

LEGAL AND REGULATORY FRAMEWORK OF THE PAYMENT AND E-MONEY SERVICES IN THE BRICS COUNTRIES

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This article focuses research on a comparative analysis of the legal and regulatory framework of the payment and e-money services in the BRICS countries. These services are the most receptive to innovation and considerably contribute to financial inclusion. The central banks of the BRICS countries play key roles in their national payment systems, and they each have different statutory authorities on regulation and supervision or oversight of payment services providers, payment schemes and payment systems. Nevertheless, there are a number of features common to all the BRICS countries and the research emphasizes and describes these features as well as distinguishes national particularities.

Keywords: payment services regulation; e-money regulation; branchless banking regulation; payment oversight; central banks; BRICS legal framework.

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Table of Contents

- 1. Basic Economic and Legal Framework of the BRICS Payment Markets**
- 2. Regulation of Payment Services**
- 3. Regulation of Payment Services Provided Through Banking
Correspondents or Agents**
- 4. Regulation of E-Money Services**

1. Basic Economic and Legal Framework of the BRICS Payment Markets

All five BRICS countries belong to the actively developing payment markets. The statistics of the Bank of International Settlements (BIS)¹ demonstrates the data displayed in Table 1 below. As can be seen from the figures, Brazil, Russia, India and China have non-bank payment services providers including e-money issuers (except Russia). The South African payment market is totally bank-led.

Table 1: Statistics on Payments and Financial Market Infrastructures in the CPMI Countries

| 2017 | Brazil | Russia | India | China | South Africa |
|--|--------|---------|---------|---------|--------------|
| Total number of institutions offering payment services/instruments | 1,163 | 4,822 | 1,739 | 4,797 | 34 |
| Banks | 153 | 562 | 1,693 | 4,550 | 34 |
| Number of e-money issuers | | 93 | 60 | | |
| Non-banks offering payment services/instruments | 1,010 | 4,260 | 46 | 247 | |
| Non-banks offering storage of value | 1,004 | | 46 | | |
| Number of e-money issuers | | | 46 | | |
| Non-banks relying on storage of value offered by others | 6 | 4,260 | | | |
| Total volume of cashless payments (millions) | 31,071 | 25,794 | 15,942 | 133,919 | 4,492 |
| Credit transfers | 10,495 | 1,817 | 6,035 | 9,666 | 797,76 |
| Electronic means | nap | 1,645 | nap | nap | nap |
| Card and e-money payments | 14,485 | 22,397 | 8,257 | 122,473 | 2,848 |
| E-money payments | 49.99 | 1,721 | 3,459 | nap | nap |
| Fast payments | nap | 10,389 | nap | 8,464 | nap |
| Total value of cashless payments (billions) | 47,870 | 741,545 | 286,052 | 3,626 | 30,110 |
| Credit transfers | 37,516 | 693,061 | 188,228 | 2,780 | 27,244 |

¹ Statistics on payments and financial market infrastructures in the CPMI countries, Bank for International Settlements (May 12, 2019), available at <http://stats.bis.org/statx/toc/CPMI.html>.

| | | | | | |
|---------------------------|-------|---------|--------|---------|-------|
| Electronic means | nap | 646,078 | nap | nap | nap |
| Card and e-money payments | 1,255 | 37,350 | 10,967 | 628,654 | 1,082 |
| E-money payments | 3,48 | 1,256 | 1,416 | 61,720 | nap |
| Fast payments | nap | 8,496 | nap | nap | nap |

Key trends and indicators of the Russian payment market may be summarized as the following. During the last few years the number and amount of cashless payments of legal entities and individuals have increased. The share of cashless payments in the total amount of retail purchases is expected to exceed 55% by the end of 2018. Online payments have demonstrated an annual growth of more than 26%. One out of five individual customer electronic payments was effected through the internet and smartphones. The Russian payment market is a worldwide leader in contactless payments through mobile apps. The annual growth of e-money operations has reached 39%.

In *Brazil*, the Financial System Law of 1964 established the Banco Central do Brasil (BCB) which, under the National Monetary Council (CMN) policy directives, shall authorize financial institutions and supervise them.

The Payment System Law 10,2014/2001 is the main legal instrument that regulates the Brazilian Payments System (SPB). According to the Law 12,865/2013 (Brazilian Payment Law), payment schemes and payment institutions are also a part of the SPB and governed by CMN and BCB resolutions 4,282/2013 and 4,283/2013, and BCB circulars 3,680/2013, 3,681/2013, 3,682/2013 and 3,683/2013.

According to the Brazilian Payment Law, the BCB shall:

- regulate, authorize and oversee payment schemes;
- regulate the constitution and operation of payment institutions and supervise them;
- regulate fees and commissions relating to payment services;
- regulate risk management and customers funds protection measures.

The *Russian* payment market is governed by the Federal Law “On National Payment System” (Russian NPS Law)² as well as by several other federal laws:

- Federal Law “On the Central Bank of the Russian Federation” (Bank of Russia Law);
- Federal Law “On Banks and Banking Activity”;
- Civil Code of the Russian Federation;
- Federal Law “On Accepting Payments of Individuals by Payment Agents” (Russian Payment Agents Law);
- Federal Law “On Postal Service” (Russian Postal Law).

The key provisions of the Russian NPS Law include:

² *Шамраев А.В. Законодательство о национальной платежной системе и его влияние на развитие платежных инноваций // Банковское право. 2011. № 5. С. 15–17 [Andrey V. Shamraev, National Payment System Legislation and Its Influence on the Development of Payment Innovations, 5 Banking Law 13, 15–17 (2011)].*

- definitions of payment services, funds transfer, electronic means of payment, e-money;
- procedures of funds transfer and e-money transfer;
- procedures of interaction between mobile phone companies and e-money operators;
- procedures of the Bank of Russia supervision and oversight over the national payment system.

The Bank of Russia Law establishes the objectives, functions and authority of the Bank of Russia with respect to the national payment system. According to Articles 82.1 and 82.3 of the Bank of Russia Law, the bank shall ensure the stability of and develop the national payment system as well as set the rules, forms and standards of cashless settlements.

