

**FINANCIAL INCLUSION, REGULATION, AND ACCESS TO BASIC  
BANK ACCOUNTS IN SOUTH AFRICA**

by

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# DECLARATION

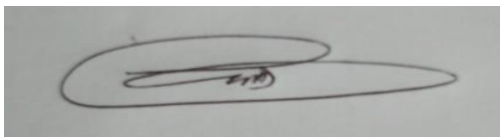
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## ACKNOWLEDGEMENTS

*No one who achieves success does so without acknowledging the help of others. The wise and confident acknowledge this help with gratitude.*

**Alfred North Whitehead**

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## RESEARCH SUMMARY

This research analyses the current policy and regulatory framework in South Africa to establish whether or not it is effective and responsive in promoting financial inclusion and facilitating access to basic bank accounts for the poor and the low-income households. The research takes a “back to basics” approach and focuses on access to basic bank accounts as the simplest form of financial service provided by banks and a gateway to other financial services. The main objective of the study is to determine whether the regulatory framework in South Africa that applies to commercial banks as deposit-taking institutions imposes obligations on them to provide access to basic bank accounts for consumers. The study applies Ayres and Braithwaite’s theory of *responsive regulation* and the *pyramid of regulatory strategies* to determine the type of regulatory instruments that may be applied to promote financial inclusion and access to basic bank accounts, and whether the current regulatory framework in South Africa should be redeveloped and improved to make it more effective and responsive to achieving this objective. The study uses existing regulatory frameworks for financial inclusion and access to basic bank accounts adopted by global standard-setting bodies, continental bodies, national legislatures, and associations of banks to benchmark the forms of regulatory responses and to determine whether these responses are responsive and effective in promoting financial inclusion generally, and access to basic bank accounts in particular. It further discusses the role that various regulatory bodies play through mutual collaboration and coordination to enforce and promote compliance with measures that promote financial inclusion and access to basic bank accounts. This research makes a number of findings and identifies gaps in the current policy and regulatory framework in South Africa. It, therefore, makes specific recommendations for improving and developing policy and regulatory measures to promote financial inclusion with a specific focus on access to basic bank accounts.

**KEYWORDS:** Bank, Basic Bank Account, Basic Bank Saving and Deposit Account, Conduct Standards, Financial Inclusion, Financial Exclusion, Financial Sector Regulation Act, Product Standards, Responsive Regulation.

## **LIST OF ACRONYMS AND ABBREVIATIONS**

ABA	Australian Banking Association
ABTA	Association of British Travel Agents
ADB	Asian Development Bank
ADB ERD	Asian Development Bank Economic and Development Department
ADB I	Asian Development Bank Institute
AEC	African Economic Community
AEC Treaty	Treaty Establishing an African Economic Community
AFI	Alliance for Financial Inclusion
AJPSIR	African Journal of Political Science and International Relations
AML	Anti-Money Laundering
ASCAs	Accumulated Savings and Credit Association
ASEAN	Andean Community, the Association of Southern Asian Nations
ASIC	Australian Securities and Investment Commission
ATM	Auto Teller Machine
AU	African Union
BASA	Banking Association of South Africa
BBA	British Banking Association
BBAs	Basic Bank Accounts
B-BBEE	Broad-based black economic empowerment
B-BBEE Act	Broad-Based Black Economic Empowerment Act 52 of 2003
BEEAC	Black Economic Empowerment Advisory Council
BBVA	Banco Bilbao Vizcaya Argentaria
BCBS	Basel Committee on Banking Supervision
BCCC	Banking Code Compliance Committee
BCOBS	Banking Conduct of Business Sourcebook
BCSB	Banking Codes and Standards Board
BCSBI	Banking Codes and Standards Board of India
BGFRS	Board of Governors of the Federal Reserve System
BIS	Bank of International Settlement
BJIL	Brooklyn Journal of International Law
BSBDA	Basic Savings Bank Deposit Account

CBI	Central Bank of Ireland
CCCC	Code of Conduct Complaints Committee
CCMC	Code Compliance Monitoring Committee
CDD	Customer Due Diligence
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFI	Centre for Financial Inclusion
CFT	Combating the Financing of Terrorism
Ch	Chapter
CIGI	Centre for International Governance Innovation
CIV	Customer Identification and Verification
CGAP	Consultative Group to Assist the Poor
CGD	Centre for Global Development
COMESA	Common Market for Eastern and Southern Africa
CPA	Consumer Protection Act 68 of 2008
CRA	Community Reinvestment Act 1977
CPRC	Chronic Poverty Research Centre
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
DTIC	Department of Trade, Industry and Competition
ECom	European Commission
ECOWAS	Economic Community of West African States
EFT	Electronic Funds Transfer
EIU	Economist Intelligence Unit
EJDR	European Journal of Development Research
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
E-Parl	European Parliament
EU	European Union
FATF	Financial Action Task Force
FCA	Financial Conduct Authority
FCAC	Financial Consumer Agency of Canada
FE	Financial Exclusion
FERDI	Foundation for International Development Study and Research
FI	Financial Inclusion

FIAP	Financial Inclusion Action Plan
FICA	Financial Intelligence Centre Act 38 of 2001
FIICMIF	Financial Inclusion Internal Compliance, Monitoring, and Inspection Function
FMI	Financial Markets, Institutions & Instruments
FSA	Financial Services Authority
FSCA	Financial Sector Conduct Authority
FS Charter	Financial Sector Charter
FS Code	Financial Sector Code
FSMA	Financial Service Market Act 2000
FSRA	Financial Sector Regulation Act 9 of 2017
FSTC	Financial Sector Transformation Council
GPFI	Global Partnership for Financial Inclusion
GSSB	Global Standards Setting Bodies.
HCRCLR	Harvard Civil Rights-Civil Liberties Law Review
HRMJs	High-risk and other Monitored Jurisdictions
IFIRS	International Financial Inclusion Regulatory Strategy
IIF	Institute for International Finance
IIMB	Indian Institute of Management, Bangalore
IJBM	International Journal of Bank Marketing
IJETMAS	International Journal of Engineering Technology, Management and Applied Sciences
IJSSP	International Journal of Sociology and Social Policy
ILO	International Labour Organisation
IMF	International Monetary Fund
I-SIP	Inclusion-Stability, Integrity, and Protection
JCES	Journal of Contemporary European Studies
JEM	Journal of Economics & Management
JFRC	Journal of Financial Regulation and Compliance
JLSE	The Journal of Legal Studies Education
JMLR	John Marshall Law Review
JSP	Journal of Social Policy
KYC	Know Your Customer
MDGs	Millennium Development Goals



MFI	Microfinance Institution(s)
MLR	Modern Law Review
MULR	Monash University Law Review
NBER	National Bureau of Economic Research
NCA	National Credit Act 34 of 2005
NCCT	Non-Cooperative Countries and Territories
NCR	National Credit Regulator
Nd	No date
NDP	National Development Plan
NEDLAC	National Economic Development and Labour Council
NFIS	National Financial Inclusion Strategy
NYULR	New York University Law Review
OAU	Organisation of African Unity
OECD	The Organisation for Economic Cooperation and Development
OUP	Oxford University Press
PA	Prudential Authority
PAD	Payment Account Directives
PELJ	Potchefstroom Electronic Law Journal
PMJDY	Pradhan Mantri Jan-Dhan Yojana
PRS	Pyramid of Regulatory Strategies
PSR	Payment Services Regulations 2009 (UK)
RBA	Risk-based Approach
RBI	Reserve Bank of India
RCMP	Risk Compliance and Management Programme
RDP	Reconstruction and Development Programme
RECs	Regional Economic Communities
RIDSP	Regional Indicative Development Sector Plan
RR	Responsive Regulation
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SADCFIS	SADC Financial Inclusion Strategy
SAEJ	South Asian Economic Journal
SAIA	South African Insurance Association
SAJIA	South African Journal of International Affairs

SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
SARB	South African Reserve Bank
SDGs	Sustainable Development Goals
SHG	Self-Help Group
SICJ	Statute of the International Court of Justice
SIFETL	Studies in International, Financial, Economic, and Technology Law
SME	Small-and-Medium Enterprise
TFEU	Treaty on the Functioning of the European Union
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UBCLR	University of British Columbia Law Review
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UPLR	University of Pennsylvania Law Review
USA	United States of America
WJLTA	Washington Journal of Law, Technology & Arts

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# CHAPTER ONE: INTRODUCTION AND BACKGROUND

*[P]overty is not [always] the result of rapacious financiers exploiting the poor. It has much more to do with the lack of financial institutions, with the absence of banks, not their presence. Only when borrowers have access to efficient credit networks can they escape from the clutches of loan sharks, and only when savers can deposit their money in reliable banks can it be channelled from the idle rich to the industrious poor. This point applies not just to the poor countries of the world. It can also be said of the poorest neighbourhoods in supposedly developed countries.*

Ferguson *The Ascent of Money* (2008)<sup>1</sup>

## 1.1 INTRODUCTION AND PROBLEM STATEMENT

### 1.1.1 Financial Inclusion, Poverty Alleviation, and Economic Growth

Financial inclusion (FI) (or inclusive finance) – broadly defined as the state in which the majority of the population has access to and can use financial services – has been recognised as a panacea for poverty alleviation and economic growth at international, regional, and national levels for several decades.<sup>2</sup> Internationally, however, the United Nations' (UN) 2000 Millennium Development Goals<sup>3</sup> (MDGs) do not specifically prioritise access to financial services as the key driver in alleviating poverty and providing access to basic services.<sup>4</sup> Chibba

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<sup>1</sup> Ferguson *The Ascent of Money: Financial History of the World* (2008) 13.

<sup>2</sup> Barr "National Savings and Financial Services Policy" 2007 1 *Harvard Law & Policy Review* 161 163. See also Chibba "Financial Inclusion, Poverty Reduction and the Millennium Development Goals" 2009 21 *EJDR* 213 214; Ibrahim *An Investigation into the Determinants of Access to Finance in Rural Areas of Katsina State* (Unpublished Master of Science Thesis, Usmanu Danfodiyo University, 2011) 10; Diniz, Birochi and Pozzebon "Triggers and Barriers to Financial Inclusion: The Use of ICT-based Branchless Banking in an Amazon County" 2012 11 *Electronic Commerce Research and Applications* 484 485; Kumar and Mishra "Financial Inclusion: The Road Traversed and the Way Ahead" 2014 2 *The International Journal of Business & Management* 50 54; Baidoo and Akoto "Does Trust in Financial Institutions Drive Formal Saving? Empirical Evidence from Ghana" 2019 213 *International Social Science Journal* 63; Nsiah, Yusif, Tweneboah, Agyei, and Baidoo "The Effect of Financial Inclusion on Poverty Reduction in Sub-Saharan Africa: Does Threshold Matter?" 2021 7 *Cogent Social Sciences* 1; International Evaluation Group and the World Bank Group "The Drive for Financial Inclusion: Lessons of World Bank Group Experience" (2021) [https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ap\\_driveforfinancialinclusion.pdf](https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ap_driveforfinancialinclusion.pdf) (accessed: 2022-03-21).

<sup>3</sup> United Nations "The Millennium Development Goals" (2000) <http://www.un.org/en/mdg/summit2010/pdf/List%20of%20MDGs%20English.pdf> (accessed: 2017-03-30).

<sup>4</sup> Fanta and Mutsonziwa "Gender and Financial Inclusion: An Analysis of Financial Inclusion of Women in The SADC Region" (2016) *FinMark Trust Policy Research Paper No 01/2016* 01



correctly identifies that “in addition to traditional approaches, new and complementary approaches are required to accelerate the momentum towards achieving the MDGs, and FI [financial inclusion] offers such an opportunity”.<sup>5</sup> Following the development of the Sustainable Development Goals (SDGs) in 2015, the UN provided for FI as an integral part of and one of the approaches to poverty alleviation and economic growth at the international level.<sup>6</sup> While it is still too early to measure the success of these new international commitments, the SDGs have contributed to a reduction in global poverty.<sup>7</sup> This notwithstanding, access to financial services across the globe remains a major concern.

### 1.1.2 World Statistical Overview of the Problem

In the most cited Global Findex Database of 2017 on the global FI statistics, 73% (almost 2 billion people) of the world population did not have access to transactional accounts in 2015.<sup>8</sup> In the latest global FI data provided by the World Bank, it is estimated that half of the population in developing countries was still without access to quality saving accounts and credit available in mainstream financial institutions in the fourth quarter of 2015.<sup>9</sup> The World

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<http://www.finmark.org.za/wp-content/uploads/2016/08/gender-and-financial-inclusion.pdf> (accessed: 2017-11-26).

<sup>5</sup> Chibba 2009 *EJDR* 214. See also Littlefield, Murdoch and Hashemi “Is Microfinance an Effective Strategy to Reach the Millennium Development Goals?” (2003) *Consultative Group to Assist the Poor Focus Notes No 24* <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Is-Microfinance-an-Effective-Strategy-to-Reach-the-Millennium-Development-Goals-Jan-2003.pdf> (accessed: 2017-03-31).

<sup>6</sup> UNDP “Sustainable Development Goals” (Nd) [www.undp.org/content/dam/undp/library/corporate/.../SDGs\\_Booklet\\_Web\\_En.pdf](http://www.undp.org/content/dam/undp/library/corporate/.../SDGs_Booklet_Web_En.pdf) (accessed: 2017-03-31) SGD 1.4. In terms of SGD 1 poverty in the SGD is measured as people living on less than \$1.25 a day.

<sup>7</sup> World Bank “Global Monitoring Report 2015/2016: Development Goals in an Era of Demographic Change” (2016) <http://pubdocs.worldbank.org/en/503001444058224597/Global-Monitoring-Report-2015.pdf> (accessed: 2017-03-31). The MDGs classified poverty as living on \$1.90 or less a day, ie under 10% of the world population in 2015.

<sup>8</sup> World Bank “UFA2020 Overview: Universal Financial Access by 2020” (2016) <https://www.worldbank.org/en/topic/financialinclusion/brief/achieving-universal-financial-access-by-2020> (accessed: 2021-03-11) (“World Bank “UFA2020 Overview” (2018)”). See also Fanta, Mutsonziwa, Goosen, Emanuel and Kettles “The Role of Mobile Money in Financial Inclusion in the SADC Region: Evidence Using FinScope Survey” (2016) *FinMark Trust Policy Research Paper No 03/2016* <https://finmark.org.za/system/documents/files/000/000/258/original/mobile-money-and-financial-inclusion-in-sadc-1.pdf?1602600110> (accessed: 2022-03-23).

<sup>9</sup> Sahay, Čihák, N’Diaye, Barajas, Mitra, Kyobe, Mooi, and Yousefu “Financial Inclusion: Can it Meet Multiple Macroeconomic Goals?” (2015) *IMF Staff Discussion Note* <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1517.pdf> (accessed: 2017-04-15). The estimated FI with reference to account ownership by low-income households in 2017 was 63%. See also Demirgüç-Kunt, Klapper, Singer, Ansar, and Hess “The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution” (2018)

Bank has an ambitious target of achieving universal financial access by 2020.<sup>10</sup> Among specific targets of this vision was that by 2020, “adults, who currently aren't part of the formal financial system, are able to have access to a transaction account to store money, send and receive payments as the basic building block to manage their financial lives”.<sup>11</sup> The World Bank expected to achieve universal financial access by creating a regulatory environment to enable access to transactional accounts and so encourage a move away from access to financial services to the use of accounts.<sup>12</sup> The World Bank has indicated a “delayed availability of a new round of Global Findex data” since 2018 “due to COVID-19-related factors”.<sup>13</sup> As discussed below, it is anticipated that, when available, this data will not reflect more positive results in achieving universal access in that the Covid-19 pandemic has had knock-on effects on the provision of financial services.

### **1.1.3 Financial Inclusion Statistics in the SADC Region and South Africa**

In the sub-Saharan region of Africa, FI in 2016 was projected at less than 30% as regards basic accounts and micro-credit offered by formal financial institutions.<sup>14</sup> The latest FI statistics for the Southern African Development Community(SADC) released in 2021 paint a different picture. The 2021 survey by the FinMark Trust projects 71% of adults in the SADC region that are financially included.<sup>15</sup> Only 61% of the adult population in this region access financial services in formal financial institutions, and only 37% of this population do so through banks.

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[https://globalfindex.worldbank.org/sites/globalfindex/files/201804/2017%20Findex%20full%20report\\_0.pdf](https://globalfindex.worldbank.org/sites/globalfindex/files/201804/2017%20Findex%20full%20report_0.pdf) (accessed: 2021-03-15) 18.

<sup>10</sup> World Bank “UFA2020 Overview” (2016).

<sup>11</sup> World Bank “UFA2020 Overview” (2016).

<sup>12</sup> World Bank “UFA2020 Overview” (2016).

<sup>13</sup> International Evaluation Group and The World Bank Group “The Drive for Financial Inclusion” (2021) 16.

<sup>14</sup> International Monetary Fund “World Economic and Financial Survey: Sub-Saharan Regions” (2016) <https://www.imf.org/external/pubs/ft/reo/2016/afr/eng/pdf/sreo0416.pdf> (accessed: 2017-04-23) 55. According to the IMF, roughly 1 Billion people in sub-Saharan Africa have no bank account (though have mobile phones). See also Nord “Financial Development, Financial Inclusion, and Growth in Africa” (2016) *IMF* [https://www.bceao.int/sites/default/files/inlinefiles/session\\_2\\_ecowas\\_financial\\_inclusion\\_conf\\_regioale\\_eng\\_09\\_17\\_2016.pdf](https://www.bceao.int/sites/default/files/inlinefiles/session_2_ecowas_financial_inclusion_conf_regioale_eng_09_17_2016.pdf) (accessed: 2017-04-23).

<sup>15</sup> FinMark Trust “Annual Report 2021” (Nd) [https://finmark.org.za/Publications/Annual\\_Report\\_2021.pdf](https://finmark.org.za/Publications/Annual_Report_2021.pdf) (accessed: 2022-03-24) 17. See FinMark Trust “Annual Report 2021” (Nd) [https://finmark.org.za/system/documents/files/000/000/296/original/FMT\\_2020\\_Annual\\_Report.pdf?1614067524](https://finmark.org.za/system/documents/files/000/000/296/original/FMT_2020_Annual_Report.pdf?1614067524) (accessed: 2021-03-11) 15, where financial inclusion in the SADC was 68%, with 58% using formal financial institutions.

The South African financial sector has been rated on aggregate as inclusive for several years.<sup>16</sup> The 2017 statistical data projected some 38 million adults (ie, an estimated 89% of a population of approximately 56 million)<sup>17</sup> above the age of 16 have access to some type of financial account in either formal or informal financial institutions.<sup>18</sup> These data translates into 11% of the adult population that is financially excluded. Regarding specific financial products, the country's FI in terms of providing appropriate financial products and outlets in the 2018 global FI database recorded 77% of the adult population held bank accounts.<sup>19</sup> This percentage included some 19% of adults who had access to bank accounts on the basis of government grant payments.<sup>20</sup>

This statistical overview acknowledges the impact of existing policies and infrastructural initiatives on improving access to financial services in South Africa. Considering the statistics, a large segment of the population is excluded from the mainstream financial sector. FI, as defined in detail in Chapter two, is no longer defined or measured solely with reference to *access* to financial services.<sup>21</sup> The determination of outreach to financial services distinguishes between *access* and the possibility of *using* such services, as well as the actual use of financial services.<sup>22</sup> "Access" in this case refers only to the ability to use available financial services or

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<sup>16</sup> See Consultative Group to Assist the Poor "Financial Inclusion and the Linkages to Stability, Integrity and Protection: Insights from the South African Experience" (2012) <http://www.cgap.org/publications/financial-inclusion-linkages-stability-integrity-and-protection> (accessed: 2021-09-15) ("CGAP *I-SIP South Africa* (2012)"). See also FinMark Trust "Results from FinScope South Africa 2016: Survey on Financial Inclusion" (2016) <https://www.finmark.org.za/finscope-south-africa-2016-leave-behind-note/> (accessed: 2017-04-23) ("FinMark Trust "FinScope SA Results" (2016)"). See further Chibba 2009 *EJDR* 223.

<sup>17</sup> Worldmeters "South Africa Population (1950-2017)" (Nd) <http://www.worldometers.info/world-population/south-africa-population/> (accessed: 2017-04-24).

<sup>18</sup> FinMark Trust "FinScope SA Results" (2016).

<sup>19</sup> The latest global FI database has indicated no change in the percentage of account ownership of between 70 and 80% in developing economies, including South Africa. See Demircug-Kunt *et al* "The Global Findex Database 2017" (2018).

<sup>20</sup> FinMark Trust "FinScope SA Results" (2016) which that sets statistics on savings at 33% of adults, with mainstream banks offering 15% of these savings, 14% by other formal (non-bank) institutions, while 8% of the population saved from informal institutions.

<sup>21</sup> Hannig and Jansen "Financial Inclusion and Financial Stability: Current Policy Issues" (2010) *ADB Working Paper Series No 259* <https://www.adb.org/sites/default/files/publication/156114/adb-wp259.pdf> (accessed: 2017-04-28) 3-4.

<sup>22</sup> Beck, Demircug-Kunt and Peria "Reaching Out: Access to and Use of Banking Services Across Countries" (2005) <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3754> (accessed: 2017-03-31) 4. See also The World Bank "Financial Access" (Nd) <https://www.worldbank.org/en/publication/gfdr/background/financial-access> (accessed: 2017-03-31). Other considerations used include the quality and impact of financial products and services. See further Hannig and Jansen "Financial Inclusion and Financial Stability" (2010) *ADB Working Paper Series No 259* 3-4.

products, while “usage” focuses on the permanence and depth of financial products and services. “Usage” requires more than the basic adoption of such services or products.<sup>23</sup> When considering the use of financial services, FI is measured taking the regularity, frequency, and duration of use of the service or products over time into account.<sup>24</sup> Although *access* to financial services has remained a core policy objective, including a population in the mainstream financial sector involves more than simply meeting a target through ownership of or access to financial services. It also involves helping people to use these services effectively.<sup>25</sup> If the “use” of financial services is taken into account, full reliance on the statistical data that takes only “access” to financial services into account in defining FI remains questionable. These data do not provide a complete picture of the current global or national measures of FI or the extent to which people are excluded from mainstream financial services.

The latest 2019 FI statistics for South Africa generally show a major improvement. The data reflect a positive outlook on the country’s achievements in promoting FI over the past few years. FinScope 2019 recorded at least 91% of South African adults who have been formally included in the financial system, with only 9% still excluded.<sup>26</sup> Of those who are included, 81% have bank accounts, while 78% use other formal non-bank channels. The data also records approximately 61% of the population who uses informal channels. The 2019 data recorded that 5.3 million South Africans included in the formal financial systems are social grant beneficiaries.<sup>27</sup> However, the Global Microscope 2020 statistics recorded 30% of overall financial products and outlets that are suitable to provide an enabling environment for FI in the country.<sup>28</sup>

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<sup>23</sup> Hannig and Jansen “Financial Inclusion and Financial Stability” (2010) *ADB Working Paper Series No 259* 3-4.

<sup>24</sup> Hannig and Jansen “Financial Inclusion and Financial Stability” (2010) *ADB Working Paper Series No 259* 3-4.

<sup>25</sup> Bhattacharyya and Dutta “Financial Inclusion and its Delivery Models in India-Select Issues” 2016 *5 Global Journal for Research Analysis* 321 321.

<sup>26</sup> National Treasury “Draft Policy Paper: An Inclusive Financial Sector to Serve All” (2020) [http://www.treasury.gov.za/comm\\_media/press/2020/Financial%20Inclusion%20Policy%20-%20An%20Inclusive%20Financial%20Sector%20For%20All.pdf](http://www.treasury.gov.za/comm_media/press/2020/Financial%20Inclusion%20Policy%20-%20An%20Inclusive%20Financial%20Sector%20For%20All.pdf) (accessed: 2022-01-22) 1 (“National Treasury Draft FI Policy (2020)”).

<sup>27</sup> FinMark Trust “FinScope South Africa: 2019 Pocket Guide” (2020) [https://finmark.org.za/system/documents/files/000/000/242/original/FinScope\\_SA\\_2019\\_Pocket\\_Guide\\_2020.pdf?1604679365](https://finmark.org.za/system/documents/files/000/000/242/original/FinScope_SA_2019_Pocket_Guide_2020.pdf?1604679365) (accessed: 2022-03-24). See also National Treasury Draft FI Policy (2020) 1.

<sup>28</sup> Economist Intelligence Unit “Global Microscope 2020: The Role of Financial Inclusion in the Covid-19 Response” (2020) [https://pages.eiu.com/rs/753-RIQ-438/images/EIU\\_Microscope\\_2020\\_proof\\_10.pdf](https://pages.eiu.com/rs/753-RIQ-438/images/EIU_Microscope_2020_proof_10.pdf) (accessed: 2022-06-01) 59.

Research has indicated that government transfers such as social benefit payments and wages or other work-related payments have contributed to improving access to financial services in many countries.<sup>29</sup> This is especially the case where recipients receive payments directly into their bank accounts. While a limited percentage continues to use these accounts for cash management processes, a higher percentage is reported to withdraw all the funds immediately after receipt.<sup>30</sup> As a result, a statistical calculation of the population that does not cover the percentage of the actual usage of financial services paints a bleak picture of the current position of FI in the country.

For instance, in the context of South Africa, in 2003 the national government, in collaboration with major banks, introduced debit cards for payments of social grants such as pensions, disability grants, and child support grants.<sup>31</sup> These cards provide limited transactional banking such as savings at no cost to the recipients and require no minimum balance.<sup>32</sup> Studies have however established that little has been done to educate recipients on these benefits.<sup>33</sup> There is a perception that recipients must withdraw their grants on the day on which money is deposited.<sup>34</sup> In the absence of financial education, withdrawals from these accounts remain

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<sup>29</sup> Demirgüç-Kunt, Klapper, Singer and Oudheusden "The Global Findex Database 2014: Measuring Financial Inclusion around the World" (2015) *World Bank Policy Research Working Paper No 7255* <http://documents.worldbank.org/curated/en/187761468179367706/pdf/WPS7255.pdf> (accessed: 2017-05-26) 32. See also Demirguc-Kunt *et al* "The Global Findex Database 2017" (2018) 12.

<sup>30</sup> Demirguc-Kunt *et al* "The Global Findex Database 2014" (2015) 32. See also Kempson and Atkinson "Policy Level Response to Financial Exclusion in Developed Economies: Lessons for Developing Countries" (2016) *Report of Personal Finance Research Centre, University of Bristol* <http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0410.pdf> (accessed: 2021-05-26). See further, Rhyne *Microfinance for Bankers and Investors: Understanding the Opportunities and Challenges of the Market at the Bottom of the Pyramid* (2009) 23; Demirguc-Kunt *et al* "The Global Findex Database 2014" (2015) 31. See further the Financial Sector Conduct Authority "Regulatory Strategy 2021-2025" (Nd) <https://www.fsca.co.za/News%20Documents/FSCA%20Regulatory%20Strategy%202021-2025.pdf> (accessed: 2022-02-27) 13 ("FSCA "Regulatory Strategy 2021-2025" (Nd)", FinMark Trust FinScope South Africa 2019 (2020) 19.

<sup>31</sup> Anon "Social Grant ATM Card Launched" (2003-08-21) *Fin24* <http://www.fin24.com/Companies/Social-grant-ATM-card-launched-20030821> (accessed: 2017-05-03).

<sup>32</sup> Rhyne *Microfinance for Bankers* (2009) 223.

<sup>33</sup> Nyoka *The Impact of Smart Cards on South Africa Rural Pensioners' Lives* (Unpublished Masters' Thesis, Rhodes University, 2004) 67-68.

<sup>34</sup> Nyoka *The Impact of Smart Cards* (Masters 2004) 67. See also Van Rensburg "SA's High Level of Financial Exclusion" (2017-04-16) *Fin24* <https://www.fin24.com/Economy/sas-high-level-of-financial-exclusion-20170416-2> (accessed: 2017-05-03).

the main function known to the recipients.<sup>35</sup> As a result, where FI is defined with both access and usage components, the inclusion of accounts linked to social security benefits does not reflect the highest level of FI currently projected. Despite the government's role in improving access by linking social benefit payments and bank accounts, the FinScope 2019 data justifiably projects the current South African FI with reference to those who are banked at 68% of the adult population who are financially included by the financial sector. This excludes social grant benefit recipients.<sup>36</sup>

The statistical overview poses an important question as to the targets set out for achieving FI at both national and international levels. The World Bank has set the target at enabling one billion people to gain access to transactional accounts through targeted interventions by 2020.<sup>37</sup> In South Africa, the government has set the target to increase the proportion of the population who is banked or has access to transactional financial services to 90% by 2030 in the National Development Plan 2030.<sup>38</sup> The question remains whether and how this FI target will be achieved and to what extent the regulatory framework may be developed or reformed to achieve this?

#### **1.1.4 Financial Inclusion and the COVID-19 Pandemic**

Various efforts to meet both global and national targets have begun to promote FI. The devastating Covid-19 health crisis that engulfed the world in 2019 is expected to delay these efforts due to its major effect on poverty, unemployment, and access to basic services, including basic financial services.<sup>39</sup> Due to the outbreak of the pandemic, countries' authorities introduced lockdown, quarantine, social distancing, curfews, and travel restrictions as

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<sup>35</sup> Rhyne *Microfinance for Bankers* (2009) 224.

<sup>36</sup> FinMark Trust FinScope South Africa 2019 (2020) 19. See also National Treasury Draft FI Policy (2020) 2.

<sup>37</sup> World Bank "UFA2020 Overview" (2016).

<sup>38</sup> National Planning Commission: South Africa "National Development Plan 2030: Our Future – Make It Work" (2011) [http://www.dac.gov.za/sites/default/files/NDP%202030%20%20Our%20future%20%20make%20it%20work\\_0.pdf](http://www.dac.gov.za/sites/default/files/NDP%202030%20%20Our%20future%20%20make%20it%20work_0.pdf) (accessed: 2022-06-10) 150.

<sup>39</sup> See Parker *Life After COVID-19: The Other Side of Crisis* (2020), World Economic Forum "Impact of COVID-19 on the Global Financial System" (2020) [http://www3.weforum.org/docs/WEF\\_Impact\\_of\\_COVID\\_19\\_on\\_the\\_Global\\_Financial\\_System\\_2020.pdf](http://www3.weforum.org/docs/WEF_Impact_of_COVID_19_on_the_Global_Financial_System_2020.pdf) (accessed: 2021-03-13); ILO-OECD "The Impact of the COVID-19 Pandemic on Jobs and Incomes in G20 Economies" (2020) [https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/reports/WCMS\\_756331/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/reports/WCMS_756331/lang--en/index.htm) (accessed 2021-03-13) for a variety of topics on the impact of Covid-19 pandemic.

measures to prevent the spread of the disease.<sup>40</sup> These measures had an on-going and devastating impact on both health and economic growth. The lockdown and social distancing measures to control the spread of the pandemic affected people's livelihood and many are no longer able to generate incomes due to unemployment.<sup>41</sup> In the financial market in particular, lockdown, unemployment, and non-performing business sectors are threatening the existing liquidity problem experienced by many households and businesses.<sup>42</sup> This has decreased households' consumption and saving patterns and, with little or no social protection schemes available, many households have been forced to use their savings.<sup>43</sup> Therefore, the pandemic derailed the FI efforts, and policy and legal frameworks that consider the possible effects of similar future crises are essential. As Arunachalam and Crentsil correctly argue, there is a need for a new framework that will ensure "sustained financial inclusion" and high-quality financial services to help the low-income and the excluded people.<sup>44</sup>

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<sup>40</sup> Sahay, von Allmen, Lahreche, Khera, Ogawa, Bazarbash, and Beaton *The Promise of Fintech: Financial Inclusion in the Post COVID-19 Era* (2020) 2. See also Kasradze "Challenges Facing Financial Inclusion Due to the COVID-19 Pandemic" 2020 3 *European Journal of Marketing and Economics* 3; Arndt, Davies, Gabriel, Harris, Makrelov, Robinson, Levy, Simbanegavi, Van Seventer, and Anderson "Covid-19 Lockdowns, Income Distribution, and Food Security: An Analysis for South Africa" 2020 26 *Global Food Security* 100410.

<sup>41</sup> Gutiérrez-Romero and Ahamed "COVID-19 Response Needs to Broaden Financial Inclusion to Curb the Rise in Poverty" 2021 138 *World Development* 105229.

<sup>42</sup> Wójcik and Ioannou "Covid-19 and Finance: Market Developments So Far and Potential Impacts on The Financial Sector and Centres" 2020 111 *Journal of Economic and Human Geography* 337 338.

<sup>43</sup> Martin, Markhvida, Hallegatte, and Walsh "Socio-Economic Impacts of COVID-19 on Household Consumption and Poverty" 2020 4 *Economics of Disasters and Climate Change* 453 471-472. See also Lelissa "The Impact of COVID 19 on the Private Banking System" 2020 12 *European Journal of Business and Management* 53 56. Cf Levine, Lin, Tai, and Xie "How Did Depositors Respond to Covid-19?" (2020) *National Bureau of Economic Research Working Paper 27964* [https://www.nber.org/system/files/working\\_papers/w27964/w27964.pdf](https://www.nber.org/system/files/working_papers/w27964/w27964.pdf) (accessed: 2020-03-13).

<sup>44</sup> Arunachalam and Crentsil "Financial Inclusion in the COVID-19 Era" Paper Presented at the Conference For Central Bankers, Ministries of Finance, Financial Sector Development & Financial Inclusion Professionals, Commercial & Microfinance Bankers, NBFIs, DFIs, MFIs, Consultants, Fintech & RegTech Companies, Investors, Insurers & Pension Funds, London UK (8 June 2020) 15. See also National Treasury Draft FI Policy (2020) on the need for "improved financial inclusion".

## 1.2 BACKGROUND TO THE STUDY

### 1.2.1 History and Causes of Financial Exclusion

The problem associated with lack of access and use of financial services has been part of different societies for several decades although policies and regulatory frameworks to promote FI only emerged recently. However, efforts to address income inequality and the problem of financial exclusion (FE) pre-date financial intermediation and the emergence of banking. For instance, the use of barter as medium of exchange of goods and services necessitated the invention of money and pointed to the importance of financial intermediation.<sup>45</sup> Examples in Europe include the Italian Medici bank established as financial intermediation to service the rich and business clientele such as the influential Italian merchants including taking deposits and loans from the Catholic Church and the monarch.<sup>46</sup> When these banks became moneylenders and pawnbrokers their services were no longer aimed at “poor individuals desperately in need of cash”.<sup>47</sup>

Many of these early practices necessitated the development of informal financial institutions such as illegal moneylenders, and semi-formal ones such as cooperative banks, group-lending microfinance institutions such as accumulated or rotational savings, and credit associations (ASCAs or ROSCAs) to accommodate the poor’s financial needs.<sup>48</sup> In many jurisdictions these institutions operate outside the framework that regulates the registration of financial institutions. This raises the issues of trust in these institutions by the consumers and exclusions from formal and semi-formal financial systems.<sup>49</sup>

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<sup>45</sup> Kinder *Seven Stages of Money Maturity: Understanding the Spirit and Value of Money in your Life* (1999) 114. See also Hoggson *Banking Through the Ages: From the Romans to the Medici’s From the Dutch to the Rothschild* (2007) 27. Cf Graeber *Debt: The First 5,000 Years* (2011) 22-24.

<sup>46</sup> Geisst *Beggar Thy Neighbour: A History of Usury and Debt* (2013) 69. See also Roussakis “Global Banking: Origins and Evolutions” 2000 37 *Revista de Administracao de Empresas* 45-47.

<sup>47</sup> Geisst *Beggar Thy Neighbour* (2013) 71.

<sup>48</sup> Byrne, McCarthy, and Ward “Money Lending and Financial Exclusion” 2007 27 *Public Money & Management* 45 48. See also Squires “Inequality and Access to Financial Services” in Niemi, Ramsay, and Whitford (eds) *Consumer Credit, Debt & Bankruptcy: Comparative and International Perspectives* (2009) 17.

<sup>49</sup> Bhuvana and Vasantha “Drivers of Financial Inclusion to Reach Out Poor” 2016 6 *Arabian Journal of Business and Management Review* 1 3. See also Xu “Trust and Financial Inclusion: A Cross-country Study” 2020 35 *Financial Research Letter* 1.



In South Africa, FE arose, in the main, from a dispensation defined by the stark reality of various forms of inequality across spatial, economic, social, cultural, and racial lines.<sup>50</sup> The structural legacy of apartheid and the policies which excluded the majority of society before and after the adoption of the current democratic dispensation, are well documented.<sup>51</sup> Different patterns of employment and their significance in generating income are important determinants of access to financial services. For instance, people who are active in the labour market are more likely to have a bank account than those who are not.<sup>52</sup> The system that favours the skilled or semi-skilled sector of the community has also pushed many of the unskilled into the informal labour market and self-employment. Income from this market is unstable and also characterised by lower remuneration.<sup>53</sup> Due to restrictions on entrepreneurial activities, exclusions from the labour market, and depressed wage income the majority are unable to build wealth through savings from their incomes.<sup>54</sup> As a result, many in this sector of the community have no or relatively limited access to the mainstream financial sectors.<sup>55</sup> Therefore, like many developing countries, South Africa generally faces the

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<sup>50</sup> World Bank Group *Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa: South Africa Systematic Country Diagnostic* (2018) 6.

<sup>51</sup> Nanziri "Financial Inclusion and Welfare in South Africa: Is There a Gender Gap?" 2016 18 *Journal of African Development* 109. See also Meiring, Kannemeyer, and Potgieter "The Gap Between Rich and Poor: South African Society's Biggest Divide Depends on Where You Think You Fit In" (2018) *Southern Africa Labour and Development Research Unit, Working Paper Series Number 220, Version 1* [http://opensaldru.uct.ac.za/bitstream/handle/11090/901/2018\\_220\\_Saldruwp.pdf](http://opensaldru.uct.ac.za/bitstream/handle/11090/901/2018_220_Saldruwp.pdf) (accessed: 2021-03-01). See further Bhorat, Lilenstein, Oosthuizen, and Thornton "Structural Transformation, Inequality, and Inclusive Growth in South Africa" (2020) *United Nations University WIDER Working Paper 2020/50* <https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2020-50.pdf> (accessed: 2021-5-08) for the latest on transformation in South Africa.

<sup>52</sup> Demirguc-Kunt *et al* "The Global Findex Database 2017" (2018) 30. See also Kempson and Whyley *Kept Out or Opted Out? Understanding and Combating Financial Exclusion* (1999) 11; McKay and Kempson "Savings and Life Events" (2003) *UK Department for Work and Pensions Research Report No 194* <https://www.bristol.ac.uk/medialibrary/sites/geography/migrated/documents/pfrc0302.pdf> (accessed: 2021-05-26) 16.

<sup>53</sup> Cichello and Rogan "Informal Sector Employment and Poverty in South Africa: Identifying the Contribution of Informal Sources of Income on Aggregate Poverty Measures" (2017) *Research Project on Employment, Income Distribution and Inclusive Growth 3x3 Working Paper 34* <https://www.redi3x3.org/sites/default/files/Rogan%20%26%20Cichello%202017%20REDI3x3%20Working%20Paper%2034%20Informal%20income%20and%20poverty%20reduction%20FINAL.pdf> (accessed: 2021-05-26) 4. See also Blaauw "Informal Employment in South Africa: Still Missing Pieces in the Vulnerability Puzzle" 2017 21 *Southern African Business Review* 339 350. See further, Hepple *South Africa: Workers Under Apartheid* 2<sup>nd</sup> ed (1971) 51-52.

<sup>54</sup> World Bank Group *Incomplete Transition Overcoming the Legacy of Exclusion in South Africa: South Africa Systematic Country Diagnostic* (2018) 14.

<sup>55</sup> El Badaoui, Strobl, and Walsh "Is There an Informal Employment Wage Penalty? Evidence from South Africa" 2008 56 *Economic Development and Cultural Change* 684 685. See also Maharaj "The Apartheid City" in Massey and Gunter (eds) *Urban Geography in South Africa: Perspectives and Theory* (2020) 40-41.

challenges of providing basic services to the poor. As Norton correctly observes, “apartheid did leave South Africa with a developed banking system that served the dominating white population”.<sup>56</sup> The post-democratic government had to develop policies to alleviate the inequality in income, unequal economic opportunities, and inaccessible basic services identified with the policies of the pre-democratic dispensation.<sup>57</sup>

Banks both pre-and-post the democratic era have shown some reluctance to provide financial services in remote areas.<sup>58</sup> There are continuing allegations of patterns of redlining, similar to that in the United States of America, which manifest as the denial of financial services across the colour line.<sup>59</sup> In South Africa this has changed in form and character extending beyond spatial segregation by financial institutions.<sup>60</sup> It now includes circumstances in which certain groups in the population are “starved of credit, disinvested, blighted, subject to predatory financiers, and drained of savings, having been declared ‘unbankable’”.<sup>61</sup> As a result, financial institutions continue to justify various patterns of exclusion in favour of risk profiling and assessment, rather than profiling customers in terms of their race or location.<sup>62</sup> As Haferburg

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<sup>56</sup> Norton “Law, Social Justice, Economic Development, and Modern Banking Sector Legal Reform: Taking in the ‘Excluded’” 2007 8 *SIFETL* 192 217. See also Neves “The Financialisation of the Poor and the Reproduction of Inequality” in Pillay, Khadiagala, Southall, Mosoetsa, and Kariuk (eds) *New South African Review 6: The Crisis of Inequality* (2018) 86; Dubow *Apartheid: 1948 – 1994* (2014) 11

<sup>57</sup> Norton 2007 *SIFETL* 217.

<sup>58</sup> Hamann, Khagram, and Rohan “South Africa’s Charter Approach to Post-Apartheid Economic Transformation: Collaborative Governance or Hardball Bargaining?” 2008 34 *Journal of Southern African Studies* 21 32.

<sup>59</sup> Cf Kotze and Donaldson “Residential Desegregation in Two South African Cities: A Comparative Study of Bloemfontein and Pietersburg” 1998 35 *Urban Studies* 467 472, who discovered redlining in certain areas in Bloemfontein by banks “[o]wing to the clayey soil” that resulted in a large number of houses suffering serious structural damage in this area. See also Haysom and Shaw “The Settling of Organised Crime in Bedfordview” 2017 50 *SA Crime Quarterly* 27 30, who discovered patterns of redlining in various suburbs close to the Johannesburg CBD that had hosted criminal subcultures, such as Cyrildene and Hillbrow. See further de Beer “Contesting Inner-city Space: Global Trends, Local Exclusion/s and an Alternative Christian Spatial Praxis” 2008 36 *Missionalia* 181 189, who discovered redlining by banks in large parts of the inner city of Pretoria and refused to provide finance that had devastating effects on local neighbourhoods due to bomb explosions of shopping malls after 1994.

<sup>60</sup> Hamann *et al* 2008 *Journal of Southern African Studies* 32.

<sup>61</sup> Bond “Contradictions in Consumer Credit: Innovations in South African Super-Exploitation” 2015 29 *Critical Art* 218 226.

<sup>62</sup> Standing Committee on Finance and the Portfolio Committee on Trade and Industry “1st Report on the Transformation of the Financial Sector” (2017) [https://www.parliament.gov.za/storage/app/media/misc/2017/november/27-112017/FST\\_1st\\_Report\\_15\\_November-27\\_Nov\\_17\\_ATC\\_1\\_Without\\_tracking.pdf](https://www.parliament.gov.za/storage/app/media/misc/2017/november/27-112017/FST_1st_Report_15_November-27_Nov_17_ATC_1_Without_tracking.pdf) (accessed: 2021-06-21) pars 8.1.1 and 8.1.12, and the Banking Association of South Africa refuting that the banking sector is not transformed and standing against any empowerment commitment to be set out in the legislation with a punishable offence.

and Huchzermeyer observe, “[redlining] has remained legitimate in the toolbox of financial institutions and is currently not in the spotlight of *urban* research in South Africa”.<sup>63</sup>

### **1.2.2 The Current Position and the Regulatory Framework to Realise Financial Inclusion**

The discussion above highlights a need for financial services and institutions together with regulatory reforms that address the financial needs of the poor. The practices of early banks and the informal and other formal financial institutions call into question the level of effectiveness of the current legal and regulatory frameworks in addressing these financial needs. Modern financial institutions, both formal and informal, continue to be geographically inaccessible to the majority of the poor in developing countries who largely reside in rural areas. Banks in these countries continue to pay more attention to the rich and large enterprises.<sup>64</sup> The conventional banking products were not designed with the poor as potential customers in mind. Monthly fees attached to basic financial services have always been relatively high for low-income earners.<sup>65</sup> Research has indicated that the likelihood of having a bank account is higher among the rich urban dwellers, and lower for persons in low-income households.<sup>66</sup> The minimum balances required to maintain existing current accounts remain high.<sup>67</sup> In addition, banks continue to deny access to basic bank accounts (BBAs) to those with poor or no credit histories, or who have previously had difficulty in managing these accounts.<sup>68</sup> To address these barriers, policy, regulatory, and institutional frameworks must

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See also Pearcy “The Most Insidious Legacy -Teaching About Redlining and the Impact of Racial Residential Segregation” 2020 17 *The Geography Teacher* 44 44.

<sup>63</sup> Hafenburg and Huchzermeyer “Redlining or Renewal? The Space-based Construction of Decay and its Contestation Through Local Agency Brixton, Johannesburg” in Kirkness and Tije-Dra (eds) *Negative Neighbourhood Reputation and Place Attachment* (2017) 60 (emphasis added).

<sup>64</sup> Claessens “Access to Financial Services: A review of Issues and Public Policy Objectives” 2006 21 *The World Bank Research Observer* 207 208.

<sup>65</sup> Barr “Banking the Poor” 2004 21 *Yale Journal on Regulation* 121 177. See also *The Micro Finance Regulatory Council v AAA Investments (Pty) Limited* (2006) 1 SA 27 (SCA) par 1; *The Micro Finance Regulatory Council v AAA Investments (Pty) Ltd* (2007) 1 SA 343 (CC).

<sup>66</sup> Demirguc-Kunt, Klapper, and Peria “The Foundation of Financial Inclusion: Understanding Ownership and Use of Formal Accounts” 2016 27 *Journal of Financial Intermediation* 1 16.

<sup>67</sup> Karger *Short Changed: Life and Debt in Fringe Economy* (2005)18.

<sup>68</sup> Tescher and Stuhldreher “Breaking The Savings Barrier: How the Federal Government Can Build an Inclusive Financial System” (2005) *New American Foundation Issues Brief* <https://na-production.s3.amazonaws.com/documents/breaking-the-savings-barrier> (accessed: 2017-05-12) 4. See also Yunus *Banker to the Poor: Micro-lending and the Battle Against World Poverty* (2003) 52-54; Narayan and Petesch “Voices of the Poor from Many Lands” (2002) <https://siteresources.worldbank.org/INTPOVERTY/Resources/335642.../full.pdf> (accessed:

be developed or reformed to provide BBAs that meet the financial needs of this sector of the community.<sup>69</sup>

### **1.3 THE PURPOSE AND OBJECTIVE OF THE STUDY**

This research aims critically to analyse whether or not existing policies, regulatory and institutional frameworks are effective and responsive in promoting FI and facilitating access to BBAs for low-income households. The main objective of the study is to examine whether the regulatory framework for commercial banks, as deposit-taking institutions, imposes obligations to provide customers with access to BBAs. It uses the results from the analysis to recommend regulatory and policy reforms that are necessary to promote FI. The study applies the theory of “responsive regulation” (RR Theory) and the “Pyramid of Regulatory Strategies” (PRS) introduced by Ayres and Braithwaite to identify the type of regulatory instruments that may be applied to promote FI and to establish whether the current regulatory framework in South Africa is effective and responsive in achieving this objective.<sup>70</sup> The study uses existing regulatory frameworks aimed at access to BBAs across the globe to benchmark the forms of regulatory response and to determine whether these are responsive and effective in promoting FI in general and access to BBAs in particular.

The study takes a “back-to-basics” approach and focuses on access to BBAs as the most basic financial service provided by banks. The study takes into account the emergence of Internet banking, mobile payments, and financial technology which facilitate access to banking services and their main purpose of transmitting payments to customers. It specifically appreciates the efforts that are made by existing mobile networks, electronic money remittance systems, and

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2017-06-24) 207; Bayulgen “Giving Credit Where Credit Is Due: Can Access to Credit Be Justified as a New Economic Right?” 2013 *Journal of Human Rights* 492. See further Hannig and Jansen “Financial Inclusion and Financial Stability: Current Policy Issues” in Kawai and Prasad (eds) *Financial Market Regulation and Reforms in Emerging Markets* (2011) 299 who discuss the requirements of credit history and stringent credit scoring measures that exclude a number of populations from access to consumer credits.

<sup>69</sup> Allen *et al* 2016 *Journal of Financial Intermediation* 29. See also Anderloni and Carluccio “Access to Bank Accounts and Payment Services” in Anderloni, Braga and Carluccio (eds) *New Frontiers in Banking Services: Emerging Needs and Tailored Products for Untapped Markets* (2007) 29.

<sup>70</sup> Ayres and Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992).

financial technology products such as Safaricom's M-Pesa<sup>71</sup> and Wizzit<sup>72</sup> to bridge the gap between customers and financial institutions.<sup>73</sup> Developments in financial technology and virtual currencies such as Bitcoin and Ethereum also drive FI by limiting financial intermediation processes and the costs of transactions, and increase the mobility of money across the globe.<sup>74</sup> Nonetheless, the study is based on one of its general assumptions that the transmission of money, even electronically, is often difficult without a bank account.<sup>75</sup> An account in the formal banking system has remained a gateway to other financial products and services.<sup>76</sup>

#### 1.4 RESEARCH FOCUS AND SCOPE

The discussion immediately above highlights the problems and challenges currently facing the realisation of FI, including access to BBAs. The problem is summarised in Ferguson's *Ascent of Money* cited at the beginning of this chapter.<sup>77</sup> What can be deduced from the quotation is that access to financial services can only be achieved through multiple efforts. Current regulatory and policy frameworks aimed at FI may only be effective and responsive if they can also address the multiple barriers confronting FI. Due to the scope of the literature, policy,

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<sup>71</sup> See <https://www.safaricom.co.ke/> (accessed: 2018-01-23).

<sup>72</sup> See <http://www.wizzit-int.com/wizzit.html> (accessed: 2018-01-23). According to the statement from its website "WIZZIT is a *Mobile Banking Solution Provider* that assists partner *Financial Institutions & Service Providers* in promoting Financial Inclusion".

<sup>73</sup> Moremoholo "Central Bank Lauds Mobile Money Schemes" (2016-05-13) *The Post* <http://www.thepost.co.ls/business/central-bank-lauds-mobile-money-transfer-schemes/> (accessed: 2017-06-09). See also Baradaran *How the Other Half Bank: Exclusion, Exploitation, and the Threat of Democracy* (2015) 177-179; Realini and Mehta *Financial Inclusion at the Bottom of the Pyramid* (2015) Chps 5 and 11, Cook and McKay "Banking in the M-PESA Age: Lessons From Kenya" (2017) *Consultative Group to Assist the Poor Working Paper* <http://www.cgap.org/sites/default/files/Working-Paper-Banking-in-the-M-PESA-Age-Sep-2017.pdf> (accessed: 2018-03-02); Lawack "Mobile Money, Financial Inclusion and Financial Integrity: The South African Case" 2013 8 *Washington Journal of Law, Technology & Arts* 391; Buku and Meredith "Safaricom and M-PESA in Kenya: Financial Inclusion and Financial Integrity" 2013 8 *Washington Journal of Law, Technology & Arts* 375 on the discussion of mobile banking platforms such as M-Pesa and WIZZIT.

<sup>74</sup> For these developments see Loo "Enhancing Financial Inclusion in ASEAN: Identifying the Best Growth Markets for Fintech" 2019 12 *Journal of Financial Management* 181. See further Arslanian and Fischer *The Future of Finance: The Impact of FinTech, AI, and Crypto on Financial Services* (2019); Abdulhakeem and Hu "Powered by Blockchain Technology, DeFi (Decentralized Finance) Strives to Increase Financial Inclusion of the Unbanked by Reshaping the World Financial System" 2021 12 *Modern Economy* 1.

<sup>75</sup> Cartwright *Bank Consumers and Regulations* (2004) 219.

<sup>76</sup> Cartwright *Bank Consumers and Regulations* (2004) 219.

<sup>77</sup> Ferguson *The Ascent of Money* (2008) 13 (own addition).

and legal frameworks, and multiple issues surrounding the prevention of FE and the promotion of FI, it is essential “to tame the many-headed beast of financial inclusion”.<sup>78</sup> It is, therefore, necessary to set certain limits to keep the study to manageable proportions.

First, it must be noted that many barriers lead to FE and inhibit access to various financial services. These barriers take the institutional and regulatory context and the government’s social and economic policies into account.<sup>79</sup> They are clustered in two categories. On the one hand we find the demand side and involuntary factors – also known as societal factors – such as the level of income inequality and changes in labour markets which affect people’s access to financial services and exacerbate FE.<sup>80</sup> Relevant regulatory frameworks may be required to encourage or mandate financial service providers to offer relevant financial education as a precondition for making these services available to their customers. It may be important to strengthen limited financial literacy and capability to make the customers aware of available and accessible services.<sup>81</sup> This will require the promotion of financial literacy, education frameworks, and suitable financial advice to address financial difficulties.<sup>82</sup>

On the other hand, there are supply factors that contribute to FI by determining whether financial services are available for all who require them. Supply factors that contribute to FE include lack of infrastructure, concentration in the financial market, entry barriers for new competitors and products, financial institutions’ criteria for accepting clients, the fees they

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<sup>78</sup> Gardeva and Rhyne “Opportunities and Obstacles to Financial Inclusion” (2011) *Center for Financial Inclusion at Accion International Survey Report* <https://www.centerforfinancialinclusion.org/opportunities-and-obstacles-to-financial-inclusion> (accessed: 2017-06-22) 7.

<sup>79</sup> Lämmermann “Financial Exclusion and Access to Credit” (2010) *European Social Watch Report* [http://www.socialwatch.eu/wcm/financial\\_exclusion.html](http://www.socialwatch.eu/wcm/financial_exclusion.html) (accessed: 2017-06-22) 26.

<sup>80</sup> Honohan “Measuring Microfinance Access: Building on Existing Cross Country Data” (2005) *The World Bank Policy Research Working Paper No 3606* <https://openknowledge.worldbank.org/handle/10986/8941> (accessed: 2017-06-22) 2. See also Claessens 2006 *The World Bank Research Observer* 232; Demirgüç-Kunt and Klapper “Measuring Financial Inclusion: Explaining Variation in Use of Financial Services Across and Within Countries” 2013 *Brookings Papers on Economic Activity* 279 329; Lämmermann “Financial Exclusion” (2010) *European Social Watch Report* 26-28.

<sup>81</sup> Bank of Papua New Guinea “National Financial Inclusion Strategy 2016-2020” (Nd) <http://www.thecefi.org/images/2nd%20NFIS%20-%20CEFI%20PNG.pdf> (accessed: 2018-02-20) 11.

<sup>82</sup> Anderloni and Carluccio “Access to Bank Accounts and Payment Services” in Anderloni, Braga, and Carluccio (eds) *New Frontiers in Banking Services* (2007) 96. Initiatives suggested to promote this demand include integration of financial education into the school curriculum, skills training, and family assistance.

charge the customer to access their services, the regulatory requirements such as risk assessment procedures, and the inefficiency of regulation in promoting FI.<sup>83</sup>

Although there is a fine line between the two categories, the focus of this research is, in the main, on the supply factors as the most effective obstacles in the process of achieving FI.<sup>84</sup> Supply factors are important both for improving the design of financial products and services and for benchmarking possible financial sector policy and regulatory reforms.<sup>85</sup> Therefore, while the demand factors such as financial literacy and education frameworks are important, a general and detailed discussion of these factors falls outside the scope of this study. The research is limited to the need for marketing, awareness, and education that target access to and usage of BBAs.<sup>86</sup>

Second, FI is defined with reference to a wide range of financial services such as savings and credit facilities, money payments and transfers, insurance, and pension facilities.<sup>87</sup> Studies around the world have identified basic financial services as more important among the poor due to their “smaller, more irregular, and often more unreliable income”.<sup>88</sup> Field studies have also established that savings – together with borrowing and insurance – have become one of the main categories of personal financial behaviour in poor and low-income households.<sup>89</sup>

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<sup>83</sup> Lämmermann “Financial Exclusion” (2010) *European Social Watch Report* 26-28. See also Martinez, Hildago and Tuesta “Demand Factors That Influence Financial Inclusion In Mexico: Analysis of the Barriers Based on the ENIF Survey” (2013) *BBVA Research Working Paper No 12/37* [https://www.bbva.com/KETD/fbin/mult/WP\\_1337\\_tcm348-415216.pdf](https://www.bbva.com/KETD/fbin/mult/WP_1337_tcm348-415216.pdf) (accessed: 2017-06-22) 3.

<sup>84</sup> Swamy “Bank-Based Financial Intermediation of Financial Inclusion and Inclusive Growth” 2010 *Bank and Banks Systems* 63 65.

<sup>85</sup> Honohan “Measuring Microfinance Access” (2005) *The World Bank Policy Research Working Paper No 3606* 2.

<sup>86</sup> See Ch 6.6.4.3 below.

<sup>87</sup> Claessens 2006 *The World Bank Research Observer* 212. See also Inoue and Hamori *Indian Economy: Empirical Analysis of Monetary and Financial Issues in India* (2015) 127.

<sup>88</sup> Rutherford “The Economics of Poverty: How Poor People Manage Their Money” (Nd) [http://media.microfinancelessons.com/resources/Economics\\_poverty\\_rutherford.pdf](http://media.microfinancelessons.com/resources/Economics_poverty_rutherford.pdf) (accessed: 2017-06-23). See also Collins, Morduch, Rutherford, and Ruthven *Portfolios of the Poor: How the World's Poor Live on \$2 a Day* (2009) 15-18; Warburton *Debt and Delusion: Central Bank Follies that Threaten Economic Disaster* (1999) 73; Gupta “Key Barriers Faced in Implementing Financial Inclusion” 2015 *International Journal of Engineering Technology, Management and Applied Sciences* 171 171.

<sup>89</sup> Rutherford and Arora *The Poor and Their Money: Microfinance from a Twenty-First Century Consumer's Perspective* 2ed (2009) 7-12. The author establishes three ways of savings as “saving up” which refers to a normal saving for accumulation of a sum of money, “saving down” which refers to borrowing and repayment of loan, and “saving through” where a lump sum becomes

Although financial services such as savings and borrowings must be used simultaneously to manage cash flow on a day-to-day basis to ensure smooth consumption and assist consumers to cope with emergencies,<sup>90</sup> this study focuses only on access to BBAs as one of the essential basic financial services provided by banks. This approach is in line with South Africa's newly-introduced national FI policy. The approach adopted in the National Treasury's draft *An Inclusive Financial Sector for All* is also that,

[i]n South Africa the pathway to full financial inclusion begins with the acquisition of a basic bank account and is generally followed by credit, insurance (e.g. medical), and long-term savings in the form of retirement.<sup>91</sup>

Therefore, this research focuses on policy and regulatory frameworks that promote FI and access to BBAs in South Africa.

Thirdly, FI is largely defined with reference to access and the use of "formal" financial services. "Formal", in this context, refers to financial institutions that are regulated and supervised with reference to their deposit-taking functions; particularly banks. This study take cognisance of the feasibility of a number of financial institutions to provide access to financial services. A number of countries have established state banks as vehicles to promote FI.<sup>92</sup> A number of countries are also formulating regulations to reform informal rotational savings and credit associations into formal or semi-formal financial institutions.<sup>93</sup> Post offices have also become a vehicle to promote access to basic financial services such as basic bank accounts.<sup>94</sup> However, studies on the level of FI largely use terms such as "banked" or "underbanked" as yardsticks in determining the level of FI and the continuing relationship between mainstream banking

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available at some point during a series of savings, for instance, insurance cover. See also Collins *et al Portfolios of the Poor* (2009) 19.

<sup>90</sup> Collins *et al Portfolios of the Poor* (2009) 19.

<sup>91</sup> National Treasury Draft FI Policy (2020) 11.

<sup>92</sup> Visit <https://www.sbp.org.pk/finc/finc.asp> (accessed: 2022-10-12) for the State Bank of Pakistan and <https://www.onlinesbi.sbi/> (accessed: 2022-10-12) for the state bank of India.

<sup>93</sup> See, for instance, Microfinance Act 2018 of Tanzania, Microfinance Act 3 of 2013 of Zimbabwe, Microfinance Act 21 of 2010 of Malawi, Tier 4 Microfinance Institutions & Money Lenders Act 2016 of Uganda, See also Ha, Hoque, and Pathan "Regulation of Microfinance Institutions in Asia: A Comparative Analysis" 2008 4 *International Review of Business Research Papers* 421 for a number of countries in Asia.

<sup>94</sup> See Anson, Berthaud, Klapper, Singer "Financial Inclusion and the Role of the Post Office" (October 2013) *The World Bank Policy Research Working Paper 6630* <https://openknowledge.worldbank.org/bitstream/handle/10986/16882/WPS6630.pdf?sequence=1&isAllowed=y> (Accessed: 2022-10-13). Malakar "Role of Indian Post in Financial Inclusion" 2013 6 *IOSR Journal of Humanities And Social Science* 4.



institutions and low-income consumers.<sup>95</sup> Therefore, this research focuses on FI and access to and the use of financial services provided by formal institutions, and in particular, commercial banks as formal deposit-taking institutions.

Fourthly, the focus of this study to require commercial banks to promote FI takes into account a number of factors that affect the regulation of the financial sector. It takes into account that the banking sector worldwide is a highly regulated industry and banks always wish away any new regulations that may be costly and impact on the operations of their businesses.<sup>96</sup> As a result, this study has carefully adopted the RR theory and the PRS which begin with self-regulatory measures by the banking industry associations, and to escalate these measures to enforced-self regulation or command-and-control types of regulation only if they are not effective and responsive.<sup>97</sup> Also, based on the findings in this research, it does not propose new legislative measures to promote FI, but recommends improvements of the relevant current policy and legislative measures to make them effective and responsive to promote FI.

This research also takes cognisance that banks are generally private institutions that must conduct their businesses profitably for the benefit of shareholders.<sup>98</sup> As a result, this may raise a number of concerns whether banks are suitable vehicles to promote FI. A major concern is that, striving to promote access to financial services in compliance with FI policy and regulatory frameworks often runs counter to the need for banks to be profitable and to create value for their shareholders. This concern raises a question whether banks should focus specifically on shareholders or broadly on stakeholders, including their customers. More

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<sup>95</sup> Friedline and Rauktis "Young People Are the Front Lines of Financial Inclusion: A Review of 45 Years of Research" 2014 48 *The Journal of Consumer Affairs* 535 537. Cf Barman, Mathur, and Kalra "Role of Microfinance Interventions in Financial Inclusion: A Comparative Study of Microfinance Models" 2009 13 *The Journal of Business Perspective* 51; Milana and Ashta "Microfinance and Financial Inclusion: Challenges and Opportunities" 2020 29 *Strategic Change* 257.

<sup>96</sup> Prasad "Financial Sector Regulation and Reforms in Emerging Markets: An Overview" in Kawai and Prasad (eds) *Financial Market Regulation* (2011) 11, See also Alamaw S "The Effect of Bank regulation on The Banks' performance: A Literature Review Approach" 2020 8 *Global Scientists Journal* 1359.

<sup>97</sup> See Ch 3 below for the discussion of the RR theory and the pyramid of regulatory strategies.

<sup>98</sup> See Levine "The Corporate Governance of Banks: A Concise Discussion of Concepts and Evidence" (September 2004) *World Bank Policy Research Working Paper 3404* <https://openknowledge.worldbank.org/handle/10986/14239> (Accessed: 2022-10-14), on banks as corporate entities with shareholders. See also, Mülbart "Corporate Governance of Banks After the Financial Crisis - Theory, Evidence, Reforms" in Wymeersch, Hopt, and Ferrarini (eds) *Financial Regulation and Supervision: A Post-crisis Analysis* (2012) 342.

importantly, it raises the question whether promoting access to financial services for the poor or the low-income is profitable.

With regard to banks and companies generally to make business for the benefit of shareholders, the focus of any private companies for the benefit of its owners (shareholders) has dominated corporate governance discourses for many years. What is universally called the shareholder theory provides that companies are vehicles for conducting business in the interest shareholders.<sup>99</sup> The shareholder theory claims that the main objective of a company is to maximise profit for the benefit of shareholders, and its performance is measured by its shareholder value.<sup>100</sup> A paradigm shift has emerged that requires companies to adopt an integrated corporate governance strategy that is reinforced by a stakeholder model.<sup>101</sup> The governance framework of companies now requires them “to foster wealth-creating co-operation among stakeholders” by recognising the interests of all stakeholders and how they contribute to its long-term success.<sup>102</sup> The importance of this shift is that a company is consider a “social entity that has accountability and responsibility to a variety of stakeholders”, including shareholders themselves, customers, creditors, and the government.<sup>103</sup> According to the Basel Committee on Banking Supervision (BCBS), “[a]mong stakeholders, particularly with respect to retail banks, shareholders’ interest would be secondary to depositors’ interest”.<sup>104</sup> Therefore, companies such as banks are required to incorporate these integrated corporate governance values that maximise value and their performance for the “mutual benefit of shareholders and other potential stakeholders”.<sup>105</sup>

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<sup>99</sup> Carrillo “Corporate Governance: Shareholders’ Interests’ and Other Stakeholders’ Interests” 2007 4 *Corporate Ownership & Control* 96, See also Vasudev “The Stakeholder Principle, Corporate Governance, and Theory: Evidence From the Field and The Path Onward” 2012 41 *Hofstra Law Review* 399 401-402.

<sup>100</sup> Maher and Andersson “Corporate Governance: Effects On Firm Performance And Economic Growth” (1990 OECD <https://www.oecd.org/sti/ind/2090569.pdf> (Accessed 2022-10-14) 5.

<sup>101</sup> World Economic Forum “Integrated Corporate Governance: A Practical Guide to Stakeholder Capitalism for Boards of Directors” (June 2020) [https://www3.weforum.org/docs/WEF\\_Integrated\\_Corporate\\_Governance\\_2020.pdf](https://www3.weforum.org/docs/WEF_Integrated_Corporate_Governance_2020.pdf) (Accessed 2022-10-14).

<sup>102</sup> OECD “G20/OECD Principles of Corporate Governance” (2015) <http://dx.doi.org/10.1787/9789264236882-en> (Accessed: 2022-1014).

<sup>103</sup> Ntim “Defining Corporate Governance: Shareholder Versus Stakeholder Models” in Farazmand (ed) *Global Encyclopedia of Public Administration, Public Policy, and Governance* (2018) 1330.

<sup>104</sup> BCBS “Guidelines Corporate Governance Principles for Banks” (July 2015) <https://www.bis.org/bcbs/publ/d328.htm> (Accessed: 2022-10-14) 3. <https://www.bis.org/bcbs/publ/d328.htm> (Accessed: 2022-10-14).

<sup>105</sup> Ntim in Frazaman (ed) *Global Encyclopedia of Governance* (2018) 1330. See also He Di and Yao “Stakeholder Governance and the CSR of Banks: An Analysis of an Internal Governance

It remains debatable in the literature whether promoting FI is profitable for banks. The lack of unanimity about the profitability of FI initiatives derives from empirical studies that focus on either one type of product which banks develop or on different measurements of FI, rather than a combination of them.<sup>106</sup> One side of the argument sees the long-term profitability of FI on banks and the benefits of FI, but there is a concern about the short-term costs of providing the poor with financial services.<sup>107</sup> The literature has associated the profitability of FI on banks with their aggressiveness in pursuing FI policies and strategies.<sup>108</sup> Research that establishes the link between FI and profitability indicates how implementing measures in the FI legislation and policy is profitable in the long run. It is specifically established that making access to funds in the bank through a number of ATMs and bank branches, product quality, and the manner in which it is delivered, “such as the average cost of maintaining a bank’s current account” improve a banks’ profitability.<sup>109</sup> Researchers do not refute possible costs associated with promoting FI. It is identified that often banks struggle to achieve economies of scale and to drive down the average fixed financial infrastructure costs for the poor, particularly in areas dominated by the poor with low, average or insufficient incomes.<sup>110</sup> What is proposed to address this challenge is the need for “[r]egulatory frameworks to balance the benefits of regulation against its costs in order to allow sufficient room for innovation and avoid the unintended consequence of hindering financial inclusion”.<sup>111</sup> Therefore, adopting an integrated corporate governance framework and balancing the economies of scale between

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Mechanism Based on Game Theory” 2022 10 *Frontiers in Psychology* 1 3, who views is that “[t]he corporate governance of banks should adhere to the principle of “shared governance by stakeholders.” Through the joint participation of stakeholders including shareholders, employees, creditors, customers, and suppliers, the effective corporate governance can be formed, and the problem of information asymmetry in the original principal–agent relationship can be improved.

<sup>106</sup> Yakubu and Musah “The Nexus Between Financial Inclusion and Bank Profitability Dynamic Panel Approach” 2022 *Journal of Sustainable Finance & Investment* 1 3. See also Jajah and Anarfo “Financial Inclusion and Bank Profitability in Sub-Saharan Africa” 2022 27 *International Journal of Finance & Economics* 32 34. See further Sedera, Risfandy, and Putri “Financial Inclusion and Bank Profitability: Evidence from Indonesia” 2022 23 *Journal of Accounting and Investment* 398 409.

<sup>107</sup> Raj “Profitable Models of Financial Inclusion” 2012 *BANCON 2011 Selected Conference Papers* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2080845](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2080845) (Accessed: 2022-1014).

<sup>108</sup> Jajah and Anarfo 2022 *International Journal of Finance & Economics* 34.

<sup>109</sup> Khatib SFA, Hendrawaty E, Bazhair AH, Abu Rahma IA, and Al Amosh H “Financial Inclusion and the Performance of Banking Sector in Palestine” 2022 10 *Economies* 1 13.

<sup>110</sup> Markose S “Financial Inclusion, at What Cost?: Quantification of Economic Viability of a Supply-Side Roll Out” 2020 22 28 *European Journal of Finance* 3 22.

<sup>111</sup> De Sousa “Financial Inclusion and Global Regulatory Standards” (2015) *CIGI New Thinking and the New G20 Series Paper NO 7* [https://www.cigionline.org/sites/default/files/new\\_thinking\\_g20\\_no7.pdf](https://www.cigionline.org/sites/default/files/new_thinking_g20_no7.pdf) (accessed: 2017-11-01) 2.

possible benefits of FI on bank against infrastructural costs will go a long way to ensure that banks are suitable vehicles to promote FI.

The study is consequently restricted to the following critical aspects in addressing its main objectives:

- (a) The first key aspect of the study is to determine whether the current regulatory framework in South Africa is effective and responsive in promoting FI through access to BBAs. This research introduces Ayres and Braithwaite's RR theory and their seminal PRS to analyse critically whether this theory may be applied by regulators in the banking sector to promote FI by providing access to BBAs in South Africa.<sup>112</sup> This analysis serves two purposes. First, it attempts to address FI challenges with a possible shift away from the conventional command-and-control approach to regulation and purely social science research and policy analyses, with less emphasis on how the law may be implemented effectively and responsively to address these challenges.<sup>113</sup> Second, the analysis sets out from the premise that current policies and regulatory measures to prevent FE are ineffective. In this context, it looks at a possible move towards new regulatory approaches that accommodate the interests of stakeholders in various measures by applying the PRS introduced by Ayres and Braithwaite. The analysis generally questions whether direct regulation (through legislative measures) or self-regulation (through voluntary codes and sectoral charters), or both, will effectively address barriers to FI and prevent FE through access to BBAs.
- (b) The second aspect discusses a specific and narrow focus of this study. It critically analyses and evaluates the current policies and regulations that facilitate access to BBAs for low-income households in a formal financial system, particularly those provided by commercial banks as an institutions. The focus here is on evaluating the efficacy of extant laws and policies in improving the provision of BBAs to the low-income population. The study discusses the measures applied and specific regulatory bodies assigned by the regulatory measures to implement and enforce the relevant provisions.

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<sup>112</sup> Ayres and Braithwaite *Responsive Regulation* (1992).

<sup>113</sup> Kruger *Turning on the Townships: A Study of Discourses of Financial Inclusion in South Africa* (Unpublished PhD Thesis, University of the Witwatersrand, 2015). For other countries, see Morris *Financial Exclusion and Australian Domestic General Insurance: The Impact of Financial Services Reforms* (Unpublished PhD Thesis, University of Technology, Sydney, 2012).

The research specifically determines how these measures are implemented in addressing the following barriers to access to BBAs:

- (i) conventional bank account services, features, and fees;
- (ii) high minimum initial deposit requirements;
- (iii) minimum balance to maintain a current account;
- (v) high administrative costs, and fees;
- (vi) lack of migration to better services; and
- (vi) the documentary requirements as measures to protect financial services against the abuse for money-laundering and terrorist financing (ML and TF).

Defining the scope of research to promote FI also requires a specific focus on the choice from the existing myriad of regulatory frameworks and instruments. As outlined in Chapter three below, there is a competition between traditional financial sector regulatory objectives such as financial stability, financial integrity, consumer protection and FI. A responsive and effective regulatory framework for FI requires policymakers and regulators to strike a balance between these objectives. While these traditional objectives are important, a detailed analysis of them falls outside the scope of this research. They are referred to briefly only in so far as they are relevant to the promotion of FI and access to BBAs through the proposed I-SIP Methodology that requires the regulation of FI to also take into account the trade-offs between FI, financial stability, integrity and consumer protection.<sup>114</sup> Also, a discussion of a number of policy and legislative measures that have been introduced in South Africa over the years and which have played an important role in promoting FI and access to various financial services and products, also falls outside the scope of this research. These include the exemption in the Usury Act, the common bond regulations that made group-based savings and credit associations such as *stokvels* flourish, the Community Reinvestment (Housing) Bill, and the Dedicated Banks Bill. The discussion of the relevant policies such as *A Safer Financial Sector to Serve South Africa Better*, and *An Inclusive Financial Sector for All*, focuses specifically on the promotion of FI and the design of financial products and services, particularly BBAs.

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<sup>114</sup> See Ch 3.4.4 below.

This research also takes into account the lack of a specific financial consumer protection legislation in South Africa as in other countries.<sup>115</sup> The National Credit Act<sup>116</sup> (NCA) and the Consumer Protection Act<sup>117</sup> (CPA) are the main pieces of consumer protection legislation in South Africa. The NCA is limited to credit aspects of consumer protection. Therefore, the discussion of the NCA is limited to the introduction of the right to apply for credit. The CPA is a single, comprehensive legal framework that guarantees a market that is fair, accessible, efficient, sustainable, and responsible to consumers.<sup>118</sup> The CPA specifically aims to reduce the disadvantages that low-income consumers may experience “in accessing any supply of goods or services”.<sup>119</sup> “Services” is defined to include “any banking services, or related or similar financial services” that are not credit agreement,<sup>120</sup> financial advice,<sup>121</sup> or insurance”.<sup>122</sup> The discussion of the CPA falls outside the scope of this research for the following reasons. Although banking services are included in the definition of “services”, it has become clear with the introduction of the Financial Sector Regulation Act<sup>123</sup> (FSRA) that the CPA does not cover

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<sup>115</sup> See, eg, Financial Consumer Protection Act 6 of 2022 of Seychelles; Financial Consumer Protection Act 7 of 2022 of Lesotho; and Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 2 USC 5301 of the USA (“Dodd-Frank Act”).

<sup>116</sup> 34 of 2005.

<sup>117</sup> 6 of 2008.

<sup>118</sup> S 3(1)(a) of the CPA.

<sup>119</sup> S 3(1)(b) of the CPA.

<sup>120</sup> Under the NCA. See s 5(2)(d) of the CPA. See further Melville and Palmer “The Applicability of the Consumer Protection Act 2008 to Credit Agreements” 2010 22 *SA Merc LJ* 272. The exclusion covers transactions that constitute credit agreement but not the goods and services that are the subject of the agreement. For the discussion on the application of the CPA see The World Bank “Achieving Effective Financial Inclusion in South Africa” (Nd) par 85; Sharrock “Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act” 2010 22 *SA Merc LJ* 295 301. See further Van Eeden and Barnard *Consumer Protection Law in South Africa* 2nd ed (2017) 45; Lawack-Davids and Marx “Consumer Protection Measures for Erroneous or Unauthorized Internet Payments: Some Lessons from the European Union?” 2010 31 *Obiter* 446 456 who are of the view that “banking services” include credit cards and internet payments; Naude “The Protection of Low-income Consumers under the South African Consumer Protection Act 68 of 2008” 2010 4 *Journal of European Consumer and Market Law* 243 regarding the need to protect low-income consumers in relation to financial services. See further Itzikowitz and Gunning “The Application of the Consumer Protection Act to Open Banking” (2021-11-17) *Mondaq* <https://www.mondaq.com/southafrica/dodd-frank-consumer-protection-act/1130670/the-application-of-the-consumer-protection-act-to-open-banking> (accessed: 2022-06-10) who argue that the definition of “services” should be read to specifically exclude services provided by the supplier that constitute “advice” or “intermediary services” as defined in FAIS, or services regulated in terms of the insurance legislation. These services are regulated by their own legislation and not by the CPA. They argue, however, that the CPA applies to general banking products and services not regulated under the Financial Sector Conduct Authority legislation.

<sup>121</sup> In terms of the Financial Advisory and Intermediary Services Act 37 of 2002.

<sup>122</sup> Regulated in terms of both the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998.

<sup>123</sup> 9 of 2017.

general financial products and services. The FSRA specifically excludes the application of the CPA in relation to any function, act, transaction, financial product or service that is subject to financial sector law – such as the NCA, the National Payment System Act<sup>124</sup> and the Banks Act.<sup>125</sup> The research will therefore discuss relevant financial consumer protection measures that have been introduced in the FSRA briefly, particularly the measures to develop conduct standards within the treating customer fairly policy principles.

The research will also discuss the Financial Intelligence Centre Act (FICA), the Broad-Based Black Economic Empowerment Act (B-BBEE Act), including the Financial Sector Charter and the Financial Sector Code, the FSRA and the Conduct of Financial Institutions Bill (CoFI Bill). The discussion of these legislative measures will focus on the relevant provisions that promote FI and the design of financial services and products, including bank accounts that target low-income households. Therefore, a discussion of the broader goals of each policy and legislative measure also falls outside the scope of this research.

## **1.5 RESEARCH METHODOLOGY AND DATA COLLECTION**

The research adopts a desktop analysis of relevant books, journal articles, and other academic writings, court cases, legislative frameworks, periodicals, leading policy documents, as well as relevant Internet sources. The study extracts legal principles and issues from these sources and interprets and applies them to address the main objectives of this research.

This study does not take a comparative approach for several reasons. First, there are currently limited regulations and policies that deal specifically with FI in South Africa and many other developed and developing countries. The regulatory frameworks and policies available globally deal with different aspects of financial services that impact FI, such as savings and credit mobilisation. Second, South Africa is a member of a global village, such as the BCBS<sup>126</sup>

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<sup>124</sup> 78 of 1998.

<sup>125</sup> 94 of 1990. See Schedule 1 to the FRSA for legislations that are included in the list of financial sector law". See s 10 of the FSRA. Section 85(1) of the FSRA allows the Minister to request the Inter-Ministerial Council to consider whether the provision of the proposed or existing financial sector laws, including regulations may set standards and protection that is equequivalento or higher than the protection in the NCA and CPA.

<sup>126</sup> See Bank of International Settlement "Basel Committee Membership" (Nd) <http://www.bis.org/bcbs/membership.htm> (accessed: 2022-02-20).

and the Alliance for Financial Inclusion (AFI).<sup>127</sup> In addition, although aspects of access to financial services have been on the national agenda since the dawn of democracy, compared to other related jurisdictions that have either adopted one or more of the recognised frameworks that directly or indirectly promote FI, South Africa is still in its infancy in addressing the challenges raised by FE. For these reasons, the study critically analyses selected regulatory frameworks that are globally recognised or have served as benchmarks to promote FI and prevent FE. The research also uses the regulatory and policy frameworks in various countries which have introduced these frameworks to promote FI and to prevent FE to benchmark key regulatory aspects on which regulators need to focus to achieve these objectives. It also discusses examples of codes of banking practice and regulatory instruments in various countries which impose obligations on banks to provide access to BBAs. The discussion of regulatory and policy frameworks in various countries is necessary to identify deficiencies and offer possible solutions to the domestic regulatory problems in South Africa and recommend possible law reforms effectively and responsively to promote FI and access to BBAs.

## **1.6 OUTLINE OF THE STUDY**

The study is divided into seven chapters including this introduction and an overview of the study. The chapter outline is as follows:

**Chapter One:** *Introduction and Background.* This chapter introduces the study and offers a brief background to the problem. It also covers the study objectives and the research methodology. The chapter importantly outlines the scope and limits of the research, taking into account a myriad of areas, and the policy and regulatory approaches involved in promoting FI and preventing FE. It concludes with an overview of each chapter focusing on their specific objectives within the broader scheme of the research as a whole.

**Chapter Two:** *Financial Inclusion: A Conceptual Framework.* This chapter outlines different definitions and approaches to FI and FE. It traces the origin of initiatives for promoting FI from a microfinance movement focusing on *access*, to a broader approach that includes the

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<sup>127</sup> See Alliance for Financial Inclusion "Members" (Nd) <http://www.afi-global.org/members/> (accessed: 2022-02-20).



*usage* of financial services as an additional component to measure inclusion. It further discusses the narrow definitions that focus on credit as a financial service which low-income users need, to broader definitions that include other services such as savings, insurance, and remittance. Since FI policies serve as remedies for FE, this chapter also outlines different dimensions of FE. It further introduces different elements that have been proposed to define FI and the main aspects that must be included in a regulatory or policy framework for FI. It concludes by discussing different proposals for redefining FI, which focus on a broader look at FI through the lenses of social inclusion which measures FI with reference to the impact it has on poverty alleviation and improved economic growth. The main purpose of this chapter is to develop a definitional framework for FI which incorporates all the elements that policies and regulatory frameworks must include if they are to alleviate FE.

**Chapter Three: *Responsive and Effective Regulation.*** This chapter introduces and discusses the seminal Braithwaite and Ayres's RR theory and their PRS to establish the effectiveness and the responsiveness of different regulatory instruments – eg, direct legislation, voluntary codes of practice, or charters – that are in place to promote FI. A literal analysis of this theory paints a picture of adopting one type of regulatory instrument at a particular time while determining the effectiveness of available regulatory strategies. Chapter three further discusses the smart regulation and regulatory pluralism theories which have emerged as the progeny of the RR theory. These theories offer supplementary views, models, and interpretations, and refine and complement many of the RR theory's shortcomings focusing, in particular, on the pyramid and the presumed sequential and hierarchical application of the PRS. The chapter concludes with the discussion of traditional financial sector regulatory objectives that require policymakers and regulators to maximise their synergies and minimise possible trade-offs with the promotion of FI, as an additional step to promote effective and responsive regulation of FI. The purpose of this discussion is to highlight how regulators may apply one or various regulatory instruments effectively and responsively to promote FI.

**Chapter Four: *International, Continental, and Regional Regulatory Frameworks.*** This chapter introduces international, continental, and regional commitments to FI. It analyses different policies, principles, and guidelines formulated by various global standard-setting bodies (GSSBs) such as the World Bank, the G20, and the AFI to provide policy and regulatory approaches to promote FI. It also discusses FI measures that have been introduced at the continental level. This chapter discusses the FI measures introduced by the European Union

(EU) in the Payment Accounts Directives (PAD) to benchmark regulatory measures for FI at this level. It also considers the policy measures developed by the African Union (AU) to promote FI on the African continent. It concludes by discussing the FI policy and regulatory measures of the SADC as one of the regional economic communities. The purpose of this chapter is to determine whether there are existing regulatory measures at the international, continental, and regional levels to promote FI and access to basic banking accounts (BBAs). The chapter concludes with a discussion of the general approaches to FI regulation at these levels and determines how any extant measures at these levels influence this regulation at the national level.

**Chapter Five:** Chapter five examines *National Regulatory Frameworks* on FI. It traces various policies and regulatory frameworks in different countries that promote FI and prevent FE. In the absence of a specific international framework that guides national frameworks, this chapter uses selected regulatory frameworks in different countries to benchmark the regulation of FI in South Africa. It begins by discussing regulatory frameworks in various countries that promote FI through voluntary self-regulatory measures. It first considers different codes of banking practice that are purely voluntary and have no enforcement mechanisms. It also discusses codes of banking practice and charters in different countries that have enforcement mechanisms. In this regard, it analyses the Australian Code of Banking Practice,<sup>128</sup> the Indian Code of Bank's Commitment to Customers,<sup>129</sup> and the UK's Good Banking: Code of Practice to be Observed by Banks, Building Societies, and Card Issuers in their Relations with Personal Customers. It focuses on these instruments to illustrate how to promote FI through voluntary self-regulatory measures that provide for compliance and enforcement mechanisms. This chapter analyses measures applied by the monitoring and compliance institutions, such as the UK's Banking Code Standard Board (BCSB), the Australian Securities and Investment Commission (ASIC), the Banking Code Compliance Committee (BCCC) in Australia, and the Banking Code and Standard Board of India. It further examines a selection of legislative measures that promote FI and access to basic bank accounts. With regard to legislative measures, it begins with measures that mandate access to BBAs. It traces these legislative frameworks from the Banks Acts of Canada and France and the Payment

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<sup>128</sup> Australian Banking Association "Banking Code of Practice" (2019) <https://bankingcode.org.au/app/uploads/2019/07/Banking-Code-of-Practice-2019.pdf> (accessed: 2019-07-17).

<sup>129</sup> Banking Codes and Standards Board of India (BCSBI) "Code of Bank's Commitment to Customers" (2018) <http://www.bcsbi.org.in/Pdf/CBCC2018.pdf> (accessed: 2019-03-04).

Accounts Regulations of the UK and Ireland. It also analyses different mechanisms in place to enforce compliance with these measures. It concludes by discussing the disclosure requirements under the Community Reinvestment Act of 1977 (CRA) of the United States of America. It analyses how this Act is applied to promote FI and access to retail financial services and products such as BBAs, through the service test, as part of its broader aim of eradicating redlining and prohibiting discriminatory practices by financial institutions in the allocation of financial services such as credit and other retail financial services that are suitable for low-income households. It also analyses the relevant enforcement mechanisms that the CRA applies such as performance rating on banks, and the reporting and disclosure of such performance as a measure to improve the effectiveness of the banks' duty to provide access to financial services.

**Chapter Six:** This chapter focuses on *Financial Inclusion and Access to Basic Banking in South Africa*. The chapter builds on the discussion in Chapters four and five concerning the general approaches to FI frameworks at international, regional, and national levels. This chapter focuses on the specific policy and legal frameworks that promote FI and access to BBAs in South Africa. The chapter is divided into different sections. The first section begins with a discussion of policies on FI. It discusses the problem of FE and various regulatory measures that have been adopted to promote FI in South Africa pre- and post the democratic dispensation. It also examines various measures introduced by government in the post-apartheid era. Various policy documents such as *A Safer Financial Sector to Serve South Africa Better*<sup>130</sup> and the recent *An Inclusive Financial Sector for All* issued by National Treasury are also considered.<sup>131</sup> The chapter also discusses voluntary regulatory measures such as the Financial Service Charter<sup>132</sup> and the Financial Sector Code which facilitate access to "first order retail products and services" such as savings accounts.<sup>133</sup> This chapter further considers the

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<sup>130</sup> National Treasury "A Safer Financial Sector to Serve South Africa Better" (2011) <http://www.treasury.gov.za/documents/national%20budget/2011/a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf> (accessed: 2022-04-05) 8 ("National Treasury "The Red Book" (2011)").

<sup>131</sup> National Treasury Draft FI Policy (2020).

<sup>132</sup> National Treasury "Financial Service Charter" (2002) [www.treasury.gov.za/comm\\_media/press/2003/2003101701.pdf](http://www.treasury.gov.za/comm_media/press/2003/2003101701.pdf) (accessed: 2017-10-07) ("National Treasury Financial Service Charter" or "FS Charter"); Department of Trade, Industry and Competition "Financial Sector Code for Black Economic Empowerment" GN 35914 in GG of 2012-11-26 ("FS Code"); Department of Trade, Industry and Competition "Draft Amended Financial Services Sector Code" GN 257 in GG 39818 of 2016-03-17 ("Amended FS Code").

<sup>133</sup> FS Charter par 8.1.

legislative measures such as Banks Act,<sup>134</sup> the Broad-based Black Economic Empowerment Act (B-BBEE Act),<sup>135</sup> the Financial Intelligence Centre Act (FICA),<sup>136</sup> the National Credit Act (NCA),<sup>137</sup> the Financial Sector Regulation Act (FSRA),<sup>138</sup> and the CoFI Bill and how they promote FI in South Africa. With regard to FICA, the discussion focuses on the KYC provisions in terms of the regulations<sup>139</sup> as well as specific exemptions under the Act.<sup>140</sup> The focus on FICA is on the effects of documentary requirements on access to BBAs for low-income households. This chapter also discusses the FSRA and the CoFI Bill and how they promote FI as their main objective in regulating financial market conduct and ensuring the safety and soundness of the financial system through a Twin-Peaks model.

The second part of this chapter addresses access to BBAs. It looks at the traditional bank accounts and starts with an outline of savings as one of the services provided by banks. It outlines the types and main features of existing savings products such as current (or cheque) accounts with specific focus on the challenges experienced by the low-income households in accessing these products. It considers the basic requirements that customers must satisfy when applying for them such as a minimum initial deposit, maintenance of a minimum balance, and the documents required for the identification and verification of identity. This chapter then outlines the meaning of a BBA and examines the main features of a BBA that have been introduced by the market so as to identify key features which may promote access to BBAs. The policy and regulatory frameworks for BBAs in South Africa follow the conceptual discussion to establish whether this framework effectively regulates BBAs with key features to promote access. The chapter concludes with an analysis of the policy and regulatory frameworks for FI and access to a BBA in South Africa and assesses whether they are effectively regulated by the current measures.

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<sup>134</sup> 90 of 1990.

<sup>135</sup> 53 of 2003.

<sup>136</sup> 38 of 2001.

<sup>137</sup> 34 of 2005.

<sup>138</sup> 9 of 2017.

<sup>139</sup> National Treasury "Regulations in terms of The Financial Intelligence Centre Act, 2001" GN R1595 in *RG* 7541 of 2002-12-20.

<sup>140</sup> National Treasury "General Exemptions in Terms of Financial Intelligence Centre Act, 2001 (Act 38 of 2001)" GN R1353 in *GG* 27011 of 2004-11-19 ("FIC Exemption 17"). See also National Treasury "Exemption in Terms of Financial Intelligence Centre Act, 2001 (Act 38 of 2001) GN R454 in *GG* 33211 of 2010-05-28.

**Chapter Seven:** This chapter concludes this research under the head *Conclusion and Recommendations*. It revisits the main objectives of the thesis as discussed in detail in the preceding chapters. On the strength of the study of South African policies and legal frameworks discussed in Chapter six, this chapter evaluates the frameworks for FI and access to BBAs and recommends how South Africa can address possible regulatory gaps in its efforts to promote access to BBAs. These recommendations are guided by the application of Ayres and Braithwaite's responsive regulation theory and enforcement pyramid, introduced and discussed in Chapter three. This theory is applied to test the effectiveness of the current legislative and policy frameworks in promoting the inclusion of low-income households in the BBAs offered by banks as licensed deposit-taking institutions.

The next chapter discusses FI and how the concept has developed to include different types of product, dimensions, services products, and the relevant targets of inclusion. It further discusses key dimensions of the problem of FE, and the need to reconceptualise FI to determine the impact that it has on society and how it should be used as a tool for economic growth. The chapter discusses these aspects to identify a functional definition that must inform policy and regulatory frameworks to promote FI.

## CHAPTER TWO: FINANCIAL INCLUSION: A CONCEPTUAL FRAMEWORK

*In many respects, the rhetorical battle to acknowledge that certain groups are consistently and persistently excluded from the development process has been won, but the war to bring a greater sense of conceptual and empirical rigour to these debates are far from over.*

**Woolcock in Alsop (ed) *Power, Rights, and Poverty: Concepts and Connections* (2005)<sup>141</sup>**

### 2.1 INTRODUCTION

This chapter discusses “financial inclusion” and its antithesis “financial exclusion” (FI and FE) as key concepts that inform many policy and regulatory frameworks to address the multifaceted problems associated with lack of access to and use of financial services. It analyses these concepts as adopted and implemented by different institutional, legal, and policy measures to differentiate between who does or does not have the privilege of accessing and using certain financial services. The purpose of this chapter is critically to discuss the development of FI as a policy and regulatory priority to eradicate FE. The discussion of these concepts serves many purposes. First, the definition of FI is important in informing the regulatory framework suitable for addressing the challenges of FE.<sup>142</sup> This definition is also important in reforming policies and regulatory frameworks and for translating it into an operational concept to measure the progress and outcomes of such reforms.<sup>143</sup> The AFI has established a correlation between defining FI and setting appropriate policies and regulations to increase FI.<sup>144</sup> Defining FI is therefore important for setting benchmarks against which

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<sup>141</sup> Woolcock “Empowerment at the Local Level: Issues, Responses, Assessments” in Alsop *Power, Rights, and Poverty: Concepts and Connections* (2004) 112.

<sup>142</sup> Alliance for Financial Inclusion “Defining and Measuring Financial Inclusion” in Triki and Faye (eds) *Financial Inclusion in Africa* (2013) 32.

<sup>143</sup> Aduda and Kalunda “Financial Inclusion and Financial Sector Stability With Reference to Kenya: A Review of Literature” 2012 2 *Journal of Applied Finance & Banking* 95 99.

<sup>144</sup> Alliance for Financial Inclusion “Financial Inclusion Measurement for Regulators: Survey Design and Implementation” (2010) [https://www.afi-global.org/sites/default/files/afi\\_policypaperdata\\_measurement\\_en.pdf](https://www.afi-global.org/sites/default/files/afi_policypaperdata_measurement_en.pdf) (accessed: 2018-03-06) 1. AFI is a network of FI policymakers comprising central banks and other financial regulatory institutions from developing countries, visit <https://www.afi-global.org/about-us> (accessed: 2017-11-20). South Africa is a member of AFI through the National Treasury and South African Reserve Bank, as a principal member and associate member, respectively, [https://www.afi-global.org/sites/default/files/inlinefiles/AFI%20Official%20Members\\_9%20April%202018.pdf](https://www.afi-global.org/sites/default/files/inlinefiles/AFI%20Official%20Members_9%20April%202018.pdf) (accessed: 2018-06-05).

policy and regulatory frameworks are developed and monitored.<sup>145</sup> Second, FI is context-specific and FI practices and initiatives vary from one country to another. Regulatory frameworks for addressing the problem of FE, therefore, consider the country's financial, social, economic, political, and legal contexts.<sup>146</sup> As indicated in the Consultative Group to Assist the Poor's (CGAP) Guideline Statements, "[a] clear definitional framework for financial inclusion that includes definitions at the national, policy and product levels is needed to establish priorities, to avoid both irresponsible and misguided inclusion, and to measure progress".<sup>147</sup> A misguided inclusion is possible in cases where a regulatory framework towards FI fails to determine the interrelation of various objectives with similar terms such as "inclusive growth,"<sup>148</sup> and "financial deepening".<sup>149</sup> Thirdly, the definitions of FI and FE are further important to bridge a long-standing position of adopting a narrow approach to FI that originated from the first definition by Leyshon and Thrift.<sup>150</sup> These authors defined FE as "those processes that serve to prevent certain social groups and individuals from gaining

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<sup>145</sup> AFI "Financial Inclusion Measurement for Regulators" (2010) 1.

<sup>146</sup> De Sousa "FI and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper NO 7* 10.

<sup>147</sup> Consultative Group to Assist the Poor "Financial Inclusion and the Linkage to Stability, Integrity, and Protection: Insights From South Africa Perspective (2012) <https://openknowledge.worldbank.org/bitstream/handle/10986/13095/75157020120CGA0Box374307B00PUBLIC0.pdf?sequence=1&isAllowed=y> (accessed: 2017-11-27) 6.

<sup>148</sup> Inclusive growth is a wide policy objective that targets both public and businesses for economic developments and poverty alleviation. FI policies are narrowly focused initiatives to promote inclusive growth. Financial inclusion is, however, one of the main facets of inclusive growth. See George, McGahan, and Prabhu "Innovation for Inclusive Growth: Towards a Theoretical Framework and a Research Agenda" 2012 49 *Journal of Management Studies* 661. See further Swamy "Financial Inclusion, Gender Dimension, and Economic Impact on Poor Households" 2014 56 *World Development* 1; Chibba "Perspectives on Inclusive Development Concepts, Approaches and Current Issues" 2008 9 *World Economics* 145.

<sup>149</sup> Financial deepening shares many similarities with FI policies. Financial deepening is defined broadly as the increase in the supply of financial assets in the economy. It is related to FI policy as it requires financial institutions both in the formal and informal sectors to mobilise access to financial savings and investments. See Shaw *Financial Deepening in Economic Development* (1973). See further Mohan "Economic Growth, Financial Deepening, and Financial Inclusion" Paper Presented at the Annual Bankers' Conference, Hyderabad (2 November 2006); Olawumi, Lateef, and Oladeji "Financial Deepening and Bank Performance: A Case Study of Selected Commercial Banks in Nigeria" 2017 7 *Journal of Mathematical Finance* 519 523; Iyoboyi "Bank and Non-Bank Financial Deepening and Economic Growth: The Nigerian Experience (1981–2010)" 2013 42 *Economic Notes* 247.

<sup>150</sup> Leyshon and Thrift "Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States" 1995 20 *Transactions of the Institute of British Geographers* 315 312. See also Leyshon "Geographies of Money and Finance I" 1995 19 *Progress in Human Geography* 531; Wentzela, Diathab, and Yadavallie "An Investigation into Factors Impacting Financial Exclusion at the Bottom of the Pyramid in South Africa" (2016) 33 *Development Southern Africa* 203 23. See Salignac, Muir and Wong "Are you Really Financially Excluded if You Choose not to be Included? Insights from Social Exclusion, Resilience and Ecological Systems" 2016 45 *JSP* 269.

access to the financial system” and thus paying attention to the geographical access to financial services.<sup>151</sup> With the focus on access, the availability of financial services from the supplier when demanded was the determinant of FI, and the exclusion from financial services was determined on an in-or-out basis.<sup>152</sup> Product ownership and access served as important indicators for determining FI irrespective of whether FI is improving or declining.<sup>153</sup> Many definitions thereafter followed this narrow approach by focusing either on limited groups of

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<sup>151</sup> Leyshon and Thrift 1995 *Transactions of the Institute of British Geographers* (emphasis added). There are a lot of similar definitions in the literature that still follow this approach. See, for instance, Sinclair “Financial Exclusion: An Introductory Survey” (2001) *Report of Centre for Research in Socially Inclusive Services* [https://s3.amazonaws.com/academia.edu.documents/33733104/Financial\\_Exclusion\\_An\\_Introductory\\_Survey.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1528225321&Signature=vA5NJBdfnjpesqDDJFpT7g8KTNs%3D&response-contentdisposition=inline%3B%20filename%3DFinancial\\_Exclusion\\_An\\_Introductory\\_Surv.pdf](https://s3.amazonaws.com/academia.edu.documents/33733104/Financial_Exclusion_An_Introductory_Survey.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1528225321&Signature=vA5NJBdfnjpesqDDJFpT7g8KTNs%3D&response-contentdisposition=inline%3B%20filename%3DFinancial_Exclusion_An_Introductory_Surv.pdf) (accessed: 2017-11-06) 4 (emphasis added), who defines financial exclusion as “the inability to *access* essential financial services in a form appropriate to the needs and circumstances of customers”. Cf Sinclair “Financial Inclusion and Social Financialisation: Britain in a European Context” 2012 33 *IJSSP* 658, where the author has provided a broad definition that focuses on access and usage of financial services. See also Sharma “Nexus Between Financial Inclusion and Economic Growth Evidence from the Emerging Indian Economy” 2016 8 *Journal of Financial Economic Policy* 13 15: “In simple words, it is about ensuring that everyone has the opportunity to access the financial services products needed to participate fully in modern-day society and the economy”; Loureiro and Gonzalez “Competition Against Common Sense: Insights on Peer-To-Peer Lending as a Tool to Allay Financial Exclusion” 2015 33 *IJBM* 605. See further European Parliament: Directorate-General for Internal Policies “Basic Banking Services” (2011) *Briefing Paper P/A/IMCO/NT/2011-16 Nov PE 464.458*. [https://www.europarl.europa.eu/RegData/etudes/note/join/2011/464458/IPOL-IMCO\\_NT\(2011\)464458\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2011/464458/IPOL-IMCO_NT(2011)464458_EN.pdf) (accessed: 2017-05-06) 18 (“EU DG Basic Banking Services” (2011) which defines FI along this narrow line as “ensuring that everyone has the opportunity to *access* the financial services products needed to participate fully in modern-day society and the economy” (italic emphasis added). Cf European Commission “Financial Services Provision and Prevention of Financial Exclusion European” (2008) <https://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0807.pdf> (accessed: 2018-02-20), where FI is defined in much broader terms to include usage as an added yardstick (“ECom “Financial Services Provision” (2008)”).

<sup>152</sup> Kumar *Financial Exclusion Among the Scheduled Tribes: A Study of Wayanad District in Kerala* (Unpublished Ph D Thesis, Mahatma Gandhi University, 2013) 39. See also Sain, Rahman, and Khanam “Financial Exclusion in Australia: An Exploratory Case Study of the Muslim Community”, Paper Presented at the 3rd Malaysian Postgraduate Conference Sydney, Australia (4-5 July 2013) 226. See further Manji “Eliminating Poverty? ‘Financial Inclusion’, Access to Land, and Gender Equality in International Development” 2010 73 *The Modern Law Review* 985 992.

<sup>153</sup> See Demirgüç-Kunt *et al* “The Global Findex Database 2014” (2015) 17-33. See also Cheston, Conde, Byreke, and Rhyne “The Business of Financial Inclusion: Insights from Banks in Emerging Markets” (2016) *IIF & CFI* [www.centerforfinancialinclusion.org/storage/documents/IIF\\_CFI\\_Report\\_FINAL.pdf](http://www.centerforfinancialinclusion.org/storage/documents/IIF_CFI_Report_FINAL.pdf) (accessed: 2017-05-06) 12; Sarma and Pais “Financial Inclusion and Development” 2011 23 *JID* 613 614; Demirgüç-Kunt and Klapper 2013 *Brookings Papers on Economic Activity* 283, Centre for Social Impact for National Australia Bank “Measuring Financial Exclusion in Australia”(2011) [http://www.csi.edu.au/media/uploads/Measuring\\_Financial\\_Exclusion\\_in\\_Australia\\_-\\_May\\_2012.pdf](http://www.csi.edu.au/media/uploads/Measuring_Financial_Exclusion_in_Australia_-_May_2012.pdf) (accessed: 2017-10-25) 9; Cnaan, Moodithaya and Handy “Financial Inclusion: Lessons From Rural South India” 2012 41 *JSP* 183 187; Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 106.



people as targets of FI,<sup>154</sup> specific products or services that are provided by financial institutions such as credit,<sup>155</sup> on the particular types of exclusions,<sup>156</sup> on one indicator of FI,<sup>157</sup> on the types of institution that provide financial services, or only on price and cost-related barriers to FI.<sup>158</sup> As discussed in 2.3 below, all these elements are important for an effective

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<sup>154</sup> Gupta 2015 *IJETMAS* 171.

<sup>155</sup> Rangarajan *Indian Monetary Policy, Financial Stability and Other Essays* (2009) 307. See also Demirgüç-Kunt and Klapper 2013 *Brookings Papers on Economic Activity* 279-340; De Sousa "FI and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper NO 7 2*; The Banking Association of South Africa "Working Definition of Financial Inclusion" (Nd) <http://www.banking.org.za/what-we-do/overview/working-definition-of-financial-inclusion> (accessed: 2018-02-22). See further Stein, Randhawa and Bilandzic "Toward Universal Access: Addressing the Global Challenge of Financial Inclusion" in Fardoust, Kim, and Sepúlveda *Postcrisis Growth and Development: A Development Agenda for the G-20* (2011) 445, who refer to the early "microcredit-only approach" that derives from the evolution of FI from microfinance movements that originated from the assumption that the poor require small amounts of credit for promoting self-employment and economic growth through microfinance systems. See Helm *Access for All: Building Inclusive Financial Systems* (2006) 17; Joshi and Kohli "Financial Inclusion and Its Impact in India: A Must for Sustainable Development" 2017 37 *Vinimaya* 26 26, who identify a definition of FI that focuses on credit as a poor definition. Many definitions in the literature and policy documents specifically mention access to credit as one of the financial services. Therefore, it is argued that these types of definition do not take credit as the only financial service but focus more attention on credit among other services. For examples of these types of definition see Howell "National Consumer Credit Laws, Financial Exclusion and Interest Rate Caps: The Case for Diversity Within a Centralised Framework" 2009 17 *Competition and Consumer Law Journal* 212 214, who defines FE as the "lack of access by certain consumers to...financial products and services from mainstream providers, and the particular concern is of access to small loans"; Rangarajan "Report of the Committee on Financial Inclusion" (2008) <https://www.sidbi.in/files/Rangarajan-Committee-report-on-Financial-Inclusion.pdf> (accessed: 2017-11-30) 1, defining FI as "the process of ensuring access to financial services and timely and *adequate credit* where needed by vulnerable groups such as weaker sections and low-income groups at an affordable cost".

<sup>156</sup> See, for instance, Salignac *et al* 2016 *JSP* 269. See also Rangarajan *Indian Monetary Policy* (2009) 307; Bhowmik and Saha *Financial Inclusion of the Marginalised: Street Vendors in the Urban Economy* (2013) 3; Demirgüç-Kunt and Klapper 2013 *Brookings Papers on Economic Activity* 283, who either focused on the demand barriers associated with the availability of financial products and services, therefore turning a blind eye to the importance of both the demand and supply barriers.

<sup>157</sup> See, for instance, Leyshon and Thrift 1995 *Transactions of the Institute of British Geographers* 315. See also Shetty and Pinto "Financial Exclusion: Concept, Causes & Consequences: A Tri-Dimensional Literature Analysis" 2015 4 *IJAFMP* 1605 1606; Beck, Demirgüç-Kunt and Peria "Banking Services for Everyone? Barriers to Bank Access and Use Around the World" 2008 22 *The World Bank Economic Review* 397. See further European Commission "Financial Services Provision" (2008) 14; Amidžić, Massara and Mialou "Assessing Countries' Financial Inclusion Standing - A New Composite Index" (2014) *IMF Working Paper WP/14/36* <https://www.imf.org/external/pubs/ft/wp/2014/wp1436.pdf> (accessed: 2018-02-20) 9 who focus on the geographical aspects and "access" to financial services as the main indicators of inclusion. The geographical aspects of FI derive from the period of restricted physical access to banking services because of the closure of bank branches in the United Kingdom.

<sup>158</sup> Beck "Financial Inclusion – Measuring Progress and Progress in Measuring" (2016) [https://www.imf.org/external/np/seminars/eng/2016/statsforum/pdf/beck\\_paper.pdf](https://www.imf.org/external/np/seminars/eng/2016/statsforum/pdf/beck_paper.pdf) (accessed: 2018-04-10) 2. See also Aduda and Kalunda 2012 *Journal of Applied Finance &*

and responsive policy and regulatory framework for FI. This chapter, therefore, discusses how the definitions of FI and FE have evolved into a broad approach. Some definitions are wide and support a “universal access” or “full financial inclusion” as the main indicators of FI,<sup>159</sup> include additional indicators of FI,<sup>160</sup> or refer to a broad range of financial services.<sup>161</sup> The chapter further illustrates the importance of adding the impact of FI on the social welfare of societies as an additional element in the definition. Lastly, these definitions are important given the evolving international standards such as those of the G20,<sup>162</sup> the Bank of International Settlement, AFI, and the World Bank, and their effect on FI policies and legal frameworks. These standards were developed to provide global financial policy and regulatory frameworks with a specific focus on the most essential targets, objectives, features, and relevant indicators of FI. They also exist to enable regulators to implement relevant reforms that will promote new products and institutional innovation, as well as to eliminate barriers to these innovations.<sup>163</sup> Therefore, this chapter uses examples of various definitions to illustrate important features that help to construct a responsive and operational definition that reflects the specific national context.

