibility when a mobile money sector is in the early stages of development.¹³² In Malawi, the two MNOs need to determine how to most effectively deal with a number of agent-related issues, particularly agent illiquidity and the expenses required for training and retraining. Important provisions of Malawi's *E-Money Regulations* provide the MNOs with flexibility in organising their approaches to agent network management.¹¹⁴ In particular, these provisions make the Provider liable for its agents' actions rather than requiring the RBM to regulate agents directly.¹¹⁵ This regulatory flexibility must be balanced with effective oversight to minimise the risk of agent robbery and agent misconduct, particularly theft.

B. Applying a Risk-Based Approach to Implementing AML/CFT Measures

1. Best Practice

It is important that mobile money providers are able to implement AML/CFT measures and that

¹¹² Greenacre, Malady & Buckley, *supra* note 16, at 32.

¹¹³ § 34 deals with regular reporting, while § 35 deals with event-driven reporting.

¹¹⁴ Part VI of the E-Money Regulations deals with agents.

¹¹⁵ Part VI of the E-Money Regulations deals with agents.

regulators can assess this implementation in a manner consistent with international standards, particularly those issued by the Financial Action Task Force (FATF), the global standard-setting body for AML/CFT measures.¹³³ The FATF can publicly identify and label countries that have inadequate AML/CFT controls as “high-risk” and/or “non-cooperative jurisdictions.”¹¹⁶ However, it is also important that implementing AML/CFT measures does not become unduly burdensome for either the regulated entity or the end-user as this may compound financial exclusion. If the documentation required to open a new mobile money account is unnecessarily extensive the consumer may simply decide it is easier not to open the account and continue using informal financial services, such as cash payments and the hawala systems for transferring funds; they will continue to be ‘financially excluded’.¹³⁴ A risk-based approach to implementing AML/CFT measures for mobile money is therefore designed to further financial inclusion by avoiding an unduly burdensome AML/CFT process which constrains service growth.

In recent years, FATF has been working to increase international awareness and understanding of the risk-based approach, particularly for products such as mobile money.¹¹⁷ The underlying premise of this international agenda is that the goals of financial inclusion, integrity, and stability can be pursued simultaneously.¹¹⁸ The general principle behind FATF’s risk-based approach is that there is no ‘one size fits all’ approach to CDD: when higher risks are identified then enhanced CDD measures are *required* to manage and mitigate risks; when risks are lower, simplified CDD measures *may be used*, and in certain specific situations *exemptions* from CDD are possible.¹¹⁹

¹¹⁶ Financial Action Task Force, *High-risk and Non-cooperative Jurisdictions*, FINANCIAL ACTION TASK FORCE (2014), <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/>

¹¹⁷ Financial Action Task Force, *Risk-Based Approach Guidance for the Banking Sector*, FINANCIAL ACTION TASK FORCE (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf>

¹¹⁹ Financial Action Task Force, *Guidance for a Risk-Based Approach: Prepaid Cards, Mobile Payments*

In June 2013, FATF issued a guidance note entitled *Guidance for a Risk-Based Approach: Prepaid Cards, Mobile Payments and Internet-Based Payment Services (Guidance Note)*.¹³⁵ This document seeks to provide regulators and institutions with a greater understanding of the risk-based approach so as to enable them to make more informed judgments as to level of CDD required to mitigate money laundering/terrorist financing (ML/TF) risk and comply with international standards.¹²⁰ The *Guidance Note* encourages the use of simplified CDD for new payment products and services (NPPS) which are specifically aimed at growing financial inclusion.¹²¹ It also provides details on how to apply the risk assessment and risk mitigation processes, which underpin the risk-based approach, for NPPS, and provides guidance for regulators on how to undertake the regulation and supervision of entities involved in providing NPPS.¹²²

The following section examines how FATF's risk-based approach is being used to implement AML/CFT measures for mobile money in Malawi.¹³⁶

2. *In Practice*

Based on discussions with fieldwork interviewees, it was apparent that obtaining the correct identification documents was a challenge for many potential mobile money customers in Malawi, particularly in rural areas.

At the time of our country study, Malawi's main CDD obligations for mobile money were contained in the *AML/CFT Act* and *AML/CFT Regulations*.¹³⁷ The *Customer Due Diligence for Banks and Financial Institutions, Directive 2005 (CDD Directive)* may also apply to mobile money, although this is not clear.¹³⁸ Malawi's proposed *E-Money Regulations* provide an updated approach on applying

and Internet-Based Payment Services (Guidance Note), FINANCIAL ACTION TASK FORCE 21-22 (2013), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/guidance-rba-npps.pdf>.

¹²⁰ *Id* at 21.

¹²¹ *Id* at 21-22.

¹²² *Id* at 13-14.

AML/CFT measures for mobile money.

The *AML/CFT Act* provides that KYC requirements for individuals should include the name, address, and occupation of the person and applicable official identifying documents such as a National Identity Card or passport.¹³⁹ These obligations can be reduced if the transaction is part of an existing and regular business relationship with a person who has already produced sufficient evidence of identification or if the transaction is an occasional transaction that does not exceed a certain amount.¹⁴⁰

The *AML/CFT Act* does not provide a reduced KYC framework for low value transactions and so may be considered unduly burdensome for some mobile money providers and customers. However, the *AML/CFT Regulations* outline that the FIU is authorised to allow the use of reduced KYC requirements.¹⁴¹ This provides the sort of tiered approach to KYC that is not available through the *AML/CFT Act*. Using this power, the FIU has informed Airtel and TNM that a letter from a local chief or voter registration card is sufficient for KYC requirements.¹²³

However, in practice both MNOs have found it challenging to implement KYC requirements, primarily because the lack of a national identification system in Malawi makes it difficult to identify clients.¹²⁴ MNOs have experienced increased costs due to delays in obtaining a photocopy of identification or a letter from a local chief.¹²⁵ Obtaining information on the source and level of income has also been found to be relatively costly.¹²⁶

3. *Analysis*

There are a number of provisions in the *E-Money Regulations* that relate to KYC requirements for mobile money. These provisions are designed to harmonise with and not replace those obligations contained in the *AML/CFT Act*. Under the *E-Money Regulations*, EMSPs can use a tiered KYC

¹²³ Greenacre, Malady & Buckley, *supra* note 16, at 35.

¹²⁴ *Id.*

¹²⁵ *Id.*

approach,¹⁴² and the *Regulations* provide detail on how such a tiered approach would operate. The implementation of these regulations may raise the following points.

First, Part VII, section 30 of the *E-Money Regulations* indicates that RBM will determine the applicable transaction limit for each tier of KYC.¹²⁷ This approach is different to that elsewhere; for example, in the EU, where the EU sets the relevant amount in its Directives.¹²⁸ How RBM will make its determination on applicable transaction limits could involve industry consultation.

Second, it is necessary to clarify identification requirements — the RBM will need to determine how a customer's identification can be captured. The *E-Money Regulations* imply that only paper based records are permissible. For example, section 32.1.1.3 refers to photocopying the identification, and manually recording the identification if no photocopying facility is available.¹⁴³ As will be further explained below, it may be useful for such information to be captured electronically particularly in rural areas where this requirement may prove prohibitive.

Third, consistency between the regulations remains an issue. From our on-site discussions with the FIU it is understood that the provisions of the *E-Money Regulations* have been designed to be consistent with, and not replace, the *AML/CFT Act*.¹²⁹ Furthermore, the FIU contributed to the design of the AML/CFT measures outlined in provisions in the *E-Money Regulations*.¹³⁰ A policy statement may be required to clarify the interaction between the relative provisions of the two instruments. For example, it could be clarified how the provisions in the *E-Money Regulations* that allow for tiered KYC and electronic capturing of identification relate to the requirements in the *AML/CFT Act*.

Finally, a policy statement could helpfully clarify how the *CDD Directive* relates to the *AML/CFT Act* and the *E-Money Regulations*. Effective implementation of KYC requirements and

¹²⁷ The reference to § 30 is sufficiently specific.

¹²⁸ Greenacre, Malady & Buckley, *supra* note 16, at 35.

¹²⁹ The source is provided in the sentence i.e. on-site discussions.

¹³⁰ Greenacre, Malady & Buckley, *supra* note 16, at 36.

compliance with FATF guidelines will be furthered by a consistent application of a risk-based approach to implementing AML/CFT measures for mobile money as set out in the three instruments, irrespective of whether a bank or non-bank issues the e-money.