The Federal Law “On Banks and Banking Activity” regulates the activities of credit institutions in Russia, determines their legal status and establishes authorization and prudential requirements. The law divides credit institutions into two types – banks and non-bank credit institutions.

A non-bank credit institution shall mean:

- a credit institution entitled to perform funds transfers without opening bank accounts, including e-money transfers, and to open corporate bank accounts for funds transfers without opening bank accounts (so-called “payment non-bank credit institution”);
- a credit institution entitled to perform funds transfers with opening bank accounts, including correspondent accounts, as well as without opening bank accounts, including e-money transfers (so-called “settlement non-bank credit institution”).

The Civil Code of the Russian Federation sets out the key norms that define the terms of agreements on bank accounts and regulate non-cash payments. It establishes such forms of non-cash payments (similar to payment instruments in international practice) as settlements by payment orders, by letters of credit, by collection orders, by cheques and by remittance orders. The Russian NPS Law additionally regulates direct debits and e-money transfers.

In *India*, the Payment and Settlement Systems Act of 2007 (Indian PSS Law) empowers the Reserve Bank of India (RBI) to regulate and oversee all payment and settlement systems and also to provide settlement finality and a sound legal basis for netting. The Indian PSS Law specifies that the RBI may prescribe policies relating to the regulation of payment systems including electronic, non-electronic, domestic and international payment systems affecting domestic transactions and give such directions to system providers or the system participants or any other person as it may consider to be necessary. Mobile banking transactions, the issuance and operation of prepaid payment instruments and customer protection from unauthorized electronic banking transactions are regulated by the RBI as follows:

- Guidelines for Licensing of “Payments Banks” 2014 (RBI Guidelines);
- Master Circular “Mobile Banking Transactions in India – Operative Guidelines for Banks” 2016 (RBI MC on MB);
- Master Direction on Issuance and Operation of Prepaid Payment Instruments 2017 (RBI MD on PPIs);
- Instruction “Customer Protection – Limiting Liability of Customers in Unauthorized Electronic Banking Transactions” 2017 (RBI Instruction).

In *China*, the Law of the People’s Republic of China on the People’s Bank of China (PBC Law) defines the PBC’s responsibilities to:

- maintain the normal operation of payment and clearing systems in China (Art. 4.9);
- organize or assist in organizing clearing systems among banking institutions, to coordinate the efforts of such institutions in clearing and to provide services in this regard (Art. 27);
- have the right to inspect the implementation of relevant clearing regulations for banking institutions and other institutions and individuals (Art. 32).

The People’s Bank of China (PBC) prescribes payment and settlement rules jointly with the State Council’s banking regulator as well as oversees the payment and settlement business of banking institutions.

The PBC is also responsible for market access of payment services of non-financial institutions and regulation of their payment activities. Important examples of such PBC’s regulations are:

- Administrative Measures for Payment Services Provided by Non-financial Institutions 2010 and the Administrative Measures for Online Payment Business of Non-bank Payment Institutions 2015 (NFI PSP Administrative Measures);
- People’s Bank of China Announcement No. 7 of 2018 (Announcement No. 7).

In *South Africa*, the regulator’s authority is represented in section 10(1)(c) of the South African Reserve Bank Act No. 90 of 1989 and in the National Payment System Act No. 78 of 1998 (SA NPS Law). The South African Reserve Bank (SARB) is required by law to perform such functions, implement such rules and procedures and take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems. The SARB performs management, administration, operation, regulation and supervision functions concerning payment, clearing and settlement systems in South Africa. The laws mentioned here do not consist of any specific requirements for payment services providers and their activities. In terms of regulation, the SARB may issue directives and position papers. Directives contain binding rules to address payment system risks, while position papers contain guidelines to address payment system risks and to foster sound practices within the payment system.³

³ Charles C. Okeahalam, *Regulation of the Payments System of South Africa*, 4(4) Journal of International Banking Regulations 338, 347–348 (2003).

2. Regulation of Payment Services

The *Brazilian* Payment Law contains definitions relating to payment services in Article 2:

- payment scheme: a set of rules and procedures which regulates the provision of certain payment services to the public accepted by more than one recipient/payee, by means of direct access by end users, payers and recipients/payees;
- payment institution: a legal person adhering to one or more payment schemes and carrying out the following activities:
 - a) providing cash-in and cash-out services;
 - b) performing or facilitating payment instructions;
 - c) managing payment accounts and e-money;
 - d) issuing and acquiring payment instruments and e-money;
 - e) money remittances;
 - f) converting currency into e-money or vice versa.

Funds in payment accounts should be separated from payment institution assets including cases of bankruptcy, and they cannot be pledged or judicially restrained.

Resolution 4,282/2013 empowers the BCB authority to define the requirements for the constitution, operation and cancellation of the payment institutions. The risk management framework for payment institutions should be compatible with the nature of their activities and the complexity of services they offered covering at least operational, credit and liquidity risks.

The payment institution shall meet the following requirements established by Circular 3,683/2013:

- be duly organized as a legal entity;
- have a principal business purpose in the performance of payment transactions;
- be licensed by a payment arrangement settlor;
- be authorized by the BCB in payment modalities as an issuer of electronic currency,⁴ an issuer of postpaid payment instruments⁵ or an accrediting institution;⁶
- comply with the minimum capital amount of 2 million reais for each payment modality.

Circular 3,681/2013 stipulates risks management and minimum equity requirements as well as governance procedures of payment institutions, preservation of value and liquidity of balances in payment accounts and other measures.

⁴ It is a payment institution that manages payment accounts of end users of a prepaid type and makes payment transactions available based on the electronic currency contributed in such an account, with the possibility of registering its acceptance and converting such funds into physical or book-entry currency or vice-versa.

⁵ It is a payment institution that manages payment accounts of end users of a postpaid type and makes payment transactions based on such an account.

⁶ It is a payment institution that, without managing payment accounts, accredits individual or legal entity receivers for acceptance of payment instruments issued by a payment institution or a financial institution participating in the same payment arrangement.