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- Banking* 96; Beck and De La Torre “The Basic Analytics of Access to Financial Services” 2007 16 *FMII* 79; Rai, Ananth and Mor “Universalizing Complete Access to Finance: Key Conceptual Issues” in Kawai and Prasad (eds) *Financial Market Regulation* (2011) 267.
- <sup>159</sup> Gupta 2015 *IJETMAS* 171. See also The ATM Industry Association “Access To Cash: The First Step Toward Financial Inclusion” (2017) <http://www.cashrepository.com/wp-content/uploads/2017/04/Cash-and-Financial-Inclusion-31-MAR-2017.pdf> (accessed: 2018-04-05); Howell and Wilson “Access to Consumer Credit: The Problem of Financial Exclusion in Australia and the Current Regulatory Framework” 2005 5 *Macquarie Law Journal* 127 148; Gardeva and Rhyne “Opportunities and Obstacles to Financial Inclusion” (2011) *Centre For Financial Inclusion at Accion International Survey Report*.
- <sup>160</sup> Arun and Kamath “Financial Inclusion: Policies and Practices” 2015 27 *IIMB Management Review* 267.
- <sup>161</sup> Prabhakar “Financial Inclusion: A Tale of Two Literatures” 2018 18 *Social Policy & Society* 1 11. See also Molyneux “What Are the Specific Economic Gains From Improved Financial Inclusion? A Tentative Methodology for Estimating these Gains” in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 192. See also Brennan *The Changing Landscape of Financial Services in Manitoba: A Location Analysis of Payday Lenders, Banks and Credit Unions* (Unpublished PhD Thesis, The University of Manitoba, 2012) 9, who defines it as “the inability (however brought about) of some individuals or societal groups to access the financial system”.
- <sup>162</sup> The G20 or Group of Twenty is an international forum of different governments and central banks for the development of economic policies. See <http://www.oecd.org/g20/> (accessed: 2017-11-20).
- <sup>163</sup> Douglas and Ortega “Financial Inclusion Strategies: Reference Framework” (2012) <http://documents.worldbank.org/curated/en/801151468152092070/Financial-inclusion-strategies-reference-framework> (accessed: 2017-12-04). See also Gust “Financial Inclusion” 2017 2 *The Journal Contemporary Economy* 5; De Sousa “FI and Global Regulatory Standards” (2015) *CIGI New Thinking and the New G20 Series Paper No 7*.

## 2.2 CHALLENGES IN DEFINING FINANCIAL INCLUSION AND EXCLUSION

Defining FI or FE comes with many challenges. There are no universally accepted definitions of these concepts. Existing literature and global standard-setting bodies (GSSBs) commonly use these concepts interchangeably and discuss FI extensively from the perspective of the problem of FE. Policy and research documents use various catchphrases such as “banking the unbanked”, and “access to banking or financial services” to address various aspects of FI and FE. The literature also widely agrees that these concepts are multidimensional and involve a variety of possible financial services, products, and systems that must be available to society, as well as different dimensions, components, and indicators of such availability.<sup>164</sup> FI and FE are defined by many different products and services, as well as different types of financial service provider. As a result, far broader definitions have gradually been adopted to provide a wider ambit for the definition. With a broad approach, access and geographical aspects are no longer the predominant indicators of FI. Similarly, the literature has shifted from defining FI by reference to the availability of one or few specified financial products such as credit. Also, these concepts are frequently defined with reference to country-specific problems and related socio-economic conditions.<sup>165</sup> As discussed further in 2.4 below, the literature proposes other elements for determining the main objectives of FI. There is a proposal for an additional focus on the impact of FI. This proposal is aimed at ensuring that policies and regulatory frameworks are not in place purely for inclusion’s sake, but for broader objectives of making a social impact, alleviating poverty and income inequality, and enhancing economic growth.

## 2.3 IMPORTANT ELEMENTS OF THE DEFINITION

The existing approaches to the definitions of FI and FE, as highlighted in 2.1 above, are useful for policymakers and regulators in identifying exclusions experienced in different national

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<sup>164</sup> World Bank “Financial Inclusion” (2014) Global Financial Development Report [http://Siteresources.Worldbank.Org/Extglobalfinreport/Resources/8816096-1361888425203/9062080-1364927957721/Gfdr-2014 Complete Report.pdf](http://Siteresources.Worldbank.Org/Extglobalfinreport/Resources/8816096-1361888425203/9062080-1364927957721/Gfdr-2014%20Complete%20Report.pdf) (accessed: 2018-02-10) 15. See also Roa “Financial Inclusion in Latin America and The Caribbean: Access, Usage And Quality” (2015) *Center For Latin American Monetary Studies Research Paper 19* <http://www.cemla.org/PDF/investigacion/inv-2015-04-19.pdf> (accessed: 2018-02-14) 6; AFI “Financial Inclusion Measurement For Regulators” (2010) 04; Sarma and Pais 2011 *JID* 614.

<sup>165</sup> Swamy 2010 *Bank and Banks Systems* 64. See also, Fungáčová and Weill “Understanding Financial Inclusion in China” 2015 34 *China Economic Review* 196; Yadav and Sharma “Financial Inclusion in India: An Application of TOPSIS” 2016 32 *Humanomics* 328.

contexts. They, however, do not provide guidance on how they should be defined within the context of a particular community, the degree of inclusion that must be satisfied, the types of financial services that are important, or the type of providers required to offer these services.<sup>166</sup> With the challenge of adopting universal definitions of FI and FE, the guidelines developed by AFI are useful in formulating clear and concise definitions that may be used for effective FI instruments.<sup>167</sup> AFI identifies specific elements that require answers to a specific set of questions that must be asked in drafting the definition of FI. According to the AFI, this guideline requires a consideration of the national context.<sup>168</sup> These questions are:

- (a) Which are the most relevant dimensions by which to measure financial and exclusion?
- (b) Which types of financial service should be included?
- (c) What target groups/income levels apply?
- (d) Which providers should deliver services?

The discussion below looks at the theoretical debate relating to each of these elements.

### **2.3.1 Relevant Dimensions: Access and Usage**

As highlighted in 2.1 and 2.2 above, access to financial products and services is often used as a yardstick to measure FI and FE. The availability of financial services and contact between people and financial institutions determine access.<sup>169</sup> The availability of these institutions as

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<sup>166</sup> Chant Link and Associates "A Report on Financial Exclusion in Australia" (2004) <https://www.anz.com/resources/b/9/b9d9e5004f1d3eb8a57cb558b54e5b8d/Financial-Exclusion-Final-Report.pdf?MOD=AJPERES> (accessed: 2017-06-26) 38.

<sup>167</sup> Alliance for Financial Inclusion "Defining Financial Inclusion" (2017) *Guideline Note No 28* [https://www.afi-global.org/sites/default/files/publications/2017-07/FIS\\_GN\\_28\\_AW\\_digital.pdf](https://www.afi-global.org/sites/default/files/publications/2017-07/FIS_GN_28_AW_digital.pdf) (accessed: 2017-11-26) 2. See also The World Bank "Indicators of Financial Access Household-Level Surveys" (Nd) [http://siteresources.worldbank.org/FINANCIALSECTOR/5399141118439900885/20700929/Indicators\\_of\\_Financial\\_Access\\_Household\\_Level\\_Surveys.pdf](http://siteresources.worldbank.org/FINANCIALSECTOR/5399141118439900885/20700929/Indicators_of_Financial_Access_Household_Level_Surveys.pdf) (accessed: 2018-02-18).

<sup>168</sup> AFI "Defining Financial Inclusion" (2017) *Guideline Note No 28* as a guideline for drafting an FI definition. See also The World Bank "Template for the Design of a National Financial Inclusion Strategy" (2016) <http://pubdocs.worldbank.org/en/379031452203008464/WBG-FMGP-Template-for-Designing-a-NFIS-Jan-2016-FINAL.pdf> (accessed: 2018-02-18) ("Word Bank *NFIS Template* (2016)") which also emphasises the specific country context in developing a strategic approach to FI. See further Centre for Financial Inclusion "Financial Inclusion: What's The Vision?" (Nd) <https://centerforfinancialinclusionblog.files.wordpress.com/2011/12/financial-inclusion-whats-the-vision.pdf> (accessed: 2017-11-27) where similar questions are identified as the core dimensions.

<sup>169</sup> Talledo "Access to and Use of Financial Services: Evidence from Peru" (2015) [www.sbs.gob.pe/Portals/0/jer/ddt.../20151230\\_SBS-DT-003-2015\\_JTalledo.pdf](http://www.sbs.gob.pe/Portals/0/jer/ddt.../20151230_SBS-DT-003-2015_JTalledo.pdf) (accessed: 2018-02-10)

service points is a necessary condition for FI.<sup>170</sup> Available methods used to determine access count the number of households or individuals who actually have a bank account, access credit facilities, or make payments.<sup>171</sup> In relation to bank services, those who do not have access to banking services are classified as “unbanked” while those who have a relationship with a bank, such as owning an account, are “banked” or “bankable”.<sup>172</sup>

Access to financial services serves many purposes. Chief among them is the first step towards FI. Access creates platforms for other dimensions used to measure FI. It creates platforms for other dimensions for measuring FI. A bank account, for instance, is a gateway to other financial services.<sup>173</sup> Ownership of a bank account facilitates the storage of money and sending and receiving payments. Consequently, it is difficult to assess the other dimensions of FI such as the “use” of financial services if there is no access to such services.

It was also highlighted that FI and FE are multidimensional with other dimensions as proxies to the access dimension. Usage, availability, quality, appropriateness, and the safety of financial products and services have been identified as other important dimensions of FI.<sup>174</sup>

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5. See also Napier “Provision of Financial Services in South Africa” in OECD and The World Bank (eds) *Liberalisation and Universal Access to Basic Services: Telecommunications, Water and Sanitation, Financial Services, And Electricity* (2006) 179. Martinez *et al* “Demand Factors that Influence Financial Inclusion in Mexico” (2013) *BBVA Research Working Paper No 12/377*. AFI “Financial Inclusion Measurement for Regulators” (2010) 06.

<sup>170</sup> Talledo “Access to and Use of Financial Services” (2015) 5. See also Mindra, Moya, Zuze, and Kodongo “Financial Self-Efficacy: A Determinant of Financial Inclusion” 2017 35 *IJBM* 338 340.

<sup>171</sup> Demirgüç-Kunt, Beck and Honohan *Finance for All? Policies and Pitfalls in Expanding Access* (2008) 30. See also Honohan Paper for Access to Finance Building (30-31 May 2006) 7-9, See further Demirguc-Kunt *et al* “The Global Findex Database 2014” (2014) on measuring the ownership of credit cards; Consultative Group to Assist the Poor *Financial Access: Measuring Access to Financial Services Around the World* (2009) 5. See also AFI “Financial Inclusion Measurement for Regulators” (2010) 4.

<sup>172</sup> Although the term “banked” is not used in the literature, assessing access alone may determine whether a person does or does not have a relationship with the banks. The terms “unbanked”, “underbanked” (or “marginally banked”), and “fully banked” are used. The latter two are determined by other dimensions to measure the degree of inclusion, particularly the “usage” of financial services. See Smyczek and Matysiewicz “Financial Exclusion as Barrier to Socio-Economic Development of The Baltic Sea Region” 2014 15 *JEM* 80 86-87 for these different degrees of exclusion. See further United Nations *Building Inclusive Financial Sectors For Development* (2006) 3, referring to “bankable” as people and firms who are excluded from full participation in the financial sector and are not using formal financial services although they should be.

<sup>173</sup> Singh “Financial Inclusion: Concepts, Issues and Policies for India” (2017) [https://economics.ucsc.edu/research/downloads/singh\\_financial\\_inclusion.pdf](https://economics.ucsc.edu/research/downloads/singh_financial_inclusion.pdf) (accessed: 2018-02-16) 1. See also Talledo “Access to and Use of Financial Services” (2015) 8, who views access as the first stage and usage as the second stage towards FI.

<sup>174</sup> Sarma and Pais 2011 *JID* 614. See also Prahalad *The Fortune at the Bottom of the Pyramid: Eradicating Poverty Through Profit* (2005) 18, who identifies affordability, access, and availability

Price and costs-related dimensions that focus on the affordability of financial services and products are also key elements that form part of the FI definition.<sup>175</sup> To assess the degree of FI, regulators and policymakers first measure the level of access to financial services. It is only once consumers access or are able to access financial services that usage is determined. If usage is not satisfactory, FI is measured by using other elements such as quality, appropriateness, and affordability. The latter are not in themselves important measures of whether FI has been achieved; they become important factors only if the degree of access and usage are satisfactory. Honohan and King observe that access and usage are the basic dimensions by which to measure the supply of and demand for financial services.<sup>176</sup> They see other recent additional dimensions to measure the degree of FI – such as the nature and quality – as elements within access and usage.<sup>177</sup> Furthermore, an FI definition that measures both access to and the usage of FI is considered a perfect one.<sup>178</sup> Therefore, access and usage become the key dimensions in determining the supply and demand of financial services and products. They are also important in establishing the appropriate policy and regulatory goals for FI. To assess whether it is necessary to reform an FI framework, it is important to understand what usage entails.

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as the three basic principles upon which creating the capacity to consume is based and describes them as the “Three As”. See further Mehta, Jindal, and Singh “Financial Inclusion in India: Shifting the Base Towards Crowning Glory” 2015 5 *Arabian Journal of Business and Management Review* 2, who identify access, usage, affordability, and quality as the key areas that must be addressed in achieving FI objectives. See further Consultative Group to Assist the Poor “Financial Inclusion, Stability, Integrity, and Protection: Observations and Lessons for the I-SIP Approach from the Philippines” (2017) *CGAP Working Paper* <https://www.cgap.org/sites/default/files/Working-Paper-Financial-Inclusion-Stability-Integrity-and-Protection-Jul-2017.pdf> (accessed: 2021-08-24) 55; Bank of Papua New Guinea “National Financial Inclusion Strategy 2016-2020” (Nd) 11; Howell and Wilson 2005 *Macquarie Law Journal* 129; Cheston *et al* “The Business of Financial Inclusion” (2016) *IIF & CFI* 12.

<sup>175</sup> Phahalad *The Fortune at the Bottom of the Pyramid* 5th ed (2004) 18.

<sup>176</sup> Honohan and King Conference Paper (12-14 March 2009) 4. See also Nanda and Kaur “Bank-Led Financial Inclusion and Human Development: Evidence from India” 2017 24 *South Asian Journal of Management* 114 120.

<sup>177</sup> Honohan and King Conference Paper (12-14 March 2009) 4.

<sup>178</sup> Turkmen and Cagil “Sustainable and Inclusive Finance in Turkey” in Dincer and Hacioğlu (eds) *Risk Management, Strategic Thinking, and Leadership in the Financial Services Industry: A Proactive Approach to Strategic Thinking* (2017) 13. See also De Sousa “FI and Global Regulatory Standards” (2015) *CIGI New Thinking and the New G20 Series Paper No 7* 2. According to Makaha “Beyond Access, Financial Inclusion Can Do More” (2017-01-20) *Zimbabwe Independent* <https://www.theindependent.co.zw/2017/01/20/beyond-access-financial-inclusion-can/> (accessed: 2022-01-03), “financial inclusion is meaningless if it can only be defined and measured as access to financial services whilst ignoring the reliability and security of usage of such financial products”.

Measuring the use of financial services is not as simple as determining access. Some studies treat the two dimensions as synonymous, where access presupposes an automatic use of financial services.<sup>179</sup> With these challenges, these dimensions are often used interchangeably.<sup>180</sup> The usage of financial services is an additional step to taking up financial services. Measuring usage focuses on the regularity, the actual consumption, and the duration of use of financial services.<sup>181</sup> The element of continuity is used to measure whether financial services that are available and accessible are used by the communities. The focus in measuring usage is principally concerned with the regularity and frequency with which the financial services are used.<sup>182</sup>

For regulatory purposes, measures implemented to ensure usage are useful in preventing financial services such as bank accounts from lying dormant. However, the use of financial services is not always important in the assessment of FI for all types of financial service and products. For instance, failure to service a term loan by continually failing to pay the loan instalments may not always indicate a lack of use of the benefits provided by the loan. On the flip side, a failure to use available funds in a revolving overdraft or credit card facility may be indicative of non-use of these facilities notwithstanding their availability. In contrast, mere storage of money in a transactional bank account with payment facilities may signify a lack of use of the services provided. Therefore, incorporating both dimensions in the evaluation of financial inclusion is not always important.

The assessments of FI have lately added as a component, the *ability* to use available financial services and products irrespective of whether actual use occurs.<sup>183</sup> Access in this context is

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<sup>179</sup> Demirgüç-Kunt *et al Finance For All?* (2008) 34.

<sup>180</sup> See, for instance, Consultative Group to Assist the Poor *Financial Access* (2010) 5, where the challenge of identifying voluntary exclusion is highlighted in relation to where an individual chooses not to open a bank account even when this service is readily available, thus reducing use relative to access.

<sup>181</sup> AFI "Financial Inclusion Measurement for Regulators" (2010) 04. See also The World Bank "How to Measure Financial Inclusion" (2015) [http://www.worldbank.org/en/topic/financial\\_inclusion/brief/how-to-measure-financial-inclusion](http://www.worldbank.org/en/topic/financial_inclusion/brief/how-to-measure-financial-inclusion) (accessed: 2018-02-16); Claessens 2006 *The World Bank Research Observer* 210; Anastasi, Blanco, Elosegui, and Sangiácomo "Bancarization and Determinants of Availability of Banking Services in Argentina" (2006) *Banco Central De La República Argentina Working Paper 15* [http://www.bcra.gov.ar/pdfs/investigaciones/WP%202006%2015\\_i.pdf](http://www.bcra.gov.ar/pdfs/investigaciones/WP%202006%2015_i.pdf) (accessed: 2018-02-16); Roy, Singh, and Singh "Factors Affecting the Financial Inclusion of SHG Members: An Empirical Study in Tripura" 2017 16 *JBM* 59 60.

<sup>182</sup> Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 105. See also AFI "Financial Inclusion Measurement for Regulators" (2010) 5.

<sup>183</sup> See Talledo "Access to and Use of Financial Services" (2015) 2.

measured by looking at whether financial services are readily available. The argument in favour of this approach establishes FI in terms of the availability of service points without which usage would not be possible.<sup>184</sup> This blurs the distinction between access and usage as discrete dimensions of FI. It creates an assumption that usage can be measured simply on the basis that the availability of accessible financial services automatically leads to the usage of such services. The research has found support in the application of the supply-and-demand approach to determine factors that contribute to both access and usage and to identify the differences between the two.<sup>185</sup> In terms of this approach, access relates closely to factors that affect the supply of financial services, whereas use is determined by both the demand and supply factors.<sup>186</sup> Demand factors focus on the personal circumstances that influence access to financial services.<sup>187</sup> Overall, these circumstances are beyond an individual's control as regards the choice of available financial services. These factors can, among others, be psychological, cultural, religious, and educational.<sup>188</sup> Lack of financial skills (ie, financial illiteracy) may contribute to a person's financial capability.<sup>189</sup> Similarly, religious values such

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<sup>184</sup> Talledo "Access to and Use of Financial Services" (2015) 2.

<sup>185</sup> Prabhakar 2018 *Social Policy & Society* 4. See also Sain *et al* Conference Paper (4-5 July 2013) 273; Regan and Paxton "Beyond Bank Accounts" (2003) *Institute for Public Policy Research London* [https://www.ippr.org/files/images/media/files/publication/2011/05/beyond\\_bank\\_accounts\\_1297.pdf](https://www.ippr.org/files/images/media/files/publication/2011/05/beyond_bank_accounts_1297.pdf) (accessed: 2018-02-08) 2; Talledo "Access to and Use of Financial Services" (2015) 2.

<sup>186</sup> Yadav and Sharma 2016 *Humanomics* 328. See also De Sousa "FI and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper No 72*; Rahim, Wan and Franceschelli "Financial Inclusion Amongst New Migrants in Northern Ireland: A Literature Review" (2009) *Report for Information Centre about Asylum and Refugees* <https://www.bl.uk/collection-items/financial-inclusion-amongst-new-migrants-in-northern-ireland-a-literature-review> (accessed: 2018-04-19) 12; Tuesta, Sorensen, Haring, and Cámara "Financial Inclusion and Its Determinants: The Case of Argentina" (2015) *BBVA Research 15/03 Working Paper No 15/03* [https://www.bbva.com/wp-content/uploads/2015/01/WP\\_15-03\\_Financial-Inclusion-in-Argentina.pdf](https://www.bbva.com/wp-content/uploads/2015/01/WP_15-03_Financial-Inclusion-in-Argentina.pdf) (accessed: 2018-02-20) 18; Matsebula and Yu "Financial Inclusion in South Africa: A NIDS Data Analysis of Household Access and the Usage of Financial Services and Products" (Nd) [https://2017.essa.org.za/fullpaper/essa\\_3538.pdf](https://2017.essa.org.za/fullpaper/essa_3538.pdf) (accessed: 2018-04-12) 3; Claessens, Honohan and Rojas-Suarez "Policy Principles for Expanding Financial Access" (2009) *Report for the CGD Task Force on Access to Financial Service* [https://www.cgdev.org/files/1422882\\_file\\_Financial\\_Access\\_Task\\_Force\\_Report\\_FINAL.pdf](https://www.cgdev.org/files/1422882_file_Financial_Access_Task_Force_Report_FINAL.pdf) (accessed: 2018-04-12) 11.

<sup>187</sup> Prabhakar 2018 *Social Policy & Society* 4.

<sup>188</sup> Salignac *et al* 2016 *JSP* 271; Beck and Demirgüç-Kunt "Access to Finance: An Unfinished Agenda" 2008 22 *The World Bank Economic Review* 383 385; Tita and Aziakpono "The Effect of Financial Inclusion on Welfare in Sub-Saharan Africa: Evidence from Disaggregated Data" (2017) *Economic Research Southern Africa Working Paper 679* [https://econrsa.org/system/files/publications/working\\_papers/working\\_paper\\_679.pdf](https://econrsa.org/system/files/publications/working_papers/working_paper_679.pdf) (accessed: 2018-04-14) 5.

<sup>189</sup> Smyczek and Matysiewicz 2014 *JEM* 82. Daneshvar, Garry, López, Santamaría and Villarreal "Financial Inclusion of Small-Scale Rural Producers: Trends and Challenges" in Villarreal (ed) *Financial Inclusion of Small Rural Producers* (2017) 22.



as the prohibition on charging exorbitant interest (*riba*) under Islamic law may inhibit a person from taking out a conventional interest-bearing loan, and, accordingly, contribute to the person's exclusion from the financial system.<sup>190</sup>

### 2.3.2 Types of Financial Products and Service

The discussion of different definitions, dimensions, and approaches to FI and FE above highlights the challenges associated with defining these concepts with reference to specific products. As discussed above,<sup>191</sup> credit has played a major part in the microfinance revolution. It has also been observed that access to credit is no longer a key focus of FI strategies. As already indicated, FI is context specific. The different contexts must be taken into account in identifying suitable products for national FI policies and regulatory frameworks. It was also observed that various definitions of FI refer specifically to financial services that form integral parts of FI frameworks. Others do not specify the products preferring simply to refer to "one or more financial services",<sup>192</sup> "formal financial services",<sup>193</sup> or the "range of financial services".<sup>194</sup> The following examples illustrate how the definition of FI and FE deal with the different types of financial service.

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<sup>190</sup> Demirgüç-Kunt *et al Finance for All?* (2008) 27-28. See also Acharya "Does Anti-Money Laundering and Combating of Terrorism Financing (AML/CFT) Measures Inhibit Financial Inclusion?" (2015) <https://ssrn.com/abstract=2616572> (accessed: 2018-05-08); Tuba "Lodhi 5 Properties Investments CC v FirstRand Bank Limited [2015] 3 All SA 32 (SCA) and the Enforcement of Islamic Banking Law in South Africa" 2017 20 *PELJ* 1.

<sup>191</sup> See Ch 2.1 above.

<sup>192</sup> Martínez *et al* "Demand Factors that Influence Financial Inclusion in Mexico" (2013) *BBVA Research Working Paper 13/373*. See the definition by the CFI referring to "a full suite of financial services" <https://www.centerforfinancialinclusion.org/about/who-we-are/our-definition-of-financial-inclusion> (accessed: 2018-03-02); Zhang and Valle-Sison "Financial Inclusion and Regulatory Implications" in Azis and Shin (eds) *Global Shock, Risks, and Asian Financial Reform* (2014) 600.

<sup>193</sup> Zins and Weill "The Determinants of Financial Inclusion in Africa" 2016 6 *Review of Development Finance* 46 46. See also Sarma and Pais 2011 *JID* 613; Ramji "Financial Inclusion in Gulbarga: Finding Usage in Access" (2009) *Centre for Micro Finance Working Paper Series No 26* <http://indiagovernance.gov.in/files/financial-inclusion.pdf> (accessed: 2018-03-24) 6; Dasgupta "Two Approaches to Financial Inclusion" 2009 44 *Economic and Political Weekly* 41. See further Zhang and Valle-Sison "Financial Inclusion and Regulatory Implications" in Azis and Shin (eds) *Global Shock, Risks, and Asian Financial Reform* (2014) 600; Consultative Group to Assist the Poor "Financial Inclusion, Stability, Integrity, and Protection" (2017) *CGAP Working Paper* 55.

<sup>194</sup> Dasgupta 2009 *Economic and Political Weekly* 41. See also Zhang and Valle-Sison in Azis and Shin (eds) *Global Shock Risks, and Asian Financial Reform* (2014) 600.

Molyneux defines FE as “the inability (however occasioned) of some societal groups to access the *financial system*”.<sup>195</sup> The BCBS defines it with reference to “having access to and using the type of *financial services* that meets the user’s needs”.<sup>196</sup> Likewise, the European Commission defines it with reference to “*financial services and products* in the mainstream market”.<sup>197</sup> Other definitions have narrowed the ambit of this product-menu-driven approach by identifying financial products and services that are either basic or essential. The International Monetary Fund (IMF) defines FI as “an economic state where individuals and firms are not denied access to *basic financial services* based on motivations other than efficiency criteria”.<sup>198</sup> The National Australian Bank has adopted a definition of FI limited to appropriate financial products and services.<sup>199</sup> The focus of this definition is on simple but “*essential financial services and products*”. In these definitions there are no specifications of what constitutes basic or essential financial services or products.

Other definitions specify the types of products and services. These definitions identify some of the financial services that are included in the definitions of both FI and FE. The G20 defines FI with reference to only two types of financial product. It defines it as “an integration in the financial system *via accessing deposit and credit services*”.<sup>200</sup> Turkmen and Cagil define FI

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<sup>195</sup> Molyneux in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 192. See also Brennan *The Changing Landscape of Financial Services in Manitoba* (PhD Thesis, University of Manitoba, 2012) 9.

<sup>196</sup> Basel Committee on Banking Supervision “Payment Aspects of Financial Inclusion” (2016) <https://www.bis.org/cpmi/publ/d144.pdf> (accessed: 2018-02-12) 4. According to the BCBS “A comprehensive approach to FI addresses at least three aspects: access to *financial products and services*; usage of *financial products and services*; and quality of *financial products and services*, defined by consumer ability to benefit from new financial services and products”. See also The World Bank “Financial Inclusion Strategies Reference Framework” (2012) <https://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1339624653091/8703882-1339624678024/8703850-1339624695396/FI-Strategies-ReferenceFramework-FINAL-Aug2012.pdf> (accessed: 2018-02-15) 8; World Bank “FI Strategies Reference Framework” (2012). See further Arun and Kamath 2015 *IIMB Management Review* 267 referring to access to a full suite of quality financial services.

<sup>197</sup> European Commission “Financial Services Provision” (2008) 9.

<sup>198</sup> Amidžić *et al* “Assessing Countries’ Financial Inclusion” (2014) *IMF Working Paper WP/14/36* 6. See also Brennan *The Changing Landscape of Financial Services in Manitoba* (PhD Thesis, University of Manitoba, 2012) 12.

<sup>199</sup> Centre for Social Impact for National Australia Bank “Measuring Financial Exclusion in Australia” (2014) <https://www.nab.com.au/content/dam/nabrwd/About-Us/corporate-responsibility/docs/measuring-financial-exclusion-in-australia-2014-final.pdf> (accessed: 2018-02-15) 8.

<sup>200</sup> Busch “Broadening the G20 Financial Inclusion Agenda to Promote Financial Stability: The Role for Regional Banking Networks” (2017) *G20 Insight* <http://www.g20-insights.org/wp-content/uploads/2017/05/04-Financial-Broadening-the-G20-financial-inclusion.pdf> (accessed: 2018-02-15) 2.

with reference to three financial services considered “basic” – “savings, loans, and insurance”.<sup>201</sup> Thorat, on the other hand, added other services to the definition of FI and defines it as “the provision of affordable financial services, viz., *access to payments and remittance facilities*, savings, loans, and insurance services by the *formal financial system* to those who tend to be excluded”.<sup>202</sup> Pension funds, mutual funds, investment products, and leasing have also been added as some products that must be covered in the definition of FI.<sup>203</sup> The mix of products that continues to be added to the definition of FI and FE raises the following question: What products should form part of FI policies and regulatory frameworks?

### ***2.3.2.1 Customers’ Financial Problems and Suitable Financial Services for their Needs***

In addition to identifying the relevant financial products and services, there is a need to understand how the products will address the financial problems and needs. Policy frameworks provide few examples of definitions that place special emphasis on the financial needs of the consumer. The BCBS’s definition, for instance, refers to FI that involves “access and using the type of financial services *that meet the user’s needs*”.<sup>204</sup> In similar vein, the AFI suggests the identification of relevant products “in terms of the customers’ problems that could be addressed through financial mechanisms rather than specific products”.<sup>205</sup> From these guidelines, it seems important to answer these questions by identifying the customers’ problems with the current financial services and then identifying what they need.

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<sup>201</sup> Turkmen and Cagil in Dincer and Hacioğlu (eds) *Risk Management, Strategic Thinking* (2017) 13.

<sup>202</sup> Thorat “Financial Inclusion and Information Technology”, Paper Presented at the WIPRO-NDTV Convergence Conference on Vision 2020 – Indian Financial Services Sector, Mumbai, (12 September 2008). See also Bank of India “Financial Inclusion” (Nd) <http://www.bankofindia.com/FI-BOI/images/FI%20Definition.pdf> (accessed: 2018-02-17) which defines financial inclusion as “delivery of financial services at an affordable cost to the vast sections of the disadvantaged and low-income groups. Various financial services include credit, savings, insurance and payments, and remittance facilities”. See further Marron “Governing Poverty in a Neoliberal Age: New Labour and the Case of Financial Exclusion” 2013 18 *New Political Economy* 785 801 who identified affordable credit, savings, and insurance products as the type of financial subjects that have been anticipated by the conceptualisation of FI in the UK.

<sup>203</sup> Ramji “Financial Inclusion in Gulbarga” (2009) *Centre for Micro Finance Working Paper Series No 26* 6-7; ATM Industry Association “Access to Cash” (2017) 7. See also Shetty and Pinto 2015 *IJAFMP* 1607.

<sup>204</sup> BCBS “Payment Aspects of Financial Inclusion” (2016) 4.

<sup>205</sup> AFI “Defining Financial Inclusion” (2017) *Guideline Note No 28* 4. The guide, however, suggests that we must look at the problems relating to the demand rather than the products that are consumed to address the customer’s problem.

Several studies have attempted to understand poor and low-income communities and their relationships with financial services, as well as the problems they experience with lack of access to these services. The field studies by Collins *et al's* *Portfolios of the Poor*<sup>206</sup> and Rutherford and Arora's *The Poor and their Money*<sup>207</sup> are crucial to understanding the financial problems facing the poor and the financial services that are important for their needs.

The poor and the low-income societies generally face a challenge in managing their money.<sup>208</sup> They either do not have it or have little from irregular sources. Their biggest challenge is that banks, insurance companies, and other financial institutions do not cater to their financial needs. They therefore need effective money management schemes that will lift them out of poverty and help them improve their necessities and risks such as health and education. Collins *et al/* explain the challenges poor and low-income households experience in what they term "triple whammy" situations.<sup>209</sup> This means the poor generally suffer from both low and uncertain income that is also irregular and unpredictable<sup>210</sup> They also lack sufficient financial instruments to manage their unpredictable income flows.<sup>211</sup> According to these authors, available financial service providers must offer key services that provide three opportunities: helping the poor to manage money on a day-to-day basis; building savings in the long term; and helping them to borrow money for all uses.<sup>212</sup> Rutherford and Arora describe the essential financial needs of the poor as services which will "convert their small savings into useful large sums".<sup>213</sup> These services are what they term "basic personal financial intermediations"<sup>214</sup> which are "personal" and relate to how a poor person turns savings into larger amounts of money. They are "basic" because they are the basic requirements of everyday life for most people.<sup>215</sup>

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<sup>206</sup> Collins *et al* *Portfolios of the Poor* (2009) 16.

<sup>207</sup> Rutherford and Arora *The Poor and Their Money* (2009) 7-12.

<sup>208</sup> See Ch 2.3.3 below for a discussion of what constitutes a low-income household.

<sup>209</sup> Collins *et al* *The Portfolios of the Poor* (2009)16.

<sup>210</sup> Collins *et al* *The Portfolios of the Poor* (2009) 16.

<sup>211</sup> Collins *et al* *The Portfolios of the Poor* (2009)16.

<sup>212</sup> Collins *et al* *Portfolios of the Poor* (2009) 178-180. See also Labie, Laureti and Szafarz "Discipline and Flexibility: A Behavioural Perspective on Microfinance Product Design" 2017 45 *Oxford Development Studies* 321 323.

<sup>213</sup> Rutherford and Arora *The Poor and Their Money* (2009) 8. They refer to these services as "basic personal financial intermediations". The other methods that are not relevant for this study are the sale of assets, mortgages, and pawns.

<sup>214</sup> Rutherford and Arora *The Poor and their Money* (2009) 12.

<sup>215</sup> Rutherford and Arora *The Poor and their Money* (2009) 12. "Intermediation" according to the authors simply refers to the fact that small amounts must be intermediated through financial institutions in order to generate larger sums of money.

Rutherford and Arora<sup>216</sup> further identify the financial needs of poor and low-income households as comprising three general saving strategies which have become the main options available to transform their small, irregular, and unpredictable incomes into large amounts of money. They describe the three ways of saving as “saving-up”, “saving-down”, and “saving-through”.<sup>217</sup> Saving down and saving through generally refer to access to credit and insurance products, respectively.<sup>218</sup> Importantly within the scope of this research, saving-up is what the term “saving” denotes in common parlance. It refers to the method of depositing a small amount with a financial institution over a period until it accumulates into a large amount to meet the financial needs of the depositor such as emergencies, start-up business capital, and major life-cycle events (eg, marriage, burials, etc).<sup>219</sup> Examples are savings and deposit accounts. This type of saving recognises the special challenges the poor face in accessing safe

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<sup>216</sup> Rutherford and Arora *The Poor and Their Money* (2009) 8-10.

<sup>217</sup> Rutherford “Savings and the Poor: The Methods, Use and Impact of Savings by the Poor of East Africa” (1999) [http://www.microsave.net/files/pdf/Savings\\_And\\_The\\_Poor\\_The\\_Methods\\_Use\\_And\\_Impact\\_Of\\_Savings\\_By\\_The\\_Poor\\_Of\\_East\\_Africa.pdf](http://www.microsave.net/files/pdf/Savings_And_The_Poor_The_Methods_Use_And_Impact_Of_Savings_By_The_Poor_Of_East_Africa.pdf) (accessed: 2018-03-02). See also Rutherford “The Economics of Poverty” (Nd). See also Agegnehu *Why Do Members Join Indigenous Informal Financial Institutions - ROSCAs? An Empirical Evidence From Equbs In Ethiopia* (Unpublished Master’s Thesis, Swedish University of Agricultural Sciences, 2012) 7-8; Cheruiyot, Cheruiyot, and Yegon “A Study on Operations and Impact of Rotating Savings and Credit Associations: Case of Middle-Income Earners in Embakasi Nairobi, Kenya” 2016 4 *International Journal of Economics, Commerce and Management* 871 876; Rutherford “Raising the Curtain on the ‘Microfinance Services Era’” (2000) *CGAP Focus No 15* <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Raising-the-Curtain-on-the-Microfinancial-Services-Era-May-2000.pdf> (accessed: 2018-03 27); Jos and Ramji “When You Can’t Save Up: Saving Down and Saving Through” (2011) *MicroSave India Focus Note 84* [http://www.microsave.net/files/pdf/IFN\\_84\\_When\\_You\\_Cannot\\_Save\\_Up\\_Saving\\_Down\\_and\\_Saving\\_Through.pdf](http://www.microsave.net/files/pdf/IFN_84_When_You_Cannot_Save_Up_Saving_Down_and_Saving_Through.pdf) (accessed: 2018-04-16); Rutherford “Boosting the Poor’s Capacity to Save: A Note on Instalment Plans and their Variants” in Armendáriz and Labie (eds) *The Handbook of Microfinance* (2011) 520; Bylanader “Credit as Coping: Rethinking Microcredit in the Cambodian Context” 2015 43 *Oxford Development Studies* 533 544; Looft *Inspired Finance: The Role of Faith in Microfinance and International Economic Development* (2014) 28, Matul “Financial Behaviours and Vulnerability to Poverty in Low-Income Households in Transition Context” (2009) [http://www.microfinancegateway.org/sites/default/files/mfg-en-paper-financial-behaviours-and-vulnerability-to-poverty-in-low-income-households-in-transition-context-jun-2009\\_0.pdf](http://www.microfinancegateway.org/sites/default/files/mfg-en-paper-financial-behaviours-and-vulnerability-to-poverty-in-low-income-households-in-transition-context-jun-2009_0.pdf) (accessed: 2018-04-30) 7; and el Hennawy *Mobile Banking and Poverty Alleviation: Delivering Financial Intermediation Through Mobile Networks* (Unpublished Masters Dissertation, University of Erfurt, 2014) 36.

<sup>218</sup> Saving-down in this case means that customers access large sums of money at some earlier point, followed by the payment of a series of savings through instalments. This money becomes available before saving. Saving-through is associated with insurance cover in terms of which saving is performed continuously through a series of premium payments.

<sup>219</sup> Jos and Ramji “When You Can’t Save Up” (2011) *MicroSave India Focus Note 84*.

places to store their money for future use. The availability of these savings has a major impacts of poverty alleviation and to enhancing economic growth.<sup>220</sup>

Other financial products are equally important, for example, bank accounts for transactional and saving purposes. Transfer of money and remittance, both national and international, has emerged as one key financial service that must be integrated into a FI agenda.<sup>221</sup> This has made the designing of low-cost remittance services to meet the needs of the poor an important factor in FI.<sup>222</sup> Studies have indicated that poverty has played a significant role in the migration of the poor and low-income households from one place to another.<sup>223</sup> Migrant labourers, for instance, need to send money home to care for their families. This often takes the form of remitting cash through a friend or family members or using public transports such as taxis.<sup>224</sup> Alternatively, others send money via conventional agents such as Western Union and MoneyGram.<sup>225</sup> The available channels are not always suited to the need of poor migrants. Challenges relating to cost and lack of proper documentation create hurdles for using banks and other formal channels.<sup>226</sup> The significant development of online channels and mobile phones (m-banking) have contributed to addressing the challenges arising from safety, costs, and unsuitability of the conventional channels.<sup>227</sup>

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<sup>220</sup> On the link between FI, savings, and economic growth, see Ifediora, Offor, Eze, Takon, Agem, Ibe and Onwumere "Financial Inclusion and Its Impact on Economic Growth: Empirical Evidence From Sub-Saharan Africa" 2022 10 *Cogent Economics & Finance* 1, See further Liu, Zhang, Hafeez and Ullah "Financial Inclusion and its Influence on Economic-environmental Performance: Demand and Supply Perspectives" 2022 29 *Environmental Science and Pollution Research* 58212.

<sup>221</sup> UNDP "Sustainable Development Goals" (Nd), goal 10 aims to "reduce to less than 3 percent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 percent, by 2030".

<sup>222</sup> Chehade, Navarro and Sobol "Remittances and Financial Inclusion: A Demand-Side Analysis of Low-Income Jordanians and Syrian Refugees in Jordan" (2017) *CGAP Working Paper* <http://www.cgap.org/sites/default/files/Working-Paper-Remittances-and-Financial-Inclusion-Dec-2017.pdf> (accessed: 2018-04-27).

<sup>223</sup> Rhyne *Microfinance for Bankers* (2009) 41. See also Beck, Maimo, Faye, and Triki *Financing Africa Through the Crisis and Beyond* (2011) 118-119; Roodman *Due Diligence: An Impertinent Inquiry into Microfinance* (2012) 20; Realini and Mehta *Financial Inclusion* (2015) 31-35; Lehman and Ledgerwood "Payment Services and Delivery Channels" in Ledgerwood, Earne & Nelson (eds) *The New Microfinance Handbook* (2013) 272; and Helm *Access for All* (2006) 26; Beck and Demirgüç-Kunt 2008 *The World Bank Economic Review* 91.

<sup>224</sup> Beck *et al Financing Africa* 118-119, eg taxis.

<sup>225</sup> Helm *Access for All* (2006) 120.

<sup>226</sup> Realini and Mehta *Financial Inclusion* (2015) 33-34. See also Beck *et al Financing Africa* 119.

<sup>227</sup> Realini and Mehta *Financial Inclusion* (2015) 33-34.

The introduction of m-banking has also played a significant role in reducing the use of cash, the costs associated with the remittance, and more importantly, accelerating the development and access to savings accounts.<sup>228</sup> M-Pesa remains a typical example of a success story in mobile banking in sub-Saharan Africa by offering cheaper and safer methods for transferring money.<sup>229</sup> Its launch in 2007 by Safaricom has seen a major improvement in access to financial services in Kenya and other countries.<sup>230</sup> The available mobile payment systems fall into either a bank-led model or a non-bank-led model, depending on the involvement of banks and provision of access to the formal financial system.<sup>231</sup> For purposes of this study, the classification of mobile payment as transformational (or converted) and additive models is important.<sup>232</sup>

<sup>228</sup> Alexandre and Eisenhart "Mobile Money as an Engine of Financial Inclusion and Lynchpin of Financial Integrity 2013 8 *WJLTA* 287-294 See also Dube, Chitakunye and Chummun "Mobile Money as a Strategy for Financial Inclusion in Rural Communities" 2014 5 *Mediterranean Journal of Social Sciences* 216 223.

<sup>229</sup> Oluwole "M-Pesa: Kenya's Mobile Money Success Story Celebrates 15 Years" (2022-03-07) *Business Insider Africa* <https://africa.businessinsider.com/local/markets/m-pesa-kenyas-mobile-money-success-story-celebrates-15-years/srp9gne> (accessed: 2022-06-09). Cf Dagada "Over-regulation is Killing Mobile Money in SA" (2021-08-19) *Innovation* <https://www.itweb.co.za/content/mQwkoM6PVRyv3r9A> (accessed: 2022-06-09), who identified why the M-Pesa introduced by Vodacom and Nedbank was unsuccessful due to inflexible regulatory focus on consumer protection and money laundering.

<sup>230</sup> It is recorded that FI in Kenya grew significantly from 2007 to 2016 because of partly M-Pesa. See Cook and McKay "Banking in the M-PESA Age" (2017) *CGAP Working Paper*.

<sup>231</sup> See el Hennawy *Mobile Banking and Poverty Alleviation* (Masters 2014) 48. The author also identifies the partnership model in terms of which a financial institution and a mobile network operator collaborate to provide a payment system. See further Devadevan "Mobile Banking in India – Issues & Challenges" 2008 3 *International Journal of Emerging Technology and Advanced Engineering* 516 517.

<sup>232</sup> See Porteous "The Enabling Environment for Mobile Banking in Africa" (2006) *Bankable Frontier Associates Report* [https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-the-enabling-environment-for-mobile-banking-in-africa-may-2006\\_0.pdf](https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-the-enabling-environment-for-mobile-banking-in-africa-may-2006_0.pdf) (accessed: 2018-04-26) 3. See also Porteous "Just How Transformational is M-Banking" (2007) *Finmark Trust* <https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-just-how-transformational-is-m-banking-feb-2007.pdf> (accessed: 2018-04-26); el Hennawy *Mobile Banking and Poverty Alleviation* (Masters 2014) 48-49. See further Arestoff and Venet "Learning to Walk Before You Run: Financial Behavior and Mobile Banking in Madagascar" (2013) *UMR DIAL Document De Travail* DT/2013-09 [www.Dial.Ird.Fr/Content/Download/72748/.../3/.../DT+2013-09+Arestoff+-+Venet.Pdf](http://www.Dial.Ird.Fr/Content/Download/72748/.../3/.../DT+2013-09+Arestoff+-+Venet.Pdf) (accessed: 2018-04-26) 4 who identify two different types of banking services as additive and converted. See also Krugel "Mobile Banking Technology Options: An Overview of the Different Mobile Banking Technology and their Impact on the Mobile Banking Market" (2007) *FinMark Trust* [https://www.gsma.com/mobilefordevelopment/wpcontent/uploads/2012/06/finmark\\_mbt\\_aug\\_07.pdf](https://www.gsma.com/mobilefordevelopment/wpcontent/uploads/2012/06/finmark_mbt_aug_07.pdf) (accessed: 2017-04-26) 10-12, who identifies two options for implementing mobile banking through either the extension of a banks payment franchise to mobile or new payments franchise on mobile. See further Ndlovu and Ndlovu "Mobile Banking the Future to Rural Financial Inclusion: Case Study of Zimbabwe" 2013 9 *Journal of Humanities and Social Science* 70 70-71.

The transformational model of mobile payment refers to payments in which the “financial product linked to the use of the phone is targeted at the unbanked, who are largely low-income people”.<sup>233</sup> In this model, a mobile phone service combines the opening of a new bank account and access to mobile banking.<sup>234</sup> The importance of using a mobile phone in this model is the alignment of payment services, the opening of a new saving account, and the benefits arising from this account – eg, using an ATM or a debit card for withdrawals and cash top-ups.<sup>235</sup> The transformational element of this model is its ability to bring the unbanked into the banking sector through mobile phones, which are accompanied by new forms of transactional accounts.<sup>236</sup> M-Pesa is an example of a transformative model. The operation of M-Pesa does not require customers to have a bank account before they start to transfer money or make payments.<sup>237</sup> Payment or transfer through an M-Pesa account is effected irrespective of an existing bank account.

Additive types of mobile payment systems, in contrast, add the mobile phone as an additional channel through which the phone is simply a connection to an existing banking account to facilitate other necessary functions such as transfers between accounts and checking account balances.<sup>238</sup> According to Porteous, these are additive (ie, additional) because they provide additional transactional channels to customers who already have a bank account.<sup>239</sup> The mobile phone “is merely another channel to an existing bank account”.<sup>240</sup> The distinction

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<sup>233</sup> Porteous “The Enabling Environment for Mobile Banking In Africa” (2006) *Bankable Frontier Associates Report* 3; Porteous “Just How Transformational is M-Banking” (2007) *Finmark Trust* 19 who identifies a mobile phone as transformational if its main target is the “unbanked people with cell phones.

<sup>234</sup> Porteous “Just How Transformational is M-Banking” (2007) *Finmark Trust* 21. The author has identified MTN Banking and WIZZIT as transformative.

<sup>235</sup> Porteous “Just How Transformational is M-Banking” (2007) *Finmark Trust* 21. See also Arestoff and Venet “Learning to Walk Before You Run” (2013) *UMR DIAL Document De Travail* DT/2013-09 4.

<sup>236</sup> Arestoff and Venet “Learning to Walk Before You Run” (2013) *UMR DIAL Document De Travail* DT/2013-09 4.

<sup>237</sup> Etim “Mobile Banking and Mobile Money Adoption for Financial Inclusion” 2014 9 *Research in Business and Economics Journal* 1 5.

<sup>238</sup> Porteous “Just How Transformational is M-Banking” (2007) *Finmark Trust* 3. Examples are those provided by banks such as FNB and ABSA. See also Etim 2014 *Research in Business and Economics Journal* 3.

<sup>239</sup> Porteous “Just How Transformational is M-Banking” (2007) *Finmark Trust* 20. Examples of additive model of mobile banking provided by Porteous are FNB and ABSA mobile payments. See also el Hennawy *Mobile Banking and Poverty Alleviation* (Masters 2014) 48; Weber and Darbellay “Legal Issues in Mobile Banking” 2010 11 *Journal of Banking Regulation* 129 130.

<sup>240</sup> Porteous “The Enabling Environment For Mobile Banking In Africa” (2006) *Bankable Frontier Associates Report* 3. See also Chemtai “The Effects of Mobile-banking on the Bank’s Competitive Advantage: A Case of Selected Commercial Banks in Eldoret Town, Kenya” 2016 18 *IOSR Journal*



between transformational and additive is significant in illustrating the significance of mobile payments for savings or transactional purposes. However, in the context of this study and its focus on basic financial services such as basic savings, additive mobile payment systems may not form part of the FI framework unless they have the effect of promoting the opening of new saving accounts which is bundled with other services forming part of the mobile money systems. The argument adopted in this research supports Donovan's view that simply formalising finances onto a mobile phone falls short of meaningful FI.<sup>241</sup> To achieve FI, the additive model of mobile money, in his view, must be modified to transformational mobile money to extend financial services to those who were previously excluded.<sup>242</sup> However, it is important to note that for policies and regulatory frameworks promoting FI to be effective and responsive to the needs of the targeted society, they must accord access to savings equal treatment to that accorded other products and services such as credit, insurance, remittances, and mobile payments.

### **2.3.2.2 Flexibility and Discipline in Financial Products Design**

The literature on FI and FE highlights the importance of designing financial products by taking the needs of the poor and low-income households into account. One of the factors that contribute to FE is the lack of access to available products that are appropriate for the needs of low-income consumers.<sup>243</sup> These consumers suffer, in particular, from "financial services mismatch" because of products that are not designed to cater to their specific needs.<sup>244</sup> Existing financial services are generally not appropriate for low-income households and the poor. For instance, restrictions or limits on withdrawals from saving accounts and penalty charges on early withdrawals are some of the factors that contribute to the lack of access to transactional and savings accounts with banks.<sup>245</sup> The requirements for adjusting these

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*of Business and Management* 26 26; Muthua *The Relationship Between Mobile Phone Banking and Financial Performance of Commercial Banks in Kenya* (Unpublished Masters Dissertation, University of Nairobi, 2011) 40; Mwaikali "Mobile Money Service as an Opportunity for the Growth of Commercial Banks in Tanzania: Learning from Mobile Money Service in Iringa Municipality in Tanzania" 2013 3 *Information and Knowledge Management* 35 36.

<sup>241</sup> Donovan "Mobile Money for Financial Inclusion" in World Bank (ed) *Information and Communications for Development: Maximising Mobile* (2012) 71.

<sup>242</sup> Donovan in World Bank (ed) *Maximising Mobile* (2012) 71.

<sup>243</sup> Smyczek and Matysiewicz 2014 *JEM* 8; Sinclair 2012 *IJSSP* 671.

<sup>244</sup> Barr 2007 *Harvard Law & Policy Review* 169.

<sup>245</sup> Ashraf, Karlan and Yin "Household Decision Making and Savings Impacts: Further Evidence From a Commitment Savings Product in the Philippines" (2006) *Economic Growth Center Discussion Paper No 93945* [http://www.econ.yale.edu/growth\\_pdf/cdp939.pdf](http://www.econ.yale.edu/growth_pdf/cdp939.pdf) (accessed: 2018-02-12) 4.

products to the needs of the consumers yield to ensuring that they are flexible enough to meet these needs. However, existing financial services also incorporate terms aimed at instilling financial discipline in customers. Financial discipline mechanisms are integrated into service contracts either to induce savings or to enforce the repayment of loans.<sup>246</sup> This gives rise to a trade-off between product flexibility and financial discipline, which are both important principles of product design. This raises the question of whether the designing of financial products can incorporate flexibility while also promoting financial discipline in the process of reinforcing FI. A policy or a regulatory framework that leans towards flexibility may affect the objectives for strengthening financial discipline. Equally, learning more about the flexibility of financial products is actually what FI frameworks aim to achieve. Therefore, this requires a possible balance that will encourage access to flexible products and not compromise financial discipline.

The flexibility of financial products in relation to transactional and savings accounts refers to the design of products that accommodate the financial requirements of the relevant customers.<sup>247</sup> Flexibility is defined as “the ease with which transactions can be reconciled with

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<sup>246</sup> de Janvry, Sadoulet, Coulibaly and Abordonado “Progress with Flexible Microfinance Products: A Review of Evidence and a Proposal” (2014) *FERDI Policy Brief 83* [http://www.ferdi.fr/sites/www.ferdi.fr/files/evenements/presentations/janvry\\_sadoulet\\_coulibaly\\_abor\\_donado\\_flexible\\_financial\\_products\\_to\\_address\\_risk.pdf](http://www.ferdi.fr/sites/www.ferdi.fr/files/evenements/presentations/janvry_sadoulet_coulibaly_abor_donado_flexible_financial_products_to_address_risk.pdf) (accessed: 2018-06-04) 6. Equally, interest rates and the rigid repayment terms on loans also cause the exclusion of this sector of the economy from mainstream finances.

<sup>247</sup> Cohen “Making Microfinance More Client-Led” 2002 14 *JID* 335 339. In relation to consumer credit, see Sánchez and Lechuga “Assessment of a Credit Scoring System for Popular Bank Savings and Credit” 2016 61 *Contaduría y Administración* 391; Rhyne *Microfinance for Bankers* (2009) 26. See also Schraten “The Transformation of the South African Credit Market” 2014 85 *Transformation: Critical Perspectives on Southern Africa* 1 4; Banerjee and Duflo *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (2011) 298; Benito “The Down-Payment, Constraint and UK Housing Market: Does the Theory Fit the Facts?” 2006 15 *Journal of Housing Economics* 1; Tsukada “Microcredit Revisited: Towards More Flexible Loan Contracts” in Shonchoy (ed) *Seasonality and Microcredit: The Case of Northern Bangladesh* (2014) 10; Czura, Johny, and Spantig “Maintaining Repayment Discipline While Reducing Peer Pressure in Microfinance: Repayment Flexibility vs Social Insurance” (2017) [https://economics.handels.gu.se/digitalAssets/1643/1643734\\_36.-spnating.-czura\\_john\\_spantig\\_jl\\_and\\_flex\\_draft\\_20170228.pdf](https://economics.handels.gu.se/digitalAssets/1643/1643734_36.-spnating.-czura_john_spantig_jl_and_flex_draft_20170228.pdf) (accessed: 2018-05-09) 2; Dupas and Robinson “Why Don’t the Poor Save More? Evidence from Health Savings Experiments” 2013 103 *American Economic Review* 1138 1141; Mallick “Microfinance and Moneylender Interest Rate: Evidence from Bangladesh” 2011 40 *World Development* 1181 1182; de Janvry *et al* “Progress with Flexible Microfinance Products” (2014) *FERDI Policy Brief 83* 7; Jain and Mansuri “A Little at A Time: The Use of Regularly Scheduled Repayments in Microfinance Programs” 2003 72 *Journal of Development Economics* 253 255; Czura “Do Flexible Repayment Schedules Improve the Impact of Microcredit? Evidence From a Randomized Evaluation in Rural India” (2015) *Munich Discussion Paper No 2015-2020* <https://www.econstor.eu/bitstream/10419/142723/1/845471600.pdf> (accessed: 2018-02-09) 20. Factors such as strict credit-scoring procedures, negative reports of

cash flows".<sup>248</sup> It requires financial products to be adapted to improve customers' ability to pay (in the case of loans),<sup>249</sup> and generally the ability to manage day-to-day today financial costs and expenditures.<sup>250</sup> The development of financial products for the poor must take into consideration the specific constraints that the design seeks to overcome.<sup>251</sup> The search for flexibility derives from the perceived rigidity of financial products that often restrict access to financial services.<sup>252</sup> Traditional saving products generally impose and rigidly enforce regular and involuntary deposit programmes to control customers' saving behaviour.<sup>253</sup> Saving accounts generally require opening or minimum balance fees that negatively affect the take-up rates of these accounts.<sup>254</sup>

To illustrate, time deposits are characterised by fixed maturity periods and therefore prevent urgent requests for withdrawals before such maturity.<sup>255</sup> Withdrawal penalties are also applied

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credit histories obtained from credit bureaus, down payment of a certain percentage of the loan amount upfront, and high frequency regular repayment schedules for loans are some of the factors contributing to the inflexibility of credits products. To be flexible, consumer credits must adjust credit screening, lower the commitment to pay, adjust penalties associated with failure to adhere to the repayment schedule, reduce loan payments during difficult financial times, or offer grace periods.

<sup>248</sup> Collins *et al* *Portfolios of the Poor* (2009) 181.

<sup>249</sup> de Janvry, Sadoulet, Coulibaly and Abordonado "Flexible Financial Products in Microfinance to Address Risk" Paper Prepared for the FERDI Workshop on Flexible Financial Products in Microfinance to Address Risk (12-14 June 2013) 6.

<sup>250</sup> Collins *et al* *Portfolios of the Poor* (2009) 181.

<sup>251</sup> Jagtap and Larsson "Design and Development of Products and Services at the Base of the Pyramid: A Review of Issues and Solutions" 2013 5 *International Journal of Sustainable Society* 207 210.

<sup>252</sup> Karlan and Mullainathan "Is Microfinance too Rigid?" (2006) <https://pdfs.semanticscholar.org/6aed/a5cfab84b6c616bbbed6069da981d21e708f8.pdf> (accessed: 2018-05-09). See also Guérin, Morvant-Roux and Servet "Understanding The Diversity And Complexity of Demand For Financial Services: Lessons From Informal Finance" in Armendáriz and Labie (eds) *The Handbook of Microfinance* (2011) 113.

<sup>253</sup> Atkinson, de Jancry, McIntosh and Sadoulet "Prompting Microfinance Borrowers to Save: A Field Experiment from Guatemala" 2013 62 *Economic Development and Cultural Change* 21 22.

<sup>254</sup> Bikker and Gerritsen "Determinants of Interest Rates on Time Deposits and Savings Accounts: Macro Factors, Bank Risk, and Account Features" 2017 18 *International Review of Finance* 169 171. See also Prina "Banking The Poor Via Savings Accounts: Evidence From a Field Experiment" 2015 115 *Journal of Development Economics* 16 22; Dupas, Green, Keats and Robinson "Challenges in Banking the Rural Poor: Evidence From Kenya's Western Province" (2012) *NBER Working Paper 17851* <http://www.nber.org/papers/w17851.pdf> (accessed: 2018-05-09) 14; Dupas and Robinson "Savings Constraints and Microenterprise Development: Evidence from a Field Experiment in Kenya" 2013 5 *American Economic Journal: Applied Economics* 163 166; Kempson, Whyley, Caskey, and Collard "In or Out: Financial Exclusion: A Literature and Research Review" (2000) <https://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0002.pdf> (accessed: 2022-01-19) 70.

<sup>255</sup> Bikker and Gerritsen 2017 *International Review of Finance* 178. See also Ashraf, Gons, Karlan, and Yin "A Review of Commitment Savings Products in Developing Countries" (2003) *ADB ERD*

as an enforcement mechanism for urgent and early withdrawals.<sup>256</sup> They are also applied for failure to adhere to the commitment to savings and as a deterrent to frequent withdrawals.<sup>257</sup> One disadvantage of these enforcement mechanisms is the inconvenience for customers in meeting their non-discretionary spending needs and the costs associated with withdrawal and balance fees.<sup>258</sup> Designing or reforming financial products that are flexible therefore involves the refinement of existing products or the introduction of new products.<sup>259</sup> The terms and conditions of service contracts must also be simple and provide for the financial needs of targeted customers.<sup>260</sup> In relation to low-income households, financial products must accommodate their uncertain, irregular, and cyclical income flows.<sup>261</sup> If applied to savings, flexible saving accounts must allow for discretionary commitment to saving.<sup>262</sup> It must also allow full withdrawal of the accumulated savings without a minimum balance fee and attract negligible or no withdrawal charges.<sup>263</sup> The customer identification and verification procedures applied to prevent money-laundering must also be adjusted "to reflect the realities and the risks posed by those seeking access to financial services".<sup>264</sup>

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*Working Paper Series No 45* <https://luskin.ucla.edu/sites/default/files/download-pdfs/commitmentreview.pdf> (accessed: 2018-05-09) 6.

<sup>256</sup> Labie *et al* 2017 *Oxford Development Studies* 324.

<sup>257</sup> Labie *et al* 2017 *Oxford Development Studies* 324. See also Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45* 4; Sinha and Patole "Microfinance and the Poverty of Financial Services: How the Poor in India Could be Better Served" 2003 4 *SAEJ* 301 341.

<sup>258</sup> De Janvry *et al* "Flexible Financial Products" (2013) *FERDI Policy Brief* 83 7.

<sup>259</sup> Cohen 2002 *JID* 335 339. See also Matin, Rutherford and Maniruzzaman "Exploring the Client Preferences in Microfinance: Some Observations From SafeSave" (2000) *CGAP Focus Note No 13* <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Exploring-Client-Preferences-in-Microfinance-Some-Observations-from-Safesave-Sep-2000.pdf> (accessed: 2018-05-09) 6.

<sup>260</sup> Copestake "Mainstreaming Microfinance: Social Performance Management or Mission Drift?" 2007 35 *World Development* 1721 1730.

<sup>261</sup> Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45* 4.

<sup>262</sup> Labie *et al* 2017 *Oxford Development Studies* 330. See also Sinha "Impact Assessment of Microfinance in India Interim Findings From a National Study of MFIs in India" Paper Prepared for the Conference on "Current Issues in Microfinance" Johannesburg, South Africa (12-14 August 2003) 20.

<sup>263</sup> Hamp and Laureti "Balancing Flexibility and Discipline in Microfinance: Innovative Financial Products that Benefit Clients and Service Providers" (2011) *Centre Emile Bernheim Working Paper No 11/044* <https://dipot.ulb.ac.be/dspace/bitstream/2013/98728/1/wp11044.pdf> (accessed: 2018-05-09) 5. See also de Janvry *et al* "Progress with Flexible Microfinance Products" (2014) *FÉRDI Policy Brief* 83 7-8; Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45* 8.

<sup>264</sup> Gelb "Balancing Financial Integrity with Financial Inclusion: The Risk-Based Approach to "Know Your Customer"" (2016) *CGD Policy Paper 074* <http://www.cgdev.org/publication/balancing-financial-integrity-financial-inclusion-risk-based-approach> (accessed: 2018-02-18). See also Auda and Kalunda 2012 *Journal of Applied Finance & Banking* 97.

Flexible financial products generally promote access to financial services. However, there is also a need for effective mechanisms linked to these products to instil discipline in customers. Without some form of commitment to savings such as restrictions on withdrawals, fixed repayment schedules, and minimum balances for opening a banking account, customers may not be able to control and channel their saving behaviour.<sup>265</sup> Both product flexibility and discipline are therefore important. The question is whether it is possible to balance the two while ensuring FI.

Studies have established consumer demand for financial services with disciplining devices to address these self-control-related problems.<sup>266</sup> They voluntarily demand financial services such as savings to incorporate disciplining devices to restrict easy access to the savings. As a result, their desire to have flexible products on one hand, and products with rigid conditions to discipline their financial behaviour on the other, are often at odds and create a trade-off that must be addressed through regulatory reform.<sup>267</sup> It is therefore important for the regulatory framework to weigh the need for flexibility against the client's wish to impose discipline devices.

Academic discourses differ on whether a balance between flexibility and discipline is possible when designing financial products. Placing greater emphasis on flexibility may compromise

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<sup>265</sup> Laureti and Hamp "Innovative Flexible Products in Microfinance" 2011 35 *Savings and Development* 97 100. Similarly, adherence to payments of loan instalments may not be possible without a strict set of payment schedules and penalty interests for default.

<sup>266</sup> Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45 2*; Akbas Ariely, Robalino and Weber "How to Help Poor Informal Workers to Save a Bit" (2016) *IZA Discussion Paper No 10024* <https://docs.iza.org/dp10024.pdf> (accessed: 2018-05-15) 1. See also Laureti "Matching Transactions with Clients' Cash Flow: The Debate on Product Flexibility and Discipline in Microfinance" (2011) *Centre for European Research in Microfinance* <https://www.rug.nl/research/globalisation-studies-groningen/research/conferencesandseminars/conferences/eumicrofinconf2011/papers/14b.laureti.pdf> (2018-02-15) 2.

<sup>267</sup> See Hamp and Laureti "Balancing Flexibility and Discipline" (2011) *Centre Emile Bernheim Working Paper No 11/044 2*. See also Barboni 2017 *Journal of Economic Behavior & Organization* 426; de Janvry *et al* "Progress with Flexible Microfinance Products" (2014) *FERDI Policy Brief 83 9*; Dackauskaite *Client Exit in Microfinance* (Unpublished Master's Thesis, Utrecht University, 2009) 25; Labie *et al* 2017 *Oxford Development Studies* 330; Sinha and Patole 2003 *SAEJ* 302; Field and Pande "Repayment Frequency and Default in Microfinance: Evidence from India" 2008 6 *Journal of the European Economic Association* 501 502; Barboni and Agarwal "Knowing What's Good for You: Can a Repayment Flexibility Option in Microfinance Contracts Improve Repayment Rates and Business Outcomes?" (2018) *International Growth Centre Working Paper F-89219-INC-1* <https://www.theigc.org/wp-content/uploads/2018/06/Barboni-and-Agarwal-2018Working-paper.pdf> (accessed: 2018-05-09) 6; Barboni 2017 *Journal of Economic Behavior & Organization* 426; de Janvry *et al* "Flexible Financial Products" (2013) *FERDI Policy Brief 83 3* on the trade-offs between flexibility and rigidity of products in relation to credit facilities.

the disciplining mechanisms and vice versa.<sup>268</sup> Despite the challenge, the views in the literature agree on a possible balance between these high-level principles. For the sake of analysis, this study discusses a few mechanisms applied to balance flexibility and discipline in the process of designing financial services.

With regard to saving products, it is important to balance these principles for both deposit and withdrawal purposes. The most balanced financial products incorporating both principles in saving products will require efficient features that restrict easy access to withdrawals, while also requiring clients to commit to their regular savings.<sup>269</sup> High-interest returns accumulated after a set period without withdrawals from a liquid saving account or the imposition of daunting withdrawal fees are some of the mechanisms used to encourage or impose a commitment to saving.<sup>270</sup> To access such saving products, financial institutions make them available without deposit fees but subject to substantial withdrawal fees to deter clients from impulsive withdrawals.<sup>271</sup> Depending on whether the withdrawal fee is based on a flat rate or fluctuates in relation to the amount withdrawn within a particular interval, such a fee may deter clients from making frequent withdrawals. While the fees may reduce premature withdrawals, they may also discourage deposits.<sup>272</sup> The important balance here is for clients to have their deposits in the bank available at any time. However, to prevent them from impulsive access to their funds, withdrawal fees are used to discipline them not to access the funds willy-nilly. Withdrawal fees do not delay access to money in a savings account but do discourage such withdrawals. If clients need access to savings with delayed withdrawals, they may use commitment-saving products with fixed periods and numbers of deposits and withdrawals.<sup>273</sup> Access to money in these savings remains flexible without eroding financial discipline.

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<sup>268</sup> Labie *et al* 2017 *Oxford Development Studies* 322.

<sup>269</sup> Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45* 4-6.

<sup>270</sup> Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45* 6.

<sup>271</sup> Ashraf *et al* "A Review of Commitment" (2003) *ADB ERD Working Paper Series No 45* 6.

<sup>272</sup> Beshears, Choi, Harris, Laibson, Madrian and Sakong "Self-Control and Commitment: Can Decreasing The Liquidity of a Savings Account Increase Deposits?" (2015) *National Bureau of Economic Research Working Paper 21474* <http://www.nber.org/papers/w21474.pdf> (accessed: 2018-05-27) 2.

<sup>273</sup> Laureti and Hamp "Innovative Flexible Products" 2011 *Savings and Development* 101. See also Tsukada "Microcredit Revisited: Towards More Flexible Loan Contracts" in Shonchoy (ed) *Seasonality and Microcredit* (2014) 19. Examples are term deposits or programmed savings such as educational accounts, or pension savings.

The literature identifies several mechanisms that balance rigid payment schedules without compromising financial flexibility. Barboni and Agarwal propose the choice between flexible and rigid loan contracts, with the cost of the flexible contract set at a higher rate.<sup>274</sup> The authors apply a price and cost-based discipline mechanism, similar to that applied to saving accounts where withdrawal fees are used as a deterrent to impulsive withdrawals. The choice that they propose allows borrowers who need commitment to their loan repayments as a disciplining mechanism, to choose flexible repayment contracts subject to additional costs.<sup>275</sup> Alternatively, they may choose rigid loan contracts with regular repayment schedules without additional cost.<sup>276</sup> Providing these options allows for a balance between flexibility and the financial discipline of loan repayment contracts. By choosing costly flexible options, borrowers may propose a grace period for repayment of their loans in financially difficult times by incurring additional costs.<sup>277</sup>

Other theoretical discussions on balancing flexibility and financial decisions focus on the mechanisms that also provide different choices for meeting the flexibility of financial services. It is agreed that providing flexible financial products promotes FI.<sup>278</sup> They also attempt to indicate that mixing flexibility with financial discipline is possible. Labie *et al*<sup>279</sup> identify several categories of flexibility that may be adopted by financial products. The following two are important as they incorporate both discipline and flexibility at different stages in a financial transaction. These types of flexible transaction are *ex-ante* (based on future events or circumstances) and *ex-post* (after the facts) flexibility, and full flexibility and they depend on the financial institution's choice and the information about a particular client.<sup>280</sup> *Ex-ante* flexibility requires financial institutions to adapt financial transactions to clients' expected

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<sup>274</sup> Barboni and Agarwal "Knowing What's Good for You?" (2018) *International Growth Centre Working Paper F-89219-INC-1 2*.

<sup>275</sup> Barboni and Agarwal "Knowing What's Good for You?" (2018) *International Growth Centre Working Paper F-89219-INC-1 2*.

<sup>276</sup> Barboni and Agarwal "Knowing What's Good for You?" (2018) *International Growth Centre Working Paper F-89219-INC-1 2*.

<sup>277</sup> Barboni and Agarwal "Knowing What's Good for You?" (2018) *International Growth Centre Working Paper F-89219-INC-1 8*, de Janvry *et al* "Flexible Financial Products" (2013) *FERDI Policy Brief 83 3*.

<sup>278</sup> Labie *et al* 2017 *Oxford Development Studies* 326.

<sup>279</sup> Labie *et al* 2017 *Oxford Development Studies* 328. See also Laureti "Matching Transactions with Clients' Cash Flow" (2011) *Centre for European Research in Microfinance* 1.

<sup>280</sup> Laureti "Matching Transactions with Clients' Cash Flow" (2011) *Centre for European Research in Microfinance* 1. The third category that the authors have identified is full flexibility, which fully allows financial contracts to match transactions with clients' actual financial cash flows without imposing any commitment devices.

future cash flows.<sup>281</sup> A financial transaction is entered into with inbuilt flexible terms that only operate when the client experiences cash-flow challenges in the future. For instance, a credit agreement with a dairy farmer may be entered into which already offers the possibility of a grace period or reduced repayment during the period when dairy cattle are not lactating.<sup>282</sup> Such flexibility also works for low-income households with unstable or seasonal incomes in developing economies who are largely informal macro entrepreneurs.<sup>283</sup> With *ex-post* flexibility, the possibility of adapting a financial transaction to suit the client's cash flow in the future is deferred until the actual cash flow challenges arise.<sup>284</sup> A transaction does not include flexible features at the point of its conclusion. It is concluded with the relevant information about the client's actual financial cash flow<sup>285</sup> and the standard commitment features used as disciplining mechanisms are preserved.<sup>286</sup> However, flexible terms in the contract are contingent on the future occurrence of such cash flow challenges.<sup>287</sup> A typical example is an allowance for *ex-post* contract renegotiation in the loan contract.<sup>288</sup>

### 2.3.3 Targeted Groups or Income Levels

#### 2.3.3.1 *The Low-income and the Poverty line*

One important issue that the AFI's definition guideline identifies relates to the subjects who are the targets for FI. Put differently, the question that must also be asked is who does the policy and legal framework that promote FI see as a unit of response? Who are experiencing FE? This question is important for policy and regulatory reform. A regular theme in policies and literature discussions connects FI with different target groups and uses different income levels to determine the sector of the community that is the focus of a national FI strategy. Poverty is an important indicator for allocating resources to achieve FI. Income level is used

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<sup>281</sup> Labie *et al* 2017 *Oxford Development Studies* 328.

<sup>282</sup> Czura "Do Flexible Repayment Schedules Improve" (2015) *Munich Discussion Paper No 2015-2020* 2.

<sup>283</sup> Barboni 2017 *Journal of Economic Behaviour & Organization* 426.

<sup>284</sup> Labie *et al* 2017 *Oxford Development Studies* 328.

<sup>285</sup> Labie *et al* 2017 *Oxford Development Studies* 331.

<sup>286</sup> Laureti "Matching Transactions with Clients' Cash Flow" (2011) *Centre for European Research in Microfinance* 26.

<sup>287</sup> Labie *et al* 2017 *Oxford Development Studies* 331.

<sup>288</sup> Hamp and Laureti "Balancing Flexibility and Discipline" (2011) *Centre Emile Bernheim Working Paper No 11/044* 2. See also Labie *et al* 2017 *Oxford Development Studies* 331; Laureti and Hamp "Innovative Flexible Products" 2011 *Savings and Development* 101.



to determine a person's degree of poverty.<sup>289</sup> Poverty lines vary both internationally and nationally. Internationally, the poverty line is set at \$1.90 a day.<sup>290</sup> The person is poor if his or her daily income is below this poverty line. Without being specific about the exact level of poverty, the discussions on FI and FE simply refer to the poor or the low-income as the main target groups for FI policy and legal frameworks. The reason for this connection is the emergence of these concepts from the provision of small-scale financial services to low-income populations through the development of microfinance institutions.<sup>291</sup>

### **2.3.3.2 Individuals or Households as the Point of Assessment**

Two relevant questions in the discussions of the targets of the FI framework are whether this framework should focus on individuals or households and whether FI is for everyone. What is observed in the academic and policy debates is the intertwined use of individuals, households, or groups as one or additional targets of FI frameworks.<sup>292</sup> This leaves a question of whether

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<sup>289</sup> Bumacov, Ashta and Singh "Poverty Scoring and Financial Inclusion of the Poor" 2017 26 *Strategic Change* 555 555. See the new poverty lines set by the World Bank, which set two poverty lines as extreme poverty line and additional poverty line at the minimum of \$1.90 a day and \$21.70 a day in World Bank "The 2017 Global Poverty Update From The World Bank" (2017) <http://blogs.worldbank.org/developmenttalk/2017-global-poverty-update-world-bank> (accessed: 2018-05-14). In South Africa, the poverty line is measured on three levels per person per month. The "food poverty line" which is currently sitting at the R531, the "lower-bound poverty line" which is at R758, and the "upper-bound poverty line" which is at a maximum of R1138. See also Statistics South Africa "Poverty Trends in South Africa an Examination of Absolute Poverty Between 2006 and 2015" (2017) <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed: 2018-05-14) 8; Woodward and Abdallah "Redefining Poverty A Rights-Based Approach" (2010) *New Economic Foundation* <https://s.bsd.net/nefoundation/default/page/-/publications/RBPLTechPub.pdf> (accessed: 2018-05-14); Woodward and Abdallah "How Poor Is 'Poor'? Towards a Rights-Based Poverty Line" (Nd) *New Economic Foundation* [https://b.3cdn.net/nefoundation/9190d355dfa2d4f550\\_kkm6bpg2y.pdf](https://b.3cdn.net/nefoundation/9190d355dfa2d4f550_kkm6bpg2y.pdf) (accessed: 2018-05-14).

<sup>290</sup> UNDP "UNDP and the Concept and Measurement of Poverty" (2016) <http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/issue-brief---undp-and-the-concept-and-measurement-of-poverty.html> (accessed: 2018-05-12). This was revised from the first target under the Sustainable Development Goal which measured poverty according to people living on less than \$1.25 a day. See also World Bank *NFIS Template* (2016) 8; Sumner and Ortiz-Juarez "Fragile Progress?: Global Monetary Poverty, 1981-2030" Paper Presented at the United Nations Virtual Inter-Agency Expert Group Meeting on the Implementation of the Third United Nations Decade for the Eradication of Poverty (24-27 May 2021).

<sup>291</sup> Gosh "Microfinance and the Challenge of Financial Inclusion for Development" 2013 1 *Cambridge Journal of Economics* 1 3. See also Schmied and Marr "Financial Inclusion and Poverty: The Case of Peru" 2016 16 *Regional and Sectoral Economic Studies* 29 30; Chibba 2009 *EJDR* 214.

<sup>292</sup> Salignac *et al* 2016 *JSP* 272-282. See also Bunyan *et al* 2016 *Journal Consumer Policy* 202; Amidžić *et al* "Assessing Countries' Financial Inclusion" (2014) *IMF Working Paper WP/14/36* 5-6; Dasgupta 2009 *Economic and Political Weekly* 41.

the definition of a FI framework should be couched in terms of individuals or households, or the community as a whole. There is no straightforward answer. Assessing FI at either individual, household (or family), or business levels has both advantages and drawbacks. With regard to whether the assessment should be at an individual or household level, a question that needs to be answered is how a particular household makes financial decisions or arrangements. It is argued that the answer depends on whether a household is a “unitary economic actor”, in which case the assessment should be made at the household level.<sup>293</sup> On the other hand, if financial arrangements in the household are based partly on the independent decision of one individual, an individual assessment as a consideration of the household’s decision as a unit would be misleading.<sup>294</sup> A disadvantage of the individualistic approach is an assessment that may marginalise people who access financial services through their partners or parents who have extensive access to these services on behalf of the entire household.<sup>295</sup> Members of the household must be assessed as financially excluded, notwithstanding that another member of the household is making full use of financial services on their behalf.<sup>296</sup>

The assessment at the household level, on the other hand, relies profoundly on the household’s decision making and financial arrangements.<sup>297</sup> This assessment assumes unitary financial decision making jointly by all members of the household, and a non-discriminatory pooling of financial resources among them.<sup>298</sup> By following the household assessment approach, the assessment can take account of both direct and indirect access to financial services in terms of which one member of the household can access these services through another member, something that the individual assessment undermines.<sup>299</sup> Its main drawback is the risk of losing relevant information on the users of financial services.<sup>300</sup> By assuming access for all members of the household if one of them has access, it fails to recognise the

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<sup>293</sup> Honohan and King Conference Paper (12-14 March 2009) 7.

<sup>294</sup> Honohan and King Conference Paper (12-14 March 2009) 7.

<sup>295</sup> Rahim *et al* “Financial Inclusion Amongst New Migrants (2009) *Report for Information Centre about Asylum and Refugees* 12.

<sup>296</sup> Rahim *et al* “Financial Inclusion Amongst New Migrants (2009) *Report for Information Centre About Asylum and Refugees* 12.

<sup>297</sup> Honohan and King Conference Paper (12-14 March 2009) 7. See also Campero and Kaiser “Access to Credit: Awareness and Use of Formal and Informal Credit Institutions” (2013) *Banco de Mexico Working Papers No. 2013-07* <http://www.banxico.org.mx/publicaciones-y-discursos/publicaciones/documentos-de-investigacion/banxico/%7BD126CDDE-93CC-942B-2A59-90A5A1AE09B9%7D.pdf> (accessed: 2018-05-15) 11.

<sup>298</sup> Matul “Financial Behaviours” (2009) 7.

<sup>299</sup> Honohan and King Conference Paper (12-14 March 2009) 7.

<sup>300</sup> The World Bank “Indicators of Financial Access” (Nd) 2.

intra-household opportunity of each member of the household's access to and use of financial services.<sup>301</sup> It also disregards the possibility of the exclusion of one member of the family, for instance, due to divorce. Both or either the individual or the household-level assessments may be appropriate in their own right.

This research follows the assessment of an FI framework at the household level for the following reasons. First, the use of the household level is important in developing countries such as South Africa. The World Bank has identified the challenge of isolating a single member of the family unit from accessing and using financial services in developing countries.<sup>302</sup> Analysing FI at the household level also takes stock of the fact that financial products may be accessed in the name of one member of the household but for the benefit of all members.<sup>303</sup> Also, FI, as discussed further below,<sup>304</sup> is not about promoting access for FI sake; it is not about the individual headcounts. While statistical overviews are important indicators, FI is not an end in itself but a means for the achievement of a particular end.<sup>305</sup> As the UNSGSAIFD notes, "[t]hat end is human development [and] improving lives of those who need help the most".<sup>306</sup> In addition, FI should be seen as an ongoing process rather than a static state.<sup>307</sup> It should, as discussed below, be a process for facilitating, social welfare and economic growth rather than one of having or not having certain financial services at a particular period.<sup>308</sup> A household that is well off, and therefore sees no need for a basic saving account at a particular time, may experience severe financial challenges that may transform it into the poorest of households which indeed needs such services.<sup>309</sup> This research focuses on the low-income

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<sup>301</sup> The World Bank "Indicators of Financial Access" (Nd) 2.

<sup>302</sup> The World Bank "Indicators of Financial Access" (Nd) 2.

<sup>303</sup> Kempson *et al* "In or Out: Financial Exclusion" (2000) *Financial Services Authority Consumer Research* 3 21.

<sup>304</sup> See Ch 2.5 below.

<sup>305</sup> See United Nations Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGAIFD) "Annual Report of the Secretary-General" (2017) [https://www.unsgsa.org/files/4915/1853/4029/UNSGSA\\_report\\_2017-2.pdf](https://www.unsgsa.org/files/4915/1853/4029/UNSGSA_report_2017-2.pdf) (accessed: 2018-05-15) 15.

<sup>306</sup> UNSGSAIFD "Annual Report of the Secretary-General" (2017) 15.

<sup>307</sup> Salignac *et al* 2016 *JSP* 277. See also Brennan *The Changing Landscape of Financial Services in Manitoba* (PhD, University of Manitoba 2012) 13; Molyneux in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 192 on financial exclusion as a state or process. Cf Kim "A Study on the Effect of Financial Inclusion on the Relationship Between Income Inequality and Economic Growth" 2016 52 *Emerging Markets Finance and Trade* 498 498; Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 100.

<sup>308</sup> Chant Link and Associates "A Report on Financial Exclusion in Australia" (2004) 37.

<sup>309</sup> Wright and Dondo "Are You Poor Enough?: Client Selection by Microfinance Institutions" (2001) [http://www.microsave.net/files/pdf/Are\\_You\\_Poor\\_Enough\\_Client\\_Selection\\_by\\_Microfinance\\_Institutions.pdf](http://www.microsave.net/files/pdf/Are_You_Poor_Enough_Client_Selection_by_Microfinance_Institutions.pdf) (accessed: 2017-10-22) 4.

households who suffer exclusion from formal financial services the most, simply to help understand how transactional and savings accounts must be designed to serve their specific needs. It takes a limited position on the impact of poverty and lack of sufficient income as key factors that contribute to FE.<sup>310</sup>

### **2.3.3.3 Access for All and "Financial Citizenship"**

The assessment of FI based on poverty lines and the focus on either individual or household levels help to identify specific targets of FI frameworks. In general, FI is intended for everyone. Consistent with the World Bank's point, "[i]nclusive finance does not require that everyone who is eligible use each of the financial services, but they should be able to choose to use them if desired".<sup>311</sup> Although the FI policy and legal frameworks target the poor with special needs owing to their exclusion from formal financial services, a broad vision of an FI framework includes everyone who can use these services. Other definitions have accommodated the concept of everyone by including both businesses and enterprises.<sup>312</sup> Ledgerwood, in discussing the target market of microfinance institutions, draws a distinction worth noting between direct targeting and indirect targeting.<sup>313</sup> Direct targeting refers to the institution's specific targeting of a particular group or sector based on its belief that the group or sector is unable to access financial services.<sup>314</sup> Ledgerwood criticises this approach on

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<sup>310</sup> See Flaherty and Banks "In Whose Interest? Action Research on Debt in Poor Households" 2013 21 *Journal of Poverty and Social Justice* 219; Ellison, Whyley, Forster, and Jones "Credit and Low Income Consumers: A Demand-Side Perspective on the Issues for Consumer Protection (2011) *Friends Provident Foundation* <https://policis.com/pdf/Credit%20and%20low-income%20consumers%20Policis%20for%20Friends%20Provident%20Foundation%20Jan%202012.pdf> (accessed: 2018-05-13) who identify poverty and low income as the factors towards FI.

<sup>311</sup> UN *Building Inclusive Financial Sectors* (2006) 3, factors such as single parents, unemployment, and those living on social benefits.

<sup>312</sup> Burkett and Drew "Financial Inclusion, market failures and New markets: Possibilities for Community Development Finance Institutions in Australia (2008) *A Foresters Community Finance Occasional Paper* <https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-financial-inclusion-market-failures-and-new-markets-possibilities-for-community-development-finance-institutions-in-australia-oct-2008.pdf> (accessed: 2018-05-13) 9; Shetty and Pinto 2015 *IJAFMP* 1607; Spaven and Nielsen *Measuring Market Development: A Handbook For Funders and Implementers of Financial Inclusion Programs* (2017) 3; Amidic *et al* "Assessing Countries' Financial Inclusion" (2014) *IMF Working Paper WP/14/36* 5.

<sup>313</sup> Ledgerwood *Microfinance Handbook* (1999) 34-35. Cf The World Bank "Impact Evaluation for Microfinance" (2007) [http://siteresources.worldbank.org/INTISPMA/Resources/383704-1146752240884/Doing\\_ie\\_series\\_07.pdf](http://siteresources.worldbank.org/INTISPMA/Resources/383704-1146752240884/Doing_ie_series_07.pdf) (accessed: 2018-05-13), in which an emphasis is placed on the impact that microfinance products have rather the specific target markets.

<sup>314</sup> Ledgerwood *Microfinance Handbook* (1999) 34 in the context of her discussion with access to credit.

several grounds including that direct targeting may, in her view, have the potential to exclude eligible clients such as unfinanced or underfinanced businesses who do not fit the profile of the specific group or sector identified.<sup>315</sup> She supports the indirect targeting approach which advocates designing products and services for all people excluded by formal financial services rather than for particular groups that fit a narrowly-defined profile.<sup>316</sup> Implicit in this distinction is the emphasis on the design of products for all rather than for specified groups. Following the indirect-targeting approach would therefore mean that a national FI framework must generally focus on all stakeholders. When the question is raised as to who such framework should cover, an additional question should be whether they are unbanked or underbanked. This would determine whether they lack access to financial services at all or have limited access to products that are not designed for their needs; thus, restricting their usage.

Proponents of full FI have also attempted to look beyond the targets for the FI framework from narrow groups or sectors to accommodate everyone as beneficiaries of this framework. Regan and Paxton define "full financial inclusion" as "when all citizens have the appropriate financial products and services and the opportunity, ability, and confidence... to make informed decisions about their financial circumstances".<sup>317</sup> Various international policies also refer to access of "citizens" or "people" to financial services as a unit of analysis to determine the effectiveness of FI policies and legal frameworks.<sup>318</sup>

The initiative aimed at the inclusion of all people in the financial systems can be traced back to the introduction of the term "financial citizenship".<sup>319</sup> In their introduction of the term FE,

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<sup>315</sup> Ledgerwood *Microfinance Handbook* (1999) 35. See also Wright and Dondo "Are You Poor Enough?" (2001).

<sup>316</sup> Ledgerwood *Microfinance Handbook* (1999) 35-36.

<sup>317</sup> Regan and Paxton "Beyond Bank Accounts" (2003) *Institute for Public Policy Research London* 8.

<sup>318</sup> Regan and Paxton "Beyond Bank Accounts" (2003) *Institute for Public Policy Research London* 8-9. See also European Commission "Financial Services Provision" (2008) 9 which refers to financial exclusion as a "process in the course of which *citizens* experience problems in accessing and/or taking advantage of financial products and services" (emphasis added); Arun and Kamath 2015 *IIMB Management Review* 269.

<sup>319</sup> The term "financial citizen" is claimed to have been used for the first by Gray and Hamilton *Implementing Financial Regulation* (2006). See also Smith and Dixon "The Consumer Interest and the Financial Markets" in Moloney, Ferran and Payne (eds) *The Oxford Handbook of Financial Regulation* (2015); Gray "What Next for Risk-based Financial Regulation?" in MacNeil and O'Brien (eds) *The Future of Financial Regulation* (2010). These authors, however, do not discuss financial citizenship within the context of FI and FE. The discussion here follows the introduction of the concept by Leyshon and Thrift (1995) *Transactions of the Institute of British Geographers*.

Leyshon and Thrift propose the notion of “financial citizenship”.<sup>320</sup> These authors use this notion as an alternative agenda that will foster resistance against FE and help to construct institutional alternatives that deliver basic banking and low-cost loans to low-income households.<sup>321</sup> They take a human-rights stance to FI to determine the state’s responsibility to confer citizenship and rights to put pressure on financial systems to realise their “state-like responsibilities which reach beyond consumer sovereignty into basic human rights”.<sup>322</sup> Their notion of financial citizenship has invigorated debate on access to financial services for all citizens. In this context, it denotes a right of citizens to participate democratically in decisions that affect their wellbeing.<sup>323</sup> Implicit in this objective is the democratic participation of all citizens in financial systems. For instance, Rahim *et al*/ argue for a more expansive FI that includes citizen participation.<sup>324</sup> Berry and Serra take this objective further by underscoring the lack of participation as a financial citizen usurping the status of full citizenship.<sup>325</sup> As they note, “[i]n a financialised society, if we are not financial citizens, then arguably we are not citizens at all”.<sup>326</sup> Shetty and Pinto support the human rights argument on financial citizenship.<sup>327</sup> They see a bank account not as a luxury but as a necessity that “should be considered as a fundamental right of citizens of a country”.<sup>328</sup> In this expansive conceptualisation, the FI framework will include all stakeholders, the poor and the well off, low-income households, and individuals as financial citizens. It will also include unfinanced

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<sup>320</sup> Leyshon and Thrift 1995 *Transactions of the Institute of British Geographers* 314. See also Leyshon “Financial Exclusion” in Kitchin and Thrift (eds) *International Encyclopaedia of Human Geography* Vol 8 (2009) 153-8; Chowdry “Can Financial Citizenship Begin at Birth?” 2012 *Stanford Innovation Review* 17; Kear “Governing *Homo Subprimicus*: Beyond Financial Citizenship, Exclusion, and Rights” 2013 45 *Antipode* 926; Pearson “Financial Literacy and the Creation of Financial Citizens” in Kelly-Louw, Nehf and Roff (eds) *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (2008) in the consumer credit context; Appleyard, Rowlingson and Gardner “The Variegated Financialization of Sub-Prime Credit Markets” 2016 20 *Competition & Change* 297.

<sup>321</sup> Leyshon and Thrift 1995 *Transactions of the Institute of British Geographers* 314.

<sup>322</sup> Leyshon and Thrift 1995 *Transactions of the Institute of British Geographers* 336. The issue of the constitutional right to financial services falls outside the scope of this research.

<sup>323</sup> Berry and Serra “Financial Citizenship Rethinking the State’s Role in Enabling Individuals to Save” (2012) *Friends Provident Foundation* [http://www.infohub.moneyadvicetrust.org/content\\_files/files/ilc\\_financial\\_citizenship\\_full\\_report1.pdf](http://www.infohub.moneyadvicetrust.org/content_files/files/ilc_financial_citizenship_full_report1.pdf) (accessed: 2018-05-18) 4.

<sup>324</sup> Rahim *et al* “Financial Inclusion Amongst New Migrants (2009) *Report for Information Centre about Asylum and Refugees* 11. See also Burton “Credit Inclusion and the Home Credit Market in Post-Communist Member States of the European Union” 2017 37 *Critical Social Policy* 444 446.

<sup>325</sup> Berry and Serra “Financial Citizenship” (2012) *Friends Provident Foundation* 4.

<sup>326</sup> Berry and Serra “Financial Citizenship” (2012) *Friends Provident Foundation* 4.

<sup>327</sup> Shetty and Pinto 2015 *IJAFMP* 1607.

<sup>328</sup> Shetty and Pinto 2015 *IJAFMP* 1607.

and underfinanced big corporations and small businesses all of which may suffer under financial constraints and FE.<sup>329</sup>

### 2.3.4 Providers that Should Deliver Services

One of the elements that the definitions of FI and FE reinforce relates to the types and characteristics of the service providers. An array of definitions identifies the service providers in terms of the industry or market required to provide financial services to the poor or refrain from excluding them from accessing the services. This is indicated by the continual use of phrases such as “products provided by the mainstream institutional players”,<sup>330</sup> “mainstream providers”,<sup>331</sup> “mainstream markets”,<sup>332</sup> or “mainstream financial services”.<sup>333</sup> Other relevant definitions try to distinguish different financial service providers in terms of how they are regulated. They refer to the provision of financial services offered by “formal” financial services or outlets.<sup>334</sup> The distinction of different types of financial institution into formal and informal is important both for identifying how the community is excluded and, for this research, how financial institutions that provide financial services for the poor are regulated. Identifying on which institutions the regulators must impose duties to provide financial services for the low-income household to promote FI depends largely on the distinction between formal and informal financial services. FI initiatives operate on the premise that the poor and the low-income groups access and use some form of financial products or services. Many financial services for day-to-day financial activities, consumption, or economic growth are in the informal sectors. Due to the difficulties of accessing formal financial services such as banks,

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<sup>329</sup> See Dymski “Financial Globalization, Social Exclusion and Financial Crisis” 2005 19 *International Review of Applied Economics* 439 440 who refers to FI (referring to it as social exclusion in the financial realm) as the systematic exclusion of households and businesses from financial citizenship. See also Lakhani and Bhardwaj “A Study of Financial Inclusion in Select Areas of Pune City” 2012 5 *Journal of Research Articles in Management Sciences and Allied Areas* 53 55; Beck and Demirguc-Kunt 2008 *The World Bank Economic Review* 387.

<sup>330</sup> Bhowmik and Saha *Financial Inclusion of the Marginalised* (2013) 2.

<sup>331</sup> Turkmen and Cagil in Dinçer and Hacıoğlu (eds) *Risk Management, Strategic Thinking* (2017) 13. See also Wilson “Consumer Credit Regulation and Rights-Based Social Justice: Addressing Financial Exclusion and Meeting the Credit Needs of Low-Income Australians” 2012 35 *UNSW Law Journal* 501 505; Smyczek and Matysiewicz 2014 *JEM* 82.

<sup>332</sup> Howell and Wilson 2005 *Macquarie Law Journal* 129.

<sup>333</sup> Bunyan *et al* 2016 *Journal Consumer Policy* 202. See also Devlin 2005 *Journal of Consumer Policy* 75; European Commission “Financial Services Provision” (2008) 9; Sain *et al* Conference Paper (4-5 July 2013) 266; Prabhakar 2018 *Social Policy & Society* 3-4.

<sup>334</sup> Ramji “Financial Inclusion in Gulbarga” (2009) *Centre for Microfinance Working Paper Series No 26*. See also Zins and Weill 2016 *Review of Development Finance* 46, Swamy 2010 *Banks and Bank Systems* 64.

many of the poor or low-income earners resort to financial services in the informal sectors which are perceived to be exploitive, expensive, and unsafe.<sup>335</sup>

The emphasis of FI policies and regulatory frameworks on formal financial services takes several factors associated with the provisions of financial services in the formal financial sector into account. Key amongst efforts to make these services accessible focus on the need for consumers to be protected from abusive and exploitative practices associated with the informal sector.<sup>336</sup> This ensures that the services provided to consumers are both convenient and safe.<sup>337</sup> Financial sustainability is also an important principle for financial service providers. It is required that the services under the FI framework must be provided responsibly and sustainably and in a regulated environment. The extant distinction between formal and informal generally identifies institutions whose legal status and functions are under the supervision and regulation of government agencies (such as the central banking authority) as formal financial services. Important for this research, formal financial institutions refer to regulated institutions such as commercial banks whose main deposit-taking functions are regulated and supervised by the central bank.<sup>338</sup>

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<sup>335</sup> Howell and Wilson 2005 *Macquarie Law Journal* 128. See also Cobb, Wry, and Zhao "Funding Financial Inclusion: Institutional Logics and the Contextual Contingency of Funding for Microfinance Organizations" 2016 59 *Academy of Management Journal* 2103 2105. Cf Ayyagari, Demirgüç-Kunt and Maksimovic "Formal Versus Informal Finance: Evidence from China" (2008) *The World Bank Policy Research Working Paper* 4465 <http://documents.worldbank.org/curated/en/394821468240019686/pdf/wps4465.pdf> (accessed: 2018-06-03); Babajide "The Relationship Between the Informal and Formal Financial Sector in Nigeria: A Case Study of Selected Groups in Lagos Metropolis" 2011 1 *International Journal of Research on Computer Application & Management* 24 25; Campero and Kaiser "Access to Credit" (2013) *Banco de Mexico Working Papers No 2013-07* 19; Beck *et al Financing Africa* 138; Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 138; Rhyne *Microfinance from Bankers* 12. See further Atieno "Formal and Informal Institutions' Lending Policies and Access to Credit by Small-scale Enterprises in Kenya: An Empirical Assessment" (2001) *African Economic Research Consortium Research Paper* 111 <https://www.africaportal.org/documents/5926/RP111.pdf> (accessed: 2018-05-23) 7 who discusses the complementary effects of the informal financial sector including flexible financial products and transactions and less stringent credit assessment procedures.

<sup>336</sup> Martínez *et al* "Demand Factors that Influence Financial Inclusion in Mexico" (2013) *BBVA Research Working Paper* 13/373.

<sup>337</sup> Patel "Financial Inclusion: Harnessing Poor Families' Potential for Development" 2016 2 *IJSRST* 144 144.

<sup>338</sup> Depending on a particular jurisdiction, co-operative banks and some of the self-help groups (ie, ROSCAs and ACSAS) do fall under this category.



## 2.4 DIMENSIONS OF FINANCIAL EXCLUSION

The above discussion focuses on key elements in the definition of FI. This definition has been expanded since its first introduction by Leyshon and Thrift. Amongst various multi-dimensions for defining FI and FE, the most discernible dimensions in the literature are derived from research by Kempson and Whyley.<sup>339</sup> These authors explored other causes that explain the difficulties of accessing financial services. They identify the following dimensions of FE in addition to access exclusion.<sup>340</sup> The first dimension, which they term the “price exclusion”, relates to the restrictions on access to financial products resulting from prices and charges that low-income households cannot afford.<sup>341</sup> The question of affordability of financial services has taken a centre stage in many policies and regulations for promoting FI.<sup>342</sup> The main factors associated with price exclusion include high transaction costs, administrative charges, high rates of interest, minimum balance requirements, and fees that are prohibitively high and unaffordable for the low-income society.<sup>343</sup> Other dimensions they identify are condition exclusion, marketing exclusion, and self or voluntary exclusion. The condition exclusion simply refers to the forms of exclusion that arise from terms and conditions attached to financial products which make them inappropriate for the needs of certain sectors of society.<sup>344</sup> Examples are insurance policies with high excess amounts and current accounts that are

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<sup>339</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 41. See also Carbo, Gardener and Molyneux “Financial Exclusion in Europe” 2007 27 *Public Money & Management* 21 21-22. See further Corr *Financial Exclusion in Ireland: An Exploratory Study and Policy Review* (2006) 10-13 who identifies additional dimensions of exclusion such as geographical exclusion, resource exclusion which relate to where people may have the need, for example, to save for but do not have the income to do so, and electronic exclusion.

<sup>340</sup> Carbo *et al* 2007 *Public Money & Management* 21-22.

<sup>341</sup> Kempson *et al* “In or Out: Financial Exclusion” (2000) *Financial Services Authority Consumer Research* 3 9.

<sup>342</sup> Shahulhameedu “Financial Inclusion – Issues In Measurement And Analysis” 2014 2 *International Journal of Current Research and Academic Review* 116 117 who defines FI as an absence of price or non-price barriers. See also Centre for Financial Inclusion “Financial Inclusion: What’s The Vision?” (Nd); Bhowmik and Saha *Financial Inclusion of The Marginalised* (2013) 2 referring to “financial inclusion as a process of ensuring access ....at an affordable costs”.

<sup>343</sup> Gómez-Barroso and Marbán-Flores “Basic Financial Services: A New Service of General Economic Interest?” 2013 23 *Journal of European Social Policy* 332 334. See also Prabhakar 2018 *Social Policy & Society* 7; Kempson *et al* “In or Out: Financial Exclusion” (2000) *Financial Services Authority Consumer Research* 3 56; Narain “Gender and Access to Finance” (2009) *Analytical Paper World Bank* 8.

<sup>344</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 9. See also Kempson “Policy Level Responses to Financial Exclusion in Developed Economies: Lessons for Developing Countries” Paper Presented at Access to Finance: Building Inclusive Financial Systems” World Bank, Washington DC (30-31 May 2006).

offered with limited or no essential facilities such as an overdraft.<sup>345</sup> Marketing exclusion involves the exclusion through targeted marketing and sales strategies that deny access to certain communities who have never used these services.<sup>346</sup> Different factors such as socio-economic status and distance from the financial service providers determine these strategies.<sup>347</sup> For instance, a marketing strategy that advertises certain products and services to affluent customers to the exclusion of people in the lower-income communities falls under this dimension.<sup>348</sup>

Kempson and Whyley also identify voluntary self-exclusion as a further dimension of FE.<sup>349</sup> This dimension is controversial as it is uncertain whether people are excluded by institution-led barriers such as the price of the product, or by “making active and unconstrained choices not to have any financial products”.<sup>350</sup> Voluntary exclusion refers to a voluntary decision not to access and use financial services even when consumers have the ability to do so.<sup>351</sup> It differs from involuntary exclusion where individuals are excluded from access to financial services due to barriers and factors that make it difficult to access these services.<sup>352</sup> According to the World Bank, procedures used to profile customers during their application for financial services and discriminatory practices by the financial service providers in their marketing of these products, may originate either from market or government failure to promote inclusion.<sup>353</sup> As a result, it remains a grey area whether policies and the regulatory framework should focus on involuntary exclusion only or include voluntary exclusion.

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<sup>345</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 9.

<sup>346</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 9.

<sup>347</sup> Sharma and Reddy “Empirical Modelling of Bank Market Exclusion” 2003 21 *International Journal of Bank Marketing* 296 297.

<sup>348</sup> Corr *Financial Exclusion in Ireland* (2006) 41.

<sup>349</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 9. See also Kempson *et al* “In or Out: Financial Exclusion” (2000) *Financial Services Authority Consumer Research* 3 9.

<sup>350</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 14 and 21.

<sup>351</sup> Park and Mercado “Financial Inclusion, Poverty, and Income Inequality in Developing Asia” (2015) *ADB Economics Working Paper Series No 426* <https://www.adb.org/sites/default/files/publication/153143/ewp-426.pdf> (accessed: 2018-02-08) 1. See also Kumar *Financial Exclusion among the Scheduled Tribes* (Masters, 2013) 42; Demircuc-Kunt *et al* “The Global Findex Database 2014” (2015) 61.

<sup>352</sup> Chaulagain “Barriers of Access to Finance in Nepal” 2015 3 *International Journal of Development and Economic Sustainability* 24 25.

<sup>353</sup> The World Bank “Financial Inclusion” (2014) *Global Financial Development Report 2014* 16. See also Gortsos “Financial Inclusion: An Overview of Its Various Dimensions and the Initiatives to Enhance Its Current Level” (2016) *European Center for Economic and Financial Law Working Paper Series NO 2016/2015* <http://www.ecefil.eu/UplFiles/WPS/wps2016-15.pdf> (accessed: 2018-02-11); Park and Mercado “Financial Inclusion: New Measurement and Cross-Country Impact Assessment” (2018) *ADB Economics Working Paper Series No 539*

There are different thoughts on whether both voluntary and involuntary exclusions should be considered in measuring the degree of FE or applying relevant policy and regulatory frameworks to extend FI. The first school of thought takes the position that a voluntary exclusion should not form part of the policy and regulatory frameworks for FI. This argument is based on the idea that FE arises largely from the failure of financial services providers to supply products appropriate for the need of society.<sup>354</sup> An affirmation by Shankar claims that the segments of the population which voluntarily exclude themselves must not form part of the assessment of FE.<sup>355</sup> This view is based on the challenge of differentiating between voluntary and involuntary exclusion. Fungáčová and Weills<sup>356</sup> appear to support this view but advocate a different approach. These authors admit the importance of the distinction between these categories of FE, and particularly the significance that “implementing of right policy” can have to overcoming obstacles to FI.<sup>357</sup> Their point of departure regarding whether an exclusion is voluntary or involuntary, is to focus on the motives associated with FE<sup>358</sup> such as lack of money, and involuntary exclusions such as excessive charges or lack of relevant documentation that are required in the banking industry.<sup>359</sup> On this basis, they conclude that only the motives associated with involuntary exclusion are useful in developing suitable policies to address FE.<sup>360</sup> Their argument appears to suggest that involuntary exclusion relates only to FI supply factors and voluntary exclusion to demand factors.

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<https://www.adb.org/sites/default/files/publication/408621/ewp-539-financial-inclusion.pdf>

(accessed: 2018-02-11) 3-4.

<sup>354</sup> Smyczek and Matysiewicz 2014 *JEM* 82. See King “The Unbanked Four-Fifths” (2012) *Institute for International Integration Studies Discussion Paper 411* <http://michaelking.ie/wp-content/uploads/2012/10/IIIS-Working-Paper-411-The-Unbanked-Four-fifths.pdf> (accessed: 2018-05-08) 11. See also Amidžić *et al* “Assessing Countries’ Financial Inclusion” (2014) *IMF Working Paper WP/14/36* 8.

<sup>355</sup> Shankar “Financial Inclusion in India: Do Microfinance Institutions Address Access Barriers?” 2013 2 *ACRN Journal of Entrepreneurship Perspectives* 60 62. See also Allen *et al* 2016 *Journal of Financial Intermediation* 1 2; Williams, Adegoke and Dare “Role of Financial Inclusion in Economic Growth and Poverty Reduction in a Developing Economy” 2017 7 *Internal Journal of Research in Economics and Social Sciences* 265 266.

<sup>356</sup> Fungáčová and Weill “A View on Financial Inclusion” (2014) *Bank of Finland Institute for Economies in Transition Policy Brief 8/2014* <https://helda.helsinki.fi/bof/bitstream/handle/123456789/12748/173611.pdf?sequence=1> (accessed: 2018-02-05).

<sup>357</sup> Fungáčová and Weill “A View on Financial Inclusion” 2014 *Bank of Finland Institute for Economies in Transition Policy Brief No 8/2014* 8.

<sup>358</sup> Fungáčová and Weill “A View on Financial Inclusion” 2014 *Bank of Finland Institute for Economies in Transition Policy Brief No 8/2014* 4.

<sup>359</sup> Fungáčová and Weill “A View on Financial Inclusion” 2014 *Bank of Finland Institute for Economies in Transition Policy Brief No: 8/2014* 8.

<sup>360</sup> Fungáčová and Weill “A View on Financial Inclusion” 2014 *Bank of Finland Institute for Economies in Transition Policy Brief No: 8/2014* 7-8.

Studies have revealed that both supply and demand factors are important in tackling FE.<sup>361</sup> From the supply side, FI initiatives are important for the provision of financial services. Not all FE demand factors can be addressed directly through regulatory frameworks for achieving FI. Examples are decisions not to use the services (particularly lack of the habit of saving or using credit facilities), or factors such as unemployment and poverty.<sup>362</sup> However, regulatory initiatives become important in tackling demand barriers such as developing financial literacy.<sup>363</sup> As correctly argued, “[t]o achieve the goal of financial inclusion, it is imperative to create demand and make people use the financial services for their economic development”.<sup>364</sup> Therefore, policy and regulatory initiatives to promote FI must necessarily also focus on the demand factors to address voluntary exclusions.

The importance of looking at both voluntary and involuntary exclusion has not been side-lined by policy developers and regulators. For instance, Bardu *et al* are of the view that customers’ voluntary refusal to use financial products should be taken into account when assessing the state of FI.<sup>365</sup> They note that although the decision may seem voluntary if justified by their decision that they have no need for financial services, that choice may arise from the supply factors such as the poor quality of the relationship with the bank or the perceived complexity of using banking products.<sup>366</sup> The World Bank’s household survey has also recognised the complexity of financial services as a key factor in determining whether an exclusion is voluntary or involuntarily.<sup>367</sup> This survey identified that among those who claim not to want financial services, reasons such as the affordability and services that are not designed to their

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<sup>361</sup> See Talledo “Access to and Use of Financial Services” (2015) 4; Mindra *et al* 2017 *An International Journal, Equality, Diversity and Inclusion* 130; Zins and Weill 2016 *Review of Development Finance* 46 53.

<sup>362</sup> However, as discussed below, the question is whether this unwillingness or lack of habit arises from factors such as negative past experiences or prejudices in dealing with financial institutions.

<sup>363</sup> Patel 2016 2 *IJSRST* 144.

<sup>364</sup> Roy *et al* 2017 *JBM* 60.

<sup>365</sup> Bardu, Boitan, Cioaca and Obreja “A Multi-dimensional Approach to the Financial Exclusion in EU Countries” 2017 44 *Romanian Journal of Economics* 130 134.

<sup>366</sup> Bardu *et al* 2017 *Romanian Journal of Economics* 134. See also Birkenmaier and Fu “Household Financial Access and Use of Alternative Financial Services in the U.S.: Two Sides of the Same Coin?” 2017 *Social Indicators Research* 1 12; Nanda and Kaur 2017 *South Asian Journal of Management* 117; Sakariya and Ruparel “Evaluation of Financial Inclusion Strategies of Banks in India: Reflections from Literature” 2018 10 *An Indexed Refereed Journal of Higher Education* 52 54; Chant Link and Associates “A Report on Financial Exclusion in Australia” (2004) 38.

<sup>367</sup> The World Bank “Indicators of Financial Access” (Nd).

needs contribute to their perception of possible rejection by financial institutions.<sup>368</sup> Demirgüç-Kunt and Klapper also support this view but add that voluntary exclusion may be linked not only to individual preferences or cultural norms but also to a lack of awareness of financial products (ie, lack of financial literacy).<sup>369</sup> Financial education plays a significant role in identifying whether exclusion is voluntary or involuntary.<sup>370</sup> What is clear from this discussion is that voluntary exclusion can result from circumstances that arise from involuntary actions of exclusion.<sup>371</sup> Situations may arise where customers exclude themselves due to conditions imposed on the use of financial products and this may lead to a lack of demand for these products.<sup>372</sup> Anastasi *et al* have suggested that the regulators have a major role to play in both voluntary and involuntary forms of exclusion.<sup>373</sup> Regulators and policymakers must endeavour to identify circumstances that lead to voluntary exclusion in addition to addressing clear cases of involuntary exclusion. Where the underlying causes of voluntary exclusion arise from demand factors such as financial illiteracy or past perceptions of discrimination, this merits positive policy and regulatory initiatives to address both voluntary and involuntary financial exclusions.

