

**MALAWI'S MOBILE MONEY REGULATORY FRAMEWORK AND THE
PROTECTION OF UNBANKED MOBILE MONEY CONSUMERS**

LLM (COMMERCIAL LAW) THESIS

By

**RALPH FELIX SAUTI Jr
LLB (Honours) – University of Malawi**

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DECLARATION

I, the undersigned, hereby declare that this thesis is my original work and has not been submitted to any other institution for similar purposes. Where other people's work has been used, acknowledgements have been made accordingly.

Full Legal Name

Signature

Date

CERTIFICATE OF APPROVAL

The undersigned certifies that this thesis represents the student's own work and effort and has been submitted with my approval.

Signature: _____ Date _____

Garton Kamchedzera, PhD (Associate Professor)

Supervisor

DEDICATION

To my wife Miriam and my daughters: Lea Ruth and Faith Monique

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ABSTRACT

Mobile money is seen as a tool for financial inclusion. Its emergence however, has raised challenges on adoption of a regulatory approach appropriate to the risks which this service has presented on the financial market. This study set out to assess whether the current regulatory framework in Malawi is suitable for the protection of vulnerable unbanked population of consumers while at the same time fostering growth of the market. The study was premised on the theoretical proposition that a regulatory framework which has capacity to protect consumers, mostly unbanked, and promote service providers on the mobile money market is one that adequately enables regulatory institutions to monitor and supervise suppliers on the financial market by proportionately protecting consumers in minimizing risks, ensuring availability of information, protects their funds and offering sufficient redress mechanisms. Using doctrinal research paradigm, comparative approach and qualitative methodology, the study compared the regulatory frameworks of Kenya and Malawi in regard to the adopted key aspects of the theoretical proposition developed in this study. Desk research technique was employed to develop theory, examine statutes in Malawi and Kenya and measure them against such aspects. The study found that although set out on a seemingly similar regulatory approach to that of Kenya, the current regulatory framework in Malawi does not adequately protect consumers and promote providers of mobile money. Reasons included lack of strong, clear and unambiguous mandates provided by the enabling statutes of various institutions and absence of regulatory instruments strategically calibrated to protect consumers of mobile money. Although the Payment Systems Bill, 2015 is promising in a number of areas, it lacks definite consumer protection norms which are key to the promotion of mobile money service. The implications of the findings on theory, law reform, practice and research include adoption of an integrated regulatory approach with the resultant amendment to the Reserve Bank of Malawi Act; and, promulgation of legally binding norms on consumer protection in mobile money. Where jurisdictional overlaps exist, a framework for referrals should be put in place to promote referrals to the most suited regulator.

TABLE OF CONTENTS

ABSTRACT.....	vi
TABLE OF CONTENTS.....	vii
LIST OF STATUTES	xi
LIST OF CASES.....	xii
LIST OF ABBREVIATIONS AND ACRONYMS	xiii
CHAPTER ONE	1
BACKGROUND AND METHODOLOGY.....	1
1.1 Background	1
1.2 Problem Statement	6
1.3 Research Questions	6
1.4 Hypothesis.....	7
1.5 Literature Review	7
1.5.1 Regulation of Mobile Money Globally	7
1.5.2 Regulation of Mobile Money in Africa	9
1.5.3 Regulation of Mobile Money in Malawi	11
1.6 Significance of the Study	12
1.7 Methodology	12
1.8 Justification	14
1.9 Limitations of the Study.....	14
1.10 Thesis Outline	15

CHAPTER TWO	16
PURPOSIVE REGULATORY FRAMEWORK FOR PROTECTING UNBANKED CONSUMERS OF MOBILE MONEY	16
2.1 Introduction	16
2.2 The Need to Regulate in order to Protect Unbanked Consumers of Mobile Money	17
2.3 A Purposive Approach to Definition of Mobile Money	18
2.4 Conceptual differences between Mobile Money and Mobile Banking.....	19
2.5 Responsive and Risk-based Theories on Regulation	21
2.5.1 Risk-based Theory.....	21
2.5.2 Responsive Regulation Theory.....	23
2.6 Strategic Framework for Protection of Unbanked Mobile Money Consumers: Protection of Consumers and Promotion of Mobile Money Market.....	24
2.7 Regulatory Approaches to Mobile Money	28
2.7.1 The Enabling Approach.....	29
2.7.2 The Proportionate Approach	30
2.7.3 The Prudential Regulatory Approach	31
2.7.4 A Combination of Enabling and Proportionate Approaches in Protection of Unbanked Mobile Money Consumers	32
2.8 Conclusion.....	34
CHAPTER THREE	35
MALAWI’S MOBILE MONEY REGULATORY INSTITUTIONAL FRAMEWORK COMPARED TO THAT OF KENYA	35

3.1 Introduction	35
3.2 The Key Regulatory Institutions and Their Mandates in Malawi	35
3.2.1 The Reserve Bank of Malawi	36
3.2.2 The Malawi Communications Regulatory Authority	38
3.2.3 The Competition and Fair Trading Commission	39
3.2.4 The Consumer Protection Council	40
3.2.5 Coordination Gaps in the Framework	40
3.3 The Key Regulatory Institutions and Their Mandates in Kenya	40
3.4 Conclusion	43
COMPARISON OF MALAWI’S REGULATORY FRAMEWORK TO KENYA IN PROTECTING MOBILE MONEY CONSUMERS	44
4.1 Introduction	44
4.2 Minimizing Risks Emerging from the Relationship between Consumers and MNOs	44
4.3 Dealing with Information Inadequacies between Consumers and MNOs	47
4.4 Balancing Involvement of Third Parties and Protection of Consumers’ Privacy ...	50
4.5 Protection of Consumer Funds	52
4.6 Effective Redress of Consumers’ Grievances	54
4.7 Conclusion	55
CHAPTER FIVE	57
CONCLUSION AND RECOMMENDATIONS: TOWARDS AN INTEGRATED APPROACH TO PROTECTIVE AND PROMOTIVE MOBILE MONEY REGULATION	57

5.1 Introduction	57
5.2 The Essence of an Integrated Regulatory Approach	57
5.2.1 Regulatory Institutions for Mobile Money in Malawi and Kenya	59
5.2.2 Protection of Consumers of Mobile Money in Malawi and Kenya.....	61
5.2.3 The Hypothesis and the Findings	62
5.2 Implications and Recommendations	64
5.2.1 Theory.....	64
5.2.2 Law Reform.....	65
5.2.3 Practice	66
5.2.4 Research.....	67
5.3 Conclusion.....	68
BIBLIOGRAPHY	69

LIST OF STATUTES

Malawi

Communications Act, Act No. 41 of 1998 (*cap 68:01 of the Laws of Malawi*)

Competition and Fair Trading Act, Act No. 43 of 1998 (*cap 48:09 of the Laws of Malawi*)

Consumer Protection Act, Act No. 14 of 2003 (*cap 48:10 of the Laws of Malawi*)

Financial Services Act, Act No. 26 of 2010 (*cap 44:05 of the Laws of Malawi*)

Reserve Bank of Malawi Act, Act No. 8 of 1989 (*cap 44:02 of the Laws of Malawi*)

Kenya

Competition Act, Chapter 504 of the Laws of Kenya

Consumer Protection Act, Act No. 46 of 2012

Central Bank of Kenya Act, Chapter 491 of the Laws of Kenya

National Payments Systems Act, Act No. 39 of 2011

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South Africa

Jonker v Meester van die Hooggesregthof (88/85) 1986 ZASCA 64

LIST OF ABBREVIATIONS AND ACRONYMS

CBKA	Central Bank of Kenya Act
CBK	Central Bank of Kenya
CFTA	Competition and Fair Trading Act
CFTC	Competition and Fair Trading Commission
CAK	Competition Authority of Kenya
CPAK	Consumer Protection Act of Kenya
CPA	Consumer Protection Act
CPC	Consumer Protection Council
ICT	Information and Communication Technology
IEC	International Electrotechnical Commission
ISO	International Organization for Standardization
ITU	International Telecommunications Union
MACRA	Malawi Communications Regulatory Authority
MGDS II	Malawi Growth and Development Strategy II
MOU	Memorandum of Understanding
MPSG	Mobile Payments Systems Guidelines
MNO	Mobile Network Operator
NPSA	National Payments Systems Act
NPSR	National Payments Systems Regulations
PSB	Payment Systems Bill
POS	Point of Sale Devices
RBMA	Reserve Bank of Malawi Act
RBM	Reserve Bank of Malawi
SMS	Short Messaging Service
SDGS	United Nations Sustainable Development Goals

CHAPTER ONE

BACKGROUND AND METHODOLOGY

1.1 Background

Goal Number 1 of the United Nations Sustainable Development Goals (SDGS), is to end poverty in all its forms everywhere in the world by 2030.¹ In order to achieve this, countries are encouraged to ‘ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services such as, appropriate new technology and financial services, including microfinance’.² In Malawi, the Malawi Growth and Development Strategy (MGDS II), which expires in 2016, aims at creating a conducive environment that enhances inclusive private sector growth and competitiveness.³ Its successor is likely to advance the SDGS. In light of such development agenda, access to technology and financial services by the poor is seen as critical to the achievement of not only the SDGS but also MGDS II or a similar development framework that may replace the MGDS II when it expires.

Financial markets are seen as a critical component for achieving the SDGS.⁴ This is so because the increase in players on the financial market is assumed to easily translate into economic development.⁵ The ripple effect of this is that those who have naturally been excluded from the financial market due to barriers such as costs of banking services, access to banking services among others, become absorbed in the financial market as the

¹ United Nations, ‘Sustainable Development Goals’ <<http://sustainabledevelopment.un.org/sdgs>> Accessed 15 December 2016

² *ibid*, Sub-theme 4

³ Theme 1 particularly sub-theme 4 which deals with private sector development

⁴ E M Flores-Roux and J Mariscal, ‘The Enigma of Mobile Money Systems’ (2010) *Communication & Strategies*, No. 79, 3rd Quarter, Pp 40 – 62 at 43 <<http://ssrn.com/abstract=1810675>> accessed 13 December 2015

⁵ *ibid*

private sector injects more capital on the market and thereby resulting in financial inclusion.⁶

Financial inclusion is defined as a move away from a predominantly unbanked economy towards a more sophisticated financial system where people from all socio-economic backgrounds have access to affordable convenient and high quality financial services.⁷ One of the products on the financial market, mobile money, has been identified as a tool which has potential for achieving financial inclusion of the poor who are otherwise financially excluded due to various barriers.⁸ Studies carried out in this area have revealed that mobile phones are a key variable to increase in information, diminishing transactional costs and strengthen social networks, which in turn diminish vulnerabilities endured by the poor.⁹ Further, mobile money payment systems have been hailed as having capacity to solve the remittance dilemma caused by poor road networks to reach the financially excluded due to geographical barriers; inaccessibility of banking services since banks are mostly available in cities, towns and smaller towns; cost of transactions using traditional money transfer services and unreliable postal services.¹⁰

With its inherent capacity to deal with dilemmas which traditional services offered on the financial market have failed to solve, mobile money enables the unbanked population to access popular banking services such as peer to peer money transactions, accessing cash and purchasing goods and paying bills and in other cases paying bank loans. Thus in Africa, just like anywhere in the world, banks have taken advantage of mobile network operators' penetration into the financially excluded population by reaching such population and offering traditional banking services. Mobile Network Operators (MNOs) have also used this model to create products which were traditionally offered by banks to their customers.

⁶ S Madise, 'Payment Systems and Mobile Money in Malawi: Towards Financial Inclusion and Financial Integrity' <<http://ssrn.com/abstract=2531319>> Accessed 13 December, 2015

⁷ Webb Henderson, 'Mobile Money Regulation' <<http://webbhenderson.com/wp-content/uploads/2015/06/Mobile-Money-Regulation-April-2014.pdf>> Accessed 1 April 2016

⁸ *ibid*

⁹ Flores-Roux (n 4) 47

¹⁰ S Madise, 'Solving the Remittance Dilemma' (2015) <<http://ssrn.com/abstract=2531338>> Accessed 10 December 2015

In Africa, successes have been registered in Kenya where Safaricom introduced a product known as M-Pesa which allows mobile phone users with or without bank accounts to deposit, withdraw and transfer money using SMS.¹¹ As of 2009, this mobile market had penetrated over 50.3% of Kenya's population.¹²

In Malawi, there are four MNOs, namely; Airtel Limited, Telekom Networks Malawi Limited, Access Communications Ltd and Malawi Telecommunications Ltd. It is estimated that over 90% of Malawian population has access to mobile phone signal.¹³ This means that there is potential for MNOs to penetrate significantly throughout the country to people of various needs on the financial market. In 2012, Airtel Limited introduced a product known as *Airtel Money* which provides payment services such as deposit and withdraw, peer remittances, top-ups for airtime and insurance. A similar service was introduced by TNM Limited a year later. As of February 2016, there were 2.4 million people who had opened a mobile money account with the existing MNOs.¹⁴ However, the levels of participation on the market remains below one-fifth of the current holders of mobile money accounts.¹⁵

Scholars have observed that those who have difficulties accessing banking services, such as deposits, have the potential of using this product to keep money in their mobile money accounts the same way they would have done with a bank account.¹⁶ With the wide publicity, marketing and funding going into this area, the population of mobile phone users using these services is likely to increase and thereby help fulfil the financial inclusion agenda.¹⁷

Regulation, however, is to ensure that the realisation of the financial inclusion agenda is fair, efficient and effective. The aim of regulation on the financial market is to ensure

¹¹ Flores-Roux (n 4) 48

¹² *ibid*

¹³ J Greenacre, L Malady and R Buckley, 'Regulation of Mobile Money in Malawi' (2014) 11 <<http://ssrn.com/abstract=2491995>> accessed 13 December 2015

¹⁴ Reserve Bank of Malawi, Monthly National Payments System Report (March 2016) Issue No.3, Vol. 4

¹⁵ Reserve Bank of Malawi, Monthly National Payments System Report (April 2016) Issue No. 4, Vol. 4

¹⁶ Flores-Roux (n 4) 50

¹⁷ Greenacre *et al* (n 13) 13

protection of the system and its customers.¹⁸ Further, with respect to mobile money market, the aim of regulation is to help speed up growth of the market and easy access of the service by consumers while ensuring that appropriate protection is offered to the system by making the regulatory framework proportionate to the needs and realities on the market. Studies carried out in Philippines¹⁹ and Ethiopia²⁰ revealed that there is a direct link between adequate regulation and financial inclusion. For example, after proper regulatory framework was put in place in 2014, the number of participants on mobile money platform had dramatically increased by 33.2% as compared to 4.3% in 2006 when Kenya's regulators had employed a 'test and learn' approach to regulation.²¹ It is generally accepted, that for mobile money services to grow, the regulatory framework must facilitate rapid growth and easy access to mobile money services while at the same time appropriately protecting the integrity and stability of the financial system.²² Ideally, as shown by international best practices, regulatory frameworks that are appropriately adapted to risks involved in various types of mobile money transaction are seen as having capacity to achieve the financial inclusion agenda.²³ However, the challenges faced with both developed and developing countries in regulating mobile money is that, being a product of technological advancement, the service mutates progressively and in the process renders regulatory frameworks irrelevant to protecting consumers on the market. The only remedy available to countries, including Malawi, is to catch up.²⁴

¹⁸ Z Nkowni, 'Regulation of Banks and Consumer Protection: The case of Adverse Selection, Law and Practice in Malawi' (Mangochi, Malawi Law Society Annual General Meeting, 25-26 February, 2016) 3

¹⁹ GM Llato, 'Financial Inclusion, Education and Regulation in the Philippines' (2015) <<http://www.adb.org/sites/default/files/publication/171786/adbi-wp541.pdf>> accessed 15 June 2016

²⁰ Getnet A Zwedu, 'Financial Inclusion, Regulation and Growth in Ethiopia' (2014) <<https://www.odl.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9278.pdf>> accessed 14 June 2016

²¹ B Muthiora, 'Enabling Mobile Money Policies in Kenya: Fostering a Digital Financial Revolution' (2015) GSMA 4 <https://www.itu.int/en/ITU-T/focusgroups/dfs/Documents/2015_MMU_Enabling-Mobile-Money-Policies-in-Kenya.pdf> accessed 10 May 2015

²² Webb Henderson (n 7)

²³ *ibid*

²⁴ J Winn and L de Koker, 'Introduction to Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity Conference Special Issue' (2013) 8 WASH JL TECH & ARTS 155 – 63 at 156

Thus with regard to regulatory infrastructure, MNOs in Malawi are regulated by the Communications Act²⁵ which created the Malawi Communications Regulatory Authority (MACRA) as a regulatory body. In practice, an MNO cannot operate without a licence from MACRA to provide mobile money services.²⁶ Financial institutions on the other hand, are regulated by the Financial Services Act which empowers the Governor of the Reserve Bank as the Registrar of Financial Institutions to issue regulations and directives to manage the financial sector. This effectively results in protection of consumers with legislative backing.