Circular 3.682 governs all payment arrangements except cases when payment instruments are:

- accepted only by the issuer or the group of companies with limited transactions volumes;
- offered to individuals in order to pay governmental benefits.

Payment arrangements may be purchase-mode when the payment service is linked to the settlement of a certain obligation or transfer-mode when the payment service is not necessarily linked to the settlement.

A payment arranger shall meet the following requirements:

- be constituted in Brazil as a legal entity;
- establishes risk management and operational procedures;
- has effective and transparent governance mechanisms.

Established procedures shall allow the payment arranger to prevent illegal foreign exchange and money laundering, to combat the financing of terrorism, to settle transactions, to provide availability of services, business continuity, information security, fraud monitoring and interoperability between participants, as well as with other payment arrangements.

Payment institutions and financial institutions joining a payment arrangement become participants. Participation criteria shall be public, objective, non-discriminatory, compatible with the participant's activities and focus on safety and efficiency.

In the framework of one payment arrangement the payment arranger may manage:

- payment accounts and issue payment instruments;
- payment accounts and convert physical or book-entry currency into electronic money.

The Central Bank of Brazil oversees the payment arrangements and may request from the institutions necessary information and documents, including statistics, a list of participants, fraud records, dispute resolution records and audit reports.

In *Russia*, according to the definition in Article 3 of the Russian NPS Law, payment service includes funds transfer service, postal transfer service and payment acceptance service. The payment services providers are money transfer operators (the Bank of Russia, credit organizations,⁷ the State Development Corporation "VEB.RF"), banking payment agents,⁸ federal postal service organizations⁹ and payment agents.¹⁰

⁷ Credit organizations provide funds transfer services in accordance with the requirements of the Russian NPS Law and the Federal Law "On Banks and Banking Activity."

⁸ Bank payment agents participate in the provision of funds transfer services under agreements concluded with money transfer operators accordance with the requirements of Article 14 of the Russian NPS Law.

⁹ Federal postal service organizations provide postal funds transfer services in accordance with the requirements of the Russian Postal Law.

¹⁰ Payment agents provide payment acceptance services in accordance with the Russian Payment Agents Law.

According to the Russian NPS Law, the funds transfer service is:

- aimed at providing the payer's funds available in the payer's bank account or provided by the latter without opening a bank account by the money transfer operator to the beneficiary;
- grounded on a contract between the money transfer operator and a customer;
- effected by the money transfer operator upon the customer's instruction issued within the framework of the applicable form of cashless settlements (customer's instruction) by crediting funds to the beneficiary's bank account, cash withdrawal to the beneficiary or the funds record without opening a bank account in favor of the beneficiary in case of e-money transfer.

According to the Russian Payment Agents Law, the payment acceptance service is:

- aimed at fulfilling the payer's monetary obligations before the suppliers of telecommunication services, public utility services, etc., by the payment agent;
- grounded on a contract between the payment agent and a supplier;
- effected by the payment agent through the payer's cash acceptance and subsequent cashless settlements with suppliers.

According to the Russian Postal Law, the postal transfer service is:

- aimed at delivering the sender's money to the recipient by the federal postal service organization;
- grounded on a contract between the federal postal service organization and a sender;
- effected by the federal postal service organization through the sender's money acceptance, processing and delivery to the receiver using postal networks.

The Russian NPS Law stipulates the following rules for the funds transfer service:

- to have such funds transfer important characteristics as irrevocability, unconditionality and finality. Funds transfer irrevocability means a feature of a funds transfer that signifies the absence or termination of the ability to revoke a funds transfer instruction. Funds transfer unconditionality means a feature of a funds transfer that signifies the absence of conditions or the fulfillment of all conditions for transferring funds. Funds transfer finality means a feature of a funds transfer that signifies the provision of funds to the payee;
- to be performed within no more than three business days starting from the day the payer's bank account is debited or from the day when the payer provides cash funds for the purpose of funds transfer without opening a bank account;
- to oblige the money transfer operator to disclose the terms and conditions of the funds transfer to the customers prior to conducting a funds transfer. The money transfer operator shall disclose the amount of fees and the procedure of their charging, the methods of determining the exchange rate applicable to funds transfers in a foreign currency, the procedure of filing claims, including the contact details of the money transfer operator, and other relevant information;
- to prohibit the money transfer operator from deducting any fees from the funds transfer amount except in the case of cross-border funds transfers;

– to oblige the money transfer operator to notify the customer of every transaction using the customer’s electronic means of payment and confirm execution of the customers’ instructions to the customers;

– to oblige the money transfer operator to compensate the customer the amounts of unauthorized transactions prior to receiving the customers’ notification. The money transfer operator shall refund the amount of the transaction performed without the customer’s authorization, unless it proves that the customer has violated the procedure of using the electronic means of payment, which resulted in the execution of the transaction without the individual customer’s authorization;

– to provide the customer with the right to revoke a payment instruction until the moment of irrevocability;

– to oblige the customer to notify without delay the money transfer operator of unauthorized transactions using the customer’s electronic means of payment.

The *Indian* PSS Law does not regulate the provision of payment services, considering “payment system” to be the wider legal concept. Payment system enables payments between payers and beneficiaries involving clearing, payment or settlement services. Any payment system operator shall be authorized by the RBI and may carry out activities as a bank or a non-bank. Non-bank pre-paid payment instruments (PPIs) issuers are in fact authorized as payment systems operators.

Banks may provide payment services if they have banking licenses granted by the RBI according to the Banking Regulation Act of 1949. The RBI Guidelines set up a specific regulatory framework for “payment banks.”

Payment banks may:

– issue payment cards (except credit cards) and PPIs;

– provide payments and remittance services through various channels including branches, ATMs, business correspondents, mobile banking and internet banking;

– become a business correspondent of another bank;

– accept remittances on behalf of multiple banks through a payment mechanism approved by the RBI;

– handle cross-border remittance transactions on behalf of individual customers.