## 2.5 RECONCEPTUALISING FINANCIAL INCLUSION AND EXCLUSION

The FI and FE conceptual framework in the literature approaches these concepts from a supply-and-demand perspective. FI discourse, policy, and regulatory frameworks single-handedly focus on the take-up levels of financial products and how the service providers design their products to cater for the needs of their clients. The definitions of FI and FE focus on ensuring access and usage of financial services. To measure the performance of an FI

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<sup>368</sup> The World Bank "Indicators of Financial Access" (Nd). See also Anderloni and Carluccio in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 10; Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 103.

<sup>369</sup> Demirgüç-Kunt and Klapper 2013 *Brookings Papers on Economic Activity* 308. See also The World Bank "Financial Inclusion" (2014) *Global Financial Development Report 2014* 34.

<sup>370</sup> Bunyan *et al* 2016 *Journal Consumer Policy* 202.

<sup>371</sup> Saunders "Can Social Exclusion Provide a New Framework?" (2003) *Social Policy Research Center Discussion Paper No 127* <https://www.sprc.unsw.edu.au/media/SPRCFile/DP127.pdf> (accessed: 2018-02-05) 6.

<sup>372</sup> Anastasi *et al* "Bancarization" (2006) *Banco Central De La República Argentina Working Paper 15*.

<sup>373</sup> Anastasi *et al* "Bancarization" (2006) *Banco Central De La República Argentina Working Paper 15*. See also Hannig and Jansen "Financial Inclusion and Financial Stability" (2010) *ADB Working Paper Series No 259* 1; Kempson *et al* "In or Out: Financial Exclusion" (2000) *Financial Services Authority Consumer Research* 3 33.

policy, regulation, and implementation strategies, research and policy reports have used account ownership as an important indicator of access or lack of access to financial services.<sup>374</sup> In terms of this approach, an important question in establishing financial outreach asks simply whether households can access and use financial services.<sup>375</sup> Statistical indicators for accessed loans and bank accounts become important for the achievement of the FI framework. This supply-and-demand approach is still promoted at the international policy level.<sup>376</sup> The AFI,<sup>377</sup> for instance, adopted a similar approach in its initial strategic documents for the measurement of FI.<sup>378</sup> Like other indicators, the extent of FI was measured with reference to access and use, with the quality of products added as the third dimension.<sup>379</sup> While this supply-and-demand approach is valuable for policy and regulatory framework reform, much is still lacking for the realisation of FI's principal goal. As indicated above, FI is not a goal in itself but a means by which to achieve a particular envisioned goal.<sup>380</sup> Taken from the microfinance policies, FI is a means of addressing various social difficulties that arise from the exclusion of certain sectors of the community from financial systems. The immediate objective of FI is to address cash-constrained challenges that poor households encounter. An effective framework for FI helps to facilitate cash management and consumption.<sup>381</sup> On a larger scale, however,

<sup>374</sup> Demirgüç-Kunt and Klapper 2013 *Brookings Papers on Economic Activity* 281. See also Kim 2016 *Emerging Markets Finance and Trade* 499.

<sup>375</sup> Beck and Demirgüç-Kunt 2008 *The World Bank Economic Review* 383. See also Ambarkhane, Singh and Venkataramani "Developing a Comprehensive Financial Inclusion Index" 2016 41 *Management and Labour Studies* 216 223.

<sup>376</sup> See Demirgüç-Kunt *et al* "The Global Findex Database 2017" (2018). See also the GPF "G20 Basic Set of Financial Inclusion Indicators" (2016) <http://www.gpfi.org/sites/default/files/G20%20Set%20of%20Financial%20Inclusion%20Indicators.pdf> (accessed: 2018-05-24); Ardic, Heimann and Mylenko "Access to Financial Services and the Financial Inclusion Agenda Around the World: A Cross-Country Analysis with a New Data Set" (2011) *The World Bank Policy Research Working Paper* <http://documents.worldbank.org/curated/en/519351468137108112/pdf/WPS5537.pdf> (accessed: 2018-05-24).

<sup>377</sup> See <https://www.afi-global.org/about-us> (accessed: 2018-05-18). AFI is a global network of FI policymaking bodies, including central banks, in developing countries with a mission to advance the development of FI policies. South Africa is a member of AFI with the National Treasury as a principal member and the South African Reserve Bank as an associate member. See <https://www.afi-global.org/members/South-Africa> (accessed: 2018-05-18).

<sup>378</sup> AFI "Financial Inclusion Measurement for Regulators" (2010) 4.

<sup>379</sup> In 2013, AFI identified the quality dimension as a challenging dimension to assess both conceptually and in terms of measurement. It then resolved to measure FI in terms of access and usage, despite acknowledging that the quality dimension is important. See AFI "Measuring Financial Inclusion" (2013) "Measuring Financial Inclusion Core Set of Financial Inclusion Indicators" (2013) *Financial Inclusion Data Working Group Guideline Note No 4* <https://www.afi-global.org/sites/default/files/publications/figwg-core-set-measuring-fi.pdf> (accessed: 2018-05-18) 2.

<sup>380</sup> See Ch 2.3.3.2 above.

<sup>381</sup> Adewale "Financial Regulation, Credit Consumption and Economic Growth – An Analysis of the National Credit Act in South Africa" 2014 30 *The Journal of Applied Business Research* 367 368.

FI serves many purposes including serving as a policy measure to alleviate poverty and promote economic growth and wellbeing.<sup>382</sup> From this perspective FI is a means to more comprehensive growth.<sup>383</sup>

The AFI is gradually acknowledging the importance of measuring FI with specific focus on welfare, that is, “the impact that a financial device or service has had on the lives of consumers”.<sup>384</sup> Together with access, usage, and quality dimensions, the AFI suggests a definition that includes welfare as an additional lens through which to assess FI.<sup>385</sup> Nevertheless, and similar to the quality dimension, welfare impact is perceived as very difficult to measure.<sup>386</sup>

Researchers and policymakers have gradually moved to a call for a reconceptualised definition of FI which extends beyond the simple supply-and-demand approach to ensure that FI policies, strategies, and regulatory frameworks have a positive impact on poverty alleviation, economic growth, and overcoming income inequalities.<sup>387</sup> Salignac *et al* suggest that an “alternative paradigm” is necessary to address issues of disadvantage and non-participation.<sup>388</sup> This paradigm, they suggest, should focus not only on factors such as lack of resources but also on how relationships and institutions prevent people from participating in the life of a community.<sup>389</sup> They therefore propose the assessment of FI through the lens of social inclusion as “a process encouraging social interaction between people with different socially relevant

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See also Yoshino and Morgan “Overview of Financial Inclusion, Regulation, and Education” (2016) *ADBI Working Paper Series No. 591* <https://www.adb.org/sites/default/files/publication/190672/adbi-wp591.pdf> (accessed: 2018-05-18) 5.

<sup>382</sup> Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 103. See also Stephen and Tom “The Role of Cooperative Banks in Financial Inclusion” 2015 14 *JBM* 55 55; Beck, Demirgüç-Kunt and Levine “Finance, Inequality and The Poor” 2007 12 *Journal of Economic Growth* 27 29; Manji 2010 *The Modern Law Review* 991.

<sup>383</sup> Joshi and Kohli 2017 *Vinimaya* 37.

<sup>384</sup> AFI “Financial Inclusion Measurement for Regulators” (2010) 5. According to the AFI this includes evaluating changes in consumption, business activities, and wellness.

<sup>385</sup> AFI “Measuring Financial Inclusion” (2013) *Financial Inclusion Data Working Group Guideline Note No 44*, 1.

<sup>386</sup> See further Helm *Access for All* (2006) 130.

<sup>387</sup> See Schmied and Marr 2016 *Regional and Sectoral Economic Studies* 32. See also Sachindra “Need for Financial Inclusion and Challenges Ahead - An Indian Perspective” 2013 9 *IOSR Journal of Business and Management* 33 34; Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 105; Kim 2016 *Emerging Markets Finance and Trade* 498; Beck “Financial Inclusion - Measuring Progress” (2016) 1-2; Beck and Demirguc-Kunt 2008 *The World Bank Economic Review* 392-393.

<sup>388</sup> Salignac *et al* 2016 *JSP* 273.

<sup>389</sup> Salignac *et al* 2016 *JSP* 273.

attributes or an impersonal institutional mechanism of opening up access to participation in all spheres of social life".<sup>390</sup>

Within its many dimensions, social inclusion is concerned with how communities are integrated into society and the impact that lack of integration has on their productive roles as human beings in that society.<sup>391</sup> Social inclusion policies focus on, for instance, how lack of employment denies income to those who have no access to the labour market and the institutional processes that manifest various forms of exclusion.<sup>392</sup> It also relates to a set of exclusions based on the availability of income and access to goods and services.<sup>393</sup> Social

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<sup>390</sup> Salignac *et al* 2016 *JSP* 273. For a detailed discussion of the link between FI and social exclusion, see Silver "The Contexts of Social Inclusion" (2015) *Desa Working Paper No 144* [http://www.un.org/esa/desa/papers/2015/wp144\\_2015.pdf](http://www.un.org/esa/desa/papers/2015/wp144_2015.pdf) (accessed: 2018-05-29) 3. See also Silver "The Process of Social Exclusion: The Dynamics of an Evolving Concept" (2007) *CPRC Working Paper 95* [http://www.chronicpoverty.org/uploads/publication\\_files/CP\\_2006\\_Silver.pdf](http://www.chronicpoverty.org/uploads/publication_files/CP_2006_Silver.pdf) (accessed: 2018-05-29) 3; Rawal "Social Inclusion and Exclusion: A Review" 2008 2 *Dhulagiri Journal of Sociology and Anthropology* 162 164; Berafe "Assessing the Causes and Effects of Social Exclusion: The Case of 'Pot Makers' in Yem Special Woreda in Sothern Nation, Nationalities and Peoples Regional State in Ethiopia" 2017 11 *AJPSIR* 68 72; Béland "The Social Exclusion Discourse: Ideas And Policy Change" 2007 35 *Policy & Politics* 123 126. The term is traced historically from France by one socialist, Rene Lenoir, in the context of social challenges experienced by those excluded from social protection. See Mascareño and Carvajal "The Different Faces of Inclusion and Exclusion" 2015 116 *Cepal Review* 128 132.

<sup>391</sup> See Wagle *Multidimensional Poverty Measurement Concepts And Applications* (2008) 43-47 for various political exclusions such as voting for membership of political parties, membership of or activity in pressure groups, or campaign organisation. See also Aduda and Kalunda 2012 *Journal of Applied Finance & Banking* 102; Berafe 2017 *AJPSIR* 69; Béland 2007 *Policy & Politics* 127; Bellani and D'Ambrosio "Deprivation, Social Exclusion And Subjective Well-Being" 2011 104 *Social Indicators Research* 68; Bhalla and Lapeyre "Social Exclusion: Towards an Analytical and Operational Framework" 1997 28 *Development and Change* 413 430; Estivill *Concepts and Strategies for Combating Social Exclusion An Overview* (2003) 36; Devicienti and Poggi "Poverty and Social Exclusion: Two Sides of the Same Coin or Dynamically Interrelated Processes?" 2011 43 *Applied Economics* 3549; Silver "The Contexts of Social Inclusion" (2015) *DESA Working Paper No 144*. See further Bradshaw "How Has the Notion of Social Exclusion Developed in the European Discourse?" 2004 14 *Economic and Labour Relations Review* 168 179; Saunders "Can Social Exclusion Provide a New Framework?" (2003) *Social Policy Research Center Discussion Paper No 1277* who identifies four dimensions as consumption, production, political engagement, and social interaction. See further Böhnke "Nothing Left to Lose? Poverty and Social Exclusion in Comparison: Empirical Evidence on Germany" (2001) *Social Science Research Center Berlin* [https://www.ssoar.info/ssoar/bitstream/handle/document/11499/ssoar-2001-bohnke-nothing\\_left\\_to\\_loose.pdf?sequence=1](https://www.ssoar.info/ssoar/bitstream/handle/document/11499/ssoar-2001-bohnke-nothing_left_to_loose.pdf?sequence=1) (accessed: 2018-05-02) 13; Percy-Smith "Political Exclusion" in Percy-Smith (ed) *Policy Responses to Social Exclusion: Towards Inclusion?* (2000) 151.

<sup>392</sup> Examples of institutional processes are the internal practices of branch expansion and closures by financial institutions in the rural areas that have a direct impact on the inclusion and exclusion rates of members of the local communities.

<sup>393</sup> Bhalla and Lapeyre 1997 *Development and Change* 419.



exclusion also involves a lack of access to banks and building societies and specific exclusion from products such as savings, payments, and credit facilities.<sup>394</sup>

In the literature on social exclusion and FI, researchers point to a connection between the lack of financial services and products and the impact this has on the social lives of the poor and the low-income households. Bowring, for instance, reveals the amount of income circulating in society and the need for money management services.<sup>395</sup> He criticises the provisions of financial services for profit as a manifestation of discrimination and social exclusion.<sup>396</sup> Lyons and Huegler have also argued that people who are socially excluded also lack access to financial services.<sup>397</sup> What can be learned is that alongside strategies to address social exclusion, it becomes imperative also to consider how to address the barriers to FE, which have become a cause and consequence that impact the promotion of FI negatively.

The interrelation between FI and social inclusion has sparked some debate on whether to incorporate the dimension of social consequences and welfare in the definitions of FI and FE. The arguments espoused by proponents of incorporating this dimension start by questioning the limited conceptual framework of these definitions. Gloukoviezoff,<sup>398</sup> for instance, is concerned by the narrow approach to defining FI notwithstanding an established link between the definition and the social consequences that arise from it. In particular, the author questions why these social consequences "are not explicitly incorporated into the formulation of the definition of financial exclusion".<sup>399</sup> He criticises the conventional idea that FI is established with reference to the issues of being unbanked or underbanked. In his view, this masks the social consequences of these difficulties as an essential part of the FI and FE

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<sup>394</sup> Hayes, Gray and Edwards "Social Inclusion: Origins, Concepts and Key Themes" (2008) *Australian Institute of Family Studies* <http://apo.org.au/system/files/8799/apo-nid8799-90181.pdf> (accessed: 2018-05-12)15. See also Peace "Social Exclusion: A Concept in Need Of Definition?" 2001 16 *Social Policy Journal of New Zealand* 17 27; Silver "The Process of Social Exclusion" (2007) CPRC *Working Paper* 95 2.

<sup>395</sup> Bowring "Social Exclusion: Limitations of the Debate" 2000 64 *Critical Social Policy* 307 311-312.

<sup>396</sup> Bowring 2000 *Critical Social Policy* 311-312.

<sup>397</sup> Lyons and Huegler "Social Exclusion and Inclusion" in Healy and Link (eds) *Hand Book of International Social Work* (2012) 41.

<sup>398</sup> Gloukoviezoff "From Financial Exclusion to Overindebtedness: The Paradox of Difficulties for People on Low Incomes?" in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 219.

<sup>399</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 219. Cf Louis and Chartier "Financial Inclusion in South Africa: An Integrated Framework for Financial Inclusion of Vulnerable Communities in South Africa's Regulatory System Reform" 2017 1 *Journal of Comparative Urban Law and Policy* 170 174 whose views are that FI should not be seen as a "social responsibility" project.

definition.<sup>400</sup> The author supports a broader approach to the definition of FI from prior discussions on the link between FI and social exclusion. This link lies at the heart of the FI frameworks and in its absence, FI will not constitute a policy, and arguably, a regulatory issue. Firstly, he finds support in Leyshon and Thrift's original definition of FI.<sup>401</sup> Gloukoviezoff finds the following wording in the initial definition of FE by Leyshon and Thrift appealing for its broader approach to the definition. In particular, the author interprets<sup>402</sup> "those processes that serve to prevent certain social groups and individuals from gaining access to financial systems" to mean an additional factor that is essential in defining FI.<sup>403</sup> This factor emphasises the causal link between FE and the broader phenomenon of social exclusion and explains why it is necessary to take the contribution that FE has made to social exclusion into account. As a result, the author proposes an approach that goes "beyond the definitions based on the identification of the various types of access difficulties" to include the use difficulties and, most importantly, the social consequences of these difficulties.<sup>404</sup> He proposes a clear definition that takes note of the cause and consequences of access and use as important dimensions of FE.<sup>405</sup> FE, in his view, must be "definable about the social consequences of the difficulties that it entails".<sup>406</sup>

Salignac *et al*<sup>407</sup> share Gloukoviezoff's sentiments about a broader definition of financial exclusion. These authors condemn the initial demand-and-supply approach to the definition by Leyshon and Thrift, and the dimensional approach to FE by Kempton and Whyley, for simplifying and isolating the concept.<sup>408</sup> They have taken this aspect of a narrow approach further and propose to reconceptualise FE with reference to social exclusion, resilience,<sup>409</sup> and

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<sup>400</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 219.

<sup>401</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 219. See also Gloukoviezoff *Understanding and Combating Financial Exclusion and Over indebtedness In Ireland: A European Perspective What Could Ireland Learn from Belgium, France and the United Kingdom?* (2011) 10. See Ch 2.1 for the definition.

<sup>402</sup> Gloukoviezoff *Understanding and Combating Financial Exclusion* (2011) 11.

<sup>403</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 220. See also Gloukoviezoff *Understanding and Combating Financial Exclusion* (2011) 10.

<sup>404</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 217.

<sup>405</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 221.

<sup>406</sup> Gloukoviezoff in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 221.

<sup>407</sup> Salignac *et al* 2016 *JSP* 270.

<sup>408</sup> Salignac *et al* 2016 *JSP* 270 and 271. See also Marron 2013 *New Political Economy* 792-793 who criticises their definition of the concepts in terms of the impediments (ie, the types of exclusions) which divorces the concepts from a consideration of embedded social experiences and structural processes.

<sup>409</sup> The elements of resilience relate to how individuals can bounce back from adverse financial events and resources through appropriate financial support.

a systematic approach.<sup>410</sup> With regard to social exclusion, the authors recommend the development of the FE concept and a deviation from its sole focus on access to financial services. They maintain that social inclusion helps to identify those who do not have items (such as lack of resources) that are considered essential, as they are not readily accessed or affordable.<sup>411</sup> By proposing this reconceptualisation, these authors propose a holistic context that seeks to challenge the restricted definitions of FE. What is significant in their reconceptualisation proposal is an emphasis on the need to approach FE holistically as a problem that goes beyond the mere availability of financial services. By equating social causes and consequences with a FE, they expose a need for a new paradigm for conceptualising FI and FE. A noted shortcoming in their debate is their failure to provide a clear-cut policy and regulatory significance of the correlation between social exclusion and FE. What is required for policy and regulatory frameworks to alleviate FE is whether and also how FI frameworks impact on the welfare and economic growth of the poor. This will ensure that policy and regulatory frameworks are not adopted for the sheer sake of FI, but rather to address wide-ranging social problems.

Economic studies further ask an important question about the objective of FI, which is also relevant in reconceptualising FI and regulatory reforms. They ask whether access to finance has any impact on the welfare of society.<sup>412</sup> More closely, the pertinent question is what we are trying to achieve through FI frameworks. These studies have established that an inclusive financial system improves efficiency and wellbeing.<sup>413</sup> It also has an impact on the income distribution of wealth and can lower income inequality and reduce poverty.<sup>414</sup> This requires a

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<sup>410</sup> Salignac *et al* 2016 *JSP* 270. The author here appears to differentiate between involuntary and voluntary exclusion. The latter raises the question whether one is excluded if he or she choose not to access financial services. A systems approach refers to the interconnected elements that must considered holistically such as institutional, policy, and regulatory designs. See also Ambarkhane *et al* 2016 *Management and Labour Studies* 223-224 who have added the law and order (calling it a drag factor) as an additional dimension of FI that has a negative impact on FI measures.

<sup>411</sup> Salignac *et al* 2016 *JSP* 270.

<sup>412</sup> See, eg, Beck and Demirgüç-Kunt 2008 *The World Bank Economic Review* 383; Demirgüç-Kunt *et al* *Finance for All* (2008) 2-3.

<sup>413</sup> Laha and Kuri "Determinants of Financial Inclusion: A Study of Some Selected Districts of West Bengal, India" (2011) [https://works.bepress.com/arindam\\_laha/4/](https://works.bepress.com/arindam_laha/4/) (accessed: 2018-06-01) 16. See also Ackah and Acquah "Which Households Use Which Financial Services? Evidence from Ghana"(2012) <https://econrsa.org/system/files/workshops/papers/2012/ackah-households-financial-services.pdf> (accessed: 2018-05-30) 6.

<sup>414</sup> Seshamani and Tounkara "Financial Inclusion and Income Inequality: A Case Study of Selected Countries in Sub-Saharan Africa" 2018 6 *Archives of Business Research* 44 46. See also Beck *et al* 2007 *Journal of Economic Growth* 29; Beck "Financial Inclusion – Measuring Progress" (2016)

measure of inclusion that goes beyond simple access and outreach to financial services.<sup>415</sup> Measuring impact also ensures that FI is not achieved simply by counting the number of customers with access to and use of financial services. Some lessons should be learned from the microfinance movements. In microfinance movements, assessing the impact of access to financial products such as microcredit is important in determining whether subsidies provided to these microfinance institutions' work towards achieving their social objectives.<sup>416</sup> Not much of this has been established in respect of assessing the impact of FI policies.<sup>417</sup> Rhyne criticises a common approach to FI which asks who financial institutions serve and how well they are served.<sup>418</sup> FI requires a further question regarding the impact which asks how it benefits and improves people's lives.<sup>419</sup> By incorporating social impact, FI will be approached not as a means in itself, but as an end to achieving various goals. These goals will include taking the social impact of FI frameworks into account and addressing the problem of income inequality and the improvement of economic well-being. These factors will require reconceptualising FI to ensure that the FI framework achieves a particular end.

## 2.6 CURRENT DEFINITIONS OF FINANCIAL INCLUSION

### 2.6.1 Examples of Definitions

The discussion in this chapter highlights the need to formulate a definition of FI that includes the important elements as provided in the AFI guidelines, the dimension of FE, and how FI impacts the welfare of the community. As the discussion above<sup>420</sup> stresses, existing definitions include some, but not all, of the key elements required in this definition. This research draws

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5. See further a speech by Fariz, Governor of the Central Bank of Jordan, "Financial Inclusion: Strategic Directive for Financial and Social Stability" (17 October 2016) at the Union of Arab Banks; Singh "Financial Inclusion: Concepts" (2017) 5.

<sup>415</sup> Kim 2016 *Emerging Markets Finance and Trade* 498.

<sup>416</sup> Helm *Access for All* (2006) 32. See also Rhyne *Microfinance for Bankers* (2009) 163.

<sup>417</sup> Cf Coulibaly and Yogo "Access to Financial Services and Working Poverty in Developing Countries" (2016) *CERDI Série Études Et Documents* <http://cerdi.org/production/show/id/1833/type/production/id/1> (accessed: 2018-06-01) 5 who specifically established the impact of financial development on income inequality through inclusion into the formal financial system. See further Demircuc-Kunt and Klapper 2013 *Brookings Papers on Economic Activity* 280; Kim 2016 *Emerging Markets Finance and Trade* 500.

<sup>418</sup> Rhyne *Microfinance for Bankers* (2009) 161-162.

<sup>419</sup> Rhyne *Microfinance for Bankers* (2009) 163. See also Heydenrych and Luiz "Regulatory Interaction with the Long-Term Insurance Industry in Pursuit of Market Stability and Financial Inclusion" 2018 49 *SAJBM* 1.

<sup>420</sup> See Ch 2.2 above.

some lessons from the following definitions and descriptions of FI in the literature and the policy frameworks.

Ozili defines FI as:

the provision of, and access to, financial services to all members of the population particularly the poor and the other excluded members of the population.<sup>421</sup>

Sarma and Pais define it as:

a process that ensures the ease of access, availability, and usage of the formal financial system for all members of an economy.<sup>422</sup>

Kaligis *et al*/define FI as:

the effort to improve the access for the society to formal financial institution that encourages the welfare.<sup>423</sup>

The Central Bank of Nigeria (CBN) defines it as:

a process or situation which allows for ease of access to, or availability of and usage of formal financial systems by members of the economy.<sup>424</sup>

And according to the World Bank:

[f]inancial inclusion means that individuals and businesses have access to useful and affordable financial products and services that meet their needs – transactions, payments, savings, credit, and insurance – delivered in a responsible and sustainable way.<sup>425</sup>

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<sup>421</sup> Ozili "Theories of Financial Inclusion" 2020 *SSRN Electronic Journal* 1 3.

<sup>422</sup> Sarma and Pais 2011 *JID* 613.

<sup>423</sup> Kaligi, Tewel, Maramis and Mangantar "Financial Inclusion Profile: Determinant and Barriers" 2018 8 *International Journal of Economics and Financial* 351.

<sup>424</sup> Central Bank of Nigeria "Financial Inclusion in Nigeria: Issues and Challenges" (2013) *Occasional Paper No 45* <https://www.cbn.gov.ng/out/2014/rsd/occasional%20paper%20no.%2045%20issues%20and%20challenges.pdf> (accessed: 2022-04-02) 4.

<sup>425</sup> World Bank "Financial Inclusion: Overview" (2022) <https://www.worldbank.org/en/topic/financialinclusion/overview#1> (accessed: 2022-04-02) adopted by the Reserve Bank of Zimbabwe "Financial Inclusion" (Nd) <https://www.rbz.co.zw/index.php/financial-stability/financial-inclusion> (accessed: 2022-04-02).

## 2.6.2 Definitions of Financial Inclusion in South Africa

Current South African policies and legislation define FI with reference to certain of the key elements in the AFI guidelines and the dimensions of FE.

The National Treasury's policy document titled *A Safer Financial Sector to Serve South Africa Better* (the Red Book) defines FI with reference to its purpose as:

about ensuring that all South Africans have access to financial services that encourage them to manage their money, save for the future, obtain credit and insure against unforeseen events.<sup>426</sup>

The National Treasury expanded this definition in 2020 as follows:

Financial inclusion refers to the delivery of financial services at an affordable cost to vast sections of the population that are historically excluded or under-served by the formal financial sector.<sup>427</sup>

The only statutory definition of FI was introduced in the FSRA and it:

means that all persons have timely and fair access to appropriate, fair and affordable financial products and services.<sup>428</sup>

It is clear from these definitions that there is no comprehensive definition that includes all the elements identified in this chapter. Each definition includes one or more, but not all the elements. Ozili's definition covers all financial services and, importantly, also refers to the targets of FI as the "excluded members of the community". However, it focuses only on access and does not identify the type and legal status of the providers of these services. It further does not identify a specific goal that FI seeks to achieve. Sarma and Pais's definition adds the usage dimension and refers specifically to the status of the service provider as "formal financial systems", but also does not outline the impact that FI must have on the community. Although they limit the definition of FI purely to the "access" dimension, Kaligis *et al* add the legal status of the service provider as "formal financial institutions". Importantly, they refer specifically to "the impact of encouraging welfare".

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<sup>426</sup> National Treasury "The Red Book" (2011). See Ch 6.2.4 for a discussion of this policy.

<sup>427</sup> National Treasury Draft FI Policy (2020) 1.

<sup>428</sup> See s 1 of the Financial Sector Regulations Act 9 of 2017 ("FSRA"). See the discussion of this Act in Ch 6.3.1.6 below.

Similar gaps can be observed in the definitions of the policymakers and regulatory bodies, including those in South Africa. The definitions of both the CBN and the World Bank cover both the access and use dimensions. The CBN specifically refers to the legal status of the providers of financial services, whereas the World Bank requires them to deliver financial services in a “responsible and sustainable way”. In 2020 South Africa’s National Treasury expanded the dimension of “access” as initially adopted in the Red Book definition, to refer to the “delivery” of financial services in general. This policy has specifically added the legal status of the service providers as the “formal financial sector”. Importantly, the 2020 policy specifically adds the FE dimension of the “excluded or the underserved”. Certain of these elements have been incorporated in the definition of FI in the FSRA. However, while it does not limit the types of financial product and services, the legislative definition in the FSRA is limited solely to the “access” dimension. It also does not refer to the legal status of the service provider (that is formal or informal) or to the specific impact of FI on society. There is, therefore, a major gap in the definitional framework of FI in South Africa that must be filled with reference to the AFI guidelines, the FE dimensions, and the recommended inclusion of the impact of FI on society.

## **2.7 DISCUSSION, SUMMARY, AND CONCLUSION**

### **2.7.1 Conclusion and Findings**

The main purpose of this chapter was to discuss FI and FE and to unpack the different conceptual challenges raised in the literature and by the regulators and policymakers.<sup>429</sup> It identified a need to develop a clear definitional framework for FI that may be applied in national policy and regulatory frameworks and avoid both irresponsible and misguided inclusion while also measuring progress as proposed by the CGAP.<sup>430</sup> To achieve this objective, this chapter adopted the AFI guidelines that help to develop national definitions for effective FI policy and regulatory instruments. This chapter applied the four elements of the AFI guidelines. It revealed that no single definition in the literature, policy frameworks, or regulatory measures captures all the important elements of the AFI guidelines. Definitions of

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<sup>429</sup> See Ch 2.2 above.

<sup>430</sup> See Ch 2.2 above.

FI are, by and large, limited to the “access” dimension. This chapter has shown that a number of definitions are gradually including usage and other ancillary dimensions of FI such as appropriateness, quality, and affordability.<sup>431</sup> Similarly, with regard to the type of products, the approach is generally to specify one or more of the financial products and services or to refer generally to “financial products and services” in the definition. Where a specific reference to products is made, some definitions focus on one or more of the financial products, and largely emphasise credit.<sup>432</sup> This chapter has identified a few definitions that have broadened the scope of financial products to include savings, loans, payment and remittance facilities, pensions, and insurance.<sup>433</sup> It further identified that products and services alone are not in themselves sufficient and that there is a need to identify the real FE problems that customers experience with access and the use of financial products and services.<sup>434</sup> It also identified the importance of designing financial services and products that are flexible as regards the attendant terms and conditions and are also able to instil the relevant customer discipline. It identified these features as key factors that the FI framework must incorporate to ensure that financial services and products are appropriately designed for the relevant consumers. The chapter further discussed the selective focus in various definitions on individuals, businesses, or low-income households as the specific focus of the FI framework. It established that the focus on the income level may present a challenge as financial status changes with time and circumstances. It also emphasised the importance of not looking at individuals only and established the need to broaden the focus to households as a “unitary economic actor”. Such a focus allows the assessment of whether a particular sector of society is the target of FI to consider the household level, particularly in developing countries such as South Africa.<sup>435</sup> It however emphasised that a national FI framework must not be exclusive but should accommodate citizens or more generally everyone.<sup>436</sup>

This chapter has also illustrated the importance of indicating the type, character, or the legal status of financial service providers as identified in the AFI guidelines. Although many of the definitions of FI adopt phrases such as the “mainstream institutional players”, “mainstream providers”, “mainstream markets”, or “mainstream financial services”, this chapter has

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<sup>431</sup> See Ch 2.3.1 above.

<sup>432</sup> See Ch 2.3.2 above.

<sup>433</sup> See Ch 2.3.2 above.

<sup>434</sup> See Ch 2.3.3.1 above.

<sup>435</sup> See Ch 2.3.3.1 and 2.3.3.2 above.

<sup>436</sup> See Ch 2.3.3.3 above.



established the importance of providing financial services in an environment that protects consumers from abusive and exploitative practices associated with the informal sector. As further discussed in Chapter three,<sup>437</sup> FI policy and regulatory frameworks must accommodate key financial sector policy objectives such as financial stability, integrity, and the protection of consumers. This chapter has, therefore, identified an important distinction between the provision of financial services by the formal or informal financial systems as a mechanism by which to identify whose legal status and functions are under the supervision and regulation of the relevant supervisory bodies. It, therefore, established the importance of specifying in an FI definition that the financial services are provided by formal financial institutions or systems.

The chapter also identified an additional gap in the definition of FI in that many definitions focus on the demand and supply factors that measure only access and usage and do not take account of the impact that the FI frameworks must have on the society. The end result of FI is achieved only if the majority of the society has access to financial services and products. This chapter has identified the importance of an FI framework that addresses various social difficulties that arise from the exclusion of certain sectors of the community from financial systems. It, therefore, identified the necessity to reconceptualise FI and to include the economic growth and the social welfare impacts of the FI framework on the community as an additional element in the demand and supply approach that the AFI guidelines provide.<sup>438</sup>

The chapter concluded by identifying a number of specific gaps in the formulation of the FI definition in South Africa which currently fails to apply all the elements in the AFI guidelines, including the dimension of FE and the additional welfare impact element.<sup>439</sup> The specific gaps identified in the policies and the FSRA are the focus on the access dimension, a lack of specific reference to the formal status of the financial service provider, and no reference to the impact of FI on the society upon which the effectiveness and the responsiveness of the framework will be measured.

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<sup>437</sup> See Ch 3.4 below.

<sup>438</sup> See Ch 2.4 above.

<sup>439</sup> See Ch 2.5 above.

## 2.7.2 Recommendations (Recs)

Based on the findings in this chapter, it makes the following recommendations:

**Rec 2A** The adoption of an FI definitional framework in the relevant FI strategies,<sup>440</sup> policies, and the regulatory frameworks that include:

- (a) The four elements of the AFI guidelines, including both access and use, the financial products and services, the target group, and the legal status of the service providers.<sup>441</sup>
- (b) The general FE dimension to recognise the need for identifying the specific exclusion dimensions that relate to access, price, conditions, marketing, and both voluntary and involuntary exclusions.<sup>442</sup>

**Rec 2B** To address the gap of limiting the definition to a specific financial service or product, this chapter recommends the followings:

- (a) A general reference to “financial products and services”, if the definition is in the general national FI policy or regulatory framework.<sup>443</sup>
- (b) A specific financial product or service, such as a savings account, credit, pension insurance, payments, or remittance facilities, if it is defined in a focused policy or a legislative measure.<sup>444</sup>
- (c) In each case, it is important to indicate in a framework that the product must be “appropriate” as regards the financial needs of the society so that the design of the product will balance both the flexibility and instil the required financial discipline.<sup>445</sup>

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<sup>440</sup> See Ch 4, 5, and 6 for the development of National FI Strategies.

<sup>441</sup> See Ch 2.3.1 to CH 2.3.4 above.

<sup>442</sup> See Ch 2.4 above.

<sup>443</sup> See Ch 2.3.2 above for the EU Commission definition.

<sup>444</sup> See Ch 2.3.2.1 above and the discussion of the need for customers to save-down, save-up, and save through by using various financial products and services.

<sup>445</sup> See Ch 2.3.2.2 above.

**Rec 2C** To solve the gap relating to the targets of FI policy and take into account the national context that the FI framework must adopt, it is recommended that the definition makes all “citizens” its targets. The definition may add a specific focus to indicate that such citizens must include the historically disadvantaged and excluded, and low-income households.<sup>446</sup>

**Rec 2D** The definition of FI must incorporate enhancing economic growth and making a social-welfare impact as the main objectives of the FI policy and regulatory framework.<sup>447</sup>

**Rec 2E** Based on the recommendations **Rec 2A** to **Rec 2D**, that the definition of FI in the National Treasury policies be developed, and that the definition of FI in section 1 of the FSRA be amended as follows:

**GENERAL EXPLANATORY NOTE FOR THE PROPOSED AMENDMENTS AND NEW LEGISLATIVE PROVISIONS:**

- [ ] Words in bold type in square brackets indicate omissions from existing enactments.
- \_\_\_ Words underlined indicate insertions in existing enactments.

“Financial inclusion” means that [**all persons**] every citizen, including the historically disadvantaged, the excluded, and low-income households, [**have timely and**] can access and use, appropriate, fair, and affordable financial products and services that are offered in the formal financial sector and the system, for their economic growth and social welfare.”

Having considered the conceptualisation of FI, it is important to consider how policy and regulatory frameworks should be effective and responsive to have a social impact on the poor and the low-income households and to enhance economic growth. In Chapter three, this research focuses on the main question that asks how regulatory measures can be applied effectively to promote FI and access to BBAs. This chapter will introduce the theory of responsive regulation (RR) as a tool with which to identify the types of regulatory instruments

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<sup>446</sup> See Ch 2.3.3.3 above.

<sup>447</sup> See Ch 2.5 above.

that may be put in place and how to make them effective and responsive to promote FI and access to BBAs.

## CHAPTER THREE: RESPONSIVE AND EFFECTIVE REGULATION

*The difficulties associated with access to adequate banking and financial services should be solved by allowing market forces to reign, or by having the government intervene in some way. If intervention is thought necessary, the question then becomes one of what type of intervention is going to be most effective.*

**Parliamentary Joint Committee on Corporations and Financial Services:  
Australia "Money Matters in the Bush" (2004)<sup>448</sup>**

### 3.1 INTRODUCTION

The main purpose of this chapter is to discuss the responsive regulation theory (the RR theory) that was first introduced by Ayres and Braithwaite to test and establish how a particular regulation can be effective and responsive to a particular purpose.<sup>449</sup> The adoption of the theory in this discussion may be questioned for several reasons, including its relevance and context<sup>450</sup> – and how expression of faith in a theory introduced almost three decades is justified. Equally, as discussed below, the fact that the RR theory was applied in the mining safety and environmental management spheres raises the question whether it is suited to regulation in the financial and banking sectors.

To address these concerns, note should be taken that many regulators and governments continue to believe in the RR theory and its pyramids. Alternative regulatory theories have not changed the core elements of this theory.<sup>451</sup> Since its inception a number of theories have been developed based on its original conceptions and they share many of its features.<sup>452</sup> Kolieb has established a continuous application of the regulatory pyramids by Australian entities,

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<sup>448</sup> Parliamentary Joint Committee on Corporations and Financial Services "Money Matters in the Bush: Inquiry into the Level of Banking and Financial Services in Rural, Regional and Remote Areas of Australia" (2004) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2002-04/banking/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2002-04/banking/report/index) (accessed: 2018-03-14) par 17.64.

<sup>449</sup> Ayres and Braithwaite *Responsive Regulation* (1992).

<sup>450</sup> See Baldwin and Black "Really Responsive Regulation" 2008 71 *MLR* 59 for three groups of criticism mainly levelled against the RR theory.

<sup>451</sup> Ford and Affolder "Responsive Regulation in Context, Circa" 2011 44 *UBCLR* 463 465.

<sup>452</sup> Ford and Affolder 2011 *UBCLR* 464. See Ch 3.3.2 for the discussion of relevant alternative theories.

such as the Australian Taxation Office and the Australian Securities and Investments Commission, as well as international organisations such as the Organisation for Economic Co-operation and Development (OECD).<sup>453</sup> Although the theory has been applied in other areas such as safety and environmental management, the regulatory pyramids, as discussed in detail below, are relevant to financial-sector regulation, including banking and finance.

This research adopts the RR theory to emphasise the promotion of FI beyond mere policy commitments. It discusses the PRS and the proposed escalation and de-escalation of the regulatory strategies to fit the purpose of a particular socio-economic goal. The discussion of the pyramid further seeks to establish whether the current regulatory frameworks need to escalate from self-regulatory instruments to more rigorously enforced measures in the form of command-and-control types of legislation. The application of this theory for promoting FI responsibly and effectively addresses an important question raised by the Australian Parliamentary Joint Committee on Corporations and Financial Services in the quote at the beginning of this chapter. The question is simply whether promoting access should be left to the financial sector through voluntary self-regulation or whether the government should legislate to promote it? In addition, it must be determined whether any intervention will be effective?

This chapter, therefore, paves a way for the discussion further in this research to determine whether the current regulatory framework for FI in South Africa is effective and responsive in addressing the relevant socio-economic challenges.<sup>454</sup> The main purpose of this chapter is to establish how to make FI regulation effective and responsive through the application of the RR theory and its supporting pyramids.

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<sup>453</sup> Kolieb "When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond" 2015 41 *MULR* 136 142. See also Braithwaite "Limits on Violence; Limits on Responsive Regulatory Theory" 2014 36 *Law & Policy* 432 for response to the narrow application of the RR theory to limited sectors of the economy.

<sup>454</sup> See Ch 6.2 and Ch 6.3 below on the financial regulatory framework in South Africa.

## 3.2 THE THEORY OF RESPONSIVE REGULATION

### 3.2.1 The Meaning of Responsive Law

The theory of responsive regulation (RR Theory) must be analysed from two related and mutually reinforcing perspectives. These relate to the responsiveness of the law, and the choice of strategies to make that law responsive. Different distinguishing factors of this theory according to Ayres and Braithwaite lie “both in what triggers a regulatory response and what the regulatory response will be”.<sup>455</sup> To determine what triggers regulation, two further analyses are important. First, it is important to understand how the law can be responsive, and second, what the object of such a response is. The idea of the responsiveness of the law is derived largely from two related discussions in two influential works on the subject: *Law and Society in Transition*<sup>456</sup> and *To Punish or Persuade*.<sup>457</sup> The RR theory introduced by Ayres and Braithwaite in *Responsive Regulation* illustrates how the law can become responsive in practice.<sup>458</sup>

In *Law and Society in Transition*, Nonets and Selznick identify basic states (or modalities) of the law in society and its role as a coercive tool.<sup>459</sup> One modality visualises law as a servant of repressive power and is termed “repressive law”. A second modality identifies law as a differentiated institution capable of taming repression and protecting its integrity; this is known as “autonomous law”.<sup>460</sup> Lastly, *Law and Society in Transition* identifies a responsive law, which serves as a facilitator of responses to social needs and aspirations.<sup>461</sup> All three modalities are, to varying degrees, characterised by some form of coercion. Coercion is dominant in the repressive law approach and seeks to mould the law to the will of the governing authority. It is moderate and characterised by a withdrawal from the purpose when

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<sup>455</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 4. See also Vincent-Jones “Competition and Contracting in the Transition from CCT to Best Value: Towards a More Reflexive Regulation?” 1999 77 *Public Administration* 273 282.

<sup>456</sup> Nonet and Selznick *Law and Society in Transition: Toward Responsive Law* (1978).

<sup>457</sup> Braithwaite *To Punish or Persuade* (1985).

<sup>458</sup> Ayres and Braithwaite *Responsive Regulation* (1992).

<sup>459</sup> Nonet and Selznick *Law and Society* (1978) 14-15.

<sup>460</sup> Nonet and Selznick *Law and Society* (1978) 14. See also Vincent-Jones “Competition and Contracting in the Transition from CCT to Best Value: Towards a More Reflexive Regulation?” 1999 77 *Public Administration* 27 33.

<sup>461</sup> Nonet and Selznick *Law and Society* (1978) 14-15.

such coercion strives for autonomous law.<sup>462</sup> With responsive law, such coercion renews the instrumentality of the law to meet the social needs and aspirations of the public.<sup>463</sup> What distinguishes these modalities is the lack of advancing the interests of those governed or regulated by the law in the first two modalities,<sup>464</sup> while such interests take a central stage in responsive law.

Responsive law requires the law to define the interests of the public and its commitment to substantive justice.<sup>465</sup> The effectiveness of the law, according to this modality, depends on the regulator becoming an instrument for social change.<sup>466</sup> It tests the competence of a legal order by how it develops new institutional methods to determine social needs and how it devises sensible and feasible legal remedies that are also socially acceptable.<sup>467</sup> The main instrument by which to achieve these objectives is regulation and less focus on adjudication.<sup>468</sup> Regulation in this context is defined as the “process of elaborating and correcting the policies required for the realization of the legal purpose” and serves to clarify the public interest.<sup>469</sup> From the analysis of the responsive law, the law achieves its purpose by becoming responsive to the interests of the public and being socially acceptable. Although Ayres and Braithwaite’s RR theory draws some inspiration from Nonet and Selznick’s responsive law, the responsive law modality does not elaborate on the relevant strategies that must be applied to make the law responsive. The question is whether Ayres and Braithwaite’s RR theory is adequate to fill this gap.

### 3.2.2 Responsive Regulation

Ayres and Braithwaite’s RR theory develops Nonet and Selznick’s responsive law theory further by the addition of strategies to make the law responsive.<sup>470</sup> At the core of their theory is competition between the proponents of deregulation and those who favour strict government

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<sup>462</sup> Nonet and Selznick *Law and Society* (1978) 15.

<sup>463</sup> Nonet and Selznick *Law and Society* (1978) 15.

<sup>464</sup> See Chapters II and III for the discussion of these modalities of law.

<sup>465</sup> Nonet and Selznick *Law and Society* (1978) 74.

<sup>466</sup> Nonet and Selznick *Law and Society* (1978) 74.

<sup>467</sup> Nonet and Selznick *Law and Society* (1978) 104-108. See also the introduction to Nonet and Selznick *Toward Responsive Law and Society* (2017) xviii.

<sup>468</sup> Nonet and Selznick *Law and Society* (1978) 108.

<sup>469</sup> Nonet and Selznick *Law and Society* (1978) 108-109.

<sup>470</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 4.



regulation.<sup>471</sup> The theory espouses a mix of private regulation by industry associations, firms, peers, and individual conscience, and public regulation by states.<sup>472</sup> The RR theory is identified as an alternative that forges an interplay between the public and private regulation to transcend the continuing debates in favour of deregulation.<sup>473</sup> The basic principle of the RR theory requires the regulating institutions to be responsive to the culture, conduct, and context of those they seek to regulate when they decide whether to impose less or strict interventionist strategies.<sup>474</sup> The RR theory in Ayres and Braithwaite's view requires regulation to be responsive to both the industry structure and the different motivations of those that are regulated.<sup>475</sup> It involves listening to those regulated and adapting the regulation in response to problems and challenges it is destined to solve, by choosing a proper course of action considering the relevant context.<sup>476</sup>

The theory is better explained with reference to the strategies it adopts to enforce compliance with the regulation. It begins to answer the question whether compliance can be reinforced by punishment or persuasion. This question is based on Braithwaite's early research on this choice.<sup>477</sup> According to the author, this choice depends on different models of human behaviour.<sup>478</sup> Applying punishment to enforce compliance presumes that a person is a rational actor who weighs the benefit of non-compliance against the probability and costs of punishment. Persuasion, on the other hand, presumes a person to be reasonable, to act in

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<sup>471</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 3. See also Braithwaite "Types of Responsiveness" in Drahos (ed) *Regulatory Theory: Foundations and Applications* (2017) 121.

<sup>472</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 3.

<sup>473</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 3. See also Parker "Twenty Years of Responsive Regulation: An Appreciation and Appraisal" 2013 7 *Regulation & Governance* 2 2; Paas "Responsive Regulation: Transcending the Deregulation Debate by Ian Ayres & John Braithwaite (Oxford: Oxford University Press, 1992)" 1994 12 *JLSE* 345 345.

<sup>474</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5. See also Braithwaite *Restorative Justice & Responsive Regulation* (2002) 29; Wood, Ivec, Job and Braithwaite "Applications of Responsive Regulatory Theory in Australia and Overseas" (2010) *Regulatory Institution Network Occasional Paper 15* [http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/ROP15\\_0.pdf](http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/ROP15_0.pdf) (accessed: 2018-11-023); Smith "A Harder Nut to Crack - Responsive Regulation in the Financial Services Sector" 2011 44 *UBCLR* 695 700.

<sup>475</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 4. See also Carney "*Responsive Regulation: Transcending the Deregulation Debate* by Ian Ayres and John Braithwaite, Oxford, Oxford University Press, 1992, 205pp, ISBN 0 19 507070" 1993 15 *Sydney Law Review* 114 115. See further Rogers "*Responsive Regulation: Transcending the Deregulation Debate*. by Ian Ayres and John Braithwaite" 1993 22 *Contemporary Sociology* 338 338.

<sup>476</sup> Wood *et al* "Applications of Responsive Regulatory Theory in Australia and Overseas" (2010) *Regulatory Institution Network Occasional Paper 15* 5.

<sup>477</sup> Braithwaite *To Punish or Persuade* (1985).

<sup>478</sup> Braithwaite *To Punish or Persuade* (1985) 100.

good faith, and able to follow advice.<sup>479</sup> Both also have deficiencies. Persuasion suffers from the failure and faulty presumptions that not all human beings are reasonable and act in good faith. Punishment, on the other hand, fails to recognise the will of well-intentioned people to comply by assuming indifference to compliance with the law.<sup>480</sup> Based on these different human behaviours, Braithwaite concludes that neither punishment nor persuasion alone may fit a particular regulatory setting.<sup>481</sup> He perceives both models as complementary and in need of a strategy for their “happy coexistence”. Some of the strategies are encapsulated in the RR theory.

Ayres and Braithwaite modelled their RR theory by first alternating between persuasion and punishment depending on the circumstances.<sup>482</sup> They adopt a tit-for-tat strategy in terms of which regulatory escalations depend on the responses of the industry that is regulated.<sup>483</sup> As Braithwaite remarks:

[t]he idea of the pyramid is that our presumption should always be to start at the base of the pyramid first. Then escalate to somewhat punitive approaches only reluctantly and only when dialogue fails. Then escalate to even more punitive approaches only when more modest sanctions fail.<sup>484</sup>

The strategy mixes punishment and persuasion depending on which is most likely to be effective in its regulation.<sup>485</sup> It also applies a graduated response to responsive regulation. The action of the regulator depends on the regulatees’ responses to the form of regulation in place to decide whether escalation is necessary.<sup>486</sup> As long as the regulatees are cooperating, the regulator refrains from punishment or strict regulation.<sup>487</sup> Ayres and Braithwaite require the application of the strategy to identify the regulator’s ability to secure compliance with the

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<sup>479</sup> Braithwaite *To Punish or Persuade* (1985) 100.

<sup>480</sup> Braithwaite *To Punish or Persuade* (1985) 100.

<sup>481</sup> Braithwaite *To Punish or Persuade* (1985) 100. He uses examples from the mine safety industry and argues that inspectors of mines may not limit their enforcement of compliance to either of the models.

<sup>482</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5. See also Smith 2011 *UBCLR* 701.

<sup>483</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5. See also Kolieb 2015 *MULR* 136 139.

<sup>484</sup> Braithwaite “The Essence of Responsive Regulation” 2011 44 *UBCLR* 475 482.

<sup>485</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5.

<sup>486</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5. See also Paas 1994 *JLSE* 347; Nielsen and Parker “Testing Responsive Regulation in Regulatory Enforcement” 2009 2 *Regulation & Governance* 376 380.

<sup>487</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5.

regulation as “benign big guns”.<sup>488</sup> This means that regulators must endeavour to speak softly to responsive regulation by transacting regulation through moral suasion. In so doing, such a soft approach is complemented by tougher forms of regulation (which they term “the carrying of big sticks”) with additional sanctions kept in the background in case the regulated industry fails or neglects to carry on its duty to comply with the soft regulatory sticks.<sup>489</sup> The regulators begin with soft regulatory interventions such as persuasion, education, and facilitation to entice the regulatees to comply.<sup>490</sup> At this point regulators do not impose any form of stronger regulatory intervention. However, they keep and signal a threat of severe punishment and an escalation to stronger intervention in the background in case the regulatees fail to respond positively to softer forms of regulation.<sup>491</sup> The regulator must be prepared to escalate the regulatory soft approach to more rigorous instruments and enforcement approaches where necessary.<sup>492</sup> Likewise, where reforms aimed at compliance are forthcoming, the regulator must be willing to scale down its regulatory and enforcement approaches depending on the appropriate behaviour of those regulated.<sup>493</sup> The RR theory is well explained through the pyramid strategies.

### 3.2.3 The Pyramids of Responsive Regulation

The RR theory operates most effectively by adopting the pyramid to explain how and when the regulator escalates and de-escalates its regulation depending on the compliance of those regulated. The application of the pyramid has become a distinctive and best known part of RR theory.<sup>494</sup> The pyramid serves to illustrate the forms of enforcement mechanism and the instruments that the regulator applies in the escalation and de-escalation of the regulatory approach. The authors of *Responsive Regulation* espouse the view that the choice between

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<sup>488</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 40. Benign big guns are defined as agencies that speak softly while carrying very big sticks. In the regulatory sphere, the authors refer to the Reserve Bank’s power to take over banks, seize gold, or increase the reserve redeposit ratio as one example.

<sup>489</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 5 and 40.

<sup>490</sup> Smith 2011 *UBCLR* 701; Baldwin and Black 2008 *MLR* 59 62.

<sup>491</sup> Braithwaite 2011 *UBCLR* 475 476. See also Kolieb 2015 *MULR* 139.

<sup>492</sup> Braithwaite 2011 *UBCLR* 483-484. See also Kolieb 2015 *MULR* 139.

<sup>493</sup> Braithwaite in Drahos (ed) *Regulatory Theory* (2017) 119. See also Braithwaite 2011 *UBCLR* 483-484; Kolieb 2015 *MULR* 139.

<sup>494</sup> Braithwaite “Responsive Regulation and Developing Economies” 2006 34 *World Development* 884 866. See also Braithwaite 2011 *UBCLR* 480; Braithwaite *Restorative Justice* (2002) 29; Mascini “Why Was the Enforcement Pyramid So Influential? and What Price Was Paid?” 2013 7 *Regulation & Governance* 48.

whether to enforce compliance through persuasion or punishment requires the regulatory agency “to display an explicit enforcement pyramid”.<sup>495</sup> *Responsive Regulation* provides for two pyramid strategies: the enforcement pyramid (or “the pyramid of sanctions”), and the PRS.<sup>496</sup> The distinction between the two takes stock of the context of enforcement and the categories of instruments that are applied to the responsiveness of the law. For instance, the enforcement pyramid is characterised by its specific application to certain types of industry. According to the authors, the “enforcement pyramid might apply to occupational health and safety, environment and nursing home regulation, but [is] inapplicable to banking and affirmative action regulation”.<sup>497</sup> This pyramid targets sanctions on a single regulated firm. It requires the design of a legal framework to incapacitate and deter irrational actors.<sup>498</sup> The enforcement pyramid aims to achieve the enforcement of compliance through an escalation of various sanctions. It accomplishes this by adopting various sanctioning mechanisms increasing in intensity as one moves up the pyramid.<sup>499</sup> Persuasion is appropriate at the base of the enforcement pyramid to coax compliance. Depending on the success of persuasion in achieving its purpose, various phases to enforce compliance follow. These include a warning letter, the imposition of civil monetary penalties, followed by criminal prosecution.<sup>500</sup> If these punitive strategies do not achieve the necessary compliance, the operation may be shut down or its operating licence be temporarily suspended followed by the permanent revocation of the licence.<sup>501</sup>

The PRS focuses on an entire industry rather than an individual affiliate or a member in a particular industry.<sup>502</sup> When applying this pyramid, the effectiveness and responsiveness of a particular regulatory framework depend on the regulatory design comprising different categories of instrument.<sup>503</sup> These categories comprise regulatory instruments, devices, and mechanisms, beginning at the base and escalating up the pyramid. The instruments applied in the PRS from its base to its apex are self-regulation, enforced self-regulation, command

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<sup>495</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 35.

<sup>496</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 35-40. See also Ford “Prospects for Scalability: Relationships and Uncertainty in Responsive Regulation” 2013 7 *Regulation & Governance* 14 16; Braithwaite 2011 *UBCLR* 481-482.

<sup>497</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 36.

<sup>498</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 36.

<sup>499</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 35.

<sup>500</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 36.

<sup>501</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 36.

<sup>502</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 36.

<sup>503</sup> Vincent-Jones 1999 *Public Administration* 283.

regulation with discretionary punishment, and command regulation with non-discretionary punishment. The question that seeks an immediate answer is which of the two types of pyramid may apply to the regulatory framework for the promotion of FI.

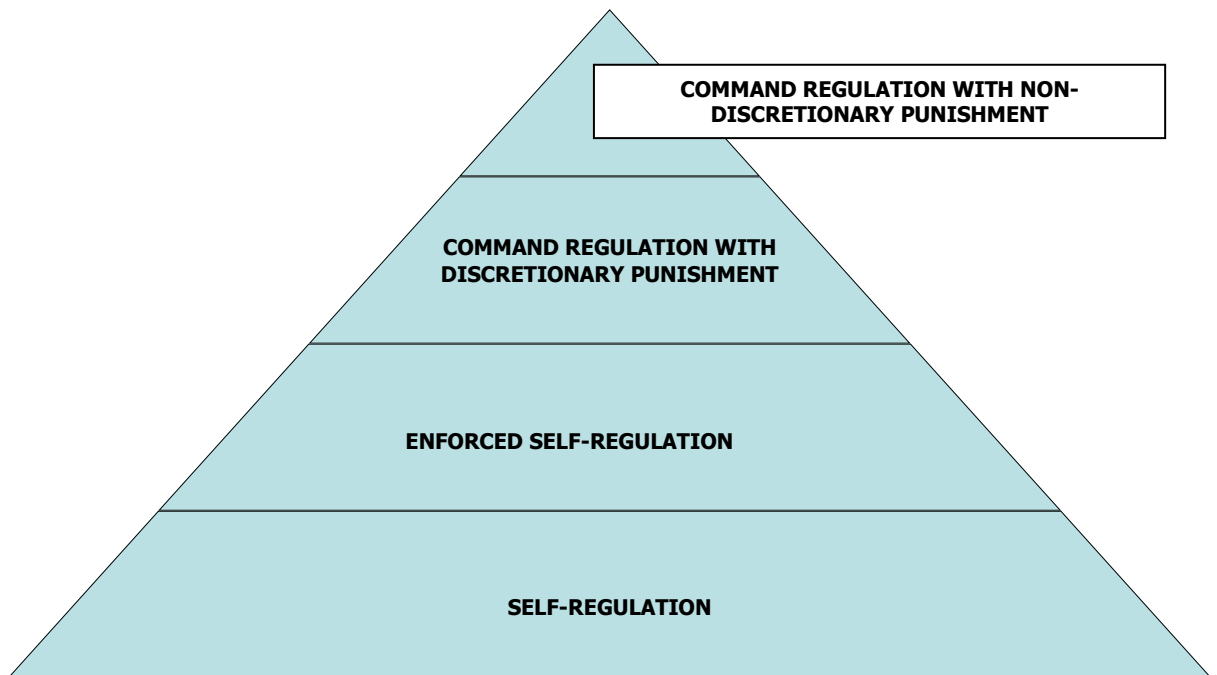
There is no straightforward answer as to whether the enforcement pyramid or the PRS is relevant as a responsive regulation for the promotion of FI. As indicated, the designers of these pyramids suggest that the enforcement pyramid is not relevant to banking and affirmative action regulation. Arguably, these are the domains of the PRS. Beginning by appreciating a responsive regulation to FI and by asking whether to punish or persuade, as Braithwaite asked,<sup>504</sup> provides a possible answer to the choice of the PRS. Lack of an existing legal framework, as discussed in Chapter two, also provides a reason for starting to develop regulatory frameworks to encourage the provision of access to and use of financial services and escalating to more strict regulatory frameworks with possible sanctions if there is minimal or no response but attempting to avoid punishment in the initial stages of regulation. The discussion now turns to the PRS.<sup>505</sup>

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<sup>504</sup> Braithwaite *To Punish or to Persuade* (1985) 2.

<sup>505</sup> This notwithstanding, the discussion may refer to the enforcement strategies that were necessary to compare or refer to principles applying to both pyramids.

### 3.2.4 The Pyramid of Regulatory Strategies and Instruments



The figure is taken directly from Ayres and Braithwaite's *Responsive Regulation* (1992).

#### 3.2.4.1 Self-Regulation

##### (a) Concept and Operation

The application of the PRS starts from the premise that different motivating factors guide responses to regulation. Those who are regulated – individuals or corporates – respond to regulation guided by either making a profit or social responsibility.<sup>506</sup> Ayres and Braithwaite suggest that when those regulated are motivated purely by social responsibility goals, they encourage regulators to begin with persuasion rather than punishment.<sup>507</sup> However, where those regulated are motivated by profit maximisation punishment is also not always an appropriate measure. However, they acknowledge that attempting persuasion will fail simply

<sup>506</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 36.

<sup>507</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 29. See also Welsh "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" 2009 33 *Melbourne University Law Review* 903 911.

because the regulated will attempt to evade the law in favour of maximising profit.<sup>508</sup> In their view, this still does not necessitate an immediate resort to punishment. They recommend voluntary strategies to begin addressing non-compliance.<sup>509</sup> Similarly, they suggest the same strategy of initial persuasion for a regulated entity that is not motivated by either profit or social responsibility but shows an affinity for both. Also, in this case, the tit-for-tat strategy should be applied by starting with persuasion and escalating to more stringent forms of punishment further up the pyramid.<sup>510</sup>

What is evident from the above discussion is both the forms of enforcement mechanism and their sequence. Although there is no suggestion on the forms of instruments to ensure compliance, each of the two enforcement pyramids provides for the relevant mechanisms. Both pyramids emphasise the importance of persuasion at the base of the pyramid. The PRS recommends self-regulation as the mechanism at the base of the pyramid to persuade responses to regulation. As *Responsive Regulation* puts it, the “key contention of this regulatory theory is that the existence of the gradients and peaks of the two enforcement pyramids channels most of the regulatory action to the base of the pyramid - in the realms of persuasion and self-regulation”.<sup>511</sup> For this discussion, it is important to understand self-regulation as a regulatory mechanism.

Self-regulation is defined in different ways depending on the level of state involvement in the regulation process. A definition that captures non-involvement of the state defines it as “regulatory conditions whereby the regulated entity give commands for itself and bears the consequences”.<sup>512</sup> It is also defined as an alternative to state regulation or the absence of

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<sup>508</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 19 and 30.

<sup>509</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 30.

<sup>510</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 30. See also Gunningham “Strategizing Compliance and Enforcement: Responsive Regulation and Beyond” in Parker and Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (2011) 200.

<sup>511</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 30.

<sup>512</sup> Muraközy and Valentiny “Alternatives to State Regulation: Self- and Co-Regulation” in Valentiny, Kiss, Antal-Pomázi and Nagy (eds) *Competition and Regulation* (2015) 56. See also Omarova “Wall Street as Community of Fate: Toward Financial Industry Self-Regulation” 2011 159 *UPLR* 411 421.

compulsion from the state.<sup>513</sup> Taken from the historical settings,<sup>514</sup> self-regulation involves a group of organised individuals or corporate entities setting rules and standards to regulate their members; commonly known as "industry self-regulation".<sup>515</sup> This type of self-regulation is termed voluntary or pure self-regulation in that rules and standards are developed and enforced privately and are independent of state intervention.<sup>516</sup> Pure self-regulation involves the total absence of state involvement in the development of voluntary standards.

The question, however, is whether voluntary or pure self-regulation exists in the modern era. Self-regulation is today defined with reference to some form of state involvement and pure self-regulation with no involvement of the state or external pressure is rare.<sup>517</sup> As the argument goes, corporate entities that are profit-oriented are unlikely to self-regulate in the absence of some form of motivation or external coercion.<sup>518</sup> Pure self-regulation is regarded as a misnomer, as private regulation and the development of self-regulatory standards involve

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<sup>513</sup> See, for instance, Lennox "Do Voluntary Standards Work among Corporations? The Experience of the Chemical Industry" in Brown and Woods (eds) *Making Global Self-Regulation Effective in Developing Countries* (2007) 62. See also Kleinsteuber "The Internet between Regulation and Governance" in Anon *Self-regulation, Co-regulation, State Regulation* (2004) 31; Baldwin and Cave *Understanding Regulation: Theory, Strategy, and Practice* (1999) 39.

<sup>514</sup> The type of self-regulation with no state involvement is traced from the USA and some European countries by newspapers and editors' associations who define their rules through codes of conduct. Membership in these associations was allowed to those who committed to adhere to self-defined rules. There was no formal punishment for non-adherence with these voluntary rules, except that expulsion from membership remained the only effective sanction. On this history see, Kleinsteuber in Anon *Self-regulation* (2004) 64. See also Muraközy and Valentiny in Valentiny *et al* (eds) *Competition and Regulation* (2015) 56; Brown "Self-Regulation in a World States" in Brown and Woods (eds) *Making Global Self-Regulation Effective* (2007) 230-240; Pearson "The Place of Codes of Conduct in Regulating Financial Services" 2006 15 *Griffith Law Review* 333 339.

<sup>515</sup> Gunningham and Sinclair "Smart Regulation" in Drahos (ed) *Regulatory Theory* (2017) 140. See also Gunningham and Rees "Industry Self-Regulation: An Institutional Perspective" 1997 19 *Law & Policy* 363 364; Omarova "Rethinking the Future of Self-Regulation in the Financial Industry" 2010 35 *BJIL* 665 677 who distinguishes between individual self-regulation and industry self-regulation. See further Ayres and Braithwaite *Responsive Regulation* (1992) 14 who refer to "associational self-regulation".

<sup>516</sup> Gunningham "Investigation of Industry-Self Regulation in Workplace Health and Safety in New Zealand" (2011) [http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-04/NG\\_investigation-industry-self-regulation-whss-nz\\_0.pdf](http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-04/NG_investigation-industry-self-regulation-whss-nz_0.pdf) (accessed: 2018-11-07) 7. See also Tuch "The Self-Regulation of Investment Bankers" 2014 83 *The George Washington Law Review* 101 110; Ayres and Braithwaite *Responsive Regulation* (1992) 106.

<sup>517</sup> Gunningham, Grabosky and Sinclair *Smart Regulation: Designing Environmental Policy* (1998) 51. See also Gunningham and Sinclair in Drahos (ed) *Regulatory Theory* (2017) 140; Gunningham and Rees 1997 *Law & Policy* 365.

<sup>518</sup> Lennox in Brown and Woods (eds) *Making Global Self-Regulation Effective* (2007) 64.



some form of government influence or pressure.<sup>519</sup> Regulation deriving from these forms of external coercion has been identified as “pre-emptive self-regulation”.<sup>520</sup> Rather than voluntary commitments to self-regulation, entities or their associations engage in self-regulation because of the rising possibilities or threat of concrete government regulation.<sup>521</sup> Such regulation is therefore prompted by the threat of imminent government intervention. Due to this potential threat, an industry association may choose to self-regulate to forestall government involvement.<sup>522</sup>

The *Responsive Regulation* does not draw this distinction between pre-emptive and voluntary regulation. It expressly compares voluntary self-regulation with enforced self-regulation.<sup>523</sup> Despite the distinction, an important question is whether self-regulation carries advantages as compared to other forms of regulation, and what disadvantages it holds.

#### (b) Advantages and Disadvantages

Self-regulation has many advantages. Ojo has categorised these as proximity, flexibility, resources, and compliance.<sup>524</sup> Self-regulating associations gain the advantage of easy access to their members and the regulated entities. Because of their proximity, they can share up-

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<sup>519</sup> Latzer “Regulatory Choice in Communication Governance” 2007 32 *The European Journal of Communication Research* 399 402. See also Bartle and Vass “Self-Regulation and the Regulatory State - A Survey of Policy and Practice” (2005) *Centre for the Study of Regulated Industries: Research Report 17* [http://www.bath.ac.uk/management/cris/pubpdf/Research\\_Reports/17\\_Bartle\\_Vass.pdf](http://www.bath.ac.uk/management/cris/pubpdf/Research_Reports/17_Bartle_Vass.pdf) (accessed: 2018-11-07) 3.

<sup>520</sup> See Maxwell, Lyon and Hackett “Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism” 2000 43 *The Journal of Law & Economics* 539. See also Lyon and Maxwell “Self-Regulation, Taxation and Public Voluntary Environmental Agreements” 2003 87 *Journal of Public Economics* 1453 on the development of the model of pre-emptive self-regulation. See further Solomon “New Governance, Pre-emptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice” 2010 2 *Wisconsin Law Review* 591 599; Smith *Environmental and Health Regulation in the United States and the European* (2012) 36-37.

<sup>521</sup> Solomon 2010 *Wisconsin Law Review* 599; Smith *Environmental and Health Regulation* (2012) 36-37.

<sup>522</sup> Lennox in Brown and Woods (eds) *Making Global Self-Regulation* (2007) 64.

<sup>523</sup> See Ayres and Braithwaite *Responsive Regulation* (1992) Chapter 4. See Ch 3.2.4.2 below for a discussion of enforced self-regulation.

<sup>524</sup> Ojo “Co-operative and Competitive Enforced Self-Regulation: The Role of Governments, Private Actors and Banks in Corporate Responsibility” 2011 19 *JFRC* 139 141. See also Omarova 2011 *UPLR* 423. See further Freiberg *The Tools of Regulation* (2010) 29-30; Gunningham *et al Smart Regulation* (1998) 52; Deutch “Protection of the Bank Customer: By Statute or by Ethical Codes - Which is Preferable? An Israeli Perspective” 2002 2 *DePaul Business and Commercial Law Journal* 419 436-437; Jamison “Developments in Voluntary Self-regulation” 1998 6 *Journal of Financial Regulation and Compliance* 31 31.

to-date information about their practices.<sup>525</sup> Self-regulatory instruments are readily adaptable to suit the changing needs of their organisations' practices and institutions and to encourage innovation.<sup>526</sup> This form of regulation is also touted largely for its reduction in costs.<sup>527</sup> The benefits of flexibility and proximity also assist to reduce various costs associated with compliance with state regulation.<sup>528</sup> Importantly, self-regulation is seen to promote greater compliance as those regulated commit to self-imposed standards rather than external regulation.<sup>529</sup>

Critics, however, question the efficacy of compliance with self-regulation by identifying lack of compliance as its major weakness.<sup>530</sup> They largely criticise it for lack of enforcement.<sup>531</sup> The argument is that in the absence of concrete enforcement mechanisms and sanctions, self-regulation boils down to "a form of deregulation and the government's complete withdrawal from the field".<sup>532</sup> This is partly what the PRS seeks to overcome through the escalation of regulatory mechanisms up the pyramid. *Responsive Regulation* considers industry self-regulation with its flexibility and cost-effective characteristics as a preferred strategy at the base of the pyramid.<sup>533</sup> When it takes the form of pre-emptive self-regulation, for instance, both the state and the regulated industry negotiate the regulatory goals and the former leaves a discretion with industry to realise this goal. However, when the state provides such a leeway, it takes cognisance that the regulated industry may be tempted to exploit the privilege provided through self-regulation by not adhering to the level of compliance expected.<sup>534</sup> The approach to overcome this exploitation is the indication of its willingness "to escalate its

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<sup>525</sup> Ojo 2011 *JFRC* 141. See also Omarova 2010 *BJIL* 669.

<sup>526</sup> Omarova 2011 *UPLR* 423. See also Omarova 2010 *BJIL* 669. See further Spencer *The Regulation of Franchising in the New Global Economy* (2010) 23.

<sup>527</sup> Spencer *The Regulation of Franchising* (2010) 23. See also Omarova 2011 *UPLR* 423; Brown in Brown and Woods (eds) *Making Global Self-Regulation* (2007); Braithwaite "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" 1981 80 *Michigan Law Review* 1466 1480.

<sup>528</sup> Omarova 2011 *UPLR* 423; Ojo 2011 *JFRC* 139. See also Cartwright "Retail Depositors, Conduct of Business and Sanctioning" 2001 7 *JFRC* 302 for the strengths and weaknesses of the English Codes of Conduct as self-regulatory instruments.

<sup>529</sup> Ojo 2011 *JFRC* 139.

<sup>530</sup> See Ojo 2011 *JFRC* 142 and Omarova 2011 *UPLR* 423, for some of the disadvantages including self-interest and lack of sanction.

<sup>531</sup> Gunningham *et al Smart Regulation* (1993) 53. See also Prosser "Self-regulation, Co-regulation and the Audio-Visual Media Services Directive" 2008 31 *Journal of Consumer Policy* 99 104.

<sup>532</sup> Omarova 2011 *UPLR* 423.

<sup>533</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 38.

<sup>534</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 38.

regulatory strategy up another pyramid of interventionism from self-regulation to enforced self-regulation".<sup>535</sup>

### **3.2.4.2 Enforced Self-Regulation**

#### (a) Concept and Operation

Enforced self-regulation is the second step up the PRS. This type of self-regulation aims to address some of the weaknesses of voluntary self-regulation.<sup>536</sup> It is used to address the inability or unwillingness of companies and their associations to enforce their self-regulatory standards.<sup>537</sup> It serves as a compromise between non-enforceable voluntary self-regulation and the imposed government regulations.<sup>538</sup> It is defined with reference to two prescriptive elements that help to distinguish it from voluntary self-regulation and how self-regulation is enforced.<sup>539</sup> These elements are the development of rules and enforcement mechanisms. The first element is the actual undertaking of self-regulation by private entities. The regulatory process begins with a negotiation between the relevant entities (or their associations) and the state to establish regulations specific to the entities' business functions.<sup>540</sup> To avoid stricter and cumbersome state regulation, the relevant private entity is required to write a set of rules tailored to its practice and operation on the instruction of the government authority.<sup>541</sup> The rules are then reviewed by the relevant government authority. If the authority is satisfied with these rules, it ratifies them. The authority may not ratify the self-regulatory standards if they do not conform to the standards and principles that are adopted in the relevant legislative enactment.<sup>542</sup> Once ratified, the rules acquire the force of law and transgressors will be subject to the enforcement applied in respect of a state regulation. The state may however require their modification if, for instance, they are too rigorous or do not conform to the set

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<sup>535</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 38.

<sup>536</sup> Braithwaite 1981 *Michigan Law Review* 1466.

<sup>537</sup> Braithwaite *To Punish or Persuade* (1985) 125.

<sup>538</sup> Braithwaite 1981 *Michigan Law Review* 1470.

<sup>539</sup> Drahos and Krygier "Regulation, Institutions and Network" in Drahos (ed) *Regulatory Theory* (2017) 13.

<sup>540</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 101.

<sup>541</sup> Braithwaite 1982 *Michigan Law Review* 1470. See also Braithwaite *To Punish or to Persuade* (2002)125; Ayres and Braithwaite *Responsive Regulation* (1992) 101; Ong *Mobile Communication and the Protection of Children* (2010) 223.

<sup>542</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 106-107.

guidelines.<sup>543</sup> The process also involves public interest groups and interest parties who must be allowed an opportunity to comment on the proposed rules.<sup>544</sup>

The second element relates to how self-regulation is enforced. Enforced self-regulation requires entities to internalise compliance and the enforcement of their privately-developed standards. The entity must establish an internal compliance group with internal inspectors and headed by a compliance director.<sup>545</sup> The main purpose of this group and its inspectors is to monitor compliance and ensure that the entity's internal units can detect the violation of their internal standards and regulations and recommend disciplinary action if there is a violation.<sup>546</sup> During the monitoring process, the internal compliance group may be required to report any violation of private regulatory rules and to recommend disciplinary action.<sup>547</sup> The compliance director is also required to report any matter that relates to the overruling of the compliance directives by the management to the government authority.<sup>548</sup> Failure to do so may render him or her criminally liable.<sup>549</sup>

The internal enforcement of these rules does not render government inspection superfluous. Government inspectors remain relevant to ensure the independence of the entities' compliance groups from possible interference by management of the entities and to audit its efficacy.<sup>550</sup> The application of enforced self-regulation takes into account that some entities may not be able to establish internal compliance groups due to cost implications, among others. In this case, government inspections will continue to monitor compliance with this regulation by entities that are too small to afford the internal compliance structures.<sup>551</sup> Key features of enforced self-regulation help to facilitate the incorporation of legislative, executive, and judicial functions by private entities in their regulatory framework.<sup>552</sup> This is achieved by

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<sup>543</sup> Braithwaite *To Punish or to Persuade* (2002) 126. See also Paas 1994 *JLSE* 349.

<sup>544</sup> Braithwaite 1981 *Michigan Law Review* 1470. See also Ayres and Braithwaite *Responsive Regulation* (1992) 106.

<sup>545</sup> Braithwaite *To Punish or to Persuade* (2002) 126. See also Ayres and Braithwaite *Responsive Regulation* (1992) 106; Braithwaite 1981 *Michigan Law Review* 1470.

<sup>546</sup> Braithwaite *To Punish or to Persuade* (2002) 126.

<sup>547</sup> Braithwaite *To Punish or to Persuade* (2002) 126.

<sup>548</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 106.

<sup>549</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 106.

<sup>550</sup> Braithwaite 1981 *Michigan Law Review* 1471. See also Braithwaite *To Punish or to Persuade* (2002) 126.

<sup>551</sup> Braithwaite 1981 *Michigan Law Review* 1471. See also Braithwaite *Responsive Regulation* (1992) 106.

<sup>552</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 105.

developing privately-written standards, monitoring compliance through internal compliance structures, and punishing and correcting instances of non-compliance through disciplinary actions and criminal liability for the compliance directors.<sup>553</sup>

(b) Advantages and Disadvantages

Enforced self-regulation has many benefits and weaknesses that affect both the regulators and the regulatees, and these weaknesses play a major role in the efficacy of the regulation. Many of the benefits and weaknesses of enforced self-regulation are similar to those for voluntary self-regulation. Some, however, are unique, in particular those that affect the enforcement of private regulatory standards.

One of the advantages of enforced self-regulation is that it can be expected to attract the least resistance to compliance from the entities that are regulated.<sup>554</sup> Requiring compliance directors to report any refusals by the management to implement the director's compliance recommendations to the regulatory agencies, is regarded as sufficient pressure to ensure compliance with these recommendations.<sup>555</sup> The management is likely to respond to the recommendations rather than face the costs of prosecution, civil litigation, and adverse publicity.<sup>556</sup> Another advantage is the likelihood that the internal inspections will result in a greater level of identification of offenders of self-regulatory standards.<sup>557</sup> Internal inspections are central to enforced self-regulation and are characterised by the inspectors' specialised knowledge and experience as regards the product line and the entity's operations coupled with the frequency of inspections. These aspects are missing in government inspections.<sup>558</sup> With these characteristics, corporate inspectors are generally able to identify offenders more often than government inspectors.<sup>559</sup> Added to this advantage, the identification of offenders through regular inspections heightens effective enforcement of internal disciplinary measures

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<sup>553</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 105. According to the authors, not all these functions should be incorporated in enforced self-regulation. For instance, where the firm is too small to establish an internal compliance group the executive and the judicial function will be rendered by the government regulatory agency through monitoring and prosecution.

<sup>554</sup> Braithwaite 1981 *Michigan Law Review* 1482-1483.

<sup>555</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 115.

<sup>556</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 115.

<sup>557</sup> Braithwaite 1981 *Michigan Law Review* 1471. See also Ayres and Braithwaite *Responsive Regulation* (1992) 114.

<sup>558</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 104.

<sup>559</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 105 and 114. See also Ojo 2011 *JFRC* 142.

in a larger proportion of cases than under traditional government regulation.<sup>560</sup> These measures may also guarantee effective prosecution of entities which violate self-regulatory standards and whose conduct warrants external enforcement.<sup>561</sup> It is important to note that the establishment of internal compliance groups seeks to overcome the ineffectiveness of external enforcement and prosecution. However, there are cases where transgression of the standards may require the external enforcement of these rules. One instance identified by Braithwaite, is where the entity has defied the recommendations of the internal compliance group and the group communicates the report of non-compliance to the regulatory agency.<sup>562</sup>

Despite the numerous advantages of enforced self-regulation, there are a few disadvantages which may warrant the application of more stringent measures higher up the regulatory pyramid. The following disadvantages are relevant as they relate to the enforcement of self-regulatory standards.<sup>563</sup> One disadvantage questions the capacity of the entity's control measures and the ability to ensure that self-regulatory measures in place are not easily evaded internally. As indicated, the effectiveness of enforced self-regulation rests solely on the enforcement and inspection mechanisms adopted by the internal compliance group.<sup>564</sup> The structural establishment and operations of the compliance group threaten its independence. Being internal and an integral part of the business entity's operations, there is a likelihood of a high level of loyalty to the business' ultimate goals at the expense of enforcing compliance against the entity's operations.<sup>565</sup> This may occur when the entity's management concludes that the compliance group's interests are not in line with the entity's long-term goals.<sup>566</sup> However, as one of the countermeasures, Ayres and Braithwaite identify the responsibility of the compliance directors to report directly to the entity's chief executive officer or a board's audit committee.<sup>567</sup> Alternatively, they also advocate for external reporting of defiant cases to

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<sup>560</sup> Braithwaite 1981 *Michigan Law Review* 1481.

<sup>561</sup> Braithwaite 1981 *Michigan Law Review* 1481-1482. See also Ayres and Braithwaite *Responsive Regulation* (1992) 114.

<sup>562</sup> Braithwaite 1981 *Michigan Law Review* 1481-1482. See also Ayres and Braithwaite *Responsive Regulation* (1992) 106 and 114.

<sup>563</sup> See Braithwaite 1981 *Michigan Law Review* 1490-1500 and Ayres and Braithwaite *Responsive Regulation* (1992) 120-128.

<sup>564</sup> See Ch 3.2.4.2 (a).

<sup>565</sup> See Braithwaite 1981 *Michigan Law Review* 1498 and Ayres and Braithwaite *Responsive Regulation* (1992) 125-128.

<sup>566</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 126.

<sup>567</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 126. See also Braithwaite 1981 *Michigan Law Review* 1497 where the author suggests the inclusion of workers or union representatives in the compliance group.

the external government authority as the “best guarantee of compliance group independence”.<sup>568</sup>

Additional disadvantages concern the specific enforcement strategies and question the effectiveness of enforced self-regulation. First, the effectiveness of the internal monitoring discussed above as compared to government monitoring is questionable. The argument here is that challenges specific to the entities may require external government monitoring of compliance. In particular, while private regulation and internal monitoring are cost-effective for the government, private entities bear the costs of implementing their enforcement measures.<sup>569</sup> The costs to small entities of mobilising independent monitoring expertise internally are prohibitive<sup>570</sup> and justify government monitoring of privately-developed standards if self-regulation is to be effective.<sup>571</sup>

Aligned to the efficacy of the monitoring systems, it is also questionable whether companies can command compliance more effectively than government. This raises the question whether the management structures of business entities can compel them to comply with internal standards more effectively than the government.<sup>572</sup> Business entities’ management structures often lack the capacity to issue instructions to companies to comply with self-regulatory standards. As a result, specific government-backed instructions to secure compliance become necessary to enforce compliance policies where management lacks the capacity to fight resistance to its compliance instructions.<sup>573</sup> According to Ayres and Braithwaite, lack of capacity by the management of business entities to instruct them to comply with self-regulatory standards is central only to voluntary self-regulation and not to enforced self-regulation. As enforced self-regulation has the necessary legal force, “the state can be seen as backing the corporate command”.<sup>574</sup> These authors, however, do not appear to reject the need for some form of state command as regards compliance. Their support for the

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<sup>568</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 126.

<sup>569</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 121.

<sup>570</sup> Braithwaite 1981 *Michigan Law Review* 1490-1500. See also Ayres and Braithwaite *Responsive Regulation* (1992) 121.

<sup>571</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 121.

<sup>572</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 125.

<sup>572</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 125.

<sup>573</sup> Braithwaite 1981 *Michigan Law Review* 1495. See also Ayres and Braithwaite *Responsive Regulation* (1992) 125.

<sup>574</sup> Braithwaite 1981 *Michigan Law Review* 1495. See also Ayres and Braithwaite *Responsive Regulation* (1992) 125.

effectiveness of enforced self-regulation in commanding compliance asserts the legitimacy of both state and corporate power to encourage compliance.<sup>575</sup> While they support enforced self-regulation over a regulatory model that is commanded by the state, they emphasise the efficacy of the enforcement mechanism as important to improve compliance with the adopted model. As they proclaim, “the alternative regulatory models rest on the legitimacy of corporate power alone or of state power alone”.<sup>576</sup>

### **3.2.4.3 Command Regulation Without Discretionary Punishment**

#### (a) Concept and Operation

As discussed above, enforced self-regulation was introduced as a middle path between voluntary self-regulation and mandated and direct government regulation.<sup>577</sup> It seeks to overcome the weaknesses of voluntary self-regulation and the inflexibility of the imposed government regulation. The authors of *Responsive Regulation* did, however, “not present it as the best idea or even an innovation that is desirable in most circumstances”.<sup>578</sup> In anticipation of the weaknesses of enforced self-regulation discussed above, *Responsive Regulation* introduces a command form of regulation which allows for the escalation of regulation depending on the responses of those regulated. While voluntary and enforced self-regulation allow the government less power to regulate, the third and fourth strategies on the PRS place the government at the centre of regulation through what is conventionally termed “command-and-control” or “direct regulation”.

*Responsive Regulation* does not provide a detailed analysis of what a command regulation is and what form it takes. A narrow and conventional understanding of regulation is associated with the government’s power to command and control societal behaviour to achieve a specific

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<sup>575</sup> Braithwaite 1981 *Michigan Law Review* 1497. See also Ayres and Braithwaite *Responsive Regulation* (1992) 125.

<sup>576</sup> Braithwaite 1981 *Michigan Law Review* 1497. See also Ayres and Braithwaite *Responsive Regulation* (1992) 125.

<sup>577</sup> See Ch 4.2.4.2(a).

<sup>578</sup> Ayres and Braithwaite *Responsive Regulation* (1992) 101. Cf Kolieb 2015 *MULR* 143 who argues that the authors sought to diminish and even supplant the role of the command-and-control style of regulation with enforced self-regulation.



purpose.<sup>579</sup> This conventional approach to regulation is associated with the original belief of government's dominant regulatory powers.<sup>580</sup>

Command-and-control regulation is the most common form of regulation and denotes a process in terms of which the government or its agencies command society or certain sectors in the society to behave or act in certain ways.<sup>581</sup> The focus of command-and-control regulation is on establishing rules, setting standards, and ensuring their effective enforcement.<sup>582</sup> "Command" refers to the prescriptive nature of the government action, while "control" refers to the support of such command with sanctions for failure to adhere to standards encapsulated in such command.<sup>583</sup> The regulation provides in precise detail, the actions that must be taken to achieve its objective.<sup>584</sup>

#### (b) Advantages and Disadvantages

In the absence of any way to ensure compliance, there is no guarantee that the regulatory objectives will be achieved. As a result, government fosters compliance through sanctions such as administrative penalties, fines, or imprisonment.<sup>585</sup> Benefits of these sanctions are the creation of certainty for both the regulator and those regulated as to what the rules provide and the standards of performance required.<sup>586</sup> In addition, the legislative function in the form of an Act of Parliament sets out the necessary enforcement mechanisms and creates the necessary legitimacy in the rule-making process. Those regulated by the regulatory instruments feel compelled to comply with specific rules expressed by the high authority.<sup>587</sup>

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<sup>579</sup> Freiberg *The Tools of Regulation* (2010) 2-3.

<sup>580</sup> King *The Regulatory State in an Age of Governance: Soft Words and Big Sticks* (2007) 67.

<sup>581</sup> Cohen *Understanding Environmental Policy* 2nd ed (2014) 40.

<sup>582</sup> Wright and Head "Reconsidering Regulation and Governance Theory: A Learning Approach" 2009 31 *Law & Policy* 192 198.

<sup>583</sup> King *The Regulatory State* (2014) 67-69.

<sup>584</sup> Sappington "Principles of Regulatory Policy Design" (1994) *The World Bank Policy Research Paper 1239* <http://documents.worldbank.org/curated/en/362021468766230529/pdf/multi0page.pdf> (accessed: 2019-11-12) 5.

<sup>585</sup> Tyler "The Psychology of Self-Regulation: Normative Motivations for Compliance" in Parker and Nielsen (eds) *Explaining Compliance* (2011) 82.

<sup>586</sup> Freiberg *The Tools of Regulation* (2010) 181-182. See also Baldwin and Cave *Understanding Regulation* (1999) 35; Gunningham *et al Smart Regulation* (1998) 41.

<sup>587</sup> Freiberg *The Tools of Regulation* (2010) 181-182.

Conventional command-and-control regulation is, in the main, characterised by rigidity, inflexibility,<sup>588</sup> and a one-size-fits-all approach.<sup>589</sup> It cannot adapt regulation and punishment to specific circumstances, contexts, or between different stakeholders. It is therefore not suited to addressing different conditions or changes over time.<sup>590</sup> It also requires those regulated to perform the standards prescriptively by doing exactly what is required and for the regulators to enforce them as prescribed.<sup>591</sup> When it is applied by the inspectors who must enforce these standards, it treats all forms of transgression and non-compliance alike without considering the degree of severity or the circumstances that gave rise to them.

#### **3.2.4.4 Command Regulation with Discretionary Punishment**

*Responsive Regulation* also proposes a command regulation with a discretionary punishment. The choice here depends largely on whether or not a regulatory instrument provides for the enforcement of compliance through inspection and sanction. Where this is the case, a further question is whether or not the instrument provides some form of discretion for the inspectors to decide whether and when to punish non-compliance. Braithwaite explains this difference and proposes the command type of regulation to begin with discretionary punishment where punishment is not always mandatory for non-compliance.<sup>592</sup> The relevant regulatory instrument provides the inspector with the discretion to determine a suitable punishment which fits the transgression or non-compliance. This choice of command regulation with discretionary punishment supports the approach adopted in *Responsive Regulation* that enforcement of compliance should begin with persuasion before punishment. The regulatory instrument does not refer to any formal punishments or sanctions but provides the regulator with the discretion to impose the necessary sanction or punishment.<sup>593</sup> The discretionary punishment infused in the command regulation informs a holistic reading of the RR theory

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<sup>588</sup> Gunningham "Regulatory Reforms and Reflexive Regulation: Beyond Command and Control" in Brousseau, Dedeurwaerdere, and Siebenhüner (eds) *Reflexive Governance for Global Public Goods* (2012) 86. See also Freiberg *The Tools of Regulation* (2010) 182. See further Baldwin and Cave *Understanding Regulation* (1999) 38; Fairman and Yapp "Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement" 2005 27 *Law & Policy* 491-492-493.

<sup>589</sup> Timothy and Malloy "The Social Construction of Regulation: Lessons from the War Against Command and Control" 2010 58 *Buffalo Law Review* 267-269.

<sup>590</sup> Gunningham in Brousseau *et al* *Reflexive Governance* (2010) 87. See also Freiberg *The Tools of Regulation* (2010) 182.

<sup>591</sup> Gunningham in Brousseau *et al* (eds) *Reflexive Governance* (2010) 88.

<sup>592</sup> Braithwaite *To Punish or to Persuade* (2002) 133-142.

<sup>593</sup> Scott "The Regulatory State and Beyond" in Drahos P (ed) *Regulatory Theory* (2017) 271.

and the regulatory pyramid. This is observed from the theme of the RR theory and the absence of specific reference to sanctions at the base of the pyramid, with only such reference to formal sanctions arising with the escalation up the pyramid.<sup>594</sup> As Scott observes, “regulators have a good deal of discretion in the deployment of their powers, which they use to construct their enforcement practices”.<sup>595</sup> For instance, an inspector can recommend the institution impose its internal disciplinary mechanisms on those who contributed to a transgression or non-compliance, rather than an external punishment specifically set out in the regulatory instrument.<sup>596</sup> However, as with voluntary and enforced self-regulation, a command regulation with discretionary punishment has its shortcomings that may necessitate an escalation to stricter forms of regulation. Key among these are the possibility of inspectors abusing their discretion or entities being inspected by co-opting inspectors for less or non-punitive stances not commensurate with the transgressions.<sup>597</sup> Conventional forms of command-and-control regulation with non-discretionary punishment, as discussed above, fill some of the gaps that other regulations in the pyramid cannot address.

### **3.3 RELEVANT SUPPLEMENTARY THEORIES**

#### **3.3.1 Brief Introduction**

It is over two decades since the RR theory espoused in *Responsive Regulation* was first introduced. Its lifespan has, however, not survived unchallenged. Various commentators have offered views on this theory that are both evolutionary and revolutionary, and have also approached it from different perspectives as to its shortcomings.<sup>598</sup> Many of the comments and reviews of the theory have attempted to offer supplementary views, models,

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<sup>594</sup> Scott in Drahos (ed) *Regulatory Theory* (2017) 271.

<sup>595</sup> Scott in Drahos (ed) *Regulatory Theory* (2017) 271.

<sup>596</sup> Braithwaite *To Punish or to Persuade* (2002) 135.

<sup>597</sup> Braithwaite *To Punish or to Persuade* (2002) 137.

<sup>598</sup> See Gunningham *et al Smart Regulation* (1998) for introducing smart regulation. See also Parker *The Open Corporation: Effective Self-Regulation and Democracy* (2002) who introduces the concept of meta regulation to involve both public and private regulatory institutions. See further Grabosky “Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process” 2013 7 *Regulation & Governance* 114; Gunningham *et al Smart Regulation* (1998) 399 who criticise the theory as state-centric with less involvement of non-state actors. Cf Scott in Drahos (ed) *Regulatory Theory* (2017) for reversal of state-centric approach; Baldwin and Black 2008 *MLR* 59 for introducing a really responsive regulation concept; and Ford 2013 *Regulation & Governance* 14 on the possible application of the RR theory to global financial regulation.

interpretations, and new theories that refine and complement many of its shortcomings – in particular focusing on the pyramid. The RR theory has, as Ford and Affolder state, “produced a number of distinct conceptual offspring, all of which share features with Ayres’ and Braithwaite’s original conception, but which may emphasise different elements, or advance the conversation along different lines, and which are sometimes in tension with each other”.<sup>599</sup>

From the study of the PRS and the different regulatory steps it provides, two preliminary assumptions may be made. First, it may reasonably be assumed that the application of these instruments is sequential, and they are applied hierarchically with one type of instrument following another bottom-up the pyramid. *Responsive Regulation* paints a picture of a regulatory pyramid that begins with softer forms of regulation at its base which advance up the pyramid only if the regulatees do not respond to the regulatory standards espoused in the relevant regulatory instrument.<sup>600</sup> Put differently, it paints a picture of one type of instrument that must be adopted and tested for its effectiveness and responsiveness before the regulator can escalate the regulation to a new level higher up the pyramid. The PRS gives the impression, for instance, that there cannot be a mix of different regulatory instruments that serve to complement and support each other to ensure that the regulatory framework is responsive to the needs of both the regulator and society at large. The second assumption is that regulation should always, and in all contexts and circumstances, begin at the bottom of the pyramid and escalate to its apex. This interpretation raises an important question as to whether all social ills or economic deficiencies and contexts require a slow movement up the pyramid, each step testing the effectiveness of a particular regulatory instrument over time before ensuring compliance with strict sanctions and punishment. A critical analysis of the literature reveals some possible answers to some of these questions.

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<sup>599</sup> Ford and Affolder 2011 *UBCLR* 464.

<sup>600</sup> King *The Regulatory State* (2014) 72.

### 3.3.2 Smart Regulation and Regulatory Pluralism

The most important complementary and mutually reinforcing theories that address the questions above are “smart regulation”<sup>601</sup> and “regulatory pluralism”.<sup>602</sup> These theories were introduced to question the effectiveness of the RR theory and its pyramid for utilising a single instrument category rather than a range of instruments and parties.<sup>603</sup> They are underscored by the idea of using multiple regulatory instruments to ensure effective and responsive regulation. Smart regulation is built on the RR theory and seeks to harness the strength of each instrument in the pyramid by proposing the use of multiple and complementary instruments.<sup>604</sup> It is defined as “a form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control”.<sup>605</sup> It is concerned with the use of various regulatory instruments as alternatives rather than as complementary and reinforcing.<sup>606</sup> It combines different types of instruments and allow one instruments to support another that is less effective or by combining different instruments that are together suited for different circumstances, contexts, risks, and hazards.<sup>607</sup> For instance, self-regulatory measures may be combined with either enforced self-regulatory or direct regulatory instruments, such as an Act of Parliament, where such a combination of measures will strengthen the effectiveness of one another. The smart regulation approach takes cognisance of the inherent strengths and weaknesses of each regulatory instrument that will serve to harness such strength while using additional and complementary instruments to overcome the weaknesses.<sup>608</sup> As a result, it

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<sup>601</sup> Gunningham *et al Smart Regulation* (1998) 453.

<sup>602</sup> Gunningham and Sinclair “Regulatory Pluralism: Designing Policy Mixes for Environmental Protection” 1999 21 *Law & Policy* 51. See also Prosser 2008 *Journal of Consumer Policy* 99 who advocates “a cocktail of different types of regulatory approach”. Another similar regulatory strategy is what has been identified as “co-regulation”.

<sup>603</sup> Gunningham and Sinclair “Designing Smart Regulation” (1998) <http://www.oecd.org/env/outreach/33947759.pdf> (accessed: 2018-12-15) 5. Cf Parker “The Pluralization of Regulation” 2008 9 *Theoretical Inquiries in Law* 349 who sees the RR theory and its pyramids as pluralistic in that it allows industries to make their own regulations which exist alongside direct government regulation. See further Hanebury “Smart Regulation Rhetoric or Reality?” 2006 44 *Alberta Law Review* 33 39.

<sup>604</sup> Simm “Regulating Sex in Peace Operations” in Drahos (ed) *Regulatory Theory* (2017) 422-423. See also Ayling “Prevention of Transnational Environmental Crime and Regulatory Pluralism” in Drahos (ed) *Regulatory Theory* (2017) 499.

<sup>605</sup> Gunningham and Sinclair in Drahos (ed) *Regulatory Theory* (2017) 133.

<sup>606</sup> Gunningham *et al Smart Regulation* (1998) 126 -131. See also Gunningham and Sinclair 1999 *Law & Policy* 50; Baldwin, Cave and Lodge *Understanding Regulation: Theory, Strategy, and Practice* 2nd ed (2010) 329.

<sup>607</sup> Freiberg *The Tools of Regulation* (2010) 99.

<sup>608</sup> Gunningham and Sinclair 1999 *Law & Policy* 50.

advocates the combination of various instruments to compensate for the weakness of each standalone instrument.<sup>609</sup>

Smart regulation does not accept that a combination of various instruments is always complementary. While some regulatory mixes may be inherently complementary, some combinations may be incompatible and thus dilute the effects of one another.<sup>610</sup> Others may be complementary only if they are applied sequentially, whereas some may either be complementary or incompatible depending on the specific context.<sup>611</sup> To address some of the challenges of the regulatory mixes, smart regulation adopts various regulatory design principles, some of which address some of the deficiencies of incompatible combinations of instruments. The following principles are relevant as they have some significance for the advancement of the RR theory.<sup>612</sup>

- *Prefer policy mixes incorporating instrument and institutional combinations.* This principle constitutes the core of smart regulation and regulatory pluralism and the efforts to overcome the deficiencies of a single-regulatory-instrument approach highlighted above. It proposes the government involving third parties, such as banks and insurers, in the regulatory process to take the regulatory burden off the government interventions.<sup>613</sup> In so doing, however, such a mix must avoid a regulatory overload that may render the introduction of a mix of regulatory instruments counterproductive.<sup>614</sup>
- *Prefer less interventionist measures.* Smart regulation generally proposes the application of less interventionist measures at the first stage of regulation. Two components of interventions inform this approach: prescription and coercion.<sup>615</sup> Prescriptive types of

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<sup>609</sup> Gunningham and Sinclair in Drahos (ed) *Regulatory Theory* (2017) 139.

<sup>610</sup> Gunningham and Sinclair 1999 *Law & Policy* 50. See also Gunningham and Sinclair "Designing Smart Regulation" (1998) 2.

<sup>611</sup> Gunningham and Sinclair 1999 *Law & Policy* 50. See also Gunningham and Sinclair "Designing Smart Regulation" (1998) 2.

<sup>612</sup> Gunningham *et al Smart Regulation* (1998) 387-396. See also Gunningham and Sinclair "Smart Regulation" in Drahos (ed) *Regulatory Theory* (2017) 139; Gunningham and Sinclair "Designing Smart Regulation" (1998) 3-5. See further Van Gossum, Arts and Verheyen "From 'Smart Regulation' to 'Regulatory Arrangements'" 2010 43 *Policy Sciences* 245 247.

<sup>613</sup> Gunningham *et al Smart Regulation* (1998) 389. See also Gunningham and Sinclair "Designing Smart Regulation" (1998) 3.

<sup>614</sup> Gunningham *et al Smart Regulation* (1998) 389-390.

<sup>615</sup> Gunningham *et al Smart Regulation* (1998) 391. See also Gunningham and Sinclair "Designing Smart Regulation" (1998) 3.

instruments are preferred if it is necessary to determine the level, type, and specific methods for improvement of performance or compliance with necessary external enforcement to ensure such improvement or compliance. Coercive measures should be preferred if improvements can be achieved only by external negative pressure on the regulated entities with less external enforcement. While less interventionist methods are preferred, this requires an assessment of measures and their contribution to either prescription or coercion to assess their respective contributions to these two components.<sup>616</sup>

- *Escalating up an instrument pyramid to the extent necessary to achieve the policy goals.* This principle takes cognisance that even the right combination of various measures may sometimes not achieve the expected outcomes. While preference is given to less interventionist measures, this principle also complements the RR theory and its pyramid with smart regulation. Smart regulation complements the *Responsive Regulation* pyramid with a proposal of using a number of different instruments “across different faces of the pyramid”.<sup>617</sup>

From the analysis of the last principle above, it becomes apparent that a combination of instruments does not intend to apply these instruments only horizontally and thus refutes the hierarchical application of the regulatory pyramid. Contrary to the application of the regulatory pyramid, the combination of different instruments also does not apply in the hierarchy alone. Such a combination may complement the pyramid of regulatory strategies by applying both hierarchically and horizontally, the latter involving self-regulation and a mix of other instruments at the base of the pyramid in accordance with the principle of less interventionist measures above.<sup>618</sup> In such instances direct state regulation serves “as a temporary and supplementary remedial action”.<sup>619</sup> This, however, raises the question whether this hierarchical application must always start with non-state regulatory instruments at the bottom of the pyramid. Put differently, the question is whether the PRS is relevant for all

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<sup>616</sup> Gunningham *et al Smart Regulation* (1998) 391. See also Gunningham and Sinclair *Designing Smart Regulation* (1998) 4.

<sup>617</sup> Gunningham and Sinclair “*Designing Smart Regulation*” (1998) 5.

<sup>618</sup> Freiberg *The Tools of Regulation* (2010) 99.

<sup>619</sup> Latzer, Just, Saurwein and Slominski “*Regulation Remixed: Institutional Change Through Self and Co-Regulation in the Mediamatics Sector*” 2003 50 *Communications & Strategies* 127.

circumstances, contexts, and situations, applying the escalation from less to more interventionist measures.

Baldwin and Black identify both the policy and the practical challenges of the escalation and de-escalation through the pyramid which are relevant to answer this question.<sup>620</sup> They question the pyramid approach and whether a step-by-step escalation up the pyramid is appropriate in all the circumstances. They argue that such escalation is not always appropriate. An example is a situation where there are potentially catastrophic risks, such as environmental hazards or mining safety, that indicate an urgent need to apply interventionist measures closer to the apex of the pyramid.<sup>621</sup> The degree of potential harm or transgression determines whether an immediate response is more necessary than a snail-paced escalation that follows a pyramidal approach.<sup>622</sup> The availability of legal mechanisms and the stagnant national regulatory culture and styles are also factors explaining why the pyramidal approach may not work. Where the regulatory agency is willing to apply the pyramid of regulatory strategies and escalate regulation, a lack of both judicial and legislative support may render the application of the approach futile.<sup>623</sup> With regard to the regulatory culture, style, and methods, governments' regulatory cultures differ in terms of the preferred market mechanisms for regulation or the command-and-control type of regulation.<sup>624</sup> For instance, the USA style of regulation has been identified as more legalistic, rigid, and formal than that of the United Kingdom which is more flexible, informal, and self-regulatory.<sup>625</sup> Some countries prefer command-and-control types of regulation, whereas others may prefer voluntary and less intrusive forms. The difference in regulatory styles and cultures depends on various factors such as the country's political pressures, philosophies, history, and legal systems, as

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<sup>620</sup> Baldwin and Black 2008 *MLR* 62-63 include, among other criticisms, conceptual and principled ones.

<sup>621</sup> Baldwin and Black 2008 *MLR* 63. See also Van Gossum *et al* 2010 *Policy Sciences* 245247.

<sup>622</sup> See Freiberg *The Tools of Regulation* (2010) 99 who argues that "some harms or offences warrant immediate serious responses, such as criminal sanctions: the responses should not depend on any future actions by the offender".

<sup>623</sup> Baldwin and Black 2008 *MLR* 63.

<sup>624</sup> Freiberg *The Tools for Regulation* (2010) 104.

<sup>625</sup> Freiberg *The Tools of Regulation* (2010) 104. See also Kagan "Introduction: Comparing National Style of in Japan and the United State" 2000 *22 Law & Policy* 225 who compares the regulatory style in the USA as adversarial and legalistic and that of Japan as non-legalistic and non-adversarial. See further Braithwaite and Ayres *Responsive Regulation* (1992) 45 who identify the USA regulatory culture as litigious. Cf King *The Regulatory State* (2014) 72-73 who argues for the challenges of escalation and de-escalation in the Westminster model of regulation where legislative authority is generally reserved to Parliament.



well as social and cultural considerations.<sup>626</sup> The regulatory cultures and stylistic differences may, however, be misleading. A country can have mixed regulatory styles across areas of regulation and agencies.<sup>627</sup> Such mix may be observed in different areas such as finance, labour, and health.<sup>628</sup> These important factors may influence the application of more interventionist measures at the relevant level on the pyramid rather than beginning with less interventionist at the bottom and escalating to its apex. As *Responsive Regulation* indicates, “the best strategy [to regulate] is shown to depend on context, regulatory culture, and history”.<sup>629</sup>

### **3.4 COMPETING FINANCIAL SECTOR REGULATORY OBJECTIVES**

#### **3.4.1 Financial Inclusion and Other Financial Sector Regulatory Objectives**

This chapter introduced the RR theory as a tool for an effective and responsive regulatory framework. There is currently no evidence that it was introduced to promote FI. It is therefore important to outline key aspects that policymakers and regulators must consider to ensure the effective and responsive regulation of the financial sector, including the promotion of FI. The financial sector all around the world is generally a highly regulated industry. FI policy and regulatory frameworks are a new and very distinct addition to the regulation of this sector. In the following chapters the research discusses the promotion of FI at international, continental, regional, and national levels and indicates the importance of paying special attention to links to various traditional and long-standing financial sector policy and regulatory objectives such as financial stability, financial integrity, and consumer protection. Arguably, to be effective and responsive policies and the regulatory frameworks cannot focus on FI as a stand-alone objective and in isolation from the goals of these objectives and their importance to the financial system. To achieve this the financial system must be stable with less risks of compromising its integrity and must protect consumers against possible abuse and unfairness in the provision of these services. However, pursuing FI in conjunction with these core regulatory and policy objectives entails potential risks of ill-defining the objectives or pursuing

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<sup>626</sup> Freiberg *The Tools of Regulation* (2010) 104. See also Kagan 2000 *Law & Policy* 225-227.

<sup>627</sup> Freiberg *The Tools of Regulation* (2010) 105.

<sup>628</sup> Freiberg *The Tools of Regulation* (2010) 105.

<sup>629</sup> Braithwaite and Ayres *Responsive Regulation* (1992) 5.

one objective without an awareness of the links to the others.<sup>630</sup> It is, therefore, important to develop policies and a regulatory framework that pursue FI and also understand the possible risks and benefits of pursuing it in conjunction with these long-standing financial sector regulatory objectives.

At the international level, pursuing these objectives together with FI has created a challenge for GSSBs. Due to their varying mandates, they often recommend conflicting approaches to the same objective.<sup>631</sup> At the national level, policymakers and regulators are required carefully to examine the relationships between these core objectives and the promotion of FI. They must identify and minimise possible trade-offs between these objectives, and possible synergies and how to maximise them.<sup>632</sup>

### 3.4.2 Trade-offs

There are a number of possible trade-offs between the core financial regulation and policy objectives and FI. Maintaining financial stability has become the focus of the financial system regulation for many years. It has been accelerated after the 2008 financial crisis for the smooth operation of the financial systems and intermediation, and to withstand possible financial shocks.<sup>633</sup> The system is also required to facilitate the smooth flow of funds between depositors and investors.<sup>634</sup> The causes of financial instability include the expansion of the

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<sup>630</sup> De Sousa "FI and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper No 7* 1. See also CGAP *I-SIP South Africa* (2012) 5 and 10-12.

<sup>631</sup> De Sousa "FI and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper No 7* 10.

<sup>632</sup> Consultative Group to Assist the Poor "Financial Inclusion, Stability, Integrity, and Protection" (2017) 1.

<sup>633</sup> Saha and Dutta "Nexus of Financial Inclusion, Competition, Concentration and Financial Stability" 2021 31 *Competitiveness Review: An International Business Journal* 669 671. See also Alber "Financial Inclusion, Stability, Integrity and Protection (I-SIP)" (2019) <https://ssrn.com/abstract=3335904> (accessed: 2021-08-24) 6. See further Ramlall *Understanding Financial Stability* (2018) Ch 2 for the discussion of different definitions of financial stability. Generally, financial stability requires that the financial systems withstand financial distresses that may pose systematic risks.

<sup>634</sup> Alber "I-SIP" (2019) 6. See also Hannig and Jansen in Kawai and Prasad (eds) *Financial Market Regulation and Reforms* (2010) 310; Khan "Financial Inclusion and Financial Stability: Are they Two Sides of the Same Coin?" (2012-03-Nd) *RBI Monthly Bulletin* 533 555; Peter and Pontines "Financial Stability and Financial Inclusion" (2014) *Asian Development Bank Institute Working Paper No 488* <https://www.econstor.eu/bitstream/10419/115305/1/791269973.pdf> (accessed: 2021-08-24) 3.

supply of credit that increases over-indebtedness,<sup>635</sup> liquidity shortages, and payment system failure that results in panic and runs on banks.<sup>636</sup> Other potential risks that FI may pose to financial stability stem from the nature of the low-income clients its targets, new financial product innovations, and initiatives to outsource financial activities.<sup>637</sup> A financial system may also remain unstable if it allows the proliferation of unregulated financial institutions that may adversely affect the stability of the regulated financial intermediaries.<sup>638</sup> Financial systems, therefore, ensure financial stability by implementing strict regulations and supervision requirements for the safety and soundness of financial institutions.<sup>639</sup> Such regulations include allocating savings to more productive investments and providing sustainable payment systems, restrictions on banking activities, tightening of entry requirements needed for obtaining banking licences for new institutions, and regulatory restrictions on the capital and financial liquidity requirements and their adequacy.<sup>640</sup>

Measures to counter money-laundering and the financing of terrorism that safeguard the integrity of the financial system may also fall foul of FI objectives.<sup>641</sup> By and large, FI introduces new customers to the financial system who have little or no records in the formal financial sector.<sup>642</sup> As discussed in Chapter four, a strict tick-box (rule-based approach)

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<sup>635</sup> Koonga, Lawb and Ibrahim "Credit Expansion and Financial Stability in Malaysia" 2017 61 *Economic Modelling* 339 342. See also De Sousa "FI and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper No 77*.