C. Protection of Customers' Funds

1. Best Practice

Protection of customers' funds is an integral part of a targeted consumer protection framework for mobile money.¹⁴⁴ This is because the funds which customers give to the mobile money provider in exchange for mobile money are not generally considered to be deposits and so are not covered by depositor protection provisions or deposit insurance.¹⁴⁵ If stored without adequate protection, customers' funds are at risk of loss through a number of means including theft, fraud, and general funds mismanagement (giving rise to liquidity and/or insolvency risks). Regulatory requirements focus on fund isolation, fund safekeeping, and operational risk management.¹⁴⁶

This section explores how trusts can be used to provide additional protection of customers' funds that are held by MNOs. It draws heavily on a knowledge product written by Jonathan Greenacre and Professor Ross Buckley and supported by the Pacific Financial Inclusion Programme, titled *Trust Law Protections for E-Money Customers: Lessons and a Model Trust Deed Arising from Mobile Money Deployments in the Pacific Islands* (October 2013).¹⁴⁷

The use of trusts can provide three key protections to customers' funds.¹³¹ The first is fund isolation, which addresses the problem of loss of customer or agent funds.¹³² Usually, customers' funds

¹³¹ Jonathan Greenacre & Ross Buckley, *Trust Law Protections for E-Money Customers: Lessons and a Model Trust Deed Arising from Mobile Money Deployments in the Pacific Islands*, ALLIANCE FOR FIN. INCLUSION 10 (Oct. 2013), http://www.afi-global.org/sites/default/files/publications/piwg_knowledge_product_e-money_trust_and_model_trust_deed.pdf.

¹³² *Id.*

are stored in aggregate in one or more bank accounts in the name of the Provider, not the customers.¹³³

This structure means that the Provider is the legal owner of the account and in the event of insolvency, the Provider can use the customers' funds to pay off debts.¹⁴⁸

Fund isolation deals with this problem by requiring the Provider to store customers' funds in a separate account — usually a trust account in a bank.¹³⁴ Declaring a trust over the funds which are held in this separate bank account, enables the customer to retain the beneficial ownership of the funds.¹⁴⁹ In other words, customers' funds are held separately and are legally isolated from the assets of the Provider. As such, the funds cannot be claimed by third party creditors should the Provider become insolvent.¹⁵⁰

The second is fund safeguarding rules which aim to minimise both the loss of agents' or customers' funds and illiquidity risk.¹³⁵ These rules aim to ensure the Provider always has a 1:1 ratio between e-money and the e-money issued (e-float).¹³⁶ Maintaining this 1:1 ratio means that the Provider will always have enough funds to repay the customers when they want to cash out their remaining e-money.¹³⁷ Three main categories of rules aim to achieve the 1:1 ratio: liquidity rules, restrictions on the use of customers' funds, and diversification of the e-float.¹⁵¹

The third is an active regulator which is designed to reduce operational risk by giving a regulator powers to monitor whether the EMSP is complying with the terms of the trust deed, including auditing requirements.¹³⁸ This protection is required because operational risk can arise in various ways such as theft, misuse, negligence, or poor administration and so may not be addressed purely through auditing

¹³⁴ Greenacre and Buckley, *supra* note 132, at 10.

¹³⁵ *Id.* at 11-12.

¹³⁶ *Id.* at 11.

¹³⁷ *Id.*

¹³⁸ *Id.* at 13.

requirements.¹³⁹

However, in a trust arrangement, the beneficiaries (in this case mobile money customers) are usually responsible for monitoring whether the EMSP is complying with the terms of the trust deed.¹⁵² This traditional trust arrangement may not be workable in these circumstances because mobile money is the first sustained interaction many Malawians will have with formal financial services.¹⁴⁰ They will not be educated and experienced in trust-related rules and principles.¹⁵³

2. *In Practice*

At the time of our country study, both MNOs in Malawi stored customers' funds in a trust account at a commercial bank.¹⁵⁴ Under the *E-Money Regulations*, the EMSP is required to open a trust account at one or more commercial banks, and a variety of provisions outline how these accounts should be operated.¹⁵⁵ Specific rules are analysed below.

3. *Analysis*

The RBM could use the *E-Money Regulations* to implement trust-based protections for customer funds through several methods. First, it could require the EMSP to use a trust deed with a declaration of trust which can create the fund isolation protection. RBM could then direct that this deed contain certain provisions relating to liquidity, restrictions on the use of customers' funds, and diversification which can create the fund safeguarding protection. Finally, the regulations could provide RBM with authority to monitor the EMSP's compliance with the terms of the trust deed which in turn can reduce operational risk.

However, these suggestions should be carefully considered as several implementation challenges may arise. First, a holistic approach is necessary. It should be considered whether or not the suggestions duplicate or contravene pre-existing methods of protecting customers' funds. For example, many of the suggested protections relating to fund safeguarding may already be contained in non-trust related

¹³⁹ *Id.* at 9.

documents, such as the contract between the customer and EMSP and it may be worth considering whether these could be enhanced.

Secondly, like any country, trust-related laws in Malawi will be complex and drawn from a range of sources, including legislation, regulation, and case law.¹⁴¹ How trust protections in the mobile money sector can be implemented in ways that are consistent with this area of law will need to be considered. Further, the trade-off between minimising risk and regulatory burden needs to be assessed; a proportionate risk-based approach should be followed where possible. It should also be borne in mind that additional regulatory costs may discourage EMSPs from expanding their services into rural areas of Malawi, or providing e-money altogether; however, the importance of proper customer protection provisions cannot be underestimated in building customer trust and ensuring the delivery of effective services.

Trust provisions could be inserted directly into the *E-Money Regulations* either directly or through a 'model trust deed' attached to the *E-Money Regulations* as a template which EMSPs must use. A sample trust deed is attached to the Trust knowledge product we drafted.¹⁴² Under this approach, the trust deed could function effectively as a rule book which contains all fund isolation, fund safeguarding, and operational risk protections that apply to customers' funds. These rules could consist of duties on the EMSP which are both express (i.e. explicitly contained in the trust deed) and implied (i.e. the court could infer a duty if it is required to fill a gap in the trust deed). Setting out the provisions in such a way may make it easier for RBM to monitor whether the EMSP is complying with its obligations to protect customers' funds.

a. Method 1: Fund Isolation

As outlined earlier, under the *E-Money Regulations*, an EMSP is required to open a trust account at a commercial bank.¹⁵⁶ However, this requirement will only create the necessary fund isolation

¹⁴² Greenacre and Buckley, *supra* note 131.

protection if a court finds sufficient evidence of an intention to create a trust relationship between the customer and EMSP. Storing customers' funds in a trust account is likely to be sufficient evidence to establish such an intention, but it may not be beyond doubt.

The *E-Money Regulations* could enhance fund isolation protection by requiring the EMSP to use a trust deed and include a declaration of trust as one of the provisions in the trust deed which specifies that the EMSP holds customers' funds on trust for the customer. These requirements would generally be sufficient to establish that a trust relationship does exist between two parties.

b. Method 2: Fund Safeguarding

The *E-Money Regulations* provide rules relating to how the trust account must be operated.¹⁴³ These fund safeguarding rules can reduce liquidity risk (by ensuring the EMSP maintains sufficient liquidity) and operational risk (by requiring the EMSP to have adequate safeguards in place to protect customers' funds).

In order to further strengthen the protection of customers' funds, the *E-Money Regulations* could require the trust deed to include additional fund safeguarding provisions on the use of trust funds. These can take the form of trustee duties specifying that the EMSP must pay all customers' funds into the trust account and that customers' funds cannot be used to finance the EMSP's operating expenses. The trustee duties could further specify that customers are entitled to their funds when they seek to cash-in an equivalent amount of e-money, and that the EMSP must return customers' funds if the trust is terminated.¹⁵⁷

c. Method 3: Reduce Operational Risk through an 'Active Regulator'

The *E-Money Regulations* grant RBM extensive monitoring powers over the EMSP's accounts, including the trust account, through for example auditing requirements for the EMSP, and powers of RBM to verify such audits.¹⁵⁸ These provisions can enable RBM to detect theft of customers' funds.

The *E-Money Regulations* could potentially provide RBM with more extensive powers to monitor

¹⁴³ Section 10 provides for the vetting of shareholders, trustees and senior management officials.

and enforce the terms of the trust on behalf of the customers, such as providing RBM with the powers, responsibilities, and duties involved in operating as a ‘protector’.¹⁵⁹ This involves giving an entity—in this case the RBM—the authority to oversee the actions of the Provider (as trustee of the trust in which customers’ funds are held).¹⁶⁰ This would enable the regulator to monitor the extent to which the Provider is storing and protecting customers’ funds.¹⁶¹

Where these powers already exist in the *E-Money Regulations*, they could be moved into the model trust deed proposed above. Protector powers, responsibilities, and duties include requiring RBM to comply with a number of duties when serving as a protector, specifically to act in the best interests of customers,¹⁶² to require the EMSP to provide it with additional audits of the trust account,¹⁶³ to remove an EMSP as trustee of the trust where it deems this necessary,¹⁶⁴ to refuse to provide consent to the EMSP’s proposed application to appoint a new person as a trustee,¹⁶⁵ and to revoke an EMSP’s approval to provide e-money for failing to operate in the interests of the customers.¹⁶⁶ RBM could further have the power to refuse to agree to the EMSP’s application to amend the trust deed,¹⁶⁷ to refuse to provide consent to the EMSP’s application to terminate or wind up the trust, and to enforce the terms of the trust on behalf of the customers, including by suing the trustee.¹⁶⁸

To conclude this analysis, scope for using trusts in Malawi as a means of protecting customers’ funds raises three main issues. First, a trust relationship cannot be automatically assumed to apply between the Provider and customers. The trust relationship needs to be specifically established by requiring a Provider to use a trust deed with a declaration of trust. Second, a regulator needs to ensure that the trust deed has the right fund safeguarding provisions. Third, in a developing country such as Malawi, many customers will have low levels of education and financial literacy, which implies that a regulator needs active powers to monitor the trust account on the customers’ behalf to ensure protections are effective.