Banks are allowed to offer mobile banking services in rupiahs under the requirements of the RBI MC on MB if they are licensed, supervised and if they have physical presence in India with implementation of the core banking solutions. Banks shall implement a registration system of customers who use mobile banking. Banks may transfer funds from the customer’s accounts for cash-out in ATMs or through the bank’s agents and business correspondents. Such cash-out services shall be provided by banks subject to limitations of the maximum value of such transfers (per month, per transaction, per beneficiary) and with identification of the recipient.¹¹

¹¹ See Brazilian, Indian and South African mobile banking regulations: C. Leigh Anderson et al., *Review of Interoperability and Regulations of Mobile Money*, EPAR Request No. 313, University of Washington (September 2015) (May 12, 2019), available at https://evans.uw.edu/sites/default/files/EPAR_UW_Request_313_Mobile%20Money%20Regulations%20and%20Interoperability_10.7.15_0.pdf.

The RBI Instruction stipulates customer protection measures in case of unauthorized electronic banking transactions. The customers shall alert their bank of any unauthorized transaction at the earliest time. The bank's systems shall record the time and date of delivery of the message and receipt of the customer's response. This shall be important in determining the extent of the customer's liability. A customer shall not be liable (zero liability) for the loss occurring due to unauthorized transactions except in cases of the customer's negligence where the maximum liability differs from INR 5,000 to INR 25,000.

In *China*, payment services may be provided by banks and non-financial institutions (NFI PSP). The NFI PSP Administrative Measures stipulate the following scope of funds transfer services provided by non-financial institutions as an intermediary between payers and payees (i.e. third-party payment services):

- network payment that means funds transfers between payers and payees through the internet, private networks, mobile terminals or other electronic devices;
- issuance and acceptance of prepaid cards;
- acquiring of payment cards;
- other types of payment services as determined by the People's Bank of China (PBC).

The NFI PSP shall provide online payment services for clients based on clients' bank accounts or payment accounts. The "payment account" refers to electronic recording of the client's prepaid balance by the NFI PSP. The payment account shall not be overdrawn. When the NFI PSP processes a money transfer between a bank account and a payment account, both accounts shall belong to the same client. The NFI PSP that only holds the business license including mobile payment, telephone payment or digital TV payment shall not open payment accounts for clients.

When providing online payment services based on bankcards, the NFI PSP shall comply with the Administrative Measures of Bankcard Acquiring Business (PBC Announcement No. 9 of 2013). When the NFI PSP processes a money transfer from prepaid cards to a payment account, the NFI PSP shall comply with the Administrative Measures of the Prepaid Card Business of Non-Bank Payment Institutions (PBC Announcement No. 12 of 2012) to implement separate management of the balance of payment account transferred from prepaid cards. Such a balance of a payment account may be used only for consumption and is prohibited from cash-out and investments.

The NFI PSP shall establish and improve its clients identity recognition mechanisms under the principle of Know Your Customer. The NFI PSP shall open payment accounts for clients in real-name system, register and take effective measures to validate clients' basic identity information, verify their valid identity certificates as required and retain the copies or photocopies of the valid identity certificates, and shall not open any anonymous or pseudonymous payment accounts.

The NFI PSP shall sign service agreements with clients stipulating the responsibilities, rights and obligations of the parties, which shall at least specify the business

rules, charging fees and rules for inquiry, dispute resolution and complaints, measures of preventing and handling business risks and illegal activities and the liabilities for clients' losses and reimbursement rules.

When the NFI PSP opens a payment account for a client, it shall inform the client in a conspicuous manner in the service agreement and take valid measures to confirm that the client is fully aware of and clearly understands that the balance of funds in the payment account is not equal to the client's bank deposit, which is as a rule insured.

The NFI PSP shall conduct categorized management of the payment accounts according to the following requirements:

- for an individual client who passes the verification of basic identity information in a non-face-to-face manner through at least one legal and safe external channel, and opens a payment account in the NFI PSP, then the NFI PSP may open a type I payment account for the client where the balance may only be used for consumption and money transfers. The accumulative amount of payments with balance for all payment accounts of the client shall not exceed RMB 1,000 on the date when the account is opened (including the money transfers from a payment account to the client's bank account);

- for an individual client whose identity is verified by the NFI PSP or by their authorized partner in a face-to-face manner, or whose basic identity information is subject to multiple cross-validation by at least three legal and safe external channels in a non-face-to-face manner, the NFI PSP may open a type II payment account for the client where the balance may only be used for consumption and money transfers. The accumulative amount of payment with balance for all payment accounts of the client shall not exceed RMB 100,000 for each year (excluding money transfers from a payment account to the client's bank account);

- for an individual client whose identity is verified by the NFI PSP or by their authorized partner in a face-to-face manner, or whose basic identity information is subject to multiple cross-validation by at least five legal and safe external channels in a non-face-to-face manner, the NFI PSP may open a type III payment account for the client where the balance may be used for consumption, money transfers and investments. The accumulative amount of payment with balance for all payment accounts of the client shall not exceed RMB 200,000 in each year (excluding money transfer from a payment account to the client's bank account).

The channels for the external verification of clients' basic identity information include, but are not be limited to, the databases of government departments, the information systems of commercial banks and commercial databases. The verification of individual client's basic identity information through commercial banks shall apply to type I bank accounts or credit cards.

The NFI PSP shall process money transfers between payment accounts and clients' bank accounts in a timely manner as agreed upon with clients and shall not

limit the number of money transfers from type II and type III payment accounts to clients' bank accounts.

The NFI PSP shall obtain the payment license of the PBC (granted for five years with the possibility of extension) and comply with the following requirements:

- be incorporated in China as a joint-stock company or a limited liability company;
- have the minimum capital for implementation of activities in the territory of China not less than RMB 100 million (about US\$ 15 million); within the territory of one province – RMB 30 million (about US\$ 5 million);
- have AML/CFT, internal control and risk management rules;
- meet the information security requirements.