Although MNOs are now providing financial services akin to banking, there is no comprehensive legislative framework governing the provision of such services. The Reserve Bank of Malawi, pursuant to its mandate under the Reserve Bank of Malawi Act,²⁷ has only issued Mobile Payment Systems Guidelines (MPSG) which generally are meant to govern non-bank providers of financial services. The MNOs are under the guidelines restricted to provision of services related to payment systems only.²⁸ What is yet to be known is whether the current regulatory framework, which is dependent on existing laws not calibrated to mobile money and guidelines, is adequate to protect consumers of mobile money on the market.

This research therefore aimed at identifying aspects of an ideal regulatory framework which will work in the face of rapid developments on the market. Following this, the study evaluated the adequacy of the current regulatory framework in Malawi in comparison to that of Kenya in protecting consumers on the mobile money market.

²⁵ Cap 68:01 of the Laws of Malawi

²⁶ Communications Act 2003 (CA), s. 5 (2) (g) (i)

²⁷ Reserve Bank of Malawi Act (RBMA) 2010, s. 4 (e)

²⁸ Mobile Payments Systems Guidelines (MPSG), Art 8.13

1.2 Problem Statement

The regulation of mobile money is made pursuant to existing laws, save for MPSG. However, little is known whether or not this framework is capable of protecting consumers, more especially the unbanked, on the market whilst at the same time promoting service providers.

Although studies have been carried out on the current state of mobile money regulation in Malawi, little has been done to specifically explore the extent to which the unbanked population are sufficiently protected from fraud and abuse, by both mobile money providers and other unscrupulous people. Thus it remains to be known whether or not inadequate regulation is one of the causes of the staggering growth of participants in the sector. This research therefore, sought to assess the adequacy of the current regulatory framework in protecting the unbanked population whilst promoting service providers as they participate on the mobile money market.

1.3 Research Questions

This study generally sought to answer whether the current regulatory framework is suitable for the protection of vulnerable unbanked population while at the same time promoting financial inclusion. In seeking to answer this question, the following questions were asked:

- (i) What aspects of a regulatory framework protect unbanked consumers of mobile money?
- (ii) What, currently, is the regulatory approach in Malawi compared to that of Kenya?
- (iii) How does the current regulatory framework in Malawi protect mobile money service users and mobile money providers in the mobile money market as compared to that of Kenya?
- (iv) What measures can be put in place to improve the regulation of mobile money market in order to fortify financial inclusion in Malawi?

1.4 Hypothesis

This study sought to answer the foregoing questions on the assumption that the mobile money market can be one of the efficient tools for financial inclusion if it is adequately regulated by providing sufficient protection for mobile money users as well as mobile money providers.

1.5 Literature Review

The discourse on mobile money payment systems cuts along several disciplines such as ICT and telecommunications. The literature on the subject matter can be categorised into: regulation of mobile money globally, in Africa, and in Malawi.

1.5.1 Regulation of Mobile Money Globally

Regulation of mobile money has attracted considerable attention in developed countries.²⁹ One of the reasons accounted for this is that in the wake of sophisticated regulatory mechanisms, countries still face challenges to combat crime and promote economic development simultaneously in the financial market.³⁰ This problem is even more complicated because of rapid technological innovations which make it difficult for regulatory environment to catch up.³¹

The mobile money programs in most countries operate without respect or effective protection of privacy for consumers on the market.³² In his paper Professor Louis de Koker assessed the impact of 2012 Financial Action Task Force (FATF) anti-money laundering (AML) and counter terrorist financing (CTF) standards on mobile money programs. He observed that, among others, these standards require service providers to report suspicious transactions to their respective financial intelligence units (FIU).³³ However, it has turned out that such disclosures are mostly exploited by powers that be in order to gain political mileage against opponents. South Africa was taken as an example

²⁹ibid (n 24) 156

³⁰ ibid (n 24) 157

³¹ ibid

³² L de Koker, 'The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks Within the New Standards Framework' (2013) 8 Wash. J.L. Tech. & Arts 165

³³ ibid 179

where “despite a modern constitution and rule of law, indications are that communications were being intercepted for political purposes.”³⁴ This is even made complicated in the wake of evidence of cases where MNOs in South Africa would release client information on the promise that due process was going to follow later. The delicate balance of combating crime and protection of consumer’s privacy remains a challenge in the regulation of mobile money in both the developed and developing world.

Apart from privacy concerns, studies have shown that in the absence of strong national or international regulatory framework, market-oriented global ICT networks are fast undermining compliance of national regulatory infrastructures. Professor Winn observed that although mobile money has the potential to be an effective policy instrument for financial inclusion in developing countries, it has the potential to fuel money laundering and terrorist financing.³⁵ Thus, she observed that current global ICT standards³⁶ have failed to keep pace with technological change in markets for ICT products which is very rapid. Global network providers, on the other hand, have enjoyed significant market power due to their strong network presence across the globe.³⁷ These network providers take advantage of jurisdictional barriers and avoid compliance of national regulatory systems by resisting to localize their services in the markets they enter.³⁸ Thus, regulation of cross-border mobile money remittances still remains a big challenge in the wake of technological advancements. This is therefore making it difficult for countries to balance both market and regulatory requirements in the development of global mobile money remittance.

It would appear that in the developed world, regulation of mobile payment systems stands to benefit from the already existing regulatory frameworks in the financial market such as bank regulations. A study carried out on regulation of electronic payment systems in China revealed that regulation of banking sector can be used as a model for regulation of

³⁴ *ibid* 181

³⁵ JK Winn, ‘Governance of Global Mobile Money Networks: The Role of Technical Standards’ (2013) 8 Wash. J.L. Tech. & Arts 197 at 197

³⁶ These standards are set by institutions such ISO, IEC, and ITU

³⁷ *ibid* (n 24) 160

³⁸ *ibid*

electronic payment systems.³⁹ According to Li, there are several regulatory bodies that play an oversight role on the electronic payments market in China. This has been characterised by regulatory inefficiencies and jurisdictional conflicts which are not the case with bank regulation where only one regulator is involved.⁴⁰ The study thus proposed that the theoretical framework for bank regulation presents potential solutions to piece-meal regulation of electronic payments currently obtaining in China. Although this study made an extensive exploration of suitability of regulatory framework on electronic payment systems, it was restricted to internet third party payments and virtual currency.

1.5.2 Regulation of Mobile Money in Africa

In Africa, a number of regulatory challenges in the mobile money market have been identified. According to Lawack-Davids⁴¹ developing technologies have challenged the traditional methods of safety and soundness of supervision by regulators because the innovations have had the effect of changing the nature and scope of existing risks in the financial market.⁴² As a matter of fact, they have actually created new ones. In South Africa, for example, it was observed that the advent of mobile banking has brought internet service providers and agents as new players on the industry with their own risks and challenges. The only available response to these challenges is a Position Paper issued by Reserve Bank of South Africa on mobile payment systems. However, this does not have legal binding force.⁴³ In this vein, the current regulatory framework does not regulate third party service providers who have now been incorporated in the banking sector, such as internet service providers and MNOs.

In the East African Community (EAC), a study on Burundi, Kenya, Rwanda, Uganda and Tanzania's regulations on mobile money identified failure to regulate agents for MNOs

³⁹ W Li, 'The Regulation of New Electronic Payment Services in China' (PhD Thesis, Queen Mary University of London, 2014)

⁴⁰ *ibid* 251

⁴¹ V Lawack-Davids, 'The Legal and Regulatory Framework of Mobile Banking and Mobile Payments in South Africa' (2012) JICLT 7 (4) pp 318 - 327

⁴² *ibid* 325

⁴³ *ibid* 326

as a further shortfall in overall regulation of the market.⁴⁴ Almost all MNOs engage the use of agents in order to register new account holders. The same are used to reach out to the customers with information on the operations of the mobile money product. A failure on this player in the mobile money market means a failure in the whole system. Yet, these players traditionally fall out of the purview of Central Bank's regulation.⁴⁵ According to Nyaga, critical issues which remain to be addressed are whether the MNOs should be directly licensed by the Central Bank and how agents should be regulated.⁴⁶

The relationship between regulation of mobile money and consumer protection was explored by Sikubwambo.⁴⁷ Using Rwandan regulatory framework, he observed that challenges existed in a number of areas such as liability of financial institutions for loss incurred by customers in mobile payment transaction; protection of customers in case of unauthorized mobile payments; limited awareness by customers; and holding principal financial institutions liable for acts of their agents in the matter of money laundering and terrorist financing. The findings of this study were that the current regulatory framework in Rwanda fails to respond to these adequately. It was therefore recommended that legislators should have in mind these issues when passing legislation on mobile money regulation.

The literature available so far on mobile money regulation in Africa correlates with the discourse currently ongoing worldwide. The main challenge which most countries face is the fact that the technological innovations in the area of mobile payment systems has caught most regulators by surprise and catching up with the risks and challenges posed by each innovation is proving difficult.

⁴⁴ JK Nyaga, 'Mobile Banking Services in the East African Community (EAC): Challenges to the Existing Legislative and Regulatory Frameworks' (2014) *Journal of Information Policy* Vol. 4 270 - 295

⁴⁵ *ibid* 291

⁴⁶ *ibid*

⁴⁷ JMV Sikubambo, 'Legal Analysis of Regulation of Mobile Payment Systems under Rwandan Law' (LLM Thesis, Kigali Independent University, 2014)

1.5.3 Regulation of Mobile Money in Malawi

Little has been written on regulation of mobile money in Malawi. However, available literature in the area of regulation of financial institutions, shows that the current laws and regulations are adequate to offer a safe and sound financial market but it is implementation of the same which is a problem. Nkowani⁴⁸ has observed that effective supervision and regulation of financial institutions provides an early warning system to the health and vulnerability of the sector to financial wrongs.⁴⁹ In assessing the adequacy of the current regulatory framework in protecting customers, three key issues were isolated. First, the nature of bank-customer relationship. Second, information asymmetry between banks and their customers. Third, the extent of financial inclusion or exclusion.⁵⁰ The paper concluded that the law makes adequate provision for regulation of banks and customers in the country, but the problem largely lay on implementation. The study is one of the landmark studies in Malawi in so far as banks and consumer protection is concerned. However, the paper was restricted to the regulation of banks in light of consumer protection and did not assess other players on the financial market such as mobile money service providers.

In Malawi, regulation of mobile money has been marred with challenges ranging from infrastructural, institutional to regulatory inadequacies. A study carried out by Greenacre, Buckley and Malady revealed a number of regulatory challenges that rock the mobile money market in Malawi.⁵¹ Some of the challenges identified include coordination among regulators, regulation for use of agents for the network operators and regulatory implications of partnerships between mobile network operators and banks.⁵² Although this study was extensive in respect to the regulatory framework, it did not provide an examination of specific legislation or regulations with regard to regulation of mobile money vis-à-vis consumer protection. As such, little is still known about protection of the mobile money market users.

⁴⁸ *ibid* (n 18)

⁴⁹ *ibid* 3

⁵⁰ *ibid* 5

⁵¹ *ibid* (n 13)

⁵² *ibid* 7

The literature so far available in Malawi, shows that there are challenges in the mobile money regulatory framework. Further, that the current regulation is still in its infancy and subject to being fortified. Little however, has been discussed or analysed with regard to the current regulatory framework and consumer protection in mobile money market. This literature however provided the researcher a good basis for identifying gaps inherent in the regulation of mobile money market.

1.6 Significance of the Study

Since the introduction of mobile money services, the market has been regulated by ad hoc regulations. Little is known regarding their suitability in protecting mobile money service users on the market. This study therefore, was conducted so that more will be known regarding the ability of the current framework to protect the mobile money consumers on the market.

1.7 Methodology

This research adopted a doctrinal research paradigm. This was chosen because this research primarily studied legal rules and principles in statutes and case law relating to mobile money, consumer protection and compared it with theoretical position with regard to regulation of mobile money. The research also examined the regulatory framework in Kenya vis-à-vis Malawi in order to assess how they fit within the larger theoretical framework. Since the relationships between various statutes, guidelines were at issue, this paradigm was considered ideal to help explain areas of conflict between the regulatory framework and theory.⁵³

The approach in this study was comparative. This approach was adopted because various regulatory approaches of mobile money exist in different countries for various reasons which make it necessary to examine how they fit within the theoretical roadmap. Although different economic conditions and rationale for existence of such frameworks are inevitable, the researcher restricted the study to consumer protection issues and

⁵³ T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Research' (2012) Deakin Law Review, Vol. 17 No. 1

regulation available within the theoretical context. Thus, on one hand, laws relating to regulation of MNOs and mobile payment systems guidelines were examined whilst on the other hand, consumer protection laws were examined. This was compared with the framework currently obtaining in Kenya and then evaluated against the theoretical context adopted in this study. This approach was considered important because it provided a platform for learning from already existing regulatory frameworks on the financial market.

In order to answer the research questions asked in this study, qualitative methods were employed. Desk study and internet research were the techniques the researcher used to collect data. Thus with regard to the first question, research papers, books and articles were perused in order to appreciate issues inherent in consumer protection in mobile money market and also appreciate what has already been studied in the area of regulation of mobile money. Secondly, theories on regulation both general and specific on mobile money were explored in order to find out an ideal regulatory framework that protects both the mobile money service providers on the mobile money market. In order to answer the second question, key regulatory institutions in Malawi and Kenya were examined in regard to their mandates. The aim was to identify regulatory approaches adopted, provisions which protect consumers and also assess the correlation between consumer protection provisions and guidelines. To answer the third question, consumer protection norms were identified in regulatory tools which comprised Mobile Payment Systems Guidelines (MPSG), Consumer Protection Act (CPA), Competition and Fair Trading Act (CFTA), Central Bank of Kenya Act (CBKA), National Payments Systems Act (NPSA) and National Payment Systems Regulations (NPSR).

The data collected was analysed by grouping into categories or themes. Categories were identified from the theories currently obtaining in regulation on the financial market. The researcher then deductively assessed correlation between regulations pertaining mobile money and banks and the identified categories. Explanation has then been provided to account for any inconsistencies or conflicts with theory.