D. Regulatory Implications of Partnerships Between MNOs and Banks/MFIs

1. Best Practice

In MNO-bank/MFI partnerships, customers holding a mobile money account with the MNO and a

deposit account with the partner bank or MFI are able to transfer money between these accounts.¹⁴⁴

Partnerships may also involve more basic cooperation where mobile money customers are able to use a partner bank's ATM to withdraw money.¹⁶⁹ Partnerships between non-banks and banks within the mobile money space are therefore beneficial on a number of fronts.¹⁷⁰ Partnerships can assist in addressing regulatory concerns; the pool of funds held by a non-bank may be reduced as end-users are able to transfer funds into deposit accounts at a bank; bank accounts are subject to well-established depositor protection provisions; and partnerships enable a broader range of product offerings beyond bill payments and remittance activities to providing customers with services such as savings, credit, and insurance.¹⁴⁵ However, partnerships between non-banks and banks give rise to potential risks which regulators need to assess when considering whether to grant approval of partnerships.¹⁷¹ Two central issues for regulators to consider include: collaboration risk, and consumer protection issues arising from the greater range of product offerings being available via a mobile phone.

Partnerships between MNOs and banks/MFIs can be structured in a number of ways and this raises risks specific to the method of collaboration.¹⁷² The two entities can enter into a legal partnership, but are in practice unlikely to want to do so because in law, partners are liable for each other's obligations.¹⁴⁶ The more likely structure to be adopted is therefore some form of joint venture. Joint ventures can be incorporated which means a new corporate legal entity is created in which the MNO and bank or MFI would each hold shares.¹⁴⁷ Alternatively they can be unincorporated, which means that although the two entities conduct business together this is not through the vehicle of a new legal entity, i.e. the unincorporated joint venture remains two entities working together.¹⁴⁸ The limitation of an

¹⁴⁴ Greenacre, Malady & Buckley, *supra* note 16, at 42.

incorporated joint venture from a regulatory point of view is that the venture will only have whatever assets the shareholders inject into it.¹⁴⁹ This may raise concerns as it may not be a substantial organisation in financial terms.¹⁵⁰ For this reason, regulators may prefer an unincorporated joint venture or may ask that the shareholders give guarantees of the liability of an incorporated joint venture.¹⁵¹

Consumer protection issues which arise as a result of a greater range of product offerings being available via a mobile phone need careful assessment by the regulator. Ideally, this should occur prior to potential issues arising for the end-users which may deter their further use of formal financial services. For example, by providing loans to customers of the MNO-bank/MFI partnerships, the partnership needs to be wary of excessive interest rate charges or poor credit risk assessments which may lead to client indebtedness and potential loan defaults.¹⁷³

2. *In Practice*

As outlined above, Airtel and TNM are now partnering with banks and MFIs in Malawi to add greater depth to mobile money product offerings and leverage on existing agent networks established by the banks and MFIs. For example, Airtel operates a partnership with Opportunity Bank (an MFI).¹⁵² TNM is piloting a partnership with First Merchant Bank.¹⁵³ The RBM is yet to determine a regulatory and supervisory approach for MNO-bank/MFI partnerships and regulation from other areas, such as competition, has yet to be applied. There is therefore a clear need to assess the regulatory requirements for the governance of such partnerships and to formulate the appropriate regulatory provisions.

3. *Analysis*

Partnerships between non-banks and banks within the mobile money space are beneficial because

¹⁵² Greenacre, Malady & Buckley, *supra* note 16, at 13.

¹⁵³ *Id.*

they can address regulatory concerns and allow for deeper product offerings, from bill payments and remittance activities to providing customers with a greater range of services, including savings, credit, and insurance. Regulators need to be aware of the implications of regulated entities entering into such partnerships and respond accordingly. Regulators will need to assess a number of factors including the proposed legal nature of the partnership and the risks this potentially gives rise to, which we refer to as collaboration risk. Partnerships will also raise consumer protection issues as a result of consumers potentially having access to a much broader range of financial services via a mobile phone than simply mobile money.

It would be beneficial at this stage of market development for the RBM to engage in ongoing dialogue with industry players in order to follow developments in partnerships. This will ensure that RBM is able to develop an appropriate oversight approach which supports the benefits from partnerships but also responds to any additional risks which may arise.

V. CONCLUSION

Mobile money products and services are an important tool in providing access to financial services for the unbanked and under-banked, thereby helping to alleviate poverty. Regulators need to assess emerging risks and sector developments. Research and on-the-ground experience suggests an enabling proportionate-based approach is appropriate for the task of designing effective regulatory frameworks for mobile money.

This article outlines the findings of a study of the mobile money sector in Malawi conducted by the research team at the University of New South Wales (UNSW). The purposes of this study were to assist regulatory agencies to develop an appropriate enabling legal and regulatory environment for service providers and end-users in Malawi's mobile money sector. It was hoped that by crafting a tailored regulatory environment, this would encourage further development in the sector which would enhance the achievement of the Government's financial inclusion and poverty reduction objectives. Insights from this study provide a better understanding of the challenges of implementing emerging best practices on the enabling approach and proportionate regulation in a developing country environment, as well as helping

to identify current gaps in understanding of the risks and challenges involved in the growth of the sector. The study identified seven key themes of regulatory development.

The first topic is the importance of establishing co-ordination among regulators and between regulators and industry in relation to mobile money. Malawi's regulators, particularly the RBM, have made considerable progress in this regard, indicating their adoption of emerging international best practice on this topic.

The second topic is the need for a regulator to clarify that its regulatory mandate extends to mobile money. Malawi's key mobile money-related regulation, the *E-Money Regulations and Payments Bill*, contain inconsistent use of important terminology, particularly 'mobile money' and 'e-money', which leads to confusion over the scope of the RBM's mandate over mobile money. This suggests that additional guidance is needed on the meaning of these terms and that this meaning needs to be conveyed to regulators so that it can be appropriately specified in regulatory documents. A document released by the Alliance for Financial Inclusion, titled *Mobile Financial Services: Basic Terminology* (2013) could be a useful framework for such a process.

The third area is a regulator's role in understanding and building consumer demand for mobile money. The considerable efforts of Malawian regulators and policy makers, particularly the RBM, in understanding and building consumer demand suggests that this component of international research can be implemented in practice.

The fourth component relates to the regulation of agents. Malawi's experience with building agent networks highlights the importance of regulatory freedom when a mobile money sector is in the early stages of development. In Malawi, the two MNOs need to determine how to continue building their networks and to overcome the challenges they face in doing so, particularly agent illiquidity and the expenses required for training and retraining. Important provisions of Malawi's *E-Money Regulations* provide a degree of flexibility in this regard, in particular by making the Provider liable for its agents' actions rather than requiring the RBM to regulate agents directly itself. This regulatory flexibility must be balanced with effective regulatory monitoring of risks that have arisen in relation to agent activity in other

countries, such as agent robbery and agent misconduct, particularly theft. Additional research is required to establish the appropriate balance with respect to regulating the use of agents. Our UNSW research team anticipates undertaking such research in the near future.

The fifth involves challenges of implementing proportionate regulation in relation to AML/CFT. The lack of a national identification system and the difficulty of obtaining photocopies of identity documents in rural areas of Malawi help us better understand the challenges developing countries face in designing even basic identification standards that are compliant with KYC rules but not unduly burdensome such as to constrain growth in the sector. In this respect, the need to comply with KYC rules has to be carefully balanced against the policy objective of furthering financial inclusion such that requirements that are workable in a developing economy environment can be identified. Furthermore, the different KYC rules in Malawi's AML/CFT legislation remind us of the importance of ensuring regulatory consistency.

Sixth, Malawi's use of trusts as a legal means of protecting customers' funds helps to identify three important issues that a country needs to address when using this tool: a trust relationship needs to be established by requiring a Provider to use a trust deed with a declaration of trust; the trust deed must contain the necessary fund safeguarding provisions; and in a country like Malawi where many customers will have low levels of education and financial literacy, it is important that the regulator has active powers to oversee the trust relationship.

The seventh relates to MNO-bank/MFI partnerships in mobile money. These partnerships are at an early stage in Malawi and other countries as they are a reasonably new development. Consequently, there is limited research on this topic. However, it is clear that Malawi and other countries will need to carefully assess developments in MNO-bank/MFI partnerships, including a specific focus on any particular risks that they may generate. We will conduct further research in this area with the objective of improving existing knowledge and awareness of the regulatory challenges that arise from MNO-bank/MFI partnerships in DFS.