<sup>636</sup> Moenjak *Central Banking: Theory and Practice in Sustaining Monetary and Financial Stability* (2014) 47. See also Allen "What Is 'Financial Stability'? The Need for Some Common Language in International Financial Regulation" 2014 45 *Georgetown Journal of International Law* 929 932; García "Can Financial Inclusion and Financial Stability Go Hand in Hand?" 2016 21 *Economic Issues* 81 96.

<sup>637</sup> García 2016 *Economic Issues* 86. See also Dittus and Klein "On Harnessing the Potential of Financial Inclusion" (2011) *BIS Working Papers No 347* <https://www.bis.org/publ/work347.pdf> (accessed: 2021-08-24) 17 on how the emergence of small-scale payment services such as M-Pesa may provide similar opportunities for illegal activities in the future.

<sup>638</sup> Atellu, Muriu and Sule "Do Bank Regulations Matter For Financial Stability? Evidence From a Developing Economy" 2021 19 *Journal of Financial Regulation and Compliance* 514 515.

<sup>639</sup> Consultative Group to Assist the Poor and The World Bank Group *Financial Access 2010: The State of Financial Inclusion Through the Crisis* (2010) 16. See also García 2016 *Economic Issues* 84.

<sup>640</sup> Kima, Koo and Park "Role of Financial Regulation and Innovation in the Financial Crisis" 2013 9 *Journal of Financial Stability* 662 665. See also Dittus and Klein "On Harnessing the Potential of Financial Inclusion" (2011) *BIS Working Papers No 347* 16.

<sup>641</sup> De Koker and Jentzsch "Financial Inclusion and Financial Integrity: Aligned Incentives?" 2013 44 *World Development* 267. See also Whisker and Lokanan "Anti-money Laundering and Counter-Terrorist Financing Threats Posed by Mobile Money" 2019 22 *JMLC* 158.

<sup>642</sup> Gelb "Balancing Financial Integrity with Financial Inclusion" (2016) *Centre for Global Development Policy Paper 074* 4.

application of customer due diligence (CDD) and the know-your-customer (KYC) measures that rigidly require the submission of documents such as identity documents, residential addresses, or income tax numbers, may exclude the majority of the population from accessing formal financial services.<sup>643</sup> They eventually resort to financial services in the unregulated informal sector which limits the efficacy of the AML/CFT controls.<sup>644</sup> Similarly, there can be a trade-off between the consumer protection regulation in the financial sector and the FI policy objective.<sup>645</sup> The regulatory frameworks that promote financial disclosure and transparency, financial literacy, the protection of data and privacy, and rules that prevent fraud and other customer abuses enable consumers to make informed choices on similar products from different providers.<sup>646</sup> These measures level the playing field between consumers and financial service providers by protecting consumers against unfair, deceptive, or discriminatory practices by financial service providers, and enhance consumer trust.<sup>647</sup> However, measures that provide greater awareness and access to financial-product information may dissuade low-

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<sup>643</sup> See Ch 4.2.2.2 and Ch 4.2.2.3 below. See also De Koker "Identifying and Managing Low Money Laundering Risk Perspectives on FATF's Risk-Based Guidance" 2009 16 *JMLC* 334 349; Ai and Broome "Carrying Out a Risk-based Approach to AML in China: Partial or Full Implementation?" 2010 13 *JMLC* 394; Lyman, De Koker, Meier and Kerse "Beyond KYC Utilities Collaborative Customer Due Diligence for Financial Inclusion" (2019) *CGAP/World Bank Working Paper* [https://www.cgap.org/sites/default/files/publications/2019\\_08\\_28\\_Working\\_Paper\\_Beyond\\_KYC\\_Utilities\\_0.pdf](https://www.cgap.org/sites/default/files/publications/2019_08_28_Working_Paper_Beyond_KYC_Utilities_0.pdf) (accessed: 2021-08-22) 17.

<sup>644</sup> Batsaikhan, Darvas and Raposo "Reconciling Contradictory Forces: Financial Inclusion of Refugees and Know-your-customer Regulation" 2019 20 *Journal of Banking Regulation* 261 262. See also Gelb "Balancing Financial Integrity with Financial Inclusion" (2016) *Centre for Global Development Policy Paper 074* 3.

<sup>645</sup> Alber "I-SIP" (2019) 10.

<sup>646</sup> Zywicki "Market-Reinforcing Versus Market-Replacing Consumer Finance Regulation" in Peirce and Klutsey (eds) *Reframing Financial Regulation: Enhancing Stability and Protecting Consumers* (2016) 335. See also Muktadir "Financial Inclusion, Consumer Awareness and Protection" Paper Presented at the 4th Conference on Financial Services and Consumers, Karachi (31 January 2013) 3; Pearson, Stoop and Kelly-Louw "Balancing Responsibilities – Financial Literacy" 2017 20 *PELJ* 1 on different approaches to financial literacy in Australia and South Africa. See further Johnson 2019 *Cato Journal* 492; Alber "I-SIP" (2019) 14; Bongomin and Ntayi "Mobile Money Adoption and Usage and Financial Inclusion: Mediating Effect of Digital Consumer Protection" 2020 22 *Digital Policy, Regulation and Governance* 157 158.

<sup>647</sup> Elsayed "The Interrelationship Between Financial Inclusion, Financial Stability, Financial Integrity and Consumer Protection (I-SIP Theory)" (2020) <https://ssrn.com/abstract=3745874> (accessed: 2021-08-25) 12. See also Johnson 2019 *Cato Journal* 496; AFI "Consumer Protection: Levelling the Playing Field in Financial Inclusion" (2010) *Policy Note* <https://www.ifc.org/wps/wcm/connect/46c1d129-5457-48ab-9443-2d530d0d2383/Tool+5.10.+AFI+Report++Consumer+Protection+Policy.pdf?MOD=AJPERES&CVID=joIM9S6> (accessed: 2021-08-25) 2. See, eg, 15 USC §16930-2(a)(2) of the Dodd-Frank Act, The Edison Alliance "Shared Principles for an Inclusive Financial System Principle" (2021) *World Economic Forum White Paper* [http://www3.weforum.org/docs/WEF\\_Shared\\_Principles\\_for\\_an\\_Inclusive\\_Financial\\_System\\_2021.pdf](http://www3.weforum.org/docs/WEF_Shared_Principles_for_an_Inclusive_Financial_System_2021.pdf) (accessed: 2021-08-24) 6.

income consumers from signing up for such an account.<sup>648</sup> Examples are access to information on high costs associated with stringent requirements to open and use a bank account, or extensive credit affordability assessment procedures that prevent over-indebtedness. They may exclude the majority with poor credit records, no credit history, or no formal income.<sup>649</sup>

### 3.4.3 Synergies

Traditional financial sector policy objectives and FI can be mutually reinforcing and have positive impacts on each other. To be inclusive, a financial sector must adopt regulatory approaches that accommodate emerging institutional and product innovations, such as mobile and fintech service providers, microfinance institutions, and agent banks, in the formal financial system. The sector can be inclusive by easing or introducing tiered bank licensing frameworks, and by adjusting minimum entry requirements based on an institutional risk assessment.<sup>650</sup> This allows for a more diversified and stable retail deposit base and efficient intermediation of financial resources that make financial services more accessible.<sup>651</sup> It also improves the resilience of deposit funding in the banking sector during financial crises and ultimately supports financial stability.<sup>652</sup>

An increased introduction of new financial institutions and services in the formal financial system also contributes positively to financial integrity and the combating of money-laundering and the financing of terrorism. More formal institutions reduce the number of informal financial

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<sup>648</sup> Allen *et al* 2016 *Journal of Financial Intermediation* 15.

<sup>649</sup> European Commission "Financial Services Provision" (2008) 108. See also Tomilova and Valenzuela "Financial Inclusion + Stability, Integrity, and Protection (I-SIP)" (2018) <https://www.cgap.org/sites/default/files/publications/Technical-Guide-ISIP-Policy-Making-Nov-2018.pdf> (accessed: 2021-09-15) 6. See also House of Commons Treasury Committee "Access to Cash Machines for Basic Bank Account Holders" (2012) <https://publications.parliament.uk/pa/ld201617/ldselect/ldfinexcl/132/13210.htm> (accessed: 2022-01-23).

<sup>650</sup> Anarfoa, Aborb and Osei "Financial Regulation and Financial Inclusion in Sub-Saharan Africa: Does financial Stability Play a Moderating Role?" 2020 51 *Research in International Business and Finance* 1 3. See also Staschen "Inclusion, Stability, Integrity, and Protection: Observations and Lessons for the I-SIP Methodology From Pakistan" (2014) *CGAP* <https://www.cgap.org/sites/default/files/researches/documents/Working-Paper-I-SIP-Pakistan-June-2014l.pdf> (accessed: 2021-09-15) 33.

<sup>651</sup> García 2016 *Economic Issues* 87-95. See also Hannig and Jansen in Kawai and Prasad (eds) *Financial Market Regulation* (2010) 310.

<sup>652</sup> Han and Melecky "Financial Inclusion for Financial Stability: Access to Bank Deposits and the Growth of Deposits in the Global Financial Crisis" (2013) *World Bank Policy Research Paper No 6577* <https://openknowledge.worldbank.org/bitstream/handle/10986/16010/WPS6577.pdf> (accessed: 2017-06-03) 20.

services that operate outside the law enforcement, monitor and improve the transparency of transactions, and the reach, effectiveness, and consistent application of AML/CFT controls.<sup>653</sup> Also, the introduction and use of electronic accounts or mobile payment systems in formal financial sectors that facilitate easy tracking and monitoring of suspicious transactions is often difficult with the anonymity of cash transactions.<sup>654</sup> Maintaining the integrity of the financial system also increases trust in financial institutions while at the same time promoting savings and smoothing the operation of credit markets.<sup>655</sup> Equally, consumer protection laws also improve trust and confidence in the financial market, which in turn increases the adoption of financial services.<sup>656</sup> An information disclosure requirement and the financial literacy programmes address the financial services information imbalances between different types of consumer and create a better understanding of services, rights, and obligations associated with financial services.<sup>657</sup> Consumers can use the information to make informed financial decisions while also protecting themselves from abusive practices or conduct, such as predatory lending, exorbitantly high prices, or discrimination.<sup>658</sup> Consumer protection measures further advance competition in the market by enabling consumers to compare various financial products from different service providers and make an informed choice.<sup>659</sup> Therefore, both AML/CFT and consumer protection laws are important in advancing FI and ensuring that the majority of the population is included in the national financial system.

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<sup>653</sup> Shehu "Promoting Financial Inclusion for Effective Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT)" 2012 57 *Crime Law Social Change* 303 313. See also De Koker and Jentsch 2013 *World Development* 267; Staschen "I-SIP: Observations and Lessons" (2014) *CGAP* 34.

<sup>654</sup> Dittus and Klein "On Harnessing the Potential of Financial Inclusion" (2011) *BIS Working Papers No 347* 17. See also Alexandre and Eisenhart" 2013 *WJLTA* 285; Allen *et al* 2016 *Journal of Financial Intermediation* 3.

<sup>655</sup> Alexandre, Mas and Radcliffe "Regulating New Banking Models to Bring Financial Services to All" 2011 54 *Challenge* 116 126-127. See also Alber "I-SIP" (2019) 13.

<sup>656</sup> Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 160. See also Dittus and Klein "On Harnessing the Potential of Financial Inclusion" (2011) *BIS Working Papers No 347* 160; Tomilova and Valenzuela "I-SIP" (2018) 44.

<sup>657</sup> Alber "I-SIP" (2019) 3. See also AFI "Consumer Protection: Levelling the Playing Field" (2010) *Policy Note* 01; Zhang and Valle-Sison "Financial Inclusion and Regulatory Implications" in Azis and Shin *Global Shocks, Risks, and Asian Financial Reforms* (2014) 613.

<sup>658</sup> Alber "I-SIP" (2019) 3. See also Johnson 2019 *Cato Journal* 493; AFI "Consumer Protection: Leveling the Playing Field" (2010) *Policy Note* 2. See further Tomilova and Valenzuela "I-SIP" (2018) 44; Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 157; Dittus and Klein "On Harnessing the Potential of Financial Inclusion" (2011) *BIS Working Papers No 347* 160.

<sup>659</sup> Johnson 2019 *Cato Journal* 492-493. See also Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 157; Dittus and Klein "On Harnessing the Potential of Financial Inclusion" (2011) *BIS Working Papers No 347* 160.

### 3.4.4 Balancing Competing Objectives

The discussion of possible trade-offs between the traditional regulatory and policy objectives highlights the challenges that national policymakers and regulators may experience in pursuing effective frameworks to promote FI. Regulators, policymakers, and the literature have identified failure to recognise the linkage between the traditional policy objective and FI as a key challenge in promoting FI. It is therefore important that relevant stakeholders understand the potential link of traditional financial sector policy objectives and the addition of FI. They are required to develop a regulatory strategy that will formulate the link between these seemingly contradictory objectives to minimise trade-offs and any other negative outcomes and to maximise synergies.<sup>660</sup>

To achieve the necessary link, the CGAP has proposed an Inclusion-Stability Integrity and Protection (I-SIP) methodology which requires policymakers and regulators to apply the principle of proportionality.<sup>661</sup> This methodology requires national policymakers to pursue FI by optimising its link with the core objectives of financial stability, financial integrity, and financial consumer protection.<sup>662</sup> In the context of financial sector regulation, a proportionality principle requires a balance between the risks and benefits against the costs of regulation and supervision of financial institutions.<sup>663</sup> In the context of promoting FI, it requires policymakers and regulators to “build a policy and regulatory framework that is proportionate with the risks

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<sup>660</sup> CGAP *I-SIP South Africa* (2012) 10. See also Staschen “I-SIP: Observations and Lessons” (2014); CGAP *I-SIP South Africa* (2012) 10-12.

<sup>661</sup> CGAP *I-SIP South Africa* (2012) 7. See also Dema “Managing the Twin Responsibilities of Financial Inclusion and Financial Stability” 2015 2 *AFI Viewpoints* 1 6; Tomilova and Valenzuela “I-SIP” (2018) ii where the authors indicate Martin Alsop, David Porteous, and Timothy Layman as the original developers of the concept. See further Lee and Low *Inclusive Fintech: Blockchain, Cryptocurrency and ICO* (2018) 415; di Castri and Plaitakis “Getting Financial Inclusion Policies Right in the Digital Era: Focus on Competition and Innovation as Policy Objectives” (2018) <https://ssrn.com/abstract=3267563> (accessed: 2021-09-15) for the application of I-SIP on fintechs.

<sup>662</sup> Alber “I-SIP” (2019) (n 138) 2.

<sup>663</sup> Consultative Group to Assist the Poor “Global Standard-Setting Bodies and Financial Inclusion for the Poor: Toward Proportionate Standards and Guidance” (2011) <https://www.cgap.org/sites/default/files/researches/documents/CGAP-White-Paper-Global-Standard-Setting-Bodies-Oct-2011.pdf> (accessed: 2022-03-02) 2. See also Restoy “Proportionality in Financial Regulation: Where Do We Go from Here?” Paper Presented at the BIS FSI/IMF Meeting on Proportionality in Financial Regulation and Supervision Basel, Switzerland (8 May 2019) 1/8.

and benefits involved in such innovative products and services”.<sup>664</sup> They are required to pay attention to the risks of FE and the benefits of FI.<sup>665</sup> To promote synergies between FI and financial stability, I-SIP requires regulators to adopt supervisory practices that are commensurate with the risk profiles of financial institutions under their supervision, while accommodating smaller institutions that pose fewer stability risks.<sup>666</sup> To be proportionate, the AML/CFT controls must adopt a risk-based approach (RBA) that applies a reduced or simplified CDD to identified financial services and transactions that pose a lower risk.<sup>667</sup> Consumer protection law that is proportionate starts with basic consumer protection measures, such as transparent pricing and fair treatment, to “avoid setting the consumer protection bar so high that responsible providers are dissuaded from entering the market”.<sup>668</sup>

According to the AFI, “[t]he best results have been seen when financial inclusion is viewed as an integral component of overall financial sector growth and development strategies”.<sup>669</sup> The proposed I-SIP methodology helps to guide national regulators and policymakers to avoid an isolated application of the proportionality principle. The CGAP has made a number of statements that help guide national regulators and policymakers to design and implement policy interventions that identify, manage, and optimise the link between FI and all three

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<sup>664</sup> See Principle 8 of the G20 “G20 Principles for Innovative Financial Inclusion” (2011) <https://www.afi-global.org/wp-content/uploads/publications/afi%20g20%20principles.pdf> (accessed: 2022-03-02) (“G20 “FI Principles” (2011)”). See the discussion in Ch 4.2.3.2 above.

<sup>665</sup> CGAP “Global Standard-Setting Bodies and Financial Inclusion” (2011) 2. See also De Sousa “FI and Global Regulatory Standards” (2015) *CIGI New Thinking and the New G20 Series Paper NO. 73*; bin Ibrahim “Towards Proportionality in Practice - Financial Inclusion and Implementation of Global Standards” Paper Presented at the Global Symposium on Proportionality in Practice, Kuala Lumpur (28 May 2015) 2.

<sup>666</sup> BCBS “Core Principles for Effective Banking Supervision” (2012) [www.bis.org/publ/bcbs213.pdf](http://www.bis.org/publ/bcbs213.pdf) (accessed: 2021-09-16) Principles 8 and 9. See also, Heydenrych and Luiz 2018 *SAJBM* 9-10. See further BCBS “Guidance on the Application of the Core Principles for Effective Banking Supervision to the Regulation and Supervision of Institutions Relevant to Financial Inclusion” (2016) <https://www.bis.org/bcbs/publ/d383.pdf> (accessed: 2021-09-16) on other practical aspects of proportionate regulation and supervision.

<sup>667</sup> Global Partnership for Financial Inclusion “Proportionality in Practice Across the Standard-Setting Bodies: Applying Standards and Guidance While Supporting a Financial Inclusion Agenda” Paper Presented at the 1st Annual Conference on Standard-Setting Bodies and Financial Inclusion: Promoting Financial Inclusion Through Proportionate Standards and Guidance, Basel (29 October 2012) Plenary Session 2.

<sup>668</sup> UNESCAP “Financial Regulatory Issues for Financial Inclusion” (Nd) <https://www.unescap.org/sites/default/d8files/knowledgeproducts/Financial%20Regulatory%20Issues%20for%20Financial%20Inclusion.pdf> (accessed: 2021-09-16) 34.

<sup>669</sup> AFI G20 FI Principle 2.



objectives.<sup>670</sup> These include a proposition for a clear and detailed definition of each objective for effective measurement of any intervention aimed at achieving the objectives. The CGAP proposes a “structured approach” that identifies material links that may arise between them during the implementation of the relevant interventions.<sup>671</sup> The CGAP adopts the I-SIP methodology as a tool to assist different regulators and policymakers to espouse a common regulatory mindset. Each of the I-SIP objectives is a goal to be maximised as part of a larger scheme of financial policy and regulatory frameworks.<sup>672</sup> The CGAP requires FI to reinforce and be reinforced by the other three objectives.<sup>673</sup> Regulators must therefore manage the link between these objectives, as disregarding this link “can lead to under or overestimation of certain benefits and risks”.<sup>674</sup> Although each of the objectives is independent, an effective national policy-making and regulation process that seeks to promote FI should consider all these objectives as the main essence of the I-SIP methodology.<sup>675</sup> Therefore, determining the effectiveness and responsiveness of the FI policy and regulatory framework by applying the RR Theory, as discussed in Chapter two, may require such measures to not focus only on improving the level of FI. The effectiveness of the measure needs to be tested by how it manages and maximises the linking of FI and other traditional financial sector regulatory objectives.

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<sup>670</sup> See CGAP *I-SIP South Africa* (2012) 6. See also Staschen “I-SIP: Observations and Lessons” (2014) *CGAP* 33-34.

<sup>671</sup> CGAP *I-SIP South Africa* (2012) 6. See also De Sousa “FI and Global Regulatory Standards” (2015) *CIGI New Thinking and the New G20 Series Paper No 7* 10 who refers to “constructive approach” to promote principles of proportionality; Dema 2015 *AFI Viewpoints* 3. See also Elsayed “The I-SIP Theory” (2020) 1 who identifies the I-SIP theory adopted by the Arab Monetary Fund as an integrated framework for financial inclusion. See a proposal of a similar but limited to financial stability and the Twin-Peaks model, in Louis and Chartier 2017 *Journal of Comparative Urban Law and Policy* 17.

<sup>672</sup> CGAP *I-SIP South Africa* (2012) 33.

<sup>673</sup> Russian Microfinance Center and Bankable Frontier “Financial Inclusion and the Linkages to Financial Stability, Integrity and Consumer Protection: Insights from the Russia Experience” (2011) [https://www.findevgateway.org/sites/default/files/publications/files/financial\\_inclusion\\_and\\_the\\_linkages\\_to\\_financial\\_stability\\_integrity\\_and\\_consumer\\_protection\\_insights\\_from\\_the\\_russia\\_experience.pdf](https://www.findevgateway.org/sites/default/files/publications/files/financial_inclusion_and_the_linkages_to_financial_stability_integrity_and_consumer_protection_insights_from_the_russia_experience.pdf) (accessed: 2021-09-01) 7.

<sup>674</sup> Staschen “I-SIP: Observations and Lessons” (2014) *CGAP* 32.

<sup>675</sup> See Mminele “Remarks by Daniel Mminele, Deputy Governor, South African Reserve Bank” Paper Presented at The G20 Agenda under the Australian Presidency Conference Sydney, Australia (21 February 2014) 3.

## **3.5 DISCUSSION, SUMMARY, AND CONCLUSION**

### **3.5.1 Conclusion and Findings**

The purpose of this chapter was to determine how a selection of regulatory frameworks are effectively applied to promote FI. It introduced Ayres and Braithwaite's RR theory to establish how the law can be responsive to the socio-economic needs of the community. This is important in determining how the FI framework can respond to economic growth and make a social welfare impact on society as we saw in Chapter two.<sup>676</sup> It emerged that to be responsive, the law must serve as both a facilitator of responses to social needs and aspirations and also an instrument of change by developing institutional methods and feasible remedies that are socially acceptable and advance social needs.<sup>677</sup> This chapter identified an important gap in the theoretical discussion of the meaning of responsive law – there are no specific methods, measures, or strategies that facilitate the responsiveness of the law.<sup>678</sup> The RR theory and the supplementary PRS were selected as appropriate tools to improve the responsiveness of the law.

This chapter outlined the choice of the RR theory and the PRS as instruments that require the regulating institutions to be responsive to the culture, conduct, and context of those they seek to regulate and to assist them to decide whether to impose strict or less intrusive interventionist strategies. The chapter chose the PRS in preference to the enforcement pyramid for the following reasons. It emerged that the PRS is suited to the implementation of the regulatory framework at institutional, industry, or sectoral levels, it promotes the design of regulation through different categories of instrument by beginning at the base progressing from less to more stringent measures. It was also found to be relevant for banking and financial sector regulation. The PRS was also selected on the basis of its support for the adoption of a framework beginning with persuasive and coercive measures and moving gradually to more strict regulatory frameworks with possible sanctions if there is a minimal or no response.<sup>679</sup>

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<sup>676</sup> See Ch 2.5 and Ch 2.7 above.

<sup>677</sup> See Ch 3.2.1 above.

<sup>678</sup> See Ch 3.2.1 above.

<sup>679</sup> See Ch 3.2.3 above.

Each type of instrument forming part of the PRS was discussed and it was established that the effectiveness of each instrument depends on the enforcement mechanisms in place. Although the RR theory supports pure self-regulation as an initial strategy, this form of regulation is not effective when regulated entities seek only to maximise profits.<sup>680</sup> This chapter has found that pure self-regulation without state intervention has become a misnomer in the modern era. Corporate entities and industry associations set their own standards and rules prompted by and to forestall the threat of imminent government regulation and intervention (ie, pre-emptive self-regulation). This chapter identified a number of advantages to self-regulation. Importantly, the ease with which the rules and standards can be adapted to suit the changing needs of their organisations' practices and institutions and to encourage innovation is important for the adoption of self-regulation.<sup>681</sup> This chapter, however, identified one important gap in pure self-regulation that must be filled by possible government intervention associated with pre-emptive self-regulation – ie, pure self-regulation lacks effective compliance and enforcement mechanisms and, therefore, requires some form of state intervention.<sup>682</sup>

Different levels of state intervention to improve compliance and enforcement of self-regulation in the PRS were identified and enforced self-regulation was set as the second option to address the compliance and enforcement gaps associated with pure-self regulation. Three key mechanisms to enforce self-regulation emerged starting with negotiations between the industry or association of entities to establish the regulations, followed by the state instructing the industry or association to design and tailor rules and standards according to the industry's specific operations, and finally, the establishment of an internal compliance group with internal inspectors to facilitate enforcement through regular inspections. This chapter also identified a number of gaps associated with enforcement mechanisms applied to enforced self-regulation. These include the structural establishments and operations of the compliance group within the entities which poses a threat to its independence and the ineffectiveness of entities commanding internal compliance. Government inspection was identified as the relevant measure to ensure the independence of the entities' compliance groups, to limit possible interference by the management of the entities, and to audit the group's efficiency. Also, it established monitoring of privately-developed standards and external reporting of defiant

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<sup>680</sup> See Ch 3.2.4.1 above

<sup>681</sup> See Ch 3.2.4.1(a) above.

<sup>682</sup> See Ch 3.2.4.1(b) above.

cases to a regulatory agency as the most effective mechanisms to ensure compliance with private rules and standards.

This chapter found command regulation, with and without a discretion, in the form of legislation as the necessary government intervention to complement self-regulation.<sup>683</sup> Key benefits of this approach are the certainty it creates for both the regulator and those regulated as to what the rules provide and the standards of performance required. It also outlines the necessary enforcement mechanisms and so creates the necessary legitimacy in the rulemaking process. However, the chapter further identified the rigidity, inflexibility, and a one-size-fits-all of the approach that fails to adjust regulation to the specific circumstances and context of the command type of regulations as a possible challenge. As established in this chapter, a command form of regulation may impose discretionary punishment that addresses this challenge by allowing an inspector to recommend that the institutions impose their internal disciplinary mechanisms on those who contributed to a transgression or non-compliance, rather than an external punishment specifically set in the regulatory instrument. However, this chapter also posited the key gap in this regulatory strategy as the possible abuse of the discretion by the inspectors or entities being inspected by co-opting inspectors for less or non-punitive stances not commensurate with the transgressions. Although command regulation without discretionary punishment fills this gap, it was established that prescriptive sanctions such as administrative penalties are its effective tools to ensure compliance. But the main challenge posed by such measures is to treat all forms of transgression and non-compliance alike without regard to the degree of severity and the circumstances that gave rise to them.

This chapter also noted a further important gap in the application of the RR theory and the PRS as some form of a one-at-a-time instrument and a hierarchical regulatory strategy.<sup>684</sup> Smart regulation and regulatory pluralism that use multiple regulatory instruments as a complementary strategy which combines instruments to counter the redundancy of one instrument to ensure effective and responsive regulation was mooted.<sup>685</sup> A critical challenge for smart regulation is that the combination of various instruments may lead to a situation where the instruments prove to be incompatible which may dilute their individual efficacy. From this research it has emerged that smart regulation establishes the importance of a

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<sup>683</sup> See Ch 3.2.4.3 and Ch 3.2.4.4 above.

<sup>684</sup> See Ch 3.3.1 above.

<sup>685</sup> See Ch 3.3.2 above.

specific context in determining when various instruments have complementary effects if applied sequentially, whereas others may either be complementary or incompatible. Although this is a difficult decision for policymakers and regulators, adopting a less interventionist approach, a mix of instruments, and institutional combinations that lighten the state's regulatory burden are important regulatory design principles which assist in making proper choices in this regard. It proposes PRS forms of regulation that use a number of different instruments "across different faces of the pyramid" as a preferred method where the less interventionist methods are not effective and responsive.

This chapter concluded by contextualising the RR theory and the PRS by introducing important financial sector regulatory objectives that the promotion of FI must take into account. It identified the importance of aligning the promotion of FI with long-standing financial sector regulatory objectives, such as financial stability, integrity, and consumer protection. It identified a need to balance possible trade-offs and synergies that may arise in the regulation of these objectives and FI. It, however, identified the challenge of minimising the trade-offs and any other negative outcomes and the maximisation of synergies between these regulatory objectives at the international, regional, and national levels. It established how the I-ISP methodology has been adopted to address this challenge.

### **3.5.2 Recommendations (Recs)**

Based on the findings and gaps identified in this chapter, the following recommendations are made:

**Rec 3A** Building on recommendation **Rec 2D** above,<sup>686</sup> regulatory measures that aim to facilitate responses to socio-economic needs such as promoting FI, must determine how the law will be responsive and effective to its objective by adopting the theory of responsive regulation (RR theory) and the pyramid of regulatory strategies (PRS) introduced in Ayres and Braithwaite's *Responsive Regulation*.<sup>687</sup>

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<sup>686</sup> See Ch 2.7.2 above.

<sup>687</sup> See Ch 3.2.1 and 3.2.2 above.

**Rec 3B** Pre-emptive self-regulatory measures are recommended as a start to regulating the promotion of FI and to allow financial institutions, the relevant industry, and its associations easily to adapt relevant measures to suit the changing needs of their organisations' practices and institutions. As effective voluntary or pure self-regulation is something of a misnomer in today's reality, governments should negotiate with the relevant industry or association on the possible regulation of an identified socio-economic challenge, such as FE.<sup>688</sup> This will raise the spectre of imminent government regulation and prompt the industry to forestall government intervention.

**Rec 3C** Enforced self-regulation is recommended if pure self-regulatory measures by the financial institutions, the industry, or its association do not achieve the objective of promoting FI. As will be illustrated by the EU's position in Chapter four and the Conduct Standards for Banks in Chapter six, the government can set FI targets and a specific timeframe for the industry to meet the targets set for their pure self-regulatory measures before implementing enforcement measures.<sup>689</sup> If the FI target is not achieved within the set timeframe, the government must impose enforced self-regulatory measures by allowing the industry to propose pure self-regulatory standards that are ratified by the relevant government agency, as will be illustrated with the *Australian Code of Banking Practice* in Chapter five.<sup>690</sup> The following measures are recommended to address the compliance gap in the enforcement of self-regulation by the internal compliance group. It is recommended that the relevant legislative enactment providing for the development and ratification of the industry self-regulatory standards must also provide for the establishment of the "Financial Inclusion Internal Compliance, Monitoring and Inspection Function" (FIICMIF) in the self-regulatory standards. The FIICMIF will monitor each financial entity's compliance with relevant FI standards and detect a violation of their internal standards and regulations and recommend disciplinary actions if there is a violation, and where necessary require reporting on FI measures adopted. Similarly, the FIICMIF may form part of the financial sector regulatory agency which is also responsible for ensuring

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<sup>688</sup> See Ch 3.2.4.1(a) above.

<sup>689</sup> See the discussion of the process to the introduction of the EU Payment Account Directive in Ch 4.3.1 below.

<sup>690</sup> See Ch 5.3.4 read with Ch 5.4.2 below.

compliance with financial sector laws<sup>691</sup> through reporting, monitoring, and disciplinary action. Introducing both entities will address the gap identified in the effectiveness of the internal compliance groups such as threats to their independence in that they are an internal and integral part of the business entity and likely to be loyal to the business' ultimate goal.<sup>692</sup>

**Rec 3D** This chapter makes the following recommendations in relation to adopting specific legislation that commands regulation with punishments. This chapter does not propose a wholesale legislative measure to deal with FI for a number of reasons.

- (a) Based on the recommendation to adopt flexible self-regulatory standards that are ratified by the relevant government agency in **Rec 3C** above, conceptualisation and the regulatory frameworks for FI are still developing and, therefore, do not require a rigid, inflexible, and one-size-fits-all approach that characterises the command type of legislation.
- (b) As discussed in 3.4 above, an effective FI regulatory framework must also address other financial sector regulatory objectives that are, as discussed in Chapter six, addressed in different and focused pieces of legislation. With the application of the I-SIP methodology as recommended in **Rec 3F** below,<sup>693</sup> it is recommended that the requirement for the promotion of FI must be provided in the specific legislation, with the relevant mandatory right to apply for access to specific financial products and services. Each legislative measure must clearly outline FI as an objective aligned to the specific element of the I-SIP that is the essence of that particular legislation.<sup>694</sup> The relevant provisions containing the FI objective and the right of access to specific financial products and services are only adopted to provide certainty and to legitimise FI and the right through a command type of regulation. It should, however, not be prescriptive about

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<sup>691</sup> See Ch 6 on the discussion of the financial sector laws under the Financial Sector Regulation Act 9 of 2017.

<sup>692</sup> See Ch 3.2.4.2(b) below.

<sup>693</sup> See the discussion of I-SIP in Ch 3.4.4 above.

<sup>694</sup> See Ch 3.4 above on the I-SIP approach. See also Ch 5 on a number of countries that introduced the right to a bank account and Ch 6 on the introduction of a right to a BBA, and the relevant recommendation on the specific provisions proposed for FI and the right of access to a BBA.

the specific standards and designs of financial products and services to avoid rigidity, inflexibility, and a one-size-fits-all approach that may not be adaptable to financial institutions' operations and, therefore, hamper innovations.<sup>695</sup>

- (c) In the absence of a wholesale command FI regulation, it is recommended that some of the enforcement and compliance mechanisms espoused in the command regulation in the PRS should be adopted to enforce both enforced self-regulatory measures and the relevant provisions on FI objectives and the right of access to specific financial products and services, such as access to BBAs. It is recommended that the relevant legislative measures authorise the inspector of the "Financial Inclusion Internal Compliance, Monitoring and Inspection Function", recommended in **Rec 3C** above, to have the discretion to impose an administrative penalty or a fine (or both) for non-compliance with the regulatory standards ratified in the relevant legislation recommended in **Rec 3D(b)** above.<sup>696</sup> The inspector must take factors such as the degree of severity and the circumstances that gave rise to non-compliance into account when imposing an administrative penalty or a fine, and should, therefore, avoid treating all forms of non-compliance alike.

**Rec 3E** It is recommended that, based on the recommendations to adopt enforced self-regulation with the relevant enforcement mechanisms in **Rec 3C** and **Rec 3D** above, the FI regulatory framework should adopt a smart regulation that uses multiple instruments to complement each other. This approach is informed by the South African government's regulatory culture and methods in similar socio-economic needs, of preferring market mechanisms over strict command and control type of regulation, such as the regulation of broad-based black economic empowerment (B-BBEE), as discussed in 6.2.1 and 6.3.1.3 below. The smart regulation is also aligned with the recommendation for the adoption of the I-SIP approach to FI regulation in **Rec 3F**, which requires a combination of specific and focused legislative measures that deal with financial stability, integrity, and consumer protection. It is, therefore, relevant for the FI framework to take the inherent strengths and weaknesses of each

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<sup>695</sup> See the discussion of the Reserve Banks of India's basic bank circulars that have been made flexible and adaptable to changing circumstances in Ch 5.4.3.2 and Ch 6.4.2 below.

<sup>696</sup> See Ch 3.2.4.3(b) above for the discussion of the relevant sanctions.



regulatory instrument into account, and combining these instruments to harness each other's strengths while using additional and complementary measures to overcome inherent weaknesses in each instrument.<sup>697</sup> Such a smart regulation for promoting the FI framework must, therefore, be guided by the three principles of adopting policy mixes of instruments and institutions that involve government and third parties, industry associations, and financial institutions, such as banks, in the regulatory process to take the regulatory burden off government intervention. It must prefer less interventionist measures and only escalate to command and prescriptive measures with strict enforcement depending on the degree of transgression or non-compliance that will determine whether an immediate command and control regulation is a necessary response rather than a snail-paced escalation that follows a pyramidal approach.<sup>698</sup>

**Rec 3F** It is further recommended that, as discussed further in Chapter six, the South Africa policy and regulatory framework and strategy adopt the I-SIP approach to ensure the effectiveness of the FI regulatory framework. This will require the effectiveness of the FI framework to be determined by how it effectively adopts the I-SIP methodology that provides an interlink between FI and financial stability, integrity, and consumer protection to address these seemingly contradictory objectives by minimising possible trade-offs and any other negative outcomes, and by maximising synergies.

The following chapters focus on the current policy and regulatory measures to promote FI. In Chapter four below, this research discusses measures that have been adopted to promote FI by global standard-setting bodies, continental bodies such as the African Union and the European Union, and by regional bodies such as the SADC.

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<sup>697</sup> See Ch 3.3.2 above.

<sup>698</sup> See the discussion in Ch 3.3.2 above. See also the discussion of The EU Payment Account Directive in Ch 4.3.4.2 below on a hierarchical approach in the EU.

## CHAPTER FOUR: INTERNATIONAL, CONTINENTAL, AND REGIONAL LEGAL FRAMEWORKS

*The stark reality is that most poor people in the world still lack access to sustainable financial services, whether it is savings, credit, or insurance. The great challenge before us is to address the constraints that exclude people from full participation in the financial sector... Together; we can and must build inclusive financial sectors that help people improve their lives.*

**Kofi Annan, Year of Microcredits 2005 (2003)<sup>699</sup>**

### 4.1 INTRODUCTION

Financial inclusion has been on the global policy agenda for quite some time. GSSBs such as the UN, the G20, the AFI, FATF, the BCBS, the World Bank, and the IMF have committed to various individual and collaborative policy initiatives to promote FI over many years. These bodies have developed their standards with a specific focus on the most essential targets and objectives, features, and relevant indicators to promote FI. Their standards generally aim to implement relevant regulatory reforms that encourage new products and institutional innovations, as well as the elimination of barriers that impede these innovations.<sup>700</sup> The policy and regulatory frameworks at international, continental, and regional levels are highly fragmented. The promotion of FI at these levels is still in its embryonic stage and very few legislative instruments specifically regulate or refer to FI. On some of these levels, there are no specific regulatory frameworks targeting FI.

There are no coordinated policy and regulatory frameworks to promote FI at the international level. Various existing GSSBs and the newly created ones deal with various components aimed at promoting FI in their policies and regulatory frameworks. The international legal and regulatory framework to promote FI is characterised by various commitments to particular sets of goals promoting access to specific financial products and services, or FI as a general

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<sup>699</sup> Quoted in United Nations "General Assembly Greenlights Programme for the International Year of Microcredit 2005" (2003) <https://www.un.org/press/en/2003/dev2452.doc.htm#:~:text=The%20stark%20reality%20is%20that,participation%20in%20the%20financial%20sector> (accessed: 2022-04-25).

<sup>700</sup> The World Bank *Bankers Without Borders* (2018) 43. See also Gust 2017 *The Journal Contemporary Economy* 5; De Sousa "Financial Inclusion and Global Regulatory Standards" (2015) *CIGI New Thinking and the New G20 Series Paper No 7*.

policy objective. Initiatives at this level comprise declarations and commitments to improve FI and the establishment of various supporting institutions to facilitate these commitments. At this level, the UN has committed effectively to the promotion of FI. FI at this level has largely been the brainchild of various GSSBs, their partners, and international banking institutions. Institutions such as the AFI and the World Bank have played a significant role in developing FI policies by formulating the *National Financial Inclusion Strategy Reference Framework (NFIS Reference Framework)* and the *Template for the Design of National Financial Inclusion Strategy (NFIS Template)*.<sup>701</sup> This chapter therefore addresses the development of regulatory frameworks by the UN and various GSSBs, such as the FATF, the G20, the AFI, and the World Bank, to identify the main focus, aims, and strategies adopted towards FI. The discussion begins by considering the different forms of FI regulations and policies. Paragraph one (4.2) addresses policy instruments at the international level to establish how they offer roadmaps that serve as benchmarks for the development of national FI policy and regulatory strategies at regional and national levels.

Paragraph two (4.3) discusses FI regulatory frameworks at the continental level focusing on the European Union (EU) and the African Union (AU). The research uses the FI regulation by the EU as a benchmark due to the lack of specific FI regulatory frameworks at continental levels, including the African Union which, as a continental governing body in Africa, has no specific regulatory framework to promote FI and access to BBA. The EU's specifically selected policy and regulatory frameworks that promote FI and access to BBAs serves as a useful example. Generally, the EU has become an inspirational model for regional economic and trade integration for certain continental and regional bodies such as the Andean Community, the Association of Southern Asian Nations (ASEAN), and the Southern Common Market (Mercosur).<sup>702</sup> It has become a "living laboratory for the integration theory" that inspires regional integration approaches adopted in various continents, including Africa.<sup>703</sup> In particular, the EU's integration model has become essential in the facilitation of economic

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<sup>701</sup> World Bank "NFIS Reference Framework" (2012). See also World Bank *NFIS Template* (2016).

<sup>702</sup> Malamud "Overlapping Regionalism, No Integration: Conceptual Issues and the Latin American Experiences" (2013) *Robert Schuman Centre for Advanced Studies (RSCAS), Working Paper RSCAS 2013/20* [http://cadmus.eui.eu/bitstream/handle/1814/26336/RSCAS\\_2013\\_20.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/26336/RSCAS_2013_20.pdf?sequence=1&isAllowed=y) (accessed: 2017-07-03) 1.

<sup>703</sup> Asante *Regionalism and Africa's Development: Expectations, Reality and Challenges* (1997) 23. See also Sauroombe "The European Union as a Model for Regional Integration in the Southern African Development: A Selective Institutional Comparative Analysis" 2013 17 *Law Democracy & Development* 457 457.

integration by the AU through various regional economic communities (RECs), including the SADC.<sup>704</sup> It has also taken a leading role in promoting FI and access to a BBA, through the development of a regulatory framework for the free movement of services and the development of its financial sector.<sup>705</sup> The EU has not only facilitated FI through its regional integration agenda, its unique policy-making process is particularly significant in light of its progressive steps from less binding legislative instruments, such as recommendations and opinions, to more binding directives and decisions. The EU also serves as a model for regulatory innovation to promote FI. In this regard we consider the EU's adoption of the Payment Account Directive (PAD) and its overarching objectives of promoting FI and access to a BBA. The EU FI framework using the PAD serves as a model of Ayres and Braithwaite's regulatory development and enforcement through the pyramid by gradually moving from less intrusive to more binding regulatory instruments depending on how a particular instrument is responsive in promoting FI and preventing FE. PAD is also considered to benchmark the regulation of access to BBAs.

Paragraph three (4.4) focuses on the regulatory framework under the AU. The lack of concrete regulatory measures by the AU to promote FI on the African continent as opposed the measures adopted by the EU is examined. Here, selected policy measures gradually being adopted by the AU to promote FI such as the *Development of Postal Financial Services as a Strategy to Increase the Inclusion of Low-Income Populations*, Agenda 2063, and the AU's declaration of 2020-2030 as a new Decade of Women's Financial and Economic Inclusion are highlighted.

This chapter concludes with a discussion of regional integration and FI policies in the SADC. Many factors inform the choice of SADC among the many RECs that form the African Economic Community. As will be indicated, the AU does not have a specific policy or regulatory framework to promote FI and access to BBA in place. It largely approaches economic and financial integration through the Regional Economic Communities (RECs). SADC is one of the RECs recognised by the AU. As South Africa is a SADC member state, the regulatory framework to promote FI in the SADC is important for the development of the FI regulatory framework

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<sup>704</sup> Oyugi "African Union and European Union: A Comparative Analysis" in Adejumbi and Olukoshi (eds) *The African Union and the New Strategies for Development in Africa* (2008) 155.

<sup>705</sup> Urquijo "Financial Exclusion in the European Union: Addressing Difficulties in Accessing Finance Within the Current Integration Framework" 2015 23 *JCES* 100 102.

in this country. In addition, SADC is the only known REC that is in the process of developing an NFIS in line with the *NFIS Reference Framework*. Overall, the main purpose of this chapter is to determine whether the international, continental, and regional intergovernmental organisations have taken FI on board as a developmental priority by adopting effective regulatory frameworks to achieve their objectives and to lay a sufficient basis for achieving this objective at national levels. This chapter, therefore, discusses regulatory frameworks to promote FI at these levels, to establish whether they are effective and responsive in terms of the RR theory and its PRS. The chapter concludes by identifying whether the RR theory and the pyramid introduced in Chapter three apply at regional, continental, and international levels.

## **4.2 INTERNATIONAL FINANCIAL INCLUSION FRAMEWORK**

### **4.2.1 International Institutional and Regulatory Approaches**

To determine the effectiveness and responsiveness of the international FI regulatory framework it is important to understand the forms and approaches to regulation at this level. International law lacks an “official global legislature” similar to domestic law.<sup>706</sup> Article 38 of the Statute of the International Court of Justice (ICJ) outlines recognised sources of international law.<sup>707</sup> These include international conventions, international custom, and the general principles of law recognised by civilised nations.<sup>708</sup> These are traditionally classified as “hard law”, as distinguished from “soft law”. Three key features characterise an instrument as international hard law – precision, obligation, and delegation.<sup>709</sup> It also requires certain

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<sup>706</sup> Goldbarsht *Global Counter-Terrorist Financing and Soft Law: Multi-Layered Approaches* (2020) 4.

<sup>707</sup> See Hirsch “Sources of International Investment Law” in Bjorklund and Reinisch (eds) *International Investment Law and Soft Law* (2012) 9.

<sup>708</sup> Bjorklund “Assessing the Effectiveness of Soft Law Instruments in International Investment Law” in Bjorklund and Reinisch (eds) *International Investment Law and Soft Law* (2012) 52. See also Ebikakev “Money Laundering an Assessment of Soft Law as a Technique for Repressive and Preventive Anti-money Laundering Control” 2016 19 *JMLC* 346 351.

<sup>709</sup> Abbott and Snidal “Hard and Soft Law in International Governance” 2000 54 *International Organization* 421 421-422. See also Dostov, Shust, Leonova and Krivoruchko “Soft Law” and Innovations: Empirical Analysis of ICO-related Statements” 2019 21 *Digital Policy, Regulation and Governance* 476 477 and 423. “Delegation” in this context connotes simply that soft law does not allow for the delegation of sovereignty from states to supranational bodies, nor does it delegate authority for interpreting and implementing the law.

procedural formalities to give the rules a specific legal status.<sup>710</sup> "Soft law" denotes international standards that lack key tenets of international law such as formalities for its legitimacy, precise normative content, enforceability, and formal legal status. Examples are general non-binding principles, guidelines, policy statements, recommendations, voluntary standards, and other provisional international legal frameworks.<sup>711</sup> Soft-law instruments depend on individual member's consent and consensus by members for their adoption and implementation.<sup>712</sup> Consent to international soft law standards is important to encourage compliance by member's states, enhance the legitimacy of the soft law instruments, to protect against any detrimental changes to the rule laid down in the instrument.<sup>713</sup>

Soft law is generally not recognised by Article 38 of SICJ.<sup>714</sup> Other than hard law, its contents are less precise and it does not impose binding obligations.<sup>715</sup> Many soft-law instruments serve "norm-creating" and progressive law-making roles in the areas where there is an absence of binding international standards to influence the development of the law or in anticipation of themselves becoming enforceable laws.<sup>716</sup> For instance, soft law may serve as a template for hard law and subsequently emerge as a model treaty.<sup>717</sup> However, soft law promulgation can

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<sup>710</sup> Weber "Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises" 2012 1 *Journal of Governance and Regulation* 8 11-13, cf at page 11 where the author indicates that "[t]he notion that legalization entails a specific form of discourse, requiring justification and persuasion in terms of applicable rules and pertinent facts is not only an element of hard law, but also of soft law".

<sup>711</sup> Johansson and Donner *The Shipping Industry, Ocean Governance and Environmental Law in the Paradigm Shift* (2015) 93. See also Dostov *et al* 2019 *Digital Policy, Regulation and Governance* 477. Others include non-binding decisions of international organisations and bodies, programmes, declarations, directives, opinions, plans of action, and programmes of action. See further Blutman "In the Trap of a Legal Metaphor: International Soft Law" 2010 59 *International and Comparative Law Quarterly* 606 607.

<sup>712</sup> Johansson and Donner *The Shipping Industry* (2015) 93.

<sup>713</sup> Gruchalla-Wesierski "A Framework for Understanding "Soft Law"" 1984 30 *McGill Law Journal* 37 61, See also Ahmed and Mustofa "Role of Soft Law in Environmental Protection: An Overview" 2016 4 *Global Journal of Politics and Law Research* 1 12.

<sup>714</sup> Blutman 2010 *International and Comparative Law Quarterly* 606-608.

<sup>715</sup> Dostov *et al* 2019 *Digital Policy, Regulation and Governance* 477.

<sup>716</sup> Blutman 2010 *International and Comparative Law Quarterly* 617-618. See also Bjorklund in Bjorklund and Reinisch (eds) *International Investment Law and Soft Law* (2012) 53-54. According to this author "[t]he concept of soft law is effective in alerting users to the possibility of different levels [and] components of any legal formulation". See further Weber 2012 *Journal of Governance and Regulation* 12.

<sup>717</sup> Bjorklund in Bjorklund and Reinisch (eds) *International Investment Law and Soft Law* (2012) 55 and 73. The author, however, identifies one goal of soft law as "promulgation to forestall formal regulation that would likely be more cumbersome and intrusive and thus less welcome".

also serve to forestall formal regulation that would likely be more cumbersome and intrusive and thus less welcome.<sup>718</sup>

The additional distinguishing characteristic of the two is the language used in each instrument. Soft law signifies unspecified, vague, and informal principles that are not rules.<sup>719</sup> It consists of “law-like promises or statements that fall short of hard law” and uses the language that is merely “hortatory, aspirational or promotional in character”.<sup>720</sup> Where it takes the form of principles, these are formulated with a high level of abstraction. Such vagueness precludes objective verification. Therefore, members can choose whether or not to comply with these voluntary standards.<sup>721</sup>

One feature that distinguishes hard law from soft law is the type of institutions that formulate and implement international standards. Many of the traditional international regulatory institutions and organisations traditionally create international instruments and agreements between states, such as treaties and charters that impose international legal obligations.<sup>722</sup> International soft law norms are generally developed by informal institutions, such as standard-setting transnational and intergovernmental bodies that also adopt various compliance mechanisms.<sup>723</sup> These institutions are established by either informal by-laws (ie, they are adopted by certain international institutions such as the IMF to support and supplement their main regulations),<sup>724</sup> agreements, or declarations that do not create formal international obligations or existence, unlike most traditional international regulatory institutions, such as the United Nations.<sup>725</sup> In many instances, they lack effective enforcement

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<sup>718</sup> Bjorklund in Bjorklund and Reinisch (eds) *International Investment Law and Soft Law* (2012) 73 and 74.

<sup>719</sup> Guzman and Meyer “International Soft Law” 2010 2 *Journal of Legal Analysis* 174 205.

<sup>720</sup> Guzman and Meyer 2010 *Journal of Legal Analysis* 188.

<sup>721</sup> Bjorklund in Bjorklund and Reinisch (eds) *International Investment Law and Soft Law* (2012) 58.

<sup>722</sup> Brummer *Soft Law and the Global Financial System* 2ed (2012) 64.

<sup>723</sup> See Borlini and Montanaro “The Evolution of the EU Law Against Criminal Finance: The Hardening of FATF Standard Within the EU” 2017 48 *Georgetown Journal of International Law* 1009 1024. See also Andonova and Elsig “Informal International Lawmaking: A Conceptual Overview from International Relations” in Berman, Duquet, Pauwelyn, Wessel and Wouters (eds) *Informal International Lawmaking: Case Studies* (2012) 64-65. Examples of these standard-setting bodies in the financial sector include the Bank for International Settlement (BIS), the International Organisation of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS), the Financial Stability Board (FSB), and the Organisation for Economic Co-operation and Development (OECD).

<sup>724</sup> See, eg, International Monetary Fund *By-Laws, Rules and Regulations* 66th Issue (2021).

<sup>725</sup> Brummer *Soft Law* (2012) 64-65.

and dispute-settlement mechanisms. Their available enforcement mechanisms include the disciplining of members when they fail to comply with their obligations as members of the organisation.<sup>726</sup>

#### 4.2.2 The UN Financial Inclusion Policy Framework

Since 2002, the UN has adopted a number of initiatives that promote FI in general terms.<sup>727</sup> It has recognised access to financial services for women under the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), by eliminating discrimination against women in the areas of economic and social life, including bank loans.<sup>728</sup> Its general FI initiatives include the declaration of 2005 as the international year of microcredit, and the appointment of Queen Maxima of the Netherlands as the UN Secretary-General's Special Advocate for Inclusive Finance for Development in 2009 with an office to reinforce the UN's aim of achieving global FI.<sup>729</sup> Its initial initiatives referred to the importance of microcredit but later extended to microfinance instruments generally, including credit, savings, and other

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<sup>726</sup> Brummer *Soft Law* (2012) 64-65.

<sup>727</sup> See United Nations "Monterrey Consensus of the International Conference on Financing for Development: The Final Text of Agreements and Commitments Adopted at the International Conference on Financing for Development Monterrey, Mexico, 18-22 March 2002" (2003) <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (accessed: 2018-07-03) pars 1 and 18. Heads of state recognised the important function of financial institutions and pledged their efforts to incorporate the informal into the formal sectors and to reduce the costs of remittance where feasible in order to facilitate access to finance and to address challenges relating to poverty alleviation and sustainable economic growth. See further United Nations Capital Development Fund "International Year of Microcredit 2005 Final Report" (2006) [https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-international-year-of-microcredit-2005-final-report-may-2006\\_0.pdf](https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-international-year-of-microcredit-2005-final-report-may-2006_0.pdf) (accessed: 2018-07-03) 2. See also United Nations Department of Economic and Social Affairs "International Year of Microcredit 2005" (1998) *Resolution 1998/28* <http://www.un.org/documents/ecosoc/res/1998/eres1998-28.htm> (accessed: 2018-07-03) declaring 2005 as the "International Year of Microcredit" by recognising the role of microcredit as a poverty alleviation strategy. United Nations Department of Public Information "UN Launches International Year of Microcredit 2005" (18 November 2004) *Press Release* <https://www.un.org/press/en/2004/dev2492.doc.htm> (accessed: 2018-07-03) shows the UN aspiring to provide efforts to make financial services more accessible to the poor and the low-income.

<sup>728</sup> See Article 13(b) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf> (accessed: 2019-07-12) (CEDAW). See also Khan and Akhter "Microfinance for Promoting Human Rights in Bangladesh: A Right-based Assessment" 2017 22 *Journal of Humanities and Social Science* 12 15; Tully "The Exclusion of Women from Financial Services and the Prospects of a Human Rights Solution Under Australian Law" 2006 12 *Australian Journal of Human Rights* 53 68.

<sup>729</sup> Visit [www.usgsa.org](http://www.usgsa.org) (accessed: 2017-07-03). This office establishes and leads the voicing of global efforts towards FI, collaborates with other international and national institutions with similar objectives, and fosters awareness and supports actions that promote FI.



related products.<sup>730</sup> The UN's policy commitments towards FI are specifically set out in the Sustainable Development Goals (SDGs).<sup>731</sup> In 2015 UN member states committed to adopting policies to promote FI as part of the 2030 SDGs agenda.<sup>732</sup> Since then, FI has become an important policy item in sessions of the General Assembly.<sup>733</sup> The UN continuously commits to promoting FI by emphasising policy and regulatory frameworks to support financial stability, integrity, and the promotion of FI.<sup>734</sup> The UN also achieved an important milestone in its efforts towards FI by endorsing the *National Financial Inclusion Strategy Framework* developed by the G20.<sup>735</sup> Based on the successes in countries that have adopted these strategies, the UN encourages member states to adopt similar strategies.<sup>736</sup> As a result, the UN has not committed to promote FI in the form of a concrete regulatory framework, but has endorsed FI policy developments by the GSSBs such as the G20 and the World Bank.<sup>737</sup>

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<sup>730</sup> United Nations Department of Economic and Social Affairs "International Year of Microcredit 2005" (1998) *Resolution 1998/28*. See also United Nations "Doha Declaration on Finance for Development: The Final Text of Agreements and Commitments Adopted at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus Doha, Qatar, 29 November-2 December 2008" (2009) [http://www.un.org/esa/ffd/doha/documents/Doha\\_Declaration\\_FFD.pdf](http://www.un.org/esa/ffd/doha/documents/Doha_Declaration_FFD.pdf) (accessed: 2018-07-05) par 19 where the UN committed to "improve access to services in the fields of finance and credit" as vehicles to achieve internationally agreed development goals such as the Millennium Development Goals.

<sup>731</sup> United Nations "Transforming Our World: The 2030 Agenda for Sustainable Development" (2016) A/RES/70/1 <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (accessed: 2018-07-06). See the preamble. See also Jones, Hillier, and Comfort "The Sustainable Development Goals and the Financial Services Industry" 2017 3 *Athens Journal of Business and Economics* 37 for a discussion of the four industry matrix including financial inclusion that outlines opportunities for financial services companies to create value for their business whilst creating a more sustainable and inclusive path to economic growth, prosperity, and well-being.

<sup>732</sup> United Nations "The 2030 Agenda" (2016) par 27. "We will adopt policies which increase productive capacities, productivity and..., *financial+ inclusion*" (emphasis added).

<sup>733</sup> United Nations: General Assembly "Financial inclusion for Sustainable Development" (2016) *Resolution A/RES/72/206* adopted by the General Assembly's 81st Plenary Meeting on 22 December 2015 [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/72/206](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/72/206) (accessed: 2018-05-05) par 5.

<sup>734</sup> UN "FI for Sustainable Development" (2016) *UN Resolution A/RES/72/206* Preamble.

<sup>735</sup> UN "FI for Sustainable Development" (2016) *Resolution A/RES/72/206* par 5. See Ch 4.2.5.2 below for the discussion of national financial inclusion strategies.

<sup>736</sup> UN "FI for Sustainable Development" (2016) *UN Resolution A/RES/72/206* par 5. See the discussion in 4.2.5.2 below for countries that have adopted the national financial inclusion strategies.

<sup>737</sup> See the discussion in Chs 4.2.3 and 4.2.5 below.

## 4.2.3 The Financial Action Task Force (FATF) Initiatives

### 4.2.3.1 The FATF and the AML/CFT Measures

The FATF is an influential GSSB in promoting FI. The FATF is an inter-governmental body with objectives that include setting standards, known as “recommendations”, to promote effective implementation of legal and regulatory measures to combat ML and TF.<sup>738</sup> The current revised 2012 recommendations<sup>739</sup> require countries to adopt measures that assist in identifying ML and TF risks posed to the financial sector.<sup>740</sup> They impose obligations on financial institutions to adopt customer due diligence (CDD), the reporting obligation,<sup>741</sup> and the record-keeping obligation.<sup>742</sup> The CDD measure imposes the duty on financial institutions to identify and verify the identity of customers (CIV) and to report on transactions which exceed a set cash threshold.<sup>743</sup> The CIV obligation requires information on the customer’s identity using reliable sources and information.<sup>744</sup> This includes personal information such as full names, date of birth sourced from identity numbers issued by the government, and residential address.<sup>745</sup> The strict application of this obligation raises concerns for efforts that promote FI.

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<sup>738</sup> FATF “Who We Are” <http://www.fatf-gafi.org/fr/aproposdugafi/> (accessed: 2018-07-07). See FATF “International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations” (2012) (updated March 2022) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> (accessed: 2022-04-22) (“FATF Recommendations (2012)”). See further Pieth “International Standards against Money Laundering” in Pieth and Aiolfi (eds) *A Comparative Guide to Anti-Money Laundering* (2004) 3-35; De Koker *South African Money Laundering and Terror Financing Law* (2013) 9 on the ancient history of the FATF.

<sup>739</sup> The Recommendations were revised for the first time in 1996 to take into account changes in money laundering trends and to anticipate potential future threats. This was followed by the review and updates of the 40 recommendations in 2003 to address the challenges of the September 11, 2001 terror attacks and more importantly the use of electronic devices by money launderers. This resulted in the addition of further nine special recommendations to deal with terror financing. The Recommendations were recently revisited to include the know-your-customer procedure in relation to new technologies among others. See the FATF Recommendations (2012).

<sup>740</sup> See 6 of The FATF Recommendations (2012).

<sup>741</sup> See the FATF FATF Recommendations (2012) Rec 10 (for CDD) and Rec 20 (for reporting of suspicions transactions).

<sup>742</sup> See the FATF Recommendations (2012) Rec 10(1). The current cash threshold is USD/EUR 15 000. See also Van den Broek and Addink “Prevention of Money Laundering and Terrorist Financing From a Good Governance Perspective” in Unger and Van der Linde (eds) *Research Handbook on Money Laundering* (2013) 369-371.

<sup>743</sup> The FATF Recommendations (2012) Rec 10. See also the FATF 2003 Recommendations Rec 5.

<sup>744</sup> See the FATF 2003 Recommendations Rec 5(a).

<sup>745</sup> Financial Intelligence Center “Guidance Note 7 on the Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)” (2017) [https://www.fic.gov.za/Documents/171002\\_FIC%20Guidance%20Note%2007.pdf](https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20Note%2007.pdf) (accessed: 2021-11-15) par 32 (“FIC

#### **4.2.3.2 A Risk-based Approach to AML/CFT**

Efforts to combat money-laundering originally followed a rule-based approach. Financial institutions were required to comply strictly with the anti-money laundering and countering the financing of terrorism (AML/CFT) regulations by following specific rules, regardless of whether they achieve the goal of combating the relevant criminal activities.<sup>746</sup> This follows a “tick-box approach” and focuses on meeting regulatory demands rather than the actual prevention of money-laundering or financing of terrorism.<sup>747</sup> This approach also requires excessive and unnecessary submissions of identification and verification information that may negatively affect efforts to promote FI.<sup>748</sup>

In 2001, the BCBS reviewed the CDD for banks as part of its efforts to prevent potential financial loss that may result from reputational, legal, and concentration risks.<sup>749</sup> The BCBS identified significant gaps related to the KYC policies (as CDD measures are often called) in certain countries, whereas in other countries such policies did not exist.<sup>750</sup> As a result, it identified the robustness of the CDD and the KYC obligations in various countries as challenges in promoting FI and proposed a review of the KYC policies to take the level of risks involved into account. Within this mandate, such reviews require measures tailored to the risks of specific institutions and the banking system.<sup>751</sup> As an example, the BCBS recommended increased diligence in the case of higher-risk accounts.<sup>752</sup> This recommendation paved way for a risk-based approach (RBA) to money-laundering and the promotion of FI.

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“Guidance Note 7” (2017)”) 32. See also De Koker “Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001” 2004 4 *TSAR* 715.

<sup>746</sup> Pieth in Pieth and Aiolfi (eds) *A Comparative Guide to AML* (2004) 28.

<sup>747</sup> FATF “Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion” (2011) <http://www.fatfgafi.org/media/fatf/content/images/AML%20CFT%20measures%20and%20financial%20inclusion.pdf> (accessed: 2018-07-10) (“FATF “Financial Inclusion Guidance” (2011)”).

<sup>748</sup> FATF “Financial Inclusion Guidance” (2011) 18. See further Bester, Chamberlain, De Koker, Hougaard, Short, Smith and Walker “Implementing FATF Standards in Developing Countries and Financial Inclusion: Findings and Guidelines” (May 2008) *Genesis Report* 11.

<sup>749</sup> BCBS “Customer Due Diligence for Banks” (2001) <https://www.bis.org/publ/bcbs85.pdf> (Accessed: 2018-07-08) (“BCBS *CDD for Banks*”). See also Pieth in Pieth and Aiolfi (eds) *A Comparative Guide to AML* (2004) 24. Concentration risks in this context refer to possible risks that may be posed to the financial systems due to a banking sector that is less diversified in terms of portfolio, sector, or institutions.

<sup>750</sup> BCBS *CDD for Banks* 2.

<sup>751</sup> BCBS *CDD for Banks* 3.

<sup>752</sup> BCBS *CDD for Banks* 3.

#### **4.2.3.3 The FATF and Financial Inclusion**

The FATF's efforts to promote FI within its AML/CFT mandates began in 2010.<sup>753</sup> The FATF identified FE as a major risk to achieving the implementation of the FATF Recommendations, particularly where consumers could use financial mechanisms beyond the parameters of the authority's scrutiny.<sup>754</sup> As a starting point, it initiated a global inventory for innovative approaches to risk-based implementation of the AML/CFT measures.<sup>755</sup> It accomplished this by developing the *Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion* in 2011<sup>756</sup> and the revision of its recommendations in 2012. The *FATF Financial Inclusion Guideline 2011* warned against an overly cautious approach to AML/CFT measures that may have the unintended consequence of excluding legitimate businesses and customers from the mainstream financial sector.<sup>757</sup> The purpose of the *FATF Financial Inclusion Guidance 2011* is "to provide the necessary support to countries and their financial institutions" to design AML/CFT measures to meet the national FI goals without compromising current AML/CFT measures.<sup>758</sup> This guidance focuses on certain AML/CFT measures that support FI. These include the CDD and suspicious transaction reporting.<sup>759</sup> Generally, the *FATF Financial Inclusion Guidance 2011* promotes the interpretation of AML/CFT measures in the FATF Recommendations to accommodate an RBA. Although the 2003 FATF Recommendations did not specifically mandate the application of an RBA, financial institutions were allowed in terms of Recommendation 5 to "determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship or transaction". The guidance accommodates the application of an RBA in terms of which AML/CFT measures are commensurate with the risks identified.<sup>760</sup> The application of this approach will thus ensure

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<sup>753</sup> See FATF "Outcomes of the FATF Plenary Meeting, Amsterdam, 23-25 June 2010" <http://www.fatf-gafi.org/documents/documents/outcomesofthefatfplenarymeetingamsterdam23-25june2010.html> (accessed: 2018 -7-10). It began with putting it on the agenda at its plenary meeting.

<sup>754</sup> FATF "Financial Inclusion Guideline" (2013).

<sup>755</sup> See FATF "Outcomes of the FATF Plenary meeting, Amsterdam, 23-25 June 2010".

<sup>756</sup> FATF "Guidance: Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion" (2011) ("FATF "Financial Inclusion Guideline (2011)"), following the revision of the Recommendations in 2012, these were revised as the FATF "Financial Inclusion Guideline" (2013).

<sup>757</sup> FATF "Financial Inclusion Guidance" (2011) 6.

<sup>758</sup> FATF "Financial Inclusion Guidance" (2011) 6.

<sup>759</sup> FATF "Financial Inclusion Guidance" (2011) 6.

<sup>760</sup> FATF "Financial Inclusion Guidance" (2011) 18.

that countries built a more inclusive financial system for the financially excluded who often present a lower risk for AML/CFT.<sup>761</sup>

The *FATF Financial Inclusion Guidance* 2011 also requires the CDD measures to be interpreted in light of the FI objectives. It encourages countries to apply simplified CDD measures in a risk-sensitive manner.<sup>762</sup> With regard to the promotion of FI, the guidance encourages countries to consider reducing the obligation to collect certain identification information that is used to understand the nature and purpose of certain low-risk business relationships where these “can be inferred from the types of transactions established (e.g., access to basic financial services)”.<sup>763</sup>

The 2003 Recommendations did not impose a mandatory RBA on financial institutions. The FATF’s revised 2012 Recommendations<sup>764</sup> now provide specifically for the RBA which is critical for FI efforts.<sup>765</sup> Recommendation 1 provides a detailed RBA which includes how to identify, assess and understand the AML/CFT risks involved.<sup>766</sup> It also allows countries to apply simplified measures for some of the recommendations where they identify lower risks.<sup>767</sup> It requires financial institutions to apply the RBA to financial products and services that are limited to certain types of customers to increase access to financial products and services where such customers may pose a lower risk for CDD obligation purposes.<sup>768</sup> The 2012 FATF Recommendations have thus achieved several milestones by applying the AML/CFT measures to complement FI initiatives. In particular, they have unequivocally rejected the “one-size-fits-all” approach to assessing the risk of AML/CFT.<sup>769</sup> With this milestone, the RBA is no longer encouraged but is imposed on countries and financial institutions.<sup>770</sup> In terms of the revised

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<sup>761</sup> FATF “Financial Inclusion Guidance” (2011) 18.

<sup>762</sup> FATF “Financial Inclusion Guidance” (2011) 31.

<sup>763</sup> FATF “Financial Inclusion Guidance” (2011) 18. See Ch 6 below for the discussion of a tiered KYC and BBAs such as Mzansi Account.

<sup>764</sup> FATF Recommendations (2012).

<sup>765</sup> See Staschen and Nelson “The Role of Government and Industry in Financial Inclusion” in Ledgerwood *et al* (eds) *The New Microfinance Handbook* (2013) 82.

<sup>766</sup> See the Interpretative Note to Recommendation 1 in FATF Recommendation 2012.

<sup>767</sup> Recommendation 1. See also De Koker “The FATF’s Customer Identification Framework: Fit for Purpose?” 2014 17 *Journal of Money Laundering Control* 281 282.

<sup>768</sup> FATF Interpretive Note to Recommendation 10 (Customer Due Diligence)” in the FATF 2012 Recommendations 68.

<sup>769</sup> Gortsos “Financial Inclusion” (2016) *European Center for Economic and Financial Law Working Paper Series NO 2016/2015* 20.

<sup>770</sup> FATF “Financial Inclusion Guidance” (2013) 17.

guideline 2013, countries are now required to consider the level of risk posed by the newly banked and vulnerable groups who often conduct a limited number of basic and low-value transactions within the FI context.<sup>771</sup>

FI, however, is still not one of the FATF's AML/CFT standards provided in the FATF Recommendations. It is only recommended to assess the level of risk of money-laundering or the financing of terrorism during the CCD process. The Interpretive Notes to Recommendation 10 on CDD simply require countries when assessing lower risk of ML/TF to "take into account ... [f]inancial products or services that provide appropriately defined and limited services to certain types of customers, so as to increase access for financial inclusion purposes".<sup>772</sup> Therefore, when applying the CDD measures FI is simply a consideration rather than one of the essential FATF AML/CFT standards.

#### **4.2.3.4 The FATF's Enforcement Mechanisms**

##### (a) Compliance and Enforcement Mechanisms

The question remains whether the FATF Recommendations and the FATF *Financial Inclusion Guidance* are enforceable international legal instruments. In particular, this asks whether the FATF has the relevant mechanisms to implement its AML/CFT standards effectively and to balance them against the promotion of FI. The FATF is a "policy making body" and its purpose

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<sup>771</sup> FATF "Financial Inclusion Guidance" (2013) 21.

<sup>772</sup> See par 17(b) of the Interpretative Note to Recommendation 10. See similarly, Article 16 read with Annexure 11 of The European Parliament and the Council of the European Union "Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC" (5.6.2015) *Official Journal of the European Union* L 141/73 ("EU "AML/CFT Directives (2015)"), which requires financial institutions in member states when assessing the risks of money-laundering and terrorist financing relating to particular products, services, transactions or delivery channels, to take into account a number of factors of potentially lower-risk situations, including "financial products or services that provide appropriately defined and limited services to certain types of customers, so as to increase access for financial inclusion purposes".

is to generate the relevant political will for relevant legislative and regulatory reforms.<sup>773</sup> As Mugarura correctly asserts:<sup>774</sup>

[I]t is a voluntary task force and not a treaty organization: its ... recommendations do not constitute a binding national convention but provide a guideline framework for combating money laundering.

The FATF's *Financial Inclusion Guidance* is also not binding.<sup>775</sup> It does not override national measures on FI.<sup>776</sup> It simply provides guidelines intended to assist countries to develop AML/CFT measures that meet the goals for FI.<sup>777</sup> *The Financial Inclusion Guidance* 2011 and 2013 are therefore not specifically part of the Recommendations but serve to guide the interpretation of the FATF AML/CFT standards. Likewise, the FATF Recommendations appear to mean simply "recommendations" and are not mandatory.<sup>778</sup> Although the FATF is not a law-making body such as the UN, its recommendations have contributed to the adoption of AML/CFT measures in many countries.

The FATF enforces compliance with its standards by applying the black-listing and grey-listing of non-complying countries identified as "high-risk and other monitored jurisdictions" (HRMJs).<sup>779</sup> This is a revised version of the Non-Cooperative Countries and Territories (NCCT)

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<sup>773</sup> FATF "About the FATF" <http://www.fatf-gafi.org/about/> (accessed: 2018-07-11). See also Hayes "Counter-Terrorism, Policy Laundering, and the FATF: Legalizing Surveillance, Regulating Civil Society" 2012 14 *International Journal of Not-for-Profit Law* 6 14.

<sup>774</sup> Mugarura *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries* (2012) 79-80.

<sup>775</sup> FATF "Financial Inclusion Guidance" (2011) 6 and 10. See also FATF "Financial Inclusion Guidance" (2013) 5.

<sup>776</sup> FATF "Financial Inclusion Guidance" (2013) 5.

<sup>777</sup> FATF "Financial Inclusion Guidance" (2013) 5.

<sup>778</sup> See Ping "International Legal Sources I - The United Nations Conventions" in Blair, Brent and Grant (eds) *Banks and Financial Crime - The International Law of Tainted Money* (2008) 91 on the deliberate choice not to cast the recommendations in the form of a treaty. See further Ryder *Money Laundering - An Endless Cycle* (2012) 15; Ghoshray "Compliance Convergence in FATF Rulemaking: The Conflict Between Agency Capture and Soft Law" 2014 59 *New York Law School Law Review* 521; Shami *The Impact of Economic, Governance and Terrorist Activity on Compliance with FATF Recommendations* (Unpublished PhD Dissertation, The State University of New Jersey, 2015) 21. A number of Recommendations refer to the phrase "should consider" and leave a choice for countries to consider the application or rejection of its approaches. See FATF Recommendations (2012) Rec 4 ("Countries should consider adopting measures"), Rec 10 (Financial institutions...should consider making a suspicious transactions report"). See also Recs 24 and 25. See further Broome *Anti-Money Laundering: International Practice and Policies* (2005) 555.

<sup>779</sup> FATF "High-risk and Other Monitored Jurisdictions" (Nd) [https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc\(fatf\\_releasedate\)](https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)) (accessed: 2022-04-22). See also FATF "Financial Action Task Force on Money

the FATF has applied since its inception.<sup>780</sup> Under the NCCT process, the FATF blacklisted countries that are either not cooperating or that are showing no improvement in the implementation of the FATF, and cautioned other countries for conducting financial relationships with them. Many countries have developed and implemented AML/CFT measures because of the coercive pressure that the NCCT process exerts on them.<sup>781</sup> Currently, the FATF applies the HRMJs as a less intrusive form of NCCT.<sup>782</sup> The identification of HRMJs culminates from the FATF standards enforcement that involves an annual self-assessment exercise, and a more detailed mutual evaluation process in terms of which each member is subject to an on-site visit and the evaluation of its measures.<sup>783</sup> The self-assessment involves the FATF sending questionnaires to countries to record progress on their AML/CFT measures

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Laundering Annual Report 1996-1997" (1997) <http://www.fatf-gafi.org/media/fatf/documents/reports/1996%201997%20ENG.pdf> (accessed: 2018-07-13); Ryder *Financial Crime in the 21st Century: Law and Policy* (2011) 17. Cf Iqbal and Naz "Analyzing FATF's Concerns and Actions Taken by Pakistan for Compliance" 2021 5 *Pakistan Social Sciences Review* 219 2022 who correctly state that the FATF "neither uses these two terms 'Blacklist' and 'Grey List' officially nor is it found in FATF jargon".

<sup>780</sup> FATF "About the Non-Cooperative Countries and Territories (NCCT) Initiative" (Nd) [http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthe-noncooperativecountriesandterritoriesncctinitiative.html?hf=10&b=0&s=desc\(fatf\\_releasedate\)](http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/aboutthe-noncooperativecountriesandterritoriesncctinitiative.html?hf=10&b=0&s=desc(fatf_releasedate)) (accessed: 2018-07-20). See also Nance "Re-thinking FATF: An Experimentalist Interpretation of the Financial Action Task Force" 2018 69 *Crime Law & Social Change* 131 141-142; Ferwerda, Deleanu and Unger "Strategies to Avoid Blacklisting: The Case of Statistics on Money Laundering" 2019 14 *Plus One* 1.

<sup>781</sup> Broome *Anti-Money Laundering* (2005) 556. See FATF "Annual Review of Non-Cooperative Countries and Territories 2006-2007: Eighth NCCT Review" (2007) <http://www.fatf-gafi.org/media/fatf/documents/reports/2006%202007%20NCCT%20ENG.pdf> (accessed: 20-07-20) ("FATF Eighth NCCT Review (2007)") for the countries listed and delisted since between 2000-2006. Of a total of 47 countries reviewed between 2000-2001, 23 were identified as NCCT.

<sup>782</sup> See further FATF "Eighth NCCT Initiative" (2007) which followed up the removal of Myanmar and Nigeria for the NCCT list in 2016. See also Koh *Suppressing Terrorist Financing and Money Laundering* (2006) 162; Shahin, El-Achkar, and Shehab "The Monetary Impact of Regulating Banking and Financial Sectors by FATF on Non-Cooperative Countries and Territories" 2012 13 *Journal of Banking Regulation* 63 64; Tsingou "Global Financial Governance and the Developing Anti-Money Laundering Regime: What Lessons for International Political Economy?" 2010 47 *International Politics* 617 619; Hardouin "The Aftermath of the Financial Crisis: Poor Compliance and New Risks for the Integrity of the Financial Sector" 2010 18 *Journal of Financial Crime* 148 154. See further Ryder *Financial Crime in the 21st Century* (2011) 16-17 for criticism of the NCCT process.

<sup>783</sup> FATF "Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems" (2018) <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> (accessed: 2018-07-14) ("FATF "Effectiveness Assessment Methodology" (2018)"). See also Koh *Suppressing Terrorist Financing* (2006) 162; Tuba "Prosecuting Money Laundering the FATF Way: An Analysis of Gaps and Challenges in South African Legislation from a Comparative Perspective" 2012 *Acta Criminologica: 2011 Conference Special Edition No 2* 103 106; Mugarura *The Global Anti-Money* (2012) 79-80; Ryder *Financial Crime in the 21st Century* (2011) 16-17.



and guidelines.<sup>784</sup> The questionnaires serve to guide countries to provide the relevant information and to identify measures that are in place to meet the criteria for each FATF Recommendation.<sup>785</sup> The FATF also conducts a peer review and assesses the country's compliance with the FATF Recommendations through its mutual evaluation initiatives.<sup>786</sup> Importantly, FI now forms part of the FATF's CDD measures as a "guidance only" on how to conduct CCD and to identify lower risks relating to certain financial products and transactions.<sup>787</sup> It also forms part of the peer-review and the assessment processes.<sup>788</sup> Assessors are required to determine how countries apply the AML/CFT measures and specifically "how AML/CFT measures are applied to prevent the legitimate use of the formal financial system, and what measures are taken to promote financial inclusion".<sup>789</sup> For instance, in 2018 the mutual evaluation revealed that Mauritius has a high percentage of FI and therefore, does not pose a high risk of ML and TF as consumers use services in the formal sector.<sup>790</sup> The FATF was also concerned with AML/CFT risks posed by the low level of FI in Mexico, due to a higher percentage of consumers who still use products in the informal financial sector.<sup>791</sup> This indicates how promoting FI has become an important part of the process to prevent money-laundering and the financing of terrorism.

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<sup>784</sup> Roberger "Financial Action Task Force" in Hale and Held (eds) *The Handbook of Transnational Governance: Institutions and Innovations* (2011) 46.

<sup>785</sup> FATF "Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations" (2018) <http://www.fatf-gafi.org/media/fatf/content/images/FATF-4th-Round-Procedures.pdf> (accessed: 2018-07-16) 5 ("FATF "Mutual Evaluation Procedure" (2018)").

<sup>786</sup> FATF "Mutual Evaluation Procedure" (2018). See also FATF "Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism: South Africa" (2009).

<sup>787</sup> FATF Recommendations (2012). See also Interpretative Note to Recommendation 16 (Wire Transfer) which advises countries to "minimise thresholds taking into account the risk of driving transactions underground and the *importance of financial inclusion*", as a result of the potential countries trace all wire transfers including small wire transfers (emphasis added). The FATF provides the procedure to apply a risk-based approach aligned to the CDD in transactions and is identified not "to impose rigid standards or to mandate" but "included for guidance only". See FATF Recommendations (2012) Interpretative Note to Recommendations 10 par 14, and FATF Recommendations (2012) Interpretative Note to Recommendations 16 par 2.

<sup>788</sup> FATF "Effectiveness Assessment Methodology" (2018) 103. Cf FATF "Financial Inclusion Guidance" (2013) 9. According to this guidance paper, it "does not explore how financial inclusion should be integrated into the mutual evaluation methodology and process. However, it highlights the need to better inform the assessors and the assessed countries based on the principle that financial exclusion could undermine the effectiveness of an AML/CFT regime given".

<sup>789</sup> FATF "Effectiveness Assessment Methodology" (2018) 103.

<sup>790</sup> ESAAMLG "Anti-money Laundering and Counter-terrorist Financing Measures: Mauritius, Mutual Evaluation Report" (2018) <https://www.esaamlg.org/reports/Second%20Round%20MER%20of%20MauritiusJuly%202018.pdf> (accessed: 2018-07-19) par 58.

<sup>791</sup> FATF and GAFILAT "Anti-money Laundering and Counter-Terrorist Financing Measures: Mexico Mutual Evaluation Report" (2018) <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Mexico-2018.pdf> (accessed: 2018-07-19) par 53.

In either self-assessment or mutual evaluation, the FATF may identify deficiencies in a country's AML/CFT measures.<sup>792</sup> If it finds a country to have "strategic weaknesses" it will place it on a "grey list" as "a jurisdiction under increased monitoring".<sup>793</sup> The list comprises countries that have committed to a swift resolution of the identified strategic deficiencies within the agreed timeframes and are subject to increased monitoring.<sup>794</sup> The problem arises for countries that do not comply or show any progress following their assessments. In this regard, the FATF relies on coercive methods to enforce compliance with its standards. It places such countries on a blacklist as "high-risk jurisdictions subject to a call for action" and calls all its members and other jurisdictions to apply enhanced due diligence.<sup>795</sup> Depending on the seriousness of the deficiencies in a blacklisted country, it will call upon countries "to apply counter-measures to protect the international financial system from money laundering, terrorist financing, and proliferation financing (ML/TF/PF) risks emanating from the country".<sup>796</sup>

It should be noted that South Africa is at the brink of being on the grey list for failure to implement the relevant measures to address the deficiencies in the AML/CFT regulation in a mutual evaluation by the FATF in 2021.<sup>797</sup> Although the FATF identified major improvements in AML/CFT framework in South Africa, it identified a number of areas that must be improved by implementing relevant measures. Largely, the FATF identified deficiencies relating to the effectiveness of the investigation and prosecution of money laundering and terror financing.<sup>798</sup> The mutual evaluation report also identified a number of deficiencies relating to the regulation

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<sup>792</sup> FATF "Effectiveness Assessment Methodology" (2018) 5. See also FATF "Mutual Evaluation Procedure" (2018). The evaluation rates the standards as compliant, largely compliant, partially compliant, or non-compliant.

<sup>793</sup> FATF "Jurisdictions under Increased Monitoring" (2022) <https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-march-2022.html> (accessed: 2022-04-22). See also Turner "The Financial Action Task Force: International Regulatory Convergence Through Soft Law" 2015 59 *New York Law School Law Review* 547 553-555.

<sup>794</sup> See FATF "Jurisdictions under Increased Monitoring" (2022) for countries on this list.

<sup>795</sup> FATF "High-Risk Jurisdictions Subject to a Call for Action" (2020) <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-february-2020.html> (accessed: 2022-04-22).

<sup>796</sup> FATF "High-Risk Jurisdictions Subject to a Call for Action" (2020).

<sup>797</sup> FATF "Anti-money Laundering and Counter-terrorist Financing Measures South Africa Mutual Evaluation Report" (2021) <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf> (accessed: 2022-05-15) par 53 ("FATF Mutual Evaluation SA" (2021)).

<sup>798</sup> FATF Mutual Evaluation SA" (2021) 31-35.

and compliance with the FICA. These include lack of detecting and recovering cash proceeds especially as the use of cash by South Africans is prevalent.<sup>799</sup> It also identified lack of readily available and updated information on beneficial ownership, lack of identification of ML/TF risks by smaller financial institutions and designated non-financial businesses and professions, and lack of conducting RBA by high risks sectors such as dealers of precious metals and stones.<sup>800</sup> The FATF concluded with recommendations for the improvements in those areas that it identified. South Africa has not implemented the relevant measures as required by the FATF. It has until February 2023 to implement measures to comply with the relevant recommendations relating to the AML/FCT deficiencies.<sup>801</sup> The FATF will determine then whether the country's authorities have done enough to avoid possible listing.

It can be observed that the HRMJs procedure resembles the revised NCCT procedure. The FATF continues to enforce the NCCT-style of listing by publishing names of countries with deficiencies. It also appeals to both its members and non-members to consider the risks of AML/CFT posed by these members and to apply countermeasures to protect the international financial system from risks emanating from these jurisdictions.<sup>802</sup> The mutual evaluation and the identification of HRMJs remain the effective mechanisms to enforce the AML/CFT measures under the FATF. While the listing of countries with deficiencies may have changed names from "NCCT" to "HRMJs", the identification of non-compliant countries continues as an effective strategy to monitor and implement its AML/CFT standards.<sup>803</sup>

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<sup>799</sup> FATF "Mutual Evaluation SA" (2021) 19.

<sup>800</sup> FATF "Mutual Evaluation SA" (2021) 43-45.

<sup>801</sup> Anon "Massive Changes on the Cards for South Africa's Finance Laws as Greylisting Draws Near" (18-08-2022) *BusinessTech* <https://businesstech.co.za/news/finance/618057/massive-changes-on-the-cards-for-south-africas-finance-laws-as-greylisting-draws-near/> (Accessed: 2022-10-15), See also Van Niekerk R "How SA might Stay Off the Grey List" (13-10-2022) *Moneyweb* <https://www.moneyweb.co.za/moneyweb-podcasts/special-report/how-sa-might-stay-off-the-grey-list/> (Accessed: 2022-10-15), See further the Minister of Finance "General Laws (Anti-Money Laundering And Combating Terrorism Financing) Amendment Bill" [B 18—2022] [https://www.parliament.gov.za/storage/app/media/Bills/2022/B18\\_2022\\_General\\_Laws\\_Anti\\_Money\\_Laundering\\_and\\_Combating\\_Terrorism\\_Financing\\_Amendment\\_Bill/B18\\_2022\\_General\\_Laws\\_Anti\\_Money\\_Laundering\\_and\\_Combating\\_Terrorism\\_Financing\\_Amendment\\_Bill.pdf](https://www.parliament.gov.za/storage/app/media/Bills/2022/B18_2022_General_Laws_Anti_Money_Laundering_and_Combating_Terrorism_Financing_Amendment_Bill/B18_2022_General_Laws_Anti_Money_Laundering_and_Combating_Terrorism_Financing_Amendment_Bill.pdf) (Accessed; 2022-10-15), as the necessary measure to address the deficiencies identified by the FATF.

<sup>802</sup> FATF "Public Statements" (2018) <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2018.html> (accessed: 2018-07-30), the statement list the Korea Republic and Iran on the list.

<sup>803</sup> See the FATF "Annual Report 2016-2017" (2018) 38 (2018) <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF-annual-report-2016-2017.pdf> (accessed: 2018-07-30).

## (c) National and International Coordination and Cooperation

The FATF Recommendations also provide for cooperation and coordination between various regulatory authorities. It requires countries to establish a national financial intelligence unit to have measures in place for cooperation, coordination, and exchange of information domestically and within the law enforcement authorities, supervisors, and other relevant competent authorities in relation to national AML/CFT policies.<sup>804</sup> It also requires national authorities to ensure international cooperation with their peers in other countries.<sup>805</sup> In terms of Recommendation 40, international cooperation is limited to competent authorities “in relation to money laundering, associated predicate offences, and terrorist financing and for safeguarding the information received”.

### 4.2.4 The G20 Financial Inclusion Initiatives

#### 4.2.4.1 The G20 Financial Inclusion Commitments

One of the international forums that have made an effort to promote FI is the G20.<sup>806</sup> It has introduced certain commitments and concrete steps to promote FI since 2009 through discussions of financial markets and the world economy post the 2008-2009 global financial crisis.<sup>807</sup> Among its major commitments, the G20 undertook to “improving access to financial services for the poor” and identify innovative regulatory and policy approaches on access to finance, financial literacy, and consumer protection.<sup>808</sup>

The G20’s 2010 commitments are significant in facilitating FI, the establishment of the *Financial Inclusion Action Plan* (FIAP), and the Global Partnership for Financial Inclusion

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<sup>804</sup> FATF Recommendations (2012) 2.

<sup>805</sup> FATF Recommendations (2012) 40.

<sup>806</sup> The G20 is a forum of the world’s major economies that seek to develop global policies to address current pressing challenges. Its members are 19 countries across the globe and the European Union. South Africa is the only African member state. Visit G20 “What is the G20?” <https://www.g20.org> (accessed: 2018-08-03).

<sup>807</sup> G20 “The G-20 Toronto Summit Declaration” (26-27 June 2010) [http://www.g20.utoronto.ca/2010/g20\\_declaration\\_en.pdf](http://www.g20.utoronto.ca/2010/g20_declaration_en.pdf) (accessed: 2018-08-03) (“G20 “Toronto Declaration” (2010)”). The Summit was held on 24-25 September 2009 in Pittsburg, Pennsylvania, USA.

<sup>808</sup> G20 “Leaders’ Statement: The Pittsburgh Summit” (24-25 September 2009) <http://www.g20.utoronto.ca/2009/2009communique0925.html> (accessed: 2018-08-03) Preamble and par 41.

(GPIFI).<sup>809</sup> The G20 established the GPIFI as a platform for all the G20 and non-G20 member countries and other relevant stakeholders to carry forward the work on promoting FI.<sup>810</sup> More importantly, the G20 members committed to improve access to financial services by developing the *Principles for Innovative Financial Inclusion (G20 FI Principles)* to create policy and regulatory frameworks to encourage innovations to promote FI.<sup>811</sup> Because of their importance, this section discusses the principles most relevant to access to financial services.<sup>812</sup>

#### **4.2.4.2 The G20's Principles for Innovative Financial Inclusion**

The *G20 FI Principles* draw from experiences and lessons that it has learned from the relevant policies worldwide.<sup>813</sup> Despite national initiatives already in place to promote FI such as agent banking, the delivery of financial services through mobile phone networks, and the establishment of new institutions, products, and technology to achieve this purpose, 2.5 billion people across the world remained excluded from access to financial services at the time of the development of these principles.<sup>814</sup> The G20 developed these principles to consolidate various national experiences and to produce a set of practical recommendations for

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<sup>809</sup> G20 "The G20 Seoul Summit Leaders' Declaration" (11-12 November 2010) <http://www.g20.utoronto.ca/2010/g20seoul.pdf> (accessed: 2018-08-03). See also Wang and Guan "Financial Inclusion: Measurement, Spatial Effect and Influencing Factors" 2017 49 *Applied Economics* 1751-1752; Global Partnership for Financial Inclusion "G20 2020 Financial Inclusion Action Plan" (2020) <https://www.gpfi.org/sites/gpfi/files/sites/default/files/G20%202020%20Financial%20Inclusion%20Action%20Plan.pdf> (accessed: 2022-03-20) ("GPIFI "G20 FI Action Plan" (2020)).

<sup>810</sup> GPIFI "About GPIFI" [www.gpfi.org](http://www.gpfi.org) (accessed: 2018-08-03).

<sup>811</sup> G20 "Report on Innovative Financial Inclusion From the Access Through Innovation Sub-Group of the G20 Financial Inclusion Experts Group" (2010) <https://www.gpfi.org/sites/default/files/documents/Principles%20and%20Report%20on%20Innovative%20Financial%20Inclusion0.pdf> (accessed: 2018-08-03). See also The G20 "FI Principles" (2011), Global Partnership for Financial Inclusion "The G20 Principles for Innovative Financial Inclusion: Bringing the Principles to Life, Eleven Country Case Studies" (2011) <https://www.gpfi.org/sites/default/files/documents/G20%20Principles%20for%20Innovative%20Financial%20Inclusion%20Bringing%20the%20Principles%20to%20Life.pdf> (accessed: 2018-08-03) ("GPIFI "Bringing Principles to Life" (2011)"). The principles were first released at the subsequent Seoul Summit. See The G20 "Toronto Declaration" (2010) par 22; The G20 "FI Principles" (2011); ShahulHameedu 2014 *International Journal of Current Research and Academic Review* 118.

<sup>812</sup> See Ch 4.2.4.2 below.

<sup>813</sup> The G20 "FI Principles" (2011). See also GPIFI "Bringing Principles to Life" (2011); Kimenyi and Songwe "Why the G20 Must Prioritize Financial Inclusion to Promote Global Growth" (2012) *The Brookings Institution* [https://www.brookings.edu/wp-content/uploads/2016/06/g20\\_kimenyi\\_songwe.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/g20_kimenyi_songwe.pdf) (accessed: 2018-08-06). Cf Busch "Broadening the G20 Financial Inclusion Agenda" (2017) *G20 Insight* 4. The author argues that most of these experiences have not been considered within the FIAP.

<sup>814</sup> The G20 "FI Principles" (2011). See also GPIFI "Bringing Principles to Life" (2011).

policymakers worldwide.<sup>815</sup> Principles 1, 2, 6, 8, and 9 are discussed for their specific relevance to promote FI through access to basic financial services.<sup>816</sup>

Principle 1 concerns leadership and set the tone at the top by highlighting governments' leadership and commitments as preconditions for increasing FI.<sup>817</sup> Successful leadership is essential to address policy and regulatory issues towards innovation, consumer protection, and payment facilities, and the adoption of a collaborative approach to FI.<sup>818</sup> Principle 2 generally encourages the diversity of both financial products and service providers.<sup>819</sup> Key aspects of this principle include the government's efforts to facilitate a market structure that promotes competition and the entry of new service providers outside the traditional channels.<sup>820</sup> It further proposes that governments encourage the development of a broad range of financial services that are sustainable, secured, and affordable.

Principles 6, 8, and 9 are significant for addressing key issues that are relevant for a regulatory framework to promote FI. Principle 6 seeks to create coordination and cooperation between different institutions that oversee the implementation of FI policies. The principle takes cognisance of multi-public institutions, regulatory agencies, and a range of different private sector organisations that are involved in facilitating innovations of financial services and delivery channels. It identifies the need to coordinate policies across the different institutions involved to avoid conflicting or inconsistent approaches. Principle 6 requires these instructions to "encourage partnerships and direct consultation across government, business, and other stakeholders". A measure proposed for this coordination and consultation is for countries to identify "a lead agency" to coordinate among government agencies. This principle is important to reduce the possible regulatory arbitrage that will allow the relevant financial institutions

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<sup>815</sup> The G20 "FI Principles" (2011). See also GPIF "Bringing Principles to Life" (2011).

<sup>816</sup> Principle 3 deals with promoting FI by adopting financial technology such as mobile phones to bridge the distance gap and reduce costs. Principle 4 deals with consumer protection issues. Principle 5 provides financial literacy and financial capability. Principle 6 fosters cooperation among government agencies and the private sector. Principle 7 deals with gathering knowledge about FI through appropriate and reliable data.

<sup>817</sup> The G20 "FI Principles" (2011) Principle 1.

<sup>818</sup> The G20 "FI Principles" (2011) Principle 1. It also requires governments to support inclusion programmes such as financial literacy and data collection.

<sup>819</sup> The G20 "FI Principles" (2011) 2.

<sup>820</sup> G20 "FI Principles" (2011) 2. These service providers include traditional banks, agents, telecoms companies, and microfinance institutions.

responsible to provide access to financial services to act beyond the reach of certain regulations by taking advantage of the loopholes in the system.<sup>821</sup>

Principle 8 takes stock of the current barriers and possible risks posed by the existing regulatory and legislative frameworks on the objectives to promote FI. It proposes a proportionality principle that encourages policy and regulatory frameworks which are proportionate to the possible risks involved. The principle requires the law and policy frameworks to strike the right balance by determining whether the demands of the existing regulations are proportionate to the risks posed to service providers and customers. The proportionality principle is important in establishing whether existing regulations that ensure financial stability, integrity, and consumer protection can be balanced against the objective of achieving FI. Principle 9 is a synoptic overview of the issues that should be included in an FI framework and draws from all the other principles. In terms of this principle, a regulatory framework for FI must reflect international standards and national circumstances and support the competitive landscape. It must also reflect an appropriate, flexible, and risk-based AML/CFT regime as proposed by the FATF above.<sup>822</sup> Such a framework must further incorporate conditions for the use of agents as customer interface and provide a regulatory framework for electronically stored-value products.

#### **4.2.4.3 The Financial Inclusion Action Plan (FIAP)**

The G20 developed the FIAP to apply these principles through “pragmatic action” to advance FI.<sup>823</sup> It identified six actions that countries may adopt to advance FI. The key among them was to establish the GPFI. Many of these actions repeat the *G20 FI Principles*, the activities that must be taken, and the expected outcomes. For instance, one of the activities that supports these principles involves the provision of support to the work of other GSSBs such

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<sup>821</sup> On the regulatory arbitrage, see Ayadi, Ferri and Pesic “Regulatory Arbitrage in EU Banking: Do Business Models Matter” (2016) *International Research Centre for Cooperative Finance Working Paper* <https://bbmresearch.org/wp-content/uploads/2019/06/regulatory-arbitrage-eu-banking-do-business-models-matter-ayadi-ferri-pesic.pdf> (accessed: 2022-04-22). See also Willeson “What is and What is Not Regulatory Arbitrage? A Review and Synthesis” in Molyneux (ed) *Financial Markets, SME Financing and Emerging Economies* (2017); Minto, Prinz and Wulf “A Risk Characterization of Regulatory Arbitrage in Financial Markets” 2021 22 *European Business Organization Law Review* 719.

<sup>822</sup> See Ch 4.2.2 above and Ch 6 below.

<sup>823</sup> GPFI “G20 FI Action Plan” (2020) 1.

as the FATF and the BCBS.<sup>824</sup> The FIAP also requires countries to integrate FI into other types of financial system assessments, such as financial integrity and financial stability. As one of its activities for achieving this integration, it appeals to the World Bank and the IMF to strengthen their approach and apply a uniform standard to promote FI.<sup>825</sup>

The *G20 FI Principles* and the FIAP provide guides and roadmaps to promote FI. As policy instruments, several challenges may be encountered with regard to their implementation and enforceability. The first challenge relates to the institutional structure of the G20. Unlike other international governmental organisations such as the UN and the IMF which also operate under founding charters or international treaties, the G20 is not established on a similar constitutive document.<sup>826</sup> As a result, its guidelines, declarations, and plans do not place any legal obligations on member states and can, therefore, not be enforced.<sup>827</sup> The *G20 FI Principles* specifically indicate that the principles “are not rigid prescriptions but indications”;<sup>828</sup> they are deliberately broad to provide insights into existing country experiences and innovations.<sup>829</sup> The regulatory framework provided by the *G20 FI Principles* is based on voluntary guidelines and also lacks the relevant implementation mechanisms and so is not legally binding.<sup>830</sup>

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<sup>824</sup> GPMI “G20 FI Action Plan” (2020) 6-7. Examples of measures that must be integrated include particularly their application of the risk-based approach and the proportionality principle to balance the objectives of FI with those of the AML/CFT and the effective banking to ensure financial stability.

<sup>825</sup> GPMI “G20 FI Action Plan” (2020) 11.

<sup>826</sup> Hanjal *The G20: Evolution, Interrelationships, Documentation* 2nd ed (2019) 1. See, eg, the Charter of the United Nations 1945 and the IMF Articles of Agreement 1944.

<sup>827</sup> Hanjal *The G20: Evolution* (2019) 1.

<sup>828</sup> The G20 “FI Principles” (2011). GPIF “Bringing Principles to Life” (2011) 2.

<sup>829</sup> The G20 “FI Principles” (2011); GPIF “Bringing Principles to Life” (2011) 2.

<sup>830</sup> Soederberg “Universalising Financial Inclusion and the Securitisation of Development” 2013 34 *Third World Quarterly* 593 599.



## 4.2.5 The Alliance for Financial Inclusion (AFI)

### 4.2.5.1 Brief Introduction

The AFI – a member-led organisation established in 2008<sup>831</sup> – has become one of the influential international bodies to advance policies to promote FI.<sup>832</sup> Its main purpose is to advance the development of FI policies in developing and emerging economies.<sup>833</sup> AFI organises annual global policy forums that serve as platforms for leaders of different member institutions to discuss and exchange ideas on how to develop and improve their national financial strategies and policies.<sup>834</sup> It held the first forum in 2011 where the entire membership of AFI adopted a set of principles, goals, and commitments to achieve FI under what came to be known as the “Maya Declaration”.<sup>835</sup>

### 4.2.5.2 The Maya Declaration

The Maya Declaration provides five specific sets of commitments by the AFI members some of which overlap with the *G20 FI Principles*. Members committed to put FI policies in place to create an enabling environment for access to financial services.<sup>836</sup> They further committed to a proportionality principle which ensures a sound and proportional regulatory framework to facilitate the complementary efforts of FI, financial integrity, and financial stability.<sup>837</sup>

Unlike the G20, the AFI does not specifically provide an action plan on how members will implement their commitments. The Maya Declaration only provides for the realisation of its

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<sup>831</sup> AFI “Official Members” (Nd) <https://www.afi-global.org/sites/default/files/inline-files/AFI%20Official%20Members.pdf> (accessed: 2018-08-08) (“AFI “Official Members (Nd)”). Its members comprise central banks and other financial regulatory institutions in more than 90 developing countries, including South Africa.

<sup>832</sup> As a Bill and Melinda Gate Foundation funded project.

<sup>833</sup> AFI “Official Members” (Nd).

<sup>834</sup> Visit [www.afi-global.org](http://www.afi-global.org). (accessed: 2018-08-08).

<sup>835</sup> Alliance for Financial Inclusion “Maya Declaration the AFI Network Commitment to Financial Inclusion” (2011) <https://www.afi-global.org/publications/879/Maya-Declaration-The-AFI-network-commitment-to-financial-inclusion> (accessed: 2018-08-08) (AFI “Maya Declaration” (2011)).

<sup>836</sup> AFI “Maya Declaration” (2011).

<sup>837</sup> AFI “Maya Declaration” (2011). Like the G20 “FI Principles” (2011), they also committed to enhance consumer protection and empowerment, data collection, and the support of access to financial services for small and medium enterprises.

commitments through concerted domestic and global actions.<sup>838</sup> As of March 2021, 81% of the AFI members have made formal commitments to the Maya Declaration.<sup>839</sup> The Maya Declaration also does not impose a specific mandate on members to comply with these sets of commitments with possible sanctions for non-compliance. AFI only uses the collection of data to measure the status of FI through a set of indicators and also possible incentives as a way to persuade its members to commit to its objectives.<sup>840</sup> The collection of data and financial indicators according to the AFI is not aimed at generating rankings or setting standards.<sup>841</sup>

## 4.2.6 The G20 and the World Bank National Financial Inclusion Strategies Frameworks

### 4.2.6.1 Brief Introduction

After commitments made at the AFI forum and the signing of the Maya Declaration, several countries have committed developing and implementing their national FI frameworks.<sup>842</sup> The AFI has collaborated with other key international stakeholders such as the World Bank and the G20 countries to develop a model for the incorporation of national FI strategies.<sup>843</sup> This

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<sup>838</sup> AFI "Maya Declaration" (2011).

<sup>839</sup> AFI "2021 Maya Declaration Progress Report" (2021) [https://www.afi-global.org/wp-content/uploads/2020/12/AFI\\_maya-2020\\_AW\\_digital.pdf](https://www.afi-global.org/wp-content/uploads/2020/12/AFI_maya-2020_AW_digital.pdf) (accessed: 2022-04-22) 4.

<sup>840</sup> Alliance for Financial Inclusion: Financial Inclusion Data Working Group "Measuring Financial Inclusion Core Set of Financial Inclusion Indicators" (2013) *Guideline Note No 4* <https://www.afi-global.org/sites/default/files/publications/fidwg-core-set-measuring-fi.pdf> (accessed: 2018-07-03) 3.

<sup>841</sup> AFI "FI Indicators" (2013) *Guideline Note No 4 3*. See also Alliance for Financial Inclusion "The Sasana Accord" (2013) [https://www.afi-global.org/sites/default/files/publications/sasana\\_accord\\_2013\\_final1272014.pdf](https://www.afi-global.org/sites/default/files/publications/sasana_accord_2013_final1272014.pdf) (accessed: 2018-07-03). The AFI made commitments to FI through a set of measurable national goals.

<sup>842</sup> AFI "Maya Declaration: The AFI Network Commitment to Financial Inclusion Commitment Update Made by Bank of Uganda" (Nd) <https://www.bou.or.ug/bou/bou-downloads/Financial%20Inclusion/The-AFI-Network-Commitment-to-Financial-Inclusion.pdf> (accessed: 2018-08-10). See also AFI "Maya Declaration: The AFI Network Commitment to Financial Inclusion Commitment Made by Bank Indonesia" (Nd) <https://www.bi.go.id/id/sistem-pembayaran/duniasiana/layouts/mobile/dispform.aspx?List=13675f50-74ab-474e-af56-92ee9e6053a6&View=5d2a873e-2220-47b7-a417-11b6fada516f&ID=30> (accessed: 2018-08-10); Diflos and Glissovc-Mézières "National Microfinance Strategies" 2007 *CGAP Brief 45100* <http://documents.worldbank.org/curated/en/535061468158073925/pdf/451000BRIOCGAP1BOX0334044B01PUBLIC1.pdf> (accessed: 2018-08-10) on the national microfinance strategies before the adoption of the NFIS. See further Hinz "The Fundamentals of Financial Inclusion: An Overview" (2014) *BBVA Watch* <https://www.bbvarsearch.com/wp-content/uploads/2015/09/the-fundamentals-of-financial-inclusion-an-overview.pdf> (accessed: 2018-08-10) 7.

<sup>843</sup> Alliance for Financial Inclusion "National Financial Inclusion Strategies: Current State of Practice" (2015) [https://www.afi-global.org/sites/default/files/publications/fisplg-state\\_of\\_practice.pdf](https://www.afi-global.org/sites/default/files/publications/fisplg-state_of_practice.pdf) (accessed: 2018-08-11) (AFI "NFIS Current State of Practice" (2015)). They propose to draw lessons from existing FI frameworks in several countries.

section discusses the following framework documents and focuses on various ways of developing an NFIS and its relevant components. These are the *Financial Inclusion Strategies Reference Framework (NFIS Reference Framework)*<sup>844</sup> and the *Template for the Design of a National Financial Inclusion Strategy (NFIS Template)*.<sup>845</sup> It is important to note that they adopt a bottom-up approach by drawing lessons from existing regulatory models from national regulatory frameworks, instead of a top-down approach that seeks to impose the formulation of specific regulatory frameworks to promote FI.<sup>846</sup>

#### **4.2.6.2 NFIS Reference Framework**

The *NFIS Reference Framework* defines an NFIS as a roadmap of actions that are agreed to and defined at the national and subnational levels, which all stakeholders can follow to achieve FI objectives.<sup>847</sup> The envisaged goal of the NFIS is to promote an effective and efficient process to achieve significant improvements in FI. It aims to bring various stakeholders from both the public and private sectors on board to improve FI.<sup>848</sup> The *NFIS Reference Framework* was developed as an accessible reference point for regulators and policymakers to reflect on existing FI approaches.

The *NFIS Reference Framework* has identified six complementary components in terms of which a country can implement and monitor its progress towards FI. Importantly, these components do not specify the types of financial services or products that must be prioritised by the NFIS.<sup>849</sup> The first component of the *NFIS Reference Framework* requires a collection of relevant data which outlines the state of the national FI or FE. This involves a survey on access, use, and the quality of different financial services in a country to identify areas that still need attention. While the collection of data is not directly relevant to the regulation and

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<sup>844</sup> World Bank "NFIS Reference Framework" (2012).

<sup>845</sup> World Bank *NFIS Template* (2016). See also World Bank "Toolkit Developing and Operationalizing a National Financial Inclusion Strategy" (2018) <http://documents.worldbank.org/curated/en/201761530163552405/pdf/127712-REVISED-WP-PUBLIC.pdf> (accessed: 2018-08-13).

<sup>846</sup> Staschen and Nelson in Ledgerwood *et al* (eds) *The New Microfinance Handbook* (2013) 78. See also Stein *et al* in Fardoust *et al* (eds) *Postcrisis Growth and Development* (2011) 442.

<sup>847</sup> World Bank *NFIS Reference Framework* (2012) 6.

<sup>848</sup> Mdasha, Irungu and Wachira "Effect of Financial Inclusion Strategy on Performance of Small and Medium Enterprises: A Case of Selected SMEs in Dar es Salaam, Tanzania" 2018 2 *Journal of Strategic Management* 51 52.