Some authors consider that the PBC have imposed strict entry thresholds and onerous obligations on third-party payment providers. These are necessary to maintain quality services and high levels of consumer protection and to control the potential risks associated with third-party payment services and illegal activities.¹² Others suggest that it is inappropriate to put different types of non-financial payment services institutions in the same basket. A universal registration capital requirement is too restrictive for most pre-paid cards institutions and banks cards acquiring institutions.¹³

In Announcement No. 7 the PBC clarified the requirements to foreign investors for the establishment of the NFI PSP.

To obtain the PBC payment license, in addition to the abovementioned general requirements, the foreign investor shall meet the following extra requirements:

- have experience in providing payment services, processing services for financial institutions or e-commerce companies for more than two years until filing of application in the PBC;
- have a profit during three previous years before filing of application;
- not have a penalty imposed for illegal or criminal activities.

The operation and back-up systems of a foreign-owned NFI PSP have to be located in the territory of China. Storage, processing, analysis of personal and financial information created/collected in China have to be handled within the country. The cross-border transfer of such information requires the specific consent of the authorized Chinese state bodies.

South African laws do not define the subject of payment services limited by an intermediary criteria. Section 7 of the SA NPS Law allows a person as a regular feature of that person's business to accept money or payment instructions from any other person for purposes of making a payment on behalf of the first person to a third

¹² Weihuan Zhou et al., *Regulation of Digital Financial Services in China: Last Mover Advantage?*, 8(1) *Tsinghua China Law Review* 25 (2015).

¹³ Wen Li, *The Regulation of New Electronic Payment Services in China*, PhD Thesis, Queen Mary University of London (January 2014), at 108 (May 12, 2019), also available at https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/8550/Li_Wen_PhD_final_080714.pdf?sequence=1.

person to whom the payment is due. This service may be provided by banks or non-banks in accordance with SARB Directive No. 1 of 2007 (SA Directive No. 1).¹⁴ Non-banks may also provide services as system operators in terms of Directive No. 2 of 2007 (SA Directive No. 2).¹⁵

The scope of payment services provided by the banks is outlined in the SARB Position Paper of 2007.¹⁶ According to this document, the payment services include only the payments through access to the customers' bank accounts and cash withdrawals in a bank with no payer's account. A bank may provide the payment services using credit payment instruments and debit payment instruments, and paper-based or electronic instruments including card-based.

SA Directive No. 1 stipulates two options for non-bank service providers:

- to accept money from multiple payers on behalf of a beneficiary or to process payers' payment instructions as a beneficiary service provider;
- to accept money from a payer or to process payers' payment instructions to conduct payments to multiple beneficiaries as a payer service provider.

In both cases, the non-bank service provider acts as an agent of the beneficiary/ the payer and carries out the following obligations:

- to keep records of the payments to the third parties and retain the records for five years;
- to ensure safe and efficient processing systems compliant with the operational and technical requirements of SA Directive No. 2;
- to notify the bank of the provider's involvement in the payments to the third parties.

An entity that only processes payment instructions on behalf of the banks, non-bank service providers and their customers (users) is a system operator governed by SA Directive No. 2.

The system operator shall:

- meet the criteria recommended by the relevant payment system management body;
- have a written agreement with each user;
- keep the information regarding any user confidential and separate;
- not process the information that allows the offsetting of a user's obligations;
- keep records of the processed payment instructions for five years.

¹⁴ SARB, Directive No. 1 of 2007 – Directive for the conduct within the National Payment System in respect of payments to third persons (May 12, 2019), available at <http://www.reservebank.co.za/>.

¹⁵ SARB, Directive No. 2 of 2007 – Directive for conduct within the National Payment System in respect of system operators (May 12, 2019), available at <http://www.reservebank.co.za/>.

¹⁶ SARB, Position Paper – Bank Models in the National Payment System, Position Paper No. 01/2007 (January 2007) (May 12, 2019), available at <http://www.reservebank.co.za/>.

3. Regulation of Payment Services Provided Through Banking Correspondents or Agents

Payment service providers such as banks, the NFI PSP and e-money issuers play key roles in the national payment markets. Financial inclusion may be significantly increased by the participation of non-bank entities in providing payment services. The Consultative Group to Assist the Poor (CGAP) defines it as branchless banking. Two models of branchless banking – bank-based and nonbank-based – can be distinguished. Both of them use retail agents such as merchants, supermarkets or post offices to deliver financial services outside traditional bank branches. In the bank-based model every customer has a direct contractual relationship with a financial institution – whether account-based or involving a single transaction – even though the customer may deal exclusively with a retail agent. In the nonbank-based model, customers have no direct contractual relationship with a financial institution. Instead, the customer exchanges at a retail agent cash or otherwise transfers funds in return for an electronic record of value. This virtual account is stored on the server of a nonbank, such as a mobile operator or an issuer of stored-value cards.¹⁷

Regulatory frameworks take different approaches. The treatment of agents depends sometimes on the category of institution represented by the agent (e.g. bank or nonbank), sometimes on the type of account being handled (e.g. e-money or bank deposits) and sometimes on the activities performed by the agent (e.g. account opening or cash handling). Each approach raises distinct challenges to make regulation effective.¹⁸

Bank-based model's regulation is further considered below at examples of banking correspondents or agents. Nonbank-based model's regulation is presented in section 4 at examples of e-money service providers.

In *Brazil*, private and state-owned banks are allowed to offer the following payment services through agents who are called “bank correspondents” (BCs): domestic and international transfers, cash deposits and withdrawals; prepaid mobile phone top-ups; bill payments; and the issuance and acquiring of payment cards. The activities of BCs are governed by the BCB Resolution 3,954/2011.¹⁹

¹⁷ CGAP, Notes on Regulation of Branchless Banking in South Africa (February 2008), at 2 (May 12, 2019), available at <http://www.cgap.org>.

¹⁸ Stefan Staschen & Patrick Meagher, *Basic Regulatory Enablers for Digital Financial Services*, Focus Note No. 109, CGAP (May 2018), at 3 (May 12, 2019), available at <http://www.cgap.org>; Michael Tarazi & Paul Breloff, *Regulating Banking Agents*, Focus Note No. 68, CGAP (March 2011), at 3–5 (May 12, 2019), available at <http://www.cgap.org/sites/default/files/CGAP-Focus-Note-Regulating-Banking-Agents-Mar-2011.pdf>.