1.8 Justification

Since mobile money is a recent entrant on the financial market in Malawi, little is known on the extent to which the regulatory framework for mobile money services in Malawi protects consumers. This study highlights aspects of a regulatory framework that can provide adequate protection for mobile money consumers and recommendations on measures that can be taken to adequately protect consumers. This can be further be a point of reference for legislators, policy makers and key players on the mobile money market to effect possible solutions to the challenges in the current framework in order to make mobile money market attractive to the mobile money consumers and thereby move towards the financial inclusion agenda.

1.9 Limitations of the Study

There were a number of limitations anticipated in this study. First, considering the fact that mobile money is a recent entrant on the market, there was little literature with regard to the area under study. However, the study expounded on the existing framework on the topic. Second, the study was primarily desk research and hence studied statutes, case law and other literature. As such information relating to what is actually happening on the ground in terms of perceptions of mobile money users and challenges they currently face was not directly obtained. The study relied on studies and reports done in this area so as to cover this shortfall, to mitigate this problem. Third, this being a new area, there was limited case law available specific to mobile money. However, this was mitigated by relying on statutes and regulations available. Fourth, due to lack of adequate regulation in the sector, MNOs have employed self-regulation strategies in order to boost confidence in the consumers. This study would have thus been enriched if qualitative interviews were carried out to incorporate the extent of consumer protection in self-regulation. However, this was mitigated, by restricting the objective of this study to the laws currently in force. Where relevant, reports on measures adopted by MNOs in self-regulation have been used.

1.10 Thesis Outline

This paper is divided in five chapters. Chapter one gives the general introduction, literature review, methodology. Chapter two explores aspects of a regulatory framework that protects the vulnerable unbanked consumers of mobile money. Chapter three analyses the regulatory framework in Malawi and Kenya in respect of the regulatory approach adopted in this paper. Chapter four discusses how Malawi's regulatory framework on mobile money is positioned to effectively protect consumers on the market as compared to that of Kenya. Chapter five presents a summary of key findings and recommendations.

CHAPTER TWO

PURPOSIVE REGULATORY FRAMEWORK FOR PROTECTING UNBANKED CONSUMERS OF MOBILE MONEY

2.1 Introduction

This chapter explores aspects of a regulatory framework which has capacity to protect unbanked consumers of mobile money while promoting mobile money market. The aim of regulating financial markets, which includes both banked and unbanked consumers among other players, is to ensure protection of the system and customers.⁵⁴ With respect to mobile payment systems, however, the aim of regulation is to help speedy growth of the market with easy access of the service by consumers while ensuring that appropriate protection is offered to the system by making the regulatory framework proportionate to the needs and realities on the market.⁵⁵ Considering that the unbanked consumers of mobile money are the most vulnerable on the financial market, the type of regulatory approach employed for mobile money service is crucial for the success of the product on the market. A purposive approach to regulation is therefore advocated to ensure that regulation is designed according the type of service or category of product and is calibrated according to the risks that the service poses.⁵⁶

⁵⁴ Z Nkowan, 'Regulation of Banks and Consumer Protection: The case of Adverse Selection, Law and Practice in Malawi'(Mangochi, Malawi Law Society Annual General Meeting, 25-26 February, 2016) 3

⁵⁵ M Tarazi and P Breloff, 'Nonbank E-Money Issues: Regulatory Approaches to Protecting Customer Funds' (2010) CGAP Focus No 63

⁵⁶ GSMA, 'Mobile Money Regulation: Is More Regulation Better?' <http://www.itu.int/en/ITU-D/Regulatory-Market/Pages/Events2016/Abidjan/Ses3_5%20Muthiora_GSMA_DFS.pdf> Accessed 4 April 2016

2.2 The Need to Regulate in order to Protect Unbanked Consumers of Mobile Money

MNOs use low cost business models to reach unbanked consumers who, in their large numbers and demand for financial services, offer a profitable consumer group. This group however comprises of people who are mostly first time users of financial services without basic knowledge of risks associated with such services on the mobile financial market. These risks are both from the demand side and include financial illiteracy, failure to understand language used predominantly in mobile money and disclosures of passwords to wrong people; and supply side including fraud, inappropriate product design, system failures and collapse of institutions.

Regulation would be justified to protect this group which is seen as weaker compared to their contracting partners whose expertise and competence makes it difficult for the weaker parties to have equal bargaining power on the market.⁵⁷ Inequalities of bargaining power arise not only due to the fact that consumers normally cannot negotiate terms on which services are provided, but also because service providers are able to exploit information and sophistication differences in their favour.⁵⁸ This can occur where providers deliberately avoid entering into service agreements with their customers on whose terms and conditions guiding the relationship are derived, as such, consumers will fail to bargain for better conditions which in the first place are not known to them. Where there is more than one player on the market, consumers can choose a provider whose conditions are considered better. However it can happen that even where multiple providers are involved, their standard terms and conditions or similar practices place consumers at a disadvantaged position. Regulation is therefore made to deal with inequalities inherent in the market by ensuring that the providers do not use their position to exploit consumers.

⁵⁷ H Beale, 'Inequality of Bargaining Power' (1986) 6 OXFORD J. LEGAL STUD. 123; S Thal, 'The Inequality Of Bargaining Power Doctrine: The Problem Of Defining Contractual Unfairness' (1988) 8 OXFORD J. LEGAL STUD.; R Baldwin, M Cave, and M Lodge, *Understanding Regulation, Theory, Strategy, and Practice* (2nd ed., Oxford: Oxford University Press, 2012)

⁵⁸ R Giesela, 'Consumer Protection in Choice of Law,' (2011) 44 CORNELL INT'L L.J. 569

Information inadequacies may call for regulation to protect this group by empowering them to make financial decisions, exercise their rights and obligations and be allowed access to effective and timely redress of their complaints.⁵⁹ Where information inadequacies exist, there is potential for providers of services to ignore warning consumers about the general risks or deficiencies associated with a particular services.⁶⁰ For example, customers may only be notified of the cost of the service after it has already been provided and the MNOs, taking advantage of the balance in the customer's account, collect their fees by making deductions on the account. It may also be that agents may demand extra fees than what is actually charged by the providers. Considering that a large number of people using mobile money have less literacy levels on technology, finances and costs of services, regulation will be called to make information accessible, accurate and affordable.

2.3 A Purposive Approach to Definition of Mobile Money

Although mobile money involves a relationship between the MNOs and the customer, there is little that has been done to define the basic rights and duties flowing from this relationship as is the case with banks. Inasmuch as mobile banking and mobile money appear as two sides of the same coin, they carry different meanings which effectively give two sets of rights and duties.

There are different ways in which money is perceived.⁶¹ Money can be used to refer to store of wealth.⁶² This concept sees money as wealth power in relation to its purchasing power. The owner uses it to settle his own liabilities such as payment of bills and services from the wealth stored in a mobile phone for example. This concept works for mobile money in that when one deposits cash with an MNO, he is able to use that wealth to settle liabilities such as water bills, electricity bills and other payments. The relationship here is between the holder of wealth and his creditors. It is the creditors who have rights over the

⁵⁹ Alliance for Financial Inclusion, 'Consumer Protection in Mobile Financial Services' <<http://www.afii-global.org/library/publications/consumer-protection-mfs-guideline-note-13>> Accessed 14 February 2016

⁶⁰ cf Baldwin (n 57) 17

⁶¹ F Hayek, *Denationalisation of Money: an analysis of theory and practice of concurrent currencies* (Institute of Economic Affairs 1976) 10

⁶² *Jonker v Meester van die Hooggesregthof* (88/85) 1986 ZASCA 64; Leon Joseph Perlman, 'Legal and Regulatory Aspects of Mobile Financial Services' (LLD Thesis, University of South Africa, 2012) 77

holder of wealth and in the event of lapse or failure to honor the liabilities for whatever reason, it is the holder of wealth who becomes liable.

Money is also conceptualized as a store of value.⁶³ In mobile money discourse, money is seen as a value that is loaded on the mobile phone in exchange for cash. The value holder is then able to use the mobile phone to effect instructions. For example, transferring the value to others (as in peer to peer transfers), withdraw it or use it to settle liabilities (such as payment of loans, bills and purchasing goods or services). Money is further conceptualized as a debt which banks owe account holders when they deposit coins or cash into their accounts (the 'debt concept').⁶⁴

Where money is seen as a form of debt, as in the bank setup, the client becomes the creditor and the bank becomes the debtor.⁶⁵ The effect of this relationship is that the debtor is under obligation to pay the debtor on demand.⁶⁶ Further, the debtor will have to act only on the creditor's valid instructions not on any forgery of those instructions.⁶⁷ Every dimension that money carries goes with the definition of the nature of the relationship between the parties involved and the duties that ordinarily flow from such a relationship.

2.4 Conceptual differences between Mobile Money and Mobile Banking

Mobile money is basically understood as money that is accessed via phones⁶⁸ or 'services that connect consumers financially through mobile phones'.⁶⁹ Using this platform, a subscriber is able to access services such as deposit money into his account and use it for payment of bills, goods and even transferring the value to other subscribers.⁷⁰ Most

⁶³ S Madise, *Mobile Money and Airtime: Emerging Forms of Money* (2015) <https://www.researchgate.net/publication/274380482_Mobile_money_and_airtime_emerging_forms_of_money> accessed 15 December 2015.

⁶⁴ C Bamford, *Principles on International Financial Law* (Oxford University Press 2011) 10

⁶⁵ *Foley v Hill* (1848) 2 HL Cas 28

⁶⁶ *Libyan Arab Foreign Bank v Bankers Trust* (1989) AC 80 (PC)

⁶⁷ *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* (1986) 80 (PC)

⁶⁸ S Madise, 'Mobile Money and Airtime' (n 63) 4

⁶⁹ V Lawack-Davids, 'The Legal and Regulatory Framework of Mobile Banking and Mobile Payments in South Africa' (2012) JICLT 7 (4) pp 318 – 327 at 319

⁷⁰ *ibid*

jurisdictions including here in Malawi, mobile money is conceptualized as a mode of payment.⁷¹ As such, though a potential avenue for keeping customers' savings, regulatory institutions do not allow service providers to accept deposits.⁷² Mobile banking on the other hand, is defined as 'a set of financial services involving the use of portable devices connected to communication networks that provide users with access to mobile payments, banking and other services linked to a customer's account'.⁷³ It also includes access to retail and small banking products and services as well as large value electronic payments and other banking services that are delivered electronically.⁷⁴ Mobile banking is therefore, treated as a banking service that simply benefits from existing technological platforms. These conceptual differences present difficulties in treating 'money' in mobile money the same way it is in mobile banking.

In mobile banking, 'money' that is transacted still falls under the definition of debt-concept which banks owe account holders when they deposit coins or cash into their accounts. This accounts for the fact that mobile banking is just an extension of the traditional banking system where relationship between the bank and customers have long been developed and enforced by courts. The result of this is that banked consumers of mobile money enter the market with basic knowledge of their rights and obligations. Unlike their peers, most unbanked consumers of mobile money are not familiar with the opportunities, costs and risks inherent in a formal financial market.⁷⁵ Further, most unbanked consumers, who are mostly financially illiterate, may not be conversant with the language predominantly used on the market, it makes it more likely that they stand at risk of being taken advantage of by MNOs through their employees or agents who may commit various acts of fraud to the unsuspecting consumers.⁷⁶

⁷¹ JMV Sikubambo, 'Legal Analysis of Regulation of Mobile Payment Systems under Rwandan Law' (LLM Thesis, Kigali Independent University, 2014) 25

⁷² K Mwenda, *Legal aspects of banking regulation, common law perspectives from Zambia* (Pretoria University Law Press, 2010)

⁷³ cf Lawack-Davids (n 69) 319

⁷⁴ *ibid* 320

⁷⁵ *ibid*

⁷⁶ J Mudiri, *Fraud in Mobile Financial Services* (2011) WORLD BANK

<www.microsave.net/files/.../RP151_Fraud_in_Mobile_Financial_Services_JMudiri.pdf>

Accessed 16 May 2016

Mobile money is therefore distinct from mobile banking in that mobile money deals with both banked and unbanked consumers and a bank account is not required to deposit a value into a mobile account and conduct subsequent transactions with it. This conceptual difference also leads to a difference in regulatory approach. Consumers using mobile banking benefit from the adequate regulation already existing in the banking sector, such as liquidity requirements on institutions and identity protections, whereas those using mobile money become excluded. Adequate regulation of mobile money therefore will entail adoption of a regulatory approach that does not ignore all the elements, both formal and informal, inherent in the mobile money market. This will entail recognition of the fact that mobile money can also be used as a savings platform for other quarters who are more exposed to loss due to non-existence of regulation in this aspect. This will ensure that the consumers, mostly unbanked, are protected from the risks, such as fraud, on the market.

2.5 Responsive and Risk-based Theories on Regulation

Theoretically, regulation of money market is approached from a number of stand points such as the relationship between the parties in mobile money transactions is attendant with risks that make the customer vulnerable and overly dependent on the service provider. Two regulation theories are pertinent: risk-based regulation theory and responsive regulation theory. These two theories are both pertinent because one is responsive to the protection needs of the unbanked customer and the other is about protection and promoting the mobile money market by identifying risks and mitigating them through regulatory tools.

2.5.1 Risk-based Theory

This theory asserts that regulatory frameworks should exist principally to control risks and not necessarily to secure compliance with set rules.⁷⁷ The central argument in this theory is that sustainable mobile money markets can only develop and allow the digital

⁷⁷J. Black, 'The Emergence of Risk-based Regulation and the New Public Risk Management in the United Kingdom' (2005) <http://www.academia.edu/1295947/The_emergence_of_risk-based_regulation_and_the_new_public_risk_management_in_the_United_Kingdom> Accessed 16 May 2016; Baldwin *et al* (n 57) 281-292

finance ecosystem to flourish where MNOs are able to mitigate risk cost-effectively, maintain integrity of the financial system and offer inclusive services.⁷⁸ The role of regulators therefore is to identify its objectives and risks that the regulated organizations may present to the achieving of those objectives. Where the objective is protection of consumers, the risk of loss of funds through fraud, involvement of agents and collapse of the market are measured against the strategies employed by the regulator to mitigate the risks.⁷⁹

The relevance of this theory in protection of mobile money consumers is that it informs legislators to enact legislation which is enabling in nature and equip the regulators with wider discretion in carrying out their mandates. However, there exists an inherent challenge of over classifying risks than they really are and over regulating one aspect at the expense of others.⁸⁰

In respect of protection of mobile money consumers on the market, regulation must serve two purposes. First, place a duty on MNOs to mitigate risks by ensuring that they put in place mechanisms that ensure protection of consumers from fraud either arising from demand side or the supply side. This effectively means that MNOs are to take adequate measures to ensure that are the first point of call to resolve grievances from consumers effectively and efficiently. Second, regulators must be empowered to monitor MNOs and agents in their discharge of contractual obligations which include meeting financial demands from consumers as well as avoiding exploitation of consumers due to inequalities of bargaining power.