<sup>849</sup> See, however, World Bank *NFIS Reference Framework* (2012) 32 where the framework acknowledges that "[a]ccessible bank accounts, or 'basic' bank accounts, are increasingly being promoted or mandated".

policy making, FI indicators are important for setting national strategies and to monitor progress. They are also important to identify key targets and existing barriers to FI and which of the barriers should be prioritised by the policy and regulatory reforms.<sup>850</sup> The second component focuses on the essential elements of national targets and objectives in achieving FI. This generally requires countries to set specific targets and objectives in their NFISs. These may relate to targets as to the percentages of FI within a particular time scale.<sup>851</sup> It recommends setting a specific target for one or more financial products with reference to specific barriers applicable to that product or products in a country.<sup>852</sup> For instance, when FE is identified regarding access to credit, a target for the FI strategy may situate credit as the main target of its NFIS.

One of the important components identified in the *NFIS Reference Framework* is the actual NFIS framework. An important issue of this component is how an NFIS is developed, or an existing one revised, with reference to the *NFIS Reference Framework*. The NFIS need not be an all-inclusive policy document that highlights all key areas which will improve FI. The *NFIS Reference Framework* recommends the development of an NFIS in “whatever form”.<sup>853</sup> The *NFIS Reference Framework* identifies three different approaches to developing an NFIS.

An NFIS may be developed as fragmented (standalone and focused); as part of an overall financial sector development strategy; or an inclusive and comprehensive NFIS.<sup>854</sup>

(a) Fragmented (Standalone and Focused) NFIS

As a standalone document, the NFIS is published as a detailed blueprint document identifying specified action plans and specific targets to achieve FI. It can focus on one or more areas

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<sup>850</sup> World Bank *NFIS Reference Framework* (2012) 16.

<sup>851</sup> AFI “NFIS Current State of Practice” (2015) 10.

<sup>852</sup> AFI “NFIS Current State of Practice” (2015) 10.

<sup>853</sup> World Bank *NFIS Reference Framework* (2012) 11.

<sup>854</sup> World Bank *NFIS Reference Framework* (2012) 11. See also AFI “Strategy Development Organizing for Financial Inclusion Supporting Strategic Approaches in the AFI Network” (2012) [https://www.afiglobal.org/sites/default/files/publications/AFI\\_Strategy%20development\\_AW\\_lo\\_w%20res.pdf](https://www.afiglobal.org/sites/default/files/publications/AFI_Strategy%20development_AW_lo_w%20res.pdf) (accessed: 2018-08-20) 2. See further Prochaska “Financial Inclusion Strategies: Global Trends and Lessons Learnt for the AFI Network” (2014) <https://www.worldbank.org/content/dam/Worldbank/Event/ECA/Turkey/tr-fin-incl-confer-klaus-prochaska.pdf> (accessed: 2018-07-26) who identifies traditional two approaches as the stand-alone FIS and broader financial sector strategy.

where there is a need for actions.<sup>855</sup> The *NFIS Reference Framework* does not identify specific areas that must form part of an NFIS. It identifies important policy objectives that interrelate with existing policies for FI. These may include financial stability, financial integrity, market conduct, and financial capability.<sup>856</sup> The *NFIS Reference Framework*, therefore, recommends an NFIS to be prepared with a specific focus on these objectives.<sup>857</sup> The main objective of this document is to promote FI, thus excluding other national development strategic goals. These are the types of NFIS developed on the basis of the recommendations in *NFIS Reference Framework* and *NFIS Toolkit* and seek to address each of the components proposed in the *NFIS Reference Framework*.<sup>858</sup>

An NFIS can focus on specific areas where need for action has been identified.<sup>859</sup> For instance, an NFIS may specifically focus on financial education as a key barrier to FI.<sup>860</sup> It may also focus on addressing barriers to microfinance, access to low-income retail banking, or prioritise microlending.<sup>861</sup>

The approaches to NFISs in India and Kenya provide examples of a typical fragmented approach to NFIS. India does not have a comprehensive NFIS and is not a signatory to the Maya Declaration. Nonetheless, it is currently ranked sixth in the world by the Economist Intelligent Unit.<sup>862</sup> This country has put in place several measures to enhance access to financial services.<sup>863</sup> One relevant measure is the launch of an account-opening scheme termed the “Pradhan Mantri Jan-Dhan Yojana” (PMJDY) to provide every unbanked Indian

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<sup>855</sup> World Bank *NFIS Reference Framework* (2012) 11.

<sup>856</sup> World Bank *NFIS Reference Framework* (2012) 11.

<sup>857</sup> World Bank *NFIS Reference Framework* (2012) 11-12.

<sup>858</sup> See AFI “NFIS Current State of Practice” (2015). See AFI “Financial Inclusion Strategy Peer Learning Group (FISPLG)” (Nd) <https://www.afi-global.org/working-groups/fis/> (accessed: 2022-06-01) for 38 countries (as of 2020) that have developed NFIS.

<sup>859</sup> World Bank *NFIS Reference Framework* (2012) 11.

<sup>860</sup> See, eg, Reserve Bank of India “National Strategy for Financial Education” (2012) <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/NSFE016072012.pdf> (accessed: 2018-08-20).

<sup>861</sup> AFI “Strategy Development Organizing for FI” (2012) 2.

<sup>862</sup> EIU “Global Microscope 2020” (2020) 82. The Economist Intelligence Unit (EIU) is the research arm of The Economist Group, publisher of *The Economist*, the world’s leading provider of country intelligence. It helps governments, institutions, and businesses by providing timely, reliable, and impartial analysis of economic and development strategies. It has collaborated with the Centre for Financial Inclusion which helps to bring about conditions to achieve FI.

<sup>863</sup> These measures include microfinance programmes for the low-income segments such as the nationalisation of banks and the expansion of branch networks. See, eg, the Banking Companies (Acquisition and Transfer of Undertakings) Act 5 1970 of India.

adult with a basic, cost free, no-frills account.<sup>864</sup> Also, the Indian *Master Circular-Lending to Priority Sector*, which stimulates the provision of microcredit to the priority sectors such as agriculture, is a good example of this type of NFIS.<sup>865</sup>

In the African context, Kenya, too, has no comprehensive NFIS. It was ranked twenty-sixth by the Global Microscope 2020.<sup>866</sup> Key initiatives in this country are the growing use of M-Pesa, which allows for receipt of money via mobile phone, and the continued uptake of M-Shwari banking accounts.<sup>867</sup> The regulatory reforms to accommodate the offering of these services has seen their adoption increasing which in turn improves Kenya's FI.<sup>868</sup>

#### (b) NFIS as Part of the Overall National Financial Sector Strategy

An NFIS developed as part of the overall national financial sector strategy is the antithesis of a standalone NFIS. This NFIS identifies FI as an ancillary and complementary objective. A relevant example is a national financial strategic document that focuses on financial stability, integrity, or consumer protection, and outlines these strategic plans as the main objectives, with FI having the status of simply one other important target.<sup>869</sup> It may also be part of other national strategic documents such as the national poverty reduction strategy or national development plan.<sup>870</sup> An NFIS may be broad in scope and cover both public and private sector

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<sup>864</sup> PMYDJ is translated as the Prime Minister's People's Wealth Scheme. See also Chopra, Prabhala and Tantri "Bank Accounts for the Unbanked: Evidence From a Big Bang Experiment" (2017) *Robert H Smith School Research Paper No RHS 2919091 Indian School of Business WP 2191091 2191091* <http://dx.doi.org/10.2139/ssrn.2919091> (Accessed: 2018-06-20). See also EIU "Global Microscope 2020" (2020) 24. The scheme was launched by the Indian Prime Minister on 27 November 2014. Other initiatives include the issuing of a guideline for the licensing of special types of bank with low capital requirements, paving way for access to finance for the low-income society by the Reserve Bank of India in July 2014.

<sup>865</sup> Reserve Bank of India "Master Circular - Lending to Priority Sector" (1 July 2008) *RBI/2008-09/69*.

<sup>866</sup> EIU "Global Microscope 2020" (2020)82.

<sup>867</sup> EIU "Global Microscope 2020" (2020)11.

<sup>868</sup> See The National Payment System Act 39 of 2011 s 11, which allows a bank, a payment service provider, or a designated payment system operator, among others, to accept money or payment instructions from any other person for purposes of making payment as a regular feature of that person's business.

<sup>869</sup> See, eg, National Treasury "The Red Book" (2011). This is the national treasury policy document developed following the global financial crisis to address financial sector instability. See Ch 6 below.

<sup>870</sup> UN *Building Inclusive Financial Sectors* (2006) 3.

actions and provide a framework for reform.<sup>871</sup> It is characterised by various sets of actions to address different barriers to financial development.<sup>872</sup>

When an NFIS is part of an overall financial sector development strategy, FI does not become the main policy priority for the achievement of the strategic vision. Some regulatory frameworks introduced after the global financial crisis encourage FI to complement the main objective of ensuring stability in the financial system. For instance, the USA does not have a comprehensive NFIS. The Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted with its main purpose, “to promote the financial stability of the United States”, after the global financial crisis.<sup>873</sup> Title XII of this piece of legislation provides for the improvement of access to financial services by establishing programmes and initiatives to establish accounts appropriate to meet the financial needs of low and moderate-income individuals.<sup>874</sup> However, the improvement of access to financial products and services provisions has not been prioritised by the legislators.<sup>875</sup>

### (c) An Inclusive and Comprehensive NFIS

The *NFIS Reference Framework* promotes the development of an NFIS which targets one or more barrier to FI. However, it takes cognisance of its link with other important policy objectives. These objectives are financial stability, financial integrity, market conduct, and the financial capability of consumers.<sup>876</sup> Depending on the country’s context, they may also include financial consumer protection and small-and-medium enterprise finance (SME).<sup>877</sup> The *NFIS Reference Framework* recommends the development of NFIS that considers these important objectives.<sup>878</sup> These policy objectives may be prioritised according to their relative importance

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<sup>871</sup> World Bank *NFIS Reference Framework* (2012) 11. See also Mdasha *et al* 2018 *Journal of Strategic Management* 52.

<sup>872</sup> World Bank *NFIS Reference Framework* (2012) 11.

<sup>873</sup> Preamble of the Dodd-Frank Act.

<sup>874</sup> See ss 1201-1204 of the Dodd-Frank Act.

<sup>875</sup> Bekk, Sahay, Ariyoshi, Morita, Kagawa and Park “Financial System Stability, Challenges, and Future Regional Finance in Japan” in Yoshino (ed) *Financial Systems Stability, Regulation, and Financial Inclusion* (2015) 6.

<sup>876</sup> World Bank *NFIS Reference Framework* (2012) 11. See also World Bank *NFIS Template* (2016) 8.

<sup>877</sup> World Bank *NFIS Template* (2016) 8.

<sup>878</sup> World Bank *NFIS Reference Framework* (2012) 11.

in achieving the vision of the NFIS. The NFIS should, however, not rank one or more of each objective more important than the other for the realisation of FI.<sup>879</sup>

There are numerous advantages to adopting a comprehensive NFIS. With an all-inclusive NFIS, FI becomes the key financial system strategy. It is clear that there are no legal instruments at the international level that impose obligations on countries to adopt comprehensive strategies for FI. Formulating an all-inclusive NFIS establishes a political will and sets a clear vision for the achievement of FI. The existence of a politically-endorsed strategy increases the chances of implementation.<sup>880</sup> It also helps to win the support of different stakeholders and the population at large.<sup>881</sup> Through the set of broad visions, timeframes and priorities, an all-inclusive NFIS can serve as a reference point for dialogue among regulators and other stakeholders to outline specific actions and how to implement reforms to achieve FI.<sup>882</sup> It is also important in raising awareness about important issues that underpin FI in a country and to secure the necessary national commitment to FI.<sup>883</sup>

There is one identified example that serves to illustrate the impact that a fragmented approach has on the development of NFIS and the need for comprehensive national policy commitments to FI. Such an approach has many advantages. An all-inclusive NFIS promotes FI holistically to cover all policy objectives associated with its purpose. Porter convincingly observes that in those countries with an FI strategy, regulators are more likely to have more FI topics as part of their responsibilities.<sup>884</sup> They are also more likely to allocate resources than countries that do not have such strategies.<sup>885</sup> A comprehensive NFIS is also useful in setting timeframes to achieve specific FI targets.

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<sup>879</sup> World Bank *NFIS Template* (2016) 8.

<sup>880</sup> UN *Building Inclusive Financial Sectors* (2006) 97.

<sup>881</sup> UN *Building Inclusive Financial Sectors* (2006) 99.

<sup>882</sup> Porter "National Strategies: Where Do They Get Us? A Roadmap for Financial Inclusion" Paper presented at Global Microcredit Summit Commissioned Workshop, Valladolid, Spain (14-17 November 2011) 2.

<sup>883</sup> Porter Conference Paper (14-17 November 2011) 2.

<sup>884</sup> Porter Conference Paper (14-17 November 2011) 3. See also Consultative Group to Assist the Poor and The World Bank Group *Financial Access 2010* (2010) 2; Staschen and Nelson in Ledgerwood *et al* (eds) *The New Microfinance Handbook* (2013) 78.

<sup>885</sup> Porter Conference Paper (14-17 November 2011) 3.



What is evident from the countries with comprehensive NFISs is how they have aligned policy frameworks to their FI or FE databases. As discussed above,<sup>886</sup> this data helps policymakers with the relevant regulatory steps to achieve FI. The collection of this data is also important in monitoring the progress of specific financial targets. A comprehensive NFIS is, therefore, not only important for recommending regulatory steps; it is also helpful for incorporating the relevant *G20 FI Principles* and all the relevant components suggested in the *NFIS Reference Framework* for implementing and monitoring progress in promoting FI.<sup>887</sup> The data may also guide specific target groups who experience FE to put necessary implementation plans by relevant implementation bodies in place and for continuous monitoring of the effectiveness of such measures.

Uganda, for instance, adopted a comprehensive NFIS in October 2017 that covers many of the components in the *NFIS Reference Framework*.<sup>888</sup> Its NFIS identifies several objectives and barriers that it seeks to address, as well as the timeframe within which they must be addressed through regulatory steps and implementation processes.<sup>889</sup> It identifies specific FI gaps, the level of priorities that must be offered to identify the gaps, the period within which such gaps must be addressed, and the expected FI outcomes.<sup>890</sup>

#### **4.2.6.3 NFIS Policy and Legal Framework**

The *NFIS Reference Framework* also recommends specific public sector action to achieve FI.<sup>891</sup> It recommends a coordinated partnership among government agencies such as the financial regulators and ministries of finance to implement policies, regulations, and financial

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<sup>886</sup> See Ch 4.2.4.2 above.

<sup>887</sup> See Banco Central do Brasil "Action Plan to Strengthen the Institutional Environment" (2012) [https://www.bcb.gov.br/Nor/reincfin/Brazil\\_Financial\\_Inclusion\\_Action\\_Plan.pdf](https://www.bcb.gov.br/Nor/reincfin/Brazil_Financial_Inclusion_Action_Plan.pdf) (accessed: 2018-08-02).

<sup>888</sup> The Republic of Uganda "National Financial Inclusion Strategy 2017-2022" (2017) [https://www.bou.or.ug/bou/bou-downloads/publications/special\\_pubs/2017/National-Financial-Inclusion-Strategy.pdf](https://www.bou.or.ug/bou/bou-downloads/publications/special_pubs/2017/National-Financial-Inclusion-Strategy.pdf) (accessed: 2018-07-23).

<sup>889</sup> See World Bank *NFIS Reference Framework* (2012) 21-23.

<sup>890</sup> See World Bank *NFIS Reference Framework* (2012) 49-54. One of the barriers identified in this NFIS is the restriction on youth below the age of 18 to open a bank account in their own names. The NFIS set a specific target to introduce legal exemptions to allow youth between the age of 15 and 17 years to open such accounts in their own names. This must be accomplished before December 2019.

<sup>891</sup> The World Bank *NFIS Reference Framework* (2012) also requires the private sector to advance the financial growth of the poor, by developing and delivery of financial products and services, such as mobile phones, and BBAs.

infrastructures.<sup>892</sup> Such coordination is important for both the formulation and execution of the strategies.<sup>893</sup> It recommends that governments and regulators implement reforms that promote financial sector activities and innovations in accordance with the NFIS targets.<sup>894</sup> Possible policy and regulatory actions that may be implemented include regulatory reforms to remove barriers to FI and bottlenecks that impede private sector actions.<sup>895</sup> An example of possible reform is to remove possible barriers to financial service innovations and delivery, as well as barriers that impede access by households and firms to financial services.<sup>896</sup> The reform must balance several objectives. It must be proportional and flexible to allow new business models and innovations to advance FI while also ensuring financial stability and integrity.<sup>897</sup> The regulatory reforms must prioritise strengthening the stability of financial institutions and agents, and the appropriate protection for consumers and depositors. This must enhance the regulatory role of designing and implementing an enabling environment for FI proportionately.<sup>898</sup>

The *NFIS Reference Framework* requires not only policy and regulatory reforms from the government and regulators; they are also required to put financial infrastructures in place.<sup>899</sup> These infrastructures help to complement regulatory reforms. Efficient financial infrastructures are necessary to reduce the costs of financial products and costs that may be incurred by the service providers who offer products and financial systems.<sup>900</sup> They are also necessary for regulatory reforms to promote new financial innovations such as channelling payment through bank accounts and EFTs, and the introduction of low-cost products and delivery models to expand FI.<sup>901</sup>

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<sup>892</sup> World Bank *NFIS Reference Framework* (2012) 13. See also AFI "Strategy Development Organizing for FI" (2012) 1 on the importance of effective coordination.

<sup>893</sup> Mdasha *et al* 2018 *Journal of Strategic Management* 68.

<sup>894</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>895</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>896</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>897</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>898</sup> World Bank *NFIS Reference Framework* (2012) 29.

<sup>899</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>900</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>901</sup> World Bank *NFIS Reference Framework* (2012) 13.

#### **4.2.6.4 Voluntary Private Sector Commitment**

From the analysis of the *NFIS Reference Framework*, it is evident that FI is not the responsibility of governments and regulators alone. Because of the private sector's role in developing and delivering financial products and services, the *NFIS Reference Framework* recommends their active participation in the FI strategic design and target-setting, as well as the monitoring of signs of progress made.<sup>902</sup> It identifies two possible actions that the private sector can take to implement the NFIS. The first involves financial infrastructure development. The private sector can help to achieve national FI targets by introducing products and delivery mechanisms that respond to the needs of the excluded.<sup>903</sup> The second action that the *NFIS Reference Framework* recommends is voluntary private sector commitment through a self-regulatory model of regulation as the effective regulatory method for promoting FI.<sup>904</sup> It encourages banks and other financial institutions to cooperate with relevant government departments and to take a leading role in achieving FI.<sup>905</sup> It specifically recommends the establishment of task forces and coordinating bodies to identify barriers and develop shared objectives for FI.<sup>906</sup> As an example of a voluntary commitment, the *NFIS Reference Framework* recommends that financial institutions develop their FI targets and actions in a charter.<sup>907</sup> In so doing, they are expected to take ownership of their achievements to improve FI in their own interests rather than through external imposition by the regulator.<sup>908</sup> The *NFIS Reference Framework* nevertheless takes cognisance of the possible reluctance of financial institutions to prioritise FI. It encourages voluntary commitments to avoid possible threats of regulation and monitoring from government.<sup>909</sup> While it encourages policy and regulatory reforms, the *NFIS Reference Framework* notes the possible delayed impact and slowing down of FI as a result of the slow pace of regulatory reforms that are not flexible to accommodate FI initiatives.<sup>910</sup> It therefore recommends limited public initiatives and interventions to stimulate

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<sup>902</sup> World Bank *NFIS Reference Framework* (2012) 40.

<sup>903</sup> World Bank *NFIS Reference Framework* (2012) 10. Examples of these products include mobile phone banking, electronic money, microinsurance, and accessible low-income savings accounts, and credits.

<sup>904</sup> World Bank *NFIS Template* (2016) 13.

<sup>905</sup> World Bank *NFIS Template* (2016) 13.

<sup>906</sup> World Bank *NFIS Reference Framework* (2012) 40. See also World Bank *NFIS Template* (2016) 13.

<sup>907</sup> World Bank *NFIS Reference Framework* (2012) 40.

<sup>908</sup> World Bank *NFIS Reference Framework* (2012) 40.

<sup>909</sup> World Bank *NFIS Reference Framework* (2012) 40. See also World Bank *NFIS Template* (2016) 13.

<sup>910</sup> World Bank *NFIS Reference Framework* (2012) 37.

private sector responses. It anticipates possible threats of regulation as an approach to accelerating regulatory reforms to enhance FI. As it posits,

[t]he implicit threat of regulation may...help to ensure financial institutions respond seriously and go beyond their initial comfort zone in rethinking their business models.<sup>911</sup>

The *NFIS Reference Framework* appears to suggest a progressive form of regulation by the private sector to promote FI. As a start, it encourages coordinated efforts to develop voluntary commitments to achieve FI. Where they fail to develop such commitments, it encourages a regulatory step that imposes obligations on financial institutions to provide the necessary products, services, and channels to achieve it.

#### **4.2.6.5 *NFIS Monitoring and Enforcement Mechanisms***

The final component of the *NFIS Reference Framework* deals with the monitoring and implementation of the NFIS.<sup>912</sup> It addresses how to implement the strategies and plans to achieve the main goal of promoting FI. It requires an ongoing monitoring process that assesses the level that a country achieves in reaching the FI targets and objectives outlined in an NFIS. Importantly, it also assesses “the effectiveness of the reforms, products, or delivery mechanisms” that have been introduced.<sup>913</sup> The monitoring process must further assess possible risks that may affect the implementation of the strategies. What the *NFIS Reference Framework* encourages regarding the implementation of the NFIS is simply continuous monitoring of the measures in place to achieve FI.<sup>914</sup> Such monitoring involves global cross-country data drawn from national surveys.<sup>915</sup>

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<sup>911</sup> World Bank *NFIS Reference Framework* (2012) 40.

<sup>912</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>913</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>914</sup> World Bank *NFIS Reference Framework* (2012) 13.

<sup>915</sup> World Bank *NFIS Reference Framework* (2012) 19.

### **4.3 CONTINENTAL FINANCIAL INCLUSION FRAMEWORKS**

#### **4.3.1 The European Union**

##### **4.3.1.1 Financial Exclusion and European Commission Responses**

The regulatory framework to promote FI in the EU arises from a European Commission's (ECom) fact-finding study on the levels, causes, and consequences of FE with specific focus on banking, unsecured credit, and savings.<sup>916</sup> The study identifies, among others, product design and associated costs, and the delivery of these products as causes of FE that merit greater attention.<sup>917</sup> This study draws lessons from developed financial programmes and existing financial products – such as BBAs and financial education tailored to the needs of the low-income society – to tackle FE in various European countries.<sup>918</sup> In particular, it identifies countries such as Germany, France, Poland, Belgium, and Austria which offer low-cost bank accounts.<sup>919</sup> The disparity in regulatory models in these countries aimed at implementing the provisions of these financial services is interesting within the context of this research. The regulatory models for providing financial services, such as bank accounts, range from voluntary undertakings by individual financial institutions as part of their corporate social responsibility (CRS) agenda, to some forms of coercion by their trade associations. Examples are voluntary codes of conduct or charters, legislative mandates by government, or a combination of these models.<sup>920</sup> Several countries in the EU require banks to provide BBAs in their voluntary banking codes and charters.<sup>921</sup> The ECom study aptly observes mixed impacts

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<sup>916</sup> ECom "Financial Services Provision" (2008) 17 and 56. See also ECom "Financial Inclusion - Ensuring Adequate Accesses to Basic Financial Services" *MEMO/08/344* (28 May 2008) par 19 (ECom "Financial Inclusion" *MEMO/08/344*). The study also identified diverse policy responses to address FI in member states. Cf ECom "Special Eurobarometer: Services of General Interest" (2007) [http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs\\_260\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_260_en.pdf) (accessed: 2018-07-29) 22 which identified 88% of EU citizens who access banking services, current accounts in particular. According to the study, there are variations in each of the countries in respect of banking transactions, the level of credit exclusion, and savings.

<sup>917</sup> ECom "Financial Services Provision" (2008) 56.

<sup>918</sup> ECom "Financial Services Provision" (2008) 68-72.

<sup>919</sup> ECom "Financial Services Provision" (2008) 68-72.

<sup>920</sup> ECom "Financial Services Provision" (2008) 63. See also EU DG "Basic Banking Services" (2011) *Briefing Paper P/A/IMCO/NT/2011-16 Nov PE 464.458*.

<sup>921</sup> See Ecom "Financial Services Provision" (2008) for Belgium, Germany, Italy, Netherlands, and the United Kingdom. See also Banking Association of South Africa "Code of Banking Practice" (2012) <https://www.banking.org.za/?s> (accessed: 2021-10-05) par 5 ("BASA *Code of Banking Practice* (2012)"), in terms of which banks commit to providing affordable and accessible basic banking services to all South Africans. See also ABA *Code of Banking Practice* (2019) in terms of

of self-regulation through these voluntary frameworks to promote FI. It also highlights problems relating to the effectiveness of this measure and the lack of enforcement, which have paved the way for the introduction of legislative measures in countries such as France and Belgium.<sup>922</sup>

#### **4.3.1.2 European Commission Policy and Regulatory Recommendations**

The ECom study further highlights the different roles that governments in Europe have played to prevent FE – either as facilitators or legislators in one or more aspects aimed at achieving FI. As facilitators, governments establish task forces to raise awareness, undertake research projects, and propose measures to address FI.<sup>923</sup> In its legislative role, the study identifies three forms of intervention. The following two are important for this research.<sup>924</sup> Governments may design *direct legislation*, which serves to promote FI by imposing the provision of financial services on certain financial providers.<sup>925</sup> Certain governments in the EU have promulgated direct legislative measures that mandate the provisions of financial services. Examples of these pieces of legislation mandate, for example, the provision of BBAs.<sup>926</sup> Another proposed approach is to design *indirect legislation* to remove obstacles that undermine FI.<sup>927</sup> Examples of these types of legislation are the AML/CFT legislative measures which introduce a risk-based tiered KYC obligation to accommodate undocumented low-income clients.<sup>928</sup> The result

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which member banks generally make commitments to provide basic account or no fee account in Australia. See Ch 6.2.3 for the discussion of the BASA *Code of Banking Practice* 2012.

<sup>922</sup> ECom “Financial Services Provision” (2008) 117.

<sup>923</sup> Anderloni and Carluccio in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 41. The UK Financial Inclusion Commission (formerly Financial Inclusion Task Force), which was established to raise awareness of the issues on FE and to propose measures that promote FI to policymakers and legislators, is a typical example. See also Financial Inclusion Commission “Financial Inclusion: Improving the Financial Health of the Nation” (2015) [http://www.financialinclusioncommission.org.uk/pdfs/fic\\_report\\_2015.pdf](http://www.financialinclusioncommission.org.uk/pdfs/fic_report_2015.pdf) (accessed: 2018-08-01) 01. The task force was created in 2005 and has since been disbanded and replaced by the Financial Inclusion Commission from 2011.

<sup>924</sup> The third intervention are positive interventions that serve to encourage the use of banking products such as providing these products free of tax or providing guarantees for credit risks.

<sup>925</sup> ECom “Financial Services Provision” (2008) 98.

<sup>926</sup> See Ch 5.5 below. See, eg, French Banking Act 84-46 of 1984 (unofficial translation). See similar mandates in s 448 of the Canadian Banks Act of 1991 which mandates banks to open low-fee retail bank accounts for individuals who meet the prescribed bank account requirements. See also ECom “Financial Services Provision” (2008).

<sup>927</sup> ECom “Financial Services Provision” (2008) 98.

<sup>928</sup> See the discussion on FATF in Ch 4.2.3 above. See chapter II of the EU “AML/CFT Directives” (2015) which provides for an obligation to conduct a CDD on a risk-sensitive basis and has been transposed into national legislation. Another example of a government incentive includes providing positive incentives that aim to encourage the use of banking products by people at the

of these fragmented policies and legislative responses and the approaches to address FI gave rise to efforts at the integration and consolidation of the regulatory frameworks in the EU. The diversity of policy and regulatory initiatives has played an important role in integrating FI frameworks as part of the European economic integration framework.<sup>929</sup>

The ECom's fact-finding study further identified a number of policy recommendations to address FI. It proposed solutions to address FE through self-regulation by the banking sector or legislative frameworks that focus on BBAs.<sup>930</sup> One of its objectives was to take different approaches to avoid a one-size-fits-all approach in national practices. It identified a possible right of all citizens to a transactional bank account, and the imposition of conditions that would require financial providers to provide "a defined minimum or basic package of transaction bank services to an individual".<sup>931</sup> The recommendations in this study paved a way for regulatory initiatives to FI in the EU. It achieved this by focusing on ensuring that all citizens have access to BBAs as "a gateway to other products like savings, insurance, and credit".<sup>932</sup>

The ECom proposed self-regulation by the industry with a clear and effective monitoring mechanism, particularly in those countries where regulation is not in place.<sup>933</sup> It suggested a soft-law approach in the form of a non-binding recommendation or a communication addressed to member states that stipulates principles and actions to ensure that every EU citizen or resident has access to a BBA.<sup>934</sup> Alternatively, the ECom envisaged binding rules that impose obligations on member states to guarantee access to this type of account. The consultation document became useful in identifying key issues for the promotion of FI. Although it focused on access to a basic payment account, it in effect dealt generally with the

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risk of exclusion, such as the Individual Development Account, a tax-free bank account in the USA. See s 404 of the Personal Responsibility and Work Opportunity Act of 1996. Through the IDA, the government subsidises matched-saving accounts to fund pre-secondary education and first home purchases, and to cover the funding of new business ventures.

<sup>929</sup> Gortsos "Financial Inclusion" (2016) *European Center for Economic and Financial Law Working Paper Series NO 2016/2015* 21. See also Urquijo 2015 *JCES* 109.

<sup>930</sup> ECom "Financial Services Provision" (2008) 114-127.

<sup>931</sup> ECom "Financial Services Provision" (2008) 117-118. Another important proposal made is the provision of an education campaign that provides information on the use of new products.

<sup>932</sup> ECom "Financial Inclusion: Ensuring Access to a Basic Bank Account Consultation Document" Brussels, MARKT/H3/MI D (2009) 5 ("ECom *Basic Banking CD* (2009)"). Basic payment in the the document refers to services such as payments and withdrawals but excludes overdraft facilities. See Ch 6 for the discussion of this product.

<sup>933</sup> ECom *Basic Banking CD* (2009) 13.

<sup>934</sup> ECom *Basic Banking CD* (2009) 13.

promotion of FI. One of the questions that the consultation document asks for opinions or suggestions on is whether FI should cover financial products other than BBAs.<sup>935</sup>

#### **4.3.1.3 Basic Payment Accounts Recommendations**

The current regulatory framework to promote FI and the provision of basic payment accounts follows a proposal made in the Monti Report on *A New Strategy for the Single Market*.<sup>936</sup> The Monti Report identified access to basic services as one avenue by which to achieve effective participation in the EU single market and proposed a regulation “ensuring that all citizens are entitled to a number of basic banking services”.<sup>937</sup> As a result, the ECom issued Basic Payment Account Recommendations (ECom *BPA Recommendations*) in 2011 that provided general principles applicable to the provision of basic payment accounts within the EU.<sup>938</sup> It subsequently issued directives on the same issue after the majority of member states failed to include the principles set out in the recommendations in their national frameworks. Both the recommendations and the directives address similar issues. They, however, have different levels of regulatory force. For this discussion, binding force is important to illustrate the regulatory models for FI by the EU and therefore merits further analysis.

#### **4.3.1.4 The BPA Recommendations and the Enforcement Mechanisms**

The ECom’s *BPA Recommendations* establish general principles on access to a basic payment account with basic features broadly to promote social inclusion.<sup>939</sup> In comparison with the subsequent directives, the binding effect of this document is important. The general policy

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<sup>935</sup> ECom *Basic Banking CD* (2009) 14.

<sup>936</sup> Monti “A New Strategy for the Single Market” (2010) [http://ec.europa.eu/internal\\_market/strategy/docs/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf) (accessed: 2018-09-28). The Presidency of the ECom commissioned this report on obstacles that consumers experienced in the EU member states and to propose measures to overcome them. See also Barroso “Political Guidelines of the Next Commission” (2009) [http://www.sbbe.gr/newsletters/eflashnews/2009\\_21/Barroso\\_Political\\_Guidelines\\_2009.pdf](http://www.sbbe.gr/newsletters/eflashnews/2009_21/Barroso_Political_Guidelines_2009.pdf) (accessed: 2018-08-15) 32.

<sup>937</sup> Monti “A New Strategy for the Single Market” (2010) 74.

<sup>938</sup> ECom “Commission Recommendation of 18 July 2011 on Access to a Basic Payment Account (2011/442/EU)” (21.7.2011) *Official Journal of the European Union* L190/87 recital 4 (ECom “BPA Recommendations” (2011)). This resulted from consultations on the issue, where there was wide support for actions to provide access to a payment account at EU level. See also ECom “Consultation on Access to a Basic Payment Account” (2010) [http://ec.europa.eu/finance/consultations/2010/paymentaccount/docs/access\\_basic\\_payment\\_account\\_en.pdf](http://ec.europa.eu/finance/consultations/2010/paymentaccount/docs/access_basic_payment_account_en.pdf) (accessed: 2018-08-27) 4; Nordic Financial Unions “NFU Response to the Consultation on Access to a Basic Payment Account” (17 Nov 2010).

<sup>939</sup> See recital 2 of the ECom “BPA Recommendations” (2011).



principles of the ECom *BPA Recommendations* require member states to “be in a position to open and use basic payment account”.<sup>940</sup> This policy document provides policy principles on access to a basic payment account with monitoring and compliance procedures. It requires supervisory institutions at national level to implement these principles through a monitoring process.<sup>941</sup> It also requires member states to gather reliable annual statistics on the number of basic payment accounts that have been opened, the number of applications refused, the terminations of basic payment accounts, as well as charges associated with these accounts.<sup>942</sup> They must submit this information to the ECom on an annual basis.<sup>943</sup>

The procedure for the implementation of the principles in the *BPA Recommendations* is remarkable for designing a regulatory framework to promote FI in the EU. These principles generally invited member states to take measures to apply their provisions within six months after it was published.<sup>944</sup> The ECom would then assess and monitor any progress made to implement its provisions and decide on whether there are necessary legislative measures to ensure that states achieve the proposed actions.<sup>945</sup> The *BPA Recommendations* therefore proposed possible legislative measures. The decision to put the necessary legislative measures in place depends on the outcomes of reports about the measures adopted at national level and the outcomes of the monitoring and the assessment of the measures that have been implemented.<sup>946</sup>

The *BPA Recommendations* did not bear the expected fruits in promoting FI through access to basic payment accounts. By the deadline for submission of information in July 2012 regarding the number of accounts opened or refused, only three member states - Belgium, France, and Italy - had complied with the *BPA Recommendations*.<sup>947</sup> A further consultative

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<sup>940</sup> See recital 7 of the ECom “BPA Recommendations” (2011).

<sup>941</sup> See recital 17 of the ECom “BPA Recommendations” (2011).

<sup>942</sup> See recital 17 of the ECom “BPA Recommendations” (2011). See also par 18. The first submission was due on 1 July 2012.

<sup>943</sup> See recital 18 of the ECom “BPA Recommendations” (2011). See also par 19.

<sup>944</sup> See recital 18 of the ECom “BPA Recommendations” (2011). The date of its publication was 18 July 2011.

<sup>945</sup> See recital 19 of the ECom “BPA Recommendations” (2011).

<sup>946</sup> See recital 19 of the ECom “BPA Recommendations” (2011).

<sup>947</sup> ECom “Proposal for a Directive on the Comparability of Fees Related to Payment Accounts Payment Account Switching and Access to Payment Account with Basic Features” (8 May 2012) *COM(2013)266* 5 <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52013PC0266&from=EN> (accessed: 2018-08-12) (ECom “PAD Proposal” (2012) *COM(2013)266*). See further European Parliament “Report with Recommendations to the Commission on Access to

process became necessary to consider further steps to promote access to basic payment accounts. This received mixed reactions. The financial service industry and other member states took a position that the then national regulatory measures did not create obstacles to the provision of this service, as they adhered to national frameworks and the ECom Recommendations.<sup>948</sup> They found it unnecessary for any further regulatory action as the *BPA Recommendations* are sufficient to ensure that consumers access basic payment accounts.<sup>949</sup> The financial service industry took the position that measures at the national level were adequate. Consumers and representatives of civil society took a different view. They were not satisfied with the existing position regarding access to basic account services.<sup>950</sup> They strongly supported an initiative at EU level, but suggested a legislative measure that would provide some form of flexibility.<sup>951</sup> The EU took the latter's view and issued the PAD in July 2012.<sup>952</sup>

The PAD<sup>953</sup> is important for the regulation of FI in the EU. It refers broadly to financial inclusion,<sup>954</sup> banking inclusion,<sup>955</sup> and the reduction of consumer exclusion<sup>956</sup> in its specific regulation of access to basic payment accounts.<sup>957</sup> It regulates three key objectives that mutually reinforce the EU's regional integration and single market agenda. These include access to payment accounts in Chapter IV.<sup>958</sup>

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Basic Banking Services" (2012) 2012/2055(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0293+0+DOC+PDF+V0//EN> (accessed: 2018-08-07).

<sup>948</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 6.

<sup>949</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 6.

<sup>950</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 6.

<sup>951</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 7.

<sup>952</sup> See The EU Parliament "European Parliament Resolution of 4 July 2012 with Recommendations to the Commission on Access to Basic Banking Services" (2012/2055(INI)) (2012) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0293+0+DOC+PDF+V0//EN> (accessed: 2018-08-07).

<sup>953</sup> Directive 2014/92/EU of The European Parliament and of the Council of 23 July 2014 on the Comparability of Fees Related to Payment Accounts, Payment Account Switching and Access Payment Accounts with Basic Features (28 August 2014) *Official Journal of the European Union* L 257/214 (EU "PAD" (2014)).

<sup>954</sup> Recital 54 of the EU "PAD" (2014).

<sup>955</sup> Article 18(4) and 28(1)(j) of the EU "PAD" (2014).

<sup>956</sup> Article 28(1) of the EU "PAD" (2014).

<sup>957</sup> See also ECom "PAD Proposal" (2012) *COM(2013)266* par 6.

<sup>958</sup> See Articles 15-20 of the EU "PAD" (2014). See also Chapter II Articles 03-08 of the EU "PAD" (2014) which deals with the regulation of comparability of fees connected to payment accounts, particularly the transparency of fees charged for accessing and using payment accounts. See further Chapter III (Articles 09-13) of the EU "PAD" (2014) that deals with the opportunity for switching of accounts, including cross-border accounts, by transferring information regarding the payment account from one service provider to another on the customer's request without closing the account. See, in addition, Braunroth "One Year of Consumer Access to Payment Accounts -

Chapter IV regulates access to basic payment accounts in the form of promotional regulatory measures that are intended to remove barriers to access to such accounts.<sup>959</sup> It establishes a right of access to basic payment accounts. Article 16 of PAD requires EU member states to ensure that all or a sufficient number of banks guarantee access to basic payment accounts.<sup>960</sup> Article 16(2) specifically requires them to ensure that consumers “have the right to open and use a payment account with basic features with credit institutions located in their territory”. It also requires them to ensure that such access is not difficult for the consumers.<sup>961</sup> It further requires states to implement national measures to ensure that banks approve applications for these accounts without delay or at least within ten days of application.<sup>962</sup>

PAD generally requires member states to identify cases where banks may refuse applications for basic payment accounts.<sup>963</sup> For instance, a bank may refuse the application for an account where a consumer already has a similar payment account with another bank.<sup>964</sup> Banks may therefore open an account for such a customer once the existing account has been closed.

The PAD identifies limited barriers that may prevent the right to basic payment accounts. For instance, it requires members to ensure that banks do not discriminate against consumers when they apply for an account on one or more of the prohibited grounds.<sup>965</sup>

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A New Dimension of European Anti-Discrimination Law?” 2018 14 *European Review of Contract Law* 1 for the discussion of these objectives.

<sup>959</sup> See Articles 17 and 18 for the main characteristics of a payment account with basic features. See Ch 6.4.2 below where various features of basic payment accounts are discussed in order to identify how a framework for providing this account can effectively address the challenges of accessing banking accounts.

<sup>960</sup> See Article 16(1) of the EU “PAD” (2014). It refers to “credit institutions” which are defined as “an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account”. See the definition in Article 4(1) of Regulation (EU) No 575/2013 of Prudential Requirements for Credit Institutions and Investment Firms (27.6.2013) *Official Journal of the European Union* L176/ 1. In these regulations, “credit institutions”, “banks”, and “financial institutions” are used interchangeably in this section to refer to the institutions upon which the EU “PAD” (2014) imposes the duty to give access to basic payment accounts.

<sup>961</sup> Article 16(2).

<sup>962</sup> Article 16(2).

<sup>963</sup> Article 16(6).

<sup>964</sup> Article 16(5). See Article 15 of EU “PAD” (2014) read with Charter of Fundamental Rights of the European Union (2000/C364/01) 8.12.2000 *Official Journal of the European Communities* C 364/1.

<sup>965</sup> See Article 15 of the EU “PAD” (2014), read with Charter of Fundamental Rights of the European Union (2000/C364/01) 8.12.2000 *Official Journal of the European Communities* C 364/1. The listed grounds are sex, race, colour, ethnic or social origin, genetic features, language, religion

The PAD specifically identifies FI challenges that arise from an overly cautious application of the AML/CFT measures. It generally requires member states to impose obligations on banks to refuse to offer accounts where to do so would infringe the EU's AML/CFT Directive.<sup>966</sup> It nevertheless requires banks to take the provisions of the EU AML/CFT Directive into account, particularly the adverse impact this Directive may have on efforts to promote FI if they apply its provisions with excessive caution.<sup>967</sup> As a balancing exercise between the promotion of FI and the AML/CFT measures, PAD requires member states to guarantee that AML/CFT regulations do not inhibit the provision of these accounts. It specifically requires them to ensure that banks adopt the appropriate CDD and reporting measures in accordance with the AML/CFT Directives.<sup>968</sup> This aims to address the challenges that a strict application of the AML/CFT obligations may have on customers' eligibility to open a bank account, particularly where some people are unable to satisfy the identification requirements.<sup>969</sup> Article 16(2) overcomes these barriers by imposing a duty on member states to provide access to basic payment accounts for all consumers who are legally resident within EU countries. It specifically requires member states to ensure that all consumers are legally resident in the EU countries and those who have not been granted permanent residence, or have no fixed address, or asylum seekers also have the right to open such account with a bank in their home states.<sup>970</sup>

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or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation. See further Braunroth 2018 *European Review of Contract Law* 1 who compares the grounds of discrimination in EU "PAD" (2014) and those in the Charter, and the PAD's provision of a "consumer-specific non-discrimination right".

<sup>966</sup> Article 16(4). See EU "AML/CFT Directives" (2015).

<sup>967</sup> Urquijo 2015 *JCES* 109.

<sup>968</sup> Article 16(8).

<sup>969</sup> ECom *Basic Banking CD* (2009) 6. According to Thind and Wyatt "Payment Accounts Directive: The AML Challenges for Banks" 2016 *E-Finance & Payments Law & Policy* 01 03, these provisions create potential clashes with AML/CFT controls, particularly when a person without a fixed address may open an account without the standard documentation.

<sup>970</sup> As regards asylum seekers, it must be proved that their expulsion is impossible. See Braunroth 2018 *European Review of Contract Law* 10 who identifies the definition of legal residence in the "EU PAD" (2014) as unprecedented taking that the standard definitions of these concepts in other EU regulations excludes non-EU migrant consumers.

#### **4.3.1.5 The PAD Enforcement, Institutional Coordination and Cooperation**

##### (a) Monitoring and Enforcement

The EU adopts a unique regulatory style and enforcement mechanisms to guarantee the effectiveness of its regulatory instruments. To identify whether or not the legislature may impose a binding or non-binding legislative measure, the effectiveness and type of the relevant legal instrument are important. In addition, the effectiveness of the enforcement mechanisms applied to a particular instrument depends on the EU's legislative process that starts with less intrusive forms of regulation before moving to more stringent ones that reinforce this hierarchical escalation.

The EU promotes FI within the context of its single or internal market strategy which integrates various infrastructural and policy frameworks in various areas including the economic sector.<sup>971</sup> Article 26(2) of the Treaty on the Functioning of the European Union (the TFEU) requires the EU to adopt measures that establish the functioning of the internal market.<sup>972</sup> The TFEU does not specifically provide for the hierarchy of legal acts, and it also does not give any preference to a particular legislative instrument. The EU Council has formulated a general principle that helps to determine the hierarchy of existing legislative instruments. It proposed that the form of action should be as simple as possible and be able to achieve the objective of the measures and the need for effective enforcement.<sup>973</sup> The EU requires any legislative action that it takes at the regional level to be cost-effective and to "take the lightest form of

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<sup>971</sup> ECom "A Deeper and Fairer: Single Market" (Nd) [www.consilium.europa.eu](http://www.consilium.europa.eu) (accessed 2018-07-27). See Article 13 of the Single European Act 29.6.87 *Official Journal of the European Communities* No L169/2. "Integration" is defined in this context as a state of affairs or a process that involves efforts to combine separate national economies into larger economic regions. See further Koester "Market Integration: How It Works" in Burrell and Oskam (eds) *Agricultural Policy and Enlargement of the European Union* (2000) 1.

<sup>972</sup> Treaty on the Functioning of the European Union 26-10-2012 *Official Journal of the European Union* C326/5 (TFEU). See Article 26(1) and (2). The internal market comprises "an area without internal frontiers in which the free movements of goods, persons, services and capital is ensured". See also Urquijo 2015 *JCES* 100 for a detailed discussion of various efforts at EU level to promote FI. In terms of Article 1 of the TFEU, the European Union is founded on the Treaty of the European Union (26.10.2012) *Official Journal of the European Union* C326/13 and the TFEU, which have the same legal force.

<sup>973</sup> Anon "Conclusion of the Presidency European Council in Edinburgh" (11-12 December 1992) [https://www.consilium.europa.eu/media/20492/1992\\_december\\_-\\_edinburgh\\_eng\\_.pdf](https://www.consilium.europa.eu/media/20492/1992_december_-_edinburgh_eng_.pdf) (accessed: 2018 09-14).

regulation".<sup>974</sup> This means that non-binding measures should be preferred where appropriate, and a directive should be preferred over regulations.<sup>975</sup> Preference is therefore given first to the least coercive and peremptory instruments to achieve the intended objectives.<sup>976</sup>

Different measures are available and can be applied in the EU's legislative process. They include recommendations, opinions, regulations, directives, and decisions.<sup>977</sup> Only regulations, directives, and decisions are binding. While decisions and regulations are binding in their entirety, directives are binding only as regard the intended results. Notably, directives provide member states with a choice to determine the forms and methods to be adopted when they transpose their provisions into national laws. Directives allow for different approaches for their implementation.<sup>978</sup> Regulations are the strictest legislative options as they are directly applicable to all members.<sup>979</sup> They are directly effective and do not require additional implementation measures.<sup>980</sup>

As indicated above,<sup>981</sup> the process for the development of PAD started with the *BPA Recommendations*.<sup>982</sup> It was followed by the PAD after *Recommendations* proved ineffective. This is a typical example of the legislative hierarchy in the EU to ensure the effective regulation of FI and access to a basic payment account. In the process of achieving its main purpose of integration, the ECom first adopted non-binding recommendations that impose an obligation on a member state to ensure that every consumer "has the right to open and use a basic

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<sup>974</sup> ECom "Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Implementing the Community Lisbon Programmer: A Strategy for the Simplification of the Regulatory Environment" (25.10.2005) *COM(2005)* 535 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0488:FIN:en:PDF> (accessed: 2018-09-14).

<sup>975</sup> Anon "Conclusion of the Presidency European Council in Edinburg" (11-12 December 1992) 21. See also Korkea-aho "EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?" 2009 16 *Maastricht Journal of European and Comparative Law* 271 272.

<sup>976</sup> Lenaerts and Desomer "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures" 2005 11 *European Law Journal* 744 758. See also Korkea-aho 2009 *Maastricht Journal of European and Comparative Law* 272.

<sup>977</sup> Article 288 of the TFEU. See also Rotondo "The Legal Effect of EU Regulations" 2013 29 *Computer Law and Security Review* 437.

<sup>978</sup> Rotondo 2013 *Computer law and Security Review* 438.

<sup>979</sup> Article 288. See Nikčević and Parlić "The Legal Effects of EU Directive Through Its Interpretation" 2013 10 *Singidunum Journal of Applied Science* 11 on the legal effects of each instrument.

<sup>980</sup> Rotondo 2013 *Computer law and Security Review* 438.

<sup>981</sup> See Ch 4.3.4.1 above.

<sup>982</sup> See Ch 4.3.3 above.

payment account with a payment service provider operating in their territory".<sup>983</sup> Measures to implement its provisions are reinforced through supervisory review at the national level.<sup>984</sup> The *BPA Recommendations* require member states to provide the ECom with information on the number of basic payment accounts that have been opened, the number of applications for basic payment accounts refused, and the grounds for such refusals, on an annual basis.<sup>985</sup> Member states are further required to take the necessary measures to ensure the application of the *BPA Recommendations* six months after their publication.<sup>986</sup> The ECom uses this information to determine whether it is necessary to propose legislative action to achieve its main objectives.<sup>987</sup>

The EU adopted PAD as a direct result of the information submitted to the ECom. Recital 8 of PAD clearly indicated that at the date of its adoption only a few member states complied with the principles laid down in the *BPA Recommendations*.<sup>988</sup> The EU discovered that some member states had adopted measures that were not legislative acts but self-regulatory actions "impacting those banks which voluntarily chose to adhere to the principles in question".<sup>989</sup> This necessitated binding legislation to ensure the right of access to a payment account with basic features for every EU consumer.<sup>990</sup> It further discovered that self-regulation applied in member states was unsuccessful due to a lack of monitoring and enforcement.<sup>991</sup> A directive was therefore an appropriate measure, as it is binding and allows for the implementation of its objectives according to national specifications.<sup>992</sup>

The PAD further provides measures to implement and enforce its provisions, and they help to determine the effectiveness and responsiveness of the current FI measures. These measures include member states' submissions of evaluation reports to the ECom relating to their compliance with its provisions,<sup>993</sup> reviews on the application of the Directive,<sup>994</sup> and the

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<sup>983</sup> ECom "BPA Recommendations" (2011) par 2.

<sup>984</sup> ECom "BPA Recommendations" (2011) par 17.

<sup>985</sup> ECom "BPA Recommendations" (2011) par 19. The first annual report was due on 1 July 2012.

<sup>986</sup> ECom "BPA Recommendations" (2011) par 20.

<sup>987</sup> ECom "BPA Recommendations" (2011) par 19.

<sup>988</sup> See ECom "PAD Proposal" (2012) *COM(2013)266* par 4.

<sup>989</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 4.

<sup>990</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 8.

<sup>991</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 10.

<sup>992</sup> ECom "PAD Proposal" (2012) *COM(2013)266* par 10.

<sup>993</sup> Article 27.

<sup>994</sup> Article 28.

deadline for the transposition of the Directive into national law.<sup>995</sup> Member states were generally required to adopt and publish the necessary regulatory measures to comply with this directive and to communicate these measures to the Commission by 18 September 2016.<sup>996</sup> By May 2018, 96% member states had communicated their full implementation of the Directives.<sup>997</sup> Although this marks a success for the adoption of these regulatory measures, the transposition of the PAD's provisions into national laws is not the end. Article 27 requires member states to provide information generally on compliance with the provisions of the Directive. This includes information on the number of accounts opened, the number of applications refused, and the number of institutions offering the account.<sup>998</sup> The first submissions of this information to the ECom were due by 18 September 2018, and every two years thereafter.<sup>999</sup>

A review process follows the submission of the information.<sup>1000</sup> The ECom was required to submit the information to the European Parliament (E-Parl) for review by 18 September 2019.<sup>1001</sup> The purpose of the review is to assess the achievements already made with regard to the implementation of the Directive.<sup>1002</sup> Importantly, the review assesses the "effectiveness of existing measures and the need for additional measures to increase financial inclusion".<sup>1003</sup> The PAD was therefore not intended to be the end of the regulation of access to the payment accounts.

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<sup>995</sup> Article 29.

<sup>996</sup> Article 29. See Article 29(2)(a) which identifies different timelines for other provisions of the Directives.

<sup>997</sup> See ECom "Payment Accounts Directive - Transposition Status" (2018) [https://ec.europa.eu/info/publications/payment-accounts-directive-transposition-status\\_en](https://ec.europa.eu/info/publications/payment-accounts-directive-transposition-status_en) (accessed: 2019-02-03). Twenty seven member states of the EU. See, eg, Financial Services and Markets: The Payment Accounts Regulations NO 2038 2015 (UK) ("UK Payment Accounts Regulations (2015)"); European Union (Payment Accounts) Regulations SI No 482 of 2016 (Ireland); Credit Institutions and Financial Institutions (Payment Accounts) Regulations Subsidiary Legislation 371.18 (7 December 2016) *Legal Notice* 411 of 2016. Only 5 members failed to communicate such compliance by the due date. See ECom "Payment Accounts: Commission Refers Spain to the Court for Failure to Implement Payment Accounts Rules" (2017) *Press Release* [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_17\\_3498](https://ec.europa.eu/commission/presscorner/detail/en/ip_17_3498) (accessed: 2022-04-23).

<sup>998</sup> Article 27(1).

<sup>999</sup> Article 27(1).

<sup>1000</sup> Article 28(1).

<sup>1001</sup> Article 28(1).

<sup>1002</sup> Article 28(1).

<sup>1003</sup> Article 28(1)(j).



A review process proposed in this Directive further reinforces the promotion of access to payment accounts. Article 28 required the ECom to submit a report on the application of PAD to the E-Parl and the EU Council by 18 September 2019. This report had to include, among others, an assessment of the number of credit institutions offering payment accounts with basic features.<sup>1004</sup> More importantly, the report had also to include the “assessment of the effectiveness of existing measures”.<sup>1005</sup> The reports in terms of Article 28 that must be submitted to the E-Parl on the application of PAD must also provide if it is necessary for a legislative proposal. The information on the assessment of the effectiveness of the existing measures assists to determine whether there is “the need for additional measures to increase financial inclusion”.<sup>1006</sup>

From the wording of Article 29(1) it is clear that the ECom may adopt other regulatory measures to ensure the effective implementation of its provisions, but that it may only take this step after assessing whether PAD has been effectively transposed and implemented at national levels. The PAD required that the reports to be submitted to the E-Parl on its application be accompanied by a “legislative proposal”, if appropriate.<sup>1007</sup> The EU may, therefore, introduce a new regulatory measure if the PAD is not effective in providing access to payment accounts. These assessment and transposition provisions in the PAD illustrate how the EU uses PAD as a benchmark to increase FI through a regulatory framework. It also serves to indicate that putting regulatory measures in place is not an end to the achievement of FI. The EU continuously assesses existing measures to review their impact and to suggest possible effective measures. In the latest report, ECom established that 85% of EU member states had transposed PAD through national legislation.<sup>1008</sup> Therefore, it did not recommend any additional legislative proposal.

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<sup>1004</sup> Article 28(1)(g).

<sup>1005</sup> Article 28(1)(j).

<sup>1006</sup> Article 28(1)(j).

<sup>1007</sup> See recital 54 and Article 28 of PAD.

<sup>1008</sup> ECom “Study on EU Payment Accounts Market” (2020) <https://op.europa.eu/en/publication-detail/-/publication/0854f727-6117-11eb-814601aa75ed71a1/language-en> (accessed: 2022-04-23) 4.

## (b) Institutional Cooperation and Coordination

As an important measure to ensure effective enforcement, the PAD provides for coordination between designated competent authorities empowered to enforce it.<sup>1009</sup> It specifically requires each member state to designate different competent authorities empowered to enforce the wide-ranging obligations laid down in this Directive, such as relevant authorities to enforce consumer protection and others for prudential supervision.<sup>1010</sup> Article 22 of the PAD requires competent authorities in EU member states to cooperate with each other to fulfil the duties assigned to them.<sup>1011</sup> They are required to exchange information and cooperate in any investigation or supervisory activities.<sup>1012</sup> As a measure to facilitate and accelerate cooperation, the PAD requires each member state to designate a single competent authority that will serve as a contact and service point to exchange information with other competent authorities.<sup>1013</sup> The PAD, however, specifically warns against the designation of competent authorities that affect ongoing supervision and cooperation between different competent authorities.<sup>1014</sup>

### 4.3.2 African Union (AU)

#### 4.3.2.1 Lack of Concrete Financial Inclusion Regulatory Measures

There is currently no continental regulatory framework akin to the PAD in the EU, for FI that is effectively enforceable in Africa. Instead of putting efforts into regulating and developing policies that specifically deal with economic and trade-related aspects at the continental level, the AU adopted a regional integration approach and established Regional Economic Communities (RECs) as its building blocks.<sup>1015</sup> As a result, it adopted a stage-pronged

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<sup>1009</sup> See recital 51 of the EU "PAD" (2014).

<sup>1010</sup> See recital 51 of the EU "PAD" (2014).

<sup>1011</sup> See recital 51 of the EU "PAD" (2014).

<sup>1012</sup> See Article 22(1) of the EU "PAD" (2014).

<sup>1013</sup> See Article 22(1) of the EU "PAD" (2014).

<sup>1014</sup> See Article 22(1) and (3) of the EU "PAD" (2014).

<sup>1015</sup> See recital 51 of the EU "PAD" (2014). On designated competent authorities that are service points in the UK and Ireland, see Ch 5.5.2.2 below.

<sup>1015</sup> Organisation of African Unity "The Treaty Establishing an African Economic Community" (3 June 1991) Abuja Nigeria ("AEC Treaty"). The Treaty was signed in 1991 and entered into force in 1994 after the required number of ratifications. See the Preamble to the OAU "Monrovia Declaration of Commitments of the Heads of State and Government of the Organisation of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic Development for the Establishment of a new International Economic Order" (July 1979)

approach to overcome the challenges that the continent experiences in the areas of finance, trade, and economic growth.<sup>1016</sup> The Treaty Establishing an African Economic Community (the AEC Treaty) established the African Economic Community (AEC) and the existing RECs including COMESA, ECOWAS, and SADCC (now SADC) that formed these building blocks.<sup>1017</sup> The AEC Treaty's stage-pronged approach establishes the AEC gradually in six stages of variable duration over a transitional period that must not exceed thirty-four years.<sup>1018</sup> These

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*AHG/ST.3 (XVI) Rev.1* ("The Monrovia Declaration") par 2. See also Jiboku "The Challenges of Regional Economic Integration in Africa: Theory and Reality" 2015 3 *Africa's Public Services Delivery & Performance Review* 19. On the shortcomings of the Monrovia Declaration see Sekgoma "The Lagos Plan of Action and Some Aspects of Development in Sierra Leone" 1994 8 *PULA: Botswana Journal of African Studies* 68. The AEC Treaty was developed due to the need for urgent action to provide political support and successful measures to achieve economic growth. Member states who signed the 1979 Monrovia Declaration committed to establishing national, sub-regional, and regional institutions to achieve economic integration in a self-reliant and self-sustainable manner. This was followed by the adoption of concrete measures to strengthen the existing regional economic communities, to establish other economic groupings in other regions of Africa, and to ensure economic, social, and cultural integration.

<sup>1016</sup> The Constitutive Act of the African Union (11 July 2000). See also Biswano *Perspectives on African Integration and Cooperation from OAU to AU* (2004) 46-49; Van der Mei "The Ordeal of African Unity: Past Present and the Future of the African Union" in Ott and Vos (eds) *Fifty Years of European Integration* (2009) 389; Nkrumah *Axioms of Kwame Nkrumah* (1967) 77. See further Biney *The Political and Social Thoughts of Kwame Nkrumah* (2011) 3 on the vision of Africa shared by NKwame Nkrumah.

<sup>1017</sup> The Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA)(1993), the Economic Community of West African States (ECOWAS) (1975), the Economic Community for Central African States (ECCAS)(1983), and the Southern Africa Development Community (SADC)(1980). See Genge, Kornegay and Rule "Formation of the African Union, African Economic Community and Pan-African Parliament" (2000) African Union and Pan-African Parliament: Working Papers <http://unpan1.un.org/intradoc/groups/public/documents/idep/unpan003885.pdf> (accessed: 2018-07-04). See Article 2 read with Article 4 of the AEC Treaty. Article 88(1) of the AEC Treaty forms the AEC through the coordination, harmonisation, and progressive integration of the RECs. That is, the existing RECs will become the building blocks that form the AEC. See Van der Mei in Ott and Vos *Fifty Years of European Integration* (2009) 390.

<sup>1018</sup> These stages are: first, establishing the AEC by strengthening existing RECs and establishing new ones; the second, third, and fourth stages deal with the harmonisation of the law on tariffs and tariff-related barriers among the RECS, and the establishment of free trade areas and customs unions, see Article 6(5) of the AEC Treaty. The Treaty set specific target dates by which each stage must be achieved. See Kouassi "The Itinerary of the African Integration Process: An Overview of the Historical Landmarks" 2007 1 *African Integration Review* 1 5-7; Nyirabu "Appraising Regional Integration in Southern Africa" 2004 13 *African Security Studies* 21 22-23. See further Olubomehin and Kawonishe *The African Union and the Challenges of Regional Integration in Africa* Paper Presented at the African Renewal, African Renaissance: New Perspectives on Africa's Past and Africa's Present, Annual Conference 26-28 November 2004, University of Western Australia 4; Tavares and Tang "Regional Economic Integration in Africa: Impediments to Progress?" 2011 18 *South African Journal of International Affairs* 217 222. The OAU "Sirte Declaration: Fourth Extraordinary Session of the Assembly of Heads of State and Government 8-9 September 1999 Sirte Libya 2, however, sought to shorten the period for implementing the AEC Treaty by ensuring the speedy establishment of all the institutions provided in the Treaty including the Pan African Parliament and the African Central Bank. See

stages include the establishment of the African Central Bank; the African Monetary Fund; and the African Investment Bank.<sup>1019</sup> None of these institutions have been practically established.<sup>1020</sup> This will delay the AU's development of regulatory frameworks to enhance economic and financial growth, including FI.

#### **4.3.2.2 AU Financial Inclusion Initiatives**

##### (a) The AU Commission's Financial Inclusion Strategy

The Constitutive Act of the AU established the Commission as the executive body of the AU.<sup>1021</sup> Despite the delay to fully establish the relevant financial institutions, in 2012 the AU Commission commissioned a study on the *Development of Postal Financial Services as a Strategy to Increase the Inclusion of Low-Income Populations*.<sup>1022</sup> The study, in general, identified FI as a priority to reduce poverty on the continent.<sup>1023</sup> It acknowledges various

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Mohammed "Towards an Effective African Union: Participation, Institution, and Leadership" in Adejumobi and Olukoshi (eds) *The African Union and the New Strategies* (2008) 82.

<sup>1019</sup> On the proposal to introduce these institutions and their purposes see AU "Financial Inclusions (Nd) <https://au.int/en/ea/epr/auafi> (accessed: 2022-04-23).

<sup>1020</sup> OAU "Sirte Declaration" (1999). See also Kouassi 2007 1 *African Integration Review* 7-8. With regard to the establishment of the African Investment Bank, see AU Protocol on the Establishment of the Establishment of the African Monetary Fund, Adopted by the twenty-third Ordinary Session of the Assembly, Addis Malabo, Equatorial Guinea (27 June 2014). With regard to the establishment of the African Monetary Fund, see Protocol on the Establishment of the African Monetary Fund, Adopted by the Twenty-third Ordinary Session of the Assembly, Addis Malabo, Equatorial Guinea (27 June 2014). Only one country (Chad) had ratified the Protocol as at 28/06/2019. See AU "List of Countries which have Signed, Ratified/Accessed to the Protocol on the Establishment of the African Monetary Fund" (08 June 2019) <https://au.int/sites/default/files/treaties/36417-sl-PROTOCOL%20ON%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20MONETARY%20FUND.pdf> (accessed: 2022-06-03). See further AU: Directorate of Information and Communication "The African Central Bank Project Presented During the First Ordinary Meeting of the Bureau of the African Central Bank Association (AACB) held in Dakar, Senegal" (23 February 2018) *Press Release 031/2018* <https://au.int/en/pressreleases/20180223/african-central-bank-project-presented-during-first-ordinary-meeting-bureau> (accessed: 2022-06-03); AU *African Union Handbook 2018* 5th ed (2018) 130; Vickers *A Handbook on Regional Integration in Africa* (2017) 45; Mashigo "An African Monetary Fund Could Help Continent Reach Financial Stability" (2020-06-07) *Business Day* <https://www.businesslive.co.za/bd/opinion/2020-06-07-an-african-monetary-fund-could-help-continent-reach-financial-stability/> (accessed: 2021-03-31).

<sup>1021</sup> Articles 5 and 20.

<sup>1022</sup> AU Commission "Development of Postal Financial Services in Africa: Strategies to Increase Inclusion of Low-Income Populations" (2012) [https://au.int/sites/default/files/newsevents/workingdocuments/27221-wd-auc\\_min\\_concl\\_020312\\_hb.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/27221-wd-auc_min_concl_020312_hb.pdf) (accessed: 2018-08-04) (AU Commission *Development of Post Financial Services* (2012)).

<sup>1023</sup> See AU Commission *Development of Postal Financial Services* (2012) 2-3.

efforts that African governments and the national financial sectors have made to improve FI.<sup>1024</sup> The study specifically identifies insufficient infrastructure for physical access to financial services as the key concern for FI.<sup>1025</sup> Although the study identifies the challenges of using the number of post offices in Africa to increase FI for the low-income population, it highlights key initiatives that the AU must adopt to achieve FI with reference to postal service infrastructures. With specific reference to the efforts that have been taken at the continental level, it identifies the improvement of access to financial services that require “strong commitment from all stakeholders, including the African Union, RECs, and AU member states”.<sup>1026</sup> In particular, the AU Commission requires the AU in collaboration with RECs to propose a minimum set of policies and strategies including the legal, regulatory, and operational framework to leverage existing postal infrastructures for access to financial services in Africa.<sup>1027</sup>

(b) The Agenda 2063

Despite the lack of a specific legal regulatory and operational framework to provide access to financial services in Africa, the AU also continues to strive to promote FI as one of its aspirations for the realisation of its *Agenda 2063*.<sup>1028</sup> *Agenda 2063* identifies various aspirations that the AU hopes to achieve, and this involve creating an enabling environment “that advances financial inclusion...through innovative financial mechanism” by the year 2063.<sup>1029</sup> The AU Commission plans to achieve these aspirations either at the national, regional, or continental level.<sup>1030</sup> As one of its aspirations, the *Agenda 2063* aims to create Africa as a strong, united, resilient, and influential global partner and player.<sup>1031</sup> However, the AU sets to achieve these goals at the national level. It does not provide policies to achieve

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<sup>1024</sup> AU Commission *Development of Postal Financial Services* (2012) 2.

<sup>1025</sup> AU Commission *Development of Postal Financial Services* (2012) 2.

<sup>1026</sup> AU Commission *Development of Postal Financial Services* (2012) 11.

<sup>1027</sup> AU Commission *Development of Postal Financial Services* (2012) 12.

<sup>1028</sup> AU Commission “Agenda 2063: The Africa We Want” (2015) <http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> (accessed: 2018-08-07) (AU *Agenda 2063* (2015)). For the discussion of this document, see Vickers *A Handbook on Regional Integration* (2017) 47; Muchie and Gumede “Is it Still ‘Unite or Perish’ Time in Africa” in Muchie, Gumede, Lukhele-Olorunju and Demissie (eds) *Unite or Perish: Africa Fifty Years After the Founding of the OAU* (2014) xvii who argue that the year 2063 as a target for African unity is set too far in the future.

<sup>1029</sup> AU *Agenda 2063* (2015) 2 read with 81-83..

<sup>1030</sup> AU *Agenda 2063* (2015) 13. See also Vickers *A Handbook on Regional Integration* (2017) 47-48.

<sup>1031</sup> See Aspiration 7 of the AU *Agenda 2063* (2015) 80.

this at the continental level or by the RECs. The absence of concrete commitments has stalled progress in establishing a regulatory framework to promote FI by the AU. Also, the delay in achieving the AU's institutional targets has implications for the proposed AU's efforts to establish a minimum set of policies and strategies, and legal and regulatory frameworks for access to financial services in Africa, and to work, in collaboration with the RECs and the AU members, towards FI as an aspiration in *Agenda 2063*.<sup>1032</sup> The current approach to economic integration in Africa has not prioritised access to financial services. The delays in realising the six stages to such integration also cast doubts on whether the AU will prioritise FI in the near future.

(c) Women Financial and Economic Inclusion Declaration

FI continues to form an important part of the AU's socio-economic policy agenda. In February 2020 the AU declared 2020 to 2030 as "a new Decade of Women's Financial and Economic Inclusion".<sup>1033</sup> The declaration is a commitment by African leaders "to scale up actions for the progressive gender inclusion towards sustainable development at the national, regional and continental levels". The aim of the declaration is to unlock the unexploited potential of individuals and businesses who are currently excluded from or underserved by the formal financial sector. This will allow them to build capacity, engage in income-generating activities, and manage risks associated with their livelihoods. The AU identifies examining the regulatory, legislative, and policy contexts as the necessary steps "to determine the changes needed to foster the FI of women and to assist financial institutions in adopting approaches tailored to women". As the AU Commission cannot implement these efforts on its own, it specifically outlines the role that member states and regional blocs (RECs) can play through the financial sector, such as banking, to achieve women's FI and empowerment. What is evident from the declaration is that FI initiatives focus only on women's equality and empowerment and not on promoting FI for everyone on the African continent.

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<sup>1032</sup> AU Commission *Development of Postal Financial Services* (2012) 12.

<sup>1033</sup> AU: Directorate of Information & Communication "A New Decade of Women's Financial and Economic Inclusion; Why Scaling up Actions is Inevitable" (2020) <https://au.int/en/pressreleases/20200615/new-decade-womens-financial-and-economic-inclusion-whyscaling-actions#:~:text=Their%20efforts%20translated%20into%20the,national%2C%20regional%20and%20continental%20levels> (accessed: 2022-04-23).

## 4.4 REGIONAL FINANCIAL INCLUSION FRAMEWORK: SADC AS A BENCHMARK

### 4.4.1 Financial Inclusion in the SADC Region

As discussed above, the AU adopted a regional integration approach and established Regional Economic Communities (RECs) as its building blocks to advance economic and trade-related policies and programmes.<sup>1034</sup> SADC is one of the RECs recognised by the AU, and South Africa is one of its members.<sup>1035</sup> One of the purposes of the SADC is to promote sustainable and equitable economic growth and socio-economic development to alleviate poverty and to improve the standards and quality of life of people through regional integration.<sup>1036</sup> SADC endeavours to harmonise its policies and plans, and to create appropriate institutions and mechanisms for the implementation of its programmes and projects in pursuit of this objective.<sup>1037</sup> As a member of the AU, SADC has also adopted a stage-pronged approach by setting various progressive targets for regional integration.<sup>1038</sup> The Regional Indicative

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<sup>1034</sup> See Ch 4.3.5.1 above.

<sup>1035</sup> SADC "Member States" (Nd) <https://www.sadc.int/member-states/> (accessed: 2018-09-30). For a detailed discussion of the formation of the SADC, from SADCC to SADC, see SADCC Conference "Southern Africa: Towards Economic Liberation" A Declaration by the Governments of Independent States of Southern Africa Lusaka 1st April 1980" (1980) [https://www.sadc.int/files/8613/5292/8378/Declaration\\_Treaty\\_of\\_SADC.pdf](https://www.sadc.int/files/8613/5292/8378/Declaration_Treaty_of_SADC.pdf) (accessed: 2018-10-02) ("Lusaka Declaration"). SADC was established following the launch of the Southern African Development Coordination Conference (SADCC) held in July 1979 by the Frontline States. SADC "Regional Indicative Strategic Development Plan" (Nd) [https://www.sadc.int/files/5713/5292/8372/Regional\\_Indicative\\_Strategic\\_Development\\_Plan.pdf](https://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf) (accessed: 2018-10-03) 1-2 (SADC "RISDP" (Nd)). See further Nshimbi and Fioramonti "The Will to Integrate: South Africa's Responses to Regional Migration from the SADC Region" 2014 26 *African Development Review* 52 54. SADCC founding members included five Frontline States: Angola, Botswana, Mozambique, Tanzania, and Zambia, plus Lesotho, Malawi, and Swaziland. See further Saurombe 2013 *Law Democracy & Development* 462; Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing With Regional Integration" 2012 15 *Potchefstroom Electronic Law Journal* 454 456; Saurombe "A Regional Integration Agenda for SADC Caught in the Winds of Change Problems and Prospect" 2009 4 *Journal of International Commercial Law and Technology* 100; Peters *The Quest for an African Economic Community; Regional Integration and its Role in Achieving African Unity –The Case of SADC* (2010) 98; Thornhill and Van Dijk "The Functioning of the Southern African Development Community (SADC) and the Primary Characteristics of the Member States" 2002 37 *Journal of Public Administration* 187 188; Babarinde "Regionalism and Economic Development" in Nnadozie *African Economic Development* (2003) 493; Shumba "Revisiting Legal Harmonisation Under the Southern African Development Community Treaty: The Need to Amend the Treaty" 2015 19 *Law Democracy & Development* 127.

<sup>1036</sup> Article 5(1)(a) of the SADC Treaty 1992.

<sup>1037</sup> Article 5(2)(a) and (c). As some of its integration and harmonisation of legal frameworks, see SADC "SADC Central Bank Model Law" (2009) [https://www.sadcbankers.org/Lists/News%20and%20Publications/Attachments/118/Model\\_Law\(English2009\)\\_SADC%20Central%20Bank%20Model%20Law.pdf](https://www.sadcbankers.org/Lists/News%20and%20Publications/Attachments/118/Model_Law(English2009)_SADC%20Central%20Bank%20Model%20Law.pdf) (accessed: 2021-04-04).

<sup>1038</sup> See Hartszenberg and Kalenga "National Policies and Regional Integration in the South African Development Community" (2015) *World Institute for Development Economics Research Working*

Development Sector Plan (RIDSP) is the main instrument and provides coherent regional policies and a political commitment to SADC's regional integration agenda.<sup>1039</sup> It implements programmes to establish free-trade areas and the customs union that will assist to establish the SADC common market.<sup>1040</sup> The specific targets of the RIDSP were to achieve the free trade area by 2008, a customs union by 2010, a SADC common market by 2015, monetary union and a central bank by 2016, and a regional currency by 2018.<sup>1041</sup> Similarly, the realisation of the common market by 2015, and monetary union and a central bank by 2016 have been beset by problems and delayed by the AU's failure to establish the customs union.<sup>1042</sup> It may also have an impact on introducing economic growth policies such as FI. SADC, however, introduced the FI strategy for the region in 2016.

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*Paper No 2015/056* <https://www.wider.unu.edu/sites/default/files/wp2015-056.pdf> (accessed: 2022-02-27) 3.

<sup>1039</sup> See the forewords to the SADC "RISDP" (Nd). See also SADC Communique "The Summit of Heads of State and Government of the SADC, Dar es Salam, Tanzania" (25-26 August 2003) [https://sarpn.org/documents/d0000492/P462\\_SADC\\_Communique\\_082003.pdf](https://sarpn.org/documents/d0000492/P462_SADC_Communique_082003.pdf) (accessed: 2018-10-11) par 37; Hartzenberg and Malungisa "Regional Integration in Southern Africa: Key Issues and Challenges" in Volz (ed) *Regional Integration, Economic Development and Global Governance* (2011) 65-66; SADC Council "Desk Assessment of the Regional Indicative Strategic Development Plan" (2011) 10; Peters *The Quest of AEC* (2010) 149-151. The SADC "RISDP" (Nd) is a fifteen-year strategic roadmap aimed at achieving SADC's integration objectives provided in the SADC Treaty.

<sup>1040</sup> SADC "RISDP" (Nd) 66.

<sup>1041</sup> SADC "RISDP" (Nd) 66-67. See also Hartzenberg and Malungisa in Volz (ed) *Regional Integration* (2011) 66; Saurombe 2009 *JICTL* 100. See further Kamau *The Regulation on Trade Barriers under SADC and EAC: Assessing the Effectiveness of Their Legal Framework* (Unpublished Master's Dissertation, University of Cape Town, 2014) 27.

<sup>1042</sup> See SADC "Summary of the SADC Revised Regional Indicative Strategic Development Plan 2015-2020" (2017) [https://www.sadc.int/files/5415/2109/8240/SADC\\_Revised\\_RISDP\\_2015-2020.pdf](https://www.sadc.int/files/5415/2109/8240/SADC_Revised_RISDP_2015-2020.pdf) (accessed: 2018-10-09) ii. See also Charamba "Lack of Political Will Derail SADC Integration" (2016-06-23) *The Herald* <https://www.herald.co.zw/lack-of-political-will-derails-sadc-integration/> (accessed: 20-10-10); Bell "The Southern African Development Community: Solid Achievement and Future Challenges" (2017) *FutureDirection International Strategic Analysis Paper* <http://www.futuredirections.org.au/publication/the-southern-african-development-community-solid-achievements-and-future-challenges/> (accessed: 2018-10-11) 3; Peters *The Quest of AEC* (2010) 133-134; SADC "2008 SADC Summit for Heads of State and Government" Sandton, South Africa (17 August 2008) [https://www.sadc.int/files/1213/5292/8402/Summit\\_Record\\_-\\_August2008.pdf](https://www.sadc.int/files/1213/5292/8402/Summit_Record_-_August2008.pdf) (accessed: 2022-06-06) 4. See further SADC "Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government" (16-17 August 2010) Windhoek, Namibia <https://www.thepresidency.gov.za/content/communique-30th-jubilee-summit-sadc-heads-state-and-government> (accessed: 2022-06-06) par 21. See Anon "SADC Rolls over Customs Union" (2010-08-17) *NewsDay* <https://www.newsday.co.zw/2010/08/2010-08-17-sadc-rolls-over-customs-union/> (accessed: 2018-10-07) on the achievements of free-trade area targets by 2008, and delay in achieving the customs union target by 2010, which also contributes to delay on establishing relevant institutions such as the central bank.



## 4.4.2 Draft SADC Financial Inclusion Strategy (SADCFIS)

### 4.4.2.1 Brief Background

During the first Financial Inclusion Indaba in 2016, SADC's Committee of Ministers of Finance and Investment agreed on the need for a regional approach to FI to overcome the current fragmented approaches in the region.<sup>1043</sup> The Committee highlighted that although there is a regional approach to integration within the existing SADC protocols, "there are specific issues to be addressed from a financial inclusion perspective".<sup>1044</sup> The Committee recommended the FinMark Trust to facilitate the FI strategy agenda.<sup>1045</sup> A few weeks after the Indaba, the Committee confirmed the isolated and uncoordinated manner in which national financial inclusion programmes were developing and the need for a regionally coordinated approach to FI in the form of a regional strategy.<sup>1046</sup> It directed the SADC Secretariat to partner with FinMark Trust to develop a regional FI strategy to be presented at its next meeting.<sup>1047</sup> SADC presented a draft *SADC Financial Inclusion Strategy* (SADCFIS) at the SADC Financial Inclusion Strategy Workshop in 2016.<sup>1048</sup>

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<sup>1043</sup> FinMark Trust "SADC Financial inclusion Indaba for Economic Growth and Poverty Elevation" (2015) <https://finmark.org.za/sadc-financial-inclusion-indaba-for-economic-growth-andpoverty-alleviation/> (accessed: 2018-10-12). The indaba was hosted jointly by SADC, South African National Treasury, FinMark Trust, and the SADC Banking Association staff. See also SADC "Report of the SADC Financial Inclusion Indaba, Sandton 23 and 24 July 2015" (2015) [https://finmark.org.za/system/documents/files/000/000/494/original/Report\\_SADCFI\\_INDABA\\_23-24July.pdf?1615204540](https://finmark.org.za/system/documents/files/000/000/494/original/Report_SADCFI_INDABA_23-24July.pdf?1615204540) (accessed: 2022-06-06) par 2.3 (SADC "FI Indaba Report" (2015)). See also Speech by Minister of Finance Mr Nhlanhla Nene SADC Financial Inclusion Indaba Venue: Balalaika Hotel, Johannesburg (23 July 2015) <http://www.treasury.gov.za/comm-media/speeches/2015/2015072301%20-%20Financial%20Inclusion%20Speech.pdf> (accessed: 2018-10-12).

<sup>1044</sup> SADC "FI Indaba Report" (2015) par 15.

<sup>1045</sup> SADC "FI Indaba Report" (2015) par 7.3. See also FinMark Trust "An Excluded Society: Financial Inclusion in SADC Through FinScope Lenses" (2016) <http://finmark.org.za/wp-content/uploads/2015/07/an-excluded-society-financial-inclusion-in-sadc-through-finscope-lenses.pdf> (accessed: 2018-10-15) 13, at their meeting held in Bulawayo, Zimbabwe.

<sup>1046</sup> FinMark Trust "An Excluded Society" (2016) 13 at their meeting held in Bulawayo, Zimbabwe.

<sup>1047</sup> FinMark Trust "SADC Financial Inclusion Strategy Workshop Report" (2016) [https://finmark.org.za/system/documents/files/000/000/474/original/SADC-Financial-Inclusion-Strategy-Workshop\\_Feb2016.pdf?1615196092](https://finmark.org.za/system/documents/files/000/000/474/original/SADC-Financial-Inclusion-Strategy-Workshop_Feb2016.pdf?1615196092) (accessed: 2022-06-06) (FinMark "FI Strategy Workshop Report" (2016)).

<sup>1048</sup> FinMark "FI Strategy Workshop Report" (2016). See SADC "SADC Financial Inclusion Strategy (2016-2021)" (2016) [https://finmark.org.za/system/documents/files/000/000/207/original/FI-strategy-SADC.pdf?1601978334#:~:text=The%20SADC%20Council%20of%20Ministers,Indicative%20Strategic%20Development%20Plan%20\(RISDP](https://finmark.org.za/system/documents/files/000/000/207/original/FI-strategy-SADC.pdf?1601978334#:~:text=The%20SADC%20Council%20of%20Ministers,Indicative%20Strategic%20Development%20Plan%20(RISDP) (accessed: 2018-10-15) (SADCFIS (2016)).

#### **4.4.2.2 Provisions of Draft SADC FIS**

The main purpose of the draft SADC FIS is to outline the SADC strategy for FI to address the need for policy alignment and regional issues to support regional financial integration.<sup>1049</sup> SADC developed this strategy to recognise the importance of FI and access to finance by the small and medium enterprises as the core of the industrial development and market integration provided in the revised RIDSP.<sup>1050</sup> The draft SADC FIS was drawn largely from the World Bank's *NFIS Reference Framework*.<sup>1051</sup> The draft SADC FIS identifies a number of barriers that inhibit the promotion of FI in the region, including barriers to new entrants to provide financial services experienced through high capital requirements and complex regulatory compliance and licensing processes.<sup>1052</sup> These include lack of documentation and the effect of applying stringent KYC requirements.<sup>1053</sup> It specifically highlights the differences in the application of the RBA in the AML/CFT frameworks in SADC member states.<sup>1054</sup> Two other barriers are the lack of appropriate products such as savings and credits which are relatively inflexible as regards meeting the needs of the majority of the low-income population.<sup>1055</sup> The draft SADC FIS further identifies the harmonisation of AML/CFT regulations as a solution to the creation of an enabling environment for increased access to financial services.<sup>1056</sup>

The draft SADC FIS also identifies various challenges originating specifically from the current policy and regulatory environment. The transitional nature of the draft SADC FIS regulatory framework on FI leads to market uncertainty. This incomplete and inconsistent framework creates uncertainty for investors that seek to develop new products and services for the low-

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<sup>1049</sup> SADC FIS (2016) 5.

<sup>1050</sup> SADC FIS (2016) 5. See SADC "Summary of the Revised RISDP 2015-2020" (2017) [https://www.sadc.int/files/5415/2109/8240/SADC\\_Revised\\_RISDP\\_2015-2020.pdf](https://www.sadc.int/files/5415/2109/8240/SADC_Revised_RISDP_2015-2020.pdf) (accessed 2018-10-02). The revised plan is not relevant as it addresses the main purpose of the RIDSP through infrastructural development to support industrialisation.

<sup>1051</sup> Although the document does not refer to the World Bank *NFIS Reference Framework* (2012) or *Template*, it acknowledges the existing efforts on FI in the SADC region including AFI "Maya Declaration" (2011) and the World Bank. See SADC FIS (2016) 51 and 52.

<sup>1052</sup> SADC FIS (2016) 36.

<sup>1053</sup> SADC FIS (2016) 38.

<sup>1054</sup> SADC FIS (2016) 40.

<sup>1055</sup> SADC FIS (2016) 38. See also other barriers such as limited financial capability, education, and negative perception of financial institutions as only providing services to the elite.

<sup>1056</sup> SADC FIS (2016) 38 and 41. Another barrier to FI is the poor physical infrastructure to address the distance gap for the low-income groups who live far from brick and mortar financial institutions.

income population.<sup>1057</sup> It further identifies relevant interventions to address some of these barriers.<sup>1058</sup> In addition, it identifies the lack of policy harmonisation as a key barrier and the need to ensure that policies are coherent across multiple countries and also coherent across multiple topics within a single country.<sup>1059</sup>

The draft SADCFIS proposes various interventions to promote FI in the SADC and to address the key barriers to this project. It proposes five categories of intervention that SADC must use to address the barriers identified – funding, advocacy, research and development, capacity building, and technical assistance. The main objectives of these interventions are to establish different funding approaches to facilitate the mobilisation and provision of financial services; to make various stakeholders and regulators aware of their mandate to promote FI; and to generate and disseminate data and knowledge.<sup>1060</sup> The capacity building seeks to develop the capabilities of states and non-government actors to drive FI at the national and regional levels through research capacity and training.<sup>1061</sup> These interventions are, however, not regulatory and do not promote FI within a legal framework.

The draft SADCFIS has many advantages for the achievement of an FI in the SADC region. First, it seeks to coordinate a variety of existing national activities and policies to promote FI. It does not attempt to elevate the FI framework to a regional level and sideline existing national policies. It does not replace these strategies or prescribe what they must cover, but aims to complement and support them.<sup>1062</sup> The draft SADCFIS was developed to align national and regional strategies and to address regional FI issues that support regional integration.<sup>1063</sup> These issues include “regulatory harmonisation and alignment”.<sup>1064</sup> From the reading of the draft SADCFIS, it is quite clear that it does not propose the form that the regulatory strategy for FI in the SADC must take.

A number of shortcomings were also identified in the draft SADCFIS as a regional FI policy strategy. When the draft SADCFIS was presented to the SADC Secretariat and Ministers of

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<sup>1057</sup> SADCFIS (2016) 40.

<sup>1058</sup> SADCFIS (2016) 40.

<sup>1059</sup> SADCFIS (2016) 40.

<sup>1060</sup> SADCFIS (2016) 43.

<sup>1061</sup> SADCFIS (2016) 50.

<sup>1062</sup> SADCFIS (2016) 5.

<sup>1063</sup> SADCFIS (2016) 5. See also FinMark “FI Strategy Workshop Report” (2016).

<sup>1064</sup> SADCFIS (2016) 5.

Finance and Investment, concerns were raised that the draft does not specifically refer to FI as a policy objective to address poverty.<sup>1065</sup> The other shortcomings appear to question whether the draft SADC FIS adequately addresses all key components of the *NFIS Reference Framework* and the template.<sup>1066</sup> The two components relate to the limited focus on the type of products and the lack of other regulatory aspects that promote FI such as financial stability, integrity, and consumer protection.<sup>1067</sup> Although the draft SADC FIS does cover transactional products, credit, investment, and insurance, a key concern raised was the predominant focus on credit with less attention being paid to other products such as savings and investment vehicles.<sup>1068</sup>

#### **4.4.2.3 The Legal Force and Implementation of the RIDSP and Draft SADC FIS**

From the discussion of the RIDSP and draft SADC FIS these two instruments should be commended for igniting the political will to overcome the challenges of fragmented socio-economic policies – poverty alleviation and economic growth in particular – through FI.<sup>1069</sup> From a regulatory stand, these instruments suffer from one key shortcoming. The RIDSP, and likewise the draft SADC FIS, enjoys its fair share of political legitimacy as the SADC strategic plan in the promotion of integration.<sup>1070</sup> This notwithstanding, neither instrument is legally binding.<sup>1071</sup> As a result, their targets can be revisited and revised.<sup>1072</sup> The continuing postponements affecting the establishment of a customs union by 2010, a common market by 2015, and monetary union by 2016, are clear evidence of the lack of legal force and proper implementation of the RIDSP. From its objectives, the RIDSP was not destined to have such legal force. It is “indicative” in nature to outline the necessary conditions for the development

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<sup>1065</sup> FinMark “FI Strategy Workshop Report” (2016). This concern arose based on the absence of a link between SADC FIS and industrialisation as articulated in the revised RIDSP.

<sup>1066</sup> See Ch 4.2.2.4.

<sup>1067</sup> See Ch 3.4 above on traditional financial sector regulatory objectives.

<sup>1068</sup> FinMark “FI Strategy Workshop Report” (2016). The SADC workshop report also highlighted the lack of identifying consumer education and consumer protection as separate pillars upon which financial products must rest.

<sup>1069</sup> SADC “RISDP” (Nd) 8. See also Tralac “The Regional Indicative Strategic Development Plan: SADC’s Trade-Led Integration Agenda: How is it Doing?” (2012) *Tralac Trade Brief No S12TB02/2012* <http://www.tralac.org/files/2012/04/S12TB022012-SADC-RISDP-SADC-agenda-20120418.pdf> (accessed: 2018-10-18).

<sup>1070</sup> SADC “RISDP” (Nd) 8. See Kamau *The Regulation on Trade Barriers under SADC and EAC* (Masters Dissertation, University of Cape Town, 2014) 27.

<sup>1071</sup> See Hartzenberg and Malungisa in Volz (ed) *Regional Integration* (2011) 65. See also Peters “Is SADC Losing Track?” in Bösl, Breytenbach, Hartzenberg, McCarthy and Schade *Monitoring Regional Integration in Southern Africa Yearbook* Vol 10 (2010) 146 on RIDSP.

<sup>1072</sup> Hartzenberg and Malungisa in Volz (ed) *Regional Integration* (2011) 65.

goals.<sup>1073</sup> It is, therefore “not a prescriptive or a command type of plan”.<sup>1074</sup> Likewise, the SADC Secretariat and Council cleared the draft SADC FIS for submission and approval subject to addressing the shortcomings regarding its implementation. The draft SADC FIS proposes an implementation structure and entrusts the Secretariat with its implementation.<sup>1075</sup> It does not provide how to implement it to measure the progress. It also does not envisage imposing any obligation on member states to review their current frameworks to achieve its objectives. It is aimed to be “a policy indicator on the development and implementation of national financial inclusion strategies”.<sup>1076</sup> It uses this indicator to assess how to pursue regional efforts to spur legislative changes at national level.<sup>1077</sup> At the 2016 workshop, the member states enjoined SADC to support the implementation of the SADC FIS through legislative and regulatory reforms.<sup>1078</sup> They, however, did not pronounce the form such reforms should take. While they adopted the SADC FIS, they needed to address the shortcomings identified by incorporating suggestions made at the 2016 workshop before it could be cleared for submission to the Ministers of Finance and Investment and the Council.<sup>1079</sup> The question remains whether SADC is capable of enacting or implementing such reforms.

Numerous challenges stand in the way of this reform and a concrete FI framework in this region. Peters summarises a set of challenges that apply equally to policy frameworks such as the RIDSP and SADC FIS.<sup>1080</sup> In his view:

Legally, regional integration is usually based on agreements between states. Such agreements - as in the case of the SADC Treaty - often provide integration objectives and general provisions of how to achieve them. However, only if such agreements are legally binding - and not just voluntary in nature - and come attached with deadlines and timeframes do regional integration endeavours have a chance to succeed. Without agreements of an obligatory character and a timeframe such political agreements tend to be postponed, referred to working groups or are conveniently forgotten if they do not fit into the immediate national policies landscapes.<sup>1081</sup>

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<sup>1073</sup> SADC “RISDP” (Nd) 6.

<sup>1074</sup> SADC “RISDP” (Nd) 6.

<sup>1075</sup> SADC FIS (2016) 61.

<sup>1076</sup> SADC FIS (2016) 63.

<sup>1077</sup> SADC FIS (2016) 63.

<sup>1078</sup> FinMark “FI Strategy Workshop Report” (2016).

<sup>1079</sup> FinMark “FI Strategy Workshop Report” (2016).

<sup>1080</sup> See Peters in Bösl *et al Monitoring Regional Integration Yearbook* Vol 10 (2010) 143.

<sup>1081</sup> Peters in Bösl *et al Monitoring Regional Integration Yearbook* Vol 10 (2010) 143. The author adds a continental history of failed attempts at regional integration resulting from the failure of regional agreements at the national level, to these challenges.

This extract also indicates the lack of domestication and implementation of many of the SADC Protocols, particularly if the envisaged reforms are approached through relevant legally binding protocols. Studies have specified many of the SADC protocols that have been signed by members states but have not been ratified and implemented.<sup>1082</sup> Although not legally binding agreements, the RIDSP and the SADC FIS provide a broad framework and a step towards the possibility of formulating topics for which protocols may be negotiated among all stakeholders and subsequently adopted by the relevant SADC institutions.<sup>1083</sup> The current trend in the lack of implementation of protocols may have similar outcomes for the implementation of policy frameworks such as the RIDSP and the SADC FIS. As things stand the SADC FIS is still in its draft form. According to the latest SADC 2020 statistics, 23% of adults in the SADC region are financially excluded from both formal and informal financial products and services.<sup>1084</sup> This indicates the need for both institutional and regulatory frameworks to promote FI and prevent FE.

## 4.5 INTERNATIONAL RR THEORY APPLICATION AND LEGITIMACY OF GSSBs

### 4.5.1 International Application of the RR Theory

The discussion in this chapter raises the question whether the RR theory and the PRS introduced in Chapter three apply to determine the effectiveness and responsiveness of

<sup>1082</sup> Hartzenberg and Malungisa in Volz (ed) *Regional Integration* (2011) 66. See also Karuombe in Bösl *et al Monitoring Regional Integration Yearbook* Vol 10 (2010) 2.

<sup>1083</sup> Van der Vleuten and Hulse "Governance Transfer by the Southern African Development Community (SADC)" (2013) *Sonderforschungsbereich Governance Working Paper Series No 48* [http://www.sfb-governance.de/publikationen/sfb-700-working\\_papers/wp48/SFB-Governance-Working-Paper\\_48.pdf](http://www.sfb-governance.de/publikationen/sfb-700-working_papers/wp48/SFB-Governance-Working-Paper_48.pdf) (accessed: 2018-10-15) 31.

<sup>1084</sup> SADC "Real Time Gross Settlement System" (2020) <https://www.sadc.int/news-events/news/sadc-records-notable-progress-financial-markets-and-regional-integration/#:~:text=In%20the%20area%20of%20financial,to%2040%20percent%20in%20Mozambique> (accessed: 2022-04-23). Compare similar 2018 statistic by FinMark Trust in FinMark Trust "Measuring Progress: Financial Inclusion in the SADC" (2019) [https://finmark.org.za/system/documents/files/000/000/183/original/ME\\_Report\\_2019.pdf?1601964365](https://finmark.org.za/system/documents/files/000/000/183/original/ME_Report_2019.pdf?1601964365) (accessed: 2020-03-22). The FinMark Trust has subsequently provided FI statistics that focus on measuring selected SADC countries, rather than an overview of the SADC as a whole. See FinMark Trust "Measuring Progress: Financial Inclusion in Selected SADC Countries" (2019) [https://finmark.org.za/system/documents/files/000/000/266/original/Measuring\\_Progress\\_Financial\\_Inclusion\\_in\\_selected\\_SADC\\_countries\\_-\\_2019\\_Report.pdf?1603091586](https://finmark.org.za/system/documents/files/000/000/266/original/Measuring_Progress_Financial_Inclusion_in_selected_SADC_countries_-_2019_Report.pdf?1603091586) (accessed: 2021-04-04); FinMark Trust "Eswatini Financial Inclusion Refresh" (2020) [https://finmark.org.za/system/documents/files/000/000/391/original/Eswatini\\_Financial\\_Inclusion\\_Refresh.pdf?1614849476](https://finmark.org.za/system/documents/files/000/000/391/original/Eswatini_Financial_Inclusion_Refresh.pdf?1614849476) (accessed: 2020-04-04); FinMark Trust "Zimbabwe Financial Inclusion Refresh" (2020) [https://finmark.org.za/system/documents/files/000/000/392/original/Zimbabwe\\_Financial\\_Inclusion\\_Refresh.pdf?1614849719](https://finmark.org.za/system/documents/files/000/000/392/original/Zimbabwe_Financial_Inclusion_Refresh.pdf?1614849719) (accessed: 2021-04-04).

regulatory frameworks at international, continental, and regional levels. It is important to make the following *caveat* regarding the application of the RR theory and the accompanying pyramid to the regulatory frameworks at these levels. From the reading of *Responsive Regulation*, there is a trend for the RR theory and its supporting pyramids to apply domestically but not beyond the borders of a particular state.<sup>1085</sup> The aim of the work, as Ayres and Braithwaite outline in the opening chapter, is “to transcend the intellectual stalemate between those who favour *strong state regulation* of business and those who advocate deregulation”.<sup>1086</sup> Its limited application, however, does not exclude its application at regional, continental, and international levels. For instance, Abbott and Snidal argue that the RR theory holds an important lesson for transnational regulation with necessary adaptations to the different circumstances of international business and politics.<sup>1087</sup> Drahos further attests to the international application of the RR theory and how it introduces an “international enforcement pyramid” in terms of which soft regulatory tools, such as guidelines and protocols, are applied at the base of this pyramid and more coercive ones, such as treaties, at the apex of the pyramid.<sup>1088</sup> This arguably supports the application of the RR theory with necessary regulatory and enforcement institutions at these levels.<sup>1089</sup>

#### 4.5.2 Institutional Legitimacy of GSSBs

Another key issue that determines the effectiveness of the current FI framework relates to the power and the legitimacy of the current GSSBs to develop binding legal instruments. Notably, the FI guidelines, principles, and the template discussed in this chapter are not established through binding international legal instruments but by agreements between member states

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<sup>1085</sup> See also their reference to good policy as a “symbiosis between state regulation and private regulation” and their continuous use of “state regulation” in the discussion in this work. See Abbott and Snidal “Taking Responsive Regulation Transnational: Strategies for International Organizations” 2013 7 *Regulation & Governance* 95 96.

<sup>1086</sup> Braithwaite and Ayres *Responsive Regulation* (1992) 3 (emphasis added).

<sup>1087</sup> See Abbott and Snidal 2013 *Regulation & Governance* 96. See also Parker 2013 *Regulation & Governance* 6; Scott “The Regulatory State and Beyond” in Drahos (ed) *Regulatory Theory* (2017) 265.

<sup>1088</sup> Drahos “Towards an International Framework for the Protection of Traditional Group Knowledge and Practice” Paper Presented at the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework, Geneva, 4-6 February 2004 6.

<sup>1089</sup> Abbott and Snidal 2013 *Regulation & Governance* 96 highlight the lack of effective regulating institutions as a major problem for taking RR theory international.

and declarations. As discussed above,<sup>1090</sup> the AFI is a member-driven peer learning framework that is founded on a declaration between the states involved.<sup>1091</sup> Likewise, the G20 was formed as an informal *ad hoc* grouping of governments and central banks comprising twenty countries to coordinate and drive policies and regulations after the 2008 financial crisis. It does not resemble formal international organisations such as the UN either structurally or legally. It lacks structural and legal resemblance to formal international organisations such as the UN. As with the AFI, these institutions lack legitimacy as international law-making bodies. The World Bank's influence on international policies and regulation of financial institutions does not go unnoticed. It also is not a formal international organisation with the power to regulate FI.<sup>1092</sup> Although its coercive and persuasive enforcement mechanisms have influenced the adoption of AML/CFT standards in the majority of countries, the FATF cannot be described as an international legal body but as a transnational AML policy network.<sup>1093</sup> These bodies lack formal legal mandates by or consent from their non-members who are also subject to their policy standards.<sup>1094</sup> However, the enforcement mechanisms applied by the FATF indicate that the formality of a particular international institution or organisation has not remained the sole determinant of the effectiveness of all international policy and legal frameworks. The FATF's ability to achieve regulatory coordination using soft-law standards is an indication that, as Turner correctly asserts, "hard law, whether by a treaty or other international agreement, need not be one of the conditions for effective international regulation".<sup>1095</sup>

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<sup>1090</sup> See Ch 4 3.2.5 above.

<sup>1091</sup> Mehrotra and Nadhandel "Financial Inclusion and Monetary Policy in Emerging Asia" in Gopalan and Kikuchi (eds) *Financial Inclusion in Asia: Issues and Policy Concerns* (2016).

<sup>1092</sup> Donnelly "Informal Financial Law Making: Global Financial Market Regulation" in Berman *et al* (eds) *Informal International Lawmaking* (2012) 188.

<sup>1093</sup> See Nance "The Regime that FATF Built: An Introduction to the Financial Action Task Force" 2018 69 *Crime Law and Social Change* 109 115 and 132, who describes it as taking experimental governance built around an inclusive, multi-level network of stakeholders who establish, evaluate, contest, and consistently revise standards in order to generate new knowledge about challenges and solutions, without precluding material sanctions.

<sup>1094</sup> Choo and Kelly "Promises and Perils of New Global Governance: A Case of the G20" 2012 12 *Chicago Journal of International Law* 491. See also Alexander, Lorez, Zobl and Thürer "The Legitimacy of the G20 – A Critique Under International Law" (2014) <https://ssrn.com/abstract=2431164> (accessed: on 2021 -07-26) 2.

<sup>1095</sup> Turner 2015 *New York Law School Law Review* 547.



## **4.6 DISCUSSION, SUMMARY, AND CONCLUSION**

### **4.6.1 Conclusion and Findings**

The main purpose of this chapter was to establish whether there are effective policy and regulatory frameworks to promote FI at the international, continental, and regional levels that lay sufficient grounds to develop an FI regulatory framework at the national levels. It discussed the frameworks at these levels to determine whether they exist and, if so, whether they promote FI and access to BBAs effectively. This chapter has established that the regulatory frameworks at these levels comprise different types of regulatory instruments ranging from mere commitments and voluntary guidelines to very limited specific binding instruments. Save for the EU and the UN, this chapter has established that the efforts to promote FI have been adopted by GSSBs that have not acquired the relevant institutional legitimacy to develop binding legal instruments.<sup>1096</sup> The chapter began by discussing the forms of and approaches to regulation at international levels. It identified “hard law”, such as treaties and charters, and “soft law” such as general principles, guidelines, policy statements, recommendations, and other provisional international legal frameworks as the form that regulations at these levels may take.<sup>1097</sup> It identified gaps within soft law instruments such as their vagueness and a high level of abstraction. Soft law also comprises voluntary and non-binding principles and depends on consensus among members regarding their implementation and adoption as compared to hard law. With reference to the institutions that establish soft law, this chapter established that international soft law norms are generally developed by informal institutions, such as standard-setting transnational and intergovernmental bodies through informal by-laws, agreements, or declarations that lack effective enforcement and dispute settlement mechanisms. This contrasts with international hard law instruments that are developed by legitimate traditional international regulatory institutions and organisations established by binding international instruments and agreements between states which impose international legal obligations. It identified one important characteristic of soft law as norm-creating and progressive law-making roles to influence the development of the law or in anticipation of them becoming laws that are enforceable, especially in the area where there is the absence of binding international standards. This discussion paved the way for determining the existence of an international FI framework and its effectiveness.

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<sup>1096</sup> See Ch 4.5.2 above.

<sup>1097</sup> See Ch 4.2.1 above.

This chapter also showed that no international FI framework has been developed by traditional international regulatory bodies such as the UN. Besides prohibiting unfair discrimination in relation to access to financial services for women in CEDAW, the UN only promotes FI through declarations and by endorsing developing policies on FI strategies by GSSBs.<sup>1098</sup> The role played by the FATF to promote FI within its AML/CFT mandates was considered. The FATF's introduction of a mandatory RBA will ensure that the prevention of AML and CTF does not totally inhibit the promotion of FI by measuring the level of AML/CTF risks posed by a particular financial product. This chapter further established the importance of the RBA and the promotion of FI in the *Financial Inclusion Guidance 2011* as an important milestone in promoting FI and for ensuring that the application of CDD measures takes cognisance of the risk posed by particular financial products. FI was specifically identified as an important measure to ensure that a large percentage of the population uses formal financial systems and financial products and services that offered in these systems can be accessed by the authority to prevent AML/CFT. An important gap in the FATF's *Financial Inclusion Guidance 2011* is that it serves as "guidance only" and does not impose an obligation on countries to promote FI. Although the mutual evaluation of countries' AML/CFT measures applies FI as one of the assessment criteria, FI is not a specific FATF standard in terms of its recommendations.

This chapter considered the FATF and the important mechanisms it applies to enforce its voluntary standards; while the non-binding recommendations and the FI guidance apply to members, the FATF's mutual evaluation, self-assessment, and the identification of "high-risk and other monitored jurisdictions" can exert the necessary pressure on both members and non-member states to comply with its AML/CFT standards. By naming and shaming countries with weak AML/CFT measures on the "grey list" as "jurisdictions under increased monitoring" or on the "black list" as "high-risk jurisdictions subject to a call for action" and a call on its members and other jurisdictions to apply enhanced due diligence, symbolises effective compliance and enforcement mechanisms for soft law measures at the international level.

The promotion of FI by the FATF's FI is limited to its AML/CFT mandates. This chapter identified the promotion of FI through general principles and guidelines by the World Bank, the AFI, and the G20. The G20 provides for policy principles and the forms of promoting FI

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<sup>1098</sup> See Ch 4.2.2 above.

through NFIs.<sup>1099</sup> What is significant from the *G20 Principles for Innovative Financial Inclusion* and the *NFIS Reference Framework* is for each country to develop an NFIS as a road map for its FI policy and regulatory framework that comprises specific targets on access to various financial products and services, service providers, and how they deal with other traditional principles such as financial stability, integrity, and consumer protection, and on the choice of approaches to NFIS.<sup>1100</sup> This chapter further identified important measures that the G20 principles propose to promote FI. It has established that the G20 encourages countries to integrate FI into other financial systems policies and assessments and to ensure that various government agencies coordinate their FI policy and regulatory actions and cooperate with each other to promote FI. Importantly, it encourages countries to identify a “lead agency” to coordinate FI frameworks among government agencies. There is, however, an important gap in the *G20 FI Principles* and the *NFIS Reference Framework*. The policy documents are not binding on member states and merely serve as indications on how to promote FI; they were not designed to be prescriptive or to impose legal obligations. This chapter has, therefore, established that these principles and guidelines do not provide for compliance and enforcement mechanisms and are therefore not legally binding.

The discussion in this chapter also identified how AFI and its members have committed to promoting FI through declarations. The main gap with the AFI is that the declarations do not impose specific obligations to promote FI, but only collect FI data without setting any FI standards. This chapter also discussed collaborative efforts between the AFI, the G20, and the World Bank by developing guidelines on various forms and approaches that each country may adopt to develop NFIS. From the approaches to NFIS discussed in this chapter,<sup>1101</sup> it becomes clear that each of them has its own advantages and disadvantages. This chapter established that adopting a stand-alone and focused NFIS may have the effect of focusing on either FI only or on one aspect of FI such as microcredit.<sup>1102</sup> It may overlook the importance of incorporating other financial products or services. It may also exclude financial sector regulatory objectives such as financial stability, integrity, and consumer protection.<sup>1103</sup> An identified gap in NFIS as part of the overall national financial sector strategy, is that while this form of NFIS incorporates the financial sector regulatory objectives, it may set one or all of

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<sup>1099</sup> See Chs 4.2.4 and 4.2.6 above.

<sup>1100</sup> See the discussion of principles 2 and 6 in Ch 4.2.4.2 above.

<sup>1101</sup> See Ch 4.2.6.2 above.

<sup>1102</sup> See Ch 4.2.5.2.1 above.

<sup>1103</sup> See Ch 3.4.1 above on FI and other financial sector regulatory objectives.

them as the main priority and therefore FI becomes complementary.<sup>1104</sup> This indicates a need to accord FI a priority while incorporating these objectives to maximise possible synergies and minimise trade-offs between them. This chapter has identified an inclusive and comprehensive NFIS that prioritises FI and takes cognisance of its links with other important financial sector policy and regulatory objectives.<sup>1105</sup> Importantly, adopting this form of NFIS must ensure that it prioritises FI while not ranking one or more objective as more important than the other in realising FI.

This chapter also noted that whatever form of NFIS is adopted its effectiveness relies on the existing governance bodies and the participation of both the government and the private sector. Protecting the soundness and the integrity of financial institutions and the protection of depositors are equally important. The *G20 FI Principles* and the *NFIS Reference Framework* reemphasises a coordinated partnership between relevant government agencies in both the formulation and execution of the strategies. The main gap in the *G20 FI Principles* and World Bank's *NFIS Reference Framework* is that they rely solely on continuous monitoring and data collection to assess the effectiveness of NFIS and reforms that have been introduced.