In conclusion, Malawi's mobile money sector is a new development, having started just a few

years ago. Malawi has therefore been in the fortunate position of being able to draw upon experience in other markets, and as a result its regulatory arrangements appear to be well geared towards the continued safe growth of mobile money in the country. The legislative and regulatory changes currently being proposed in Malawi, the *Payments Bill* and draft *E-Money Regulations*, respond to the need to develop the mobile money market safely and in a way which responds positively to the needs of end-users, and thereby furthers financial inclusion objectives.

VI. APPENDIX: LIST OF ACRONYMS

ACL	Access Communications Limited
AFI	Alliance for Financial Inclusion
Airtel	Bharti Airtel
AML	Anti-money laundering
AMPI	African Mobile Phone Financial Services Policy Initiative
ATM	Automatic teller machine
BTCA	Better Than Cash Alliance
CBA	Commercial Bank of Africa
CDD	Customer due diligence
CDD Directive	Customer Due Diligence for Banks and Financial Institutions, Directive 2005
CFT	Countering the financing of terrorism
CFTC	Competition and Fair Trading Commission

CGAP	Consultative Group to Assist the Poor
CGAP Template	Consultative Group to Assist the Poor's Branchless Banking Diagnostic Template
DFS	Digital financial services
ECA	United Nation's Economic Commission for Africa
EMSP	E-money service provider
FATF	Financial Action Task Force
FHI 360	World Bank and Family Health International 360
FIU	Financial Intelligence Unit
GDP	Gross domestic product
G2P	Government-to-person
KYC	Know your customer
MACRA	Malawi Communications Regulatory Authority
MFI	Microfinance institutions
ML	Money laundering
MMCG	Mobile Money Consultative Group
MNO	Mobile Network Operators
MOF	Ministry of Finance
MOU	Memorandum of understanding
MPC	Malawi Postal Corporation

MTL	Malawi Telecommunications Limited
MM4P	Mobile Money for the Poor
NGO	Non-government organisation
NPC	National Payments Council
NPPS	New payments products and services
P2G	Person-to-government
RBM	Reserve Bank of Malawi
RBM-MF/CM	Reserve Bank of Malawi's Micro-finance and Capital Markets Department
Department	
SIM	Subscriber Identification Module
SMS	Short message service
TF	Terrorist financing
TNM	Telekom Networks Malawi Limited
UNCTAD	United Nation's Conference on Trade and Development
USAID	US Agency for Development

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*** Senior Research Fellow, University of New South Wales. This research is supported by the Centre for International Finance and Regulation (CIFR) (project no. E226), UNCDF, Standard Chartered Bank and the University of New South Wales (UNSW). CIFR is a Centre of Excellence for research and education in the financial sector which is funded by the Commonwealth and NSW Governments and supported by other consortium members, www.cifr.edu.au. We would like to thank Mary Dowell-Jones for her helpful comments. Thanks also to Samuel Gerber, Jessie Ingle, and Nicole Mazurek for excellent research assistance. All responsibility lies with the authors. This document is a draft version and as such the footnote referencing has not been corrected or finalized.

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6. Claire Alexandre, Ignacio Mas & Daniel Radcliffe, *Regulating New Banking Models to Bring Financial Services to All*, 54(3) CHALLENGE MAG. 116–134 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664644.

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9. The focus on financial inclusion is seen in many international forums: G20 Summits, the Global Policy Forum (GPF) of AFI, BTCA, FATF, and the Basel Committee on Financial Inclusion.

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11. For a discussion of the extensive methods that the unbanked and poor households more generally must take in order to deal with their liquidity and cope with economic challenges, see DARYL COLLINS, JONATHAN MORDUCH, STUART RUTHERFORD & ORLANDA RUTHVE, *PORTFOLIOS OF THE POOR: HOW THE WORLD'S POOR LIVE ON \$2 PER DAY* (2010). See Kempson, *supra* note 7, at 10 for related definitions of financial inclusion as the capacity to access and use appropriate financial services proposed by mainstream providers. See also *Financial Inclusion*, CONSULTATIVE GRP. TO ASSIST THE POOR (2014), <http://www.cgap.org/topics/financial-inclusion>; *About Global Findex: Background*, THE WORLD BANK <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTFINRES/EXTGLOBALFIN/0,,contentMDK:23172730~pagePK:64168182~piPK:64168060~theSitePK:8519639,00.html> (last visited Feb. 7, 2015).

12. Arguments about the benefits of shifting away from cash that relate to cost savings, transparency, speed and security, financial inclusion, new market access and economic development can be found at: *Why Shift to Electronic Payments*, BETTER THAN CASH ALLIANCE, <http://betterthancash.org/why-e-payments> (last visited Feb. 7, 2015). For a discussion of the ways in which customers can leverage mobile money for other financial services, see discussion of the 'ladder of financial inclusion' in Ignacio Mas & Colin Mayer, *Payments: Innovations on Mobile Money Platforms* (Sept. 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825122.

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17. *Id.*

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28. Regulatory freedom is considered a key reason for the development of M-Pesa in Kenya. See Ignacio Mas & Daniel Radcliffe, *Mobile Payments Go Viral: M-Pesa in Kenya*, in YES AFRICA CAN: SUCCESS STORIES FROM A DYNAMIC CONTINENT 353–370 (Punam Chuham-Pole & Manka Angwafo eds., 2011); Mwangi S. Kimenyi & Njuguna S. Ndung'u, *Expanding the Financial Services Frontier: Lessons from Mobile Phone Banking in Kenya*, BROOKINGS INST. 6–7 (Oct. 16, 2009), <http://www.brookings.edu/research/articles/2009/10/16-mobile-phone-kimenyi>. See also Alexandre, Mas & Radcliffe, *supra* note 6, at 122 for a discussion of regulatory freedom for non-bank e-money issuers to raise deposits and process payments.

29. *Branchless Banking Template*, CONSULTATIVE GRP. TO ASSIST THE POOR (2010), <http://www.cgap.org/sites/default/files/CGAP-Branchless-Banking-Diagnostic-Template-Feb-2010.pdf>. This template was developed using various earlier diagnostic processes and models between 2006 and 2009 and released publically in 2010.

30. The project is being undertaken at the University of New South Wales' Faculty of Law.

Several academics and development agencies throughout the world (World Bank, USAID, United Nations, and the Alliance for Financial Inclusion) are currently studying legal and regulatory issues for mobile money. In order to add to this developing knowledge base, and importantly, avoid duplicating research efforts, our project has identified four key legal and regulatory issues in relation to mobile money which to focus upon. These are:

Protection of customers' funds;

Agents—legal and regulatory considerations;

Applying a risk-based approach when implementing AML/CFT measures for mobile money; and

The role of the regulator in understanding and building consumer demand for mobile money.

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33. *Malawi: The World Factbook*, CENTRAL INTELLIGENCE AGENCY (Jan. 6, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/mi.html>.

34. *Id.*

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37. *Human Development Report 2013: Malawi*, UNITED NATIONS DEV. PROGRAMME (Jan. 7, 2014), <http://hdr.undp.org/sites/default/files/Country-Profiles/MWI.pdf>.
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39. *Malawi: The World Factbook*, *supra* note 33.
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42. See RBM, *Malawi National Payment Systems Vision and Strategy Framework for the Period 2014 to 2018 7* (Dec. 2013) (*Payment System Vision for 2014-2018*).
43. Dermish, Phiri & Sanford, *supra* note 31, at 10.
44. *Id.* at 9.
45. *Id.* at 14.
46. Lewis Kalasawa, *Mobile and Cyberthreat Issues*, 4 (September 10-12, 2013). More details on the telecommunications sector can be found in a recent report: *Malawi—Telecoms, Mobile, Broadband and Forecasts*, BUDDECOMM (2014), <http://www.budde.com.au/Research/Malawi-Telecoms-Mobile-Broadband-and-Forecasts.html>.
47. Kalasawa, *supra* note 46, at 4.
48. *The Little Data Book on Information and Communication Technology*, WORLD BANK & INT'L TELECOMMS. UNION 12 (2012), http://data.worldbank.org/sites/default/files/little_date_book_ict_2014.pdf.
49. See Edwin Saidi, *Mobile Opportunities Mobile Problems: Assessing Mobile Commerce Implementation Issues in Malawi*, 14 J INTERNET BANK & COMM 5, 8 (2009), available at <http://www.arraydev.com/commerce/jibc/2009-04/Saidi.pdf>. Saidi refers to poor mobile network

infrastructure in Malawi. *Id.* See also Kalasawa, *supra* note 46, at 4–7: Kalasawa refers to the existence of several problems in relation to mobile and internet use, namely, unsatisfactory and intermittent mobile service quality, high tariffs on internet and mobile phones, poor customer service, and low internet connectivity. *Id.*

50. Bharti Airtel is an Indian multinational telecommunications company that purchased the African operations of the Kuwaiti mobile company Zain (including Malawi) in 2010. John Ribeiro, *India's Bharti Airtel Completes Acquisition of Zain Africa*, PCWORLD (Jun. 8, 2010), <http://www.pcworld.com/article/198287/article.html>.