⁷⁸ S Di Castri, J Grossman and R Sihin, 'Proportional Risk-based AML/CFT regimes for Mobile Money: A Framework for Assessing Risk Factors and Mitigation Measures' (2015) 14 <<http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2015/10/Proportional-risk-based-AMLCFT-regimes-for-mobile-money.pdf>> Accessed 15 June 2016

⁷⁹ P Chatain, et al, 'Protecting Mobile Money Against Financial Crimes: Global Policy Challenges and Solutions' (2011), WORLD BANK 112 <<https://openknowledge.worldbank.org/>> Accessed 12 March 2016

⁸⁰ *ibid* 53

2.5.2 Responsive Regulation Theory

This theory is defined as regulation that is responsive to the moves regulated actors make, to industry, context and to the environment.⁸¹ The regulatory framework based on this theory is crafted in a manner that allows a lot of supervisory powers and exercise of discretion on the part of the regulator to allow the regulated to expand the market whilst being given appropriate responses for actions which the regulator intends to encourage or discourage. The thesis behind this theory is that compliance is more likely when a regulatory agency operates a range of enforcement sanctions starting from persuasion, warnings to licence suspensions and revocation.⁸² Regulatory framework therefore can achieve whatever objective so long as the regulator has been empowered to monitor and ensure compliance using sanction based techniques. For protection of consumers in mobile money to be achieved, there must exist clear legislative and regulatory instruments outlining the rights and liabilities of various suppliers on the market. The limitation, however, is that where regulation is complex involving a number of regulatory agencies with similar regulatory activities it becomes difficult to provide certainty and predictability of regulatory actions. It may also lead to forum shopping, where MNOs prefer to comply with a regulator who is seen to be weaker.

This theory is relevant in so far as it helps in identification of rights and obligations of both consumers and MNOs. Literature on mobile money identifies a number of rights of consumers. These are access to adequate and timely education; information; right to have the MNO honour various sets of commands in real time, the right to privacy and confidentiality and the right to adequate, timely and effective redress mechanisms.⁸³

Against these rights, the MNOs would be seen as duty bearers who will have to meet their obligations by complying with the specific set standards. The corresponding duties are: provision of information which will make the consumers aware of the technological,

⁸¹ J Braithwaite, 'The Essence of Responsive Regulation' (2010)
https://www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/essence_responsive_regulation.pdf
accessed 14 May 2016

⁸² *ibid* (n 59) 6

⁸³ *ibid*

financial and operational demands of the industry; the duty to meet their financial obligations in real time; the duty to respect privacy and ensure that the customers are protected from breaches of confidentiality and the duty to provide functional procedures for redress of consumers' grievances. Failure to comply, will result in sanctions being imposed on the offending regulatee.

The use of this theory in mobile money would have the capacity of thwarting the agenda of financial inclusion since MNOs will have to meet high costs in order to comply. This will translate in high tariffs which effectively would exclude the low income consumers who form the bulk of those using this service.

2.6 Strategic Framework for Protection of Unbanked Mobile Money Consumers:

Protection of Consumers and Promotion of Mobile Money Market

The risk-based regulation and responsive regulation theories are credible sources for a credible strategic framework to regulate mobile money for the protection of the unbanked customer. Together, these two theories meet the rights and duties of the unbanked customer and the service provider respectively. Five attributes or principles for promotive and protective regulatory framework can be extracted from these theories. These are: minimizing risks emerging from the relationship between consumers and MNOs; dealing with information inadequacies on the market; balancing the third parties' involvement and protection of customers from privacy breaches as well as fraud; protection of consumers' funds; and, redress of grievances. These attributes emanate from the theoretical underpinnings surrounding the two theories which in essence aim at protecting the consumer while the other foster growth of the market by promoting market players to be innovative within a meticulously guarded framework.

The first attribute is that a protective and promotive strategic framework for the regulation of mobile money has to minimise risks that emerge from the relationship between consumers and MNOs. As the risks against the unbanked customer relate to rights, there is a duty on the part of the regulator to minimize such risks as a way of protecting the consumer. A proper regulatory framework should aim at ensuring that

existing and potential risks emanating from the relationship between the consumers and MNOs are identified and measures are taken in order to minimize such risks. This objective is often met when regulation is done.

The second attribute for a protective and promotive mobile money regulatory framework is that it must deal effectively with information inadequacies on the mobile money market. With these challenges related to financial illiteracy, the unbanked users of mobile money risk making errors and provide incorrect information both at the time of registration and actual use of the services. Losses resulting from this may make the users reluctant to participate on the market with the resultant loss to MNOs and failure to achieve financial inclusion with the tool of mobile money.

Generally, it is believed that competitive markets can only function properly where consumers are sufficiently well e under or through legislation, to use legally binding norms. The importance of relying on legally binding norms is that regulatory action commands support when it has legislative authority.⁸⁴ Posited regulations further provide more definite standards to guide decisions and actions compared to discretion that may vary from regulator to regulator. This avoids unnecessary challenges related to the legality of the actions taken by the regulator.

The second attribute for a protective and promotive mobile money regulatory framework is that it must deal effectively with information inadequacies on the mobile money market. With these challenges related to financial illiteracy, the unbanked users of mobile money risk making errors and provide incorrect information both at the time of registration and actual use of the services. Losses resulting from this may make the users reluctant to participate on the market with the resultant loss to MNOs and failure to achieve financial inclusion with the tool of mobile money.

⁸⁴ cf Baldwin *et al* (n 57) 27

Generally, it is believed that competitive markets can only function properly where consumers are sufficiently well informed to evaluate competing products.⁸⁵ Where there exists information inadequacies there is potential for producers of a product as a group to fail to warn consumers about the general hazards of deficiencies associated with a product.⁸⁶ In this respect, Professor Baldwin recommended as follows:

‘Regulation by making information more extensively available, accurate and affordable, may protect consumers against information inadequacies and the consequences thereof and may encourage the operation of healthy and competitive markets.’⁸⁷

This can best be achieved, when deliberate state intervention exists to make such information available since those with information may profit if they withhold such information from consumers.

The third attribute of a protective and promotive regulatory framework for the mobile money market is to balance the involvement of third parties and protection of privacy of consumer information. Use of third parties such as agents is one of the core aspects of the business model employed by MNOs in the provision of mobile money service. Studies carried out by Louis de Koker⁸⁸ Sikubambo,⁸⁹ Li⁹⁰ and Lawack-Davids⁹¹, however, have revealed that involvement of third parties in the provision of services such as mobile money presents its own challenges such as theft, fraud and privacy breaches.⁹² Considering that most agents do not have fixed place of operation, fixed capital and known identities to customers, there is therefore need for regulation to focus on the role that the agents play on the market.

⁸⁵ *ibid* (n 57) 14

⁸⁶ *ibid*

⁸⁷ *ibid* 18

⁸⁸ L de Koker, ‘The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks Within the New Standards Framework’ (2013) 8 *Wash. J.L. Tech. & Arts* 165.

⁸⁹ *cf* Sikubambo (n 71)

⁹⁰ W Li, ‘The Regulation of New Electronic Payment Services in China’ (PhD Thesis, Queen Mary University of London, 2014)

⁹¹ *cf* Lawack-Davids (n 69)

⁹² J Nyaga, ‘Mobile Banking Services in the East African Community (EAC): Challenges to the Existing Legislative and Regulatory Frameworks’ (2014) *Journal of Information Policy* Vol. 4 pp 270 - 295

Regulation which is aimed at protecting unbanked consumers must cover certain crucial issues with regard to agents. This includes ensuring that agents are properly trained, identified, bear a level of liability if negligent or fraudulent and that efficient mechanisms are in place for redress of customer complaints in the event that they are mishandled by not only agents but also MNOs. Thus protection of unbanked consumers entails that while ensuring that there is less burdening of MNOs on costs of engaging third parties in their provision of the mobile money service, an extent of liability to which an MNO can be held liable in the event of acts of such agents result in loss to the customers is also clearly defined.

The fourth attribute for a protective and promotive regulatory framework for mobile money is to protect the funds of the consumers. Loss of money by consumers through collapse of the market or a provider losing creditworthiness is a risk that is posed in mobile money. There is greater security for customers when they know that their funds are secured and not vulnerable to claims by MNOs' creditors, or in cases of insolvency. Deliberate state intervention in protecting customers' funds through regulatory processes has capacity to inspire confidence in the unbanked population and thereby advance financial inclusion agenda.

The protection of customers' funds is a crucial part of strategic framework for mobile money considering the MNOs are traditionally prohibited from receiving deposits and are not required to insure the funds.⁹³ Fund isolation and fund safeguard therefore do not place a huge burden on the MNOs in the provision of the mobile money service and yet works to the advantage of consumers by assuring them of protection of their money.

Considering the uniqueness of the service and that even where funds have been isolated, they may still be accessed by a shrewd creditor or in an event of insolvency, a requirement for use of trust law would be strategic in protecting consumer's funds. Thus, regulatory framework should be in such a way that MNOs are mandated to create trusts

⁹³ R P Buckley, J Greenacre and L Malady, 'The regulation of mobile money in Malawi.' (2015) *The Free Library* (September, 22), <[http://www.thefreelibrary.com/The regulation of mobile money in Malawi.-a0443457618](http://www.thefreelibrary.com/The+regulation+of+mobile+money+in+Malawi.-a0443457618)> Accessed 6 February 2016

through appropriate deeds on consumers' funds and also provide how such funds can be treated in the time of insolvency. The advantages are not only that funds are truly isolated and safeguarded but also that consumers have a beneficial owners of the funds. This effectively means that the funds are legally isolated and the threat of loss of such funds is greatly minimized.

The fifth attribute for a protective and promotive mobile money regulatory framework is to provide effective redress of consumer grievances. Access to redress of grievances is a right that consumers have on the mobile money market. Considering that mobile money service is a unique service that cuts across various regulatory spheres a number of regulatory agencies are involved at various levels with potential gaps and overlaps existing in the process. This effectively makes realization of this right difficult as certainty, consistence of remedies and timely redress of grievances may not be attained.

One of the widely accepted means to dealing with such challenges is the establishment of a regulatory mandate that is strong, clear, consistent and transparent.⁹⁴ This ensures that the responsibilities of various agencies are clear and well-defined and are as broad enough to accommodate future innovations which is normally characteristic of electronic payment systems. In protecting unbanked consumers of mobile money, this principle is important in that it helps to ensure that there is no duplication of roles between the various regulatory agencies in dealing with supervision, regulation as well as redressing complaints arising from the consumers on the market. In the event that various roles are clearly defined, it becomes easy to ensure that consumers are not left in suspense as to which regulator is responsible for handling their grievances for example.

2.7 Regulatory Approaches to Mobile Money

To achieve the objectives or achieve the strategic framework, it is essential to ensure that the approach to regulation is appropriate. This is so because how regulation is implemented is as important as the results that it may be expected to achieve. In this regard, three approaches are worth examining, to determine the ideal regulatory

⁹⁴ *ibid*

framework for the protection and promotion of the interest of the unbanked and the mobile money service provider: the enabling, proportionate and prudential approaches.

2.7.1 The Enabling Approach

Under this approach, the legislature aims to enable the regulator to permit key market players to explore various arrangements in order to provide an atmosphere where innovation and growth are encouraged. Coordination between the central regulator and other regulatory agencies become key to the regulation process in this model.⁹⁵ With regard to the mobile money market, this entails that the central regulator should work with government agencies such as Ministry of Finance, Mobile Network Operators' regulator who is usually a different agency and consumer protection institutions. This model hence involves extending the mandate of the Central Bank, which is traditionally to regulate and supervise financial institutions, to include regulation of mobile money –a service offered by non-financial institutions and its service providers in coordination with other regulatory agencies.⁹⁶

The advantage of this approach is that the regulatory institutions involved are sanctioned by Parliament. This may entail that they are accountable to Parliament or certain specified institution. In turn, this effectively gives confidence to the consumers to rely on regulators' authority, competence and expertise in protecting their interests.⁹⁷ Further, this approach, responds to the framework advanced herein in protecting the unbanked in so far as solving coordination problems between regulators and supervising the role of agents in the process of offering mobile money on the market. Furthermore, this approach is very useful where the regulatory agencies are used to help in disseminating accurate information which the unbanked consumer would need in order to use the mobile money service. These institutions also help in providing efficient channels of redress of grievances made by consumers in the course of using the service in question. However, this approach falls short of comprehensively offering protection to consumers as the

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ *cf Baldwin et al (n 57) 27*

operations of regulatory agencies rely on the statutory mandates which if not properly calibrated to respond to the risks involved in the market.

2.7.2 The Proportionate Approach

While the enabling approach focuses on proper coordination of institutions, the proportionate approach focuses on the actual content of regulation. The rationale behind this approach is to ensure that the costs to the regulator, institutions and consumers are proportionate to the risks and benefits.⁹⁸ It is argued that this approach enables banks, MNOs and cash merchants to work together in order to best serve consumers and expand services. The major regulatory concerns (such as licensing requirements, consumer protection and regulation of agents) are addressed under this approach by enacting provisions in statute and regulations which address specific needs of the market and capacity of the mobile money service provider.

Theoretically, for a proportionate regulatory approach to address consumer protection issues, it should provide for funds safeguarding and funds isolation.⁹⁹ Fund safeguarding is a principle that ensures that funds are available whenever demanded by the customer. In order to achieve this, regulations ought to make it a requirement for MNOs to maintain liquid assets equivalent to the total value of the customer funds collected.¹⁰⁰ These assets should be maintained with a prudentially regulated bank or in some safe and risk free investments. Provisions also ought to be entrenched restricting use of customer funds for purposes other than meeting customer demands.¹⁰¹ An example of such restriction may be use of customer funds for operating expenses. Although maintenance of liquid assets in prudentially regulated banks may be a solution, harsh realities across the globe have shown that banks do fail. Where banks are unable to pay all depositors this will result in loss of money for the consumers.

⁹⁸ cf Buckley (n 93) 9

⁹⁹ M Tarazi and P. Breloff (n 55)

¹⁰⁰ *ibid* 5

¹⁰¹ Webb Henderson, Mobile Money Regulation, Thinking Telecoms Series (April, 2014) at pp 2-4
<<http://webbhenderson.com/wp-content/uploads/2015/06/Mobile-Money-Regulation-April-2014.pdf>>
Accessed

Funds isolation provisions on the other hand, require that funds held in prudentially regulated banks are held in a trust fund or with third party trustees.¹⁰² The rationale behind this is that since funds held in banks are ordinarily held in the name of the service provider, and therefore the MNOs becomes the legal owner of the accounts and not the customers, the funds become vulnerable to claims either by MNO's creditors or to attachment of such funds as security for loans.¹⁰³ In order to avoid this, regulation should provide for clear protection of customers' funds both by clearly identifying safeguards for funds as well as isolating such funds from ordinary operation of MNO's day to day expenses and liabilities. Considering the above principles inherent within this approach, it can to a greater extent be used to respond to the framework principles for protection of unbanked consumers by catering for protection of consumers' funds and minimizing risks emerging from the market. However, this approach falls short in that supervision aimed at preventing damage cannot be a possibility.

2.7.3 The Prudential Regulatory Approach

The approach employed in regulation of banks is intended to avoid damage to the financial system by the failure of licensed banks.¹⁰⁴ Supervision and regulation of the sector therefore 'is aimed at safeguarding the interests of both present and potential depositors and other creditors as well as to ensure safety, soundness and stability of the banking system through effective regulation'.¹⁰⁵ The regulator relies heavily on the strength of various Acts of Parliament which provide for higher standards of compliance and strict requirements on the part of banks. For example, maintenance of capital adequacy ratio, filing and submission of returns, provision of profit/loss accounts.