The discussion of the continental FI regulatory framework by the EU indicates that, with the necessary political will and institutional capacity, both international and continental governing bodies have the ability to promote and impose specific obligations for FI. The promotion of FI and access to a payment account with basic features by the EU PAD is an example of a gradual and pyramidal approach to regulation starting with fact-finding studies<sup>1106</sup> and implementing non-binding standards such as Recommendations or a Communication to binding measures, such as Directives and Regulations, depending on countries' responses to the implementation of the necessary measures.<sup>1107</sup> This discussion further established the importance of the integration of FI policy and regulatory frameworks in different countries by these bodies. Importantly, the EU PAD is also an example of a regulatory measure to promote the right of every citizen to access and use BBAs with banks in their countries.<sup>1108</sup> The EU has also ensured that the AML/CFT measures are not applied with excessive caution which may inhibit access to basic financial services. The chapter identified reporting by member states and the review

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<sup>1104</sup> See Ch 4.2.5.2.1 above.

<sup>1105</sup> See Ch 4.2.6.2 above.

<sup>1106</sup> See Ch 4.3.1.1 above.

<sup>1107</sup> See Chs 4.3.1.1 and 4.3.1.2 above.

<sup>1108</sup> See Chs 4.3.3.3 and 4.3.1.4 above.

of each measure as necessary steps to determine whether stringent measures should be implemented as a means of promoting the effectiveness of the PAD. It also noted the emphasis of the EU PAD on the coordination and cooperation of important competent authorities and the designation of a single competent authority to serve as a contact and service point that also serve to exchange information with other competent authorities on further steps to be taken. However, apart from escalating measures to more stringent ones, PAD does not indicate stringent measures that must be applied if the reporting and review indicate non-compliance with its provisions by member states.<sup>1109</sup>

Although the EU has become a library for economic policy integration and a point for reference for other continental bodies, this chapter has established a lack of concrete FI framework by the AU, similar to the EU.<sup>1110</sup> While it acknowledges the importance of integration and harmonisation of FI policy and regulatory frameworks on the continent, the AU has to date only set out aspirational policy measures focusing on women and promoting FI through postal financial services without specific obligations to promote FI for all.<sup>1111</sup> The discussion of FI in the SADC also indicates a lack of concrete FI measures with effective enforcement mechanisms. The development of the Draft SADCFIS is a step in the right direction as regards FI strategy and regulatory measures in the region. This chapter has discussed key challenges identified by the Draft SADCFIS which inhibit the promotion of FI – eg, barriers to new financial service providers entering the market; differences in AML/Measures across SADC countries; stringent KYC measures; and lack of appropriate financial products such as savings. This chapter also discussed important gaps that affect the full implementation of the draft such as the traditional nature of its adoption and the lack of policy harmonisation in the region. It established that relevant implementation measures such as funding, advocacy, research and development, capacity building, dissemination of data and knowledge about FI, will not provide for effective enforcement of the SADCFIS once the draft is fully adopted.

#### **4.6.2 Recommendations (“Recs”)**

Based on the findings and gaps identified in this chapter, the following recommendations are made:

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<sup>1109</sup> See Ch 4.3.1.6(a) above.

<sup>1110</sup> See Ch 4.3.1.2 above.

<sup>1111</sup> See Ch 4.3.2.2 above.

**Rec 4A** To address the lack of a relevant international body with institutional and regulatory legitimacy, and an international FI framework, it is recommended that:

- (a) Rather than continuing with a haphazard approach to the FI framework by different institutions such as the G20, the World Bank, and the AFI, AFI should be recognised as a legitimate global standard-setting body that is fully endorsed by the UN to develop international FI standards.
- (b) On whether the FI regulatory framework should be based on hard law or soft law, various factors discussed in this chapter do not support the early adoption of a binding hard law international instrument to promote FI. Among them is that, as the current FI policy framework is benchmarked through a bottom-up approach that considers national contexts and approaches,<sup>1112</sup> it is clear that FI has not developed into an exact science that requires off-the-shelf solutions. It still lacks the precision relating to the types of product and issues that must be included in the regulatory instrument. Also, although the proportionality principle to balance competing financial regulatory objectives is proposed, there is still no consensus on the link between financial regulation and other traditional financial policy objectives, and how policymakers can optimise the link that minimises trade-offs and maximises synergies. Therefore, soft law measures, with the necessary compliance and enforcement mechanisms that serve “norm-creating” and progressive law-making roles in the area of FI where there is absence of binding international standards to influence the development of the law, are the necessary regulatory approach. Soft law will serve as a starting point in developing a template for the possible introduction of hard law in the form of an international convention.<sup>1113</sup> Rather than taking a completely top-down regulatory approach, AFI should adopt relevant standards in the form of the *International Financial Inclusion Regulatory Strategy* (IFIRS) with specific measures to influence FI practices in various countries. The IFIRS must outline stakeholders and their different roles, key FI objectives, and cross-

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<sup>1112</sup> See Ch 4.2.6.1 above.

<sup>1113</sup> See Ch 4.2.1.1 above.

reference key components of the I-SIP methodology,<sup>1114</sup> as outlined in Principles 8 and 9 of *the NFIS Reference Framework*, and must establish a link between FI and other long-standing financial policy objectives.

**Rec 4B** With reference to the specific standards that must be incorporated in the IFIRS it is recommended that:

- (a) The IFIRS must make the promotion of FI its main objective.
- (b) The IFIRS must require NFIS and the relevant national legislative frameworks to make provisions for the right of access and to open basic financial products and services, such as BBAs, similar to the right to payment accounts with basic features in the EU PAD and similar existing rights as discussed in Chapter five below, as follows:<sup>1115</sup>

**“Right of Access to, Open and Use of Basic Financial Products and Services**

- (1) Member states must ensure that every citizen has the right to access, open, and use basic financial products and services offered by financial institutions duly licensed in terms of national financial sector laws.
- (2) Member states must require financial institutions to create platforms that raise awareness on these types of products and services and to give relevant information about the ease of access to them, and offer them once they have conducted the eligibility assessments.<sup>1116</sup>
- (3) A financial institution may only refuse a customer with financial services or products provided:
  - (i) the customer does not satisfy the eligibility requirements in subsection 2.
  - (ii) opening such a product or service would result in an infringement of the provisions on the prevention of money-laundering and the countering of terrorist financing in terms of the relevant national law.
  - (iii) there are reasonable grounds to believe that the customer will use such an account for illegal or fraudulent purposes.
- (4) If any of the grounds for refusal in subsection 3 is established, and the financial institution refuses to open a basic financial service or product, the financial

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<sup>1114</sup> See Ch 3.4.4 above and Rec 3F.

<sup>1115</sup> See Ch 4.3.1.4 above. See also Ch 5 below for the discussion of the rights in different countries.

<sup>1116</sup> See Ch 5.3.4 below for similar provisions in the Australian ABA *Code of Banking Practice*(2019), and Ch 5.3.3 in UK’s Financial Service Authority “Banking Conduct of Business Sourcebook” (Nd) <https://www.handbook.fca.org.uk/handbook/BCOBS.pdf> (accessed: 2019-03-06).

institutions must provide a written notice of refusal to the applicant within a reasonable time.”<sup>1117</sup>

**Rec 4C** The IFIRS must require each country to adopt a NFIS to promote FI. It must encourage countries to adopt an inclusive and comprehensive NFIS that prioritises access and the use of financial products and services, and also provide a link between FI and other financial sector regulatory objectives as required by the I-SIP Methodology.<sup>1118</sup> It must, therefore, refer to the duty on countries to balance FI proportionately with financial stability, integrity, and consumer protection as regulated in the relevant national regulatory measures.<sup>1119</sup>

**Rec 4D** With reference to the promotion of FI under the FATF AML/CFT regulations, it is recommended that:

- (a) The FATF make the promotion of FI within the AML/CFT regulatory framework mandatory rather than referring to it in the *Financial Inclusion Guidelines 2011* and the Interpretative Note to the FATF Recommendations as a “guidance only” or as merely one of the assessment criteria during the mutual evaluations and self-assessments.<sup>1120</sup>
- (b) The FATF Recommendations be revised and a new recommendation that specifically promotes FI within the AML/CFT regulatory framework be added as follows:

**“Promoting financial inclusion and ensuring access and the use of the formal financial sector**

Countries should promote financial inclusion in terms of international standards and national strategies and the regulatory measures that ensure the mitigation of money-laundering and terrorist financing risks by ensuring that a large number of the population uses a formal financial system that is accessible by the authorities to prevent money-laundering and terrorist financing. Countries should further identify, assess, and understand the money-laundering and terrorist financing risks in Recommendation 1 and apply customer due diligence measures in Recommendation 10 that are tailored to the risks of specific institutions, the banking system, and the relevant financial products, taking into accounts the promotion of financial inclusion. Countries should, therefore,

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<sup>1117</sup> See Ch 5.5.2.2 below for a similar requirement in the Bank Act of Canada.

<sup>1118</sup> See Ch 3.4.4 above on the Methodology.

<sup>1119</sup> See Ch 4.2.4.2 and Ch 4.2.4.2 above for the discussion of the proportionality principle.

<sup>1120</sup> See Ch 4.2.3.4.



consider diminishing the obligation to collect certain identification information that is used to understand the nature and purpose of certain low-risk business relationships where such nature and purpose can be inferred from the types of transactions established.”

- (c) In relation to the international coordination and cooperation between national and international regulatory bodies and authorities, it is recommended that the gap identified in the limited focus of competent authorities that must foster international cooperation be addressed by including authorities whose main purpose is to promote FI as recommended in **Rec 4A(a)**.<sup>1121</sup> Recommendation 40 of the FATF Recommendations must, therefore, be amended and the promotion of access to and use of the formal financial sector be added as an additional objective to the focus on money laundering, predicated offence, and terror financing that will allow cooperation to be fostered with the competent body that promotes FI, as follows:

**“40. Other forms of international cooperation**

Countries should ensure that their competent authorities can rapidly, constructively, and effectively provide the widest range of international cooperation in relation to money laundering, associated predicate offences, **[and]** terrorist financing, and ensuring access and the use of formal financial systems.”

**Rec 4E** With reference to the enforcement of the FI standards set in the IFIRS as recommended in **Rec 4A(a)** above, it is recommended that similar mechanisms such as self-assessment, mutual evaluations, and the identification of “high-risk and other monitored jurisdictions” be included.<sup>1122</sup>

- (a) The assessment criteria should include the followings:
- (i) Whether a country has an NFIS in place.
  - (ii) Whether there are national measures to provide for access and use of formal financial products and services, and how effective these measures are in promoting FI.

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<sup>1121</sup> See Ch 4.2.3.4(b) above.

<sup>1122</sup> See Ch 4.2.3.4(a) above.

- (iii) The criteria must also determine whether measures to promote FI provide for a proportionate link with other financial sector regulatory objectives such as financial stability, integrity, and consumer protection.
  - (iv) Whether there is a leading agency or a regulatory body to promote FI as proposed in **Rec 3D**.
  - (v) Provision be made for cooperation and coordination between national and international regulatory bodies involved in promoting FI.
- (b) AFI should list a country on a “grey list” if it does not have an inclusive and a comprehensive NFIS in place which complies with the specific FI standards set out in **Rec 4E(b)** above; or on a “black list” if it finds that such country has not implemented the international FI standards outlined in the recommended IFIRS, and such failure promotes the use of financial products and services outside the formal financial system and out of the reach of the enforcement and the regulatory authorities.

**Rec 4F** To address the lack of FI policy and regulatory measures on the continent, it is recommended that:

- (a) The African Union develop a continental FI strategy that encapsulates the FI standards of the IFIRS recommended in **Rec 4A**.
- (b) The AU advance the FI policy and regulatory aspirations in the current *Development of Postal Financial Services as a Strategy* and the *Agenda 2063* by following the policy and regulatory steps adopted by the ECom in the EU PAD. As the AU has already commenced with the study on postal financial services, the AU Commission must begin by commissioning a study to identify general FI challenges across the continent through a bottom-up approach (similar to that in the *NFIS Reference Framework*) and to develop a continental policy framework, similar to the ECom’s *BPA Recommendations*. Based on its current approach to facilitate economic and trade-related policies and strategies through RECs such as the SADC, the AU must introduce measures that will ensure that each REC transposes the FI policy measures and monitor how they are applied by each member state.

- (c) The AU must set a timeframe for each REC to report on a number of countries that have already implemented the proposed FI policy measures. Such a report will guide it as to whether to impose more stringent FI regulatory measures similar to the EU Directive or Regulations with strict enforcement mechanisms.

**Rec 4G** This chapter makes the following recommendations in relation to the current FI policy framework in the SADC:

- (a) The SADC's Committee of Ministers of Finance and Investment must finalise and adopt the SADC FIS that addresses a number of issues with FI in the region.
- (b) The SADC FIS must incorporate the FI standards in the IFIRS recommended in **Rec 4A**. It must not focus only on few financial products and services such as credit, but on financial products and services in general.<sup>1123</sup> It must further apply the I-SIP methodology and the proportionality principle to balances FI with financial stability, integrity, and consumer protection.

**Rec 4H** It is recommended that each of the measures proposed in this chapter on FI provide for institutional coordination and cooperation between different regulatory bodies and authorities responsible for promoting FI at international, continental, regional, and national levels.

This chapter identified a lack of concrete measures to promote FI at the international level, and at regional levels by the AU and the SADC. The EU has developed relevant measures and requires member states to transpose them into local regulations. It is, therefore, important to identify how EU member states apply the FI measures and how other countries have developed these measures within national contexts. Chapter five below focuses on national regulatory measures to promote FI. It benchmarks how selected national FI measures may be applied to reinforce current measures in South Africa to promote FI and access to BBAs.

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<sup>1123</sup> See Ch 4.4.2.2 above.

## CHAPTER FIVE: NATIONAL FINANCIAL INCLUSION REGULATORY FRAMEWORKS

*Tailoring a country's financial system to enable financial markets to work better for the poor involves the combined efforts of public and private players. It is relatively recent, and commendable, that both government and the financial services industry acknowledge the importance of increasing financial inclusion.*

**Staschen and Nelson in Ledgerwood *et al* (eds)  
*The New Microfinance Handbook* (2013)<sup>1124</sup>**

### 5.1 INTRODUCTION

Regulatory frameworks around the world provide a mix of different regulatory instruments and different aspects to address the challenges of FI. National policy and regulatory frameworks comprise either voluntary instruments or legislative frameworks. In many countries, there is a mix of both types of instrument. Voluntary codes of practice and charters developed by the banking associations have emerged as the common solution to prevent FE and promote FI. These instruments largely focus on promoting access to one or more of the financial products such as bank accounts or microcredit. Developing countries in Africa and Asia have developed policies and legislative frameworks that focus on access to finance through microfinance institutions. Countries in Europe and America have promulgated legislation that provides for a right of access to basic accounts and microcredit. Other regulatory measures do not promote FI directly but many of them play an important indirect role in preventing FE in addition to their main objectives. These include measures to prevent the challenges associated with the documentary requirements for preventing ML and TF. The discussion of national approaches to promote FI in Europe in Chapter four<sup>1125</sup> introduced some of the approaches that several countries follow to promote FI and prevent FE. Lessons from this discussion point to countries that adopt voluntary self-regulatory and legislative measures. It is important to note that in certain instances countries apply both voluntary and legislative measures.

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<sup>1124</sup> Staschen and Nelson "The Role of Government and Industry in Financial Inclusion" in Ledgerwood *et al* (eds) *The New Microfinance Handbook* 2013) 71.

<sup>1125</sup> See Ch 4.3.1 above.

This chapter discusses national regulatory frameworks to promote FI. Although this research focuses on the regulatory frameworks for FI with a specific focus on access to BBAs, this chapter discusses national policy and regulatory measures that promote FI in general. It investigates how different countries deal with FE, the financial products and services that are prioritised, and the types of regulatory instrument and their enforcement mechanisms. The main purpose of this chapter is to establish whether the choice of services, products, and instruments effectively achieve this purpose in line with different levels of Aryes and Braithwaite's PRS. The chapter, therefore, analyses a myriad of regulatory instruments and how they can be effectively applied to promote FI and access to BBAs. It draws lessons from existing regulatory practices in carefully selected countries to benchmark the effectiveness and responsiveness of the South African regulatory framework discussed in Chapter six.

The chapter begins by discussing various voluntary self-regulatory measures, such as codes of banking practice and charters, and how they promote FI and access to BBAs. This is followed by the discussion of self-regulatory measures that provide for enforcement mechanisms. It concludes with various legislative measures that have been adopted in different countries and how they are enforced to achieve FI. The discussion immediately below begins by tracing various self-regulatory frameworks such as codes of banking practice and charters that are purely voluntary and do not provide for enforcement mechanisms, followed by those with these mechanisms.

## **5.2 PURE VOLUNTARY BANKING CHARTERS AND CODES OF BANKING PRACTICE**

### **5.2.1 Codes of Banking Practice**

Various codes of banking practice promote FI without enforcement mechanisms.<sup>1126</sup> The Singapore Association of Banks' *Code of Consumer Banking Practice* is "a voluntary initiative of the banking industry" which outlines minimum standards of good banking practice that

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<sup>1126</sup> See many of these codes that do not provide for access to financial services such as Tanzania Bankers Association "Code of Banking Practice" (Nd) <http://www.tanzaniabankers.org/constitution/Code%20of%20Banking%20Practice.pdf> (accessed: 2019-01-30); New Zealand Bankers Association "Code of Banking Practice" (2012) <http://www.nzba.org.nz/wp-content/uploads/2018/05/Code-Of-Banking-Practice-A4-PDF-FINAL.pdf> (accessed: 2019-01-30)("New Zealand *Code of Banking Practice* (2012)").

customers can expect when they contact a bank.<sup>1127</sup> Clause 8(a) commits major retail banks to provide basic banking services with a specific focus on the basic bank account.<sup>1128</sup> The Hong Kong Association of Banks' 2015 *Code of Banking Practice* was issued as a "non-statutory Code issued on a non-statutory basis" and expects authorised institutions to observe the practices in their relationships with customers.<sup>1129</sup>

A few codes of banking practice on the African continent also require banks to promote FI on a voluntary basis.<sup>1130</sup> As with voluntary codes above, the Banking Association of Zambia's *Code of Banking Practice* 2010 "is a voluntary code of conduct which sets harmonised standards of good banking practice for banks to follow when dealing with customers".<sup>1131</sup> In terms of clause 6.10, banks have "committed to offer you [the customer] [a] Basic/ No frill account which would enable you [the customer] to perform basic banking operations". This Code provides specifically that banks' commitment in terms of this clause is "[w]ith a view to reach out to masses", implying the main objective to promote FI.<sup>1132</sup>

Namibia's *Code of Banking Practice* 2013 emphasises the provision of basic banking services and the rooting out of discriminatory practices, similar to the Hong Kong *Code of Banking Practice*.<sup>1133</sup> It is described as a "voluntary code" developed to promote good banking practice.<sup>1134</sup> Clause 5 provides various ways to ensure access to basic banking services. Banks

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<sup>1127</sup> The Association of Banks in Singapore "Code of Consumer Banking Practice" (2017) <https://abs.org.sg/industry-guidelines/consumerbanking> (accessed: 2019-01-29) clause 1 ("Singapore *Code of Banking Practice* (2017)") Preamble.

<sup>1128</sup> Clause 8(a) and (b) of the Code provides as follows:

"8. Basic Banking Services

- a. The major retail banks are committed to provide affordable basic banking services through the provision of a basic banking account.
- b. The bank will be able to provide you with the conditions and details for operating a basic banking account."

<sup>1129</sup> The Hong Kong Association of Banks "Code of Banking Practice" (2015) [https://www.hkab.org.hk/download.jsp?isTemp=N&section\\_id=5&file\\_name=CBP%28Eng%29\\_2018.pdf](https://www.hkab.org.hk/download.jsp?isTemp=N&section_id=5&file_name=CBP%28Eng%29_2018.pdf) (accessed: 2019-01-29). The code became effective from February 2015, Clause 1.2, It does not specifically refer to financial inclusion (Hong Kong "Code of Banking Practice" (2015)).

<sup>1130</sup> See Ch 6 for BASA "Code of Banking Practice" (2012). See Banking Association of Zambia "Code of Banking Practice" (2010) <https://www.baz.org.zm/baz-code/> (accessed: 2019-01-29) (BAZ Banking Code of Banking Practice" (2012)), Bankers Association Namibia "The Code of Banking Practice in Namibia" (2013) <https://www.bon.com.na/Publications/The-Code-of-Banking-Practice-in-Namibia.aspx> (accessed: 2019-01-29); (BAN "Code of Banking Practice" (2013)).

<sup>1131</sup> BAZ "Code of Banking Practice" (2010) clause 1.1.

<sup>1132</sup> See clause 1.1.

<sup>1133</sup> BAN "Code of Banking Practice" (2013).

<sup>1134</sup> See clauses 1 and 2.

have “committed to providing affordable and accessible basic banking services to all Namibians”.<sup>1135</sup> Clause 5 further commits banks to provide qualifying customers with BBAs and to improve these services through product innovation. It also takes cognizance of the specific needs of customers with disabilities, the elderly, and the infirm, and commits banks to taking reasonable measures to improve their access to these services.<sup>1136</sup> This code is not limited to promoting FI by providing access to basic banking services. Clause 10 reflects what du Toit sees as the code’s “reiterate[ion of] an aspect flowing from the bill of rights”.<sup>1137</sup> This clause commits banks to act “in a manner that does not discriminate unfairly against any customer” on identified grounds when they provide banking services.<sup>1138</sup>

### 5.2.2 Monitoring and Enforcement Mechanisms

The similarity between the codes of banking practice discussed in this section is that none of the codes provides for compliance and enforcement mechanisms. The only forms of enforcement that they provide are the handling of consumer complaints through internal and external dispute resolution processes using the offices of the ombudsman.<sup>1139</sup> These codes expressly make provision for parties to comply with their respective codes. Clause 5.2 of the 2010 *Zambian Code of Banking Practice* recognises banks’ contractual duties to comply with its provisions. However, it does not provide for specific enforcement and compliance mechanisms or the consequences of non-compliance. Singapore’s *Code of Banking Practice* 2017, for instance, commits banks to comply with the high level of services espoused in its provisions.<sup>1140</sup> However, to achieve this it takes note of possible complaints and disputes that may arise, which are to be addressed through both internal and external dispute resolution mechanisms. Therefore, these codes of banking practice enforce their provisions through individual complaints. They do not, however, provide for independent compliance bodies that continuously monitor compliance and guard against recurring breaches of their provisions. Notwithstanding the lack of compliance or enforcement mechanisms in these countries, the

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<sup>1135</sup> See clause 5.

<sup>1136</sup> See clause 5.

<sup>1137</sup> Du Toit “Reflections on the South African Code of Banking Practice” 2014 3 *TSAR* 568 574.

<sup>1138</sup> These grounds are marital status, gender, age, or race. This notwithstanding, clause 10 provides one specific reason upon which it may deviate from its non-discriminatory provisions of these services. Banks may provide certain special services, such as BBAs, which are designed for members of a target market group, such as the previously underbanked and the low-income earners.

<sup>1139</sup> See clause 13 of the Hong Kong “Code of Banking Practice” (2015).

<sup>1140</sup> See clause 16.

latest record of bank account ownership is 98% in Singapore, 95% in Hong Kong, 81% in Namibia, and 46% in Zambia.<sup>1141</sup> This produces mixed results concerning the effectiveness and enforceability of voluntary codes of banking practice and charters, including banks' compliance with their commitments to provide basic financial services.

### **5.3 ENFORCED SELF-REGULATORY CHARTERS AND CODES OF PRACTICE**

#### **5.3.1 Codes of Banking Practice and Financial Inclusion**

Section 5.2 above discussed voluntary codes of banking practice that do not provide enforcement mechanisms such as monitoring and sanctions. This section focuses on the type of codes of banking practice and charters that fit neatly into Ayres and Braithwaite's description of enforced self-regulation. It begins by discussing codes of banking practice, followed by examples of enforcement mechanisms in various codes. Voluntary codes of practice and charters by banking associations have recently incorporated provisions to promote access to financial services. Save for India, many of these voluntary instruments do not directly refer to FI but require financial institutions to make financial services available that are appropriate to the circumstances of the low-income communities and the poor accessible.<sup>1142</sup> These voluntary instruments have become the common approach to overcoming FE.<sup>1143</sup> This section discusses various codes of banking practice that have adopted measures to promote FI. Very few specifically provide for these measures. The Hong Kong Association of Banks' *Code of Banking Practice* of 2015 referred to above,<sup>1144</sup> for example, does not provide for specific provisions that promote FI but focuses on eradicating any form of discrimination associated with such efforts.<sup>1145</sup> This code generally promotes equal opportunity of access to financial services and discredits any forms of discrimination related to these services.<sup>1146</sup> The code specifically protects customers with a disability, and requires banks to adopt "a helpful approach to making available to the appropriate means of accessing

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<sup>1141</sup> Demircuc-Kunt *et al* "The Global Findex Database 2017" (2018) 124.

<sup>1142</sup> See, eg, the BCSBI "Code of Bank's Commitment" (2018). Clause 11 of this code is titled "Financial Inclusion". See also BASA *Code of Banking Practice* (2012) clause 5. This is discussed in Ch 6.2.3 below.

<sup>1143</sup> ECom *Basic Banking CD* (2009) 10.

<sup>1144</sup> See Ch 5.2 above.

<sup>1145</sup> Hong Kong "Code of Banking Practice" (2015).

<sup>1146</sup> Hong Kong "Code of Banking Practice" (2015) clauses 10.1 and 10.4.



banking services".<sup>1147</sup> This code is just one of many voluntary codes available for the promotion of FI worldwide.

### **5.3.2 Selected Codes of Banking Practice**

This section discusses a selection of voluntary codes of banking practice that promote FI in several African countries and other countries such as the UK, India, and Australia to illustrate how voluntary and self-regulatory codes of banking practice are used to promote FI. Codes of banking practice in the UK, India, and Australia have been carefully selected to illustrate how similar instruments help to promote FI. Importantly, codes of banking practice in India and Australia are relevant as these countries' banking laws, like those of South Africa, are modelled on the English banking law and its code of banking practice.<sup>1148</sup> The English type of enforcement mechanisms, the Banking Code Standard Board (BCSB), and England's main enforcement bodies guide the choice of codes in these countries. There is a dearth of enforcement mechanisms regarding the provisions of codes of banking practice by the courts in many jurisdictions.

This section starts with the discussion of FI in the UK specifically to illustrate key elements of the codes of banking practice that have been adopted in India and Australia. The discussion of the code in the UK seeks to highlight a paradigm shift from the now inoperative English codes of banking practice into numerous other legislative and regulatory frameworks that follow the promulgation of the Financial Service and Market Act 2000. It also analyses the impact of the EU's Payment Systems Directive and the subsequent Payment Account Directive on national frameworks.

The Australian and Indian codes of banking practice are typical models of voluntary self-regulatory instruments aimed at promoting FI. In Australia, the Australian Securities and Investment Commission (ASIC) provides helpful guidelines on how to make voluntary codes effective, which is missing in many codes of banking practice that lack effective enforcement mechanisms and institutions.

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<sup>1147</sup> Hong Kong "Code of Banking Practice" (2015) clause 10.2.

<sup>1148</sup> See Schulze "The South African Banking Adjudicator - A Brief Overview" 2000 12 *SAMLJ* 38 44 for a comparative analysis of the Ombudsman for Financial Services and codes of banking practices in these countries.

### 5.3.3 Financial Inclusion through Voluntary Codes in the UK

The first code of banking practice in the UK was developed in 1992 and has been reviewed several times. The voluntary codes were the *Banking Code* and the *Business Code*.<sup>1149</sup> The *Banking Code* specifically dealt with standards of good practice for banks, and aimed to help customers better to understand banking services.<sup>1150</sup> The 1997 version of the code specifically mentioned “basic banking services” and required banks to provide names and addresses of their customers with current accounts to other banks only with the customer’s express written consent.<sup>1151</sup> The 2005 version of the code also contained specific commitments to offer BBAs.<sup>1152</sup>

The latest edition of the English code of banking practice was issued in 2008. Several regulatory reforms at both EU and national levels prompted possible reforms. These include the need to align the regulation with the EU Payment Services Directive of 2007<sup>1153</sup> which was adopted in the UK through the Payment Services Regulations 2009 (PSR).<sup>1154</sup> The PSR focuses

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<sup>1149</sup> Since these codes of practice are no longer operative and not available from the website of the British Banking Association, the background is drawn from the website of the Banking Code Standard Boards, which was the monitoring institution for these codes, and relevant textbook discussions on their content. See <http://www.bcsb.co.uk/> (accessed: 2019-03-15). This code was entitled *Good Banking: Code of Practice to be Observed by Banks, Building Societies and Card Issuers in their Relations with Personal Customers* and covered current accounts, savings, credit cards, personal loans, while the Banking Business Code covers small businesses with a turnover of up to £1 million a year, and was introduced in 2002. See also Cranston, Avgouleas, Van Zwieten, Hare and Van Sante *Principles of Banking Law* 3rd ed (2017) 217; Cartwright *Banks, Consumers and Regulation* (2004) 126.

<sup>1150</sup> See reference to par 2.1 of the 1994 version of the Banking Code in Hapgood and Neil *Paget’s Law of Banking* 11th ed (1996) 111. This banking code was dissolved as of November 2009 and broken up into two parts where the lending aspect of the code is the responsibility of the Lending Standards Board and bank business, including opening bank accounts, is the responsibility of the Financial Services Authority. See Hussain “Banking on the Basics: The Accessibility of Basic Bank Accounts in Scotland” (2010) <https://www.cas.org.uk/system/files/publications/banking-on-the-basics.pdf> (accessed: 2022-01-23) 13 for a detailed background to the code.

<sup>1151</sup> Kempson Conference Paper (30-31 May 2006). See also Campbell “Bank Confidentiality and the Consumer in the United Kingdom” in Cartwright *Consumer Protection in Financial Services* (1999) 85-86 who refers to par 2.1 of the code which provides that no such permission will be required in relation to “basic banking services”.

<sup>1152</sup> Anderloni and Carluccio in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 58.

<sup>1153</sup> See EC “Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services in the Internal Market” 2007 5 *Official Journal of the European Union* L 319, 5.12.2007 1–36.

<sup>1154</sup> Financial Services and Markets: The Payment Services Regulations No 209 of 2009. See also Cartwright 2007 *JFRC* 302.

on payment services including the provision of payment accounts.<sup>1155</sup> It, however, does not regulate all services that were covered by the code of banking practice.

In 2008, the Financial Service Authority (FSA) – and now the Financial Conduct Authority (FCA) – began to question the effectiveness of voluntary codes used to regulate bank-customer relationships in the area of retail banking.<sup>1156</sup> In addition, the FCA was responsible for regulating and overseeing the specific payment services in terms of the regulations.<sup>1157</sup> The FSA identified a gap regarding the limited scope of application of the PSR and its supervisory role, particularly as it was a single authority overseeing the regulation of the financial service sector. The FSA identified several challenges raised by self-regulation under the *Banking Code*. One of them was its power specifically to regulate, monitor, and enforce payment services provisions under the PSR, while core consumers' retail banking is regulated under the *Banking Code* and monitored by the BCSB in collaboration with the Financial Services Ombudsman.<sup>1158</sup> This anomaly was seen as a potential risk that could restrict the FSA's regulatory effectiveness. The FSA was "unable to look comprehensively across all risks affecting firms' retail market activities within the scope of FSMA [Financial Service Market Act 2000]".<sup>1159</sup> With this challenge in mind, the FSA proposed to introduce "a new framework to replace self-regulation in respect of deposit-taking activities".<sup>1160</sup> This led to the introduction of the new "Banking and Payment Services Conduct regime" which empowered the FSA to regulate all retail banking services, deposit-taking, and related activities.<sup>1161</sup> This regime currently comprises the Payment Service Regulation and *The Banking Conduct of Business*

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<sup>1155</sup> Financial Service Authority "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 09/19 [http://www.fsa.gov.uk/pubs/cp/cp08\\_19.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_19.pdf) (accessed: 2019-02-26) 13.

<sup>1156</sup> FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 09/19. The FSA was given statutory power by the Financial Service and Market Act 2000. However, the 2007-2008 financial crisis saw the establishment of the Prudential Regulation Authority responsible for the prudential regulation and the Financial Conduct Authority responsible for regulating the conduct of banks to ensure the protection of consumers. See also HM Treasury "A New Approach to Financial Regulation: the Blueprint for Reform" (2011) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/81403/consult\\_finreg\\_new\\_approach\\_blueprint.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/81403/consult_finreg_new_approach_blueprint.pdf) (accessed: 2019-01-24).

<sup>1157</sup> FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 08/19.

<sup>1158</sup> FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 08/19. See also Cartwright 2009 *JFRC* 307.

<sup>1159</sup> FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 08/19 par 3.14.

<sup>1160</sup> FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 08/19 par 3.1.

<sup>1161</sup> FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultation Paper* 08/19 par 3.1. Ellinger, Lomnicka and Hare *Ellinger's Modern Banking Law* 5th ed (2011) 68.

*Sourcebook* (BCOBS) which the FSA introduced to regulate banks' deposit-taking activities.<sup>1162</sup> With regard to the latter, the FSA exercised its power in terms of section 64 of the FSMA to issue codes of practice for complying with the "statement of principles".<sup>1163</sup> The BCOBS provides a high-level approach to issues such as financial promotion and communication with customers,<sup>1164</sup> distance marketing,<sup>1165</sup> information to customers on statements of account,<sup>1166</sup> unauthorised payments, lost and dormant accounts, and the right to cancel accounts.<sup>1167</sup> It requires banks to provide appropriate information to customers including information regarding "basic bank accounts", provided the bank offers these services and the customer is eligible for them.<sup>1168</sup> To comply with the EU PAD, payment accounts with basic features (referring to BBAs), are regulated under the Payment Accounts Regulations 2015.<sup>1169</sup> These two documents have changed the face of regulation in the UK from a voluntary self-regulation code to regulation under the legislative framework of the FSMA 2000. The now-defunct FSA had a statutory power to secure compliance with these regulations.<sup>1170</sup> The latest data on adults who own a bank account in the UK is 96%.<sup>1171</sup>

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<sup>1162</sup> FSA "Banking Conduct of Business Sourcebook" (Nd). The BCOBS came into effect on 1 November 2009. See the discussion of this document in Ellinger *et al* *Ellinger's Modern Banking Law* 5th ed (2011) 65-68.

<sup>1163</sup> See s 64(2) of the FSMA. The FCA statements of principles that must be adhered to by financial services firms include the requirement to act with integrity and with due skill, care, and intelligence. See FCA "Statements of Principle and Code of Practice for Approved Persons" (2019) *Release 36* <https://www.handbook.fca.org.uk/handbook/APER.pdf> (accessed: 2019-03-26).

<sup>1164</sup> FSA "Banking Conduct of Business Sourcebook" (Nd) 2.

<sup>1165</sup> FSA "Banking Conduct of Business Sourcebook" (Nd) 2A and 3.

<sup>1166</sup> FSA "Banking Conduct of Business Sourcebook" (Nd) 4.

<sup>1167</sup> FSA "Banking Conduct of Business Sourcebook" (Nd) 5.

<sup>1168</sup> FSA "Banking Conduct of Business Sourcebook" (Nd) 6.

<sup>1169</sup> See Ch 4 for the discussion of the EU "PAD" (2014). See also the UK Payment Accounts Regulations (2015). The regulations came into effect on 18 September 2016. See Part 4 for the "Regulation of Payment Account with Basic Features".

<sup>1170</sup> See s 1A of Chapter 1 of the Financial Service Act 2012 in terms of which the FSA will now be called the Financial Conduct Authority. The new dispensation, however, did not completely abolish voluntary codes as instruments to regulate banking activities. The new regime also introduced the original Lending Code of 2009 to regulate consumer credit practices as a self-regulatory code that sets standards of good practice on products such as loans, overdraft, credit, and charge cards. The British Bankers Association "The Lending Code Setting Standards for Banks, Building Societies and Credit Card Providers" (2009) <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2016/06/The-Lending-Code-Nov-2009.pdf> (accessed: 2019-03-25). See also Walsh "Banker's Duty of Confidentiality: Dead or Alive" 2010 1 *Edinburgh Student Law Review* 10 and Crerar "Review of the Lending Code 2010/11" 2011 5 *Law and Financial Markets Review* 337, for a brief discussion of this code. See further The British Bankers Association and The UKcard Association "The Standards of Lending Practice for Business Customers" (2016) <https://www.lendingstandardsboard.org.uk/wp-content/uploads/2017/03/standards-of-lending-practice-business.pdf> (accessed: 2019-03-25).

<sup>1171</sup> Demirguc-Kunt *et al* "The Global Findex Database 2017" (2018) 124. This code recognised the needs of elderly customers and those with a disability to have access to transactional services.

### 5.3.4 Financial Inclusion in terms of the Australian Code of Banking Practice

The first Australian code of banking practice was developed in 1993.<sup>1172</sup> It was reviewed in 2004<sup>1173</sup> and 2013.<sup>1174</sup> The *Code of Banking Practice* 2013, like its predecessor, committed banks to provide suitable financial services to specific sectors of the community. It required banks to provide suitable services to low-income earners, the disadvantaged, and to “members of indigenous communities”.<sup>1175</sup> It also required them to make information about these services available and to include details of accounts with no or low standard fees.<sup>1176</sup> The 2013 *Code of Banking Practice* was reviewed in 2019.<sup>1177</sup>

The new code is significant for its detailed set of commitments to promote FI. Chapter 13 of the *Code of Banking Practice* 2019 specifically provides for the banks’ commitment to “inclusive and accessible banking”.<sup>1178</sup> This code commits banks to provide services that are generally inclusive for all people.<sup>1179</sup> Clause 42 specifically commits banks to provide transaction banking services with no or low standard fees to low-income earners. Any low-income earner must make the bank aware of this position.<sup>1180</sup> Under Chapter 16, banks commit to provide basic and low or no-fee accounts.<sup>1181</sup> They offer to raise awareness on these types of accounts and to give relevant information about the ease of access to them and offer them

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<sup>1172</sup> ABA “The Code of Banking Practice” (1993) <http://www.reviewbankcode.com/bankcode.htm> (accessed: 2019-03-25). See also Howell “Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Improving Consumer Protection Standards?” 2015 38 *University of New South Wales Law Review* 544.

<sup>1173</sup> See also The ABA “Code of Banking Practice” (2004) <http://www.ccmc.org.au/cms/wp-content/uploads/2014/09/2004-Code-of-Banking-Practice.pdf> (accessed: 2019-03-25) (“ABA *Banking Code of Practice* (2004)”). Australian banks committed to provide bank accounts that are suitable for the needs of the low-income and required a customer to inform the bank that he or she is either a low-income earner or a disadvantaged person.

<sup>1174</sup> ABA “Banking Code of Practice and Code Compliance Monitoring Committee” (2013) [https://www.ausbanking.org.au/wpcontent/uploads/2019/04/2013\\_ABA\\_CODE.pdf](https://www.ausbanking.org.au/wpcontent/uploads/2019/04/2013_ABA_CODE.pdf) (accessed: 2019-03-25) (ABA *Banking Code of Practice* (2013)).

<sup>1175</sup> ABA *Banking Code of Practice* (2013) clause 8.

<sup>1176</sup> ABA *Banking Code of Practice* (2013) clause 8.

<sup>1177</sup> The review came into effect in July 2019. See ABA “Code of Banking Practice and Code Compliance Monitoring Committee” (2019) [https://www.ausbanking.org.au/wp-content/uploads/2019/04/2013\\_ABA\\_CODE.pdf](https://www.ausbanking.org.au/wp-content/uploads/2019/04/2013_ABA_CODE.pdf) (accessed: 2019-06-20) (“ABA *Banking Code of Practice* (2019)”).

<sup>1178</sup> ABA *Banking Code of Practice* (2019) chapter 13.

<sup>1179</sup> ABA *Banking Code of Practice* (2019) clause 32. The code specifically mentions its specific target as old customers, the disabled, and indigenous Australians who live in remote locations. See par 32(a)-(c), read with par 35.

<sup>1180</sup> ABA *Banking Code of Practice* (2019) clause 42.

<sup>1181</sup> ABA *Banking Code of Practice* (2019) clauses 45-48.

once they have conducted eligibility assessments.<sup>1182</sup> The 2017 Global Findex database records adult bank account ownership in Australia at 100%.<sup>1183</sup>

### 5.3.5 Financial Inclusion through Voluntary Codes in India

The Indian *Code of Bank's Commitment to Customers* 2018 specifically provides for FI.<sup>1184</sup> It includes banks' commitments to offer a "Basic Savings Bank Deposit Account" without requiring a minimum balance.<sup>1185</sup> A unique feature of this code is the banks' commitment to organise special events in remote areas to promote FI, which are followed by regular visits to these places to monitor the implementation of FI efforts.<sup>1186</sup> With these efforts, India has adopted a more inclusive approach to FI with a variety of efforts and products. The latest data on the ownership of bank accounts in India is 80%.<sup>1187</sup>

## 5.4 CODES OF BANKING PRACTICE COMPLIANCE AND ENFORCEMENT MECHANISMS

### 5.4.1 Introduction of Enforcement Mechanisms

Section 5.2 above highlights an important characteristic of codes of banking practice as regulatory instruments which are generally not enforced by specific enforcement mechanisms similar to legislative instruments. Save for adverse publicity regarding banks and the inherent reputational risks of non-compliance, they are generally voluntary and not enforceable.<sup>1188</sup> The effectiveness of codes as regulatory instruments depends both on adequate implementation mechanisms and on how they are effectively enforced. As Herrnstadt remarks,

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<sup>1182</sup> ABA *Banking Code of Practice* (2019) clauses 45-47.

<sup>1183</sup> Demirguc-Kunt *et al* "The Global Findex Database 2017" (2018) 123.

<sup>1184</sup> BCSBI "Code of Bank's Commitment to Customers" (2018). Clause 10 of this code is titled "financial inclusion" and provides for various types of product that are tailored to achieve this objective.

<sup>1185</sup> BCSBI "Code of Bank's Commitment to Customers" (2018) clause 10(a). Banks also commit to provide correspondence banking to bridge the distance gap, and to provide mobile banking facilities and other modes of remittance. Banks further commit to offer "credit facilities at affordable costs". See 10(i), (j), (k), (m).

<sup>1186</sup> See clauses (v) and (w).

<sup>1187</sup> Demirguc-Kunt *et al* "The Global Findex Database 2017" (2018) 124.

<sup>1188</sup> Du Toit 2014 3 *TSAR* 568. See also Cartwright 2009 *JFRC* 311, Cartwright *Banks Consumers and Regulations* (2004) 143-144. See further BASA *Code of Banking Practice* (2012) clause 1 about its commitment to abide by the recommendation of the Ombudsman for Financial Service. The clause specifically provides that if the bank fails to abide by its determination "the Ombudsman may publish the recommendation and the relevant bank's refusal to comply". This may be sufficient to alert non-compliant banks to possible reputational risk for non-compliance.

"voluntary codes that do not adequately include...programs for effective implementation and enforcement are doomed to fail".<sup>1189</sup> The Australian system of enforcing financial services sector codes of practice provides a unique example of how to implement enforcement mechanisms for compliance with voluntary codes effectively. The Australian Securities and Investments Commission's (ASIC) *Approval of Financial Services Sector Codes of Conduct Regulatory Guideline 183* provides key threshold criteria for approval of codes and requires any breach of the code to be dealt with effectively and independently.<sup>1190</sup> The criteria require that: (a) subscribers be contractually bound by the code; (b) there exists an independent body that is empowered to administer and enforce the code and be able to impose sanctions; (c) provides specific provisions in the code for the availability of internal and external dispute resolution; and (d) that there must be a broad standing (*locus standi*) to complain about any other code breaches to the independent body. The discussion below focuses on the approval process under the ASIC 2013 *Regulatory Guidelines* and, in particular, criteria (a) and (b) as they are relevant to ensure that measures are taken proactively to promote the enforcement of the code and its provisions which promote FI.

#### 5.4.2 Australian Self-regulatory Codes Approval Mechanisms

The enforcement of the *Code of Banking Practice* in Australia is reinforced by the unique approval process for voluntary codes. The legislature has vested the power to approve voluntary codes in the ASIC.<sup>1191</sup> In terms of section 1101A of the Corporation Act 2001, ASIC has the power to approve codes of conduct that relate to the activities of financial service licencees or issuers of financial services.<sup>1192</sup> As indicated above,<sup>1193</sup> one of the criteria that a code must satisfy for approval is that "the rules contained in the code must be binding on

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<sup>1189</sup> Herrstadt "Voluntary Corporate Codes of Conduct: What's Missing?" 2001 16 *The Labor Lawyer* 349 370.

<sup>1190</sup> ASIC "Approval of Financial Services Sector Codes of Conduct: Regulatory Guideline 183" (2013) <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rq-183-approval-of-financial-services-sector-codes-of-conduct/> (accessed: 2019-04-02) RG 183.25. ("ASIC *Codes Regulatory Guidelines* (2013)").

<sup>1191</sup> ASIC is an independent Australian government body that acts as Australia's corporate regulator. Its role is to enforce and regulate companies and financial services laws to protect Australian consumers, investors, and creditors. See more details about ASIC at <https://asic.gov.au/about-asic/> (accessed: 2019-04-01). It is set up under and administered in terms of the Australian Securities and Investments Commission Act 2001.

<sup>1192</sup> See also ASIC *Codes Regulatory Guidelines* (2013) RG 183.20(a).

<sup>1193</sup> See Ch 5.4 above.

(and enforceable against) subscribers through contractual arrangements”.<sup>1194</sup> In compliance with this criterion, different versions of the *Code of Banking Practice* specifically provide for the inclusion of an express statement that the code shall apply in any written terms and conditions to the banking services provided to the customers.<sup>1195</sup> For instance, clauses 2 and 3 of the Australian Banking Association *Banking Code of Practice* 2019 provide as follows:

The Code forms part of our banking services and guarantees:

1. ....
2. Our written terms and conditions for all banking services and guarantees to which the Code applies will include a statement to the effect that the relevant provisions of the Code apply to the banking service or guarantee.
3. The terms and conditions need not set out those provisions.

This differs from the New Zealand *Code of Banking Practice* which specifically excludes the terms and conditions of any written relationships between banks and their customers from the application of the code.<sup>1196</sup> In addition, the New Zealand code specifically excludes reference by the code to terms and conditions in a contract concluded by banks with their customers regarding the obligations between the parties.<sup>1197</sup> Clause 2 provides specifically that “the terms and conditions of our banking services must be ... consistent with the code”.<sup>1198</sup> By implication, this requires the provisions of the code to incorporate these terms directly in any relationship between banks and their customers. This complements the ASIC’s criteria for approval of codes of practice that require codes to be binding on subscribers through contractual arrangements. Also, courts in Australia have scrutinised the binding effect and have in certain instances enforced the provisions of the *Code of Banking Practice*.<sup>1199</sup>

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<sup>1194</sup> ASIC *Codes Regulatory Guidelines* (2013) RG 183.13. See Pearson 2006 *Griffith Law Review* 355.

<sup>1195</sup> ABA *Banking Code of Practice* (1993) clause 2.2. See also ABA *Banking Code* (2004) clause 10.3, ABA *Banking Code of Practice* (2013) clause 12.3.

<sup>1196</sup> New Zealand *Code of Banking Practice* (2012).

<sup>1197</sup> New Zealand *Code of Banking Practice* (2012) 2. The code also provides specifically that: “[t]his Code doesn’t override or replace those terms and conditions. It also doesn’t form part of any contracts with us”.

<sup>1198</sup> ABA *Banking Code of Practice* (2004) clause 10.2 (c); ABA *Banking Code of Practice* (2013) clause 12.2(c). See further clauses 2 and 3 of the ABA *Banking Code of Practice* (2019).

<sup>1199</sup> See *Sam Management Services (Australia) Pty Ltd v Bank of Western Australia Ltd* [2009] NSWCA 320 par 75, where the New South Wales Court of Appeal ruled the Code as a “promotional instrument [which] is likely to lead to complications in litigation”. See also *Commonwealth Bank of Australia v Starrs* [2012] SASC 222 for Peek AJ of the Supreme Court of South Australia’s obiter view that “the Code is largely a collection of ‘dos and don’ts’ of bankers”. In *Bank of Western Australia Ltd v Abdul* [2012] VSC 222 par 100 the Code was viewed as nothing more than “a distillation of fair and prudent practice which represent a consensus in the banking and financial sector”. See further Tyree “The Code of Banking Practice in the Courts” (Nd) <http://www2.austlii.edu.au/~alan/code-enforce.html> (accessed: 2019-01-17) who is concerned



### 5.4.3 Codes' Compliance Bodies and their Compliance and Monitoring Mechanisms

#### 5.4.3.1 United Kingdom

Like the UK, the Australian and Indian codes of banking practice have adopted monitoring mechanisms by special bodies to ensure and enforce compliance. Although the UK *Banking Code* was voluntary, specific mechanisms have been put in place to improve its effectiveness. In 1999, the Banking Code Standard Board (BCSB) was established with the responsibility of monitoring banks' compliance with the code.<sup>1200</sup> Its enforcement strategies involve compliance inspections where inspectors visit subscribing financial institutions' premises to assess the extent of their compliance with the code.<sup>1201</sup> The visits are tailored according to the size and complexity of the organisation, and involve high-level compliance controls as well as checking the details on sales documents of the organisation.<sup>1202</sup> The BCSB also enforces compliance through market research activities, including spot checks through mystery shopping.<sup>1203</sup> The BCSB's compliance strategies derive their strength from a variety of sanctions. It may publish details of the bank and its breach of the code in its annual report or publicly censure the code's subscribers. It may also cancel or suspend the transgressor's registration.<sup>1204</sup> Despite these enforcement tools, the adequacy of its sanctions has been under scrutiny. In particular, the BCSB is criticised for its lack of disciplinary procedures and penalties.<sup>1205</sup> Those against

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with the approach of the courts in these cases and their findings that the code does not have a direct effect, and breaches of these codes are only relevant if they relate to existing causes of action that derive from their content. In his view, if this is the case and if they do not have contractual force, there is no reason to incorporate its terms and conditions into the contract for the provision of banking services. Cf *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351.

<sup>1200</sup> See <http://www.bcsb.co.uk/> (accessed: 2019-03-24).

<sup>1201</sup> <http://www.bcsb.co.uk/>. See also Cartwright *Banks Consumers and Regulations* (2004) 141.

<sup>1202</sup> <http://www.bcsb.co.uk/>. See also Cartwright *Banks Consumers and Regulations* (2004) 141.

<sup>1203</sup> <http://www.bcsb.co.uk/>. See also Cartwright *Banks Consumers and Regulations* (2004) 141. See further WoodStock Institute "Full Disclosure: Why Bank Transparency Matters: A Comparison of US and UK Lending Practices in Disadvantaged Communities" (2006) [http://library.uniteddiversity.coop/Money\\_and\\_Economics/full\\_disclosure-why\\_bank\\_transparency\\_matters.pdf](http://library.uniteddiversity.coop/Money_and_Economics/full_disclosure-why_bank_transparency_matters.pdf) (accessed: 2019-03-24).

<sup>1204</sup> FSA "Regulating Retail banking Conduct of Business" (2008) *Consultative Paper* 08/19 9. See also Cartwright *Banks Consumers and Regulations* (2004) 142.

<sup>1205</sup> Cartwright *Banks Consumers and Regulations* (2004) 142. See also Cruickshank "Competition in UK Banking: A Report to the Chancellor of the Exchequer" (2000) [https://www.vocalink.com/media/1603/cruickshank\\_report\\_2000.pdf](https://www.vocalink.com/media/1603/cruickshank_report_2000.pdf) (accessed: 2019-03-25) 129; FSA "Regulating Retail Banking Conduct of Business" (2008) *Consultative Paper* 08/19 4.

these strict sanctions support their position by relying on the adequacy of the naming and shaming of non-compliant banks that the BCSB publishes in its annual reports.<sup>1206</sup>

### **5.4.3.2 India**

The BCSB's enforcement approach has since been followed in India and Australia. The Reserve Bank of India established the Banking Code and Standard Board of India (BCSBI) as an independent body responsible for monitoring banks' compliance with codes and standards when delivering financial products and services.<sup>1207</sup> It is responsible for monitoring the *Code of Bank's Commitment to Customers*.<sup>1208</sup> The BCSBI applies similar compliance and monitoring mechanisms to its UK counterpart. In terms of its *Banking Code Rules*,<sup>1209</sup> a member bank must have a "code compliance officer" at each of its controlling offices who is responsible to maintain a register of breaches by the bank under his or her jurisdiction and to provide for possible remedial action.<sup>1210</sup> The officer must also inform the BCSBI of any breaches and possible actions within specified periods.<sup>1211</sup> The BCSBI may also require such information to monitor compliance.<sup>1212</sup> As with the UK's BCSB, onsite visits and mystery shopping strengthen the enforcement mechanism of the BCSBI. Its representatives have the power to visit the premises of any of its members to verify and gather information necessary to monitor compliance.<sup>1213</sup> To achieve this goal, the BCSBI also has the power to undertake "incognito visits" to the premises of its members.<sup>1214</sup>

The BCSBI further has the power to sanction banks for non-compliance with the code. It imposes sanctions by taking the following relevant factors into account: the extent of harm to the customer caused by the breach; whether the breach was isolated or systematic; the length

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<sup>1206</sup> Cartwright *Banks Consumers and Regulations* (2004) 142.

<sup>1207</sup> See BCSBI website [http://www.bcsbi.org.in/Abt\\_Background.html](http://www.bcsbi.org.in/Abt_Background.html) (accessed: 2019-03-03). See also BCSBI "Annual Report of the Banking Codes and Standards Board of India (BCSBI) 2006-07" <https://web.archive.org/web/20121011101823/http://www.bcsbi.org.in/Pdf/ar200607.pdf> (accessed: 2019-03-03).

<sup>1208</sup> BCSBI "Code of Bank's Commitment to Customers" (2018), and also the BCSBI "Code of Bank's Commitment to Micro and Small Enterprises" (2015) <http://www.bcsbi.org.in/Pdf/CodeOfBankMSE2015.pdf> (accessed: 2019-03-04).

<sup>1209</sup> BCSBI "The Banking Code Rules" (2012) <http://www.bcsbi.org.in/pdf/BankingCodeRules.pdf> (accessed: 2019-03-04) Rule 9.1-9.3.

<sup>1210</sup> See Rules 9.1 and 9.2.

<sup>1211</sup> See Rule 9.3. Within 7 days in respect of breaches and 15 days in respect of the remedial action.

<sup>1212</sup> See Rule 6(a).

<sup>1213</sup> See Rule 6(b).

<sup>1214</sup> See Rule 6(c).

of time since the breach; the extent of damage to the reputation of the banking industry at large; the extent of a member's profit; and the loss or damage suffered as a result of the breach.<sup>1215</sup>

The sanctions it may impose also resemble those of the UK's BCSB. It can publish a member's breach in its annual report, issue a warning or reprimand, and publicly censure a member by publishing any breach or sanction in the media.<sup>1216</sup> It can also cancel or suspend membership.<sup>1217</sup> Like the UK's BCSB, the BCSBI does not provide for strict sanctions and penalties. Rule 11 of the BCSBI *Banking Code Rules* specifically provides that its disciplinary procedures are to encourage efforts to take remedial action that involves minimum costs and inconvenience "rather than penal measures".

### **5.4.3.3 Australia**

The current *Banking Code of Practice* 2019 empowers the Banking Code Compliance Committee (BCCC) to apply several sanctions.<sup>1218</sup> It adopts mechanisms similar to those of the UK's BCSB and the BCSBI.<sup>1219</sup> This includes sending questionnaires to subscribing banks and onsite testing of information on their practices and procedures,<sup>1220</sup> conducting market research that involves an arranged visit to the subscribing bank or mystery shopping activities to monitor compliance with the code,<sup>1221</sup> and naming and shaming of banks for breach of the code.<sup>1222</sup> It is also empowered to name banks that are in breach of the code in its Annual

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<sup>1215</sup> See Rule 15.1.

<sup>1216</sup> See Rule 15.1 (a) (b) (c) and (e).

<sup>1217</sup> See Rule 15.1 (d).

<sup>1218</sup> See clause 207 of the ABA *Banking Code of Practice* (2019) for the functions of the BCCC. The BCCC was originally called the Code Compliance Monitoring Committee. See clause 34 of AB *Code of Banking Practice* (2004).

<sup>1219</sup> Code Compliance Monitoring Committee "Guidance Note No 1 – CCMC Compliance Monitoring" (2013) <http://www.ccmc.org.au/cms/wp-content/uploads/2013/11/GN1-Monitoring.pdf> (accessed: 2019-01-25), clause 4.

<sup>1220</sup> See CCMC "Code of Banking Practice and Code Compliance Monitoring Committee Mandate" (2013) <https://bankinginaustraliatoday.com/images/Stories/BankingCode/CCMC-Mandate.pdf> (accessed: 2019-01-26), Mandate 5.1(a) and (b).

<sup>1221</sup> See also ASIC "Submission to the Review of the Code of Banking Practice" (2000) [https://asic.gov.au/media/1322167/bank\\_code.pdf](https://asic.gov.au/media/1322167/bank_code.pdf) (accessed: 2019-01-26) 38 for the recommendation of this as a monitoring strategy.

<sup>1222</sup> Clause 34(i) of the ABA *Banking Code of Practice* (2004). See also Grady "Preparing for Australia's Tough New Banking Standards" 2002 21 *International Financial Law Review* 29 29. See also clause 13.15(d) of the Insurance Council of Australia "General Insurance Code of Practice" (2014) <http://www.insurancecouncil.com.au/for-consumers/code-of-practice> (accessed: 2019-01-25)

Report or on the CCMC website.<sup>1223</sup> Depending on the seriousness of the breach, the BCCC may impose the following sanctions for breach of the code. It may require the bank to rectify or take corrective measures regarding the identified breach.<sup>1224</sup> The BCCC may undertake a compliance review of any remedial action adopted by the non-compliant bank.<sup>1225</sup> It may further require the bank to undertake a staff-training programme on the code.<sup>1226</sup> Another sanction available to the BCCC is a formal warning to non-compliant banks.<sup>1227</sup> These, however, are simply remedial actions and do not provide for strict sanctions for non-compliance. Although the code does not provide extreme sanctions upon which such a warning is issued, there are two mild sanctions that it may impose for breach. Like the UK BCSB and the BCSBI, it may name and shame non-compliant banks in its annual report or on its website.<sup>1228</sup> In addition, it may report serious or systematic ongoing cases of non-compliance to ASIC.<sup>1229</sup>

#### 5.4.4 Compliance Mechanisms from Other Bodies

What is observed from the enforcement mechanisms adopted by these codes of banking practice monitoring bodies is that, except for the naming and shaming of non-compliant members and the cancellation or suspension of registration, they rely on remedial actions and are reluctant to impose strict financial penalties on subscribing banks – an issue which has come in for considerable criticism.<sup>1230</sup>

Noticeable financial and non-financial service sector codes empower compliance and monitoring bodies to impose financial penalties. For instance, breaches of certain provisions of the Association of British Travel Agents' (ABTA) *Code of Conduct* constitute "fixed penalty

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which allows Complain Governing Committee responsible for monitoring and enforcing compliance with this Code to publish any member's non-compliance.

<sup>1223</sup> See also CCMC Mandate 11.1.

<sup>1224</sup> See clause 215(a) of the ABA *Banking Code of Practice* (2019).

<sup>1225</sup> See clause 215(b) of the ABA *Banking Code of Practice* (2019).

<sup>1226</sup> See clause 215(d) of the ABA *Banking Code of Practice* (2019).

<sup>1227</sup> See clause 215(c) of the ABA *Banking Code of Practice* (2019).

<sup>1228</sup> See clause 215(e) of the ABA *Banking Code of Practice* (2019).

<sup>1229</sup> See clause 215(f) of the ABA *Banking Code of Practice* (2019).

<sup>1230</sup> See Howell "Submission to Review of the Code of Banking Practice and Code Compliance Monitoring Committee" (2016) <https://eprints.qut.edu.au/106595/> (accessed: 2019-01-27) 5-6. See also Cartwright *Banks, Consumers, and Regulation* (2004) 141-143.

offences".<sup>1231</sup> Likewise, The South African Insurance Association's (SAIA) *Code of Conduct* provides various sanctions for breach of its provisions that are both deterrent and remedial.<sup>1232</sup> The Code of Conduct Complaints Committee (CCCC) has the power to issue the following sanctions in terms of this code – a written reprimand or warning, rectifying measures, a compliance audit, and the publication of contraventions.<sup>1233</sup> In addition, the CCCC may impose a fine for contravention of the code.<sup>1234</sup> The SAIA's *Code of Conduct*, therefore, provides for a variety of sanctions that are both remedial and deterrent. The decision to apply any of these sanctions depends on the guidelines under the code. Various factors guide the types of sanction that the committee may impose. These include the severity and impact of the contravention, mitigating or corrective actions already taken, the quantum of benefits or gain as a result of the contravention, and the financial or reputational impact on a particular member of the industry.<sup>1235</sup> Therefore, the ABTA's *Code of Conduct* and the SAIA *Code of Conduct* include both sanctions available in the codes of banking practice above, but add financial penalties. The question remains whether the naming and shaming of banks and similar mechanisms are sufficient to ensure compliance with these codes or whether they must be supplemented with disciplinary measures and financial penalties.

Cartwright has questioned the adequacy of the sanctions applied by the UK's BCSB.<sup>1236</sup> He particularly questions the cancellation and suspension of registration as principal sanctions under the UK's BCSB, and their ability to act as deterrents without the power to fine subscribers.<sup>1237</sup> The challenge with cancellation and suspension of registration as principal sanctions derived from the inherent feature of self-regulation. Self-regulatory frameworks provide subscribers with a choice to act outside the realm of the government regulatory

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<sup>1231</sup> Association of British Travel Agents "Code of Conduct" (2019) <https://www.abta.com/sites/default/files/media/document/uploads/Code%20of%20Conduct%20Oct%202020%20%281%29.pdf> (accessed: 2022-06-06). See clause 7D. This includes a breach of the requirement to show the association's logo and number in all the members' advertisements, see clause 1E. ABTA may impose a fine of four hundred pounds where any breach relates to fixed penalty offences, See clause 7D.

<sup>1232</sup> The South African Insurance Association (SAIA) *Code of Conduct* (2015) <https://saia.co.za/code-of-conduct/> (accessed: 2019-01-27) ("SAIA *Code of Conduct* (2015)").

<sup>1233</sup> See clauses 13.6.2.1- 13.6.2.5 of the SAIA *Code of Conduct* (2015).

<sup>1234</sup> See clause 3.6.2.6 of the SAIA *Code of Conduct* (2015). The fine may not exceed the amount of R500 000.

<sup>1235</sup> See clause 13.6.16 of the SAIA *Code of Conduct* (2015).

<sup>1236</sup> Cartwright *Banks Consumers, and Regulations* (2004) 142. See also Cartwright 2009 *JFRC* 309.

<sup>1237</sup> Cartwright *Banks Consumers, and Regulations* (2004) 143.

scheme, and this may place the protection of consumers at risk.<sup>1238</sup> Concerning the effectiveness of the naming and shaming of non-compliant members for the enforcement of the code, Cartwright agrees that it can be a significant sanction. This is because banks are motivated by profit and the adverse publicity derived from publishing their names can reduce profit.<sup>1239</sup> As a result, naming and shaming non-compliant providers may well compel them to comply. It can also serve to educate the public by informing them about the content of the code and thus provide opportunities to enforce their rights under it.<sup>1240</sup>

## **5.5 FINANCIAL INCLUSION THROUGH LEGISLATIVE MEASURES**

### **5.5.1 Introduction**

The preceding discussions demonstrate the banking sector's efforts and innovative measures to promote FI and access to financial services through voluntary codes of practice. A number of governments and financial regulators have also adopted policy and legislative measures to promote FI. These measures are stand alone or complement voluntary measures developed by the banking industry. Existing legislative measures worldwide differ on how they deal with specific challenges germane to specific countries' factors that contribute to FE. This section discusses a selection of the most common measures that various countries have proposed or adopted to promote FI. The literature refers widely to the legislative provisions on access to basic banking and the US modelled affirmative action legislative measures that have been adopted to combat the practice of redlining. These latter measures are distinguished from the anti-credit discrimination and the disclosure of information on the patterns of offering credits. The US Community Reinvestment Act (CRA) is the relevant measure that compels banks to offer financial services to low-income societies and to disclose information about the services they provide.<sup>1241</sup>

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<sup>1238</sup> Cartwright *Banks Consumers, and Regulations* (2004) 142-143. See also Cartwright 2009 *JFRC* 311.

<sup>1239</sup> Cartwright *Banks Consumers, and Regulations* (2004) 142.

<sup>1240</sup> Cartwright *Banks Consumers, and Regulations* (2004) 142.

<sup>1241</sup> See Buckland "Passing the Buck? Examining Canadian Banks Approaches to Financial Exclusion" (2011) *Institute of Urban Studies, The University of Winnipeg, Research and Working Paper # 49* [http://winnspace.uwinnipeg.ca/bitstream/handle/10680/411/Buckland\\_Passing\\_Buck.pdf?sequence=1&isAllowed=y](http://winnspace.uwinnipeg.ca/bitstream/handle/10680/411/Buckland_Passing_Buck.pdf?sequence=1&isAllowed=y) (accessed: 2019-03-20) who indicates the lobbying of US-led CRA in Canada.

## 5.5.2 Mandatory Access to Basic Bank Accounts

One of the approaches that governments apply is the mandatory provision of basic banking services in their legislative frameworks. These measures generally require every citizen or resident to have access to specified basic banking services. They provide details regarding the eligibility for such accounts and the requirements set for such financial services to qualify as “basic”.<sup>1242</sup> Several countries have adopted mandatory legislative measures for financial institutions requiring them to offer BBAs. These include France and Canada. Fairly recently, many other European countries have also started to provide payment accounts with basic features as required by the Payment Account Directive.<sup>1243</sup>

### 5.5.2.1 The Bank Act of France

In 1984 France provided one of the earliest legislative mandates for the right of access to a basic savings account. Article 58 of the French Bank Act<sup>1244</sup> provides for a current account with basic banking services. It guarantees a right to open a current account to any natural or legal person domiciled in France at a financial provider of his or her choice. It imposes this obligation on credit institutions,<sup>1245</sup> post offices providing financial services, or the Treasury. It further guarantees any person who declares to the chosen institution that he or she does not have a current account to have this account.<sup>1246</sup> Where the chosen financial institution

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<sup>1242</sup> Anderloni and Carluccio in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 42. For detailed features of this account see the discussion in Ch 6 below. Other countries such as the USA and India have successfully introduced policy documents on access to basic savings. As these policies do not have the status of law or relevant enforcement mechanisms, they are not discussed here but some will be referred to in the discussion of access to basic banking accounts in Ch 6.

<sup>1243</sup> See Oxford Business Group “The Report 2014 for Basic Banking Law in Peru” (2014) <https://oxfordbusinessgroup.com/peru-2014> (accessed: 2019-03-22) which introduces the basic banking account. See also Kempson Conference Paper (30-31 May 2006) and the ECom “Payment Accounts Directive - Transposition Status” (2017) indicating the transposition of the EU “PAD” (2014) into national law by 96% of European countries. See further European Commission “National Measures and Practices as Regards Access to Basic Payment Accounts: Follow-Up to the Recommendation of 18 July 2011 on Access to a Basic Payment Account” (2012) <https://ec.europa.eu/transparency/regdoc/rep/10102/2012/EN/SWD-2012-249-F1-EN-MAIN-PART-1.PDF> (accessed: 2019-03-22).

<sup>1244</sup> Banking Act 84-46 of 24 January 1984 (unofficial translation). The original Act is cited as Law n 84-46 of January 24<sup>th</sup>, 1984. See Nair “Addressing Financial Exclusion in France and India: A Review of Strategies and Institutions” (2017) <https://halshs.archives-ouvertes.fr/halshs-01451918v2/document> (accessed: 2019-03-22).

<sup>1245</sup> Defined in article 1 as “legal persons carrying out banking operations as their regular business”.

<sup>1246</sup> Article 58.

refuses to offer this account, the applicant may refer the matter to the Banque de France.<sup>1247</sup> This bank has the power to identify and assign either a credit institution or the financial services division of the Post Office or the Treasury to offer this type of account. A chosen institution is allowed to limit the provision of the current account to defined conditions for basic banking, including conditions relating to pricing.<sup>1248</sup>

### **5.5.2.2 The Bank Act of Canada**

The Bank Act of Canada echoes similar mandatory provisions.<sup>1249</sup> Section 448.1(1) mandates banks to open retail bank accounts “through and on request by a natural person or an individual who meets the prescribed conditions”. These conditions are set out in the *Access to Basic Banking Services Regulations*.<sup>1250</sup> These regulations set out documentary requirements for the provision of this account and the circumstances under which a bank may refuse to provide basic banking services. With regard to the grounds for refusal, a bank may refuse to open an account if there is a reasonable ground to believe that the customer will use the account for illegal or fraudulent purposes, provided that such activities did not happen more than seven years from the date of the application. It may also refuse the account where the bank protects the customer against possible harassment, physical harm, or abuse.<sup>1251</sup> Where any of the grounds for refusal is established and the bank refuses to open a retail deposit account, the bank must provide the applicant with a notice of refusal and a statement indicating that he or she may complain to the Financial Consumer Agency of Canada (FCAC).<sup>1252</sup>

The FCAC is a body established under its specific enabling Act and is responsible to ensure that financial institutions have external complaint measures in place. It further monitors any voluntary code of conduct and measures that have an impact on consumers of financial products and services.<sup>1253</sup> The FCAC enforces the provisions of the Act and the regulations

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<sup>1247</sup> Article 58.

<sup>1248</sup> Article 58.

<sup>1249</sup> Bank Act SC 1991 c 46.

<sup>1250</sup> Minister of Justice *Access to Basic Banking Services Regulations* SOR/2003-184.

<sup>1251</sup> See Reg 3(1)(a)-(d). The bank may also refuse where the account is linked to an account at another financial institution.

<sup>1252</sup> See Reg 5(a)-(b).

<sup>1253</sup> Financial Consumer Agency of Canada Act SC 2001 c 9. See s 3(1) which establishes the FCAC. See s 2 on the objects of the FCAC. See Buckland “Passing the Buck?” (2011) *International Development Studies Research and Working Paper # 49* 5.



through on and off-site inspection of the regulated entities to ensure compliance.<sup>1254</sup> It also applies remedial action, which involves various notices of breach that require the entity to remedy the breach.<sup>1255</sup> The FCAC also has the power to impose administrative penalties for breach of the provisions of the Act and regulations.<sup>1256</sup> The amount of penalties that may be imposed depends on the degree of intent or negligence, the harm done by the violation, and the compliance history of a particular entity.<sup>1257</sup>

Despite these enforcement mechanisms, the Canadian Bank Act and its regulations have been the subject of criticism relating to their effectiveness. For instance, Puri and Nicol question the effectiveness of the regulation as a measure to provide access to basic banking services in that ordinary consumers are not aware of their rights in terms of the regulations.<sup>1258</sup> They view the need to educate ordinary consumers about the right of access to basic banking accounts and the lack of documentary requirements for accessing this right, as key factors in the effectiveness of the regulations.<sup>1259</sup> Buckland identifies the regulations as mild and not sufficiently comprehensive to prevent the existing FE in Canada.<sup>1260</sup>

### **5.5.2.3 Payment Accounts Regulations in the UK and Ireland**

As discussed in Chapter four above, the EU PAD imposes a duty on EU members to provide access for all citizens to a payment account with basic features.<sup>1261</sup> Several European countries have adopted measures to guarantee access to this type of account in compliance with this mandate. Before PAD, the UK government and the banking industry entered into an agreement to provide BBAs specifically to support the FI agenda.<sup>1262</sup> With the legal

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<sup>1254</sup> Financial Consumer Agency of Canada (FCAC) "Supervision Framework" (2018) <https://www.canada.ca/en/financial-consumer-agency/services/industry/supervision-framework.html> (accessed: 2019-03-22) par 5.2 ("FCAC "Supervision Framework"(2018)"). See also Buckland *Hard Choices: Financial Exclusion, Fringe Banks, and Poverty in Urban Canada (2012)* 113 who identified the use of mystery shopping by the FCAC.

<sup>1255</sup> FCAC "Supervision Framework" (2018) par 6.2.

<sup>1256</sup> See s 19(1) and (2) of Financial Consumer Agency of Canada Act SC 2001 c 9.

<sup>1257</sup> FCAC "Supervision Framework" (2018) par 6.2.

<sup>1258</sup> Puri and Nichol "Developments in Financial Services Regulation: A Comparative Perspective" 2014 55 *Canadian Business Law Journal* 454 457-458.

<sup>1259</sup> Puri and Nichol 2014 *Canadian Business Law Journal* 457-458.

<sup>1260</sup> See Buckland "Passing the Buck?" (2011) *International Development Studies Research and Working Paper # 49* 5.

<sup>1261</sup> See Ch 4.3.1 and the reference to this duty in terms of s 16(2) of EU "PAD" (2014).

<sup>1262</sup> HM Treasury "Revised Basic Bank Account Agreement" (2014) <https://www.gov.uk/government/publications/revised-basic-bank-account-agreement> (accessed: 2022-02-10) ("UK

requirements introduced by the EU PAD, the parties made commitments to “address the financial inclusion agenda, separate from the implementation of the Directive”.<sup>1263</sup> The EU PAD is currently the legal requirement for access to payment accounts that seek to promote FI in the EU. At the domestic level, the UK (before the Brexit and until December 2020)<sup>1264</sup> and the Republic of Ireland are some of the countries that have adopted the payment accounts regulations to transpose the provisions of the EU PAD into national laws.<sup>1265</sup> Part 4 of both regulations deals with access to payment accounts. They both provide access to payment accounts with basic features without discrimination on a number of grounds.<sup>1266</sup> The Irish Payment Accounts Regulations specifically provide for a right to this type of account. Article 15(3) provides for all consumers legally residents in the EU to “have the right to open and use a payment account with basic features without undue difficulty”.<sup>1267</sup>

The right of access to this type of account depends on the consumer’s eligibility and the bank’s right to refuse such access in certain circumstances. In the UK, for instance, a consumer was required to be legally resident in the EU to be eligible to apply for this account.<sup>1268</sup> He or she had also not hold a payment account with similar basic features,<sup>1269</sup> or be eligible for the payment account offered by banks that are not payment accounts with basic features.<sup>1270</sup> Banks may also refuse to make access to this account available. The Irish Payment Accounts

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“BBA Agreement” (2014)”). See the discussion of the UK “BBA Agreement” (2014) in Ch 6.4.2 below.

<sup>1263</sup> UK “BBA Agreement” (2014).

<sup>1264</sup> See European Commission “Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Banking and Payment Services” (July 2020) *REV2* [https://ec.europa.eu/info/sites/default/files/brexit\\_files/info\\_site/banking\\_services\\_en.pdf](https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/banking_services_en.pdf) (accessed: 2022-06-23) which indicates that certain directives in the field of banking and payment will no longer apply to the UK countries due to its withdrawal as a member of the EU.

<sup>1265</sup> Ministry for Finance Republic of Ireland European Union (Payment Accounts) Regulations 2016 (Irish Payment Accounts Regulations (2016)). See also UK Payment Accounts Regulations (2015).  
<sup>1266</sup> Reg 18(1) and (2) of the UK Payment Accounts Regulations (2015) refers to grounds in Article 21 of the Charter of Fundamental Rights of the European Union. See similar provisions in the Irish Payment Accounts Regulations 2016 Reg 14(1) and (2) and Irish Payment Accounts Regulations (2016), Reg 15(1).

<sup>1267</sup> The UK Payment Accounts Regulations (2015) do not explicitly provide for access to a payment account with basic features as a right, but refer to the duty to this effect in Reg 22 and continuously to the right in other provisions, eg, Reg 27(1).

<sup>1268</sup> See Reg 23(1).

<sup>1269</sup> The consumer may still have access to this account if he or she declares that the bank has informed him or her that the account is closed – Reg 23(2)(b). Also see Reg 16(2) of the Irish Payment Accounts Regulations (2016).

<sup>1270</sup> See Reg 23(1)(a) and (b). See Ch 6 below for the discussion of basic features as compared to other accounts offered by banks. See also Reg 16(2) of the Irish Payment Accounts Regulations (2016).

Regulations 2016 provide for few limited grounds for refusal where the consumer already holds a similar account, and where such refusal is necessary to avoid the infringement of the relevant anti-money laundering laws.<sup>1271</sup> The UK Payments Accounts Regulations 2015 cover several grounds for refusal of access to this account. Banks may refuse to offer this type of account if doing so will be in contravention of the anti-fraud law, the AML regulations, and the relevant provisions in the immigration legislation.<sup>1272</sup> On all these grounds, the bank must notify the applicant in writing of the refusal and the ground for such refusal.<sup>1273</sup> Under the Irish Payments Accounts Regulations 2016, such notification may be dispensed with if it may be contrary to the tipping-off provisions of their AML legislation, national security laws, or against public policy.<sup>1274</sup>

Both regulations also provide for enforcement mechanisms to ensure compliance with their provisions and the necessary sanctions for contravention. The Irish Payments Accounts Regulations 2016 vests the enforcement of its provisions in the Central Bank of Ireland (CBI).<sup>1275</sup> The UK Payments Accounts Regulations 2015 vested the Financial Conduct Authority with the power to determine whether payment services providers, including banks, comply with the regulations and to enforce these regulations.<sup>1276</sup> To achieve this, the regulations require banks to provide information regarding their compliance as requested by the FCA.<sup>1277</sup> The FCA may use this information to direct the bank to take or refrain from taking specified action or to take or review remedial action in respect of past conduct.<sup>1278</sup> Where a bank contravenes or fails to comply with the direction of the FCA, the latter has a number of sanctions to punish it for such contravention or non-compliance. These include public censure

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<sup>1271</sup> See also Reg 16(2) of the Irish Payment Accounts Regulations (2016).

<sup>1272</sup> See Reg 23(1)(a)(ii).

<sup>1273</sup> Irish Payment Accounts Regulations (2016), 2016 Reg 5(a). See also Reg 25(3) of the UK Payment Accounts Regulations (2015).

<sup>1274</sup> Reg (5)(a). The relevant tipping-off provision is section 49 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 6 of 2010. Where the bank refuses to provide access to 11 basic accounts based on any of the reasons above, it is required to advise the consumer about its internal complaint procedure, as well as the availability of a financial ombudsman to deal with such complaints. See also Reg 16(5)(c) read with Reg 24 of the Irish Payment Accounts Regulations (2016) and Reg 25(4) of the UK Payment Accounts Regulations (2015). See Reg 24 of the Irish Payment Accounts Regulations (2016) which specifically provides for the Irish Financial Services and Pensions Ombudsman's responsibility for the investigation, mediation and adjudication of disputes between consumers and the payment service providers if the consumer alleges any dispute arising from the provisions of the regulations.

<sup>1275</sup> See Reg 21(1) of the UK Payment Accounts Regulations (2015).

<sup>1276</sup> See Reg 24 (1) of the UK Payment Accounts Regulations (2015).

<sup>1277</sup> Reg 29(1) and (2) of the UK Payment Accounts Regulations (2015).

<sup>1278</sup> Reg 30(1) and (2) of the UK Payment Accounts Regulations (2015).

and financial penalties. The FCA has the power to publish a statement relating to the bank's contravention of the requirements imposed by it under the regulations.<sup>1279</sup> Alternatively, it may impose an appropriate financial penalty.<sup>1280</sup> In all these forms of sanction, it must inform a non-compliant bank of the action in a warning notice followed by a decision notice which is issued following representations in response to the warning letter.<sup>1281</sup>

The Irish Payments Accounts Regulations 2016 empowers the CBI to impose administrative sanctions.<sup>1282</sup> The CBI may publicly disclose such sanctions unless the disclosure would jeopardise the financial market or cause disproportionate damage to anyone involved.<sup>1283</sup> Unlike its UK counterpart, a contravention with the Irish Payments Accounts Regulations 2016 constitutes an offence punishable with imprisonment and or a fine.<sup>1284</sup> A notable similarity in both the CBI and the FCA is the competence authorities appointed to facilitate and accelerate cooperation and provide information on various obligations imposed on different competent authorities in terms of the UK Payment Accounts Regulations 2015 and the Irish Payment Accounts Regulations 2016 as required by Article 22 of the PAD.<sup>1285</sup>

### **5.5.3 The USA's Community Reinvestment Act (CRA)**

#### ***5.5.3.1 Brief Introduction***

One of the most cited legislative approaches to promoting FI in the literature is the USA's CRA, particularly its efforts to compel banks to provide credit to low-income communities and outlaw discriminatory practices attached to the provision of these services.<sup>1286</sup> This model has been considered in both developed and developing countries, at international and regional levels, and has been proposed at the continental level to address the challenges of FE.<sup>1287</sup> The CRA

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<sup>1279</sup> Reg 33 of the UK Payment Accounts Regulations (2015).

<sup>1280</sup> Reg 34 of the UK Payment Accounts Regulations (2015).

<sup>1281</sup> Reg 34 of the UK Payment Accounts Regulations (2015).

<sup>1282</sup> Reg 26(1) of the Irish Payment Accounts Regulations (2016).

<sup>1283</sup> Reg 26(2) of the Irish Payment Accounts Regulations (2016).

<sup>1284</sup> Reg 23(1) of the Irish Payment Accounts Regulations (2016). The maximum prison term that may be imposed is 12 months, and a fine of up to £100,000.

<sup>1285</sup> See Reg 28 of the UK Payment Accounts Regulations (2015) and, regs 22 and 23 of the Irish Payment Accounts Regulations (2016). On the EU "PAD" (2014) and the institutional coordination, see Ch 4.3.1.6 (b) above.

<sup>1286</sup> See, eg, Kempson *et al* (30-31 May 2006).

<sup>1287</sup> ECom "Financial Services Provision" (2008) 136. In the process of introducing the Payment Account Directive (see Ch 4 above), the EU Commission considered "the introduction of a Community Reinvestment Act in the EU" as one option to address the problem of financial

is one of the legislative measures passed to address “the twin ills of discrimination and disinvestment” – commonly termed “redlining” – that were and still are rife in the USA.<sup>1288</sup> Redlining generally refers to the practices of financial institutions that identify certain areas and the location of the property as totally risky for obtaining credit, rather than relying on the characteristics and creditworthiness of the applicants to provide credits.<sup>1289</sup> Although the campaign against redlining arose from mortgage credit defaults, the term has now extended to the allocation of other financial products, such as insurance. It includes other forms of discrimination such as limited marketing of financial services in certain areas, and service fee structures that favour high-income consumers at the expense of their low-income counterparts.<sup>1290</sup> Although the assessment of creditworthiness of borrowers generally takes

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exclusion” but rejected the CRA model due to the uncertainty of its potential impact to effectively promote FI in the continent as there was the lack of social movements in the EU countries “to exercise pressure comparable to that which American community development NGOs exercise on banks”. Governments in countries such as Australia, Canada, and India have also proposed the adoption of the CRA model but it never found its way onto their statute books. See Parliamentary Joint Committee on Corporations and Financial Services “Money Matters in the Bush” (2004), on why CRA type of legislation was never adopted. See Woodstock Institute “A Global Survey of Community Reinvestment Laws: The Obligation of the Private Sector to Serve the Underserved in Several Countries” (2004) <https://www.issuelab.org/resources/683/683.pdf> (accessed: 2019-02-09); Buckland “Passing the Buck?” (2011) *International Development Studies Research and Working Paper # 49* on why Canada did not adopt the CRA despite requests from community representative groups. See the Rangarajan “Report of the Committee on Financial Inclusion” (2008) for India. South Africa also introduced the Home Loan and Mortgage Disclosure Act 63 of 2000, Department of Housing “Draft Community Reinvestment (Housing) Bill, 2002” GN 747 in GG 23423 of 2002-05-17 (“Draft CR Bill 2002”).

<sup>1288</sup> On redlining, see Fair Housing Act of 1968 (also called Title VIII of the Civil Rights Act of 1968), Equal Credit Opportunity Act, Pub. L. No. 93-495, Ss 501-503, 88 Stat. 1521 (1974). See also McCoy “The Home Mortgage Disclosure Act: A Synopsis and Recent Legislative History” 2007 29 *Journal of Real Estate Research* 381 381; DeVillar and Jiang *Transforming America: Cultural Cohesion, Educational Achievement, and Global Competitiveness* (2011) 90 who still establish redlining despite a number of fair lending and non-discriminatory pieces of legislation. See further Lloyd “Community Development, Research, and Reinvestment: The Struggle Against Redlining in Washington, DC, 1970–1995” 2014 88 *Progress In Planning* 1; Schwemm and Taren “Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act” 2010 45 *HCRCLR* 375 402; Home Loan Act of 1933 Preamble and s 4(a). See also Nier III “Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining under the Fair Housing Act” 1999 32 *JMLR* 617 620; Fishback, Flores-Lagunes, Horrace, Kantor and Treber “The Influence of the Home Owners’ Loan Corporation on Housing Markets During the 1930s” (2010) *National Bureau of Economic Research Working Paper 15824* <https://www.nber.org/papers/w15824.pdf> (accessed: 28-02-2019) 6; Jackson “Race, Ethnicity, and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration” 1980 6 *Journal of Urban History* 419.

<sup>1289</sup> Hilliers “Redlining and the Homeowners’ Loan Corporation” 2003 29 *Journal of Urban History* 394.

<sup>1290</sup> See, eg, Squires, Dewolfe and Dewolfe “Urban Decline or Disinvestment: Uneven Development, Redlining and the Role of the Insurance Industry” 1979 27 *Social Problems* 79. See also Marsico *Democratizing Capital: The History, Law, and Reform of the Community Reinvestment Act* (2005) 12 who defines it as “the practice by which a bank draws a red line around a neighbourhood on

into account risk factors such as the location of the property in mortgage loans,<sup>1291</sup> redlining relates to circumstances where the customer's resident in identified location was the sole determinant of the creditworthiness of consumers to access credits. It was not targeting the denial of credit based on economic factors that considers the profitability or possible risks associated with a loan, but with denying loans with more-stringent terms and conditions that focuses on race, colour, religion, the residents, and the area in which the property is located.<sup>1292</sup>

This section confines the discussion of the CRA to disclosure requirements as a means of addressing the lack of access to financial services and excludes a detailed discussion of the prohibition of discrimination under the CRA. The purpose of this discussion is to establish how the CRA uses the disclosure and reporting requirements to improve access to financial services such as credit and retail banking services. It focuses, in particular, on the service test that determines financial institutions' role in facilitating access to banking services through disclosure and reporting.

### **5.5.3.2 The CRA and the Reporting Requirements**

Governments and regulators worldwide discourage aggressive regulation of financial institutions to allocate credit in a particular manner.<sup>1293</sup> One exception to this general view is when banks deny credit to consumers based on alleged discrimination. In the USA, this exception has been entrenched in the CRA which aims to eradicate discrimination against

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a map and refuses to lend there because of perceived credit risks associated with the neighbourhood". See further Appel and Nickerson "Pockets of Poverty: The Long-Term Effects of Redlining" (2016) [http://abfer.org/media/abfer-events-2018/annual-conference/realestate/AC18P6007\\_Pockets\\_of\\_Poverty.pdf](http://abfer.org/media/abfer-events-2018/annual-conference/realestate/AC18P6007_Pockets_of_Poverty.pdf) (accessed: 2019-02-28) who define it restrictively as "the systematic restriction of mortgage credit to geographical areas"; Squires *Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (1997); Giroux *Business Scandals, Corruption, and Reform: An Encyclopaedia* Vol 2 (2013) 487; Berry and Romero "President Jimmy Carter Signed the Community Reinvestment Act on October 12, 1977" (1977) *Federal Reserve History* [https://www.federalreservehistory.org/essays/community\\_reinvestment\\_act](https://www.federalreservehistory.org/essays/community_reinvestment_act) (accessed: 2018-11-13).

<sup>1291</sup> Feschijan "Analysis of the Creditworthiness of Bank Loan Applicants" 2008 5 *Economics and Organization* 273 275.

<sup>1292</sup> Federal Reserve Bank "Federal Fair Lending Regulations and Statutes Fair Housing Act Consumer Compliance Handbook" (Nd) [https://www.federalreserve.gov/boarddocs/supmanual/cch/fair\\_lend\\_fhact.pdf](https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf) (Accessed 2022-10-15).

<sup>1293</sup> Elliot "Evaluating the U.S. Plans or Financial Regulatory Reform" in Kawai and Prasad *Financial Market Regulation and Reforms* (2011) 81.

minorities and to provide incentives to financial institutions which make an effort to provide certain types of credit.

There are two main objectives of the CRA.<sup>1294</sup> One objective is prohibitive and aims to end redlining and disinvestment.<sup>1295</sup> A concomitant and important objective has an affirmative impact in that it compels banks to report the efforts they have taken to provide access to credit to low-income households in their communities.<sup>1296</sup> Section 2901 of the CRA provides for affirmative obligations that are imposed on “regulated financial institutions”.<sup>1297</sup> The CRA requires these institutions to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business.<sup>1298</sup> Its main purpose is “financial in its nature” to “encourage” these institutions “to help meet the credit needs of the local communities”.<sup>1299</sup>

### **5.5.3.3 Enforcement Mechanisms and the Service Test**

The CRA achieves its main objectives through an examination process undertaken by the federal financial supervisory agencies comprising the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.<sup>1300</sup> This process forms the key mechanism to enforce the Act’s provisions. It is important to note that this examination process is in line with the aim of the CRA – “to encourage institutions to meet the credit needs and not to compel them to allocate the credit”.<sup>1301</sup>

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<sup>1294</sup> See Ch 5.5.3.1 above on redlining. Disinvestment in this context refers to the exporting of deposits by banks from one community to another and then providing loans to the latter communities despite the eligibility of the former communities to access such loans.

<sup>1295</sup> Marsico *Democratizing Capital* (2005) 12-13.

<sup>1296</sup> Marsico *Democratizing Capital* (2005) 15.

<sup>1297</sup> The term is defined as an insured depository institution.

<sup>1298</sup> S 2901(a)(1) and (2) of the CRA. The deposit facilities include both credit and deposit services.

<sup>1299</sup> S 2901(a)(3) of the CRA.

<sup>1300</sup> S 2901(b) of the CRA read with s 2902(1)(A)-C) on the definition of “appropriate federal supervisory agency”.

<sup>1301</sup> S 2901(a) and (b) of the CRA (emphasis added).

The CRA provides for three enforcement mechanisms: (1) denial of an expansion application; (2) disclosure of performance; and (3) public comment and protest.<sup>1302</sup>

(a) The Denial of Expansion Applications

The denial of expansion is the CRA's primary enforcement mechanism. This process may lead to a financial institution's application for expansion being denied begins with a financial supervisory agency assessing whether banks meet the CRA objective. The agency does this by taking records obtained in the assessment into account to consider whether or not to grant certain bank expansion applications.<sup>1303</sup> The expansion application facility includes applications by an institution for facilities such as deposit insurance, the establishment of a branch, the relocation of offices, the acquisition of shares, and merger or consolidation, all of which require approval under the relevant law.<sup>1304</sup>

Each financial supervisory agency provides regulations that establish standards and criteria for the assessment.<sup>1305</sup> These agencies undertake periodic CRA examinations in terms of which each bank is allocated a rating on its performance. The CRA regulations published by the Board of Governors of the Federal Reserve System (BGFRS) which apply to all banks serve to illustrate the examination criteria that are applied consistently by all the agencies to evaluate banks' obligations in terms of the CRA.<sup>1306</sup> These regulations use a three-pronged test comprising the lending test, the investment test, and the service test to evaluate large banks on their realisations of their obligations in terms of the CRA.<sup>1307</sup> The service test is relevant to

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<sup>1302</sup> Hossain "The Past, Present and Future of Community Reinvestment Act (CRA): A Historical Perspective" (2004) *University of Connecticut Working Paper 2004-30*. <http://web2.uconn.edu/economics/working/2004-30.pdf> (accessed: 2019-04 -22).

<sup>1303</sup> S 2903(1) and (2).

<sup>1304</sup> Section 2901(3)(A)-(E). See also s 228.29 of the 12 CFR 228.

<sup>1305</sup> In terms of s 2905 of CRA, each appropriate financial supervisory agency must publish regulations to carry out the purpose of the Act. For Comptroller of Currency, see 12 CFR Part 25.

<sup>1306</sup> See Board of Governors of the Federal Reserve System "Community Reinvestment (Regulation BB)" 12 CFR 228 and reg 228(c)(1) for the scope of its application. See also FDIC "Community Reinvestment Regulations" 12 CFR 345.

<sup>1307</sup> Section 228.21 of the BFRS CRA Regulation 12 CFR 228. "Large banks" are defined as those with assets of \$1.226 billion or more for the past two consecutive year-ends". See also s 25.21(a)(1) and (2) of OCC CFR Part 25. See further s 345.21 Federal Deposit Insurance Corporation CRA Regulations 12 CFR 345. The lending test is used generally to determine the bank's record relating to its efforts to meet the credit needs of the society by assessing its lending activities such as home mortgage, small business, small farm, and community development lending. The agencies also evaluate banks for consumer lending such as credit cards, motor vehicle finance, and unsecured loans if consumer lending constitutes a substantial proportion of a bank's



this study as it provides for the assessment of the provision of basic bank services, among others.<sup>1308</sup> All the tests rely on the records that banks must collect and maintain for examination purposes.<sup>1309</sup>

The CRA requires financial supervisory agencies to apply the service test to evaluate how banks adopt systems to improve retail banking services, and in particular, their basic banking services. It evaluates banks' records to establish the availability and effectiveness of a bank's systems for delivering retail banking services and the extent and novelty of its community development services.<sup>1310</sup> The performance criteria applied include the evaluation of the distribution of branches (including their opening and closing), and the availability and effectiveness of alternative systems for delivering retail banking services (such as ATMs and the use of internet and telebanking) in low- or moderate-income geographies or which primarily serve individuals in these communities.<sup>1311</sup> More importantly, financial supervisory agencies must evaluate banks on the basis of the range of services provided in low-or moderate-income communities and the degree to which these services are tailored to meet the needs of these communities.<sup>1312</sup> This indicates the efforts under the CRA to encourage banks to provide services such as BBAs which are tailored to the needs of the low- and moderate-income communities.

Based on the three tests, the assessment assigns an overall rating to a bank's performance using a four-point scale and takes this rating into account when the bank applies for expansion. A bank is assigned a rating of "outstanding", "satisfactory", "needs to improve", or "substantial noncompliance" based on its performance.<sup>1313</sup> The last two ratings illustrate

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business. The investment test evaluates a bank's record of helping to meet the credit needs of its assessment area(s) through qualified investments that benefit its assessment area(s) or a broader state-wide or regional area that includes the bank's assessment area(s). On this aspect, see s 228.22(a) of the BFRS CRA Regulation 12 C.F.R. 228. See further Silver "The Community Reinvestment Act" 2017 7 *Advocates' Guide* 20; Silver "Commentary: The Community Reinvestment Act Must be All About Public Participation, But it Still Doesn't Feel that Way" 2017 19 *Cityspace: A Journal of Policy Development and Research* 177. See, in addition, s 228.42(a) of the BFRS CRA Regulation 12 CFR 228.

<sup>1308</sup> See Stegman, Cochran and Faris "Toward a More Performance-Driven Service Test: Strengthening Basic Banking Services under the Community Reinvestment Act" 2002 9 *Georgetown Journal on Poverty Law & Policy* 405 415.

<sup>1309</sup> See s 228.42(a) of the BFRS CRA Regulation 12 CFR 228.

<sup>1310</sup> S 228.24(a) 12 CFR 228.

<sup>1311</sup> S 228.24(d)(1), (2) and (3) 12 CFR 228.

<sup>1312</sup> S 228.24(d)(4).

<sup>1313</sup> S 228.28(a). See also s 25.21(c) of OCC 12 CFR Part 25. See further s 345.21 12 CFR 345.

that the bank has failed to achieve the aims of the CRA. Depending on its performance under one or more of the tests, a bank which receives an “outstanding rating”, for example only on the lending test, is assigned an overall rating of at least “satisfactory”.<sup>1314</sup> If it receives an “outstanding” rating for both the service and the lending tests, as well as on the investment test, and “satisfactory” only on the lending test, it is assigned an overall rating of “outstanding”.<sup>1315</sup> Based on the records of the CRA evaluation and performance, a financial supervisory agency may deny or only conditionally approve expansion applications.<sup>1316</sup> However, this enforcement mechanism does not immediately affect a poor-performing financial institution as it applies only when the institution applies for expansion and needs approval by the relevant supervisory agency.<sup>1317</sup>

Although the CRA focuses on providing access to credit, Stegman *et al*'s view on the use of this test to measure banks' performance in providing basic retail financial service is that:

[j]ust as CRA lending requirements have helped banks recognize the market potential for home loans in low- and moderate-income areas, a strengthened service test would...facilitate the development of new markets, products, and technologies to help banks provide profitable basic banking services for underserved populations.<sup>1318</sup>

A number of recommendations address how the CRA service test can achieve this purpose. Among them is that the relevant regulators should clarify that the retail banking products are considered as part of the service test and they should determine the extent to which retail services, such as low cost accounts, “are provided as part of community development services”.<sup>1319</sup> The regulator should evaluate banks by allowing them the freedom to select

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<sup>1314</sup> S 228.28(b)(1). See further s 25.28(b)(1) of OCC 12 CFR Part 25 and Bylsma “Financial Modernization: What's In It for Local Communities” 2000 17 *New York Law School Journal of Human Rights* 39 41.

<sup>1315</sup> S 228.28(b)(2). See also s 25.28(b)(2) of OCC 12 CFR Part 25. See further Macey and Miller “The Community Reinvestment Act: An Economic Analysis” 1993 79 *Virginia Law Review* 291 301 for the introduction of this performance criterion.

<sup>1316</sup> S 228.29(b) of the 12 CFR 228. See also s 25.29(d) of OCC 12 CFR Part 25. See further Marsico *Democratizing Capital* (2005) 34 on the argument and the effect of providing for the denial of expansion application in the regulations rather than the Act.

<sup>1317</sup> Hossain “The Past, Present and Future of CRA” (2004) *University of Connecticut Working Paper 2004-30* 24.

<sup>1318</sup> Stegman “Creating a Scorecard for the CRA Service Test” (2002) *Brooking Policy Brief No. 96* <https://www.brookings.edu/research/creating-a-scorecard-for-the-cra-service-test-strengthening-banking-services-under-the-community-reinvestment-act/> (accessed 2022-05-13) 8.

<sup>1319</sup> Stegman *et al* 2002 *Georgetown Journal on Poverty Law & Policy* 442.

among different delivery channels based, among others, on competition with other financial services and costs associated with these services.<sup>1320</sup>

(b) The Disclosure of Performance

Before its amendment in 1989, the CRA's evaluation results were kept confidential and not disclosed for public scrutiny.<sup>1321</sup> Banks are now required to maintain a public file.<sup>1322</sup> This file must include the bank's most recent CRA performance evaluation prepared by the financial supervisory agency.<sup>1323</sup> A bank is required to make this information available to the public for inspection at its main office or each branch.<sup>1324</sup> This disclosure requirement is used as a secondary enforcement measure of the CRA compliance in that it places pressure on banks to maintain a good public image.<sup>1325</sup> Access to the disclosed information may also allow members of the public to use the information to exert pressure on banks to comply with the CRA requirements. The possible loss of reputation by financial institutions may influence them to change their lending patterns and, more importantly, dictate how they should tailor their services and products to meet the need of low-income households.<sup>1326</sup>

(c) Public Comment and Protest

The regulation of public comments on banks' CRA performance provides a third layer of enforcement. The public file which a bank is required to maintain must include all written comments relating to the bank's performance and its efforts to meet the credit needs of the community, including the banks' responses to such comments.<sup>1327</sup> These comments or responses may contain statements that reflect adversely on the good name and reputation of

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<sup>1320</sup> Stegman *et al* 2002 *Georgetown Journal on Poverty Law & Policy* 441.

<sup>1321</sup> Marsico *Democratizing Capital* (2005) 23.

<sup>1322</sup> S 228.43(a) OCC 12 CFR 228, s 345.43 FDIC 12 CFR 345. This file must contain two important pieces of information that are relevant for disclosure purposes. When a bank is required to report information in terms of the Home Mortgage Disclosure Act Public Law 1975 (HMDA), its public file must include a copy of the "HMDA Disclosure Statement" in terms of this Act. See also Bylsma 2000 *New York Law School Journal of Human Rights* 39.

<sup>1323</sup> S 228.43(a) and (b) of the 12 CFR 228.

<sup>1324</sup> Section 228.43(c)(1) and (2).

<sup>1325</sup> Section 228.43(c)(1) and (2). See also Quercia and Riley "Bridging the Gap to Scalable Community Reinvestment Lending Programs: The CRA Turns 40" 2017 19 *Cityscape* 109.

<sup>1326</sup> Hossain "The Past, Present and Future of CRA" (2004) *University of Connecticut Working Paper 2004-30* 24.

<sup>1327</sup> Section 228.43(a)(1) 12 CFR 228.

a bank or publications as regards its violation of the law.<sup>1328</sup> The disclosure of these negative public comments, similar to the disclosure of the bank's CRA's performance evaluation, may damage the bank's reputation and cause it to lose deposits. It may also exert the necessary pressure from the public on banks and force them to comply with the provisions of the CRA.<sup>1329</sup>

The public comment process also provides an avenue for advocacy groups to protest banks' mergers and acquisitions based on CRA performance results.<sup>1330</sup> Many of these protests result in formal agreements between banks and community groups in which banks commit to meet their credit needs to avoid possible delay in or denial of their mergers and acquisitions.<sup>1331</sup> These agreements however remain contractual and are not enforced under the CRA. Given this current status, the CRA has not issued public comments or protests which can be said to have influenced banks' behaviour to the provision of financial services positively.<sup>1332</sup>

## 5.6 DISCUSSION, SUMMARY, AND CONCLUSION

### 5.6.1 Conclusion and Findings

The aim of this chapter was to establish how selected countries apply their national regulatory frameworks effectively and responsively to promote FI. It discussed national regulatory frameworks in different countries that focused on different products and specific aspects of FI. This chapter has identified a number of self-regulatory and legislative measures in the identified countries that promote FI and access to basic banking services, and specifically a

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<sup>1328</sup> Section 228.43(a)(1) 12 CFR 228. The provisions specifically provide that the comments or responses should not adversely affect the good name or reputation of any persons other than the bank.

<sup>1329</sup> Hossain "The Past, Present and Future of CRA" (2004) *University of Connecticut Working Paper 2004-30* 21.

<sup>1330</sup> Bernanke "The Community Reinvestment Act - Its Evolution and New Challenges" Paper Presented at Community Affairs Research Conference Washington DC (30 March 2007). See also United State General Accounting Office "Community Reinvestment Act: Challenges Remain to Successfully Implement CRA" (1995) <https://www.govinfo.gov/content/pkg/GAOREPORTS-GGD-96-23/pdf/GAOREPORTS-GGD-96-23.pdf> (accessed: 2019-04-25) 32.

<sup>1331</sup> See Silver 2017 *Cityscape* 183. See also Anon "Banks' Community Benefits Agreements Bring Billions in Community Reinvestment" (2017) <https://www.policylink.org/equity-in-action/newsletters/banks-cbas> (accessed: 2019-04-25) detailing the agreement reached by a CRA advocacy group, National Community Reinvestment Coalition, and three major banks in 2016. See further California Reinvestment Coalition at <http://calreinvest.org/publications/bank-agreements/> (accessed: 2019-04-25) for recent similar agreements entered into during the banks' mergers.

<sup>1332</sup> Silver 2017 *Cityscape* 177.

statutory right to a bank account.<sup>1333</sup> The use of pure voluntary self-regulatory codes of banking practice to promote access to basic banking services in selected countries was highlighted. It was established that these codes rely on each bank's individual commitment to provide the services without any form of compliance and enforcement mechanisms. They rely heavily on expectations of and commitments by each bank to provide these services and to observe their provisions in their relationships with customers. They, however, do not have measures in place in case of a lack of commitment. As indicated, self-regulatory codes of practices that do not have enforcement mechanisms are not effective.<sup>1334</sup> They also do not assign duties to independent internal or external bodies to enforce compliance with their provisions.<sup>1335</sup> The discussion of the codes of banking practice in Australia, India, and the UK provide an important lesson on how self-regulatory and voluntary codes of practice may be applied to promote FI by establishing compliance bodies or using existing statutory bodies to enforce compliance and make the code effective and responsive.<sup>1336</sup> As indicated, all these codes promote access to BBAs.<sup>1337</sup> Their effectiveness in achieving the FI goal, however, relies on the enforcement mechanisms applied. The approval process under the Australia's ASIC *Approval of Financial Services Sector Codes of Conduct Regulatory Guideline 183* stands out as one of the enforcement mechanisms to improve compliance with self-regulatory codes that do not provide for specific enforcement mechanisms. It emerged from this chapter that Australia has established a unique approach that sets statutory criteria and the requirements for the approval of codes of practice in the financial sector.<sup>1338</sup> Importantly, it has established the binding effect of the code on subscribers and the establishment of an independent body with possible power to sanction.<sup>1339</sup>

Drawing on the ASIC, the UK's BCSB, and India's BCSBI as examples of independent bodies established to oversee compliance with the provisions of codes of banking practice, a benchmark has been established regarding specific measures they implement to enforce compliance.<sup>1340</sup> This chapter identified inspectors' visits to subscribing financial institutions, mystery shopping, and the naming and shaming of non-compliant banks based on published

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<sup>1333</sup> See Ch 5.2.1 above.

<sup>1334</sup> See Ch 5.4.1 above.

<sup>1335</sup> See Ch 5.2.2 above.

<sup>1336</sup> See Ch 5.4 above.

<sup>1337</sup> See Ch 5.3.3 to Ch 5.3.5 above.

<sup>1338</sup> See Ch 5.4.2 above.

<sup>1339</sup> See Ch 5.4.2 above.

<sup>1340</sup> See Ch 5.4.3 above.

periodic reports and public censure as some of the tools these bodies use to enforce compliance with the codes by subscribers.<sup>1341</sup> Because banks are, by and large, profit-driven and publication of their names and violations of the codes would result in adverse publicity, such measures may prove to be effective compliance mechanisms.<sup>1342</sup> Although codes of banking practice do not provide any specific sanctions or penalties for non-compliance, equivalent codes in, for example, the insurance industry and travel agency associations provide for specific administrative sanctions and reprimands in extreme cases of non-compliance.

The discussion of a selection of legislative measures to promote FI and access to BBAs in paragraph 5.5 above illustrates how these measures may be applied to promote FI by emulating Ayres and Braithwaite's command-and-control regulation.<sup>1343</sup> This chapter has indicated that the legislature may apply the statutory right of access to open a BBA to promote FI. It indicates how the Banks Acts of Canada and France provide for these mandatory provisions and require the statutory bodies to enforce compliance.<sup>1344</sup> This legislation, however, does not provide specific measures that the statutory bodies must apply to enforce compliance. The discussion of the UK and Irish Payment Accounts Regulations complements the types of mandatory provisions in Canada and France by providing for grounds that financial institutions may use to refuse access to these accounts and by assigning statutory bodies, such as the Central Bank of Ireland and the UK's Financial Sector Conduct, to enforce compliance.<sup>1345</sup> The discussion of payment accounts regulations in these countries also indicates how the measures applied to enforce self-regulatory codes of banking practice, such as public censure, administrative and financial penalties, the naming and shaming of financial institutions for non-compliance, as well as imprisonment or fines, have been reinforced by statutory measures.

This chapter concludes by discussing the promotion of FI through the USA's CRA, with a particular lesson that may be drawn from the service test imposed on financial institutions and the reporting requirements.<sup>1346</sup> It has established that in addition to promoting non-

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<sup>1341</sup> See Ch 5.4.3.1 – Ch 5.4.3.2 above.

<sup>1342</sup> See Ch 5.5.3.3 above.

<sup>1343</sup> See Ch 5.2.4 above.

<sup>1344</sup> See Ch 5.5.2.1 and Ch 5.5.2.2 above.

<sup>1345</sup> See Ch 5.5.2.3 above.

<sup>1346</sup> See Ch 5.5.3 above.

discriminatory access to credit, the CRA also provides for the service test which requires financial institutions to show that their deposit facilities are convenient for and meet the needs of the communities in which they are chartered to do business.<sup>1347</sup> The CRA, therefore, provides a tool to encourage banks to provide retail banking services, including BBAs, through unique enforcement mechanisms by designated statutory bodies.<sup>1348</sup> In addition to the enforcement mechanisms provided in the codes of banking practice discussed in this chapter, it has also been shown how the CRA reinforces these mechanisms through continuing evaluation, performance rating, reporting, and the disclosure of performance to the public for their review and possible objections in case of non-compliances. The discussion, therefore, provides a lesson for national legislatures and banking associations to create a right of access to BBAs in voluntary codes of banking practice. This right must be enforceable by a statutory body assigned to ensure compliance with the provisions of all codes of banking practice in the financial sector, provided such codes specifically provide for effective compliance mechanisms. Depending on the effectiveness of the self-regulatory measures, national legislatures may consider applying a statutory right of access to BBAs as a measure to promote FI and to assign specific statutory bodies to enforce this statutory right.

Overall, the study in this chapter highlights that although FI is a fairly new concept, regulatory efforts have existed for many years to promote access to basic financial services for specified low-income sectors of the community the world over. These efforts include the guarantee of access to basic financial services, such as BBAs, and ensuring that financial institutions become transparent by disclosing information on their efforts to meet the financial needs of their communities. As regards the RR theory and its PRS, and the need to escalate and de-escalate regulation depending on the responses of financial institutions, this chapter indicates that such efforts can be achieved by beginning with self-regulation, such as voluntary codes of banking practice and then escalating to enforced self-regulation in the form of these codes with appropriate enforcement mechanisms and compliance bodies. Depending on the level of response to these regulatory instruments, the PRS allows the regulator to escalate regulation to command-and-control types of regulation with various discretionary and non-discretionary enforcement mechanisms. This chapter has indicated that pure self-regulatory measures such as the codes of banking practice without enforcement mechanisms may not be effective in

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<sup>1347</sup> See Ch 5.5.3.2 above.