51. Airtel provides the insurance service in partnership with Smile Life Insurance company: Rogers Siula, *Airtel Malawi and Smile Life Insurance in Partnership*, NYASATIMES (2012), http://mobilemoneyafrica.com/details.php?post_id=689.

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53. TNM provides this insurance service in partnership with Nico Life Insurers. See Nico Life and TNM, (August 2013), available at <http://www.nico-life.com/pdfs/TNM-Moyo-Cover-1-Aug-2013-Corporate-Presentation.pdf>.

54. This estimate is based on data estimates: assuming 33 percent of population has a mobile phone (or 5.5 million people; see data quoted above) and MNOs mobile money customer base is between 0.4-0.5 million.

55. MM4P aims to assist in scaling up sustainable branchless and mobile financial services that reach the poor in very low-income countries. *Mobile Money for the Poor*, UNITED NATIONS CAPITAL DEV. FUND, <http://www.unCDF.org/en/MM4P> (last visited Feb. 7, 2014). It does so by providing financial and technical support providers and agents, supporting market and client research, bringing large scale users into the branchless and mobile financial services system, and assisting central banks to create an

enabling environment for branchless and mobile financial services. *Id.* MM4P is funded by the United Nations Capital Development Fund (UNCDF), Sida (a Swedish government agency), AusAID, and the Bill and Melinda Gates Foundation. *Id.*

56. See *FinMark Report*, *supra* note 31, at 3; *USAID Action Plan*, *supra* note 31, at 14; and *USAID Survey Results*, *supra* note 31.

57. See, e.g., *Mobile Money War: RBZ Moves In*, THE STANDARD (Mar. 2, 2014), <http://www.thestandard.co.zw/2014/03/02/mobile-money-war-rbz-moves> for an explanation of the issues in this article focusing on the Reserve Bank of Zimbabwe's (RBZ) directive for mobile money operators to seek RBZ's permission prior to entering into exclusive agreements with agents.

58. *Reserve Bank of Malawi Act 1989*, § 4(e) (Malawi), available at http://www.malawilii.org/files/mw/legislation/consolidated-act/44:02/rboma4402219_pdf_20081.pdf

59. *Communications Act 1998*, § 3 (Malawi), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=222361.

60. These include the power to 'enter into contracts, responsible for receiving, requesting, analysing and disseminating to competent authorities disclosures of financial information as required under this Act in order to counter money laundering and financing of terrorism': *AML/CFT Act*, § 11 (Malawi), available at <https://www.rbm.mw/documents/pisu/Money%20Laundering%20Act%202006.pdf>. Note that 'competent authority' means 'the Director of Public Prosecutions, and includes any person authorized by him in that behalf': *AML/CFT Act*, § 2 (Malawi), available at

<https://www.rbm.mw/documents/pisu/Money%20Laundering%20Act%202006.pdf>. There are also several other important institutions involved in AML/CFT, however their work does not directly relate to KYC for mobile money and so they are not specifically considered here. These institutions include the National Anti-Money Laundering and Combating the Financing of Terrorism Committee, the Malawi Police Service, the Director of Public Prosecutions, and the National Counter Terrorism Committee.

Furthermore, Malawi is a member of the regional group called the Eastern and Southern Africa Antimoney Laundering Group.

61. For membership list of NPC see *The Payment System in Malawi*, BANK FOR INT'L SETTLEMENTS 63, <http://www.bis.org/cpss/paysys/Malawi.pdf> (last visited Feb. 7, 2015).

62. Press reports indicate MMCG members are drawn from the World Bank, RBM, Bankers Association of Malawi, Malawi Microfinance Network, MACRA, and the MOF. If this is the case, the MMCG would appear to form the basis of a very useful collaborative effort for mobile money in Malawi given the range of expertise being brought to the table. See *Kenya Transferred \$22bn Via Mobile Money—CBK*, SCI. & TECH. WORLD (Jan. 30, 2014), <http://www.ventures-africa.com/2014/01/kenya-transferred-22bn-via-mobile-money-cbk>.

63. *Malawi to Set Up Mobile Money Co-ordination Group*, TELECOMPAPER (Jan. 2012), <http://www.telecompaper.com/news/malawi-to-set-up-mobile-money-coordination-group--992760>.

64. For example, as outlined below, the MOF produced the *Financial Inclusion Strategy for 2010-2014*, which focused on extending financial services; RBM has encouraged the development of mobile money to give effect to MOF's vision expressed in its *Financial Inclusion Strategy for 2010-2014* document.

65. As discussed below in Part 4.2, Malawi's mobile money-related AML/CFT regulations include the *E-Money Regulations*, the *Money Laundering Proceeds of Serious Crime and Terrorist Financing Act 2006 (AML/CFT Act)*, the *Money Laundering, Proceeds of Serious Crime and Terrorist Financing Regulations 2011*, and *Customer Due Diligence for Banks and Financial Institutions, Directive 2005*.

66. Kalasawa, *supra* note 46.

67. The *Payment System Vision for 2009-2013* contains plans endorsed by RBM, NPC, and the Bankers Association of Malawi (BAM). The *Payments System Vision for 2009-2013* advocates for developing electronic payment channels to serve the banked and unbanked through expanding point-of-

sale and ATM networks and greater interoperability amongst financial institutions: *Malawi National Payment System Vision and Strategy Framework for the Period 2009-2013*, RBM 12–13, 15 (Dec. 2008), http://www.rbm.mw/documents/payment_systems/NPS%20Vision%20%20Strategy%20Framework%20December%202008%20Final.pdf.

68. The *Payment System Vision for 2014-2018* advocates for extending financial services to the unbanked, including by promoting interoperability between mobile payment providers, promoting financial inclusion through affordable banking solutions, and by broadening the availability of payment products and services and adopting new technologies, at 6, 8, 12, 13.

69. The *Financial Inclusion Strategy for 2010-2014*, issued by the MOF, emphasises the need to expand services beyond the formal banking sector. This document highlights the need to reduce the costs of a cash economy but to also provide greater access to electronic channels (including mobile phones) in terms of a broader focus on payments system development. The *Financial Inclusion Strategy 2010-2014* also emphasises that incentives should be offered to financial providers involved in piloting new access-friendly innovations.

70. This document focuses on encouraging people to take up new payment avenues which will include mobile money through, for example, public awareness campaigns and market-based research.

71. See *Malawi Joins Better Than Cash Alliance*, BETTER THAN CASH ALLIANCE (Jun. 27, 2013), <http://betterthancash.org/news-releases/malawi-announces-commitment-to-transition-to-electronic-payments>. The Better Than Cash Alliance raises awareness about the benefits of replacing physical cash with electronic payments, accelerating this replacement process through the following means: advocacy; providing financial, technical and financial assistance to those aiming to shift towards electronic payments; and developing research on this topic. *About Better Than Cash Alliance*, BETTER THAN CASH ALLIANCE, <http://betterthancash.org/about> (last visited Feb. 7, 2015).

72. Chikondi Chiyemekeza, *Malawi National Switch Centre Live in 2014*, THE NATION (Sep. 2, 2013), <http://mwntation.com/malawi-national-switch-centre-live-2014>.

73. Note that the *Mobile Guidelines* are not hard law per se: laws/regulations must be issued by the Minister of Finance as per *RBM Act*, §56 (Malawi), available at http://www.uncdf.org/sites/default/files/Documents/the_regulation_of_mobile_money_in_malawi_project_report_final_version.pdf

74. *Payments Systems Bill 2013* (Malawi) [hereinafter *Payment Systems Bill 2013*]; *Reserve Bank (E-Money) Regulations 2014* (Malawi) [hereinafter *E-Money Regulations*].

75. The *Payments Bill* was widely circulated amongst the policy, regulatory, and donor community in Malawi, such as the World Bank and International Monetary Fund.

76. The *E-Money Regulations* were drafted by RBM-Payments Department with input from a consultant provided through the World Bank's Financial Sector Assistance Program.

77. 'E-money service provider' is defined in *E-Money Regulations*, § 2 to mean 'a legal entity that accepts banknotes, coins or other means of payment in exchange for e-money, and facilitates the transfer of this e-money to make payments and transfers.' This means a bank or non-bank can be an e-money issuer and so is obliged to conform with agent rules in the regulations: see *E-Money Regulations*, § 19(1)..

78. *E-Money Regulations*, § 40.

79. See *AML/CFT Act*, § 2 (Malawi), available at <https://www.rbm.mw/documents/pisu/Money%20Laundering%20Act%202006.pdf> (containing definition of Financial Institution).