This approach enables the regulator to assess whether the institutions are financially sound and able to meet their market obligations. It also inspires confidence in the

¹⁰² cf Li (n 90) 46

¹⁰³ Z Nkowni, 'Regulation of Banks and Consumer Protection: The case of Adverse Selection, Law and Practice in Malawi' (Mangochi, Malawi Law Society Annual General Meeting, 25-26 February, 2016)

¹⁰⁴ cf GSMA (n 56)

¹⁰⁵ *ibid*

customers who are assured that the financial institutions with whom they are in a relationship are subjected to high levels of accountability to the Central Bank. The approval of such central bank translates in fair participation on the financial market. This approach may not be ideal because it would demand more capital and would in the end result in the service being offered at a higher cost which would make the whole aim of financial inclusion impossibility.¹⁰⁶ This is so because the target group for the mobile money market is mostly the low income consumers.

2.7.4 A Combination of Enabling and Proportionate Approaches in Protection of Unbanked Mobile Money Consumers

Although the ultimate objective of regulation of mobile money is the protection of consumers, mostly the unbanked, mobile money payment system on the financial market can only thrive and grow where such regulation is proportionate to the realities.¹⁰⁷ One such reality is that in order to attract more customers and thereby make the service easily accessible, MNOs adopt a business strategy that does not require enormous amounts of capital. This in turn makes the service affordable even to unbanked consumers and yet with risks that have capacity to water down confidence in the whole market. Strict adherence to one regulatory approach has the effect of offering piecemeal protection to unbanked consumers. As such, it is submitted that the best way is to integrate enabling and proportionate approaches so that one is used to compliment what the other approach already attempts to do.

The enabling approach has capacity of providing regulators with sufficient authority for monitoring and supervising non-financial institutions on the market.¹⁰⁸ Considering the strategic framework for protecting mobile money users, use of enabling approach is ideal for achieving proper redress of grievances of consumers and monitoring involvement of

¹⁰⁶ C Gibney, S Trites, N Ufoegbune and B Levesque, 'International Review: Mobile Payments and Consumer Protection' (2015) FCAC 31-32 <<http://www.fcac-acfc.gc.ca>> accessed 14 June 2016

¹⁰⁷ J Greenacre, L Malady and R Buckley, 'Regulation of Mobile Money in Malawi' (2014) p 11 <<http://ssrn.com/abstract=2491995>> accessed 13 December 2015; J Winn and L de Koker, 'Introduction to Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity Conference Special Issue' (2013) 8 Wash. J.L. Tech. & Arts 155 – 63 at 156

¹⁰⁸ Greenacre, *ibid*

parties on the market by ensuring compliance to sector specific regulations in protecting privacy and customer funds.¹⁰⁹ However, the enabling approach cannot adequately achieve protection of consumers in minimizing risks from relationship of consumers and MNOs as this is highly dependent on existent legal framework which provides a platform for the regulator to assess the said risks.

On the other hand, use of proportionate approach can help achieve protection of consumers especially in aspects of minimizing risks and promulgating rights and liabilities of various players on the market. In this way, risks of consumers losing their money due to market collapses or fraud and provisions of guidance of instances where invasion of privacy would be legal can best be achieved through this approach. This approach however, is bound to fail in the face of improperly enabled institutions to supervise and monitor market players.

The two approaches in isolation of each other provide fragmented protection to consumers which means that the regulatory framework would be deficient in offering sufficient protection for unbanked consumers. Adopting an integrated approach therefore, ensures holistic protection of both consumers and suppliers on the mobile money market. Such an approach will have at least two broad aspects: enabling and proportionate. Enabling aspects will include extension of regulatory mandate of the Central Bank to cover non-financial institutions which are offering financial services and concentration of the role of supervision, monitoring and regulation in one regulator to avoid coordination challenges. Proportionate aspects include protection of consumer funds, ensuring availability of information, legislative and regulatory norms guiding the role of agents and clear norms ensuring confidentiality of customers' information, guidance on redress mechanisms with the Central Bank as the final arbiter and minimizing risks emanating from the relationship between MNOs and consumers.

¹⁰⁹ J Malala, 'Consumer Protection for Mobile Payments in Kenya: An examination of Fragmented Legislation and The Complexities it presents for Mobile Payments' (2013) <<http://www.kba.co.ke/img/pdf/Working%20Paper%20WPS-07-13.pdf>> Accessed 4 June 2016

2.8 Conclusion

Ideally, a regulatory framework must have capacity for proportionately protecting consumers by minimizing risks, ensuring availability of information and offering sufficient redress mechanisms. Simultaneously, the framework must promote the investment interests of the service provider and ensure that the mobile money market continues to expand to allow more access.

To achieve this result, an integrated regulatory approach comprising of enabling and proportionate approach is necessary. Such an approach must strategically meet objectives that address the risks. In this regard, it is pertinent to assess a regulatory framework in a given jurisdiction such as Malawi.

CHAPTER THREE

MALAWI'S MOBILE MONEY REGULATORY INSTITUTIONAL FRAMEWORK COMPARED TO THAT OF KENYA

3.1 Introduction

This chapter discusses the existing legal framework for mobile money in Malawi compared to Kenya in so far as measured against the a protective and promotive regulatory framework determined in chapter 2. The aim is to identify a regulatory approach which is employed in Malawian and Kenyan institutional framework. The chapter first discusses the relevant regulatory Malawi institutions and their mandates. The chapter then compares the results with framework obtaining in Kenya.

3.2 The Key Regulatory Institutions and Their Mandates in Malawi

The key institutions are the Reserve Bank of Malawi (RBM), the Malawi Communication Regulatory Authority (MACRA), the Competition and Fair Trading Commission (CFTC), and the Consumer Protection Council (CPC). The RBM is relevant because it has the overall mandate “to promote a money and capital market in Malawi”. MACRA’s overall duty is to ensure reliable and affordable communication services in Malawi.¹¹⁰ The CFTC is relevant because it is required to ensure fairness in trade.¹¹¹ The CPC is responsible for consumer protection. However, the pertinent question though is how the setup, mandates, and mode of working of these institutions comply with the regulation model adopted in chapter 2.

¹¹⁰ Communications Act 2003, s. 4 (1)

¹¹¹ CFTA, s. 8 (1)

3.2.1 The Reserve Bank of Malawi

The primary regulator of mobile money is the RBM. It was established under section 3 of the Reserve Bank of Malawi Act (RBMA),¹¹² and is mandated to promote sound financial structure, including payment systems, clearing systems and adequate financial services.¹¹³ It is also mandated to supervise banks and other financial institutions in Malawi.¹¹⁴ Relying on this mandate, the RBM has issued MPSG which are designed to regulate the conduct of mobile money have been made pursuant to this mandate.¹¹⁵ From the MPSG, the RBM is positioned to supervise the MNOs in their provision of mobile money service in aspects of compliance with not only the Guidelines but any other law in force in the country.¹¹⁶

However, although the RBM exercises supervision over MNOs, it does not have such a mandate under the law. According to section 4 of the RBMA, supervisory role of RBM is restricted to banks and financial institutions. MNOs do not fall in the category of financial institutions although they are currently providing financial services. This is so because the Act defines a financial institution as a person other than a bank who is registered as a financial institution under Banking Act.¹¹⁷ For MNOs to offer mobile money service, they are simply required to include the service in their application for licence with MACRA whose grant of licence enables the MNO to offer the service subject to approval of the RBM. Although the RBM would be seen as the most effective platform in which the regulatory framework could relate to enabling approach, its enabling Act restricts it to the traditional role of regulation of financial institutions. The net effect of this is that institutions which do not fall within the category of financial institution cannot be properly regulated by the RBM.

Further, the Act is silent on RBM's authority to regulate mobile money. Although the same arguable falls under payment systems, the RBM is only enabled to promote sound

¹¹⁵ MPSG, Art. 2

¹¹⁶ It is from this that the RBM can withdraw its approval should the MNO be found in breach of any other law currently in force.

¹¹⁷ RBMA, s. 2

financial structure including payment systems. Where the legislator intended to authorize the RBM to regulate a sector it expressly states so, as in section 4 (h) where the authority to regulate financial institutions is clearly spelt out, but in the case of payment systems, the mandate is framed in general terms and cannot be said to enable the RBM to regulate the sector. It is probably because of this reason that the RBM only issued guidelines which do not have legal force. The RBM therefore relies on moral persuasion and not otherwise.

Furthermore, there are no mechanisms on how the RBM can redress consumer grievances. It also does not provide how the RBM can coordinate with other regulatory bodies in achieving this result. As a result of this gap the RBM, as of 2015, entered into administrative arrangements with various regulatory institutions. It thus signed a Memorandum of Understanding (MOU) with MACRA where the two institutions agreed to jointly oversee, supervise and interact with each other in respect of any matters relating to mobile financial services offered by MNOs and to address existing regulatory gaps. Areas of cooperation include mobile money payments, mobile financial services and consumer protection. Similar MOUs have been signed between RBM and CFTC.¹¹⁸ It should be noted that besides the MOUs being indicative of a regulatory gap, it is doubtful whether the RBM can derive its powers to supervise MNOs from an MOU where the same has not been expressly granted by law.

It is important to note that the Payment Systems Bill of 2015 (PSB) seeks to extend the mandate of RBM to regulate payment systems and its participants which include regulation of both financial and non-financial institutions.¹¹⁹ If passed, RBM will now have legislative backing to supervise and regulate all players¹²⁰ and to cooperate with regulatory authorities in the country as well as outside.¹²¹ However, the PSB fails to provide how the RBM can coordinate with the other regulatory bodies considering the coordination challenges currently being experienced due to jurisdictional overlaps. It is

¹¹⁸ R Buckley, J Greenacre and L Malady, 'The Regulation of Mobile Money in Malawi' (2015) 14 Wash. U. Global Stud. L. Rev. 435 at 445

¹¹⁹ PSB, s. 12 (1)

¹²⁰ PSB, s. 4

¹²¹ PSB, s. 7

thus, the manner in which coordination ought to be done that should have been clearly spelt out in PSB in order to deal with this issue.

3.2.2 The Malawi Communications Regulatory Authority

MACRA's general mandate is to ensure that, so far as is practicable, there are provided throughout Malawi reliable and affordable communication services.¹²² In addition to this mandate, MACRA is also required to protect the interests of consumers, purchasers and other users of communication services in respect of the prices charged for the quality and variety of services provided and terminal equipment supplied.¹²³ The mandate of this institution clearly places it in a position of advantage to regulate communication services which in this respect includes those offered by MNOs.

However, the Act restricts MACRA to regulate provision of communications services and not mobile money service.¹²⁴ Regulation of mobile money or payment systems being a financial service, automatically falls outside the scope of the Act. In this respect therefore, the closest to regulation of MNOs in their provision of mobile money is in granting a licence which indicates services that the MNO is offering. The terms and conditions on which the licence is provided are governed by principles provided for under section 4 of Communications Act. The relevant principle is that of protection of interests of consumers, 'of telecommunication services in respect of prices charged for the quality and variety of services provided and terminal equipment supplied.'¹²⁵ Although this institution is well enabled to protect consumers, its mandate is restricted to those falling under telecommunication services to which mobile money service is alien.

Further, the provisions under the Act do not provide guidance on what MACRA should do where it happens that the service being offered by an MNO extend to other spheres

¹²² Communication Act 1998 (CA), s. 4 (1)

¹²³ CA, s. 4 (2) (a)

¹²⁴ Under section 2 communication services means any telecommunication service, broadcasting service or postal service. Telecommunication service means a service consisting wholly or partly in the transmission and routing of signals on a telecommunication network, with the exception of radio and television broadcasting

¹²⁵ CA, s. 4 (2) (a)

which are being regulated by other institutions. For instance, in the case of mobile money, the service is a financial one, which ordinarily would attract regulatory interest of RBM and yet its provider is an MNO which falls under the regulatory ambit of MACRA. It is this lacunae that deprives MACRA the ability to play a legally meaningful role in coordinating with other regulatory agencies in protecting consumers of mobile money. It is to this effect that administrative arrangements which the institution has made with other regulatory agencies in regulating mobile money particularly in protecting consumers are forceful morally but lacking legal effect.

3.2.3 The Competition and Fair Trading Commission

The Commission was established under section 4 of the CFTA¹²⁶ chiefly to regulate, monitor, control and prevent acts or behaviour which are likely to adversely affect competition and fair trading in Malawi.¹²⁷ In addition, it is mandated to provide information for the guidance of consumers regarding their rights and duties under its enabling Act.¹²⁸ It can also cooperate to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with provisions under the Act.¹²⁹ The rights under the Act are not defined, however, in practice the Commission works to protect consumers not only through its enabling statute but also through the CPA¹³⁰ Thus this institution is enabled to carry out functions which pertain to protection of consumers from unfair trading practices.

However, the mandate of CFTC is too general effectively to regulate the mobile money market. This is evidenced by the fact that the institution is mandated to deal with all consumer issues arising from various players on the market who present different issues from those characterising mobile money. Further, the fact that rights are not provided for under the Act, it is difficult to appreciate whether such rights reflect the rights currently available on the mobile money platform.

¹²⁶ Act No. 43 of 1998

¹²⁷ CFTA, s. 8 (1)

¹²⁸ CFTA, s. 8 (2) (e)

¹²⁹ CFTA, s. 8 (2) (g)

¹³⁰ CFTC, Consumer Protection Guidelines (2010)

3.2.4 The Consumer Protection Council

The functions of the CPC, which was established under the CPA,¹³¹ that may pertain to the mobile money market include coordination and networking with relevant actors to protect consumers. The actors with which the Council networks and whose consumer protection activities it coordinates include consumer associations or organizations or consumer protection competent authorities and agencies within and outside Malawi to protect consumer interests.¹³² The Council can also create and facilitate the establishment of conflict resolution mechanisms on consumer issues.¹³³

The protection of consumer interests by this Council, however, is general and would require particular focus to address the risks associated with the mobile money market. In practice, there is no instrument protecting unique risks that mobile money consumers face as they participate on the mobile money market. Further, the Council, though established under the Act, has never been commissioned and is at the moment, non-existent.

3.2.5 Coordination Gaps in the Framework

There are significant overlaps and gaps within the roles of the regulatory institutions. The overlaps are problematic because there is no guidance on which of these regulatory institutions should coordinate and the others. In addition, none of the institutions is statutorily created to regulate MNO in their activities on the mobile money market. The CPC would have been the best suited to protect unbanked customers interests. However, its interests cannot extend to the regulation of funds or mechanism that can ensure prudence in the handling of customer money.

3.3 The Key Regulatory Institutions and Their Mandates in Kenya

The CBK was given the monopoly of regulating the service although mobile payment systems as a service cuts across various regulatory sphere. It is established under the CBKA¹³⁴ with a principal objective of formulating and implementing monetary policy

¹³¹Consumer Protection Act 2003, s. 10 (1)

¹³² *ibid*, s. 18 (1) (d)

¹³³ *ibid*, s. 18 (1) (i)

¹³⁴ Chapter 491 of Laws of Kenya

directed to achieve and maintain stability of prices.¹³⁵ Under section 4A (1) (d) of the Act, the CBK is mandated to ‘formulate and implement such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems’. The mandate of the CBK is further fortified under the NPSA¹³⁶ where in addition to the mandate under the CBKA, the CBK is allowed to exercise all powers conferred on it under any other law.¹³⁷ It is also expressly allowed to delegate any of its powers to any of its officers or authorize any such officer to perform any of its functions under the NPSA.