<sup>1348</sup> See Ch 5.5.3.3 above.

promoting FI and BBAs. It has further established that enforcement mechanisms are necessary for both voluntary measures and statutory measures to achieve FI and make BBAs accessible.

## 5.6.2 Recommendations (Recs)

Based on the findings and gaps identified in this chapter, a number of recommendations are made that may be applied by national legislatures and self-regulatory bodies in the financial sector to promote FI effectively and responsively through both enforced voluntary self-regulatory and legislative measures. Chapter six below makes specific recommendations that build on the general recommendations in this chapter, and suggests how they may be applied to the regulatory framework to promote FI and access to BBAs in South Africa.

**Rec 5A** It is recommended that financial sector associations, such as the banking associations, include the promotion of FI and provide commitments to offer BBAs and allow customers to open these accounts in their general codes of banking practice.<sup>1349</sup> The code must also include a commitment that banks will provide appropriate information to customers to raise awareness of these types of account, the eligibility requirements, and the circumstances under which a bank may refuse to open an account on behalf of the customer. It must provide for banks to refuse to open an account if there are reasonable grounds to believe that the customer is opening it for fraudulent or illegal purposes, or if doing so would contravene national AML/CFT measures.<sup>1350</sup> Building on the recommendation for a general right of access and to open basic financial products and services in **Rec 4B(b)** above,<sup>1351</sup> it is recommended that codes of banking practice include specific commitments to customers to provide access to basic financial services including BBAs, as follows:

“We” refers to “banks” and “you” to “the customer”.

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<sup>1349</sup> See Ch 5.3.3 to Ch 5.3.5 above for similar commitments made by UK, Australian, and Indian codes of banking practice.

<sup>1350</sup> See Ch 5.5.2.2 above for similar conditions. See Rec 5C(a) below for the statutory right of customers to open a bank account. The relevant AML/CFT legislations are Drugs and Drug Trafficking Act 140 of 1992; the Prevention of Organised Crime Act 121 of 1998, and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.

<sup>1351</sup> See Ch 4.6.2 above.



## Access to Basic Banking Products and Services

- (1) We commit to provide you access and to allow you to open and use basic financial products and services.
- (2) Subject to subclause (4), nothing in this Code establishes a right of any customer to require a bank to open a basic banking service or product with the customer.
- (3) We commit to create platforms that raise awareness on these types of accounts and to give you the relevant information about the ease of access to these services and products and to offer you after conducting the eligibility assessments.<sup>1352</sup>
- (4) We may refuse to open and allow access to financial services or products or close an existing account with you if;
  - (i) you do not satisfy the eligibility requirements in subsection 3;
  - (ii) opening such an account would result in an infringement of the provisions on the prevention of money-laundering and the countering of terrorist financing in terms of the relevant national law; or
  - (iii) there is a reasonable ground to believe that you will use such account for illegal or fraudulent purposes.
- (5) If any of the grounds for refusal or closure in subsection 4 is established, and a bank refuses to open a basic financial service or product, we commit to ensure that such bank will provide you with a written notice of refusal within a reasonable time.<sup>1353</sup>
- (6) We commit to provide basic financial products and services that adhere to standards, terms and conditions published from time to time by the relevant authorities in accordance with national financial sector laws.

**Rec 5B** To address the gap identified in the lack of enforcement of voluntary codes of banking practice, as recommended in **Recs 3B** and **3C** to begin the promotion of FI by first implementing enforced self-regulatory measures, it is recommended that the self-regulatory codes of banking practice include the following relevant enforcement mechanisms:

- (a) The code of banking practice must establish an internal compliance body, such as the Banking Code Standard Boards of the UK and India.<sup>1354</sup> Alternatively, existing regulatory bodies such as the UK's Financial Conduct Authority or the Australian ASIC must be given the responsibility of enforcing compliance with the codes of banking practice. Such regulatory body must also establish the "Financial Inclusion Internal Compliance, Monitoring and Inspection Function" (FIICMIF) in the self-regulatory code of practice, as recommended in **Rec 3C**.
- (b) It is further recommended that the relevant legislative measures in the financial sector provide for the approval of codes of banking practice or similar codes in

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<sup>1352</sup> See Ch 5.3.4 above for similar provisions in the Australian ABA *Code of Banking Practice* (2019) and Ch 5.3.3 in UK's FSA "Banking Conduct of Business Sourcebook" (Nd).

<sup>1353</sup> See Ch 5.5.2.2 above for a similar requirement in the Bank Act of Canada.

<sup>1354</sup> See Ch 5.4.3.1 to Ch 5.4.3.3 above.

the financial sector, as under section 1101A of the Australian Corporation Act which empowers the ASIC to approve codes of banking practice that relate to the activities of financial service licencees or issuers of financial services.<sup>1355</sup> This approval process must include specific criteria and the requirements for approval of codes of practice. It must include, among others, the requirements for subscribing banks to incorporate the provisions and commitments made in the codes into their bank-customer relationships. It must also specifically provide for the establishment of an independent body empowered to administer and enforce the code and be able to impose sanctions, similar to the criteria laid out in the ASIC's *Approval of Financial Services Sector Codes of Conduct Regulatory Guideline 183*.<sup>1356</sup>

- (c) It is recommended that rather than imposing harsh penalties for every non-compliance with the requirement to promote FI, a choice and a combination of enforcement mechanisms applied in the Australian, Indian, and the UK codes of banking practice, such as mystery shopping, incognito visits to the premises of code subscribing members, and periodic reporting of non-compliance, should be applied to monitor and evaluate compliance with the self-regulatory measures.<sup>1357</sup> The codes must require the regulatory body to publish details of the bank and its breach of the code in its annual report or publicly censure the code's subscribers, as measures to name and shame banks which fail to provide access to basic financial products and services, including BBAs.

**Rec 5C** Aligned with **Recs 3D** and **4B** not to adopt a wholesale legislative measure to promote FI,<sup>1358</sup> but a legislative provision for the right of access and to open basic financial products or services with financial institutions, this chapter makes the following recommendations with the relevant legislative measures to promote FI and access to basic financial services:

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<sup>1355</sup> See Ch 5.2.4 above.

<sup>1356</sup> See Ch 5.4.1 above.

<sup>1357</sup> See Ch 5.4.3.1 to Ch 5.4.3.3 above.

<sup>1358</sup> See Ch 3.5.2 above.

- (a) It recommends that a general financial sector regulatory measure<sup>1359</sup> must specifically create a mandatory right of access to basic financial products and services, including BBAs, that is imposed on licensed financial institutions, including banks, in terms of the financial sector laws, similar to the rights in **Rec 4B(b)** and **Rec 5A** above.<sup>1360</sup>
- (b) The relevant legislative measure must designate the power to enforce compliance with this right to an independent regulatory body, such as a central bank or a financial conduct authority, as “a lead agency” to promote FI and access to basic financial products and services.<sup>1361</sup>
- (c) These measures must make provisions for the specific enforcement mechanisms that the designated regulatory body is empowered to apply to enforce compliance. Such measures may include continuous monitoring, periodical reporting, remedial action, visits to the premises of the financial institutions, and publication of transgressions and non-compliance which names and shames non-compliant institutions.<sup>1362</sup> These measures may be supplemented by the periodic CRA type of examination and reporting and the service test that evaluate the performance of financial institutions for the range of services provided in low-to moderate-income communities, and the degree to which these services are tailored to meet the needs of these communities.<sup>1363</sup> Adopting the CRA type of examination and periodic reporting must also require rating to determine eligibility for approval of new business opportunities such as the expansion of business. It must also require such a report to be published after public comment on the CRA rating and further allow the public to object to any business opportunities if the enterprise has not met the rating set for the promotion of access to basic financial products and services. The publication of such information is subject to various factors including, the

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<sup>1359</sup> See the discussion of the Banks Act and the Financial Sector Regulation Act as financial sector laws in Ch 6.

<sup>1360</sup> See Ch 4.6.2 above. For similar mandatory rights see Ch 5.5.2 above.

<sup>1361</sup> See Ch 5.5.2.3 for examples with the Irish and UK Payment Accounts Regulations. See Ch 4.2.4.2 above and Principle 6 of the G20 “FI Principles” (2011) and the recommendation to have “a lead agency” to promote FI.

<sup>1362</sup> See Ch 5.4.3.1 to Ch 5.4.3.3 above.

<sup>1363</sup> See Chs 5.5.3.2 and 5.5.3.3 above.

severity and the impact of the contravention; mitigating or corrective actions already taken; the quantum of benefit or gain as a result of the contravention; and the financial or reputational impact on a particular member of the industry or the financial system at large. Where the publication will have a negative impact on the financial or reputational risk of the industry at large, the regulatory body must consider imposing an administrative or financial penalty on the relevant financial institution.<sup>1364</sup>

The preceding chapters have laid a foundation for how to apply policy and regulatory frameworks to promote FI and access to BBAs. In the next chapter, this research discusses and analyses current frameworks in South Africa and determines whether they promote FI and BBAs effectively.

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<sup>1364</sup> See Ch 5.4.4 above for various factors outlined in the SAIA *Code of Conduct* (2015).

## CHAPTER SIX: FINANCIAL INCLUSION AND ACCESS TO BASIC BANK ACCOUNTS IN SOUTH AFRICA

*The critical issue...is the financial services mismatch: bank products are not structured to provide access to lower-income households.*

**Barr 2007 *Harvard Law & Policy Review* 162**<sup>1365</sup>

### 6.1 INTRODUCTION

Chapters four and five above discussed the international FI policy and regulatory frameworks. They analysed the relevant policy and regulatory instruments and key issues that policy and lawmakers have identified to make financial products and services accessible to the majority of the population. These chapters have unveiled a myriad of policy and legal instruments that promote FI both directly and indirectly. As indicated in Chapter one, this study is attempting to tame the many-headed beast that is FI by focusing on relevant measures that promote FI and access to BBAs. This chapter follows a similar approach and discusses the general policy and regulatory frameworks that promote FI and access to BBAs in South Africa. Many policy and regulatory measures were adopted in South Africa both pre-and-post the democratic dispensation. The government's policy measures such as the National Development Plan (NDP) and the Reconstruction and Development Programme (RDP) respectively identify FI as one of the "ways to deal with structural weaknesses" in South Africa's economy,<sup>1366</sup> and commit to "support innovative financial institutions and instruments which promote domestic savings and extend financial services to those who do not have adequate access to these services".<sup>1367</sup>

A number of regulatory measures have also influenced access to financial services. One example is the Exemption Notices issued in terms of the Usury Act that imposed interest rate ceiling on microloans and made the risk of lending to low-income households high and

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<sup>1365</sup> Barr 2007 *Harvard Law & Policy Review* 162.

<sup>1366</sup> National Planning Commission "National Development Plan 2030: Our Future – Make it Work" (2012) [http://www.dac.gov.za/sites/default/files/NDP%202030%20-%20Our%20future%20-%20make%20it%20work\\_0.pdf](http://www.dac.gov.za/sites/default/files/NDP%202030%20-%20Our%20future%20-%20make%20it%20work_0.pdf) (accessed: 2017-05-03) 114.

<sup>1367</sup> National Planning Commission "National Development Plan 2030" (2012) 114, Parliament of the Republic of South Africa "White Paper on Reconstruction and Development" GN 154 in GG 16085 of 1994-11-23 par 3.9.2.

unprofitable for credit providers.<sup>1368</sup> It therefore excluded the majority from accessing credit. The interest rate cap is now regulated under the National Credit Act<sup>1369</sup> and applies a different maximum rate of interest to different types of agreement.<sup>1370</sup> It has been correctly observed that as the maximum rates of interest in the NCA are very high it is unlikely to curtail or restrict access to any form of credit.<sup>1371</sup> The Mutual Banks Act<sup>1372</sup> and the Co-operative Banks Act<sup>1373</sup> were also introduced to facilitate member-based access to financial services and are equally important in advancing FI. As outlined in Chapter one, this research is limited to the regulatory framework and measures that impose an obligation on commercial banks as deposit-taking institutions to provide access to financial services and to offer transactional and saving accounts.

The discussion in this chapter is presented in three sections. The first (6.2) considers the relevant policies and self-regulatory measures. It discusses the Financial Sector Charter (FS Charter), and how it was later promoted to a Financial Sector Code (FS Code) in terms of the B-BBEE legislation. It specifically establishes how these instruments promote access to “first-order retail financial services”, and how they are implemented by the Financial Sector Transformation Council (FSTC) through B-BBEE scorecards and the approval of “access qualifying products”. It further discusses the Banking Association of South Africa (BASA) *Code of Banking Practice* as a self-regulatory measure and how banks have committed to providing access to BBAs for their customers. This section concludes by discussing the introduction of *An Inclusive Financial Sector for All* (Draft FI Policy) as the government’s first comprehensive

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<sup>1368</sup> Usury Act 73 of 1968, Department of Trade, Industry and Competition “Notice in Terms of Section 15A of the Usury Act, 1968” GN R3451 GG 14498 of 1992-12-31; Department of Trade, Industry and Competition “Notice in Terms of Section 15A of the Usury Act, 1968” GN 713 in GG 20145 of 1999-06-01. For the discussion of the Act and the Notices see Schoombee “Access to Formal Financial Services for South Africa’s Poor: Developments Since 1990” 2009 24 *South African Journal of Economic History* 131; Kelly-Louw and Stoop *Consumer Credit Regulation in South Africa* (2012) 7-12; Whittaker “South Africa’s National Credit Act: A Possible Model for the Proper Role of Interest Rate Ceilings for Microfinance” 2008 28 *Northwestern Journal of International Law & Business* 561; Chitimira “Historical Aspects of the Statutory Regulation of Financial Inclusion for the Poor and Low-Income Earners in South Africa” 2020 16 *Acta Universitatis Danubius* 269 273-277.

<sup>1369</sup> 34 of 2005.

<sup>1370</sup> See s 103 of the NCA read with the Department of Trade, Industry and Competition “Review of Limitations on Fees and Interest Rates Regulations” GN 1080 in GG 39379 of 2015-11-06.

<sup>1371</sup> Goodwin-Groen and Kelly-Louw “The National Credit Act and its Regulations in the Context of Access to Finance in South Africa” (2006) [https://finmark.org.za/system/documents/files/000/000/298/original/NCA\\_AccesstoFinance\\_2006.pdf?1614582083](https://finmark.org.za/system/documents/files/000/000/298/original/NCA_AccesstoFinance_2006.pdf?1614582083) (accessed: 2022-02-21) 28.

<sup>1372</sup> 124 of 1993.

<sup>1373</sup> 40 of 2007.

policy that re-emphasises the promotion of FI. This policy introduces specific pillars of FI, including the importance of entry-level financial services such as transactional and savings accounts.

In the second section (6.3) this chapter discusses the relevant legislative measures that apply to banks and determines whether or not they facilitate access to BBAs. This section begins by analysing a selection of Acts of Parliament. It discusses the Banks Act and how this Act regulates the scope of banking activities, minimum entry requirements, and measures that protect consumers. It critically analyses how the Banks Act does not provide for the right of access to a bank account similar to those in the Banks Act of Canada and France. The section further considers the impact of FICA's customer due diligence (CDD) obligation and the risk-based approach (RBA) to access to financial services. The Broad-based Black Economic Empowerment Act (B-BBEE Act)<sup>1374</sup> is briefly addressed, focusing on how it reinforces the promotion of access to financial services within the B-BBEE strategy, the alignment of the FS Charter, and the promotion of the FS Code and how it guides the drafting of sectoral codes of good practices and transformation charters. It also discusses the establishment of relevant regulatory bodies to implement and enforce its provisions and the duty imposed on financial institutions to report to these institutions annually on their B-BBEE progress. The section concludes with a discussion of the FSRA and how it implements *A Safer Financial Sector to Serve South Africa Better* (The Red Book),<sup>1375</sup> and the government's policy aspirations to introduce the Twin-Peaks model of financial sector regulation and supervision. It outlines the importance of the twin regulators and the importance of including "financial inclusion" as a statutory obligation for the first time in South Africa. It further discusses the requirements for the Financial Sector Conduct Authority (FSCA) to make conduct standards on matters that implement fair treatment of financial customers in relation to a particular financial institution and how this has facilitated the development of conducts standard for banks. This section concludes with a brief discussion of the draft CoFI Bill and how it generally promotes FI within its main objective to protect and treat customers fairly. Importantly, it analyses the general principles and standards that relate to the design, development, advertising, marketing, and promotion of financial products and services that are appropriate and target customers for whose needs the products or services are likely to be suitable.

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<sup>1374</sup> 53 of 2003.

<sup>1375</sup> See Ch 1 above for the introduction of this policy.

Lastly, section three (6.4) focuses on access to BBAs. It defines BBA and discusses challenges associated with access to conventional bank accounts. This section further compares key features of conventional accounts and the relevant regulatory measures that deal with features of these accounts. It also discusses the private sector initiatives and the current BBAs provided by banks. It analyses key features of these accounts and possible gaps and provides possible areas that may be improved to make them accessible to low-income households. The chapter also considers how the regulatory framework in South Africa deals with the cooperation and coordination of various regulatory bodies in South Africa to promote FI. It concludes with an analysis of the findings and makes concluding remarks and recommendations.

## **6.2 SELF-REGULATORY AND POLICY FRAMEWORK**

### **6.2.1 Financial Sector Charter**

The FS Charter was developed to address a concern arising from the failure of the financial industry “to provide banking services to the vast majority of South Africans”.<sup>1376</sup> As part of the government’s broad-based black economic empowerment (B-BBEE) policy,<sup>1377</sup> it became imperative for this sector to agree on the transformation strategies to ensure that the financial

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<sup>1376</sup> Black Economic Empowerment Commission “Strategy Report 2001” (2001) <https://www.westerncape.gov.za/text/2004/5/beecomreport.pdf> (accessed: 2022-03-07) 19. See also Moyo and Rohan “Corporate Citizenship in the Context of the Financial Services Sector: What Lessons from the Financial Sector Charter?” 2006 23 *Development Southern Africa* 289.

<sup>1377</sup> Anon “Declaration of the Financial Sector Summit” (2002) <https://static.pmg.org.za/docs/2005/050520declaration.htm> (accessed: 2021-10-03). NEDLAC is a multilateral social dialogue forum on social, economic, and labour policy that encourages members to promote social and economic integration and access to the financial services sector. See further SARB “Annual Report 2003” (Nd) <https://www.resbank.co.za/en/home/publications/publication-detail-pages/reports/pa-annual-reports/2003/3994> (accessed: 2022-02-28) 6 where it is referred to as the “Financial Sector Black Economic Empowerment Charter”. See Porteous and Hazelhurst *Banking on Change: Democratising Finance in South Africa, 1994-2004 and Beyond* (2004) 18-21 for the history of the FS Charter. See Napier in OECD and World Bank (eds) *OECD Trade Policy Studies Liberalization and Universal Access to Basic Services* (2006) 202 who views the charter as “a pre-emptive strike against the possibility of unpalatable legislation” while it remains a voluntary commitment by the financial service sector. Department of Trade, Industry and Competition “A Strategy for Black Economic Empowerment” (2003) <https://pmg.org.za/committee-meeting/1252/> (accessed: 2021-09-01) par 3.2.5. See further Tomlison “South Africa’s Financial Sector Charter: Where From, Where To?” 2005 20 *Housing Finance International* 32; Acemoglu, Gelbz and Robinson “Black Economic Empowerment and Economic Performance in South Africa” (2007) <http://www.treasury.gov.za/publications/other/growth/06-Procurement%20and%20bee/02-black%20economic%20empowerment%20and%20economic%20performance%20in%20so.pdf> (accessed: 2021-10-31) for the history of the B-BBEE policy.



sector delivers financial services effectively.<sup>1378</sup> With the possibility of the government introducing strict community reinvestment legislative measures to compel banks to provide financial services to the majority,<sup>1379</sup> the National Economic Development and Labour Council (NEDLAC) introduced the FS Charter in 2002 as a voluntary agreement to promote social and economic integration and access to financial services.<sup>1380</sup> The FS Charter “was the main pillar guiding the [financial] sector’s financial inclusion objectives”.<sup>1381</sup> It contains a number of provisions that specifically promote access to financial services.

The FS Charter makes specific commitments as to the type of financial services, the level of the commitment to create access to these services, as well as the targeted sector in the community. In terms of paragraph 8 of the FS Charter, the financial sector committed to substantially increase “effective access to first-order retail financial services”, such as transactional and saving accounts, that include a greater segment of the population “within LSM 1-5”.<sup>1382</sup>

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<sup>1378</sup> The strategies include human resource development (requiring a broad-based and diverse pool of skills to be developed for the financial sector and setting targets, and black people, women occupying different management levels), procurement policies (that requires financial institutions to implement a target procurement strategy to enhance BEE), enterprise development (requiring the financial sector’s commitments to foster new, and developing existing BEE accredited companies), and empowerment financing (that requires parties to the FS Charter to commit themselves to work in partnership with government and its development finance institutions, such as the Post Bank and Land Bank, to mobilise resources for empowerment financing), ownership and control in the financial sector (setting up targets for ownership and directorship by black people). See pars 5-7 and 9-12 of the FS Charter.

<sup>1379</sup> See the Draft CR Bill 2002, which was introduced but has since been shelved, to compel banks to disclose how they are offering home loans to poor communities. See Napier in OECD and World Bank *OECD Policy and Access to Basic Services* (2006) 202.

<sup>1380</sup> NEDLAC is a multilateral social dialogue forum on social, economic, and labour policy. Its members promote social and economic integration and access to the financial services sector. See Napier in OECD and World Bank (eds) *OECD Policy and Access to Basic Services* (2006) 202. See further Anon “Declaration of the Financial Sector Summit” (2002); SARB “Annual Report 2003” (Nd) 6 where it is referred to as the “Financial Sector Black Economic Empowerment Charter”; Porteous and Hazelhurst *Banking on Change* (2004) 18-21 for the history of the FS Charter.

<sup>1381</sup> See The World Bank “Achieving Effective Financial Inclusion in South Africa: A Payments Perspective” (Nd) <http://www.treasury.gov.za/publications/other/Achieving%20Effective%20Financial%20Inclusion%20in%20South%20Africa.pdf> (accessed: 2022-01-26) 26.

<sup>1382</sup> The LSM 1-5 refers to the population with the lowest level in terms of the Living Standard Measures, a marketing research tool in Southern Africa that was introduced by the South Africa Audience Research Foundation (SAARF). It divides the population into 10 LSM groups, 10 (highest) to 1 (lowest). See the South African Audience Research Foundation “Living Standard Measures” (Nd) <http://www.saarf.co.za/lsm/lsm.asp> (accessed: 2021-10-19). Other types of first-order financial services are credit for low-income housing and insurance products and services.

One of the post-democratic government policy initiatives was to increase the levels of participation of black people in the ownership, management, access, and control of financial and economic activities.<sup>1383</sup> A broad-based black economic empowerment became the preferred policy agenda.<sup>1384</sup> Participants at NEDLAC favoured the self-regulation of various sectors and industries to achieve the B-BBEE goals. They encouraged business sectors and enterprises to develop sector-specific charters with tangible B-BBEE targets and envisaged their achieving these targets within a set period. NEDLAC also proposed legislation to implement the B-BBEE goal through a code of practice and measures of progress using predetermined scorecards.<sup>1385</sup> The FS Charter defines "effective access" with reference to distance of access, adequacy, affordability of the products and services, and simplicity and comprehensibility of product descriptions.<sup>1386</sup>

The FS Charter established the Financial Sector Charter Council (now the Financial Sector Transformation Council (FSTC)) as an independent body responsible for overseeing its implementation and monitoring progress.<sup>1387</sup> Financial institutions were required to report

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<sup>1383</sup> BEE Commission "BEE Strategy Report" (2001) 2. The BEE strategy was developed after the establishment of the Black Economic Empowerment Commission which was responsible for spearheading the strategy. See further Horwitz and Jain "An Assessment of Employment Equity and Broad Based Black Economic Empowerment Developments in South Africa" 2011 30 *International Journal on Equality Diversity and Inclusion* 297 301-302; Molyneux in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 195; Patel and Graham "How Broad-based is Broad-Based Black Economic Empowerment?" 2012 29 *Development Southern Africa* 193; Hamann *et al* 2008 *Journal of Southern African Studies* 26-27 for the history of the strategy.

<sup>1384</sup> Department of Trade, Industry and Competition "A Strategy for Black Economic Empowerment" (2003) par 3.2.5. See also Tomlison 2005 *Housing Finance International* 32; Acemoglu *et al* "Black Economic Empowerment and Economic Performance in South Africa" (2007) for the history of the B-BBEE policy.

<sup>1385</sup> BEE Commission "BEE Strategy Report" (2001) 352. See the discussion of the Broad-Based Black Economic Empowerment Act 53 of 2003 in Ch 6.3.1.3 below. See the Preamble to the FS Charter par 2.10 which defines black people as "all Africans, Coloureds, and Indians who are South African citizens and includes black companies". See also Bankable Frontier Association and FinMark Trust "The Mzansi Bank Account Initiative in South Africa" (2009) [https://finmark.org.za/system/documents/files/000/000/316/original/MsanziBankAccInitiativeSA\\_2009.pdf?1614593520](https://finmark.org.za/system/documents/files/000/000/316/original/MsanziBankAccInitiativeSA_2009.pdf?1614593520) (accessed: 2022-01-26) 3.

<sup>1386</sup> FS Charter pars 2.22.1-2.22.6. See Norton 2007 *SIFETL* 218 who describes them as five dimensions used by the FS Charter. "Effective access" also includes avoiding discriminatory practices in offering these services.

<sup>1387</sup> FS Charter par 15.1.1. The anti-discrimination provisions of the FS Charter build-up for the aspirations at NEDLAC (to root out discrimination in the financial sector by requiring subsectors of the financial sector to establish or strengthen codes that end discrimination and by government legislating "uniform norms on disclosure of financial services by race, gender, location and categories of amount. See Anon "Declaration of the Financial Sector Summit" (2002). Other issues include rooting out HIV discrimination, developing a sustainable financial institution that

their progress on the implementation of the FS Charter to the FSTC annually.<sup>1388</sup> Their reports must be published for public information.<sup>1389</sup> The FS Charter set a specific timeframe – January 2004 to December 2014 – in which the financial sector was required to achieve specific B-BBEE targets.<sup>1390</sup> Most importantly, it required the financial sector to ensure that 80% of the poorest households had access to effective transactions and saving financial products and services by 2008.<sup>1391</sup> As discussed below, opinions differ on whether the FS Charter achieved its main objectives.<sup>1392</sup> However, the FS Charter is lauded for the successful introduction of Mzansi accounts and its provision of access to basic financial services.<sup>1393</sup>

## 6.2.2 Financial Sector Code 2012

The Financial Sector Code (FS Code) derives from a legislative elevation of the voluntary status of the FS Charter through the Broad-based Black Economic Empowerment Act (B-BBEE Act).<sup>1394</sup> As discussed below, the B-BBEE Act empowers the Minister of Trade and Industry to promote any existing transformation charter that advances the B-BBEE objectives as a sectoral code.<sup>1395</sup> It is now a transformation charter in terms of this Act and subject to the scorecards identified in the Generic B-BBEE Code.<sup>1396</sup> In 2012, the FS Charter was reviewed and gazetted

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serves poor communities, the increase of overall capital investments, and the regulation of credit bureaus. See further The National Treasury and Alliance for Financial Inclusion "The Use of Financial Inclusion Data Country Case Study: South Africa: The Mzansi Story and Beyond" (2014) <https://www.gpfi.org/publications/use-financial-inclusion-data-country-case-study-south-africa> (accessed: 2022-02-04) 3-4; National Treasury "The Red Book" (2011) 64; and Shipalana "Digitising Financial Services: A Tool For Financial Inclusion in South Africa?" (2019) *South African Institute of International Affairs Occasional Paper 301* <https://saiia.org.za/research/digitising-financial-services-a-tool-for-financial-inclusion-in-south-africa/> (accessed: 2021-10-05) 4.

<sup>1388</sup> FS Charter par 15.2.1. See also Maswanganyi "Finance Committee Concerned About Financial Sector Council's Non-compliance with B-BBEE Act" (2022) <https://www.polity.org.za/article/finance-committee-concerned-about-financial-sector-councils-non-compliance-with-b-bbee-act-2022-02-16> (accessed: 2022-02-17) raising concern about lack of annual reporting by the Council on transformation in the financial sector.

<sup>1389</sup> FS Charter par 15.2.4

<sup>1390</sup> See FS Charter par 4.2.

<sup>1391</sup> FS Charter par 8.3.1. See CGAP *I-SIP South Africa* (2012) 16-17. See also Kostov, Aruna and Annimb "Determinants of Access to Finance: An Investigation into the Mzansi Intervention" 2012 *24 European Journal of Development Research* 397 36.

<sup>1392</sup> See Ch 6.6.2 below for the discussion of the Mzansi account.

<sup>1393</sup> FS Charter par 8.3.1.

<sup>1394</sup> 53 of 2003 as amended by the Broad-based Black Economic Empowerment Amendment Act 46 of 2013.

<sup>1395</sup> See s 12 of the B-BBEE Act. See Ch 6.3.1.3 below for the discussion of the B-BBEE Act.

<sup>1396</sup> See s 12 of the B-BBEE Act. See also Department of Trade, Industry and Competition "Codes of Good Practice on Broad-Based Black Economic Empowerment" GN 997 in *GG 35914* of 2012-11-26.

to align it with the Generic B-BBEE Code under the B-BBEE Act as the FS Code.<sup>1397</sup> The FS Code applies to persons conducting business in the South African financial sector including banks.<sup>1398</sup> More importantly, it has included access to financial services as one of the additional elements on the generic scorecards that are unique to the financial sector, including making “financial services accessible to the previously unbanked and under-served”.<sup>1399</sup> The FS Code helps to measure how a financial services provider “substantially increases effective access to first order-retail financial services”.<sup>1400</sup> However, the original FS Code did not provide for a specific scorecard to measure these elements.<sup>1401</sup> This scorecard was added to the Amended FS Code in 2017.<sup>1402</sup>

The Amended FS Code sets out key principles and sub-categories of access to elements of financial services applicable to banks.<sup>1403</sup> These include geographic access,<sup>1404</sup> electronic customer infrastructure access,<sup>1405</sup> banking access via densification,<sup>1406</sup> and importantly, product access.<sup>1407</sup> Product access seeks to address the stigma, as discussed in detail

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<sup>1397</sup> Department of Trade, Industry and Competition “Financial Sector Charter on Black Economic Empowerment” GN 110 in *GG* 29610 of 2007-02-09. See also GN 997 in *GG* 35914 of 2012-11-26 (“FS Charter”). See further Standing Committee on Finance “1st Transformation Report” (2017) par 622; Arora and Leach “Towards Building an Inclusive Financial Sector: Lessons from South Africa” 2005 17 *Economic and Political Weekly* 172.

<sup>1398</sup> DTIC GN 997 in *GG* 35914 of 2012-11-26 3.

<sup>1399</sup> See the discussion of the B-BBEE scorecards in Ch 6.4.2 below. Another important element is empowering finance. See FS Code 2 and Amended FS Code 4. See further FS Code Series FS800 Statement 801 and Standing Committee on Finance “1st Transformation Report” (2017) pars 6.4.10 and 6.4.11.

<sup>1400</sup> FS Code par 7.8. See also Standing Committee on Finance “1st Transformation Report” (2017), par 6.4.11; Lawrence “The Amended Financial Sector Code” (2018-06-01) 1 *TFM Magazine* <https://tfmmagazine.co.za/wp-content/uploads/2019/02/Financial-pages.pdf> (accessed: 2021-11-04) 17.

<sup>1401</sup> See FS Code pars 11.1 and 11.2 which provides for the transition period and allows measured entities to report their B-BBEE compliance in relation to other scorecards and principles but to exclude this element until agreed by the Financial Sector Council.

<sup>1402</sup> Department of Trade and Industry “Codes of Good Practice on Broad-Based Black Economic Empowerment” GN 1325 in *GG* 41287 of 2017-12-01.

<sup>1403</sup> See Amended FS Code Series FS700, Statement FS701.

<sup>1404</sup> This refers generally to proximity of transactions, services, and sale points and does not imply product holding. Examples of methods are ATMs, automatic note acceptors, points of sale devices, and retail agencies. See Amended FS Code par 31.

<sup>1405</sup> Refers to access via any client-owned or third-party infrastructures and includes internet banking, cell-phone banking, telephone banking, or any new related electronic products and/or technology. See also Amended FS Code par 3.2.

<sup>1406</sup> This refers to the principle of measurement of the number of access points per number of the target-group clients with the sole aim of easing access to the facility of obtaining cash from their qualifying accounts within easy reach of their home bases. Amended FS Code par 3.3.

<sup>1407</sup> Amended FS Code par 3.4.

below,<sup>1408</sup> of the Mzansi account which was issued under the FS Charter.<sup>1409</sup> The Amended FS Code does not prescribe the types of product that financial institutions must offer as access products and the specific targets that must be achieved by financial institutions. It allows “them to expand their own offerings, which are far more successful at achieving financial inclusion”.<sup>1410</sup> A product will qualify as an access product if it conforms to the minimum access standards that may be negotiated by the relevant stakeholders.<sup>1411</sup> Banks are free to apply to the FSTC established in terms of the FS Charter<sup>1412</sup> for approval of a number of products as “Access Qualifying Products” which will help them meet the overall access to financial services target.<sup>1413</sup> If the application is approved by the FSTC, a bank is free to brand the product and sell it to the market. The sale and branding must, however, be aligned with its own access strategies and “be in [a] manner that promotes financial inclusion”.<sup>1414</sup> Notably, access products exclude SASSA grant accounts.<sup>1415</sup>

Financial institutions are required to meet a scorecard of 12% in respect of access to the financial services B-BBEE element.<sup>1416</sup> The Amended FS Code retains the annual reporting requirements to the FSTC but adds a possible sanction for non-compliance. It provides for the automatic downgrading by one B-BBEE level in the subsequent reporting period for institutions that did not submit reports in the previous reporting period.<sup>1417</sup> The FSTC also has the power

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<sup>1408</sup> See Ch 6.6.2 below.

<sup>1409</sup> Amended FS Code par 3.4. The stigma relates to perceiving Mzansi account as a “poor person’s banking product”.

<sup>1410</sup> Amended FS Code par 3.4.

<sup>1411</sup> Amended FS Code par 3.4.3.

<sup>1412</sup> See the introduction of the Financial Sector Charter Council (now FSTC) in Ch 6.2.1 above.

<sup>1413</sup> Amended FS Code par 3.4.4. See below for the discussion of the FSTC.

<sup>1414</sup> FS Code 112; Amended FS Code; Amended FSC Series FS700; Statement FS701 par 3.4.4 (sic).

<sup>1415</sup> Amended FS Code; Amended FSC Series FS700; Statement FS701 par 2. See also Shipalana “Digitising Financial Services” (2019) *South African Institute of International Affairs Occasional Paper 301* 13-14; The Banking Association of South Africa “Transformation Report 2020” (2021) [https://www.banking.org.za/wp-content/uploads/2021/04/BASA\\_Transformation-in-Banking-Report-2020\\_.pdf](https://www.banking.org.za/wp-content/uploads/2021/04/BASA_Transformation-in-Banking-Report-2020_.pdf) (accessed: 2021-10-05) 25.

<sup>1416</sup> Amended FS Code; Amended FSC Series FS700; Statement FS701 par 2. Financial Sector Transformation Council “Annual Reporting to the Financial Sector Transformation Council for the Measurement Period Between 1 December 2019 and 30 November 2020” (2021) [https://www.abp.org.za/wp-content/uploads/2021/05/1.-FSTC\\_2019\\_2020\\_Reporting\\_Letter-002.pdf](https://www.abp.org.za/wp-content/uploads/2021/05/1.-FSTC_2019_2020_Reporting_Letter-002.pdf) (accessed: 2021-11-05).

<sup>1417</sup> Amended FS Code; Amended FSC; Series FS700; Statement FS701 par 8.2.1.

to name institutions that do not submit reports.<sup>1418</sup> Despite the required reporting the offering of financial services continues to decline.<sup>1419</sup>

### 6.2.3 Code of Banking Practice 2012

The BASA developed the *Code of Banking Practice* in 2012<sup>1420</sup> to regulate the relationship between banks and their customers and to set out minimum standards that customers should expect from their banks.<sup>1421</sup> It serves as a “guide” by setting out these standards for general banking products and services.<sup>1422</sup> Specific products include loyalty and rewards programmes,<sup>1423</sup> credit insurance,<sup>1424</sup> credit,<sup>1425</sup> cheque accounts,<sup>1426</sup> and BBAs.<sup>1427</sup> A number of its provisions reaffirm the parties’ common-law, legislative, and constitutional duties and responsibilities.<sup>1428</sup> Some of these duties are relevant to FI and the provision of BBAs. The relevant provisions in the code are customers’ “entitlements” and banks’ “key commitments”, which are relevant in promoting FI and the provision of BBAs.<sup>1429</sup>

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<sup>1418</sup> Amended FS Code; Amended FSC; Series FS700; Statement FS701 par 8.2.1.

<sup>1419</sup> See FSTC “Briefing to the Standing Committee on Finance: Transformation of the Financial Sector Charter” (2019) <http://www.thedtic.gov.za/wp-content/uploads/FSTC.pdf> (accessed: 2021-11-05) 14 which indicated a 20% decline between 2015 and 2018 in access to finance the B-BBEE element of the Amended FS Code. See also BASA “Transformation Report 2020” (2021) which shows a decline of actual bank accounts from 16.6 in 2018 to 14.7 in 2019.

<sup>1420</sup> BASA *Code of Banking Practice* (2012). The code applies to personal and small businesses. It became effective from 1 January 2012. See Schulze 2000 *SA Merc LJ* 38.

<sup>1421</sup> BASA *Code of Banking Practice* (2012) Preamble. The code sets specific principles that guide this relationship such as fairness, transparency, accountability, and reliability. See Schulze 2000 *SA Merc LJ* 40; Uzokwe and Van Heerden “Consumer Protection in the Banking Industry: A Comparison of the South African and Nigerian Codes of Banking Practice” 2018 81 *THRHR* 631 632 who view the Banking Code as providing a variety of aspects that are germane to the bank-customer relationship.

<sup>1422</sup> BASA *Code of Banking Practice* (2012) clause 6.5.2.

<sup>1423</sup> BASA *Code of Banking Practice* (2012) clause 6.3.3.

<sup>1424</sup> BASA *Code of Banking Practice* (2012) clause 6.4.

<sup>1425</sup> BASA *Code of Banking Practice* (2012) clause 8. They include personal loans, mortgage loans, vehicle finance, and suretyship agreements.

<sup>1426</sup> BASA *Code of Banking Practice* (2012) clause 9.1.

<sup>1427</sup> BASA *Code of Banking Practice* (2012) clause 5. Other services include stop and debit orders, see clauses 9.4 and 6.5.2.3.

<sup>1428</sup> They cover standard contractual provisions and the adherence to consumer credit and protection, and anti-money laundering legislation. See the discussion of the National Credit Act 43 of 2005, The Consumer Protection Act 68 of 2008, and the Financial Intelligence Centre Act 38 of 2001 in Ch 6.3.1 below. The common law issues dealt with by the code are the unauthorized use of a bank account and the closing of an account with reasonable prior notice. See du Toit 2014 *TSAR* 574; Uzokwe and Van Heerden 2018 *THRHR* 637.

<sup>1429</sup> See BASA *Code of Banking Practice* (2012) clauses 3.1 and 4. On common-law-related duties of the bank to give reasonable notice before closing the accounts. See *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA); *Minister of Finance v Oakbay Investments (Pty) Ltd* 2018 (3) SA 515 (GP); *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP); Schulze “The

The BASA *Code of Banking Practice* commits banks to continuously improve the standards of practice and services in the banking industry<sup>1430</sup> and to provide and disclose the relevant information about their services, including fees.<sup>1431</sup> This code requires banks to provide their customers and potential customers with information relating to available types of banking products and services and their relevant features.<sup>1432</sup> They must also provide relevant information on how to open the accounts and how these accounts work.<sup>1433</sup> These undertakings allow customers to make informed choices about products that are appropriate to their needs.<sup>1434</sup> They also undertake to make the services safe and secure.<sup>1435</sup>

Clause 5 of the BASA *Code of Banking Practice* specifically commits banks to provide “affordable and accessible basic banking services to all South Africans” among other services, provided the customer meets the bank’s minimum requirements.<sup>1436</sup> It does not outline these minimum requirements, but requires banks to “be able to provide you [the customer] with the conditions and details of such accounts”.<sup>1437</sup> The BASA *Code of Banking Practice* further commits banks to continuously innovate and improve basic banking services. It, however, leaves it to the banks to define BBAs and to determine the relevant information that they must provide to the customer and the minimum requirements.<sup>1438</sup>

As a regulatory instrument, BASA *Code of Practice* is a “voluntary code” and banks subscribe to the jurisdiction of the Ombudsman for Banking Services to mediate and make binding

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Bank’s Right to Cancel the Contract Between it and its Customer Unilaterally” 2011 32 *Obiter* 219; Ngidi “The Termination of the Bank-client Relationship in South African Banking Law” 2020 53 *De Jure* 54.

<sup>1430</sup> BASA *Code of Banking Practice* (2012) clause 4.1 (emphasis added). In terms of clause 3.1, the standards include preventing unfair discrimination against customers on the ground of marital status, gender, age, or race.

<sup>1431</sup> BASA *Code of Banking Practice* (2012) clause 3.1.

<sup>1432</sup> BASA *Code of Banking Practice* (2012) clause 6.5.2.1.

<sup>1433</sup> BASA *Code of Banking Practice* (2012) clause 6.5.2.2.

<sup>1434</sup> BASA *Code of Banking Practice* (2012) clause 6.5.2. Other relevant commitments include making regular statements of accounts available on request and the provision of reliable stop or debit orders. See Clause 6.5.2. Clause 3.1 refers to “reliably stop debit orders”.

<sup>1435</sup> BASA *Code of Banking Practice* (2012) clause 4.5.

<sup>1436</sup> Clause 12 defines basic banking services as “[t]he opening, operation and maintenance of [t]ransaction accounts”. A transaction account is defined as “an account into which you can make or receive deposits and from which you can make third-party payments”.

<sup>1437</sup> Clause 5 of the BASA *Code of Banking Practice* (2012).

<sup>1438</sup> Clause 5 of the BASA *Code of Banking Practice* (2012).

recommendations on it.<sup>1439</sup> Unlike its previous version, the code does not refer to the binding effect on its subscribers.<sup>1440</sup> The provisions of the *BASA Code of Banking Practice* are regarded as implied terms, customs, and trade usages that courts may have regard in formulating legal principles that govern bank-customer relationships.<sup>1441</sup> According to du Toit, the code “is much more than an ethical code or mere soft law” as all major banks in South Africa subscribe to it.<sup>1442</sup> The code, however, does not provide for institutional and enforcement mechanisms. It is, therefore, generally not binding on banks or enforceable by an independent enforcement mechanism. The *BASA Code of Banking Practice* only provides for dispute resolution mechanisms that include internal dispute resolution and the resolution by the Ombudsman for Banking Services.<sup>1443</sup> A refusal by a bank to abide by a determination by the Ombudsman may be published together with the particular bank’s refusal.<sup>1444</sup>

#### 6.2.4 Draft Financial Inclusion Policy 2020

In 2020 the National Treasury adopted a holistic approach and the first comprehensive FI policy by introducing *An Inclusive Financial Sector for All* (Draft FI Policy) for public comment.<sup>1445</sup> This policy has multiple objectives aimed at promoting FI for both individuals,

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<sup>1439</sup> See the Preamble to the *BASA Code of Banking Practice* (2012).

<sup>1440</sup> The 2004 version of the code specifically provided that “none of the provisions of the code may be legally binding before the court of law”. It, however, provides that they may be used to influence the legal relationship between the customer and the bank and that the code gives rise to trade customs or tacit contracts. See clause 1 of code referred to in du Toit 2014 *TSAR* 569.

<sup>1441</sup> See du Toit 2014 *TSAR* 568 who discusses the common-law requirements for trade usage and how they apply to the code. See also Schulze 2000 *SA Merc LJ* 38 according to whom “the mere fact that a particular banking practice has been acknowledged and explained in the Code...is already a strong indication that it qualified or existed as a banking practice or trade usage.

<sup>1442</sup> Du Toit 2014 *TSAR* 569-570.

<sup>1443</sup> *BASA Code of Banking Practice* (2012) clause 10. See Schulze 2000 *SA Merc LJ* who discusses the role of the Banking Adjudicator as dispute resolution mechanisms under the 2000 *Code of Banking Practice*. The *BASA Code of Banking Practice* (2012) only provides for the jurisdiction of the Ombudsman for the Banking Services and how banks are bound by it and the relevant information for referral of unresolved disputes. See Xavier *The Code of Banking Practice - An Investigation into its Role and Enforceability in South Africa* (Unpublished LLM Dissertation, University of Johannesburg, 2016) for the role of Ombudsmen to enforce the codes of banking practice in South Africa, England, and Australia.

<sup>1444</sup> *BASA Code of Banking Practice* (2012) Preamble. See also Malan and Nagel “Reflections on Cheques, Payment Instruments, Phishing and Codification” in Hugo and Kelly-Louw (eds) *Jopie: Jurist, Mentor, Supervisor and Friend: Essays on the Law of Banking, Companies and Suretyship* (2017) 62.

<sup>1445</sup> National Treasury Draft FI Policy (2020). See also National Treasury “Media Statement: Draft Financial Inclusion Policy” (2020) [http://www.treasury.gov.za/comm\\_media/press/2020/20201028%20Media%20Statement%20-%20Updated%20Financial%20Inclusion%20Policy.pdf](http://www.treasury.gov.za/comm_media/press/2020/20201028%20Media%20Statement%20-%20Updated%20Financial%20Inclusion%20Policy.pdf) (accessed: 2021-10-11). (National Treasury “FI Policy Media Statement” (2020)). The public had



small, medium, and micro enterprises.<sup>1446</sup> The Draft FI Policy also aims to establish an approach on how to implement FI, and the basis of how the financial service sector, regulators, and other stakeholders will promote FI.<sup>1447</sup> It outlines the government's policy approach of implementing regulatory measures that promote FI. It complements *A Safer Financial Sector to Serve South Africa* discussed below.<sup>1448</sup> It urges regulators to support FI through regulatory and supervisory frameworks alongside the implementation of the Twin-Peaks model of regulation that prevents market conduct, prudential, and stability risks.<sup>1449</sup>

The Draft FI Policy addresses a number of policy and regulatory issues that support and promote FI and take cognisance of international FI policies, including the G20 FI principles.<sup>1450</sup> It commits to balance financial regulatory objectives and minimise any ensuing trade-offs by ensuring that FI efforts are not proportionately detrimental to these objectives.<sup>1451</sup> It aims to achieve this objective by using "an approach referred to as I-SIP".<sup>1452</sup> This requires the Draft FI Policy to "consider other critical financial sector policy objectives of promoting financial stability, consumer protection and financial integrity" in its approach to the promotion of FI.<sup>1453</sup>

The Draft FI Policy sets three specific FI policy pillars that outline specific priorities and projects to support FI.<sup>1454</sup> These pillars aim to deepen FI for individuals (Pillar 1), leverage a more diversified provider and distribution base (Pillar 2), and extend access to financial services for

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to submit the comments by 04 December 2020. See 29-34 for a discussion of policy and regulatory developments/interventions relevant to FI in South Africa.

<sup>1446</sup> See National Treasury Draft FI Policy (2020) 12 and 42 for a number of policy objectives. See also National Treasury "FI Policy Media Statement" (2020).

<sup>1447</sup> National Treasury "FI Policy Media Statement" (2020).

<sup>1448</sup> National Treasury "The Red Book" (2011). See Ch 6.3.1.6 below.

<sup>1449</sup> National Treasury Draft FI Policy (2020) 8. See the discussion of the policy and legislative measures on the Twin-Peaks model of regulation in Ch 6.3.1.6(a) below.

<sup>1450</sup> National Treasury Draft FI Policy (2020) 37.

<sup>1451</sup> National Treasury Draft FI Policy (2020) 38.

<sup>1452</sup> National Treasury Draft FI Policy (2020) 38.

<sup>1453</sup> National Treasury Draft FI Policy (2020) 37-39. It specifically prevents abusive practices associated with offering financial products, disclosure of product information, and facilitates financial literacy. It also requires access to these products not to threaten the stability of financial service providers and to prevent them from performing effective due diligence under the AML/CFT obligations.

<sup>1454</sup> National Treasury Draft FI Policy (2020) 2-17. Pillar 1 promotes the beneficial use of transactional accounts, Pillar 2 seeks to leverage a more diversified provider and distribution base, and Pillar 3 extends access to financial services for SMMEs. See also FSCA "Regulatory Strategy 2021-2025" (Nd). See also FSCA "Financial Inclusion Strategy" (Nd) <https://www.fsc.co.za/Documents/FSCA%20Financial%20Inclusion%20Strategy.pdf> (accessed: 2022-02-27) 9 (FSCA "Financial Inclusion Strategy").

small, medium, and micro-sized enterprises (Pillar 3).<sup>1455</sup> Pillars 1 specifically aims to deepen FI by prioritising the provision of entry-level financial services, such as transactional bank accounts, savings and insurance products, and retail credits.<sup>1456</sup> With regard to access to transaction accounts, the policy advocates an increase in the adoption of these entry-level banking accounts. It identifies more effective transaction accounts as a starting point and “a gateway” to financial inclusion.<sup>1457</sup> The Draft FI Policy is, however, concerned about a decreasing use of financial services.<sup>1458</sup> It identifies a “frequently reduced to a simple monthly cash distribution service (cash-in/cash-out)” as a major reason for the decreasing usage of these accounts.<sup>1459</sup> This relates to the inappropriateness of these products and the extent of their use, particularly the withdrawal of money from an account as soon as it has been deposited. Despite evidence of increasing buy-in to entry-level banking accounts, the Draft FI Policy identifies the main contributor to the lack of adoption of entry-level bank accounts as:

the lack of available, appropriate and affordable financial products and the lack of, or limited knowledge about, financial services and products for a significant portion of the South African population.<sup>1460</sup>

The Draft FI Policy further raises a specific concern over the use of entry-level accounts purely as tools for cash distribution which nullifies the store-of-value aspect of the accounts.<sup>1461</sup> It does not propose a specific regulatory framework to address this challenge but proposes measures to address product failures that hinder their usage. It, therefore, emphasises the need to improve, diversify, and develop stored-value accounts to enable them to be used as an alternative to traditional bank accounts for payment.<sup>1462</sup>

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<sup>1455</sup> National Treasury Draft FI Policy (2020) 2-7. Priorities under Pillar 2 are improving the credit infrastructure for SMMEs, leveraging a broader payment system, and incentivising the provision of asset insurance. Priorities under Pillar 3 are to encourage competition and diversification of the supply base by strengthening the co-operative sector, developing a more proportionate regulatory environment to ease compliance costs, allowing for and empowering the use of agents in financial service distribution, and leveraging fintech disruptors. See also 27four Investment Managers “A Review of the National Treasury Draft Policy Paper “An Inclusive Financial Sector for All”” (2020) <https://www.27four.com/an-inclusive-financial-sector-for-all/> (accessed: 2021-11-12).

<sup>1456</sup> National Treasury Draft FI Policy (2020) 43.

<sup>1457</sup> National Treasury Draft FI Policy (2020) 23 and 44.

<sup>1458</sup> National Treasury Draft FI Policy (2020) 21-22. See also FSCA “Financial Inclusion Strategy” (Nd) 13.

<sup>1459</sup> National Treasury Draft FI Policy (2020) 21-22.

<sup>1460</sup> National Treasury Draft FI Policy (2020) 44.

<sup>1461</sup> National Treasury Draft FI Policy (2020) 44.

<sup>1462</sup> National Treasury Draft FI Policy (2020) 44.

The Draft FI Policy is implemented through monitoring and evaluation which measure progress on FI. These measures aim to inform the design of initiatives and prioritise relevant actions.<sup>1463</sup> They assess the current status of FI to identify the areas where there are shortcomings and the effect that policies have on FI.<sup>1464</sup> The main objective is to assess the effectiveness of the current interventions, the socio-economic impact of current policies, and to inform future designs of financial products and services.<sup>1465</sup> The Draft FI Policy was not intended to be South Africa's national FI strategy in line with the AFI and World Bank's *NFIS Reference Framework* and principles.<sup>1466</sup> It specifically outlines steps that will be taken in the future. These include the introduction of the Financial Inclusion Working Group and the Financial Inclusion Forum as key institutions to implement its objectives.<sup>1467</sup> It also targets the development of a National Financial Inclusion Strategy and a Financial Inclusion Monitoring and Evaluation Framework in 2021.

One of the objectives outlined in the Draft FI Policy to promote FI is to improve FI with cooperation and coordination among stakeholders.<sup>1468</sup> It adopts a "multi-stakeholder approach" and specifically identifies the cooperation of government departments and agencies, regulators, financial institutions, representative bodies, and relevant development partners as important in the realisation of FI.<sup>1469</sup>

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<sup>1463</sup> National Treasury Draft FI Policy (2020) 89.

<sup>1464</sup> National Treasury Draft FI Policy (2020) 89.

<sup>1465</sup> National Treasury Draft FI Policy (2020) 89.

<sup>1466</sup> See Ch 4 above. The media statement specifically indicates that the Draft FI Policy is published for comment from the public "to particularly strengthen the priorities outlined in the paper to inform the development of a comprehensive national financial inclusion strategy". However, the Draft FI Policy specifically indicates that it aims to localise the G20 and World Bank FI principles.

<sup>1467</sup> National Treasury Draft FI Policy (2020) 90.

<sup>1468</sup> National Treasury Draft FI Policy (2020) 13.

<sup>1469</sup> National Treasury Draft FI Policy (2020) 90.

## 6.3 STATUTORY FRAMEWORK

### 6.3.1 Acts of Parliament

#### 6.3.1.1 *The Banks Act 1990*

The Banks Act regulates the registration and the prudential supervision of commercial banks.<sup>1470</sup> The Act, among others, specifically regulates the scope of banking activities, the adequacy of their capital, and liquidity requirements in terms of the international bank supervision standards, and measures that protect consumers.<sup>1471</sup> The Banks Act does not specifically deal with promoting FI or access to financial services.<sup>1472</sup> It, therefore, does not provide of a statutory right of access to financial products and services such as the Banks Acts of Canada and France.<sup>1473</sup> The Banks Act limits banking activities within definitions of “the business of a bank” or “deposit”.<sup>1474</sup> It requires any person conducting the business of deposit-taking to register as a bank.<sup>1475</sup> It generally requires the person who accepts, solicits, or advertises for deposits from the public to register as a bank.<sup>1476</sup> These definitions arguably include the activities of many formal and informal rotational savings and credit associations such as *stokvels*.<sup>1477</sup> The Act empowers the Minister of Finance to exclude certain activities

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<sup>1470</sup> Banks Act 94 of 1990. See s 2 which excludes other types of banks from the provisions of the Act such as mutual banks and co-operative banks.

<sup>1471</sup> Pienaar “The Prudential Requirements of the Deposit-taking Institutions Act 94 of 1990” 1992 3 *TSAR* 475. Other measures include the prevention of the undue concentration of risks and the disclosure of the positions of banks in connection with certain market-related risks.

<sup>1472</sup> See the Preamble to the Banks Act.

<sup>1473</sup> See Ch 5.5.2.1 and Ch 5.5.2.2 above.

<sup>1474</sup> See s 1 of the Banks Act. “The business of a bank” is defined to include the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business; the soliciting of or advertising for deposits; and the utilisation of money or the interest for granting a loan; and investing or obtaining money through the sale of assets. “Deposit” is defined as “money paid by one person to the other subject to an agreement that such money or part of it will be repaid with or without interest”.

<sup>1475</sup> S 11 of the Banks Act. See also Lawack-Davids “The Legal and Regulatory Framework of Mobile Banking and Mobile Payments in South Africa” 2012 7 *Journal of International Commercial Law and Technology* 318 323.

<sup>1476</sup> S 11 of the Banks Act.

<sup>1477</sup> On *stokvels*, see Schulze “The Origin and Legal Nature of the Stokvel (Part 1)” 1997 9 *SA Merc LJ* 18 and Schulze “The Origin and Legal Nature of the Stokvel (Part 2)” 1997 9 *SA Merc LJ* 153 159-165 on the definition and history of the *stokvel*. Schulze defines it as “a type of informal credit-rotating association in which a group of people enters into an agreement to contribute a fixed amount of money to a common pool on a weekly or monthly basis or as frequently as the members may agree upon”. See also Mashigo “Stokvels as an Instrument and Channel to Extend Credit to Poor Households in South Africa” 2012 5 *Journal of Economic and Financial Sciences* 49; Mkhwanazi “Accelerating Financial Inclusion in South Africa: Are Online Stokvels the Answer?”

from the definition of “the business of a bank”.<sup>1478</sup> In 2014, the Minister by notice excluded the “activities of a group of persons between the members of which exists a common bond”.<sup>1479</sup> This notice has achieved the main goal of recognising the importance of making finance available through group-based rotational and savings associations such as *stokvels*.<sup>1480</sup> However, individual group members of these associations often become invisible as each member does not obtain his or her own account under group savings accounts.<sup>1481</sup>

Some of the provisions of the Banks Act also contribute to the promotion of FI by ensuring the protection of consumers and the protection of the integrity and stability of banks and the financial system. The Banks Act established the Registrar of Banks (now the Prudential Authority)<sup>1482</sup> that has the power to inspect the operation of banks and to request relevant information,<sup>1483</sup> to authorise the establishment and registration of banks,<sup>1484</sup> supervise their management, ownership, and control, and cancel or suspend their registration.<sup>1485</sup> In addition, where the registration of a bank lapses as a result of cancellation by the PA, the Authority may direct that bank to repay all monies deposited with customers while it was still registered.<sup>1486</sup>

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(2020) *USB Management Review* [https://www.usb.ac.za/usb\\_insights/accelerating-financial-inclusion-in-south-africa-are-online-stokvels-the-answer/](https://www.usb.ac.za/usb_insights/accelerating-financial-inclusion-in-south-africa-are-online-stokvels-the-answer/) (accessed: 2022-02-16).

<sup>1478</sup> See s 1(cc) on the definition of “the business of a bank”.

<sup>1479</sup> South Africa Reserve Bank “Designation of an Activity Not Falling Within the Meaning of ‘the Business of a Bank’ (A Group of Persons Between the Members of Which Exists a Common Bond)” GN 620 in GG 37903 of 2014-08-15.

<sup>1480</sup> The Notice generally excludes the activities of co-operative financial institutions and other savings groups. It specifically refers to *stokvels*. See pars 2 and 3 of the Notice.

<sup>1481</sup> See Intellidex “Response to Request for Public Consultation on the Financial Inclusion Policy Paper: An Inclusive Financial Sector For All” (2020) <https://www.intellidex.co.za/wp-content/uploads/2021/01/Intellidex-Financial-Inclusion-Policy-Response.pdf> (accessed: 2022-02-16).

<sup>1482</sup> See the discussion of the FSRA in Ch 6.5.1.6 below. The Prudential Authority is housed in the Supervision Department of the Reserve Bank of South Africa.

<sup>1483</sup> S 12 (3) of the Banks Act.

<sup>1484</sup> Ss 11-13 read with s 17 of the Banks Act.

<sup>1485</sup> Ss 23 and 24.

<sup>1486</sup> S 32 of the Banks Act.

### 6.3.1.2 Financial Intelligence Centre Act 2001

#### (a) Anti-money Laundering Measures and Financial Inclusion

As discussed in Chapter four, the international AML/CTF framework enlists the financial services industry as the key partner to combat ML and TF. AML/CFT standards such as customer due diligence (CDD), and the know-your-customer (KYC) obligations imposed on these institutions have a considerable impact on the promotion of FI.<sup>1487</sup> It has also become imperative for countries to tailor their AML/CFT measures in a manner that does not prevent financial institutions from providing access to financial services to the majority that are excluded from accessing those services.<sup>1488</sup>

South Africa introduced a number of statutory measures to combat money-laundering in 1992.<sup>1489</sup> However, before 2001 there were no administrative measures by a specific regulatory body with a key mandate to facilitate the prevention and identification of money-laundering activities.<sup>1490</sup> Although these measures provided for suspicious transaction reporting (STR),<sup>1491</sup> they did not implement a comprehensive CDD and the identification and

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<sup>1487</sup> Other relevant AML/CFT prevention measures include cash transaction reporting and suspicious transaction reporting.

<sup>1488</sup> De Koker "Money Laundering Control and Suppression of Financing of Terrorism: Some Thoughts on the Impact of Customer Due Diligence Measures on Financial Exclusion" 2006 13 *Journal of Financial Crime* 26 27. See also Kruger "SA Banks 'Remarkably Healthy' – GCR Ratings" (2022-03-03) *Moneyweb* <https://www.moneyweb.co.za/news/companies-and-deals/sa-banks-remarkably-healthy-gcr-ratings/> (accessed: 2022-03-04) on the recent rating of South Africa banks.

<sup>1489</sup> Drugs and Drug Trafficking Act 140 of 1992 ("DDTA") s 10(13); Proceeds of Crime Act 76 of 1996 ("PCA"); Prevention of Organised Crime Act 121 of 1998 ("POCA"). See also the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) relating to terrorist activities. On common-law measures that outlawed and prosecuted money laundering, see De Koker "Money Laundering Law in South Africa" 2002 22 *Institute for Securities Studies* 2; Chitimira "An Exploration of the Current Regulatory Aspects of Money Laundering in South Africa" 2021 24 *Journal of Money Laundering Control* 789 790; De Koker "The Money Laundering Risk Posed by Low-risk Financial Products in South Africa Findings and Guidelines" 2009 12 *Journal of Money Laundering Control* 323 325.

<sup>1490</sup> South African Law Commission "Project 104: Money Laundering and Related Matters" (2004) [https://www.justice.gov.za/salrc/reports/r\\_prj104\\_1996aug.pdf](https://www.justice.gov.za/salrc/reports/r_prj104_1996aug.pdf) (accessed: 2021-11-18) 5.

<sup>1491</sup> See s 10 of the DDTA which imposed these duties on directors, managers, or executive officers of a financial institution and also on owners, occupiers or managers or persons in control of a place of entertainment and further on stockbrokers and financial instrument dealers. See s 31(1) of the PCA. See further Itzikowitz "South Africa: Money Laundering - The Duty to Report Under the Law" 2000 8 *Journal of Financial Crime* 186; De Koker *South African Money Laundering and Terror Financing Law* (2014) 119-122.

verification of customer (KYC) procedures in terms of the international AML/CFT standards.<sup>1492</sup> As De Koker observes, “businesses are better able to identify suspicious transactions when they know their clients and understand the business that they may conduct with the bank”.<sup>1493</sup> FICA introduced additional AML/CFT measures including the identification of customers in 2001.

FICA added the customer identification and verification (CIV) and cash transaction reporting (CRT) as the main AML/CFT deterrent measures.<sup>1494</sup> The current prescribed limit for cash transaction reporting is set at R24 999.<sup>1495</sup> CIV requires banks to identify and verify the identity of customers before taking or continuing with their relationship with customers.<sup>1496</sup> This process requires customers to produce certain information.<sup>1497</sup> The identification of South African natural citizens or residents requires banks to verify the identity documents or any document that bears certain required information.<sup>1498</sup>

Before 2017, FICA and its regulations were mainly prescriptive and primarily rule-based.<sup>1499</sup> A rule-based approach required banks to adopt a tick-box standard to CIV, irrespective of the

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<sup>1492</sup> See Itzikowitz 2000 *Journal of Financial Crime* 188 who criticises POCA for the lack of KYC and record-keeping provisions. See De Koker 2004 *TSAR* 723 for interchangeable use of the word KYC and customer identification and verification (CIV) procedure and for recommending the application of the former on the basis that CDD is broader than KYC. See further De Koker *South African Money Laundering and Terror Financing Law* (2014) 171-172.

<sup>1493</sup> De Koker 2004 *SAR* 721.

<sup>1494</sup> See s 21 (CIV) read with regulations 3-19 of the National Treasury “Money Laundering and Terrorist Financing Control Regulations” GN 456 in *GG* 1595 of 2002-12-20, as amended (FICA Regulations); s 28 (CTR) read with regulation 22B; and section 29. Other relevant measures include ss 22-26 (record keeping) and s 30 (conveyance of cash to or from South Africa). See also s 29 of FICA which requires businesses, their managers, and their employees to identify and report suspicious transactions to the Financial Intelligence Centre.

<sup>1495</sup> See reg 22B of the FICA Regulations.

<sup>1496</sup> S 21(1)(a) read with Schedule 1. Other provisions in s 21 include the re-identification of customers who have established a business relationship with a client before the commencement of the Act. Section 21 also requires them to identify the person on whose behalf the client is acting or another person acting on behalf of the client.

<sup>1497</sup> FICA Regulations. This includes South African citizens and residents (regs 3 and 4), foreign nationals (regs 5 and 6), close corporations and South African companies (regs 7 and 8), foreign companies (regs 9 and 10), other legal persons (regs 11 and 12), partnerships (regs 13 and 14), and trust (regs 15 and 16).

<sup>1498</sup> Reg 3(a)-(e). Reg 4 allows an accountable institution to accept documents that bear a photograph of the person, his or her full name and surname, date of birth, and identity number.

<sup>1499</sup> De Koker *South Africa Money Laundering and Terror Financing Law* (2014) 207. A risk-based approach was only provided in the Financial Intelligence Centre “General Guidance Note Concerning Identification of Clients 1” (2004) <https://www.fic.gov.za/Documents/note%201%2016.Guidance%20concerning%20identification%20of%20clients.pdf> (accessed: 2022-03-03) which prohibits the application of “a one-size-fits-all approach” to all clients.

risks of money-laundering posed by the customers, transactions, or products.<sup>1500</sup> A strict application of the CIV created barriers to access financial services for the low-income and undocumented sectors of the population, such as the rural population, refugees, and asylum seekers.<sup>1501</sup> Since 2017, FICA specifically requires accountable institutions to develop, maintain, and implement a Risk Compliance and Management Programme (RCMP) and to conduct CDD that takes different risk levels into account.<sup>1502</sup> Accountable institutions are required to apply enhanced due diligence for higher risks and reduced or simplified measures where there are lower risks.<sup>1503</sup> The reinforcement of an RBA is in line with continuing practices and policies to adopt a tiered KYC.<sup>1504</sup> Tiered KYC requires banks either to exempt certain marginalised groups up to a certain transaction or value limit or to apply regulatory adjustments for complying with documentary requirements.<sup>1505</sup> As a measure to promote FI, it applies to entry-level bank accounts of small value. The challenge, as Gelb and Castrillon identified, is to determine “how small such accounts need to be, how the risk-based assessments are to be done, and exactly what requirements should be for such low-risk accounts”.<sup>1506</sup> According to De Koker, the assessment will require financial institutions “to compare the risk profile of the low-risk products with those of standard and higher risk

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<sup>1500</sup> Unger “Money Laundering Regulation: From Al Capone to Al Qaeda” in Unger and Van der Linde (eds) *Research Handbook on Money Laundering* (2013) 24-25.

<sup>1501</sup> De Koker 2004 *TSAR* 745. See also Gelb and Castrillon “Identifying and Verifying Customers: When are KYC Requirements Likely to Become Constraints on Financial Inclusion?” (2019) *Center for Global Development Working Paper 522* <https://www.cgdev.org/sites/default/files/identifying-and-verifying-customers-when-are-kyc-requirements-likely-become-constraints.pdf> (accessed: 2021-12-13); Batsaikhan *et al* 2019 *Journal of Banking Regulation* 260.

<sup>1502</sup> S 21 of FICA. See also chapter 3 Part 1 on the CDD obligations and different levels of this obligation. See further s 42 (2) (a) of FICA on RCMP as a “risk-based framework”. See further Chitimira “The Reliance on Artificial Intelligence Measures to Curb Money Laundering Practices in the South African Banking Institutions and Real Estate Sector” 2020 16 *Acta Universitatis Danubius* 28 33.

<sup>1503</sup> Ss 21B, 21C and 21E of FICA on different levels of CDD. See also FinMark Trust “Applying the Risk Based Approach – Undertaking AML/CTF Risk Assessment of Low-Value Remittance and Banking Products and Services in South Africa Discussions and Guidelines” (2019) [https://finmark.org.za/system/documents/files/000/000/149/original/FMT\\_Product-Risk-Assessment\\_v5\\_final\\_18092019.pdf?1594736892](https://finmark.org.za/system/documents/files/000/000/149/original/FMT_Product-Risk-Assessment_v5_final_18092019.pdf?1594736892) (accessed: 2021-11-15) 4.

<sup>1504</sup> See Alliance for Financial Inclusion “KYC Innovations, Financial Inclusion and Integrity in Selected AFI Member Countries” (2019) *AFI Special Report* <https://www.afi-global.org/sites/default/files/publications/2019-03/KYC-Innovations-Financial-Inclusion-Integrity-Selected-AFI-Member-Countries.pdf> (accessed: 2022-03-03) 6. See also Villasenor, West and Lewis *The 2015 Brookings Financial and Digital Inclusion Project Report: Measuring Progress on Financial Access and Usage* (2015) 21.

<sup>1505</sup> See AFI (2019) *AFI Special Report* 6. See also Villasenor West and Lewis *The 2015 Brookings Financial and Digital Inclusion* (2015) 21. See Ch 6.5 below for a discussion of Exemption 17, its application to Mzansi accounts, and its subsequent withdrawal.

<sup>1506</sup> Gelb and Castrillon “Identifying and Verifying Customers” (2019) *Center for Global Development Working Paper 522* 5.



products”.<sup>1507</sup> In so doing, the RBA will serve to improve the efficacy of the AML/CFT measures while also promoting FI.<sup>1508</sup>

Similar to the FATF Recommendations, FICA does not set FI or the inclusion of the majority in the formal financial systems as its objective of preventing ML and TF. FI is only considered as one of the factors that should be “taken into account” when assessing the lower risk of ML and TF.<sup>1509</sup> Guidance Note 7 specifically considers FI objectives and how exploring “more innovative ways of offering financial services to a broader range of clients and bringing previously excluded sectors of society into the formal economy” may contribute to a more accurate assessment of ML and TF risks.<sup>1510</sup> The lack of a specific mandate to bring the majority into the formal financial system raises a major concern for both the promotion of FI and the prevention of ML and TF. The FATF mutual evaluation of South Africa in 2021 focused, among other aspects, on assessing the countries’ efforts to combat ML and TF in the informal sector and how ML and TF risks are “managed in the context of financial inclusion initiatives”.<sup>1511</sup> It identified FE as one of the factors that impacts on the effectiveness of AML/CFT in the countries, particularly as the large majority remain unbanked and a sizable part is in the informal economy still using cash as payment.<sup>1512</sup>

#### (b) Compliance and Enforcement Mechanisms

FICA empowers the Financial Intelligence Centre (FIC) and the supervisory bodies to supervise and enforce compliance by accountable institutions.<sup>1513</sup> Supervisory bodies include,<sup>1514</sup> the Financial Service Board (now the Financial Sector Conduct Authority) established by the Financial Services Board Act,<sup>1515</sup> and the South African Reserve Bank in term of the South African Reserve Bank Act.<sup>1516</sup> The Act requires the FIC and each supervisory body to coordinate

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<sup>1507</sup> De Koker 2009 *JMLC* 335.

<sup>1508</sup> FIC “Guidance Note 7” (2017) par 30.

<sup>1509</sup> FIC “Guidance Note 7” (2017) pars 30 and 41. Guidance Note 7 specifically identifies how the correct application of the RBA will improve the efficacy of measures to combat money laundering and terrorist financing while promoting FI without undermining AML/CFT objectives.

<sup>1510</sup> FIC “Guidance Note 7” (2017) par 30.

<sup>1511</sup> FATF Mutual Evaluation SA” (2021) par 53.

<sup>1512</sup> FATF “Mutual Evaluation SA” (2021) par 62.

<sup>1513</sup> S 45 (1) of FICA.

<sup>1514</sup> See Schedule 2 to FICA for the list of eight supervisory bodies.

<sup>1515</sup> 97 of 1990. The Financial Sector Conduct Authority is established in terms of the FSRA. See the discussion in Ch 6.3.1.5 below.

<sup>1516</sup> 90 of 1989.

their approaches to exercising the powers and performing the AML/CFT function.<sup>1517</sup> FICA empowers FIC to enforce compliance through inspection, administrative sanction, and criminal prosecution for contravention of the provisions.<sup>1518</sup> The FICA empowers an inspector of the FIC or a supervisory body to inspect any premises of an accountable institution for the purpose of determining compliance with the Act.<sup>1519</sup> It may impose administrative sanctions for failure to comply with its provisions. These sanctions include a caution not to repeat the conduct, a reprimand, directives to take remedial actions, restriction or suspension of business activities, or a financial penalty.<sup>1520</sup> It does not, however, provide for the publication of contraventions with the AML/CFT measures.

### **6.3.1.3 The Broad-based Black Economic Empowerment Act 2003 (B-BBEE Act)**

The B-BBEE Act creates and implements broad-based black economic empowerment (B-BBEE) policy guidelines, strategy, and institutional frameworks.<sup>1521</sup> It aims to facilitate B-BBEE by, among others, “promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector”.<sup>1522</sup> The Act does not regulate specific aspects of B-BBEE.<sup>1523</sup> Its implementation is largely driven by the generic code of good practice issued by the Minister which enables the adoption of sectoral codes of practice and for converting existing transformation charters into

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<sup>1517</sup> S 45(1C) of FICA. It requires them to achieve this by entering into a memorandum of understanding.

<sup>1518</sup> See ss 45B, 45C of FICA. For various offences see ss 46-68 of FICA.

<sup>1519</sup> S 45B(1) of FICA. See s 45A for the appointment of the inspector.

<sup>1520</sup> See s 45C(3) of FICA. The maximum financial penalty for natural persons is R10 million and 20 million for legal persons.

<sup>1521</sup> BEE Commission “Strategy Report 2001” (2001) 2. See also Horwiz and Jain 2011 *International Journal Equality, Diversity and Inclusion* 302; and Emuze and Adlam “Implementation of Broad-Based Black Economic Empowerment in Construction: A South African Metropolitan Area Study” 2013 20 *Acta Structilia* 126 on the legislative background of the B-BBEE Act.

<sup>1522</sup> “Black people” is defined to include Africans, Coloureds, and Indians. See the Preamble and ss 1(b) and 2 of the B-BBEE Act. See also Vilakazi and Bosiu in Andreoni *et al* (eds) *Structural Transformation in South Africa* (2021) 195 who call it “black inclusion”.

<sup>1523</sup> See Vilakazi and Bosiu in Andreoni *et al* (eds) *Structural Transformation in South Africa* (2021) 193 on the lack of specificity of the B-BBEE Act.

sectoral codes.<sup>1524</sup> As discussed above,<sup>1525</sup> the FS Charter was promoted to an FS Code in terms of the B-BBEE Act.

The B-BBEE Act establishes the Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) and the Black Economic Empowerment Advisory Council (BEEAC) to implement and enforce its provisions.<sup>1526</sup> The B-BBEE Commission's functions include overseeing, supervising, and promoting compliance with the B-BBEE Act.<sup>1527</sup> The BEEAC is responsible to review progress on BEE, draft code of good practices, and advise on transformational charters.<sup>1528</sup> The Act implements its provisions and sectoral codes through annual reporting, restrictions on certain transactions, and publication of transgressions.<sup>1529</sup> Organs of state and public entities must apply the relevant sectoral code to determine the qualification criteria for issuing licences, concessions in respect of economic activities, the sale of state enterprises, and the awarding of incentives, grants, and investment schemes that support B-BBEE.<sup>1530</sup> A code of good practice may also be used to develop and implement preferential procurement policy or criteria for entering into partnerships with the private sector. Public companies registered on the Johannesburg Stock Exchange are required to report annually to the Commission on their compliance with B-BBEE.<sup>1531</sup> The Act requires all entities in sectors that already have codes of good practice to report annually to the relevant sectoral council and for their compliance with the B-BBEE to be determined according to the relevant code.<sup>1532</sup> Banks are therefore required to report to the FSTC on their progress in achieving B-BBEE compliance in terms of the FS Code.<sup>1533</sup> In addition, the B-BBEE Commission has the power to investigate any matter arising from the application of the Act and to publish

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<sup>1524</sup> S 9 requires the Minister of Trade and Industry to issue a code of good practice that helps to interpret, define, and measure BEE targets and their categories and includes guidelines on how stakeholders must draw sectoral codes and charters. Section 12 provides for the promotion of any existing transformation charter developed by major sectoral stakeholders to advance the objectives of the Act.

<sup>1525</sup> Ch 6.4.1 above.

<sup>1526</sup> See ss 4 and 13B of the B-BBEE Act.

<sup>1527</sup> Ss 13F (1) of B-BBEE Act.

<sup>1528</sup> S 5 (a) to (e) of the B-BBEE Act. It is also responsible for developing the BEE strategy.

<sup>1529</sup> See Vilakazi and Bosiu in Andreoni *et al* (eds) *Structural Transformation in South Africa* (2021) 196-197 on the introduction of these aspects with the 2013 amendments.

<sup>1530</sup> S 10 (1) of the B-BBEE Act.

<sup>1531</sup> S 13G (1) and (2) of the B-BBEE Act read with reg 12 of the Broad-Based Black Economic Empowerment Regulations 2016 GN 689 in GG 40053 of 2016-06-06. Spheres of government must also report in their audited annual financial statements and report in terms of the Public Finance Management Act 1 of 1999.

<sup>1532</sup> S 10(3) and (4) of the B-BBEE Act.

<sup>1533</sup> See FS Code par 8.4.

any findings or recommendations it makes.<sup>1534</sup> The B-BBEE Act, therefore, serves to enforce the FS Code statutorily together with its impact on promoting FI and access to retail financial products and services as part of its transformation objective.

### **6.3.1.4 The National Credit Act 2005**

The National Credit Act (NCA)<sup>1535</sup> was introduced to address a number of challenges in the credit market. These include outdated consumer credit legislation,<sup>1536</sup> reckless credit-granting, the exploitation of consumers by credit providers, and more importantly, limited access to credit for the majority of the population in the country.<sup>1537</sup> Its specific purposes, among others, are “to promote and advance the social and economic welfare of South Africans...and *accessible credit market and industry, and to protect consumers*”.<sup>1538</sup> The NCA has dual roles of making the credit market accessible and protecting consumers.<sup>1539</sup> Consumer protection is at the heart of a number of rights provided in the NCA.<sup>1540</sup> Section 60 of the NCA affords every

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<sup>1534</sup> S 13J(6)(b) of the B-BBEE Act.

<sup>1535</sup> The provisions of the NCA came into effect piecemeal and the whole Act effectively came into operation on 01 June 2007. On the background to the NCA, see Kelly-Louw and Stoop *Consumer Credit* (2012) 3-18; Otto *National Credit Act Explained* (2016) 1-2; Scholtz, Otto, Van Zyl, Van Heerden and Campbell *Guide to the National Credit Act* (2017) 1-2 - 1-4.

<sup>1536</sup> See the Preamble to the NCA. See the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968.

<sup>1537</sup> See the Preamble to the NCA (emphasis added). See also De Wet, Botha and Booyens “Measuring the Effect of the National Credit Act on Indebtedness in South Africa” 2015 8 *Journal of Economic and Financial Sciences* 83; Wazvaremhaka and Osode “The Implications of *Truworths Limited v Minister of Trade and Industry* 2018 (3) SA 558 (WCC) for Access to Credit by Historically Disadvantaged and Low-income Consumers” 2019 3 *Law, Democracy & Development* 3.

<sup>1538</sup> See the Preamble and s 3 of the NCA (emphasis added). In terms of s 8(2) the definition of “credit agreements” does not include a transaction between a *stokvel* and a member of that *stokvel* in accordance with the rules of that *stokvel*. See Scholtz *et al Guide to the National Credit Act* (2017) 8-21.

<sup>1539</sup> Kawadza “Remarks on Lending Reforms Ushered in by Regulation 23A of the Affordability Assessment Regulations” 2018 51 *De Jure* 163 171.

<sup>1540</sup> Kelly-Louw and Stoop *Consumer Credit* (2012) 158. See also *ABSA Bank v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) par 15 where the court interpreted the NCA as “directed more for the protection and in the interests of credit consumers than of credit providers”. These rights are scattered throughout the NCA. A number of them are provided in ss 60-66 and include the right to receive information in an official, plain, and understandable language and to receive documents relating to credit agreements. See also s 103 which regulates maximum interest, fees, or charges that may be payable, and seeks to address the interest rate caps regulation that was dealt with under the Usury Act. The NCA applies a different maximum rate of interest to different types of agreement (see s 103 of the NCA). See DTIC GN 1080 in *GG 39379* of 2015-11-06. Notably, Goodwin-Groen and Kelly-Louw “The National Credit Act and its Regulations” (2006) 28, correctly opine that the maximum rates of interest are so high that it is unlikely to curtail any form of credit. See further Kelly-Louw and Stoop *Consumer Credit* (2012) Ch 9.

person the “right to *apply*” to a credit provider for credit.<sup>1541</sup> It does, however, not grant consumers an entitlement to “receive” credit but merely a right “to *require* a credit provider to enter into a credit agreement with that person”.<sup>1542</sup> The NCA prohibits credit providers from refusing to enter into a credit agreement with any prospective consumers, unless there are reasonable commercial grounds that are consistent with the credit provider’s customary risk management and underwriting practices.<sup>1543</sup> For instance, the consumer may establish the affordability for the credit applied for as a reasonable ground.<sup>1544</sup> The Act, therefore, provides consumers with a “conditional right” to credit.<sup>1545</sup>

The NCA provides this right by balancing access to credit with other consumer rights such as the prevention of over-indebtedness and protecting them from reckless credit granting by credit providers. In terms of section 81 of the NCA, credit providers are required to establish the consumer’s capacity to afford credit before entering into or amending a credit agreement with him or her by considering the consumer’s “financial means, prospects and obligations”.<sup>1546</sup> The court has emphasised the need to balance the right to access credit with other consumer rights in the NCA. In *SA Taxi Securitisation (Pty) Ltd v Mbatha*<sup>1547</sup> the court warned against an “over-critical armchair approach by the Courts” towards credit providers when evaluating reckless credit “[which] would significantly chill the availability of credit, especially to the less affluent members of our society”. The court in *Truworths Limited v Minister of Trade and*

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<sup>1541</sup> S 60(1) of the NCA (emphasis added). The right is specifically afforded to an adult natural person, a juristic person, or an association of persons.

<sup>1542</sup> See s 60(3) of the NCA (emphasis added). See also Kelly-Louw and Stoop *Consumer Credit* (2012) 159; Scholtz *et al Guide to the National Credit Act* (2017) 6-2; Schmulow “Curbing Reckless and Predatory Lending: A Statutory Analysis of South Africa’s National Credit Act” 2016 24 *Competition and Consumer Law Journal* 220 232.

<sup>1543</sup> S 60(3) of the NCA.

<sup>1544</sup> Kelly-Louw and Stoop *Consumer Credit* (2012) 159.

<sup>1545</sup> See Meyer “The Right to Credit” 2018 26 *Journal of Political Philosophy* 304 306 who advocates for a right to credit which is a conditional right to which only creditworthy applicants are entitled.

<sup>1546</sup> S 81 (2) of the NCA. The affordability assessment criteria determines whether a consumer can afford the credit by establishing whether he or she has the financial means and prospects to pay the proposed credit instalments, by validating the gross income with specified documents. This can be done by either producing the latest three payslips, the latest bank statements, the latest three documented proof of income, or the latest financial statements depending on whether or not the consumer receives a salary from an employer or is self-employed or informally employed. See Reg 23A(3) and (4) of the Department of Trade, Industry and Competition “National Credit Regulations Including Affordability Assessment Regulations” GN R202 in GG 38557 of 2015-03-13 (“Affordability Assessment Regulations”). See also the *National Credit Regulator v Gaba Cash Loans CC* NCT/91475/2017/57(1) NCA par 24.

<sup>1547</sup> 2010 6 SA 557 (GSJ) par 37. See also Scholtz *et al Guide to the National Credit Act* (2017) 11-117.

*Industry*<sup>1548</sup> further stated a balance that must be struck between preventing reckless credit and promoting an accessible credit market when applying the affordability assessment criteria to determine the consumer's affordability for credit before entering into or amending a credit agreement with him or her.<sup>1549</sup> It held that the criteria may in certain instances not only frustrate the aim of promoting the development of an accessible credit market, particularly for those historically unable to access credit, but may eliminate any credit being granted to many in this category.<sup>1550</sup>

Notably, the NCA establishes the National Credit Regulator (NCR).<sup>1551</sup> The NCR is responsible for, among others, safeguarding consumer rights and promoting, monitoring, and reporting annually to the Minister of Trade, Industry, and Competition on access to credit by persons or communities who are unable to have such access.<sup>1552</sup> It also has the power to enforce the NCA. It achieves this by, among others, monitoring trends in the consumer credit market and industry to ensure their focus on the needs of the low-income and the previously disadvantaged groups and prevent, detect, and prosecute prohibited conduct.<sup>1553</sup>

### **6.3.1.5 Financial Sector Regulation Act 2017 (FSRA)**

#### (a) Brief Background

The FSRA was introduced following regulatory reforms proposed by the National Treasury's policy *A Safer Financial Sector to Serve South Africa Better* (The Red Book).<sup>1554</sup> The Red Book

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<sup>1548</sup> 2018 (3) SA 558 (WCC). The case dealt with a challenge of the Affordability Assessment Regulation 23A(3) which deals with the requirement to submit the latest three months' statements or financial statement to validate the gross income of consumers who are informally or self-employed on the basis of unfair discrimination.

<sup>1549</sup> For the criteria see the Affordability Assessment Regulations. See also s 82 of the NCA which allows the credit provider to conduct the assessment using its determined evaluative mechanism and modes, provided it complies with mechanisms or models and procedures and provided they result in a fair and objective assessment and are not inconsistent with the affordability assessment regulations made by the Minister. See also Kawadza 2018 *De Jure* 163.

<sup>1550</sup> *Truworths Limited case* pars 52 and 53.

<sup>1551</sup> S 12 of the NCA.

<sup>1552</sup> S 13 of the NCA. See Vessio "What Does the National Credit Regulator Regulate?" 2008 20 *SA Merc LJ* 227.

<sup>1553</sup> See s 13 read with ss 15 and 16 of the NCA. See, eg, the National Credit Regulator "Annual Report 2019/2020" (Nd) [http://www.thedtic.gov.za/wp-content/uploads/NCR\\_AR\\_2020.pdf](http://www.thedtic.gov.za/wp-content/uploads/NCR_AR_2020.pdf) (accessed: 2022-02-21).

<sup>1554</sup> 9 of 2017. The Act went through a number of drafts until it was passed by the National Assembly on 22 June 2017 and was signed into law on 21 August 2017. See also National Treasury

is a roadmap to address the challenges to financial stability arising from the 2008 global financial crisis.<sup>1555</sup> In addition to dealing with the aftermath of the crisis, the Red Book aims to “provide a comprehensive review” of the key challenges facing the financial sector by focusing on broader financial sector policy priorities.<sup>1556</sup> These priorities are financial stability, consumer protection, protecting the integrity of the financial sector, and more importantly “ensuring that efficient, effective and inexpensive financial services are more accessible”.<sup>1557</sup> Its main priority was to introduce a Twin-Peaks model of regulation to make the financial sector safer. It also introduces a tougher prudential and market conduct framework that prioritise transparency, market integrity, and consumer protection.<sup>1558</sup> The Red Book requires these objectives to be implemented through clear and enforceable regulations.<sup>1559</sup> It does not outline specific regulations to promote FI or access to a BBAs but does highlight the necessity for the government to support the existing FI initiatives “through legislative and regulatory changes”.<sup>1560</sup> It, therefore, paved a way for the introduction of the FSRA.

#### (b) FSRA Objectives and Financial Inclusion

The FSRA promotes financial stability, the safety and soundness of financial institutions, fair treatment and the protection of financial customers, and the transformation of the financial sector.<sup>1561</sup> The FSRA enacted FI as a statutory objective for the first time in South Africa.<sup>1562</sup>

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“Commencement of Financial Sector Regulation Act” GN 169 in *GG* 41549 of 29 March 2018; National Treasury “Implementing the Twin-Peaks Model of Financial Regulation in South Africa” (2013) <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%203%20Roadmap.pdf> (accessed: 2022-02-23); Godwin, Howse and Ramsay “Twin Peaks: South Africa’s Financial Sector Regulatory Framework” 2017 3 *SALJ* 665 670.

<sup>1555</sup> National Treasury “The Red Book” (2011) 2. The formal review of the financial regulatory system began in 2007 and was only accelerated and expanded after 2008. See also Gordian “2011 Budget Speech” (2011) <http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf> (accessed: 2021-10-02) where the policy document was first officially introduced.

<sup>1556</sup> National Treasury “The Red Book” (2011) 2.

<sup>1557</sup> National Treasury “The Red Book” (2011) 2.

<sup>1558</sup> National Treasury “The Red Book” (2011) 29.

<sup>1559</sup> National Treasury “The Red Book” (2011) 42.

<sup>1560</sup> National Treasury “The Red Book” (2011) 62.

<sup>1561</sup> S 7(1) of the FSRA. See also Van Heerden, Van Niekerk and Huls “Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa” 2020 83 *THRHR* 491 505.

<sup>1562</sup> S 7(1)(f) of the FSRA. See also ss 34(1)(e) and 57(1)(e). In terms of s 1, “financial inclusion” “means that all persons have timely and fair access to appropriate, fair, and affordable financial products and services”. See further Van Niekerk and Phaladi “Digital Financial Services: Prospects and Challenges” 2021 24 *PELJ* 1 10.

In terms of the FSRA, FI means that “all persons have timely and fair access to appropriate, fair and affordable financial products and services”.<sup>1563</sup> The FSRA introduced a Twin-Peaks model of regulation and supervision of the financial sector. This model adopts a twin regulators approach with the PA regulating the safety and soundness of financial institutions, and the FSCA supervising financial services firms in the conduct of their businesses and treatment of customers.<sup>1564</sup>

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<sup>1563</sup> See s 1 of the FSRA. See Ch 2.6.2 above for the discussion of this definition.

<sup>1564</sup> See ss 32-34 regarding the Prudential Authority and ss 56-58 regarding Financial Sector Regulation Authority. This marked a transition from a “silos sectoral model” of financial regulation to one that focuses on the aim of the regulation, rather than solely on the type of institutions involved. See also Godwin *et al* 2017 *SALJ* 665 667; Van Niekerk and Van Heerden 2020 *SALJ* 111. See further Schmulow “The Four Methods of Financial System Regulation: An International Comparative Survey” 2015 26 *Journal of Banking and Finance Law and Practice* 151 15-165 who identified four regulatory systems, including the institutional silos approach (which focuses on the form of the legal entity under regulation and, accordingly, assigns a particular regulator), functional (focuses on the types of transaction or product under the regulation rather than the type of the legal entity), and the Twin-Peaks exemplified by regulation by objective. See further Millard “The Impact of the Twin Peaks Model on the Insurance Industry” 2016 19 *PELJ* 1; National Treasury “New Twin Peaks Regulators Established” (2018) *Press Release* <http://www.treasury.gov.za/twinpeaks/Press%20release%20Twin%20Peaks%20implementation%20March%202018%20FINAL.pdf> (accessed: 2022-02-23). Notably, the FSCA, unlike the PA, is a separate juristic person located completely outside of SARB. The FSCA was previously known as the Financial Services Board. On the Twin-Peaks model and its background, see Taylor “Twin Peaks’: A Regulatory Structure for the New Century” (1995) *Centre for the Study of Financial Innovation Report* <https://static1.squarespace.com/static/54d620fce4b049bf4cd5be9b/t/55241159e4b0c8f3afe1d11e/1428427097907/Twin+Peaks+A+regulatory+structure+for+the+new+century.pdf> (accessed: 2022-02-23); Schmulow “Twin Peaks: A Theoretical Analysis” (2015) *Centre for International Finance and Regulation Working Paper WP064* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2625331](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625331) (Accessed: 2022-02-23); Van Niekerk and Van Heerden “Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability” 2017 80 *THRHR* 636. Cf Mhango “Twin Peaks is Not for SA” (2014-03-06) *Fin24* <https://www.news24.com/fin24/twin-peaks-is-not-for-sa-20140205> (accessed: 2022-02-23). See further Van Niekerk and Van Heerden “The Importance of a Legislative Framework for Co-Operation and Collaboration in the Twin Peaks Model of Financial Regulation” 2020 137 *SALJ* 111 113 who see the set up in effect making the South African Twin-Peaks model a “three-peak model” or a quad-peak model, including the National Credit Regulator responsible for the regulation of the credit market, and which was not assimilated into the FSCA, and remains a stand-alone regulator of considerable capacity. See also Schmulow “Consumer Financial Well-Being in South Africa’s Twin Peaks Regulatory Regime: From Measurement, to Confidence in Outcomes” 2020 5 *The International Review of Financial Consumers* 1 1. The author views a Twin-Peaks model as a misnomer and suggests that it should accurately be described as a “Triple-Peak model” comprising one peak with a responsibility for the prudential soundness of banks and insurers, a second peak with a responsibility for consumer protection and good market conduct, and the central bank as the third peak with a responsibility as lender of last resort.



The FSRA specifically requires the PA to “support”, and the FSCA to “promote”, FI among their main objectives by imposing a number of duties on financial institutions.<sup>1565</sup> For instance, it requires the PA to “support sustainable competition in the provision of financial products and financial services”.<sup>1566</sup> It further requires the FSCA to ensure that financial institutions protect their customers by treating them fairly.<sup>1567</sup> The FSCA must monitor the fairness and appropriateness of financial products and services and the extent to which financial institutions meet the needs and reasonable expectations of financial customers.<sup>1568</sup> This Act further empowers the FSCA to provide customers with a financial education programme and to promote financial literacy which enables them to make sound financial decisions.<sup>1569</sup>

The FSRA does not specifically prescribe how financial institutions will achieve their mandate to promote FI. Section 47 requires both the PA and the FSCA to adopt a regulatory strategy to achieve their objectives.<sup>1570</sup> The PA’s *2020 Regulatory Strategy 2021-2024* has vowed to prioritise supporting competition in the provision of financial products and services and developing an FI approach that is aligned with the Draft Financial Policy.<sup>1571</sup> The FSCA *Regulatory Strategy 2021-2025* also sets priorities for achieving the FSCA’s main objectives. It seeks to support transformation in the financial sector and deepen FI and plans to achieve this by formalising its relationship with the Financial Sector Transformation Council and developing a *Financial Inclusion Strategy* that supports the Draft FI Policy.<sup>1572</sup> The FSCA’s *Financial Inclusion Strategy* seeks to address concerns relating to the use of transaction

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<sup>1565</sup> Ss 34(1)(e) and 57(1)(e) of the FSRA. See also Chitimira and Ncube “The Role of Regulatory Bodies and Other Role-Players in the Promotion of Financial Inclusion in South Africa” 2020 16 *Acta Universitatis Danubius* 24 27.

<sup>1566</sup> S 34(1)(d) of the FSRA. It must achieve this through co-operation and collaboration with the Competition Commission.

<sup>1567</sup> The duty to treat customers fairly is scattered across the Act. See ss 7(1)(c), 57(b)(i), 58(1)(i), 106(2)(b) and (c) and (4). See also Millard and Maholo “Treating Customers Fairly: A New Name for Existing Principles?” 2016 79 *THRHR* 594 598.

<sup>1568</sup> Ss 57(b) and 58(1)(d) and (i) of the FSRA. Financial products in terms of s 3 of the FSRA include a deposit as defined in the Banks Act and a credit agreement in terms of the NCA (subject to certain exemptions in Ch 4 of this Act).

<sup>1569</sup> S 57(b)(ii) of the FSRA. See also Pearson *et al* 2017 *PELJ* 1 39-40 on the Financial Sector Regulation Bill and consumer education.

<sup>1570</sup> Read with s 70(1) of the FSRA which requires each to adopt it within six months from the date on which the Chapter regulating its activities came into operation and to review it annually.

<sup>1571</sup> Prudential Authority “Regulatory Strategy 2021-2024” (Nd) <https://www.resbank.co.za/content/dam/sarb/what-we-do/prudential-regulation/PA%20Regulatory%20and%20Supervisory%20Strategy%202021.pdf> (accessed: 2022-02-26) 9 read with 20-22. See Ch 6.2.4 above for a discussion of the National Treasury Draft FI Policy (2020).

<sup>1572</sup> FSCA “Regulatory Strategy 2021-2025” (Nd). See also FSCA “Financial Inclusion Strategy” (Nd).

accounts as mere cash distribution vehicles, and the high costs of and lack of knowledge on BBAs.<sup>1573</sup> It, therefore, aims, among other priorities, to provide appropriate financial products and services that will “serve for un- and underserved [m]arkets”.<sup>1574</sup> The FSCA *Regulatory Strategy* adopts consumer education and creates a regulatory and supervisory framework that promotes FI as part of its objectives of ensuring that financial institutions treat customers fairly. It also aims to foster cooperation between the FSCA and the Financial Sector Transformation Council “to advocate for the development of standards that will encourage the financial services sector to design appropriate products for low income earners”.<sup>1575</sup>

The FSRA further requires the PA and the FSCA to regulate and supervise specific objectives including FI “in accordance with existing financial regulation laws”.<sup>1576</sup> Section 106 empowers the FSCA to make conduct standards on matters that implement fair treatment of financial customers in relation to a particular financial institution.<sup>1577</sup> Importantly, the conduct standards may include the design and suitability of financial products and services and the promotion, marketing, distribution, and advice in relation to these products and services.<sup>1578</sup> They may also outline principles, guiding processes, and procedures relating to the refusal, withdrawal, or closure of financial products or services.<sup>1579</sup> The standards may further provide for the implementation, monitoring, and evaluation of education programmes or other initiatives that

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<sup>1573</sup> FSCA “Financial Inclusion Strategy” (Nd) 13-14.

<sup>1574</sup> FSCA “Financial Inclusion Strategy” (Nd) 17-22.

<sup>1575</sup> FSCA “Financial Inclusion Strategy” (Nd) 22.

<sup>1576</sup> Ss 34(1) and 58(1)(a) of the FSRA. See Schedule 1 to the FSRA which lists a number of pieces of legislation as financial sector laws including the Banks Act, the Mutual Banks Act, and the Co-operative Banks Act.

<sup>1577</sup> See also s 105 which empowers the PA to set prudential standards in respect of financial institutions on a number of matters including financial soundness requirements. See further s 107 which empowers the PA and FSRC to make joint standards and s 109 on the standards that the FSRC must make in concurrence with the SARB. See National Treasury “Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa” (2014) *Discussion Document* <http://www.treasury.gov.za/public%20comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf> (accessed: 2020-02-24) 36-37 (National Treasury “TCF Discussion Document” (2014)).

<sup>1578</sup> S 106(3)(c)(i) of the FSRA.

<sup>1579</sup> S 106 (c)(i)-(v) of the FSRA.

promote financial literacy.<sup>1580</sup> As discussed below,<sup>1581</sup> in 2020 the FSCA set conduct standards for banks in terms of section 106.<sup>1582</sup>

(c) Enforcement Mechanism and Institutional Coordination

Section 58(1) imposes a duty on the FSCA to ensure compliance with the provisions of the FSRA by monitoring the extent to which the financial system delivers fair and appropriate financial products and how they meet the needs and reasonable expectations of financial customers. To achieve these objectives, the FSRA requires both the PA and the FSCA to coordinate and cooperate with each other and with other financial sector regulators such as the SARB, the National Credit Regulator, and the FIC on matters of common interest “to the extent appropriate” in terms of the relevant financial sector laws.<sup>1583</sup> Although the FSRA shares the transformation of the financial sector with the B-BBEE Act as part of its objectives, this piece of legislation is not included in the list of “financial sector laws” in Schedule 1 to the FSRA.<sup>1584</sup> In stark contrast with the FSCA’s *Regulator Strategy* to foster cooperation between the FSCA and the FSTC, the FSRA also does not include the FSTC as a financial sector regulator with which it must cooperate to the extent appropriate in terms of the B-BBEE Act.

The FSRA further empowers the PA and the FSCA to enforce compliance through directives issued to the financial institutions.<sup>1585</sup> The FSCA may equally issue a directive to a financial institution that, among others, conducts its business in a manner that poses a material risk to the efficiency or integrity of the financial market, or is not treating its customers fairly.<sup>1586</sup>

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<sup>1580</sup> S 106 (2)(b) and (c) and 106(3)(c) and (d) of the FSRA. See also Visagie-Swaart and Lawack “An Overview of the First Draft of the Conduct of Financial Institutions Bill and the Potential Impact on the National Payment System in South Africa” 2020 32 *SA Merc LJ* 129 130-131.

<sup>1581</sup> See Ch 6.5.2(b).

<sup>1582</sup> FSCA “Conduct Standard 3 of 2020 (BANKS)” (2020) <https://www.fsc.co.za/Regulatory%20Frameworks/Pages/Standards.aspx> (accessed: 2022-02-27).

<sup>1583</sup> See s 1 of the definition of “financial sector regulator”. See ss 76-78 on the requirements for cooperation and coordination, including the requirements for entering into a memorandum of understanding. See further Memorandum of Understanding between FSCA and FIC at [https://www.fsc.co.za/Regulatory%20Liaison/MOU\\_FSCA%20and%20FIC.pdf](https://www.fsc.co.za/Regulatory%20Liaison/MOU_FSCA%20and%20FIC.pdf) (accessed: 2022-02-24), and between PA and FSCA at [https://www.fsc.co.za/Regulatory%20Liaison/MOU\\_FSCA%20and%20PA.pdf](https://www.fsc.co.za/Regulatory%20Liaison/MOU_FSCA%20and%20PA.pdf) (accessed: 2022-02-24), and between FSCA and National Credit Regulator at [https://www.fsc.co.za/Regulatory%20Liaison/MoU\\_%20FSCA%20and%20NCR.pdf](https://www.fsc.co.za/Regulatory%20Liaison/MoU_%20FSCA%20and%20NCR.pdf) (accessed: 2022-02-24).

<sup>1584</sup> See s 7(c) and (g) of the FSRA for these objectives.

<sup>1585</sup> Ss 143-144. Other ways to enforce compliance include an application to the court by a natural person and debarment, which are *post-ante*.

<sup>1586</sup> S 144 of the FSRA.

These measures are relevant to support FI and to ensure that customers can make an informed decision about financial products and services. One observation from the regulatory framework in terms of the FSRA is that the Act has shifted from relying on specific financial sector laws that regulate specific financial institutions to focusing on overarching broad-based outcomes. However, the effectiveness of the FSRA still depends on the current financial sector laws as it has not changed these laws but the supervisory and regulatory authorities. The FSRA has also laid a foundation for new financial sector legislation such as the CoFI Bill.<sup>1587</sup>

### 6.3.2 Draft CoFI Bills

#### (a) Brief Background

As indicated in Chapter one,<sup>1588</sup> a number of draft bills have been introduced over the years with a broader aim of promoting FI and some have since been shelved.<sup>1589</sup> The Draft CoFI Bills are important for specifically promoting FI and for providing standards for product design and ensuring that customers are treated fairly. In 2014 the National Treasury introduced *Treating Customers Fairly in the Financial Sector* (TCF Discussion Document) as a policy framework to ensure that financial institutions deliver specific and clearly articulated fair-outcome financial services to consumers.<sup>1590</sup> The TCF Discussion Document identified the lack

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<sup>1587</sup> See Pollak "The Introduction of a New Financial Services Regulatory Model" (2018) <https://www.golegal.co.za/financial-services-regulatory-model/> (accessed: 2022-02-24). See also Visagie-Swaart and Lawack 2020 *SA Merc LJ* 131.

<sup>1588</sup> See Ch 1.4 above.

<sup>1589</sup> See Draft CR Bill 2002 that aimed to prevent the alleged "redlining" practices by banks that deny the low-income society access to home loans based on their geographical locations. It aimed to compel banks to set aside a portion of their home loan funding for lower- and middle-income households. See also the Draft Dedicated Banks Bill introduced to address the challenges associated with the proliferation of informal microlending and the slow pace of entry by new entities into the banking systems by enabling entities to enter the banking system as "dedicated banks". See also Freeman "Community Reinvestment Legislation and Access to Housing Finance in Post-Apartheid South Africa" 2008 *23 Housing Studies* 697; National Treasury "Memorandum on the Objects of the Dedicated Banks Bill" (2004) <http://www.treasury.gov.za/legislation/bills/2004/DEDICATED%20BANKS%20BILL%20Memorandum.pdf> (accessed: 2022-02-26). See further Schoombie "South African Banks and the Unbanked: Progress and Prospects" (2004) *Stellenbosch Economic Working Papers 2* <https://www.ekon.sun.ac.za/wpapers/2004/wp022004/wp-02-2004.pdf> (accessed: 2022-02-26).

<sup>1590</sup> National Treasury "TCF Discussion Document" (2014) 8. See also Financial Services Board "Treating Customers Fairly (TCF)" (2014) *A Presentation for the FSB CIS Department's Industry Briefing* <https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20presentation%20for%20CIS%20Oct%202014.pdf> (accessed: 2022-02-26). See further Millard and Maholo 2016 *THRHR* 594 and FSCA "A Robust Regulatory Framework that Promotes Fair Customer Treatment" (Nd) *Newsletter Issue 06* <https://www.>

of protection and fair treatment of financial customers due to high transaction fees, the multiplicity of incompatible charges, and inappropriate designs and sales of financial products due to poor market conduct.<sup>1591</sup> The current fragmented, inconsistent, and incomplete consumer protection regulatory framework necessitated the implementation of the TCF as an essential part of the market conduct policy and law.<sup>1592</sup> The TCF Discussion Document also identified a regulatory shift towards a Twin- Peaks model, and particularly proposed the CoFI Act as an important component of the new legal framework.<sup>1593</sup> The proposed legislation aimed to safeguard the application of “outcomes-focused conduct standards” across the converging and complex financial sectors.<sup>1594</sup>

(b) CoFI Bill and Financial Inclusion

The first Draft CoFI Bill was published in December 2018 for public comment and is largely drawn from the TFC Discussion Document.<sup>1595</sup> The second draft was published in September 2020.<sup>1596</sup> The Draft CoFI Bills<sup>1597</sup> requires financial institutions to adopt good market conduct that applies outcome-based principles.<sup>1598</sup> The specific purpose of the proposed CoFI Act is to

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[fsc.co.za/TPNL/6/fsc6/robust.html](http://fsc.co.za/TPNL/6/fsc6/robust.html) (accessed: 2022-02-27) for the background to the TCF framework in South Africa.

<sup>1591</sup> National Treasury “TCF Discussion Document” (2014) 6.

<sup>1592</sup> National Treasury “TCF Discussion Document” (2014) 6.

<sup>1593</sup> National Treasury “TCF Discussion Document” (2014) 8. See also National Treasury Draft FI Policy (2020) 31.

<sup>1594</sup> National Treasury “TCF Discussion Document” (2014) 8. See also National Treasury Draft FI Policy (2020) 31.

<sup>1595</sup> National Treasury “Draft Conduct of Financial Institutions Bill, 2018: Publication for Comments” GN 808 in *GG* 42114 of 14 December 2018 (“First Draft CoFI Bill”). See also National Treasury “Invitation for Public Comments on the Draft Conduct of Financial Institutions Bill 2018” (11 December 2018) *Media Statement* [http://www.treasury.gov.za/comm\\_media/press/2018/2018121101%20Media%20statement%20-%20COFI%20Bill.pdf](http://www.treasury.gov.za/comm_media/press/2018/2018121101%20Media%20statement%20-%20COFI%20Bill.pdf) (accessed: 2022-02-27). Comments were invited until 1 April 2019. See further National Treasury “Explanatory Policy Paper Accompanying Conduct of Financial Institutions Bill” (Nd) <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf> (accessed: 2022-02-27). For more detail on the first draft CoFI Bill, see Visagie-Swaart and Lawack 2020 *SA Merc LJ* 129.

<sup>1596</sup> National Treasury “Second Draft Conduct of Financial Institutions Bill, 2020: Publication For Public Comment” GN 519 in *GG* 43741 of 2020-09-29. See also National Treasury “Second Draft of Conduct of Financial Institutions Bill Published for Public Comment” (29 September 2020) *Media Statement* [http://www.treasury.gov.za/comm\\_media/press/2020/2020092901%20MEDIA%20STATEMENT%202ND%20COFI%20BILL%20DRAFT%20PUBLISHED%20FOR%20COMMENT.pdf](http://www.treasury.gov.za/comm_media/press/2020/2020092901%20MEDIA%20STATEMENT%202ND%20COFI%20BILL%20DRAFT%20PUBLISHED%20FOR%20COMMENT.pdf) (accessed: 2022-02-27). Comments were invited until 30 December 2020 (“Second Draft CoFI Bill”).

<sup>1597</sup> The discussion focuses on the Second Draft CoFI Bill which is the latest and current.

<sup>1598</sup> National Treasury “TCF Discussion Document” (2014) 32. This was in response to the comments about inconsistencies in the application of the Bill to existing legislation, empowering FSCA to set

establish a consolidated, consistent, and comprehensive regulatory framework that will assist the FSCA to achieve its main objectives laid out in sections 57 and 58 of the FSRA.<sup>1599</sup> Its objectives and functions include the licensing of financial institutions,<sup>1600</sup> the protection and promotion of fair treatment of financial customers, and the promotion of FI and the transformation of the financial sector. The CoFI Bill applies to all supervised or non-supervised financial institutions that provide financial products or services.<sup>1601</sup> It provides several broad rules and standards to achieve its main purpose. It further lays down a number of principles in Chapters five to seven including the provision, advertising, disclosure, and post-sale barriers and obligations applicable to financial products and services.