80. See *Consumer Protection Act 2003*: § 28(2) (Malawi), available at <https://www.rbm.mw/documents/pisu/Consumer%20Protection%20Act.pdf>. See also *FinMark Report*, *supra* note 31, at 18.

81. Further details on international Best Practice on cooperative oversight arrangements can be found in the *Central Bank Oversight of Payment and Settlement Systems*, BANK FOR INT'L SETTLEMENTS (May 2005), <https://www.bis.org/publ/cpss68.htm>. For a discussion on the dangers that

regulators will not sufficiently co-ordinate between themselves *see Supervising Nonbank E-money Issuers*, CONSULTATIVE GRP. TO ASSIST THE POOR 2 (Jul. 2012),

<https://www.cgap.org/sites/default/files/CGAP-Brief-Supervising-Nonbank-Emoney-Issuers-Jul-2012.pdf>; *Mobile Money for Business Development in the East African Community*, *supra* note 14, at 28.

Regulators need to make sure they leverage their unique competencies and capabilities in a coordinated approach to regulation and oversight of branchless banking services: *see GSR 2011 Discussion Paper: The Regulatory Landscape for Mobile Banking*, INT'L TELECOMM UNION 13 (2011),

<http://www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR11/documents/04-M-Banking-E.pdf>.

82. The composition and focus of the coordinating bodies are detailed in Part 2 of this report.

83. Details on MOUs are outlined in Part 2 of this report.

84. Details on these plans are outlined in Part 2 of this report.

85. Press reports indicate MMCG members are drawn from the World Bank, Reserve Bank of Malawi, Bankers Association of Malawi, Malawi Microfinance Network, Malawi Communications Regulatory Authority (MACRA), mobile network operators, Ministry of Finance, which if the case, would appear to form the base of a very useful collaborative effort for mobile money in Malawi given the range of expertise being brought to the table. *See Gregory Gondwe, Malawi to Launch Study on Mobile Money*, BIZTECH AFRICA (Jan. 28, 2014), http://www.biztechafrika.com/article/malawi-launch-study-mobile-money/7609/?section=government#.U_p7eLySyzs.

86. *See Malawi Joins Better Than Cash Alliance*, *supra* note 71.

87. For further discussion on issues arising from ineffective cooperation *see* Loretta Michaels, *Can Mobile Money Support Post-Conflict Development?* CONSULTATIVE GRP. TO ASSIST THE POOR (Aug. 9, 2011), <http://www.cgap.org/blog/can-mobile-money-support-post-conflict-development>; Pierre-Laurent Chatain et al., *Protecting Mobile Money Against Financial Crimes: Global Policy Challenges and Solutions*, THE WORLD BANK 119 (2011), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/03/10/000333037_20110310000

727/Rendered/PDF/600600PUB0ID181Mobile09780821386699.pdf.

88. This suggestion of leveraging on the expertise of groups represented by AMPI was suggested at the recent meeting of AMPI, held in March 2014: *Final Communiqué*, ALLIANCE FOR FIN. INCLUSION (Feb. 6, 2014), <http://www.afi-global.org/library/publications/second-ampi-leaders-roundtable-final-communicue>.

89. This suggestion of the ECA being well placed to help Malawi with regulatory policies was taken from Edwin Saidi, *Towards a Faultless Mobile Commerce Implementation in Malawi*, 15 J INTERNET BANK & COMM 9 (2010), where it was also suggested the ECA could assist with security and data protection issues.

90. *Mobile Money for Business Development in the East African Community: A Comparative Study of Existing Platforms and Regulations*, *supra* note 14, at 33.

91. Saidi, *supra* note 89, at 6, noted the potential conflict of interest for RBM if it is regulating entities which are guiding its policy development process. This issue can be addressed through focusing on developing regulatory capacity on an ongoing basis which is particularly important when regulatory financial services are undergoing rapid developments such as mobile money products and services.

92. The RBM has also used § 4(e) when issuing the *Mobile Guidelines* and for other payment initiatives, such as those outlined in the *Payment System Vision for 2009-2013* and the *Payment System Vision for 2014-2018*.

93. *Payment System Vision for 2014-2018*, *supra* note 68, at 4.

94. *Id.* at 11.

95. A GSMA article published in December 2013 on the regulatory development for mobile money in Brazil and Peru provides a very good overview of the reasons for such developments and the benefits of leveling the playing field for non-banks through regulation: Mireya Almazan, *Mobile Money for the Unbanked*, GSMA (Dec. 19, 2013), <http://www.gsma.com/mobilefordevelopment/mobile-money->

regulation-in-latin-america-leveling-the-playingfield-in-brazil-peru. Kenya also provides a good example of legislative and regulatory developments for mobile money. The enactment of its National Payments System Act (No 39 of 2011) and the draft regulations which will soon follow (these are now being finalised, following the closing of the consultation period in October 2013) will, among other things, provide greater clarity and certainty on the regulatory arrangements for non-bank payments providers. *See National Payment Systems Draft Regulations—Invitation for Comment*, CENTRAL BANK OF KENYA, <https://www.centralbank.go.ke/index.php/news/323-nps-draft-regulations> (last visited Feb. 8, 2015).

96. The *Payment System Vision for 2014-2018* notes: “A draft Payment Systems Bill was finalised and submitted to the Ministry of Justice through Ministry of Finance which is expected to be enacted in 2014”: *Payment System Vision for 2014-2018*, *supra* note 68, at 6. This detail could be expanded on to include more detail on the intention and planned implementation process of the legislation and regulations.

97. Examples of jurisdictions which take this approach include: Australia, Kenya, Philippines, Singapore, and the EU. The *FinMark Report* noted this issue as being important to clarify how institutions should treat funds held in trust which represent the stored value and not classified as deposits: *FinMark Report*, *supra* note 31, at 23.

98. The *FinMark Report* has previously canvassed issues relating to the clarification and definition of the term ‘stored value’ and provided a good explanation as to how e-money comprises the electronic funds representing the underlying stored value. *See id.*

99. Mobile Financial Services Working Group, *supra* note 1.

100. For example, see discussion in of GSMA’s 2012 global mobile money adoption survey in which just 6 out of 150 current mobile money deployments have reached more than 1 million active customers. Claire Pénicau, *State of the Industry: Results from the 2012 Global Mobile Money Adoption Survey*, GSMA 1, http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/02/MMU_State_of_industry.pdf (last visited Feb. 8, 2015). Of the remaining 90

percent of MNOs, only around 0.9 percent on average of the customer base was actively using mobile money 12 months after the launch. *Id.* at 13. This suggests that understanding consumer demand is also a pressing issue at the level of providers. See Mireya Almazan, *G2P Payments & Mobile Money: Opportunity or Red Herring?*, GSMA (Sep. 30, 2013),

<http://www.gsma.com/mobilefordevelopment/g2p-payments-mobile-money-opportunity-or-red-herring>.

101. A note on terminology in this section: Digital Financial Services (DFS) or Mobile Financial Services (MFS) are terms which are being increasingly used in place of more specific terms such as mobile money. In this section, DFS is used to refer to a range of financial services accessible via digital remote access as opposed to traditional financial services accessed through physically visited a bank branch. Mobile money is included in the definition of DFS.

102. See Alexandre, Mas & Radcliffe, *supra* note 6, at 116–134 for a discussion of regulatory steps needed to ensure market players can experiment with new products, which will be needed to ensure these products actually meet the demands of the unbanked. Davis and Owens contrast different countries to illustrate the importance of local context in understanding demand. John Owens & Ben Davis, *POS vs. Mobile Phone as a Channel for M-Banking*, MICROSAVE (Sep. 19, 2008),

<http://www.rbapmabs.org/blog/wp-content/uploads/2009/02/BN-66-POS-vs-Mobile-Phone.pdf>.

103. Graham Wright (head of Microsave) recently commented on this point in his reflections on the Mor Committee report—Wright notes the report offers a “sophisticated vision of the financial architecture” and a road map for providing financial access to all, however he questioned whether due consideration was given to the demand side noting that “the report seems to imply that low income people’s demand for formal financial services was a given.” See Graham Wright, *The Mor Committee Report—the Demand Side Conundrum*, MICROSAVE (Feb. 2014), <http://blog.microsave.net/the-mor-committee-report-the-demand-side-conundrum>.

104. Manoj Sharma, *DFS for the Under-Banked: Research, Design and Delivery* (October 2013), available at http://www.microsave.net/files/pdf/MicroSave_DFS_for_the_Under_Banked.pdf.