This regulatory mandate enables the CBK to legitimately oversee regulation of mobile money in Kenya. First, the mandate of the Central Bank is wide enough to cover not only establishment, regulation and supervision of payment systems, but also covers regulation of institutions or persons participating on the mobile money market. Under the NPSA, an “institution” means includes any institution designated as such by a Minister.¹³⁸ The extension of the mandate of the CBK from its traditional role of supervising financial institutions to supervision and regulation of all players on the financial market places it at a vantage position to identify risks inherent in the payments systems market and then take appropriate steps to protect consumers.

Second, the CBK is well enabled to redress grievances arising from participation of various players on the financial market. Under the NPSA, the CBK is mandated to facilitate resolution of disputes arising from the payments systems market.¹³⁹ The manner in which the disputes are to be resolved is a low cost approach which basically revolves around mediation. In Malawi however, the law is silent on how disputes arising from the mobile payments systems should be dealt with. The fact that several regulatory agencies have overlapping jurisdictions to redress consumer grievances raises a difficulty in proper supervision of the sector.

¹³⁵ CBKA, s. 4 (1)

¹³⁶ No. 39 of 2011

¹³⁷ NPSA 2011, s. 17 (1)

¹³⁸ NPSA, s. 2

¹³⁹ NPSA, s. 21

Coordination challenges are also solved with the vesting of the regulatory and supervisory role into the Central Bank. Enabling approach requires that the roles of regulatory institutions be clearly defined in their enabling Acts and also that provision be made on how the various agencies can coordinate. As seen under the legislative instruments with regard to regulation of mobile money, the CBK's role of regulating, supervising and promoting the sector is clearly set and so in the event of any overlaps in regulatory roles, the CBK is automatically placed at a position to claim monopoly of regulating the sector. The difference with this approach in Malawi is that the roles of various regulatory agencies are not clearly defined. The overlaps still exist in the face of regulation of mobile money. The engagement of administrative arrangements to coordinate in the regulation and supervision of the sector is a sign enough for the legislative gap.

The Competition Authority of Kenya (CAK) is established under the Competition Act of Kenya with the mandate of enforcing the Act.¹⁴⁰ It is also mandated to promote public awareness and understanding of rights, obligations and remedies under the Act¹⁴¹ and to liaise with other regulatory bodies on matters relating to competition and consumer welfare.¹⁴² Just like Malawi, it is submitted that the CAK's mandate is wide enough to cover provision of remedies to consumers on the mobile money market. The jurisdictional overlap is thus resolved on the basis that the Authority is restricted to dealing with trade practices which ultimately have an impact on consumer welfare whereas that of the CBK, is the minimization of risks posed by Payments system market. This is different from Malawi since the regulatory mandate of the RBM on mobile money is not clearly provided for in the law. The other difference between the framework in Kenya and Malawi is that the rights under the Competition Act are defined. For example, a consumer is entitled to be informed by a service provider of all charges and fees intended to be imposed on him for provision of the service. This entails that consumers know before and not after use of the service the actual charges that they are going to incur for use of the service.

¹⁴⁰ Competition Act of Kenya, s. 7

¹⁴¹ CAK, s. 9 (a)

¹⁴² CAK, s. 9 (m)

3.4 Conclusion

It has been seen that the approaches to regulation employed in Malawi differ from the one currently obtaining in Kenya in respect of regulatory mandates, coordination of regulatory agencies as well as regulatory instruments used. The thread running through the regulatory environments in these jurisdictions however, is the aim to protect consumers from the risks such as fraud, market failure and information inadequacies that the introduction of mobile money poses. It should be noted that the regulatory framework in Kenya is more promising than one currently obtaining in Malawi in reflecting the integrated approach which has capacity to protect consumers of mobile money on the market and promote the mobile money market.

The next chapter will therefore discuss the extent to which these different approaches can achieve the results that an integrated approach seeks to achieve in protecting consumers on the mobile money market.

CHAPTER FOUR

COMPARISON OF MALAWI'S REGULATORY FRAMEWORK TO KENYA IN PROTECTING MOBILE MONEY CONSUMERS

4.1 Introduction

This chapter discusses how Malawi's regulatory framework on mobile money is positioned to effectively protect consumers on the market as compared to that of Kenya. As argued in Chapter 2, an ideal regulatory framework must have capacity to protect consumers, mostly unbanked, on the mobile money market. At the same time, it must adequately enable regulatory institutions to monitor and supervise suppliers on the financial market whilst proportionately protecting consumers by minimizing risks, ensuring availability of information and offering sufficient redress mechanisms.

As has been found in chapter three, the regulatory environments in Malawi and Kenya reflect enabling and proportionate approaches to regulation of mobile money although in Malawi the enabling aspect falls below the required standards. This chapter therefore presents the findings on whether the approaches in these two jurisdictions can achieve the results that protection of consumers entail and promote the mobile money market.

4.2 Minimizing Risks Emerging from the Relationship between Consumers and MNOs

In mobile money there are unique risks such as system problems and performance risks which require specific consumer protection guidelines.¹⁴³ The relationship between consumers and MNOs being contractual, there are rights and obligations which normally

¹⁴³ J Malala, Consumer Protection for Mobile Payments in Kenya: An examination of Fragmented Legislation and The Complexities it presents for Mobile Payments (2013) available at <http://www.kba.co.ke/img/pdf/Working%20Paper%20WPS-07-13.pdf>

govern the contract during its subsistence. Common risks include failure of the MNO or its agents to pay or effect payment on the customer's demand; and, unequal bargaining power mostly resulting from MNOs' failure to disclose the terms and conditions on which the service is being offered.

In minimizing performance risks, the MPSG requires intra-scheme settlements to be settled in real time.¹⁴⁴ To this extent, the guidelines seem to address the risk where the transaction is being processed using mobile phone instructions. However, it does not address the risk of failure to effect payment by an agent, who is recognized as acting for the MNO as principal. On the mobile money market in Malawi, a customer may fail to cash money out of his account on the basis that the agent does not have the said amount demanded. The absence of provisions in the Guidelines requiring the service provider or its agents to meet their financial obligations to the customer means that the consumer cannot hold the MNO accountable for loss suffered by the consumer resulting from its failure to meet such obligations. Inasmuch as the PSB has strengthened the position of regulation in minimizing performance risks,¹⁴⁵ it is however, silent on minimizing performance risks posed by failure of agents to effect payments on demand.

In Kenya on the other hand, the requirement to meet obligations is regulated by statute. Under section 3 of NPSA the CBK is mandated to designate a payment system¹⁴⁶ where the bank is of the opinion that the same poses systemic risk¹⁴⁷ and that the said designation is in the interests of the public. With this provision, the risk of failure to meet financial obligations by MNOs is minimized as it places the participants of the system within the purview of monitoring and supervision of the CBK to ensure that the system performs to the expected standards. This means that the obligation to pay on demand is

¹⁴⁴ MPSG, Art. 9.4.1

¹⁴⁵ PSB, S. 10

¹⁴⁶ Under section 2 of the Act —payment system means a system or arrangement that enables payments to be effected between a payer and a beneficiary, or facilitates the circulation of money, and includes any instruments and procedures that relate to the system.

¹⁴⁷ Under section 2 of the Act —systemic risk means the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment obligations or their settlement obligations may result in any or all of the other settlement system participants being unable to meet their respective payment or settlement obligations.

recognized and covers not only the MNO but includes agents who are part of the system. It is therefore submitted that this protects consumers from the risk of MNOs' failure to meet obligations as this already provides a platform that the suppliers can be held accountable for their failure to meet obligations.

The risk of exploitation resulting from non-disclosure of terms and conditions on which the service is provided has not been addressed by the MPSG. The closest protection offered to the consumer under the law is protection offered under the CPA which requires contracts arising from financial transactions to be interpreted, implemented and enforced (a) in good faith; (b) consistent with the instrument embodying the contract between the parties; and, (c) in a manner that is consistent with the law governing or regulating financial transactions.¹⁴⁸ Although such protection has been offered under the law, the regulatory framework on mobile money has not been calibrated to have such enforced. This is exacerbated by the fact that in practice terms and conditions for participating on the mobile money platform are never provided to consumers or let alone any contract signed between the two parties as participation is activated upon registering with a particular MNO. Without a requirement that terms and conditions be known to the parties, the risk of consumers being exposed to exploitation through unfair terms of contract is not minimized under the regulatory framework in Malawi.

Further, other rights under the Act cannot be said to entitle a consumer to demand for terms and conditions to be provided. First, because none of the rights provided under the Act which include protection of economic interest,¹⁴⁹ consumer education,¹⁵⁰ non-discrimination,¹⁵¹ right to adequate compensation,¹⁵² freedom of association¹⁵³ and access to appropriate authorities,¹⁵⁴ places an explicit duty on MNOs to disclose terms and conditions. Second, even if the rights were to be said to provide protection, such would not be adequate because there is no guidance, under the Act or any instrument, how such

¹⁴⁸ CA, s. 28

¹⁴⁹ CA, s. 3 (a)

¹⁵⁰ CA, s. 3 (b)

¹⁵¹ CA, s. 3 (c)

¹⁵² CA, s. 3 (d)

¹⁵³ CA, s. 3 (e)

¹⁵⁴ CA, s. 3 (f)

rights can be realized with respect to mobile money. Third, the council which would be properly placed to monitor protection of consumers is non-functional and the institutions currently administering CPA lack authority as one granted to CPC under the Act. This ultimately does not leave consumers with adequate protection from the risk of exploitation.

Under the Consumer Protection Act in Kenya (CPAK), though not explicitly provided that the relationship between MNO and consumers be witnessed by a written agreement, where a consumer agreement allows for more than two interpretations, the one in favour of the consumer is to be adopted.¹⁵⁵ It has been observed that the CPAK does not provide consumer protection for financial products and services.¹⁵⁶ This observation becomes apparent when considering provisions of CPAK in isolation. However, with the promulgation of NPSR, the right to information has been fortified. Thus, under the NPSR where MNOs are required to enter into a service agreement with every customer to which they render their services.¹⁵⁷ A copy of the agreement is to be provided to the CBK¹⁵⁸ and the regulations contain minimum standards for the contents of the agreements.¹⁵⁹ The involvement of the CBK on the issue of service contracts entails that the risk of exploitation due to unfair terms of contract is minimized as the whole process is supervised by the Bank. The mechanism available automatically places terms and conditions of service agreement to scrutiny before consumers enter such agreements.

4.3 Dealing with Information Inadequacies between Consumers and MNOs

Section 3 (b) of the CPA entrenches a right of any consumer to a ‘true, sufficient, clear and timely consumer education including information on technology, goods and services offered, as well as on prices, characteristics, quality and risks that may be encountered in the consumption of technology, goods and services.’ Mobile money is a service that falls

¹⁵⁵ CPAK, s. 7

¹⁵⁶ J Malala, Consumer Protection for Mobile Payments in Kenya: An examination of Fragmented Legislation and The Complexities it presents for Mobile Payments (2013) available at <http://www.kba.co.ke/img/pdf/Working%20Paper%20WPS-07-13.pdf>

¹⁵⁷ NPSR, Art. 41 (1) (a)

¹⁵⁸ NPSR, Art. 41 (1) (b)

¹⁵⁹ NPSR, Art. 42

within the parameters of the Act.¹⁶⁰ A corresponding duty is placed on suppliers or traders of goods and services in which class the MNOs fall.¹⁶¹ The intention of parliament under the Act seems to deal with the biggest challenge of illiteracy which unbanked, and of course some banked, consumers of mobile money encounter on the market. However, this is thwarted not only by the fact that the enabling environment is weak, since neither the RBM nor CFTC is mandated to administer the Act, but also that there is no direction provided under the MPSG on how such information should be disclosed to consumers. This position seems to remain the same as the PSB does not seem to make any provision for information availability to consumers. It is important to note that the PSB provides for making of regulations and directives in furtherance of regulatory functions of RBM,¹⁶² this means that the PSB provides a platform for RBM to deal with information inadequacies. However, this will remain an opportunity until the bill is passed and such regulations or guidelines are made to this effect.

By contrast, the regulatory framework in Kenya is designed in way that ensures information availability. For example under section 5 of the NPSA, the MNOs are required to make available their constitution to the CBK and the public. Also, issuing of misleading information on adverts is prohibited and criminalized under the Act.¹⁶³ Also, under the CAK, a consumer is entitled to be informed by a service provider of all charges and fees intended to be imposed for the provision of a service.¹⁶⁴ In one case, on an allegation that Safaricom had failed to inform customers on charges in regard to one of its services, Lipa Na Mpesa, the Authority enforced section 56 (4) of Competition Act and ordered the MNO to create awareness and change POS materials in all petrol stations with the service in question.¹⁶⁵

¹⁶⁰ Under section 2 of the Act "service" means service of any description, which is made available to potential users and includes the provision of facilities in connexion with health, insurance, banking, including the rendering of a service free of charge or under a contract or personal service;

¹⁶¹ Under section 2 of the Act "Supplier" in relation to a service or technology, includes a person who performs a service or transfers technology and a person" who arranges the performance of a service or the transfer of technology, goods or services to another person;

¹⁶² PSB, s. 8

¹⁶³ NPSA, 29 (1)

¹⁶⁴ CAK, s. 56 (4)

¹⁶⁵ Beatrice Ndungu v Safaricom Ltd <<http://www.cak.go.ke/index.php/consumer-protection/sample-cases-handled#>> accessed 16 June 2016

This statutory requirements are also supplemented by the NPSR, where MNOs are required to provide clear and understandable description of services which they offer, the rates, terms, conditions and charges for such services and these are to be published and displayed prominently at all points of service.¹⁶⁶ In the event of changes, notice is to be provided to customers at least seven days before such changes take effect.¹⁶⁷ The combined import of these regulatory provisions entail that the law puts MNOs as well as agents under a duty to make appropriate disclosures of information thereby minimizing exploitation which can come as a result of information asymmetries on the market.

The mismatch between the regulations and regulatory authority existing under the Malawian regulatory framework makes it difficult in practice for information to be available to the consumers of mobile money of the hidden costs, risks and quality of the service available. For example, the MPSG do not provide any guidance on how MNOs should disseminate information and neither are the MNOs required to submit reports on how they are complying with their duty under CPA.¹⁶⁸ Further, the CFTC which is mandated to provide guidance to consumers concerning their rights and duties under its enabling Act¹⁶⁹ has not published or made any inroads regarding dissemination of knowledge to consumers about their rights or let alone clarifying to the public what those rights actually are. This accounts for the fact that the provisions in the CFT Act are general and do not explicitly touch on mobile money which ordinarily is to be regulated by sector specific regulatory framework. This means that knowledge dissemination is at the mercy of MNOs, without any regulatory direction on how the same is to be conducted. This results in lack of information being provided at all. For example, in the use of both TNM Mpamba and Airtel Money, the information on risks and costs associated with the use of the product is hardly available. This automatically places the

¹⁶⁶ NPSR, Art 35 (1) (a)

¹⁶⁷ NPSR, Art 35 (1) (c)

¹⁶⁸ Article 8 of the Guidelines provide for the roles of MNOs which include among others, submission of monthly reports to RBM on number of users, amount of transactions, any complaints raised by customers, any system breakdowns and how the same have been resolved. However, it is silent in how the RBM can follow the MNOs on their knowledge dissemination with regard to the rights, duties and risks of using mobile money.

¹⁶⁹ Section 8 of Competition and Fair Trading Act

consumers in the dark as it is difficult for them to plan on how much they have to put on the market in order to achieve a desired result.