¹⁹ Resolution 3,954 (May 12, 2019), available at http://www.bcb.gov.br/Nor/Denor/Resolution_CMN_3954_English.pdf. See also Oxford Policy Management, EFINA: Evaluation of Agent Banking Models in Different Countries (October 2011), at 6–9 (May 12, 2019), available at <http://www.efina.org.ng>.

A bank is fully responsible for the services rendered by its agents. The BCB requires the bank (i) to control the activities of each of its agents by setting transaction limits and implementing mechanisms to block transactions remotely when necessary and (ii) to ensure compliance with all applicable legal and regulatory provisions, such as AML/CFT, customer protection and data privacy. An agent must post a notice in its establishment that it acts on behalf of the bank. Agents cannot give cash advances to clients, guarantee transactions or charge extra fees.

Agent networks can be managed directly by the bank or outsourced to a third party (e.g. a network manager). The BCB considers network managers to be agents. Network managers provide a wide range of services and often communicate directly with the bank on behalf of the agents in their network. Network managers often provide training related to AML/CFT, maintenance of POS, software development, cash handling and marketing.

The BCB has unrestricted access to all information and documents related to the services rendered by the agents. All agents must be registered in the BCB's online system. The BCB monitors and evaluates the largest agent networks by focusing on the bank's internal controls and information technology infrastructure. Agent-related risks are primarily considered part of consumer protection risk. The Conduct Supervision Department of the BCB focuses on particular risks in the largest providers or in a specialized segment of the market, such as providers of payroll loans delivered through agents – and addresses the risks by requiring corrective measures in several institutions incurring the same problem, or by changing regulations. Some aspects of the agent business can also be eventually covered by the prudential supervision departments as a minor item of the operational risk assessment.²⁰

The BCs model is characterized by Brazilian researchers as a hybrid model fully integrated into the financial system. The consequences of implementation of the BCs model are two-folded. First, BCs are contracted by regulated banks that, in turn, are liable for the operations before the clients. Second, as part of the financial system, BCs use the technological tools that may increase effectiveness of banking services.²¹

The *Russian* NPS Law allows a credit institution to engage a bank payment agent under an agreement:

- to accept cash from individual customers or to issue cash to individual customers, including ATMs;
- to provide electronic means of payment to customers and to enable the use of these electronic means of payment;
- to carry out identification of individual customers in accordance with the requirements of the Russian AML/CFT legislation.

²⁰ Denise Dias et al., *Supervision of Banks and Nonbanks Operating Through Agents: Practice in Nine Countries and Insights for Supervisors*, CGAP (2015), at 11 (May 12, 2019), available at <http://www.cgap.org>.

²¹ Tania Pereira Christopoulos et al., *Evaluating Banking Agents: A Case of Brazilian Banking Correspondents*, 24(2) *DLSU Business & Economics Review* 92, 94 (2015).

In the cases stipulated by the agreement with the money transfer operator, a bank payment agent that is a legal entity has the right to engage a bank payment subagent.

A money transfer operator may engage a bank payment agent subject to the following requirements to:

- conduct the activity on behalf of the money transfer operator;
- identify an individual customer by the bank payment agent in accordance with the requirements of the Russian AML/CFT legislation;
- use a special bank account (accounts) by the bank payment agent to credit the full amount of cash received from individual customers;
- confirm by the bank payment agent of the receipt (issuance) of cash;
- use ATMs by the bank payment agent in accordance with the requirements of the Russian laws on the use of cash register equipment in cash settlements;
- inform the customers in each place of performance of operations.

A bank payment agent has the right to charge individuals a fee if this is provided by the agreement with the money transfer operator.

The money transfer operator shall:

- maintain a list of bank payment agents available to individual customers and tax authorities upon their request;
- monitor the bank payment agent's compliance with the terms of its engagement in accordance with CBR regulations and the agreement between the money transfer operator and the bank payment agent.

The Reserve Bank of *India* issued Guidelines for engaging Business Correspondents (BCs Guidelines)²² in September 2010. Banks may engage as BC individuals and entities listed in the BCs Guidelines, including cooperative societies, post offices and companies registered under the Indian Companies Act of 1956 with large and widespread retail outlets, excluding Non-Banking Financial Companies (NBFCs). The scope of payment services provided through BCs may include receipt and delivery of small value remittances and other payment instruments.

The BCs model is restricted by representing and providing banking services of only one bank in accordance with the terms and conditions governing the written agreements between the bank and the BCs. The banks may pay fees to the BCs, the rate of which may be reviewed periodically. The agreement with the BCs should specifically prohibit them from charging any fees from the customers directly for services rendered by them on behalf of the bank.

Banks are required to take full responsibility for the acts of the BCs that they engage and have to ensure due diligence and additional safeguards for minimizing the agency risk. Ensuring compliance with AML/CFT norms as laid down in the Master

²² RBI, Guidelines for engaging of Business Correspondents (BCs) (September 2010) (May 12, 2019), available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/CPC28092010.pdf>.

Circular DBOD.AML.BC. No.2/14.01.001/2010-11 under the BCs model continues to be the responsibility of banks. Banks shall implement procedures for redressing complaints about services rendered by BCs.

With a view to ensuring adequate supervision over the operations and activities of the BCs by banks, every retail outlet/sub-agent of a BC is required to be under the oversight of a specific bank branch designated as the base branch. The distance between the place of business of a retail outlet/sub-agent of a BC and the base branch should ordinarily not exceed thirty kilometers in rural, semi-urban and urban areas and five kilometers in metropolitan centers.

Banks shall adopt IT solutions to ensure integrity and fraud prevention. Banks are also required to ensure that their arrangements with BCs should specify suitable limits on cash holdings by intermediaries as well as limits on individual customer payments and receipts. It is also specified that the transactions shall be reflected in the bank's books by end of day or next working day.