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105. Debbie Watkins, *Context and Culture: Designing Relevant Financial Services*, CONSULTATIVE GRP. TO ASSIST THE POOR (Aug. 13, 2013), <http://www.cgap.org/blog/context-and-culture-designing-relevant-financial-services>.
106. For a brief description of an enabling regulatory environment for mobile money, see Gutierrez and Singh, *supra* note 24. These authors cite Porteous, *The Enabling Environment for Mobile Banking in Africa*, *supra* note 24; Porteous, *Mobilizing Money through Enabling Regulation*, *supra* note 24
107. *Homepage*, BETTER THAN CASH ALLIANCE (2014), <http://betterthancash.org>.
108. See Ignacio Mas, *Digitizing the Kaleidoscope of Informal Financial Practices* (Dec. 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359942; see also Tilman Ehrbeck, *Avoid Blaming the Victim in the Financial Literacy Debate*, THE HUFFINGTON POST (Dec. 19, 2013), http://www.huffingtonpost.com/tilman-ehrbeck/the-financial-literacy-debate_b_4459311.html.
109. See Michael Tarazi & Kabir Kumar, *Platform-level Interconnection in Branchless Banking*, CONSULTATIVE GRP. TO ASSIST THE POOR (Jan. 19, 2012), <http://www.cgap.org/blog/platform-level-interconnection-branchless-banking>. Interoperability issues are currently under consideration by many regulators in emerging markets. The Philippines, for example, are currently focused on determining the best path towards interoperability. *Building Consensus Towards Enabling an Efficient and Inclusive National Payments System in the Philippines: A Significant Step*, USAID (Apr. 24, 2013), <http://www.simmphil.org/misc/building-consensus-towards-enabling-an-efficient-and-inclusive-national-payments-system-in-the-philippines-a-significant-first-step>. Bangko Sentral ng Pilipinas (BSP), which is the Philippines' central bank, has preferred industry involvement and for BSP to not have to mandate arrangements. *Id.* For mobile money, BSP has highlighted concerns around efficiency, competition, affordability and financial inclusion as being important for interoperability. *Id.* BSP is now working with the industry to develop how this interoperability will come into effect. *Id.* For Africa, references to the pending launch of the East Africa Payments System (EAPS) are expected to have implications for

interoperability in payment systems in this region. *East Africa's Top Economies Launch Cross-border Payment System*, REUTERS (Dec. 11, 2013), <http://www.reuters.com/article/2013/12/11/us-eastafrika-trade-idUSBRE9BA0GF20131211>.

110. See generally *USAID Action Plan*, *supra* note 31.
111. *Id.* at 14.
112. National Payments System Department, *July 2013 to December 2015 Planned Strategy*, RESERVE BANK OF MALAWI 2.
113. Ralph Jooma, Inclusive Growth in Malawi and Digital Financial Inclusion (September 24 2013), available at <http://betterthancash.org/speech-delivered-by-hon-ralph-jooma-mp-minister-of-economic-planning-and-development-at-partnership-for-digital-financial-inclusion-a-driver-of-inclusive-growth>.
114. *Payment System Vision for 2009-2013*: § 3.2, 3.2.3, 3.2.6, 3.2.9, 4.2, Table 2, available at http://www.rbm.mw/documents/payment_systems/NPS%20Vision%20%20Strategy%20Framework%20December%202008%20Final.pdf [hereinafter *Payment System Vision for 2009-2013*]; *Payment System Vision for 2014-2018*, § 3.3.8 and 4.2.
115. *Mobile Guidelines*: § 5.5, 8.6, 10.1.1, 10.3.3, 11.10, and 14.11, available at https://www.rbm.mw/documents/payment_systems/Mobile%20Payments%20Systems%20Guidelines.pdf [hereinafter *Mobile Guidelines*].
116. *E-money Regulations*, § 26.
117. Almazan, *supra* note 100.
118. *Id.*
119. Jamie Zimmerman & Kristy Bohling, *E-Payments in Low-Income Settings: Cutting-Edge or High Risk?*, CONSULTATIVE GRP. TO ASSIST THE POOR (Mar. 12, 2014), <http://www.cgap.org/blog/e-payments-low-income-settings-cutting-edge-or-high-risk>.
120. See *Interoperability and Related Issues in Branchless Banking*, CONSULTATIVE GRP. TO

ASSIST THE POOR (Aug. 30, 2011), <http://www.slideshare.net/CGAP/interoperability-and-related-issues-in-branchless-banking-a-framework-december-2011>.

121. For example, Australia is currently developing a national retail payments switch which should allow for payments innovations such as mobile money to connect to. The Philippines is also considering developing a national switch (noted from BSP's discussions at ADB-CGAP Branchless Banking in the Pacific Seminar in Sydney, November 2013).

122. See *Mobile Financial Services Risk Matrix*, USAID (Jul. 23, 2010), <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/06/mobilefinancialservicesriskmatrix100723.pdf>; Neil Davidson & Paul Leishman, *Introduction: Building, Incentivising and Managing a Network of Mobile Money Agents*, GSMA (2010), <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/03/intro.pdf>.

123. At the time of doing fieldwork for this study, data on the growth in the numbers of agents for mobile money were not available.

124. For a more detailed discussion on liquidity risk see Alexandre, Mas & Radcliffe, *supra* note 6. This article focuses on the mobile money transaction process to identify the functions and regulatory issues that arise at each step of the transaction process such as account opening procedures, the cash-in cash-out arrangements, the electronic messaging arrangements, the float management and the settlement arrangements.

125. Graham Wright, *Why Rob Agents? Because That's Where the Money Is*, MICROSAVE (Aug. 2013), <http://blog.microsave.net/why-rob-agents-because-thats-where-the-money-is>; Queen Nhlema, *Airtel Money Agent Arrested in Mzimba*, CAPITALFM (Jun. 30, 2014), <http://www.capitalradiomalawi.com/index.php/component/k2/item/1619-airtel-money-agent-arrested-in-mzimba>.

126. The authors of this article have provided earlier comments to RBM on how this topic is dealt with in the *E-Money Regulations*.

127. *E-Money Regulations*, § 19(1) (permitted activities of agents), § 12(11) (principal-agent liability), § 12(11-12), § 13, § 20(1), § 21(1), § 22(1), § 23(1), § 26 (the relationship between the principal and agent), § 23(d, e), § 31, § 34 (methods by which RBM can monitor agent activity), and § 13 (outsourcing).

128. Protections in the *E-Money Regulations* operate as follows: agent illiquidity (§ 22(1)(c), 23(1)(f)), operational risk (§ 23), customer mistreatment (§ 22, 23); KYC/CDD (§ 22(1)(d), 23(1)(b)), credit risk (§ 22(1)(f, g)), and operational risk (§ 23(1)). CDD is the same as know your customer (KYC). These terms are used interchangeably in this article.

129. *See E-Money Regulations* § 3, Part IV. Note that banks may be held to additional rules if conducting banking businesses through agents. *E-Money Regulations*, § 22.1.

130. For further discussion on the issue of a level playing field when it comes to legal liability for the actions of agents, *see* Michael Tarazi & Paul Breloff, *Non-Bank E-Money Issuers: Regulatory Approaches to Protecting Customers Funds*, CONSULTATIVE GRP. TO ASSIST THE POOR (Jul. 2010), <http://www.cgap.org/sites/default/files/CGAP-Focus-Note-Nonbank-E-Money-Issuers-Regulatory-Approaches-to-Protecting-Customer-Funds-Jul-2010.pdf>.

131. *See, e.g., Mobile Money War: RBZ Moves In*, *supra* note 57 for an explanation of the issues in this article focusing on the RBZ's directive for mobile money operators to seek RBZ's permission prior to entering into exclusive agreements with agents.

132. *See* Mas & Radcliffe, *supra* note 28; Kimenyi & Ndung'u, *supra* note 28; and Alexandre, Mas & Radcliffe, *supra* note 28.

133. For a detailed view of AML/CFT measures and mobile money *see Symposium—Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity*, 8(3) WASH. J L, TECH, ARTS 153 (2013).

134. *See* Vivianne Jabbour, *Mobile Money: Is This Industry's Chance to Show a More Socially Responsible Attitude?* 17(7) COMP. & TELECOM. L. REV. 181, 182 (2011).

135. The *FTAF Guidance Note* reiterates a great deal of the content of the FATF *Guidance on Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion (2013)* but with an emphasis on applying the risk-based approach RBA to NPPS.

136. The authors of this article have provided earlier comments to RBM on how this topic is dealt with in the *E-Money Regulations. FinMark Report*, *supra* note 31 commented on the use of a risk-based approach for implementing AML/CFT measures. The *FinMark Report* was written before the *E-Money Regulations* were drafted. Its main points on AML/CFT were:

The *AML/CFT Act* did not specify a reduced KYC framework for low value transactions; nor did it specify whether transaction limits could be used for determining the level of KYC;

The *AML/CFT Act* did not specify whether the KYC identification information could be held electronically;

The *CDD Directive*, which focuses on KYC rules and procedures, did provide for the use of tiered KYC. However, the approach for applying the tiers was left to individual banks and financial institutions to determine;

The description in the *CDD Directive* of identification requirements needed for basic KYC was such that it possibly precluded new customers without regular employment and so the *CDD Directive*'s potential was more additive than transformative for financial inclusion;

It was not clear whether the *AML/CFT Act* superseded the *CDD Directive* because the latter was not referenced in the former.