4.4 Balancing Involvement of Third Parties and Protection of Consumers' Privacy

A fundamental principle of regulation in financial services is the liability of suppliers for acts of their agents.¹⁷⁰ Consumers are mostly protected where there is legal accountability for agents.¹⁷¹ In order to achieve this the providers are required to comply with applicable regulations when using third parties just as if the services are being rendered directly by them. On the mobile money market, for example, transactions and personal information is transmitted through mobile phones, handled more often by third parties who include agents and then accessed remotely by consumers, financial institutions and MNOs.¹⁷² This process presents an ongoing risk of inappropriate access and usage of information by agents or MNOs' employees. Regulating the conduct of agents through a regulatory instrument therefore shifts the burden of monitoring the agents from the MNOs to the Regulator and consumers.¹⁷³ The benefits of this is that protection of consumers is ensured because costs of ensuring compliance are minimized.

In Malawi, the MPSG designate the agents to the status of those acting for a principal.¹⁷⁴ Article 11 of the MPSG provides for the involvement of agents in the provision of mobile money service. The service provider is required to obtain verifiable name, address, signature and/or bio-data where the proposed agent is an individual;¹⁷⁵ prescribe e-money limits depending on the nature of the business of the agent;¹⁷⁶ and, train the agent to ensure that services are efficiently executed.¹⁷⁷ However, when it comes to the duties of the agents, they are only required to report any suspicious transaction to the MNO,¹⁷⁸

¹⁷⁰ D Dias, K McKee, 'Protecting Branchless Banking Consumers'
<http://www.cgap.org/publications/protecting-branchless-banking-consumers>

¹⁷¹ cf Malala (n 156)

¹⁷² ibid

¹⁷³ MPSG, Art 9.4.1

¹⁷⁴ MPSG, Art. 11.0

¹⁷⁵ MPSG, Art. 11.1

¹⁷⁶ MPSG, Art. 11.3

¹⁷⁷ MPSG, Art. 11.5

¹⁷⁸ MPSG, Art. 11.8

conspicuously display the help line maintained by the principal and any other relevant information,¹⁷⁹ and for purposes of financial inclusion, they are not to be agents of one service provider.¹⁸⁰ The Guidelines do not place on agents any duty to ensure privacy of transactions and information supplied to them by the customers. Being the first point of call on the mobile money market, the risk of unauthorized disclosure of information by agents to third parties and identity theft is a reality. It is further observed that the Guidelines do not provide circumstances where disclosure of information by an MNO may be allowed. This has the effect of exposing the MNO to potential suits where disclosure of information of consumers has been made to a third party. Much as PSB has been drafted to provide for unauthorized disclosure of information,¹⁸¹ it is only limited to employees or officers of a payment system. It would be argued that agents have been left out of the picture in the bill.

In Kenya, the agents are treated as independent entities who are part of the system. They are therefore treated in the same way as providers of the service¹⁸² and therefore are required to seek authorization from the CBK before engaging in the business.¹⁸³ Conducting business without such authorization entails criminal liability and such conduct carries a penalty of a fine or imprisonment.¹⁸⁴ Further, protection of confidential information for consumers is also guaranteed under the Act as access of such information for personal use attracts criminal liability.¹⁸⁵ Furthermore, the CBK is given the mandate under the Act to direct or advise an entity with respect to provision of information where, among others, there is reasonable grounds for so doing.¹⁸⁶ This position in Kenya is different from that in Malawi, as the current regulatory framework, being a guideline, does not make legal liability of agents or MNOs in the provision of the services. It further, fails to minimize costs of the MNO incurred through supervision and monitoring of agents. The regulation of agents through such regulatory instruments is in tandem with

¹⁷⁹ MPSG, Art. 11.9

¹⁸⁰ MPSG, Art. 11.10

¹⁸¹ PSB, s. 38

¹⁸² NPSA, s. 2

¹⁸³ NPSA, s. 12 (1). See also NPSR, Art. 4 (1)

¹⁸⁴ NPSA, s. 12 (2)

¹⁸⁵ NPSA, s. 27 (1) (b)

¹⁸⁶ NPSA, s. 22

proportionate regulatory approach as it essentially shifts the burden of monitoring and supervising the agents from the MNO to the Regulator and the public. The benefit of it is that the costs of regulation are minimized and therefore protection of consumers on the mobile money is ensured whilst the same time fostering growth of the mobile money market.

4.5 Protection of Consumer Funds

Loss of customer funds as a result of illiquidity or insolvency of the MNO or the bank where the funds are kept is a known risk that the mobile money market poses. Protection of such funds is therefore a priority for any financial regulator as failure to do so may result in serious consequences on consumers, the market and the financial system should such loss occur.¹⁸⁷ The best practice to ensure that customers' money is available when they want to redeem it has been the requirement for MNOs to maintain liquid assets equal in value to the amount of money issued. Further, in order to safe guard the funds in case of insolvency, trust law has been employed.

In Malawi, fund isolation and fund safeguarding are requirements under the MPSG. Thus, an MNO has the duty to maintain a trust account with a bank and the usage of the funds are to be restricted to the mobile payment transactions.¹⁸⁸ The MNO also has a duty to ensure that the balance in the account is equal to the total unclaimed balance of all holders of the money under the service.¹⁸⁹ Although fund safeguarding and isolation is also a principle observed in the Kenyan regulatory framework, there is a difference in the manner in which it is provided. Under the NPSR, an MNO is required to establish a trust¹⁹⁰ and that all monies collected are to be held in a trust fund.¹⁹¹ The balance in the trust fund should at all times be twice than what is owed to customers.¹⁹²

¹⁸⁷ *ibid* (n 156)

¹⁸⁸ MPSG, Art. 8.7

¹⁸⁹ MPSG, Art. 8.10

¹⁹⁰ NPSR, Art. 25 (3) (a)

¹⁹¹ NPSR, Art. 25 (3) (b)

¹⁹² NPSR, Art. 25 (3) (c)

The inclusion of requirements for funds isolation and safeguarding under Malawi and Kenyan regulatory framework has capacity to boost consumer confidence since consumers are assured of the protection of their funds during the course of transacting with the MNO. However, the position in Malawi is weaker in a number of respects. First, this requirement is made under guidelines which do not have any legal force. Secondly, being guidelines, there are no sanctions, other than withdrawal of approval by the RBM, which can be meted for non-compliance with this requirement. Thirdly, although the requirement is that the funds should be in a trust account, there is no further guidance on how the trust should operate. This is different from the position in Kenya, since the regulations are explicit on form of the trust¹⁹³ and how extra funds realized by way of interest should be applied.¹⁹⁴ Fourthly, although the funds can be kept in a prudentially regulated bank, in the case of such a bank collapsing, even if granted to have access to the funds on insolvency, the process of liquidation itself may paralyse an MNO's operations when the money has not been paid back to the MNO. Unlike in Kenya, in order to mitigate such risks, the regulations require the trust to ensure that the funds are diversified and placed in commercial banks or government securities.¹⁹⁵ This has the capacity to protect consumers by cushioning them from any shocks that the financial system may pose in the course of business as the MNOs may have options to access funds from different sources and be able to meet their financial obligations.

Also, the funds isolation and safeguarding requirements adopted under the Malawian framework do not protect consumers in the event of insolvency of either the MNO or the prudentially regulated bank where the funds are kept. This is so because there is nothing in the guidelines or let alone in any legislation providing for the treatment of funds kept on behalf of consumers in the event of insolvency. Considering that in the event of insolvency, MNOs will have to be wound up under priority rules provided for in Companies Act,¹⁹⁶ it is argued that consumers would be placed on the same level as unsecured creditors who will have to be exposed to the *pari passu* principle. On the other

¹⁹³ NPSR, Art 26

¹⁹⁴ NPSR, Art 25 (5)

¹⁹⁵ NPSR, Art. 25 (4)

¹⁹⁶ The provisions are soon going to be replaced by those in the Insolvency Act

hand, the funds isolation and safe guarding in Kenya is fortified by legislative protection from anti-divestiture principles¹⁹⁷ as well as ranking the consumers' funds in preference to unsecured creditors.¹⁹⁸

4.6 Effective Redress of Consumers' Grievances

Effective redress of consumer's grievances is the core of a regulatory environment that adequately offers protection to consumers. This is further necessitated by the fact that reliance on private law to settle disputes may not be ideal considering the cost of litigation, time and technicalities required. Best standards, dictate that the regulator should ensure that minimum standards for internal dispute resolution are set and that channels and procedures are tailored to mobile payments.¹⁹⁹ This entails clear specification of channels for redress, procedures for escalation and procedures for resolution of cases by regulator as a referee of last resort.

In Malawi, the Guidelines are silent on dispute resolution mechanisms. The situation is further exacerbated by the fact that there is no strong, clear and unambiguous regulatory mandate on the RBM as a regulator to deal with grievances arising from consumers. This means that in order to redress grievances of consumers reliance is placed on those institutions that are mandated to offer redress for consumers' grievances such as courts. However, not many people would be willing to use such institutions considering the high levels of technicalities required, legal costs as well as court fees since such issues, being commercial in nature, will have to be commenced in the Commercial Court whose fees are very high thereby making redress for consumers' grievances difficult to attain.

Under the Kenyan regulatory environment, the CBK thrives on clear mandate to resolve disputes arising from the payment systems. Procedures for such resolutions are also provided under the law. Redress for grievances is further provided under the Regulations where MNOs are required to resolve grievances within thirty days;²⁰⁰ they are also

¹⁹⁷ NPSA, s. 16 (6)

¹⁹⁸ NPSA, s. 28

¹⁹⁹ *ibid* (n 156)

²⁰⁰ NPSR, Art. 40 (1)

required to put in place processes which the complainant can follow.²⁰¹ In the event that the consumer is not satisfied, he or she can appeal to the Central Bank.²⁰²

The lack of clarity on minimum standards for dispute resolution as well as clear mandate for dispute settlement by the regulator makes it difficult for consumers to have access to redress. In Malawi for example, as of December, 2015, the RBM had signed a Memorandum of Understanding with MACRA and also with CFTC to jointly oversee, and supervise mobile financial services and mobile payments in relation to, among others, consumer protection.²⁰³ Although these arrangements have been reached by the regulators, there are no laid out procedures, which have been made public on how consumers can benefit from such arrangement, mostly on how complaints can be lodged with regard to mobile money. Further, there is a disparity between paper agreements and practice. Further, it cannot be said that the mandate of MACRA extends to dealing with issues on financial market such as mobile financial services and mobile payments as clearly its mandate is restricted to regulation of telecommunication services. This dilemma could be resolved by clearly providing mandate to the RBM to regulate mobile money and also by having minimum dispute resolution standards which MNOs should adhere to.

4.7 Conclusion

This chapter has discussed how the regulatory framework in Malawi responds to consumer protection issues in mobile money by regulating key aspects of consumer protection as compared to that of Kenya. It has been found that Malawi's regulatory framework, fails to adequately minimize risks arising from the relationship between consumers and MNOs; information inadequacies on the market; proper regulation of agents in respect of consumers' privacy; protection of consumer funds; and, offering an effective redress mechanism for consumer grievances. This is in stark contrast to the regulatory environment in Kenya which is premised on law and regulations which

²⁰¹ NPSR, Art. 40 (2)

²⁰² NPSR, Art. 40 (5)

²⁰³ R Buckley, et al, The Regulation of Mobile Money in Malawi 14 Wash. U. Global Stud. L. Rev. 435 (2015) available at http://openscholarship.wustl.edu/law_globalstudies/vol14/iss3/7

properly enable the regulatory institutions and proportionately respond to consumer protection issues on the mobile money market. The next chapter will conclude the paper by highlighting the implications these findings have on theory, law reform, practice and research.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS: TOWARDS AN INTEGRATED APPROACH TO PROTECTIVE AND PROMOTIVE MOBILE MONEY REGULATION

5.1 Introduction

This study sought to explore whether Malawi's current regulatory framework is suitable for the protection of vulnerable unbanked population of consumers while at the same time promoting financial inclusion. In order to answer this question, first, the study sought to explore aspects of a regulatory framework that protects unbanked consumers of mobile payment systems. Second, the current regulatory framework in Malawi was compared to that of Kenya. Third, the regulatory framework in Malawi was evaluated in regard to protection of mobile money service users and mobile money market compared to that of Kenya. Fourth, recommendations have been made on measures to be put in place to improve the regulation of mobile money market in order to fortify financial inclusion in Malawi.

5.2 The Essence of an Integrated Regulatory Approach

The first question for the study was: "What aspects of a regulatory framework protect unbanked consumers of mobile money?" This study has found that an integrated regulatory approach is ideal for the protection of unbanked mobile money consumers. The theoretical environment presented five aspects which are crucial for the protection of mobile money consumers. These are: minimizing risks emerging from the relationship between consumers and MNOs; dealing with information inadequacies on the market;

balancing the third parties' involvement and protection of consumers' privacy; protection of consumers' funds and effective redress of grievances.

Neither the enabling nor the proportionate approach is sufficient for effective regulation that protects the unbanked while promoting inclusion. The enabling approach solves coordination problems between regulators by extending the mandate of the Central Bank from that of regulation of financial institutions to include regulation of non-financial institutions that are offering services on the financial market. This approach can be used to advance the principle of effective redress of consumers' grievance and balancing the involvement of third parties on the market. The proportionate approach, on the other hand, focuses on funds isolation and safeguarding using norms that are legally binding. It was found that this approach can be used to minimize risks emerging from market, dealing with information inadequacies and protection of consumers' funds. The combined import of these approaches, being the integrated approach, is therefore found to be ideal for protection of mobile consumers on the market.

The strategic regulatory framework developed in this paper, collaborates the findings of Wen Li²⁰⁴ who identified consumer protection as one of the principles on which regulation of electronic payments is founded. The aspects of it therefore covers gaps identified in literature such as a delicate balance between combating crime and protection of privacy,²⁰⁵ problems created by involvement of third parties on the mobile market,²⁰⁶ coordination problems between regulators²⁰⁷ and managing the changing nature and scope of existing risks in the financial market.²⁰⁸

²⁰⁴ W Li, 'The Regulation of New Electronic Payment Services in China' (PhD Thesis, Queen Mary University of London, 2014)

²⁰⁵ L de Koker, 'The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks Within the New Standards Framework' (2013) 8 Wash. J.L. Tech. & Arts 165

²⁰⁶ JK Nyaga,., 'Mobile Banking Services in the East African Community (EAC): Challenges to the Existing Legislative and Regulatory Frameworks' (2014) Journal of Information Policy Vol. 4 pp 270 - 295

²⁰⁷ J Greenacre, L Malady and R Buckley, 'Regulation of Mobile Money in Malawi' (2014)

<<http://ssrn.com/abstract=2491995>> accessed 13 December 2015

²⁰⁸ V Lawack-Davids, 'The Legal and Regulatory Framework of Mobile Banking and Mobile Payments in South Africa' (2012) JICLT 7 (4) pp 318 - 327

The essence of adopting an integrated approach in mobile money regulation is that it assures prospects of financial inclusion.²⁰⁹ While financial inclusion is undeniably a result of a number of factors such as MNO's leveraging their technology, wide distribution of networks and partnerships with banks to deliver financial services to the unbanked,²¹⁰ an integrated approach to regulation is nevertheless one of the critical components. First, because financial inclusion is usually aligned with efforts to achieve financial stability, integrity and consumer protection since these are seen as complementary objectives.²¹¹ Second, the role of regulators in designing regulatory arrangements that permit plays to explore different outsourcing arrangements and products so as to provide an innovative environment is very crucial. This, there is correlation between adequate regulation and financial inclusion.