The *South African* regulatory framework gives wide discretion to banks to use agents to offer payment services. Section 1(1) of the Banks Act No. 94 of 1990 allows a bank to contract agents to receive on its behalf from its clients any deposits, money due to it or applications for loans or advances, or to make payments to such clients on its behalf. According to section 78(1), a bank shall not enter into an agency agreement until provision has been made out of profits for any amount representing the cost of organization or extension or the purchase of a business or a loss or bad debts.

In accordance with SARB Guidance Note 5/2014 "Outsourcing of Functions Within Banks,"²³ outsourcing is defined as the use a service provider to perform on a continuing basis on behalf of the bank a business activity, service, function or process which could be undertaken by the bank.

The Guidance Note does not specify which bank functions may be outsourced, but it does prohibit the outsourcing of a bank's compliance function. All outsourcing arrangements should be measured in terms of the materiality criteria. Where a material business activity or function is outsourced the outsourcing arrangement is deemed material. A material business activity or function is defined as one that has the potential to have a significant impact on the bank's business operations or its abilities to manage risks. From the given definition it follows that outsourcing of payment services will be considered material due to its significant impact on the bank's business operations.

If a bank chooses to outsource agents providing payment services, it shall:

- enter into a detailed outsourcing agreement;
- ensure outsourced services are performed adequately and in accordance with internal policies, standards and the outsourcing agreement;
- ensure processes are in place to identify any weakness in a supplier's service, which may include access to the supplier by the bank's internal and external auditors as well as external agencies;

²³ Available at <http://www.reservebank.co.za/>.

– provide the SARB upon request any required information on the outsourced functions or activities.

The flexible regime for banks' use of agents has enabled banks to provide payment services outside traditional bank branches. However, requiring agents to perform in accordance with the internal policies and standards of the bank may result in the exclusion of smaller establishments, which are more likely to be located in low income areas.²⁴

4. Regulation of E-Money Services

The *Brazilian* Payment Law defines e-money as resources stored in devices or an electronic system that allow the end user to perform payment transactions. There is no specific type of e-money issuer in the laws and the BCB regulations. Payment institutions that are allowed to provide payment services are also allowed to issue and acquire e-money, to manage e-money and to convert e-money into currency, or vice versa.²⁵

E-money is held on prepaid payment accounts²⁶ of end users. Payment institutions shall ensure the end user has the possibility of full redemption of outstanding balances in prepaid payment accounts at any time.

According to Article 3 of the *Russian* NPS Law, e-money means funds provided in advance by a funds provider (a physical person or a legal person) to an obligor called "e-money operator" for transfers to other parties. E-money transfer is a funds transfer without opening a bank account, using electronic means of payment and at the same time a banking operation according to banking legislation. Only Russian banks and non-bank credit organizations as e-money operators are allowed to transfer e-money.

The e-money operator shall establish rules for e-money transfers, including:

- the procedure for the e-money operator's activity related to e-money transfers;
- the procedure for providing electronic means of payment to customers and making e-money transfers;
- the procedure for the e-money operator's activities when engaging bank payment agents and organizations providing operational services and/or payment clearing services;

²⁴ Notes on Regulation of Branchless Banking in South Africa, *supra* note 17, at 14.

²⁵ Gilberto Martins de Almeida, *M-Payments in Brazil: Notes on How a Country's Background May Determine Timing and Design of a Regulatory Model*, 8(3) Washington Journal of Law, Technology & Arts 347, 360–361 (2013); Simone di Castri, *Mobile Money Regulation in Latin America: Leveling the Playing Field in Brazil & Peru*, GSMA, 19 December 2013 (May 12, 2019), available at <https://www.gsma.com/mobilefordevelopment/programme/mobile-money/mobile-money-regulation-in-latin-america-leveling-the-playing-field-in-brazil-peru/>.

²⁶ According to Circular 3,680/2013, payment accounts are used by payment institutions to record the payment transactions of end users and must identify the end user holding such account. These accounts may be either prepaid or postpaid.

- the procedure for ensuring uninterrupted e-money transfers;
- the procedure for the review of claims by the e-money operator, including prompt interactions with customers;
- the procedure for information exchange when conducting e-money transfers.

The e-money operator shall provide uninterrupted e-money transfers in compliance with the requirements established by the CBR. The e-money operator is entitled to conclude agreements with other organizations to provide operational services and/or payment clearing services to the e-money operator.

The Russian NPS Law contains specific AML/CFT requirements applicable to e-money. An e-money transfer shall be effected with customer identification, simplified identification or without identification in accordance with the AML/CFT laws.²⁷ If the e-money operator does not carry out the identification, the individual customer may only use the electronic means of payment for e-money transfers to merchants provided that the e-money balance at any moment does not exceed RUB 15,000 (US\$ 227) and the total amount of e-money transfers during a month does not exceed RUB 40,000 (US\$ 606). If the e-money operator carries out the identification, the individual customer may use the electronic means of payment for e-money transfers to other individual customers and the abovementioned monetary limits are extended according to the Russian NPS Law.

A corporate customer shall use an electronic means of payment only after the customer's identification by the e-money operator. These electronic means of payment are deemed corporate and shall be used provided that the e-money balance does not exceed RUB 600,000 (US\$ 9,090). If the specified amount is exceeded, the e-money operator shall transfer the excess money to the bank account of the corporate customer. Such a bank account shall be opened by the e-money operator.

The Russian approach presented in the Russian NPS Law has a similar feature to the definition of e-money in *South Africa*. As defined in the SARB Position Paper of 2009,²⁸ e-money is a monetary value represented by a claim on the issuer. This money is stored electronically and issued on receipt of funds, generally accepted as a means of payment by persons other than the issuer and redeemable for physical cash or a deposit into a bank account on demand. Only registered South African banks²⁹ are allowed to issue e-money. Some researchers have noted that due to the tightening

²⁷ Federal Law "On Countering the Legalization (Laundering) of Criminally Obtained Incomes and the Financing of Terrorism."

²⁸ SARB, Position Paper on Electronic Money, Position Paper NPS 01/2009 (November 2009) (May 12, 2019), available at <http://www.reservebank.co.za/>.