137. The *AML/CFT Act* applies to mobile money due to § 9.1.4 and 13.2 of the *Mobile Guidelines*.

138. *CDD Directive*, § 3, available at <https://www.rbm.mw/documents/basu/customer%20due%20diligence%20directive.pdf>

139. *AML/CFT Act*, § 24(1), available at <http://www.fiumalawi.gov.mw/AMLAct/index.html>

140. *Id.* at § 24(7).

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141. *AML Regulations*, § 3 (sub-regulations 5 and 7), 23, available at <http://www.fiumalawi.gov.mw/AMLRegulations.pdf>
142. *E-Money Regulations*, § 30. In addition, there are limitations on registration requirements of accounts for customers in certain tiers (*E-Money Regulations* § 12(10)); e-money service providers must ensure their agents comply with AML laws, rules and regulations (*E-Money Regulations*, § 12(12)); and agents must perform KYC/CDD procedures when registering new customers (*E-Money Regulations*, § 22(1)(d)).
143. As a separate point to consider, this section should possibly be applied to 30(1) (a), (b) and (c) instead of only being under 30(1)(a)(3) because this would make it clear that it applies to the capturing of identification irrespective of whether it is for Tier One, Two or Three.
144. See Michael Tarazi & Paul Breloff, *Nonbank MNOs: Regulatory Approaches to Protecting Consumer Funds*, CONSULTATIVE GRP. TO ASSIST THE POOR (2010), <http://www.cgap.org/sites/default/files/CGAP-Focus-Note-Nonbank-E-Money-Issuers-Regulatory-Approaches-to-Protecting-Customer-Funds-Jul-2010.pdf>; Lauer & Tarazi, *supra* note 27.
145. There is controversy in the literature as to whether stored value should be considered a deposit, however, for the purposes of analysing this regulatory challenge for Malawi it is assumed that e-money funds are not considered deposits — consistent with Malawi's approach as outlined in its draft *E-Money Regulations*. See *E-Money Regulations* § 12.6. For background literature on this topic see Tarazi & Breloff, *supra* note 144.
146. This is not to suggest this issue does not deserve the attention of regulators. On the contrary, it is expected that as the mobile money market develops the accompanying consumer protection framework will require significant development and strengthening. In particular, Malawian regulators should ensure an initial assessment is made, if not made already, as to whether existing consumer protection measures (such as appropriate disclosures requirements and redress mechanisms for consumer complaints) apply to EMSPs or if regulations need to be amended to ensure these measures apply to

EMSPs. The recently-released document *Mobile Financial Services: Consumer Protection in MFS* (2014) developed by the AFI's Mobile Financial Services Working Group, released in March 2014, provides a framework of analysis for identifying these issues and presents options for regulators in addressing the issues. See Mobile Financial Services Working Group, *Mobile Financial Services: Consumer Protection in MFS*, ALLIANCE FOR FIN. INCLUSION (Mar. 2014), <http://www.afi-global.org/library/publications/mobile-financial-services-consumer-protection-mfs-2014>.

147. Jonathan Greenacre & Ross Buckley, *Trust Law Protections for E-Money Customers: Lessons and a Model Trust Deed Arising from Mobile Money Deployments in the Pacific Islands*, ALLIANCE FOR FIN. INCLUSION (Oct. 2013), http://www.afi-global.org/sites/default/files/publications/piwg_knowledge_product_e-money_trust_and_model_trust_deed.pdf.

148. Tarazi & Breloff, *supra* note 144, at 6.

149. The distinction between beneficial owner and legal owner is an important one, and should be carefully considered. Equity allows the use and benefit of the land to be held separately from the legal title. Thus, even if the legal title to property is held by one person, another person may enjoy the 'beneficial title'. Beneficial ownership can only be recognised in courts of equity and not by the common law: JOHN MOWBRAY ET AL., *LEWIN ON TRUSTS* 3 (17th ed. 2000).

150. Tarazi & Breloff, *supra* note 144, at 6.

151. *Id.* at 3.

152. In turn this is because of their power to enforce the terms of the trust by suing the EMSP (as trustee) for breaches of the trust's terms.

153. Denise Dias & Katharine McKee, *Protecting Branchless Banking Consumers: Policy Objectives and Regulatory Options*, CONSULTATIVE GRP. TO ASSIST THE POOR (Sep. 2012), http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/06/fn_64_rev_d_10.pdf.

154. The authors of this article have provided earlier comments to RBM on how this topic is

dealt with in the *E-Money Regulations*.

155. See, eg., *E-Money Regulations*, § 12(14-15).
156. *Id.*
157. Note that RBM has certain powers to require RBM to repay customers' funds. *E-Money Regulations*, § 11(5), 38. This power may authorise RBM to require the EMSP to pay customers' funds to customers if the fund is terminated. However, RBM may also want a more specific requirement on EMSPs.
158. *E-Money Regulations*, § 12(3, 4, 20, and 21), 34, 35.
159. Antony Duckworth, *Protectors: Law & Practice*, 19(1) TRUSTS & TRUSTEES 98, 100 (2010).
160. *Id.* at 100.
161. Note that protectors are used in types of trusts, particularly in jurisdictions where investors are concerned about the trustworthiness of companies holding funds on their behalf. See Matthew Conalgen & Elizabeth Weaver, *Protectors as Fiduciaries: Theory & Practice*, 18(1) TRUSTS & TRUSTEES 17, 20 (2012); see also Richard Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP TRUSTS & ESTATE LJ 319 (2010); Tsun Tey, *Trust Protector*, 20 SINGAPORE ACADEMY OF LAW JOURNAL 99 (2008); Alexander Bove, *The Case Against the Trust Protector*, 25 PROBATE & PROPERTY 50 (2011).
162. See, eg., Bove, *supra* note 161; Conalgen & Weaver, *supra* note 161; Ausness, *supra* note 161.
163. Note that this power exists in *E-Money Regulations*, § 12(21) but RBM may wish to demand such audits at will without having to prescribe them. See *E-Money Regulations*, § 12(21).
164. This power may exist in *E-Money Regulations*, § 6(2), 10(1), but should be made clearer through revised drafting. See *E-Money Regulations*, § 6(2), 10(1).
165. *Id.*

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166. Similar powers exist in *E-Money Regulations*, § 11(i-j). *See E-Money Regulations*, § 11(i-j).
167. Similar powers exist in *E-Money Regulations*, § 12(16). *See E-Money Regulations*, § 12(16)
168. The RBM can take various actions in the event of revocation of approval (*E-Money Regulations*, § 11(5-9) and can impose various penalties on the trustee (*E-Money Regulations* § 37), but is not specifically authorised to sue on behalf of the beneficiaries. *See also* Tey, *supra* note 161.
169. *See* the recent announcement by MTN that its mobile money customers in 12 African countries will soon be able to use Ecobank ATMs to withdraw money. Note those customers also need to be Ecobank customers. *See* Nicole Cassandra Naidoo, *MTN, Ecobank Partner in Mobile Money Venture*, CNBC AFRICA (Mar. 17, 2014), <http://www.cnbcfrica.com/news/technology/2014/03/17/mtn,-ecobank-partner-in-mobile-money-venture>. Countries include: Benin, Cameroon, Ivory Coast, Ghana, Guinea Bissau, the Republic of Guinea, Liberia, Congo Brazzaville, Rwanda, South Sudan, Uganda and Zambia.
170. *See* Neil Davidson, *Mapping and Effectively Structuring Operator-Bank Relationships to Offer Mobile Money for the Unbanked*, GSMA (Mar. 7, 2011), <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/03/mappingandeffectivestructuringfinal2643.pdf>; R. Sultana, *Mobile Banking: Overview of Regulatory Framework in Emerging Markets* 14 (Communication Policy Research, South Conference, Negombo, Sri Lanka, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554160.,
171. *See* Tarazi & Breloff, *supra* note 144.
172. *See generally* Ignacio Mas, *Enabling Different Paths to the Development of Mobile Money Ecosystems*, GSMA (May 2011), <http://ssrn.com/abstract=1843623>; Lyman, Pickens & Porteous, *supra* note 2.
173. *See* a discussion of high interest rates in banking from Charles A. Bruch, *Taking the Pay*

Out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders, 69 UNI. CIN. L. REV. 1257 (2001). High interest rates and customer overindebtedness has contributed to micro-credit market meltdowns in a number of countries such as Morocco, Nicaragua, Pakistan. See Milford Bateman & Ha-Joon Chang, *Microfinance and the Illusion of Development: From Hubris to Nemesis in Thirty Years* 1(1) WORLD ECONOMIC REVIEW 13, 16 (2012). Perhaps the most spectacular example of this process was the 2010 micro-credit market meltdown in Andhra Pradesh: Oya Ardic, Joyce Ibrahim & Nataliya Mylenko, *Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set*, THE WORLD BANK 2 (Jan. 2011), <http://www.cgap.org/sites/default/files/CGAP-Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf>.