It is therefore crucial for financial inclusion agenda to be realised, the regulatory environment must provide stability. This in turn has potential of encouraging payers to use their leverage in technology, utilize partnerships and employ diversity of products in order to reach more customers.

5.2.1 Regulatory Institutions for Mobile Money in Malawi and Kenya

The second question for the study was as follows: "What, currently, is the regulatory approach in Malawi compared to that of Kenya?" The regulatory environment for mobile money in Malawi comprises of regulatory institutions with broad mandates. The law does not posit specific mobile-money related mandates for these institutions. First, the RBM is currently the lead regulator which, relying on broad mandate under its enabling Act, has had to issue guidelines which were designed to regulate the conduct mobile money. Second, MACRA uses its mandate to regulate the telecommunications sector by protecting interests of consumers in respect of prices for the variety of services provided.

²⁰⁹ RP Buckley, J Greenacre and L Malady, (2015) 'The regulation of mobile money in Malawi.' *The Free Library* (September, 22), [http://www.thefreelibrary.com/The regulation of mobile money in Malawi.-a0443457618](http://www.thefreelibrary.com/The+regulation+of+mobile+money+in+Malawi.-a0443457618)

²¹⁰ B Muthiora, 'Enabling Mobile Money Policies in Kenya: Fostering a Digital Financial Revolution' (2015) GSMA 5 https://www.itu.int/en/ITU-T/focusgroups/dfs/Documents/2015_MMU_Enabling-Mobile-Money-Policies-in-Kenya.pdf accessed 10 May 2015

²¹¹ *ibid* (n 209)

Third, the CFTC whose mandate, among others, is to provide information to consumers concerning their rights and duties. Fourth, the CPC whose mandate includes resolution of disputes. However, the Council is not operational until now. The overlaps and gaps existent due to lack of legislative guidance necessitated administrative arrangements, such as MOUs, by the institutions to co-regulate the sector.

In contrast, the regulatory environment in Kenya is different from that currently obtaining in Malawi. The CBK is enabled under statute to monitor, supervise and regulate payments systems. Under the NPSA, its mandate is further fortified by enabling it to supervise even institutions and individuals who offer services on the financial market and to make regulations, with legally binding norms, effectively regulating mobile money. Thus the role of regulation of mobile money is concentrated in one regulator thereby reducing coordination problems arising from fragmented regulatory mandates.

The findings of this study support those revealed in some jurisdiction that the introduction of mobile money has created regulatory challenges.²¹² This is accelerated due to the fact that there is little or lack of authority to adequately regulate the sector and that in some cases jurisdictional overlaps make it difficult for consumers to understand which authority can deal with their issues in times of conflict. In other cases, it leads to ‘forum shopping’ where providers choose the regulator who is most lenient. Before the NPKA was passed in Kenya, Malala observed as follows:

*“The lack of understanding stems from the fact that the different bodies (banks, MNOs and agents) whose operations are often overseen by different regulatory bodies also operate under different sets of regulations. Consumers are therefore unclear over what redress rights they have, which entity to turn to if there is a payment-related problem.”*²¹³

This lack of certainty in the law with regard to regulatory mandates has potential of watering down confidence of some unbanked consumers in the formal financial sector. The

²¹² *ibid* (n 209); *ibid* (n 210)

²¹³ *ibid* (n 156) 15

net effect would be failure of the regulatory environment to be used as a tool for boosting confidence in the populace and thereby playing a crucial role of financial inclusion.

5.2.2 Protection of Consumers of Mobile Money in Malawi and Kenya

The third question for the study was: “How does the current regulatory framework in Malawi protect mobile money service users and mobile money providers in the mobile money market as compared to that of Kenya?” Malawi’s regulatory tools comprising the MPSG, CPA, CFTA were compared to Kenya’s CBKA, NPSA and NPSR. Measuring these tools comparatively against the five principles of an ideal strategic framework for protection of mobile money consumers identified in chapter 2, it was found that Malawi’s regulations do not adequately address key issues of consumer protection in mobile money.

First, the risks of failure of MNOs and agents to meet their financial obligations and exploitation resulting from non-disclosure of terms and conditions on which services are provided, have not been addressed under the Guidelines and respective statutes. Second, although there is general requirement for provision of information under CPA, there is no guidance on how MNOs can comply with the same in respect of mobile money. Third, regulation of agents is restricted to ensuring that MNOs provide training and properly maintain a list of its agents. However, there is no guidance on protection of consumer’s confidential information. Fourth, although there is an extent of protection of consumer’s funds by requiring MNOs to maintain trust accounts with a bank and to maintain a balance equivalent to deposits, there is no guidance on how such funds are to be treated in the event of insolvency either of the bank or MNO with regard to other creditors. Fifth, there is silence on dispute resolution procedures under the Guidelines or the statutes. This is contrary to the tools employed in Kenya which adequately address these issues.

These findings, in so far as the protection of consumers’ funds and regulation of agents are concerned, correlate with those made by Buckley *et al*²¹⁴ who observed this gap in

²¹⁴ *ibid* (n 209) 14

Malawi's regulatory infrastructure. In reference to Kenya, before the passing of NPKA, Malala observed as follows:

“It is with this lack of formality in the current regulatory framework that has implications for consumers which regulatory body to appeal to if a problem cannot be resolved with a merchant. This is especially so since consumers have already adapted mobile payments service to uses that exceed the current regulatory definition of the MNOs channel such as storing their value for a short time, similar to the way a bank customer would use a current account.”

5.2.3 The Hypothesis and the Findings

This study hypothesised that mobile money can be one of the efficient tools for financial inclusion if adequately regulated by protecting consumers and promoting mobile money service providers. Studies have shown a correlation between adequate regulation and financial inclusion.²¹⁵ This is so because consumer protection and stability and certainty of the sector are seen as complementary objectives in financial inclusion.²¹⁶ This means that whilst other socio-economic factors, such as capacity of MNOs to reach intended unbanked population and partnerships between MNOs and third parties such as banks and cash merchants have potential to increase levels of financial inclusion, the adequacy of regulation in protecting consumers and promoting service providers to achieve more in the financial inclusion agenda can never be understated.

The results of this study show that the regulatory framework for Malawi does not adequately provide sufficient protection for mobile money consumers and promotion of mobile money service providers whereas that of Kenya provides different results. This has been deduced from the fact that currently, neither the regulations nor the authority to regulate is formally provided for under the law. And key aspects of consumer protection in mobile money theorized in this study have not been addressed. This means that the

²¹⁵ GA Zwedu, 'Financial Inclusion, Regulation and Growth in Ethiopia' (2014) <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9278.pdf>> accessed 14 June 2016; GM Llato, 'Financial Inclusion, Education and Regulation in the Philippines' (2015) <<http://www.adb.org/sites/default/files/publication/171786/adbi-wp541.pdf>> accessed 15 June 2016

²¹⁶ cf Buckley (n 209)

regulatory framework in Malawi is lagging behind in boosting mobile money to play a key role in financial inclusion. Greenacre, *et al* observed that financial inclusion and adequate regulation are crucial for financial inclusion in the following manner:

‘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 regulatory particularly central banks. An enabling regulatory approach aims to permit market players to explore different outsourcing arrangements and products in order to achieve an environment in which innovation and growth are encouraged.’²¹⁷

...Proportionate regulation is 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.’²¹⁸

From the foregoing, the failure of the regulatory framework to reflect an integrated regulatory approach entails that not only are consumers not adequately protected but also providers are not adequately promoted. The cost of boosting confidence in the consumer therefore, is largely borne by the MNO which in turn passes on that cost to consumers and thereby risking provision of such services at high costs with the result of prohibiting more participation in the sector.

For example, in Kenya, current level of inclusion for formal non-prudential institutions, which includes mobile money service providers, has been maintained above 30% after the comprehensive regulatory framework was put in place.²¹⁹ Literature has shown that CBK respondent to boom in provision of mobile money services by enacting a number of regulatory arrangements in 2010 and 2011 which have helped to unfold broader

²¹⁷ *ibid* 9

²¹⁸ *ibid* (n 209) 11

²¹⁹ Kenyan National Bureau of Statistics, 2016 FinAccess Household Survey (February, 2016) 7
<<http://fsdkenya.org/wp-content/uploads/2016/02/The-2016-FinAccess-household-survey-report1.pdf>>
accessed 20 June 2016

regulatory and consumer protection framework for mobile financial services.²²⁰ The aim of regulation of mobile money being speeding up growth and providing appropriate framework proportionate to the needs and realities of the market, it would be concluded that regulatory environment in Kenya, is one of the factors that have helped to maintain the current levels of inclusion through mobile money. In Malawi however, the levels of inclusion in mobile payment systems is still below 13%.²²¹ Although there could be other factors contributing to level of inclusion, this study has shown that lack of proper regulation is one such factor affecting mobile money to be an efficient tool for financial inclusion. To this extent therefore, the hypothesis has been proven.

5.2 Implications and Recommendations

In order to improve the regulation of mobile money market to fortify financial inclusion agenda in Malawi, there are a broad range of implications on theory, law reform, practice and research.

5.2.1 Theory

The type of regulatory approach to be adopted in regulation of mobile money is critical for any regulator more especially when protection of unbanked consumers is being considered. In one way or the other regulators will have to address this fundamental issue so that it is clearly reflected in the law. Although various theoretical approaches to regulation of mobile money exist, this paper has adopted an integrated regulatory approach where the mandate to regulate is concentrated on one institution which is then enabled to make proportionate regulations on the mobile money market whilst ensuring that there is growth of the market.

It is recommended that regulatory environment in Malawi should reflect this integrated regulatory approach which has capacity holistically to protect consumers on the market

²²⁰ C. Gibney, *et al*, International Review: Mobile Payments and Consumer Protection (2015) 33
<<http://www.fcac-acfc.gc.ca/Eng/resources/researchSurveys/Documents/InternationalReviewMobilePaymentsAndConsumerProtection.pdf>> Accessed 14 June 2016

²²¹ *ibid* (n 14)

whilst at the same time motivating providers to expand the market. Such an integrated regulatory approach is reflected in Kenyan regulatory environment. The result of adopting such an integrated approach is that the protection of consumers on the mobile money market is made holistically and not in a fragmented pattern.

Adequate regulation by providing holistic protection has the advantage of boosting consumers' confidence, increasing physical access to services and remedies and encouraging innovation. This is supported by studies carried out in Ethiopia and Philippines where it was shown that there is a direct link between adequate regulation and financial inclusion.²²²

5.2.2 Law Reform

Having found that the regulatory framework in Malawi does not adequately protect consumers on mobile money platform it is recommended that the current regulatory framework be fortified to ensure that it is able to holistically provide protection to consumers. The introduction of mobile money, a service which combines telecommunication technology and financial services presents new and unique risks not generally characterising the financial services market.

It is recommended that the regulatory framework on mobile money should deal with such risks, by using norms that are legally binding. This is so because posited norms provide definite standards to guide decisions and actions compared to discretion which may vary from time to time and from regulator to regulator. Further, having posited norms provide a basis for exposition through interpretation and enforcement by institutions such as courts in the event of conflict either between the regulator and MNOs or between consumers and MNOs.

The RBM Act therefore, should be amended to extend the mandate of the RBM in strong, clear and unambiguous terms so that the regulatory mandate of the RBM should include

²²² cf Zwedu (n 215) 28

regulation, supervision and monitoring of payments systems. This extension of mandate will resolve coordination problems currently experienced in the regulation, supervision and monitoring of mobile money market.

As shown in the foregoing chapter, the PSB if passed, may offer an opportunity for extending the mandate of RBM to regulate MNOs in their provision of mobile money service. However, the policy behind PSB is mostly follows an enabling approach which falls short of addressing critical issues in consumer protection such as redress mechanisms, legal recognition of agents, rights and duties of consumers on the payment systems market and priority of consumer funds in cases of insolvency. The PSB should therefore be reviewed to address consumer protection issues highlighted in this study. Such issues should then be fortified through comprehensive consumer protection regulations made under it. Accordingly, the currently existing MPSG should be replaced with regulations which will have to provide guidelines on accessibility of information, requirements standard for service agreements, dispute settlement and how the matter can escalate to the RBM as a final arbiter. It is proposed that the regulatory framework currently obtaining in Kenya should be used as a guide to regulatory reform in Malawi.

5.2.3 Practice

This study has revealed that the current regulatory framework in Malawi makes difficult in practice for regulators to effectively monitor and supervise MNOs. This then results in administrative arrangements to cover the deficiencies currently existing in the law. Although this is the case, little is known whether the current practice is effective. For example, in the area of redress of grievances, there is no known decision that has been made by regulators after the MOUs were signed.

To avoid ineffectiveness resulting from jurisdictional overlaps, clear guidelines on which institutions can handle specific matters would be ideal to foster proper handling of issues. This can ensure that referrals are made on matters falling outside the jurisdiction of a regulator who has been presented with a complaint. For example in Kenya, the Competition Authority is made to adjudicate on unfair trade practices even in the mobile

money market, and while the Communication Commission still retains the authority to licence MNOs, the CBK can only authorize the MNO to offer services once it is satisfied that such a MNO has complied with regulatory requirements of the Commission.²²³ It is therefore recommended that in practice regulators in Malawi should restrict their oversight roles in their respective areas of authority and that information with regard to compliance by MNOs on those areas should be shared among regulators.

5.2.4 Research

This study has generally focused on the adequacy of regulatory framework in Malawi with regard to protection of unbanked consumers and promotion of service providers on the mobile money market and promotion of mobile money service providers. Weaknesses in the current regulations were exposed and recommendations made in respect of five aspects of a protective and promotive regulatory framework theorised in this thesis. However, in the course of doing the research, it transpired that the practice currently obtaining in regulation of the sector is that regulators are using MOUs to consolidate their regulatory mandates and cover gaps in the law. It also transpired that the guidelines technically place the regulatory responsibility of agents on MNOs. It further transpired that in order to boost confidence in customers, MNOs have resorted in self-regulation. This study has also revealed that the RBM does not directly regulate agents. The current regulation is done through MNOs.

The studies carried out reveal that mobile financial markets, the category that mobile money service falls into, are seen as crucial in order to advance the financial inclusion agenda.²²⁴ It is therefore important to have studies that present a holistic view of the impact of regulators and regulatory arrangements on improvement of the service which is already a promising tool for financial inclusion in Malawi. Further research therefore can be made on the impact of self-regulation on development of mobile money; the effect of

²²³ CCRED, Mobile Money in Kenya and Zimbabwe (November 7, 2014)
<<http://www.competition.org.za/review/2014/11/7/part-two-mobile-money-in-kenya-and-zimbabwe>>
Accessed 15 June 2016

²²⁴ *ibid* (n 4)

PSB on mobile money landscape in Malawi; (un) regulation of agents and consumer protection and coordination of regulators in regulating mobile money in the face of jurisdictional overlaps.

5.3 Conclusion

This chapter has presented the findings in respect of the answers which this study set out to answer. It has been shown that the failure of regulatory framework to adequately provide a protective and promoting regulatory framework, leads to MNOs into adding an extra cost in boosting confidence in consumers due to self-regulation. The result is that the service becomes expensive, sometimes prohibitive and it can result in reluctance by providers to offer more services which can increase financial inclusion. It has been concluded that the hypothesis in this study has been proven considering mobile money, which is not adequately regulated, has only contributed to less than 13% of financial inclusion. . The implications of this study have also been discussed in respect of theory, law reform, practice and research.

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