²⁹ A bank can be defined as a commercial bank or branch of a foreign institution registered in terms of the Banks Act of 1990 (Act No. 94 of 1990), a mutual bank registered in terms of the Mutual Banks Act of 1993 (Act No. 124 of 1993) and a cooperative bank registered in terms of the Cooperative Banks Act of 2007.

of regulation, the trade-off is in favor of risk management over financial inclusion.³⁰ It is also essential that the E-Money regulatory framework is technology-neutral and does not constrain itself to a particular form factor or technology platform. Mobile phone technology is an ideal technology platform to introduce payment products and services. Mobile Money should however not be regulated in isolation and should be a subset of the bigger E-Money regulatory framework.³¹

However, the Russian e-money legal concept is different:

- e-money means funds and does not mean value;
- e-money is transferred but not issued or redeemed.

We can also outline the following similarities between *South African* and *Russian* requirements for e-money providers:

1. Necessity of prior notification to the Central Bank of providing e-money services;
2. Possibility of arrangements for providing operational and clearing services by the non-banks to the banks;
3. Public disclosure of the conditions of e-money services. In Russia, a contract between the bank and its customer is required;
4. The technologies used in e-money must be secure and ensure robust operations.

Russian banks hold e-money in their own accounts, which differs from South African practice where deposits of e-money would have to be held in a separately identifiable e-money account in a bank for each holder of e-money according to the requirements of the Banks Act. Therefore, the South African model of holding e-money resembles the bank account model in Russia.³²

In *India*, the RBI MD on PPIs defines the term “pre-paid payment instruments” (PPIs) as payment instruments that facilitate the purchase of goods and services, including funds transfer, against the value stored on such instruments. The value stored on such instruments represents the holder’s value paid by cash, by debit to a bank account or by credit card. The PPIs can be issued as smart cards, magnetic

³⁰ Vivienne A. Lawack, *Mobile Money, Financial Inclusion and Financial Integrity: The South African Case*, 8(3) Washington Journal of Law, Technology & Arts 317, 328 (2013); Michael Klein & Colin Mayer, *Mobile Banking and Financial Inclusion: The Regulatory Lessons*, World Bank Policy Research Working Paper No. 5664 (May 2011) (May 12, 2019), available at <http://documents.worldbank.org/curated/en/516511468161352996/pdf/WPS5664.pdf>.

³¹ Sarah Langan & Keith Smith, *The Legal and Regulatory Framework for Payments in 14 SADC Member States: Master Report*, FinMark Trust (August 2014), at 40 (May 12, 2019), available at http://www.finmark.org.za/wp-content/uploads/2016/02/Rep_LegalRegulatoryFramework_Payments_SADC_14states.pdf.

³² Bank accounts are regulated by the Civil Code (ch. 45), while e-money by the Russian NPS Law. See Michael Tarazi & Paul Breloff, *Nonbank E-Money Issuers: Regulatory Approaches to Protecting Customer Funds*, Focus Note No. 63, CGAP (July 2010), at 3–5 (May 12, 2019), available at <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Non-bank-E-Money-Issuers-Regulatory-Approaches-to-Protecting-Customer-Funds-Jul-2010.pdf>.

stripe cards, internet accounts, internet wallets, mobile accounts, mobile wallets. The PPIs are classified under three categories:

- closed system payment instruments;
- semi-closed system payment instruments;
- open system payment instruments.

Closed system payment instruments are issued to facilitate the purchase of goods and services from the issuer. No cash withdrawal or redemption is allowed. Issuance of these payment instruments is not required by the RBI authorization.

Semi-closed system payment instruments can be used to purchase goods and services including financial services with a group of merchants that concluded a contract with the issuer on acceptance of the payment instruments. These instruments also do not permit cash withdrawal or redemption by the holder.

Open system payment instruments can be used to purchase goods and services including financial services such as funds transfer at any card-accepting merchant locations (point of sale terminals), and they permit cash withdrawal as well.³³

Banks are permitted to issue all categories of PPIs. However, only banks providing mobile banking transactions may also issue mobile-based PPIs (e.g. mobile wallets and mobile accounts).

Non-banks may be authorized by the RBI to issue only closed and semi-closed system payment instruments including mobile phone-based PPIs. Any non-bank entity seeking the RBI authorization shall meet capital and other eligibility requirements. Existing PPIs license holders could opt for conversion into payments banks.

All authorized issuers may issue reloadable or non-reloadable PPIs depending on the issuer's type and the category of the instrument. PPIs are to be loaded (reloaded) by cash, by debit to a bank account, by credit and debit cards. The electronic loading (reloading) of PPIs shall be conducted through payment instruments issued by regulated Indian entities in rupees only. There are specific requirements for amounts loaded, outstanding in the instrument and debited from the instrument as well as for cross-border transactions through PPIs.³⁴

In *China*, opening prepaid accounts and the issuance of prepaid cards by the banks and NFI PSR are substitutes for e-money in the other BRICS countries considered.

In conclusion, it may be noted that legal and regulatory approaches to the payment and e-money services in the BRICS countries have similar features. All

³³ Shivalik Chandan, *RBI and Regulation of Digital Financial Services in India, 2012–2016*, Centre for Internet & Society, 11 July 2016 (May 12, 2019), available at <https://cis-india.org/raw/rbi-regulation-digital-financial-services-in-india-2012-2016>; Sharanya G. Randa, *The Legal Framework for E-payments in India and the Challenges It Faces*, TechCircle, 1 December 2016 (May 12, 2019), available at <https://techcircle.vccircle.com/2016/12/01/the-legal-framework-for-e-payments-in-india-and-the-challenges-it-faces/>.

³⁴ Jane K. Winn, *Mobile Payments and Financial Inclusion: Kenya, Brazil and India as Case Studies in Research Handbook on Electronic Commerce Law* 62 (J.A. Rothchild (ed.), Cheltenham: Edward Elgar Publishing, 2016).

the countries regulate non-bank payment services providers and require their authorization. Brazil, India and Russia have well-developed regulations for banking correspondents and agents. Russia and South Africa allow providing e-money services only for the banking institutions.

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