Clause 27 requires a financial institution that provides retail financial products or services to enter into and act within the mandate of a written agreement with the customer.<sup>1602</sup> It lays down specific principles that require financial institutions to design, develop, or make material changes to these products. In doing so, financial institutions must ensure that these products, among others, are appropriate and target customers for whose needs the products or services are likely to be appropriate, taking into account the fair treatment of retail financial customers.<sup>1603</sup> They must also advertise, market, and promote these products in a way that is fair and not misleading.<sup>1604</sup>

The FSCA *Regulatory Strategy* observed that “the TFC-aligned provisions of the CoFI Bill are expected to be largely principle based”.<sup>1605</sup> Like the power vested by the FSRA in terms of

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conduct standards in both the Bill and the FSCA, and the issuing of licences under the CoFI Bill based on the framework in the FSRA.

<sup>1599</sup> Clause 3(1) of the Second Draft CoFI Bill. See clause 3(1) First Draft CoFI Bill which specifically listed all the objectives verbatim from the FSRA.

<sup>1600</sup> Clause 9(1) and (2) of the Second Draft CoFI Bill requires any person not to perform activities listed in Schedule 1 without obtaining a licence from the PA. The activities include deposits in terms of the Banks Act.

<sup>1601</sup> Clauses 3(1) and 4(1) of the Second Draft CoFI Bill. Clause 4(2) provides that the Act applies to the supervised non-financial entities to the extent it provides. Clause 7(1)(d) specifically allows the PA to exempt a financial institution from the application of the CoFI Act for developmental, FI, and transformation objectives.

<sup>1602</sup> Clauses 26 and 27 of the Second Draft CoFI Bill.

<sup>1603</sup> Clause 26(2) of the Second Draft CoFI Bill. Clause 28 further requires a financial institution to establish and implement oversight arrangements to approve, monitor, and review the design, development, suitability, and provision of its financial products and services on an on-going basis.

<sup>1604</sup> Clauses 29 and 30 of the Second Draft CoFI Bill.

<sup>1605</sup> FSCA “Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021” (Nd) [https://www.fsca.co.za/Documents/FSCA\\_Strategy\\_2018.pdf](https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf) (accessed: 2022-02-

section 106, Clause 67 of the CoFI Bill empowers the FSCA to develop conduct standards that impose rigorous obligations on financial institutions to achieve the main objectives of the proposed Act. The FSCA's regulatory strategy is that it may still implement the outcomes and principled-based approach to TCF "should the COFI Bill be delayed".<sup>1606</sup> In 2020, the FSCA developed *Conduct Standards for Banks* in terms of section 106 of the FSRA.<sup>1607</sup> The *Conduct Standards for Banks* largely repeat the principles outlined in section 58 of the FSRA and clause 67 of the second Draft CoFI Bill regarding the design, advertising, and promotion of financial services as discussed above.<sup>1608</sup> They re-emphasise the need to design and promote retail financial products by taking into account the interests of financial customers generally, and specifically targeting groups of these customers.<sup>1609</sup> These standards reflect the FSCA's approach which implements the TCF through broad principles and outcomes. They make the design, advertisement, and promoting retail financial products flexible and require financial institutions to satisfy this function by delivering fair customer outcomes.<sup>1610</sup> Nonetheless, the FSCA specifically outlines measures to support its main objectives with "a more intrusive, rule-based approach, including prescribing product features".<sup>1611</sup> It proposes the use of "product standards" that outline "prescribing minimum product features" as a step in realising this approach.<sup>1612</sup> In relation to bank accounts, product standards that may be adopted are "baseline financial products for low-income South Africans in support of financial inclusion such as minimum products standards for transactional banking accounts".<sup>1613</sup> The FSCA, however, warns against adopting product standards "to the extent that there is no space for competition".<sup>1614</sup> There is evidence of notable implementation of the *Conduct Standards for Banks* by banks that had left product fees unchanged since 2020.<sup>1615</sup> The FSCA has yet to

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27) 32 (sic) (FSCA "Regulatory Strategy 2018-2021" (Nd)). See also FSCA "Regulatory Strategy 2021-2025" (Nd) 23.

<sup>1606</sup> FSCA "Regulatory Strategy 2021-2025" (Nd) 23. Section 70 of the FSRA requires the FSCA to adopt a regulatory strategy to give general guidelines to achieve its objectives and the performance of its regulatory and supervisory functions. It must review the strategy annually but may amend it any time.

<sup>1607</sup> FSCA "Conduct Standard 3 of 2020" (BANKS)" (2020).

<sup>1608</sup> See ss 4 to 7 of the Conduct Standards for Banks 2020.

<sup>1609</sup> Ss 5(1) of the Conduct Standards for Banks 2020.

<sup>1610</sup> FSCA "Regulatory Strategy 2018-2021" (Nd) 35.

<sup>1611</sup> FSCA "Regulatory Strategy 2018-2021" (Nd) 35.

<sup>1612</sup> FSCA "Regulatory Strategy 2018-2021" (Nd) 35.

<sup>1613</sup> FSCA "Regulatory Strategy 2018-2021" (Nd) 35.

<sup>1614</sup> FSCA "Regulatory Strategy 2018-2021" (Nd) 35.

<sup>1615</sup> Makhubalo "How the Conduct Standard for Banks Has Elevated the Fair Treatment of Customers" (2021-06-02) *FSCA Newsletter* <https://www.fsc.co.za/TPNL/fsc%20Newsletter2/2.html> (accessed: 2022-02-28).

develop product standards specifically in relation to transactional bank accounts. The discussion in 6.4 below focuses on regulatory and private sector initiatives to offer BBAs.

### (c) Enforcement Mechanisms and Institutional Coordination

The CoFI Bill provides some steps to enforce compliance with its provisions. The FSCA is required to enforce compliance with the CoFI Bill by ensuring that financial institutions have relevant arrangements in place to comply with its provisions.<sup>1616</sup> It may also require an independent review of existing arrangements or direct the financial institution for improvement if it questions the effectiveness of the arrangement.<sup>1617</sup> The Act also provides for the reporting and disclosure requirements. The FSCA is empowered to request any information from any financial institution that relates to the type of financial institution, activities, categories of financial customers or financial products.<sup>1618</sup> It is also empowered to impose administrative penalties if a financial institution fails to disclose such information.<sup>1619</sup> The CoFI Bill also requires financial institutions to publicly disclose this information annually.<sup>1620</sup> It may also require a financial institution to publish this information at any time if the disclosure is in the interest of current or prospective customers, public interest, or if it would support the integrity of the financial services sector.<sup>1621</sup>

## 6.4 BASIC BANK ACCOUNTS

### 6.4.1 Conventional Bank Accounts Features

Commercial banks (also known as retail banks) offer a variety of traditional accounts to their customers to fulfil their main function of deposit taking.<sup>1622</sup> These accounts are comparable

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<sup>1616</sup> Clause 8(1) and (2) of the Second Draft CoFI Bill.

<sup>1617</sup> Clause 8(1)(a) read with 8(2) of the Second Draft CoFI Bill.

<sup>1618</sup> Clause 48(1) and (2) of the Second Draft CoFI Bill.

<sup>1619</sup> Clause 48(4) of the Second Draft CoFI Bill.

<sup>1620</sup> Clause 49(1) of the Second Draft CoFI Bill.

<sup>1621</sup> Clause 49(5) of the Second Draft CoFI Bill.

<sup>1622</sup> Retail banking generally refers to the financial institutions or a division of them that provide a range of financial products available to the general public who mainly comprise deposit-taking, providing credit and payment facilities. See Ur Rehman "Cybersecurity for E-Banking and E-Commerce in Pakistan: Emerging Digital Challenges and Opportunities" in Sandhu (ed) *Handbook of Research on Advancing Cybersecurity for Digital Transformation* (2021) 167; Kokkinos and Miglionico *Banking Law: Private Transactions and Regulatory Frameworks* (2021); Surianarayanan, Ganapathy and Pethur *Essentials of Microservices Architecture* (2020) 69 who



across different countries and service providers. In the main, a current account has become the central account for all bank-customer relationships.<sup>1623</sup> Current accounts are mainly characterised by allowing withdrawals of cash at any time and a customer generally does not earn any interest on a positive balance.<sup>1624</sup> It differs from saving account which earns interests. Traditional bank accounts generally help customers to keep their deposits safe and provide payment mechanisms and credit facilities through overdrafts.<sup>1625</sup> Banks currently provide different accounts that offer savings facilities to their customers. Different names of these accounts include “current/cheque accounts”, “demand deposit saving accounts”, “term accounts”, and “investment accounts”.<sup>1626</sup> These accounts include ancillary transactional services such as access to a debit card, the use of teller machines (ATMs), support for retail purchases and cashback, overdraft facilities, and direct debit or credit.<sup>1627</sup> Many of these accounts share similar terms and conditions and design and supply-side features that help to determine their accessibility to low-income households. They differ mainly on how each account allows for immediate withdrawals.<sup>1628</sup> Terms and conditions that create possible barriers to these services fall into the following categories: physical access, affordability, and eligibility to access these accounts.<sup>1629</sup> Relevant terms and conditions attached to these products include the requirements for establishing the sources of income from the formal economic sectors to open an account, determining the eligibility of an account according to a

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refer to retail banks as “consumer banking, which is individual-oriented”. On banks’ deposit-taking function, see Malan “The Business of a Deposit-Taking Institution” 1991 4 *Journal of South African Law* 561; Schulze “Depositum, Deposit and Deposit-taking Institutions - Birds of a Feather? Not Quite” 2001 13 *SA Merc LJ* 78 78; Kawadza “Rethinking the Definition of the ‘Business of Banking in South Africa Against the Backdrop of Registrar of Banks v Net Income Solutions [2013] ZAWCHC 92” 2015 1 *Journal of Corporate and Commercial Law & Practice* 105.

<sup>1623</sup> Croxford, Abramson and Jablonowski *Supportable Predictions on the Future of Retail Banking* (2005) 38. See also Friedberg *Personal Finance: An Encyclopedia of Modern Money Management* (2005) 42-43.

<sup>1624</sup> Smit, Mostert and Mostert “Financial Innovation in Retail Banking in South Africa” 2016 3 *Corporate Ownership & Control* 393 394.

<sup>1625</sup> Croxford *et al Supportable Predictions on the Future of Retail Banking* (2005) 38.

<sup>1626</sup> Clark *International Dictionary of Banking and Finance* (2013) 71.

<sup>1627</sup> See Bick and Brown “Customer Perceptions of the Value Delivered by Retail Banks in South Africa” 2004 22 *The International Journal of Bank Marketing* 300. See also Croxford *et al Supportable Predictions on the Future of Retail Banking* (2005) 38 who refer to transactional and saving accounts interchangeably; Islam and Ghosh “A Comparative Analysis of Deposit Products in Banking Industry: An Opportunity For Eastern Bank Ltd” 2014 3 *Journal of Investment and Management* 7; Gallagher *Banking Performance and Socio Economic Development* (2019) 142. See further Surianarayanan *et al Essentials of Microservices Architecture* (2020) 69.

<sup>1628</sup> Collins *Money and Banking in the UK: A History* (2012) 94. See also Bajtelsmit *Personal Finance* 2nd ed (2020) 3-25; Boczko *Managing Your Money: A Practical Guide to Personal Finance* (2016) 204 who refers to “notice savings account and instant withdrawal account”.

<sup>1629</sup> Beck *et al* 2008 *The World Bank Economic Review* 397 413-414.

monthly or annual income level of each customer, minimum opening deposit balance and minimum account keeping balance, and fees associated with each account.<sup>1630</sup>

Studies have established that employment and income in the formal sectors of the economy are key determinants of the level of access to financial services in that sector.<sup>1631</sup> Banks traditionally refused to provide certain bank accounts to persons with unreliable income or sources of income from the informal economy.<sup>1632</sup> The practice of banks asking clients to establish sources of income from formal economic sectors is still prevalent. Some major banks in South Africa require new clients to produce the latest payslips among other documents.<sup>1633</sup> As illustrated in diagram CH 6A below, there is a continuing practice by South Africa's principal banks to tailor bank accounts according to clients' income levels.<sup>1634</sup> Some major retail banks in South Africa have tailored various transactional and current accounts according to the minimum balance required or the recommended monthly or annual income to determine

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<sup>1630</sup> Kempson *et al* "In or Out? Financial Exclusion" (2000) 33. See also Dangi and Kumar "Current Situation of Financial Inclusion in India and Its Future Visions" 2013 2 *International Journal of Management and Social Sciences Research* 155; Van Nieuwenhuyzen *Rands to Riche\$: A Guide to Personal Finance* (2019) 78-81 on the requirements and other terms imposed by South Africa banks. For Singapore see American Association of Singapore *Living in Singapore: Reference Guide* 15th ed (2021) 235; Gebregziabher and Makina "Macroeconomic Determinants of Financial Inclusion; Evidence Using Dynamic Panel Analysis" in Makina (ed) *Extending Financial Inclusion in Africa* (2019) 173. See further Torr "Money Market Funds and Accounts: Different in Nature and Purpose" (2021-05-11) *Moneyweb* <https://www.moneyweb.co.za/financial-advisor-views/money-market-funds-and-accounts-different-in-nature-and-purpose/#:~:text=Most%20Money%20Market%20Accounts%20require,are%20generally%20charged%20per%20transacti on> (accessed: 2022-01-13).

<sup>1631</sup> Anderloni and Carluccio "Access to Bank Accounts and Payment Services" in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 6. See also Chikalipah "What Determines Financial Inclusion in Sub-Saharan Africa?" 2017 8 *African Journal of Economic and Management Studies* 8; Arandara and Gunasekera "Financial Inclusion and Inclusive Growth: What Does It Mean for Sri Lanka?" (2020) *World Bank Policy Research Working Paper 9204* <https://documents1.worldbank.org/curated/en/990281586270572983/pdf/Financial-Inclusion-and-Inclusive-Growth-What-Does-It-Mean-for-Sri-Lanka.pdf> (accessed: 2022-01-14) 16.

<sup>1632</sup> Musa, Abdullahi, Idi and Tasiu "Drivers of Financial Inclusion and Gender Gap in Nigeria" 2015 4 *The Empirical Econometrics and Quantitative Economics Letters* 186 190. See also Sykes, Elder, Gurbuzer and Principi "Exploring the Linkages Between Youth Financial Inclusion and Job Creation" (2016) [http://ciaris.ilo.org/wcmssp5/groups/public/ed\\_emp/documents/publication/wcms\\_533567.pdf](http://ciaris.ilo.org/wcmssp5/groups/public/ed_emp/documents/publication/wcms_533567.pdf) (accessed: 2022-01-14) 31.

<sup>1633</sup> Absa Bank (Gold Account, Premium Banking, and Private Banking Account,) visit <https://www.absa.co.za/private-banking/private-banking-account/> (accessed: 2022-1-16).

<sup>1634</sup> Staff Writer "South Africa's Most Exclusive Bank Accounts for the Super Rich – What They Cost and What They Offer" (2021-05-10) *BusinessTech* <https://businesstech.co.za/news/banking/488743/south-africas-most-exclusive-bank-accounts-for-the-super-rich-what-they-cost-and-what-they-offer/> (accessed: 2022-01-16). See Fungáčová and Weill 2015 *China Economic Review* 201, on the discussion of these requirements.

clients' eligibility for each account.<sup>1635</sup> In addition, this diagram illustrates how banks require either a payslip or a three month bank statement for opening traditional bank accounts such as cheque accounts, in addition to other FICA-required information. It further indicates various monthly fees that banks charge clients for their services.

**DIAGRAM CH6A: TERMS AND CONDITIONS FOR TRADITIONAL BANK ACCOUNTS IN SOUTH AFRICA**

<b>Bank Name</b>	<b>Account Type</b>	<b>Account Opening Requirements</b>	<b>Income Bracket Eligibility</b>	<b>Monthly Fees<sup>1636</sup></b>
(a) <b>Absa Bank Ltd</b>	(i) Gold Value Bundle	▪ Latest payslip	▪ R4 000 - R24 999 monthly	▪ R109,00
	(ii) Premier Banking	▪ Latest payslip/3 months bank statement	▪ R25 000 monthly	▪ R190,00
	(iii) Private Banking Account <sup>1637</sup>	▪ Latest proof of income/ 3 months bank statement	▪ R62 000 monthly	▪ R460,00
(b) <b>Discovery Bank</b>	(i) Transaction Accounts: Pay-As-You-Transact Fees <sup>1638</sup>	Information not readily available	▪ R850 000 - R2.5 million annually	▪ R60,00
	(ii) Transaction Account Bundled Fees	Information not readily available	▪ R850 000 - R2.5 million annually	▪ R290,00

<sup>1635</sup> Standard Bank "Explore Our Accounts" (Nd) <https://www.standardbank.co.za/southafrica/personal/products-and-services/bank-with-us/bank-accounts/our-accounts> (accessed: 2022-01-16); First National Bank "Accounts" (Nd) <https://www.fnb.co.za/current-accounts/index.html> (accessed: 2022-01-16), <https://www.absa.co.za/personal/bank/an-account/explore/> (accessed: 2022-01-16).

<sup>1636</sup> These accounts charge various transactional fees in addition to the minimum monthly fees.

<sup>1637</sup> Absa Private Bank packages include a private banking account and private banking for young professionals with a R280 monthly fee and private banking for seniors' package (with a monthly service fee of R105). See Absa "Private Banking Pricing Guide 2022" (Nd) <https://www.absa.co.za/content/dam/south-africa/absa/pdf/pricing-brochure/2022/2022-Private-Banking-Pricing-Brochure.pdf> (accessed: 2022-02-04).

<sup>1638</sup> Discovery Bank "Transaction Accounts" (Nd) <https://www.discovery.co.za/bank/accounts#> (accessed: 2022-02-04). See also Discovery Bank "Banking Fees Guide Discovery Bank Black Transaction Account" (2022) <https://www.discovery.co.za/assets/discoverycoza/bank/fees-guides/2022/discovery-bank-black-transaction-payt-fees-2022.pdf> (accessed: 2022-02-04).

<b>Bank Name</b>	<b>Account Type</b>	<b>Account Opening Requirements</b>	<b>Income Bracket Eligibility</b>	<b>Monthly Fees<sup>1636</sup></b>
	(iii) Black Suite	Information not readily available	▪ R850 000 - R2.5 million annually	▪ R465,00
<b>(c) First National Bank Ltd</b>	(i) Fusion Aspire	▪ Recent payslip and 3 months bank statement	▪ R84 000 - R449 000 (annual income)	▪ R99,00
	(ii) Aspire Current	▪ Recent payslip	▪ R120 000 - R449 000	▪ R99,00
	(iii) Premier Account	▪ Recent payslip and 3 months' bank statement	▪ R240 000 - R849 999	▪ R219,00 - R229,00
	(iv) Private Clients Current	▪ Latest payslip or last 3 months' bank statement <sup>1639</sup>	▪ R750 000 - R179 999	▪ R419,00
	(v) Private Wealth Bundle Current	▪ Latest payslip or last 3 months' bank statement	▪ R1.8 M or more	▪ R529,00
<b>(d) Nedbank Ltd</b>	(i) Savvy Plus Gold Cheque Account	▪ Payslip or stamped 3 months bank statement	▪ R3 000 (monthly income) and have a healthy credit score	▪ R115,00
	(i) Savvy Bundle Platinum Cheque Account	▪ Payslip or stamped 3 months bank statement	▪ R3000 (monthly income) and have a healthy credit score	▪ R220,00

<sup>1639</sup> This information is required to provide an overdraft facility on this account. See <https://www.fnb.co.za/private-banking/private-clients/pc-current-account.html> (accessed: 2022-01-17).

<b>Bank Name</b>	<b>Account Type</b>	<b>Account Opening Requirements</b>	<b>Income Bracket Eligibility</b>	<b>Monthly Fees<sup>1636</sup></b>
	(iii) Private Client Pay-as-you-use-account	▪ Payslips or stamped 3 months bank statement	▪ No minimum income requirement. At least R750 000 recommended annual income	▪ R140,00
	(iv) Private Client One/Bundle <sup>1640</sup>	▪ Payslips or stamped 3 months bank statement	▪ No minimum income requirement. At least R750 000 recommended annual income	▪ R380,00
	(v) Private Wealth Bundle Account	▪ Payslips or stamped 3 months bank statement	▪ Annual income over R1.5 million or R5 million in investible assets	▪ R468,00
(i) <b>Standard Bank Ltd<sup>1641</sup></b>	(i) Prestige Banking Account	▪ Recent payslip	▪ R25 000 (monthly income)	▪ R220,00
	(ii) Private Banking Account	▪ Proof of income	▪ R58 000 or an investment of at least R3 million	▪ R380,00
	(iii) Signature Banking Account	▪ Required on the website to fill details for call me back from a private	▪ R92 000	▪ R480,00

<sup>1640</sup> Both private accounts provide for relational banking but differ in that Private Client One provides for 0.75% interest on a positive balance. Private One also provides for a single credit facility with 40 days interest-free, while Private Bundle provides for a credit card with 55 days interest-free and an optional overdraft. See <https://personal.nedbank.co.za/bank/bank-accounts/private-clients/professional.html> (accessed: 2022-01-17).

<sup>1641</sup> See Staff Writer "Standard Bank's New Fees and Account Changes for 2022" (2021-12-06) *BusinessTech* <https://businesstech.co.za/news/banking/542722/standard-banks-new-fees-and-account-changes-for-2022/> (accessed: 2022-02-04).

<b>Bank Name</b>	<b>Account Type</b>	<b>Account Opening Requirements</b>	<b>Income Bracket Eligibility</b>	<b>Monthly Fees<sup>1636</sup></b>
		banker`s assistance		

The specific requirements and criteria outlined in this diagram may create barriers to accessing these accounts. For instance, the requirement to produce a payslip is likely to favour consumers who are formally employed. A strict requirement to produce a payslip may mean that only a consumer who has a formal job stands a chance of accessing and using formal banking services.<sup>1642</sup> The reason is that their income is stable, and banks are likely to find them desirable customers. This diagram also indicates a number of accounts that require high-income brackets to open such accounts and the relatively high fees that banks charge to administer the account. Notably, banks charge additional fees for certain transactions in addition to the monthly fees. These fees relate to failure to maintain an applicable minimum balance in an account, fees for over-the-counter transactions, or for exceeding the number of prescribed monthly transactions. The relatively high fees associated with traditional bank accounts are one of the causes of exclusion.<sup>1643</sup> Banks in South Africa do not require minimum opening balances and the maintenance of a minimum account balance for all the accounts. However, the requirement that clients must have a specific minimum income in effect means that they must be able to deposit the minimum required monthly income into the account.<sup>1644</sup> The high fees and the failure to satisfy an account that falls within a particular minimum income bracket deter poor households for accessing accounts with these banks.<sup>1645</sup>

<sup>1642</sup> World Bank "Banking the Poor" (2009) <https://openknowledge.worldbank.org/bitstream/handle/10986/13804/69961Banking0The0Poor.pdf?sequence=1&isAllowed=y> (accessed: 2022-01-10) 8. See also Staff Writers (2021-05-10) *BusinessTech*.

<sup>1643</sup> Gómez-Barroso and Marbán-Flores 2013 *Journal of European Social Policy* 334. See also Bank of International Settlement "Payment Aspects of Financial Inclusion" (2016) <https://www.bis.org/cpmi/publ/d144.pdf> (accessed: 2022-01-17); Baajas, Thorsten, Belhaj and Naceur "Financial Inclusion: What Have We Learned So Far? What Do We Have to Learn?" (2020) *IMF Working Paper 20/157* <https://www.imf.org/-/media/Files/Publications/WP/2020/English/wpia2020157-print-pdf.ashx> (accessed: 2022-01-17) 27; Abrahams "Financial Inclusion in South Africa: A Review of the Literature" (2017) Southern African Accounting Association Biennial International Conference Proceedings; Gautier, Luc and Djimoudjiel "Dynamic Analysis of Determinants of Financial Inclusion in Cameroon" 2020 16 *European Scientific Journal* 106 109.

<sup>1644</sup> See, eg, Nedbank "How to Qualify for a Nedbank Overdraft" (Nd) <https://personal.nedbank.co.za/borrow/overdraft/ready-to-apply.html> (accessed: 2022-01-18) which requires customer's monthly income to be paid into the account linked to an overdraft.

<sup>1645</sup> Barr 2004 *Yale Journal of Regulation* 124. See also Demirgüç-Kunt *et al Finance for All?* (2008) 42; Demirguc-Kunt and Klapper "Measuring Financial Inclusion: The Global Findex Database"

An additional factor that contributes to the lack of access to these accounts includes bank accounts that carry overdraft facilities. The inclusion of overdraft facilities as an additional package on a current account makes access to such an account preconditioned on a good credit score, and therefore the account is not accessible to customers with a history of bad debt. For instance, the diagram above shows the importance of a healthy credit score as a condition for accessing the Standard Bank's "Savvy" account. Bank accounts carry overdraft facilities as an option or an integral part of opening the account.<sup>1646</sup> Banks must assess the creditworthiness of a client to offer deposit accounts. For instance, the Nedbank "Private Bundle" account allows for optional overdraft facilities subject to credit and affordability checks.<sup>1647</sup> Therefore, in all accounts that carry overdraft facilities as an integral element customers without an income or with bad credit records may not be able to access these accounts.<sup>1648</sup> A study by Ashton and Gregoriou<sup>1649</sup> has discovered how adding overdraft facilities to current accounts increases the costs of using these accounts. Customers may also be deterred from opening accounts with overdraft facilities if they are afraid of losing control of their spending or the possibility of incurring additional costs attached to overdrawing an account.<sup>1650</sup>

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(2012) <https://openknowledge.worldbank.org/bitstream/handle/10986/6042/WPS6025.pdf?sequence=1&isAllowed=y> (accessed: 2022-01-17) 20; Gortsos and Panagiotidis "Financial Inclusion: An Overview of Its Various Dimensions and Its Assistance in Reducing Private Sector Insolvency" in Monokroussos and Gortsos (eds) *Non-Performing Loans and Resolving Private Sector Insolvency* (2017) 367.

<sup>1646</sup> For examples of banks in South Africa, see Nedbank "Savvy Bundle Platinum Cheque" account, (optional), FNB "Aspire Current Account" (optional), FNB "Private Wealth Current Account" (integral), ABSA "Gold Cheque Account" (integral), "Absa Gold Value Bundle" (optional), visit <https://www.absa.co.za/personal/loans/for-myself/overdraft/>. ("An overdraft is a revolving credit facility loaded into your Cheque account"), ABSA "Premium Banking" (integral), Absa "Private Banking Account" (optional).

<sup>1647</sup> Visit <https://personal.nedbank.co.za/bank/bank-accounts/private-clients/professional/ready-to-apply-private-clients-bundle.html> (accessed: 2022-01-18).

<sup>1648</sup> Kempson Conference Paper (30-31 May 2006).

<sup>1649</sup> Ashton and Gregoriou "Does an Overdraft Facility Influence the Customer Costs of Using a Personal Current Account?" 2017 24 *International Journal of the Economics of Business* 1.

<sup>1650</sup> Kempson *et al* "In or Out? Financial Exclusion" (2000) 49. See also Demirgüç-Kunt *et al Finance for All?* (2008) 26; Choe "Bringing in the Unbanked Off the Fringe: The Bank on San Francisco Model and the Need for Public and Private Scholarship" 2009 8 *Seattle Journal for Social Justice* 365.

## 6.4.2 Basic Bank Accounts Features

Due to the barriers to traditional bank accounts discussed above, the need to address them has received legislative, policy, and financial industry-wide attention. Specific measures to overcome these barriers are introducing properly designed financial products, making them available, and ensuring that they are properly delivered through relevant mechanisms.<sup>1651</sup> An alternative to traditional bank accounts that aims to overcome these barriers has been identified as a BBA.

There is no universal definition of a BBA. Various names that fit these types of account include “basic banking account”,<sup>1652</sup> “basic savings account”, “first account”, “lifeline account”,<sup>1653</sup> “no-frill account”<sup>1654</sup> “or “account with basic features”.<sup>1655</sup> This account is, in the main, characterised by making the bank account basic, as compared to traditional bank accounts such as a current account. One of the early definitions of BBA was offered by Barr and Soloway and emphasised tailoring bank accounts to a minimum level.<sup>1656</sup> They define BBA generally as “the minimum level of financial services that should be available to all citizens, regardless of income”. The World Bank refers to this type of account as one that provides “a package of

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<sup>1651</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 30. See also Anderloni and Carluccio in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 31.

<sup>1652</sup> Wood and Smith “Electronic Transfer of Government Benefits” (1991-04-Nd) *Federal Reserve Bulletin* 205. See also Hannan “Retail Fees of Depository Institutions, 1997-2001” (2002-09-Nd) *Federal Reserve Bulletin* 405 406; Collins and Urban “Banking on the Future: Minor-owned Accounts and Financial Inclusion” (2019) <https://www.bbvaedufin.com/wp-content/uploads/2019/11/Montana-State-University-EduFinGrants.pdf> (accessed: 2022-02-08) 6.

<sup>1653</sup> Section 234 of the US Bank Enterprises Act 1991 12 U.S.C 1834. See also Rubun “The Lifeline Banking Controversy: Putting Deregulation to Work for the Low-Income Consumer” 1992 67 *Indiana Law Journal* 231; Budnitz “The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action” 1992 43 *Mercer Law Review* 827; Schotsky “The Need for Basic Banking Legislation” 1994 13 *Annual Banking Law* 455 on the history and the proposal to legislate the duty of banks to offer lifeline account “as the solution to the high cost of bank and nonbank payment services” in the USA; Garman and Fogue *Personal Finance* 13th ed (2018) 157.

<sup>1654</sup> Brown “Basic Banking: Has the Financial Services Industry Severed the Lifeline of Low-Income Consumers?” 1990 9 *Annual Banking Law* 559 564. See also Hogarth and O'Donnell “Banking Relationships of Lower-Income Families and the Governmental Trend Toward Electronic Payment” (1991-04-Nd) *Federal Reserve Bulletin* 459 467; Reserve Bank of India “Financial Inclusion – UCBs’, Modelling Drivers of Financial Inclusion in India – An AHP Approach” in Prasad and Nagar (eds) *Law and Economics: Market, Non-market and Network Transactions* (2019) 88-89.

<sup>1655</sup> See the EU “PAD” (2014) discussed in Ch 4.

<sup>1656</sup> Barr and Soloway “Deposit Account Developments” 1988 43 *The Business Lawyer* 987 1003. See also Brown 1990 *Annual Review of Banking Law* 560-561.



free or low-cost services to clients, usually with some restrictions on the menu of services and on the amounts held in the accounts".<sup>1657</sup> The main features of BBAs are associated with reducing the barriers attached to the product designs and the terms and conditions attached to the traditional bank accounts. Some of the features associated with the BBA are low (or no) minimum account opening balance or lower minimum monthly balance, restrictions on the number of monthly withdrawals, all either with or without overdraft facilities.<sup>1658</sup> Another important feature is the removal or tiering of the documents required to open an account. There are no uniform regulations regarding minimum-level design features for this type of account. The following selected regulatory measures illustrate the relevant product designs and common features of a BBA.

The EU PAD<sup>1659</sup> provides key features for a payment account with basic features that EU countries must adopt. The right of access to this account is afforded to customers "irrespective of the consumers' financial circumstances, such as their employment status, level of income, credit history or personal bankruptcy".<sup>1660</sup> The PAD outlines services that must be included in the account. These include depositing and withdrawing money at a counter or an ATM, debit, payment purchases, and transfer facilities.<sup>1661</sup> The PAD provides for an optional overdraft facility which may only be offered "upon the consumer's request".<sup>1662</sup> Importantly, access to this account may not be restricted or made conditional on the purchase of an overdraft facility.

The EU PAD also regulates fees. It requires financial institutions to offer this account free of charge or at a reasonable fee.<sup>1663</sup> Factors such as national income levels and the average fees charged by national banks for services provided on conventional accounts must be taken into account in determining reasonable fees.<sup>1664</sup> The UK and Irish Payment Accounts Regulations that implement the EU PAD<sup>1665</sup> repeat the provisions of the EU PAD with regard to services

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<sup>1657</sup> World Bank *Banking the Poor: Measuring Banking Access in 54 Economies* (2009) 47-48.

<sup>1658</sup> See the discussion of examples below in Ch 6.6.3, Ch 6.7.2, and Ch 6.7.3.

<sup>1659</sup> See the discussion of the EU PAD" (2014) in Ch 4.3.1.4.

<sup>1660</sup> EU the EU "PAD" (2014) recital 35.

<sup>1661</sup> Article 17 (1) and (2) of the EU "PAD" (2014). EU member states are allowed to add any service deemed "essential to the consumer based on common practice at the national level".

<sup>1662</sup> Article 17(8) of EU the EU "PAD" (2014). The EU "PAD" (2014) also requires member states to define the maximum amount and duration of the overdraft.

<sup>1663</sup> Article 18(1) of the EU "PAD" (2014).

<sup>1664</sup> Article 18(3) of the EU "PAD" (2014).

<sup>1665</sup> See Ch 5.5.2.3 for the discussion of these Regulations.

and fees.<sup>1666</sup> Both regulations, however, prohibit any financial institution offering the account from providing an overdraft facility.<sup>1667</sup> Based on the features of BBA provided in these regulations, UK banks provide BBAs with a choice of charging fees and with no overdraft facilities or similar loans.<sup>1668</sup>

The PAD reinforces the 2014 BBA agreement by the UK government and the UK banks to provide BBAs.<sup>1669</sup> This agreement deals with the eligibility, standard features, opening, refusal, and closing of an account.<sup>1670</sup> The BBA is accessible to unbanked customers or those who need to switch accounts. Key features of this account are deposits or withdrawals of cash over the counter or at an ATM, debit orders, and card payments. The BBA agreement also regulates fees. BBA carries no charges for the standard features, unpaid payments, or overdrawn balances.

The Reserve Bank of India's "Basic Bank Saving and Deposit Account" Circular (RBI BBSDA Circular 2019) introduced the duty of banks to provide customers with a "Basic Bank Saving and Deposit Account" (BBSDA).<sup>1671</sup> The BBSDA was designed as a savings account that offers

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<sup>1666</sup> See Reg 19(1)-(4) of the UK Payment Accounts Regulations and Article 17(1)-(4) of the Irish Payment Accounts Regulations (2016). For instance, regarding reasonable fees that financial institutions may levy, the Regulation requires them to consider the national income levels and the average fees charged by UK credit institutions in respect of the service.

<sup>1667</sup> Reg 19(5) of the UK Payment Accounts Regulations (2015). See also Reg 17(5) of the Irish Payment Accounts Regulations (2016).

<sup>1668</sup> See Santander "Basic Current Account" (Nd) <https://www.santander.co.uk/personal/current-accounts/basic-current-account> (accessed: 2022-01-23). See also HSBS "Basic Bank Account" (Nd) <https://www.hsbc.co.uk/current-accounts/products/basic-bank-account/> (accessed: 2022-01-23) with no monthly maintenance fees, no overdraft facility on the account, and only eligible to customers who do not qualify for current accounts. See further Barclays "Basic Bank Account" (Nd) <https://www.barclays.co.uk/current-accounts/basic-account/> (accessed: 2022-01-23) which does not include an overdraft facility (both arranged or unarranged); and Lloyds TSB "Basic Bank Account" (Nd) <https://www.lloydsbank.com/current-accounts/all-accounts/basic-account.htm> (accessed: 2022-01-23) which, among others, does not provide for an arranged overdraft.

<sup>1669</sup> UK "BBA Agreement" (2014). See also Boczko *Managing Your Money: A Practical Guide to Personal Finance* (2016) 203, Comparato *The Financialisation of the Citizen: Social and Financial Inclusion through European Private Law* (2018) 94. On the background to this agreement, see House of Lords and House of Commons *Changing Banking for Good: First Report of Session 2013-14* Vol 1 (2013) 23-25.

<sup>1670</sup> UK "BBA Agreement" (2014).

<sup>1671</sup> Reserve Bank of India "Financial Inclusion" (2005) *RBI/2005-06/204DBOD.No.Leg.BC.44/09.07.005/2005-06* <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/67155.PDF> (accessed: 2022-01-23)(RBI "No-Frill Circular" (2005)). The circular was introduced amidst major concerns regarding banking practices that excluded the majority of the population, particularly the requirement for minimum balance and charges levied that eventually deter the majority to open and maintain conventional bank accounts. See also the Reserve Bank of India "Financial Inclusion- Access to Banking Services – Basic Savings Bank Deposit Account" (2012) RBI /2012-

holders certain minimum facilities free of charge and without a minimum balance requirement.<sup>1672</sup> This circular also outlines key features of a BBSDA such as the eligibility criteria, the services available in the account offered, KYC requirements for the account, and fees. The account is generally available to everyone.<sup>1673</sup> However, the circular prohibits the holder of the BBSDA from opening any other savings account at the same bank where the latter was opened.<sup>1674</sup> The customer is required to declare to the bank that he or she is not holding a BBSDA with any other bank. Furthermore, a customer who holds this type of account at another bank is required to close the account within 30 days from the date of opening the BBSDA.<sup>1675</sup>

As regards the services offered, the RBI advises banks to offer specified minimum facilities in a BBSDA.<sup>1676</sup> It requires banks to offer a limitless number of deposits online or at ATMs monthly, a minimum number of free cash withdrawals, and to offer ATM debit cards.<sup>1677</sup> The RBI BBSDA Circular makes no provision for credit facilities such as an overdraft in the BBSDA. It allows banks “to provide additional value-added services, at the option of a customer”.<sup>1678</sup> Importantly, the additional services must be offered without discrimination and with the prior disclosure of their prices.<sup>1679</sup> The offering of the BBSDA is subject to the simplified KYC standard that serves to facilitate the easy opening of the account.<sup>1680</sup>

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13/164 DBOD.No. Leg. BC.35 /09.07.005/2012-13 <https://www.rbi.org.in/commonperson/English/Scripts/Notification.aspx?Id=2979> (accessed: 2022-1-23) (RBI “BBSBDA Circular” (2012)) which modifies the offering of no-frill accounts and changed the name to “Basic Savings Bank Deposit Account”. See further the Reserve Bank of India “Financial Inclusion- Access to Banking Services – Basic Savings Bank Deposit Account (BSBDA)” (2019) <https://www.rbi.org.in/commonman/Upload/English/Notification/PDFs/NT20610062019.pdf> (accessed: 2022-01-23) (RBI “BSBDA Circular (2019)).

<sup>1672</sup> RBI “BBSBDA Circular” (2019) par 2. See also Aggarwal and Klapper “Designing Government Policies to Expand Financial Inclusion Evidence from Around the World” (2013) <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.594.9694&rep=rep1&type=pdf> (accessed: 2022-01-23) 9.

<sup>1673</sup> RBI “BSBDA Circular” (2019) par 2.

<sup>1674</sup> RBI “BSBDA Circular” (2019) par 4.

<sup>1675</sup> RBI “BSBDA Circular” (2019) par 4.

<sup>1676</sup> RBI “BSBDA Circular” (2019) par 2. The facilities were previously not specified. See also RBI “No Frill Circular” (2005), which only refers to “transactions” and “facilities”. See, however, the RBI “BBSBDA Circular” (2012) which began to list the specific facilities in the BBSDA.

<sup>1677</sup> RBI “BSBDA Circular” (2019) par 2(i) - (v), and 6. This includes withdrawals at an ATM.

<sup>1678</sup> RBI “BSBDA Circular” (2019) par 3.

<sup>1679</sup> RBI “BSBDA Circular” (2019) par 3.

<sup>1680</sup> RBI “BSBDA Circular” (2019) par 5 which refers to the RBI “Master Direction - Know Your Customer (KYC) Direction” (2016) RBI/DBR/2015-16/18 Master Direction DBR.AML.BC.No.81/14.01.001/201516 [https://rbidocs.rbi.org.in/rdocs/notification/PDFs/MD18KYCF6E92C82E1E1419D87323E3869BC9F1\\_3.PDF](https://rbidocs.rbi.org.in/rdocs/notification/PDFs/MD18KYCF6E92C82E1E1419D87323E3869BC9F1_3.PDF) (accessed: 2022-01-24). Chapter

## 6.5 BASIC BANK ACCOUNT REGULATION IN SOUTH AFRICA

There is no specific regulatory requirement for banks to provide access to BBAs in South Africa, in stark contrast with other countries discussed in Chapter five.<sup>1681</sup> There is currently no regulation that imposes an obligation for prescriptive financial product designs.<sup>1682</sup> Therefore, South African banks are not required to issue any entry-level bank account with specific requirements on product designs, eligibility criteria, and the relevant features.<sup>1683</sup> As discussed above,<sup>1684</sup> banks under the FS Charter only made a voluntary commitment to make first-order retail financial services that are appropriately priced and available to the greater segment of the population. As observed by the Bankable Frontier and the FinMark Trust Report,<sup>1685</sup>

[t]he Charter provisions established a specific target and set a broad framework for the desired characteristics of a basic transactional and savings product but importantly did not specify the product design further.

The BASA *Code of Banking Practice* also gives banks the discretion to determine the minimum requirements for access to BBAs and to provide customers with conditions and details relating to how they access these accounts. The main reason for the lack of regulation on specific features of BBA was an emphasis on compliance with competition law. The 2003 Falkena Report on *Competition in South African Banking* warned banks to avoid national bank account initiatives that are defined in terms of price-fixing and collusion and therefore pre-empt

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VI par 23, that deals with the opening of small accounts (accounts with limited facilities). See further RBI "Basic Bank Saving Bank Deposit Account-UCBs" (2014) <https://www.rbi.org.in/commonperson/English/Scripts/FAQs.aspx?Id=1289> (accessed: 2022-01-24); Kochar "Branchless Banking: Evaluating the Doorstep Delivery of Financial Services in Rural India" (2016) *Stanford Center for International Development Working Paper No 566* [https://kingcenter.stanford.edu/sites/g/files/sbiybj16611/files/media/file/566wp\\_0.pdf](https://kingcenter.stanford.edu/sites/g/files/sbiybj16611/files/media/file/566wp_0.pdf) (accessed: 2022-01-24) 8.

<sup>1681</sup> See Ch 5.5.2.1 to Ch 5.5.2.3 above.

<sup>1682</sup> See the discussion of this issue in World Bank "South Africa: Retail Bank Diagnostic" (2018) <https://openknowledge.worldbank.org/bitstream/handle/10986/30402/129778-WP-South-Africa-Retail-Banking-Diagnostic-Report.pdf?sequence=1&isAllowed=y> (accessed: 2021-03-02) 12.

<sup>1683</sup> Bankable Frontier Association and FinMark Trust "The Mzansi Bank Account" (2009) 8. See Chs 4 and 5 on the right of access to BBAs internationally and in other countries, and Ch 6.4.1 above for the discussion of the FS Charter

<sup>1684</sup> See Ch 6.2.1 above.

<sup>1685</sup> Bankable Frontier Association and FinMark Trust "The Mzansi Bank Account" (2009) par 8. See also Kostov *et al* 2012 *European Journal of Development Research* 400 who describe the FS Charter as making recommendations that address the broader context of financial services outreach in terms of scale, depth, scope, and breadth.

competition.<sup>1686</sup> The initiative to regulate the specific product features and fees in relation to BBAs would therefore contravene section 4 of the Competition Act which prohibits restrictive horizontal practices including “directly or indirectly fixing a purchase or selling price or any other trading condition”.<sup>1687</sup> Although a discussion of the Competition Act falls outside the purview of this research, section 10(3) of the Act allows for a restrictive practice to be exempted if it contributes to any of the listed objectives. These are:

- (i) maintenance or promotion of exports;
- (ii) promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive;
- (iii) change in productive capacity necessary to stop the decline in an industry; or
- (iv) the economic stability of any industry designated by the Minister after consulting the Minister responsible for that industry.

These exemptions do not, however, include objectives for FI initiatives or the transformation of the financial sector through access to retail financial products and services in terms of the FS Code and the B-BBEE Act.

A notable regulation that impacts product features of BBA derives from the specific conditions attached to an exemption from the client’s identification and verification requirements in Exemption 17 of FICA.<sup>1688</sup> The main objective of this exemption is to ensure that low-income

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<sup>1686</sup> National Treasury and the South African Reserve Bank “Competition in South African Banking” (2004) <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.732.2716&rep=rep1&type=pdf> (accessed: 2022-01-25) (“Falkena *Competition in SA Banking Report* (2004)”) 148-149. Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 20. See also Rajeev and Vani *Financial Access of the Urban Poor in India: A Story of Exclusion* (2017) 34.

<sup>1687</sup> See s 4(1)(b)(i) of the Competition Act 89 of 1998. See also Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 20; Falkena *Competition in SA Banking Report* (2004) 16.

<sup>1688</sup> See Ch 6.3.1.2 above. FIC “Exemption 17” GN R1353 in GG 27011 of 2004-11-19. The original exemption provided for very strict conditions that had to be in the account before it could trigger the exemption. See also De Koker *South African Money Laundering Law* (2014) 226-229; Financial Sector Transformation Council “Guidance Note GN701 on Code Series FS700, Statement 701: The Measurement of the Access to Financial Services Element of Broad-Based Black Economic Empowerment as it Relates to Banks” (2019) <https://fstc.org.za/Documents/councb7dae3dc-ba28-4396-be63-32762df87deeGN701.pdf> (accessed: 2022-01-31); De Koker “Financial Action Task Force Standards and Financial Inclusion: What Should be Done – And What Should Not be Done - To Improve the Alignment Between Integrity and Inclusion Policy Objectives?” (2020) <https://ssrn.com/abstract=3679779> (accessed: 2022-01-31) for a discussion of the old and the new Exemption 17.

persons are not denied access to appropriate financial services, including bank accounts, due to the strict application of the KYC requirements to prevent ML and TF.<sup>1689</sup> Exemption 17 plays an important role in the context of this research by setting out specific conditions that must be met before a bank account can be exempted from the KYC requirements in terms of FICA. These conditions shaped the approach that banks were required to follow in designing specific accounts that could be opened without onerous identification and verification processes in terms of the FICA. It exempted business relationships or single transactions with a bank that met the following conditions.<sup>1690</sup> First, a relationship or a transaction had to enable the client to withdraw, transfer, or make payment of an amount that does not exceed R5 000 per day or R25 000 in a monthly cycle. It could also not enable the client to transfer funds outside South Africa.<sup>1691</sup> Exemption 17 provided specific conditions that would require banks to tailor their products that were to triggered by the exemption. In relation to “account-based products”, Exemption 17 required clients to maintain a balance not exceeding R25 000 at any time.<sup>1692</sup> A client could further not simultaneously hold two or more accounts that meet the criteria above and are similar in nature with the same institution.<sup>1693</sup> Importantly, if a balance exceeded the prescribed maximum, or the client acquired more than one similar account with the same institution, the exemption prohibited any debit from the account before the normal prescribed CIV and record-keeping requirements have been met.<sup>1694</sup> The conditions laid down in Exemption 17 enabled the launch of BBAs by the banking sector, particularly the Mzansi-branded accounts.<sup>1695</sup> With the 2017 amendment to the FICA and the introduction of the risk-based approach, Exemption 17 became obsolete and has been withdrawn.<sup>1696</sup> The amendment did, however, not include any exemptions or conditions that are required to apply RBA to

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<sup>1689</sup> De Koker *South African Money Laundering Law* (2014) 228-229.

<sup>1690</sup> FIC Exemption 17(2)-(4). See also De Koker *South African Money Laundering Law* (2014) 227.

<sup>1691</sup> FIC Exemption 17(4). See also De Koker *South African Money Laundering Law* (2014) 228-229. The exemption allows for a transfer of funds as a result of a point-of-sale payment or a cash transaction or a cash withdrawal in any country in the Rand Common Monetary Area.

<sup>1692</sup> FIC Exemption 17(4). See also Financial Intelligence Centre “Revised Public Compliance Communication No 21 (PCC21) on the Scope and Application of Exemption 17 in Terms of the Financial Intelligence Centre Act No. 38 of 2001, As Amended” (2014) <https://www.fic.gov.za/Documents/140212%20Revised%20PCC21%20Website%20Statement.pdf> (accessed: 2022-01-31)(“FIC PPC 21”) par 6.3; The World Bank “Achieving Effective Financial Inclusion in South Africa” (Nd) par 40.

<sup>1693</sup> FIC Exemption 17(4). See also De Koker *South African Money Laundering Law* (2014) 228-229.

<sup>1694</sup> FIC Exemption 17(4). See also FIC PPC 21 and De Koker *South African Money Laundering Law* (2014) 228-229.

<sup>1695</sup> De Koker *South African Money Laundering Law* (2014) 229. See the discussion of the Mzansi account in Ch 6.6.2 below.

<sup>1696</sup> FIC “Guidance Note 7” (2017) par 42.

BBA. This notwithstanding, FIC requires accountable institutions to continue to be guided by the contents of the exemptions as “additional factors that may indicate lower ML/TF risks in a given scenario”.<sup>1697</sup>

The views of Jenik *et al*/on how a “tier-based approach” and a simplified CDD can be used to reduce the level of AML/CFT risks through product design are useful in identifying key features of BBAs similar to the product design conditions in the Exemption 17.<sup>1698</sup> According to these authors, policy makers have two options to simplify CDD requirements: by adopting an exemption based on proven low risk; or by allowing financial service providers to simplify CDD measures in relation to “products, channels, and customers”.<sup>1699</sup> With a simplified CCD, their view is to lower the level of risk through product design by building in some restrictions to keep the ML and TF risks low. Such restrictions may include transaction limits that allow only small amounts and low-risk transactions, customer limits restricted to individuals for opening accounts, and function limitations not allowing cross-border transactions.<sup>1700</sup> In the absence of Exemption 17 and its specific outline of account features, applying this tier-based approach will allow regulator to use the existing RBA and a simplified CDD through account products design.

## 6.6 COMMERCIAL BANK INITIATIVES

### 6.6.1 Background

South African banks have individually and collaboratively introduced bank accounts that target low-income households. These ranged between mobile banking accounts and conventional accounts that target this sector of the community.<sup>1701</sup> Standard Bank became the pioneer of individual initiatives by introducing the E-Plan entry-level account in 1990 and offers a good

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<sup>1697</sup> FIC “Guidance Note 7” (2017) par 42.

<sup>1698</sup> Jenik, Kerse and De Koker “Rapid Account Opening in a Pandemic: How to Meet AML/CFT Rules for Social Assistance Payments” (2020) *CGAP Covid-19 Brief* [https://www.cgap.org/sites/default/files/publications/2020\\_07\\_COVID\\_Briefing\\_Rapid\\_Account\\_Opening.pdf](https://www.cgap.org/sites/default/files/publications/2020_07_COVID_Briefing_Rapid_Account_Opening.pdf) (accessed: 2022-05-16). The authors discuss these issues with specific focus on social assistance payments that are equally considered to pose a lower risk of money-laundering and terrorist financing.

<sup>1699</sup> Jenik *et al*/“Rapid Account Opening in a Pandemic” (2020) *CGAP Covid-19 Brief* 13-14.

<sup>1700</sup> Jenik *et al*/“Rapid Account Opening in a Pandemic” (2020) *CGAP Covid-19 Brief* 13.

<sup>1701</sup> MTN “Momo Account” (Nd) <https://www.mtn.co.za/Pages/mobile-money-promotion.aspx> (accessed: 2022-03-02). See also WIZZIT International “WIZZIT Account” (Nd) <https://wizzit.com/wp-content/uploads/2019/05/WIZZIT-TCs.pdf> (accessed: 2022-03-02) (in collaboration with Bank of Athens and ABSA).

example of private bank initiatives to provide BBA.<sup>1702</sup> Unique features of this account in addition to those offered in BBAs, included the provision of two “purses” in a single account.<sup>1703</sup> Clients had a transactional cash “purse” that allowed for a withdrawal of money on demand and a saving purse in terms of which clients could transfer funds from the transactional purse to this purse.<sup>1704</sup> Money in the saving purse was not available on demand but required consultation with a designated bank official.<sup>1705</sup> The E-plan account required no minimum opening balance. It only incentivised clients with interest for maintaining a minimum balance of at least R250, and a bonus interest for keeping more than this amount for over six months.<sup>1706</sup> The E-plan account has gradually been replaced by the Access Account and the collaborative efforts by South African banks to introduce Mzansi account brands. As discussed below,<sup>1707</sup> there is an increase in new entry-level accounts by the five main retail banks in South Africa and the newly introduced digital banks such as Tyme Bank and Bank Zero.<sup>1708</sup>

## 6.6.2 Mzansi Accounts

The four main South African commercial banks together with the Post Office collectively introduced the Mzansi account in 2004.<sup>1709</sup> They developed this account in response to the

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<sup>1702</sup> See also Porteous and Hazelhurst *Banking on Change* (2004) 46-49. See the summary of Standard Bank director of mass-market as a case study in this work. See also Lobenhofer, Bredenkamp and Stegman “Standard Bank of South Africa’s E Plan: Harnessing ATM Technology to Expand Banking Services” (2003) <https://communitycapital.unc.edu/wp-content/uploads/sites/340/2003/07/StandardBankof-SAE-Plan.pdf> (accessed: 2022-02-03) 15; Porteous “Low-balance Bank Accounts - Part 2: Must Banks Collaborate to Succeed?” 2015 9 *Journal of Payments Strategy & Systems* 311 312.

<sup>1703</sup> Standard Bank “E Plan Terms and Conditions” (Nd) [https://www.standardbank.co.za/secure/applications/wcf/eplan\\_tc.pdf](https://www.standardbank.co.za/secure/applications/wcf/eplan_tc.pdf) (accessed: 2022-02-03) (STD Bank E-Pan T&Cs) par 3.1. See also Paulson and McAndrews “Financial Services for the Urban Poor South Africa’s E Plan” (1999) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604910](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=604910) (accessed: 2022-3-03). The account also provides for stop card that freezes the account when inserted in any ATM to protect the account in case the ATM card is lost or stolen. Other features of the E-plan include requirements of R50,00 initial deposit and low monthly fees of R5.50.

<sup>1704</sup> STD Bank E-Pan T&Cs par 3.2. See also Freund and Weil “A New Approach to Banking the Unbanked” 1999 116 *Banking LJ* 271 275.

<sup>1705</sup> See Porteous and Hazelhurst *Banking on Change* (2004) 46-49.

<sup>1706</sup> STD Bank E-Pan T&Cs pars 5.2 and 5.3. See also Paulson and McAndrews “South Africa’s E Plan” (1999).

<sup>1707</sup> See Ch 6.7.3 below.

<sup>1708</sup> Visits Bank Zero at <https://www.bankzero.co.za/> (accessed: 2022-02-04). Bank Zero is not a commercial bank but a mutual bank and is, therefore, excluded from the discussion.

<sup>1709</sup> See Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009). See also CGAP *I-SIP South Africa* (2012) 17. The four main commercial banks as at 2004 were Absa, Nedbank, First National, and Standard Bank. It is recorded that Capitec Bank and Teba Bank were also invited to take part in the collaborative efforts to roll out the account but decided not to cooperate. See further Makhanya, Nhundu and Guma “Research on Competition and



voluntary commitment to provide access to products in the FS Charter.<sup>1710</sup> To avoid contravening competition law,<sup>1711</sup> banks did not agree on specific pricing or design features for this account but rather on general principles upon which these features could be based.<sup>1712</sup> A Mzansi account is a transactional bank account that provides much lower product standards compared to other equivalent bank accounts. It has been identified as “a no-frills, low-cost version of an ordinary retail account”.<sup>1713</sup> The following features were unique to the Mzansi brand of BBAs across banks and were mainly driven by Exemption 17. The account was made available for everyone without proof of income.<sup>1714</sup> There was no monthly fee. Minimum opening and ongoing balances varied between zero and R50.<sup>1715</sup> The account set a ceiling on the balance that could be held in the account at any one time. Banks agreed on a balance of R1 500.<sup>1716</sup> The account also allowed for unlimited monthly cash deposits, but only one was free.<sup>1717</sup> Banks did not require customers to have a minimum income and attracted no monthly account maintenance fee.<sup>1718</sup> The account did not provide for overdraft facilities.<sup>1719</sup> The

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Regulation: Competition, Barriers to Entry and Inclusive Growth: Retail Banking - Capitec Case Study” (2015) <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/58905653197aea6ab40b00ce/1485854300736/Barriers%2Bto%2Bentry%2B-%2Bretail%2Bbanking%2Bbanking%2B-%2BFinal%2B031215.pdf> (accessed: 2022-02-09) 30 and Ismail and Masinge “Mobile Banking: Innovation for the Poor” 2012 4 *African Journal of Science, Technology, Innovation and Development* 98 105.

<sup>1710</sup> See Ch 6.2.1 for a discussion of the FS Charter. See also Maumbe “Digital Financial Service Delivery to Poor Communities in South Africa: A Preliminary Assessment” 2006 2 *International Review of Business Research Papers* 72 75; Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 3; and Porteous 2015 *Journal of Payments Strategy & Systems* 312.

<sup>1711</sup> See Ch 6.5 above.

<sup>1712</sup> Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 26. See also The National Treasury and the AFI “South Africa: The Mzansi Story and Beyond” (2014) 4-5; World Bank “Effective FI in SA” (Nd) 59.

<sup>1713</sup> Coetzer and Pascarel “Standard Bank’s Inclusive Banking Model - An Overview” (2012) *A BAD Pathfinder Case Study* [https://www.b4dpathfinder.org/documents/standard\\_bank\\_inclusive\\_b\\_banking\\_20120921.pdf](https://www.b4dpathfinder.org/documents/standard_bank_inclusive_b_banking_20120921.pdf) (accessed: 2022-02-09) 7.

<sup>1714</sup> National Treasury Draft FI Policy (2020) 30.

<sup>1715</sup> Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 26.

<sup>1716</sup> Fischer-French “Mzansi Accounts Reach Dead End” (2012-02-17) *Mail & Guardian* <https://mg.co.za/article/2012-02-17-mzansi-accounts-reach-dead-end/#:~:text=The%20big%20banks%20in%20South,death%20of%20the%20Mzansi%20account> (accessed: 2022-03-04). Only the Postbank set the ceiling at R25 000 in line with the maximum set by the Exemption 17.

<sup>1717</sup> Stein *et al* in Fardoust *et al* (eds) *Postcrisis Growth and Development* (2011) 466.

<sup>1718</sup> Anon “Nedbank Mzansi Account” (Nd) <http://www.whichwaytopay.co.za/current-account-detail.asp?Product=Nedbank-Mzansi-Account&ID=1> (accessed: 2022-02-07).

<sup>1719</sup> Dafe “The Potential for Pro-Market Activism for Finance in Africa: A Political Economic Perspective” in Beck and Maimbo (eds) *Financial Sector Development in Africa: Opportunities and Challenges* (2013) 190. See also Napier “Including Africa - Beyond Microfinance” (2011) [https://static1.squarespace.com/static/54d620fce4b049bf4cd5be9b/t/55240e8ae4b0fef011e6d972/1428426378974/Including+Africa\\_2.pdf](https://static1.squarespace.com/static/54d620fce4b049bf4cd5be9b/t/55240e8ae4b0fef011e6d972/1428426378974/Including+Africa_2.pdf) (accessed: 2022-02-08) 17; Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 61.

Mzansi account was a major success in its early years of roll-out. It has, however, since declined and many accounts remain dormant.<sup>1720</sup>

A number of factors contributed to the decline of Mzansi-branded accounts. One major reason for its decline was the “one-size-fits-all approach” adopted in Exemption 17.<sup>1721</sup> Lack of an effective awareness campaign about the account, including knowledge of the eligibility and fees is another factor.<sup>1722</sup> Due to limited product standards, it also did not allow banks to cross-sell its products with similar conventional features such as debit orders, savings, and credit facilities across different sectors of the community.<sup>1723</sup> Banks also did not restrict access to Mzansi accounts to the target low-income market and it was therefore accessible to persons with existing accounts and higher incomes.<sup>1724</sup> However, the account was tailored for the low-income and with minimal products compared to its equivalents. It was established that the account was largely used to receive salaries or social grants and attracted little transactional activity. The account also carried a stigma and was perceived as the “‘poor’ man’s bank account” due to specific limits that positioned it separately from other bank accounts. There were also no measures which allowed customers to migrate to better products in the account or other conventional accounts.<sup>1725</sup> As a result of the introduction of the mandatory use of SASSA payment cards and the individual initiatives by banks such as Capitec, other banks stopped advertising their Mzansi accounts.<sup>1726</sup> All this added to an escalating dormancy rate of the accounts<sup>1727</sup> and moved banks to introduce various BBAs that could migrate customers

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<sup>1720</sup> Donnelly “No Interest in ‘Poor Man’s Account’” (2012-11-09) *Mail & Guardian* <https://mg.co.za/article/2012-11-09-no-interest-in-poor-mans-account/> (accessed: 2022-03-07).

<sup>1721</sup> National Treasury Draft FI Policy (2020) 31.

<sup>1722</sup> Lefifi “Flawed Mzansi Loses Its Appeal” (2011-10-02) *Timeslive* <https://www.timeslive.co.za/sunday-times/lifestyle/2011-10-02-flawed-mzansi-loses-its-appeal/> (accessed: 2022-02-09).

<sup>1723</sup> Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 80. See also Fischer-French (2012-02-17) *Mail & Guardian*.

<sup>1724</sup> De Koker 2009 *JMLC* 333.

<sup>1725</sup> The National Treasury and the AFI “South Africa: The Mzansi Story and Beyond” (2014) 08. See also Fischer-French (2012-02-17) *Mail & Guardian*; Lefifi (2011-10-02) *Timeslive*; Shipalana “Digitising Financial Services” (2019) *South African Institute of International Affairs Occasional Paper* 301 50; World Bank “Effective FI in SA” (Nd) 61. See Ch 6.6.4.2 below on the issue of migration of customers to better products or accounts.

<sup>1726</sup> Centre for Inclusive Banking in Africa “From Microfinance to Financial Inclusion” (2013) *The Microfinance Review* [https://www.up.ac.za/media/shared/Legacy/sitefiles/file/2013microfinance\\_review20140422final.pdf](https://www.up.ac.za/media/shared/Legacy/sitefiles/file/2013microfinance_review20140422final.pdf) (accessed: 2022-02-09) 10. See also World Bank “Effective FI in SA” (Nd) 60.

<sup>1727</sup> On various reasons that contributed to the dormancy of the account, see Villasenor *et al* *The 2015 Brookings Financial and Digital Inclusion* (2015) 111 and Kostov *et al* 2012 *European Journal of Development Research* 268.

to better products and provide improved functionalities at lower prices. Banks' individual low-cost entry-level accounts introduced the required competition that marked the end of the Mzansi account.<sup>1728</sup>

### 6.6.3 Current Basic Bank Accounts

South African banks have introduced a number of own-branded entry-level bank accounts that differ in form, functionalities, and fees. These accounts, as Fischer-French correctly observes, "are in essence a maturing of the Mzansi bank account".<sup>1729</sup> Unlike many conventional accounts discussed above,<sup>1730</sup> the last few years have also seen the introduction of new digital banks that have focused on low-income customers by introducing savings and transaction accounts. There are also a number of entry-level accounts that have been discontinued, rebranded, or amalgamated into new accounts such as the Absa "Access Account", Nedbank's "Ke Yona", and FNB's "EasyPlan".<sup>1731</sup> Many of them share similar features including administration fees. From an analysis of various brands of bank account that provide access to the low-income society, save for the identification and verification requirements, they have no minimum eligibility criteria such as proof of income. Diagram CH 6B below outlines various entry-level bank accounts with basic features from South African banks.

**DIAGRAM CH 6B: CURRENT BASIC BANK ACCOUNTS TERMS AND CONDITIONS<sup>1732</sup>**

Bank Name	Account Type	Income Bracket Eligibility	Minimum Opening/Account Balance	Minimum Monthly Fees
Absa	(i) Transact Account <sup>1733</sup>	None	R20,00	R4,90

<sup>1728</sup> Lefifi (2011-10-02) *Timeslive*.

<sup>1729</sup> Fischer-French (2012-02-17) *Mail & Guardian*.

<sup>1730</sup> See Ch 6.4.1 above.

<sup>1731</sup> Standard Bank Mzansi Blue Account and E-Plan, eg, were amalgamated into the Access Account which has since been discontinued. See Fischer-French (2012-02-17) *Mail & Guardian*.

<sup>1732</sup> On a number of entry-level accounts offered by banks in South Africa see Anon "The Cheapest Bank Accounts in South Africa in 2021 – Withdrawals vs Deposits vs Monthly Fees" (2021-06-20) *BusinessTech* <https://businesstech.co.za/news/banking/498691/the-cheapest-bank-accounts-in-south-africa-in-2021-withdrawals-vs-deposits-vs-monthly-fees/> (accessed: 2022-02-04).

<sup>1733</sup> In addition to this account, Absa offers the "MegaU Account" with zero monthly fees, no minimum monthly income requirements for targeted minors from 16-20 years of age; student accounts with similar features available for both undergraduate and postgraduate students; and a

Bank Name	Account Type	Income Bracket Eligibility	Minimum Opening/Account Balance	Minimum Monthly Fees
	(ii) Flexi Account	R3000 (recommended minimum)	R50,00	R30,00
<b>First National Bank</b> <sup>1734</sup>	(i) Easy Smart Account <sup>1735</sup>	R0-179 999 (annual income)	Information not available on the bank's website	R59,00
	(ii) Easy Pay As You Use (PAYU)	R0-179 999 (annual income)	Information not available on the bank's website	R4,95
<b>Nedbank</b> <sup>1736</sup>	Pay-as-you-use cheque account	None	None	None
<b>Standard Bank</b> <sup>1737</sup>	(i) MyMo Account	None	None	R4,95
	(ii) MyMo Plus Account	None	None	R110,00
	(iii) Pure Save Account	None	R0	R0
<b>Capitec Bank</b>	Global One <sup>1738</sup>	Information not available on the bank's website	R25,00	R5,00

<sup>1734</sup> "Prosperity Account" for 55 years or older with a minimum balance of R15 000. See <https://www.absa.co.za/personal/bank/youth-student-banking/student-account/> (accessed: 2022-02-03).

<sup>1734</sup> First National Bank "Easy Account" (Nd) [https://www.fnb.co.za/savings-account/easy-account.html?gclid=Cj0KCQiAuvOPBhDXARIsAKzLQ8EonK8jQX-R13tufNiDRDytmgUZZ6Fd-BtgJAuyYyTelcJTCee6V-UaAquAEALw\\_wcB&qclsrc=aw.ds](https://www.fnb.co.za/savings-account/easy-account.html?gclid=Cj0KCQiAuvOPBhDXARIsAKzLQ8EonK8jQX-R13tufNiDRDytmgUZZ6Fd-BtgJAuyYyTelcJTCee6V-UaAquAEALw_wcB&qclsrc=aw.ds) (accessed: 2022-02-04). Like Absa, FNB offers other targeted bank accounts, particularly to the youth. These include the FNBy Accounts for children under 18 with zero monthly services fee.

<sup>1735</sup> See Ntsoane "FNB Easy Account Review 2022" (Nd) *Rateweb* <https://www.rateweb.co.za/reviews/fnb-easy-account-review/> (accessed: 2022-02-04).

<sup>1736</sup> Nedbank also provides a number of targeted accounts that may be called BBAs. This includes "NedBank4me" for children under 16 years of age with zero monthly fees, and "MobiMoney", a mobile phone account with zero monthly fees.

<sup>1737</sup> Standard Bank also provides other similar accounts that specifically target customers within a particular age range. See, eg, "(Sum)1 Banking Account" with no monthly fee and minimum income requirements available to customers under the age of 16. See further Standard Bank "Transactions Terms and Conditions" (Nd) [https://www.standardbank.co.za/static\\_file/South%20Africa/PDF/Personal%20Ts%20and%20Cs/Transactional\\_Products\\_terms\\_and\\_conditions.pdf](https://www.standardbank.co.za/static_file/South%20Africa/PDF/Personal%20Ts%20and%20Cs/Transactional_Products_terms_and_conditions.pdf) (accessed: 2022-04-04) par 11.2.

<sup>1738</sup> Capitec Bank <https://www.capitecbank.co.za/global-one/save/transaction-savings-account/?gclid=Cj0KCQiAuvOPBhDXARIsAKzLQ8Go9SgKLyjAbezaBhQ0FWDqhz1TADGczN-OezNPUYGg6>

<b>Bank Name</b>	<b>Account Type</b>	<b>Income Bracket Eligibility</b>	<b>Minimum Opening/Account Balance</b>	<b>Minimum Monthly Fees</b>
<b>Tyme Bank</b>	Everyday Account	None	None	None
<b>Bidvest Bank</b>	<i>Grow Account; Pay-as-you transact</i> <sup>1739</sup>	None	R50,00	R6,00
<b>Old Mutual</b>	Money Account	None	R25,00	R4,95

## 6.6.4 Improved Account Features and Conditions

### 6.6.4.1 Additional Features and Cross-selling

From the above analysis of various bank accounts with basic features, a key component of these accounts is the regulatory and financial sector's effort to lower eligibility criteria, prices, and fees. They have addressed what Kempson and Whyley identified as "price exclusion", and do not deal with "condition exclusion" and "marketing exclusion".<sup>1740</sup> As indicated, BBAs such as Mzansi accounts are traditionally transactional accounts that allow customers to deposit and withdraw money on demand. The stigma attached to these accounts and the dormancy rate of the Mzansi account are attributed to a lack of cross-selling of products, non-availability of migration to better products, limits on key features such as daily withdrawal limits, maximum deposits and fees, and a lack of awareness of and education on these accounts.<sup>1741</sup> A number of private bank practices and regulations regarding BBAs provide possible ways to address these shortcomings.

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[1kK52SluEaAgb9EALw\\_wcB&gclsrc=aw.ds](https://www.business-tech.co.za/news/banking/545752/here-are-all-your-banking-fees-for-2022/) (accessed: 2022-02-04). See also Anon "Here Are All Your Banking Fees for 2022" (12 December 2021) *BusinessTech* <https://business-tech.co.za/news/banking/545752/here-are-all-your-banking-fees-for-2022/> (accessed: 2022-02-04). See further Makhaya and Nhundu "Research on Competition and Regulation" (2015) 111 on the competitiveness of Capitec Global One account with similar accounts from other banks.

<sup>1739</sup> Fees were effective from 01 July 2021. See Bidvest Bank "Fees and Rates Schedule" (Nd) <https://www.bidvestbank.co.za/personal/bidvest-bank-grow-account#fee-summary> (accessed: 2022-02-04).

<sup>1740</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 41. See the discussion of different types of exclusion in Ch 2.4 above.

<sup>1741</sup> FS Code par 3.5.1. See also Donnelly (2012-11-09) *Mail & Guardian* and the National Treasury Draft FI Policy (2020) 31.

With regard to additional features and the cross-selling of products, a number of banks provide additional features such as savings which allow for the accumulation of interest. For instance, the FNB Savings Account is available to individuals who already have an Easy Account.<sup>1742</sup> The account includes a saving account as a “free optional savings account” with competitive rates of interest.<sup>1743</sup> Bank accounts from a number of banks follow a model similar to the Standard Bank’s “E-Plan” by including different additional packages in a single account.<sup>1744</sup> Standard Bank’s “Pure Save” Account follows its counterpart by providing transactional day-to-day accounts while allowing clients to earn interest on their savings.<sup>1745</sup> Tyme Bank has a “GoalSave” product that is linked to the “Everyday Account” and allows for saving money and earning interest on a positive balance.<sup>1746</sup> Similarly, the Old Mutual’s “Money Account” offers customers two accounts in one: a “SWIPE Account” and a “SAVE Account”.<sup>1747</sup> Bidvest Bank’s “Grow Account” offers a day-to-day transactional account, a saving account with the potential to earn interest on a positive balance, and an EasyEquities account.<sup>1748</sup> Capitec Bank’s “Global One” has gone further and includes various types of saving options, insurance, and credit facilities.<sup>1749</sup> The Absa “Flexi Account” also allows account holders to access an ATM instant

<sup>1742</sup> See FNB “Saving Account” (Nd) <https://www.fnb.co.za/invest/linked-savings-account.html> (accessed: 2022-02-10). According to FNB, this savings account “is exclusively available to individual cheque, Easy and FNBy Transactional account clients”. See also Ntsoane “FNB Easy Account Review 2022” (Nd) *Rateweb*.

<sup>1743</sup> The rates begin with a nominal per annum rate of 2.80 percent from R1.00 to 3.55 for savings of over R100 000.

<sup>1744</sup> See Ch 6.7.1 above for the discussion of the E Plan.

<sup>1745</sup> Standard Bank “PureSave Account” (Nd) [https://www.standardbank.co.za/southafrica/personal/products-and-services/grow-your-money/savings-and-investment/our-accounts/puresave-savings-account?cid=WPS\\_NY8jG&gclid=Cj0KCCQiAjJOQBhCkARIsAEKMT01PpICa00tyrjW2\\_R5I3TtSZESTpEvzsmWEFML\\_HInV0QC14w12q4oaAgR6EALw\\_wcB#](https://www.standardbank.co.za/southafrica/personal/products-and-services/grow-your-money/savings-and-investment/our-accounts/puresave-savings-account?cid=WPS_NY8jG&gclid=Cj0KCCQiAjJOQBhCkARIsAEKMT01PpICa00tyrjW2_R5I3TtSZESTpEvzsmWEFML_HInV0QC14w12q4oaAgR6EALw_wcB#) (accessed: 2022-2-10). The interest runs from 2.7 to 3.0%.

<sup>1746</sup> Tyme Bank “GoalSave” (Nd) <https://www.tyembank.co.za/save-earn/goal-save/#benefits> (accessed: 2022-02-10).

<sup>1747</sup> Old Mutual “Money Account” (Nd) [https://www.oldmutual.co.za/personal/solutions/bank-and-borrow/money-account/?utm\\_source=google&utm\\_medium=cpc&utm\\_campaign=OMF\\_Money\\_Account\\_Search\\_FEB2021\\_CC10058374&utm\\_content=ad1&gclid=Cj0KCCQiAr5iQBhCsARIsAPcwROOXLKrghZ\\_Qj6TpXNpXVy0F1mCeNi28WI24V4gIxlJLqC78F4F7NKIaAjzgEALw\\_wcB&gclsrc=aw.ds](https://www.oldmutual.co.za/personal/solutions/bank-and-borrow/money-account/?utm_source=google&utm_medium=cpc&utm_campaign=OMF_Money_Account_Search_FEB2021_CC10058374&utm_content=ad1&gclid=Cj0KCCQiAr5iQBhCsARIsAPcwROOXLKrghZ_Qj6TpXNpXVy0F1mCeNi28WI24V4gIxlJLqC78F4F7NKIaAjzgEALw_wcB&gclsrc=aw.ds) (accessed: 2022-02-11).

<sup>1748</sup> Bidvest Bank “Grow Account” (Nd) <https://www.bidvestbank.co.za/personal/bidvest-bank-grow-account#overview> (accessed: 2022-02-10). The “EasyEquities Account” is accessible for trading in shares.

<sup>1749</sup> The savings options are /transactional savings (with 2.75% interest per year), flexible savings (with 2.75% interest per year on daily balances and a client chooses the deposit amount and the frequency of the deposits), fixed-term savings plan (either with single or multiple deposits and a client earns 3.85 to 8.55% nominal interest), and a tax-free savings account. See Makhanya *et al* “Research on Competition and Regulation” (2015) 14; Shipalana “Digitising Financial Services” (2019) *South African Institute of International Affairs Occasional Paper* 301 15.

loan subject to credit qualification assessment.<sup>1750</sup> This cross-selling of different products, either within the same account or linked to other products, eradicates the “poor-man’s-account” stigma attached to the Mzansi account while also making these BBAs profitable for banks.<sup>1751</sup> It may also limit the constant withdrawal of the entire balance in these accounts leaving them dormant.

#### 6.6.4.2 Upgrading

One of South African banks’ major concerns regarding Mzansi accounts was the difficulty of upgrading or migrating the account holders to regular bank accounts that are profitable for the banks.<sup>1752</sup> An introduction of an account upgrading that allows for upgrading of entry-level bank account clients to more advanced accounts can also help address the poor man’s accounts stigma attached to BBAs. Chris *et al*’s view is that limited-purpose instruments “should be deployed in such a way that they can more easily be converted into mainstream accounts”.<sup>1753</sup> There is also no regulation for the migration or upgrading of bank accounts in South Africa. The UK BBA Agreement, for instance, specifically provides for the upgrading of bank accounts to full-service accounts.<sup>1754</sup> A bank may review its portfolio of BBAs periodically and determine whether to migrate a customer to a current account. It may decide to migrate the customer by considering the eligibility criteria for an improved account, the customer’s financial circumstances, and the pattern of use on the account.<sup>1755</sup> The bank must give the customer at least two months’ notice and explain its reasons for the migration.<sup>1756</sup> Banks have

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<sup>1750</sup> FNB “Felix Account” (Nd) <https://www.absa.co.za/personal/bank/an-account/flexi-account/> (accessed: 2022-03-10). The maximum loan available is R8 000.

<sup>1751</sup> See Fischer-French (2012-02-17) *Mail & Guardian* quoting Lawrence Twigg, the managing executive of entry-level and inclusive banking at Absa, who sees cross-selling as an opportunity to roll out full financial access while also remaining profitable for the banks. See also Ismail, Kleyn and Ansell *New Markets, New Mindsets: Creating Wealth with South Africa’s Low-income Communities Through Partnership and Innovation* (2012) 224 who observe that Mzansi account customers did not migrate upwards to use other banking services.

<sup>1752</sup> World Bank *Banking the Poor: Measuring Banking Access* (2009) 49.

<sup>1753</sup> Chris, Porteous and Rotman “Social Cash Transfers and Financial Inclusion: Evidence from Four Countries” (2012) *CGAP Focus Note 77* <https://www.cgap.org/sites/default/files/Focus-Note-Social-Cash-Transfers-and-Financial-Inclusion-Evidence-from-Four-Countries-Feb-2012.pdf> (accessed: 2022-02-10) 7.

<sup>1754</sup> See the discussion of the UK “BBA Agreement” (2014) in Ch 6.4.2 above. See also HM Treasury “Basic Bank Account: 2019-2020” (2021) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/949475/Basic\\_bank\\_account\\_report\\_003\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949475/Basic_bank_account_report_003_.pdf) (accessed: 2022-02-10) par 2.3 (HM Treasury BBA (2021)).

<sup>1755</sup> UK “BBA Agreement” (2014). See also HM Treasury BBA (2021) par 2.3.

<sup>1756</sup> UK “BBA Agreement” (2014). See also HM Treasury BBA (2021) par 2.3.

followed the BBA Agreement and published clients' eligibility to upgrade their BBAs to current accounts.<sup>1757</sup> The India's RBI BSBDA Circular does not provide for the upgrading of BBAs. Nonetheless, some banks in India provide conditions for upgrading clients to current accounts. For instance, the Housing Development Finance Corporation (HDFC) Bank may convert a BBA account to a regular saving account if it no longer meets the minimum monetary and deposit limits.<sup>1758</sup> Likewise, there is no regulation for upgrading of BBAs in South Africa.<sup>1759</sup> South African banks are, however, not indifferent to the idea of upgrading or migrating clients to better and more advanced accounts. For instance, full- or part-time tertiary institution students between the ages of 16 and 24 years were allowed to open a "Student Achiever" Account with Standard Bank.<sup>1760</sup> It is the policy of the bank to contact holders of these accounts about the option of switching them to an appropriate bank account if they no longer meet the criteria for this account or are earning a salary. A "Professional" Banking Account is available to young professionals below the age of 30.<sup>1761</sup> Standard Bank may automatically migrate the account holder if they are unable to contact him or her when he or she turns 30 years old.

#### **6.6.4.3 Marketing and Awareness**

Lack of knowledge or awareness of BBAs has also been identified as an additional challenge.<sup>1762</sup> There is a concern about the low level of awareness due to a lack of proper education and appropriate marketing of these products.<sup>1763</sup> The collective approach of banks

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<sup>1757</sup> See, eg, HSBC Basic Bank Account that publicises that BBA account holders can upgrade to an account that offers lending subject to checks on eligibility <https://www.hsbc.co.uk/current-accounts/products/basic-bank-account/> (accessed: 2022-02-11).

<sup>1758</sup> HDFC Bank "What is Basic Savings Bank Deposit Account? Everything You Need to Know!" (Nd) <https://www.hdfcbank.com/personal/resources/learning-centre/save/a-complet-guide-on-bsbda-account> (accessed: 2022-02-10).

<sup>1759</sup> Exemption 17 requirements to apply full KYC to accounts that exceed the minimum deposit required and where a client holds more than one Mzansi type of account, in effect upgrade the clients to a normal KYC requirements for the purposes of AML/CFT regulations.

<sup>1760</sup> Standard Bank "Student Achiever Account" (Nd) <https://www.standardbank.co.za/southafrica/personal/products-and-services/bank-with-us/bank-accounts/our-accounts> (accessed: 2022-02-12). The account is discontinued from 2022.

<sup>1761</sup> Standard Bank "Student Achiever Account" (Nd).

<sup>1762</sup> Anderloni and Carluccio in Anderloni *et al* (eds) *New Frontiers in Banking Services* (2007) 8. See also Falkena "Report on the awareness of various features of banks accounts"; Kostov *et al* 2012 *European Journal of Development Research* 407; Hussain, Yahya and Waqas "Does Strong Governance Stimulate the Effect of Economic Freedom and Financial Literacy on Financial Inclusion? A Cross-Country Evidence" 2021 7 *Future Business Journal* 1 1.

<sup>1763</sup> Kempson and Whyley *Kept Out or Opted Out?* (1999) 32.



to marketing Mzansi accounts as their low-level bank accounts was a key element in its success as it created the necessary awareness of these accounts.<sup>1764</sup> A gradual discontinuation of the Mzansi account marketing has also contributed to its decline.

Save for the general measures to promote consumer education and financial literacy in the FSRA, the NCA, and the draft CoFI Bill, there is currently no specific obligation on banks to promote the awareness of BBAs.<sup>1765</sup> In terms of the FS Charter banks committed to investing a portion of their profits in consumer education programmes “that are aimed at empowering consumers with the knowledge to enable them to make more informed decisions about their finances and lifestyles”.<sup>1766</sup> There are lessons from other countries on how to implement self-regulatory and legislative measures to raise the awareness and financial literacy specifically for BBAs. Under the ABA *Code of Banking Practice*, Australian banks commit to raising awareness and providing easily accessible information about basic, low, or no-fee accounts.<sup>1767</sup> The BASA *Code of Banking Practice* commits banks to provide “advice” generally about the opening of accounts, including the type of account, how and by whom the account may be operated, any minimum balance requirements, and the charges payable if the balance falls below the prescribed minimum.<sup>1768</sup> Both the UK and the Irish Payment Accounts Regulations place an obligation on banks to provide information regarding the services, features, and fees of the payment account with basic features.<sup>1769</sup> The UK’s Money and Pensions Advice Service<sup>1770</sup> is specifically responsible for raising awareness among consumers regarding this account.<sup>1771</sup> India’s RBI also promotes the awareness of BBAs. The India RBI BSBDA Circular on this account emphasises the importance of awareness and publicity. The RBI No-Frill Account Circular 2005 specifically advised Indian banks to give wide publicity to the facility of

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<sup>1764</sup> Bankable Frontier Association and FinMark Trust “The Mzansi Bank Account” (2009) 82. See also CGAP *I-SIP South Africa* (2012) 17; Coetzer and Pascarel (2012) *A B4D Pathfinder Case Study* 7; Centre for Inclusive Banking in Africa (2013) *The Microfinance Review* 109.

<sup>1765</sup> See the discussion of this legislation in Ch 6.3 above. The general discussion of financial literacy falls outside the scope of this research.

<sup>1766</sup> FS Charter par 8.4. However, this commitment was made to apply for the date of the FS Charter to the deadline of 2008.

<sup>1767</sup> See Ch 16 pars 54-56.

<sup>1768</sup> See clauses 7.1.1 and 7.1.4 of the BASA *Code of Banking Practice* (2012).

<sup>1769</sup> Art 27(1) and (2) of the UK “Payment Accounts Regulations” (2015), and art 20(1) of the Irish Payment Accounts Regulations (2016).

<sup>1770</sup> Formerly Money Service Advice, is a body sponsored by the UK government to help improve a person’s financial wellbeing and to ensure access to high-quality money services. Visit <https://moneyandpensionsservice.org.uk/> (accessed: 2022-02-12).

<sup>1771</sup> Art 27(1).

a no-frills account including on their websites by transparently indicating the facilities and charges.<sup>1772</sup> The current RBI Circular only requires each bank to frame a “board” on the approved policy/ operational guidelines on this account.<sup>1773</sup> These measures are significant in emphasising the relevant information and creating awareness of access to and the basic features of BBAs, in addition to general consumer protection regulations that emphasise financial literacy.

## **6.7 DISCUSSION, SUMMARY, AND CONCLUSION**

### **6.7.1 Conclusion and Findings**

The purpose of this chapter was to discuss the current policy and regulatory measures in South Africa that promote FI and access to financial services, particularly access to BBAs. The main question was whether South Africa has an effective and responsive regulatory framework to promote FI with a specific focus on the promotion of access to and the use of BBAs, and to determine whether policymakers and regulators should escalate the current framework to higher levels in terms of the RR theory and the PRS.<sup>1774</sup> In the myriad of relevant policies and regulatory instruments that directly or indirectly impact the promotion of FI, this chapter carefully selected specific policies and regulatory measures that serve either to promote FI or to support it within the internationally proposed I-SIP methodology as discussed in Chapter three.<sup>1775</sup> To achieve its main purpose, the chapter discussed the frameworks by focusing on four key areas. First, it aims to determine whether there are policy and regulatory frameworks in South Africa to promote FI and how the frameworks address the level of FI and the current status and patterns of FE identified in Chapter one.<sup>1776</sup> Second, it determines whether the available FI frameworks reinforce the policy objective of adopting FI in conjunction with other objectives to reinforce stability, integrity, and consumer protection in the financial sector. The third aim was to determine whether the current FI framework in South Africa promotes access to and the usage of BBAs. Lastly, it determined whether the framework provides for regulator mechanisms effectively to monitor and enforce the promotion of FI and access to BBA, including the relevant coordination and collaboration mechanisms between relevant regulatory bodies.

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<sup>1772</sup> See RBI “No-Frill Account Circular” (2005) par 3.

<sup>1773</sup> RBI “BBSDA Circular” (2019) par 8.

<sup>1774</sup> See the discussion of the RR theory and the pyramid in Ch 2.

<sup>1775</sup> See Ch 3.4.4 above.

<sup>1776</sup> See Ch 1.1.3 above.

The chapter has made a number of findings with regard to the policy and the regulatory framework for FI and access to BBAs in South Africa. It has also identified a number of gaps that may have a knock-on effect on the effectiveness and the responsiveness of the current policy and regulatory frameworks. A general observation from the discussion reveals that both the government and the private sector have adopted policy and regulatory measures to make financial products and services available to the majority of the population pre-and-post the democratic era. A further observation is that the current frameworks in South Africa paint a picture of promoting FI as a subset of various regulatory objectives such as transformation,<sup>1777</sup> general consumer protection measures,<sup>1778</sup> consumer credit,<sup>1779</sup> financial stability,<sup>1780</sup> and integrity,<sup>1781</sup> as well as ensuring a fair treatment of customers in the financial sector.<sup>1782</sup> In terms of the types of instrument and their enforcement in line with the RR theory, the PRS and the concomitant smart regulation, a general observation is that the regulatory framework for FI comprises general policy measures, self-regulation, enforced self-regulation, and a command and control regulation with punishment. It is made up of draft policies, voluntary charters, codes of practice, standards that are supported through legislative measures, and specifically legislative measures with enforcement mechanisms. Save for the FSRA and the Draft CoFI Bill that specifically promote FI, all the measures promote FI by identifying a specific type of product to which financial institutions are required to provide access.

This chapter has also established that South Africa lacks a national financial inclusion strategy (NFIS) developed in accordance with the international standards set by the AFI, the World Bank, and the G20 in the *NFIS Reference Framework* and the *NFIS Principles*.<sup>1783</sup> The development of the Draft FI Policy 2020 is a necessary step towards adopting an NFIS for South Africa that incorporate important pillars and the principles of an Inclusive and Comprehensive NFIS in terms of *NFIS Reference Framework*.<sup>1784</sup> Importantly, this FI policy

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<sup>1777</sup> See the discussion of the FS Charter and the FS Code in Chs 6.2.1 and 6.2.2 and the B-BBEE Act in Ch 6.3.1.3 above.

<sup>1778</sup> See the discussion of the CPA in Ch 6.3.1.5 above.

<sup>1779</sup> See Ch 6.3.1.5 for a discussion of the NCA.

<sup>1780</sup> See the discussion of the Banks Act in Ch 6.3.1.1 and the FSRA in Ch 6.3.1.6 above.

<sup>1781</sup> See the discussion of FICA in Ch 6.3.1.2 above.

<sup>1782</sup> See the discussion of the Draft CoFI Bills in Ch 6.3.2 above.

<sup>1783</sup> See Ch 4.2.6.1 - Ch 4.2.6.5 for a discussion of these international standards.

<sup>1784</sup> See Ch 6.2.4 for a discussion of the policy. See also Ch 4.2.6.2 on the Inclusive and Comprehensive NFIS. See further Recommendation 4C above in Ch 4.6.2 above.

framework specifically adopts the I-SIP methodology, and has committed to international FI policies, including the G20 FI principles.<sup>1785</sup> It has also identified key barriers including the lack of appropriate services and products that contribute to the “cash-in/cash-out” patterns, and the lack of knowledge about retail financial services.<sup>1786</sup> Although it proposes the developments of regulatory and supervisory measures to support FI, the Draft FI Policy does not specifically outline specific measures to improve knowledge and prevent frequent withdrawals of money from the accounts. These policy measures further have a limited focus in terms of the targeted community for FI. They focus specifically on extending access to financial services for small, medium, and micro-sized enterprise which may exclude the general members of the public. A further gap identified relates to the implementation measures that are limited solely to monitoring and evaluation. Although the Draft FI Policy proposes the establishment of the necessary institutional framework for its implementation, this must be established and must outline key implementation measures and targets to achieve its objectives. Therefore, once adopted, it must address these gaps which are also the essence of an Inclusive and Comprehensive NFIS.

This chapter has further identified a haphazard regulation of FI through both voluntary and enforced self-regulatory measures, as well as command-and-control legislative measures, and with reference to the key focus area of each regulation. The chapter has identified the BASA’s *Code of Banking Practice* as the current voluntary measure to promote FI in South Africa. It identified relevant commitments that banks have made to their customers including a commitment to provide “affordable and accessible basic banking services to all South Africans” with minimum requirements.<sup>1787</sup> This chapter has, however, also identified a number of gaps in this code which may affect its effectiveness in promoting FI and access to BBAs. Although it commits banks to provide retail financial products and services such as BBAs, it does not specify the minimum requirements and standards for these products and leaves it to the banks to set the conditions for these accounts. As a regulatory measure, the BASA *Code of Banking Practice* is a pure self-regulatory measure that serves as a guide and is not binding on the subscribing banks. Apart from the Ombudsman for Banking Services who can mediate and make binding recommendations in case of disputes between the customer and bank, the code makes no provision for a specific code compliance and enforcement bodies and specific

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<sup>1785</sup> See Ch 6.2.4 above.

<sup>1786</sup> See Ch 6.2.4 above.

<sup>1787</sup> See Ch 6.2.3 above.

enforcement measures similar to its counterparts in Australia, India, and the UK.<sup>1788</sup> Therefore, compliance with the commitments in this code depends on banks avoiding adverse publicity and the inherent reputational risks. As discussed above, these consequences do not always make voluntary codes effective in the absence of effective implementation and enforcement mechanisms.<sup>1789</sup>

The discussion of the FS Charter and the FS Code<sup>1790</sup> serves to illustrate the promotion of access to retail financial services from pure voluntary regulation to “enforced-self regulation” as outlined in the RR theory and the PRS.<sup>1791</sup> The FS Charter characterises a “pre-emptive self-regulatory” measures developed in the face of the threat of concrete government regulation.<sup>1792</sup> In addition, for banks committing to provide first-order retail financial services, such as savings accounts, the FS Charter also established the Financial Sector Charter Council (FSCC) as an independent body to implement and monitor progress and to ensure compliance. However, the FSCC relied on annual reports on the progress with implementing the FS Charter and their publication. When the B-BBEE Act was introduced and the Financial Sector Code (FS Code) was developed, the Act provided for the implementation of the code as a statutory obligation. In addition to reporting, this chapter has established that the B-BBEE Act applies charters and codes as instruments to promote access to retail financial products. The setting of principles such as “product access” and the requirements for financial institutions to provide access to financial products to meet the required targets, are steps in the right direction. But leaving the development of the products totally in the hands of these institutions without providing specific product standards may render the objectives of the code to achieve FI ineffective. In the absence of specifically identified minimum access standards to which financial institutions must conform or benchmark their own products above certain standards for approval by the FSTC as “Access Qualifying Products”, it remains questionable whether they have a clear guide on how to develop, brand, market, and sell these products as required in terms of the code. This chapter has further established that the B-BBEE Act enforces compliance with these instruments by adding the downgrading of B-BBEE levels and empowering the FSTC to publish the names of entities that do not comply with the FS Code

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<sup>1788</sup> See Ch 5.3 and Ch 5.4 above.

<sup>1789</sup> See Ch 5.4.1 above.

<sup>1790</sup> See Chs 6.2.1 and 6.2.2 above.

<sup>1791</sup> See Ch 3.24.1 and Ch 3.2.4 above.

<sup>1792</sup> See Ch 3.2.4.1(a) above for pre-emptive self-regulation. See Ch 6.2.1 and the possible introduction of the community reinvestment legislation.

and restrictions on certain economic activities.<sup>1793</sup> As indicated, however, there is still a decline in the offering of financial services.<sup>1794</sup>

The discussion of legislative measures in this chapter reveals that the Banks Act only regulates the registration of banks and certain consumer protection issues. This chapter has established that this Act does not specifically provide for the promotion of FI, and in particular, the right of access to BBAs as do its Canadian and French counterparts.<sup>1795</sup> It has also established that although the National Credit Act (NCA) does not regulate BBAs, the legislature is not indifferent to the provision of the right to apply for access for basic financial services.<sup>1796</sup> This chapter has also illustrate the need to balance access to financial services with other competing financial sector objectives. The *SA Taxi* and *Truworths Limited* cases specifically established the need to balance the right of access to credits with the NCA's consumer protection objective of preventing over-indebtedness and reckless credit-granting.<sup>1797</sup> The discussion of AML measures in terms of FICA has established that the RBA that is applied for customer due diligence measures may also be applied for a tiered KYC in relation to basic financial services that pose low risk of ML and TF. This chapter identified specific gaps in FICA that may affect its enforcement of AML/CFT measures and also negatively affect the promotion of FI. It has established that FICA does not refer to FI or the inclusion of the majority in the formal financial systems as one of its objectives. With specific measures to promote FI it has identified the need for the RBA provisions specifically to adopt a tiered KYC that provides for a risk-based assessment based on the comparison of the risk profiles of the low-risk and high-risk financial products. The provision of the FIC and other supervisory bodies that help to implement FICA and the relevant provisions for coordination and collaboration are steps in the right direction. Equally, its enforcement mechanisms such as on-site inspection, administrative sanctions, and penalties will improve its effectiveness. Nonetheless, this chapter has established that FICA does not specifically provide for the publication of transgressions as do other supervisory bodies.<sup>1798</sup>

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<sup>1793</sup> See Ch 6.2.2 and Ch 6.3.1.3 above.

<sup>1794</sup> See Ch 6.2.2 above.

<sup>1795</sup> See Ch 6.3.1.1. See also Ch 5.5.2.1 and Ch 5.5.2.2 above.

<sup>1796</sup> See Ch 6.3.1.4 above.

<sup>1797</sup> See Ch 6.3.1.4 above.

<sup>1798</sup> See Ch 6.3.1.2(b) above. For other supervisory bodies and their enforcement mechanisms, see Ch 5.4.4 and Ch 5.5.2.3.

The discussion highlights the importance of the FSRA and the proposed Conduct of Financial Institutions Act (the CoFI Bill), as the principal regulatory measures that specifically promote FI in South Africa.<sup>1799</sup> The introduction of the Twin-Peaks model that divides the regulatory bodies into the regulation of the safety and soundness of financial institutions, and their conduct has indicated the importance that the PA and the FSCA will have with a regulatory approach that focuses on regulatory objectives rather than the types of institution. Although the FSRA does not specifically stipulate how it will promote FI, the requirements for the FSCA to issue regulatory strategies and conduct standards in terms of section 57 are a move in the right direction, taking into account the evolving nature of financial products and services that may be suitable for poor and the low-income households.<sup>1800</sup> As the FSCA is required to review them frequently, this will allow it to update and adopt new provisions within the legislative purview of the FSRA, rather than being prescriptive on the specific financial products or services. The institutional setting in this Act is also welcomed as it assigns specific functions to the PA and the FSCA. Nonetheless, although it provides for coordination and cooperation between these and other supervisory bodies, this chapter has identified that the FSRA does not provide for coordination and cooperation between these bodies and the FSTC.<sup>1801</sup> It has further established that the FSRA does not include the B-BBEE Act as one of the “financial sector laws”. As required, collaboration and cooperation in terms of the FSRA is fostered with other bodies to “the extent appropriate”.<sup>1802</sup> It may be argued that to the extent that the B-BBEE Act play some role in promoting FI, it must also be included in the list of “financial sector laws” in Schedule 1 to the FSRA. Equally, section 76 of the FSRA must include the FSTC as another financial sector regulator that the PA and the FSCA must coordinate and with whom it is required to collaborate to achieve its principal objectives, including the promotion of FI. This chapter has also established that the FSRA does not provide for extensive measures to enforce compliance with its provisions. Save for monitoring the extent to which the financial system delivers fair and appropriate financial products and how these meet the needs and reasonable expectations of financial customers, and issuing directives to financial institutions, the FSRA relies on measures provided in the relevant financial sector laws to enforce its effectiveness. As the only legislative measure that currently makes specific provision for FI,

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<sup>1799</sup> See Ch 6.3.2 above.

<sup>1800</sup> See Ch 6.3.1.6(b) above.

<sup>1801</sup> See Ch 6.3.1.6(c) above.

<sup>1802</sup> See Ch 6.3.1.6(c) above.

the lack of effective enforcement measures may impact negatively on the effectiveness of the promotion of FI.

The proposed CoFI Bill and how it supplements the provisions of the FSRA and the objective of regulating financial market conduct is also commendable.<sup>1803</sup> A legislative reinforcement of the treating-customers-fairly principles and the requirements for the FSCA to develop conduct standards that include how financial institutions design, develop, or make material changes to financial products and services will go a long way to ensuring that the FSCA promote FI as part of these principles. It is also commended for reiterating the promotion of FI as an integral part of regulating conduct of financial institutions. Without the specific requirements for the FSCA to develop specific conduct standards for the design of products that are fair to the customer, the adoption of a “largely principle-based” approach to regulate the conduct of financial institutions may work against the promotion of FI, particularly as the general principles may not provide important measures that these institutions must adopt. However, the CoFI Bill, like the FSRA, will require the FSCA to adopt conduct standards that provide specific measures. It is clear from the newly developed *Conduct Standard for Banks* that they also provide for general principles for the design and development of financial products that take into account the needs of the low-income society into account. As the FSCA contemplates developing “products standards” that include transactional accounts, such measures must provide more details and guide financial institutions on how to develop and design financial products and services.

The discussion of the basic bank account (BBA) has identified certain features and terms and conditions attached to conventional accounts that may exclude the majority from accessing them, particularly the requirements of establishing the source of income from the formal economic sector, offering the accounts subject to customers’ monthly or annual income brackets, minimum opening deposit and account holding balances, and relatively high administration fees.<sup>1804</sup> As diagram CH6A illustrates,<sup>1805</sup> these features, terms, and conditions still apply to the majority of the accounts offered by banks in South Africa. It has also been established that the absence of specific regulation of key features of these accounts is a major challenge. Although Exemption 17 provided some guidance and necessary limitations for

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<sup>1803</sup> See Ch 6.3.2 above.

<sup>1804</sup> See Ch 6.4.1 above.

<sup>1805</sup> See Ch 6.4.1 for the diagram.



certain features of BBAs within a risk-based approach to ML and TF, this chapter has shown that certain of the BBA features in the Mzansi account, the UK BBA Agreement, India's BBSDA Circular, the EU PAD, and the tiered-based approach within the RBA to AML/CFT in FICA may still be useful in tailoring financial products. This will provide the necessary guidance on the specific features that must be included in the regulation of BBAs.<sup>1806</sup> Tailoring such accounts to the needs of the majority is not limited to the reduction of charges and the eligibility requirements as observed with current basic accounts in Diagram CH 6B.<sup>1807</sup> As discussed in this chapter, the inclusion of the requirement to cross-sell other products such as "free optional savings account" and optional overdraft facilities with competitive rates of interest and migration within the same accounts through the transaction and saving purses or outside the accounts to an improved account, must also be considered as important terms and conditions attached to these accounts.<sup>1808</sup> The standards for marketing and creating awareness as a means of addressing the decreasing use of financial services, and the frequent reduction in the cash-in/cash-out patterns in these accounts are equally important.<sup>1809</sup>

The study in this chapter in conjunction with the discussion in Chapter three above raises an important question as to how to make the promotion of FI and access to BBAs in South Africa effective and responsive through regulatory measures. As indicated, the regulatory framework for FI in South Africa comprises of pure voluntary self-regulation, enforced self-regulation, and command-and-control measures. An important determinant of whether to apply the RR theory and the PRS to the current FI framework in South Africa is to make the current measures "responsive" measured by how it develops new institutional methods to determine social needs, and how it devises sensible and feasible legal remedies that are also socially acceptable.<sup>1810</sup> This process will, therefore, require regulators (from government or industry) to escalate ineffective self-regulatory instruments first to self-enforced regulation, and then to command-and-control types of regulation with punishment where necessary. As this chapter has established, a number of current FI measures are still ineffective and the regulators will need to institute smart regulation to harness the strength of effective measures while introducing additional and complementary instruments to overcome the weaknesses in the ineffective measures. As discussed in Chapter three, the regulatory measures must further

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<sup>1806</sup> See Ch 6.4.2 above.

<sup>1807</sup> See Ch 6.3.3 for the diagram.

<sup>1808</sup> See Ch 6.6.4.1 - Ch 6.6.4.3 above.

<sup>1809</sup> See Ch 6.2.4 above.

<sup>1810</sup> See Ch 3.2.1 above for the discussion of responsive law.

adopt the I-SIP methodology which promotes FI by balancing it with other financial sector policy and regulatory objectives.<sup>1811</sup> The recommendations below provide for specific measures that must be implemented to address the gaps identified in this chapter and to strengthen the efficacy of current FI policy and regulatory measures in South Africa.

### 6.7.2 Recommendations (Recs)

This research makes the following recommendations to address the issues and gaps identified in the current FI policy and the regulatory frameworks in South Africa. The recommendations build on the discussion in Chapters two to five and the relevant recommendations made in those chapters on how the policy and regulatory frameworks can be developed to make them effective and responsive.

**Rec 6A** Building on recommendations in **Rec 3D** above,<sup>1812</sup> it is recommended that when adopting measures aimed at facilitating responses to socio-economic needs such as promoting FI, the South Africa regulators must determine how these measures will be responsive to and effective for their objectives by adopting the RR theory of responsive regulation and the PRS introduced in Ayres and Braithwaite's *Responsive Regulation*. Depending on the effectiveness of these measures in promoting FI, this will require them to escalate the current self-regulatory measures to either enforced self-regulation or command-and-control legislative measures with relevant punishments. As South Africa currently promotes FI through policy, self-regulation, enforced self-regulation, and legislative measures, the legislature must in addition adopt a smart regulation and redevelop and amend these measures where necessary to complement each other and to address each other's weaknesses.

**Rec 6B** This chapter makes the following recommendations in relation to FI policy and strategy in South Africa.

- (a) It is recommended that National Treasury formulate and redevelop the Draft FI Policy and adopt it as the country's National Financial Inclusion Strategies (NFIS) which implement the internationally recognised FI standards and

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<sup>1811</sup> See Ch 3.4.4 above.

<sup>1812</sup> See Ch 3.5.2 above.

principles proposed in the *NFIS Reference Framework* and the *NFIS Principles*.<sup>1813</sup>

- (b) The newly developed NFIS must, in addition to incorporating the NFIS Principles and the I-SIP Methodology, also:
- (i) redefine FI in South Africa and expand the current definition to include all the dimensions discussed in Chapter two above in accordance with the definition recommended in **Rec 2E** above.<sup>1814</sup>
  - (ii) expand the policy target from extending access to financial services for small, medium, and micro-sized enterprises to include the general poor and low-income members of the public as the main target of FI.
  - (iii) address the cash-in/cash-out problem and the lack of available, appropriate, and affordable financial products, including entry-level accounts with store-of-value aspects, by outlining specific basic financial products and services such as BBAs that the policy must encourage financial institutions to provide for low-income consumers. The NFIS must outline a key policy objective of the government to recognise access to an application for financial products and services from financial institutions as a right. It must also emphasise the need to cross-sell and migrate the accounts, and for specific marketing to create awareness as important policy objectives.<sup>1815</sup>

**Rec 6C** The following recommendations relate to the improvement and enforcement of the current purely voluntary *BASA Code of Banking Practice 2012* to address the gaps identified in this chapter.<sup>1816</sup> It is recommended that:

- (a) the Code incorporate FI as an additional objective in Clause 2.5 as follows:

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<sup>1813</sup> See Ch 4.2.4 and Ch 4.2.6 above.

<sup>1814</sup> See Ch 2.7.2 above.

<sup>1815</sup> See Ch 6.2.4 for this problem identified in the National Treasury Draft FI Policy (2020). See Rec 6J below for specific features of the BBAs.

<sup>1816</sup> See Ch 6.2.3 above.

## 2. Objectives

This Code has been developed to:

- 2.1.....
- 2.5 promote financial inclusion and access to basic financial products and services.

- (b) aligned with the recommended commitments by the banking associations in **Rec 5A** above,<sup>1817</sup> it is recommended that banks' commitment to provide access to banking services including basic banking services be expanded. It must also address the gap identified regarding the lack of specific standards and conditions for providing retail financial products and services such as BBAs. Banks must commit to provide such services and products based on the conduct and product standards developed from time to time by the FSCA in terms of the FSRA and the proposed Conduct of Financial Institutions Act, once promulgated, as recommended in **Rec 6J** below. Clause 5 of the BASA Code of Banking Practice 2012 must be revised as follows:<sup>1818</sup>

"We" refers to banks and "you" refers to the customer.

## 5. Access to Basic Bank Products and Services

- (1) We are committed to providing affordable and accessible basic banking products and services to all South Africans.
- (2) We will provide you with a basic bank[ing] account, if you meet our minimum requirements, and after conducting the eligibility assessments.
- (3) We are committed to creating platforms that raise awareness of these types of products and accounts and to give you the relevant information about the ease of access to these services and products.
- (4) We may refuse to open and allow access to financial services or products or close an existing account with you if:
  - (i) you do not satisfy the eligibility requirements in subclause 2 above;
  - (ii) opening an account or providing access would result in an infringement of the provisions on the prevention of money-laundering and the countering of terrorist financing in terms of the Financial Intelligence Centre Act (38 of 2001); or
  - (iii) there are reasonable grounds to believe that you will use such account for illegal or fraudulent purposes.
- (5) If any of the grounds for refusal or closure in subclause 4 are established, and a bank refuses to open a basic financial service or product, we commit to ensure that such bank will provide you with a written notice of refusal within a reasonable time.

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<sup>1817</sup> See Ch 5.6.2 above.

<sup>1818</sup> See Rec 6J below on the standards for basic financial products and services in the *Conduct Standards for Banks* and the proposed *Product Standards for Banks*.

- (6) We commit to provide basic financial products and services that adhere to standards, terms, and conditions published from time to time by the Financial Sector Conduct Authority in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct for Financial Institutions Act (.....).
- (c) to enhance the enforcement and compliance with the *BASA Code of Banking Practice* 2012, this research proposes the following measures that are aligned with the approval and enforcement measures adopted by the ASIC and proposed for the FSCA in terms of the FSRA below.<sup>1819</sup>
- (i) to comply with the recommended criteria for the approval of codes (see specific criteria recommended in **Rec 6L(b)** below) similar to those adopted by the ASIC guidelines for approval of codes, that the *BASA Code of Banking Practice* establish an independent body which is empowered to administer and enforce this Code and be named “Financial Inclusion Internal Compliance, Monitoring and Inspection Function” (FIICMIF). The FIICMIF must be established with powers and the enforcement functions similar to the Australian Banking Code Compliance Committee and the Banking Code Standard Boards of India and the UK (as recommended generally in **Rec 3C** and **Rec 5B** above).<sup>1820</sup>
- (ii) the *BASA Code of Banking Practice* must provide the FIICMIF with a choice and a combination of enforcement mechanisms applied in the Australian, Indian and the UK codes of banking practice,<sup>1821</sup> such as mystery shopping, incognito visits to the premises of the Code subscribing members, and periodic reporting of compliance that must be applied to monitor and evaluate compliance with the Code. The Code must require the regulatory body to publish details of the bank and its breach of the Code in its annual report or publicly censure the Code’s subscribers, as measures to name and shame banks that are not complying with the requirement of providing access to basic financial products and services, including BBAs, in exceptional circumstances only. The FIICMIF must impose harsher measures by taking into account the severity and the impact of the contravention, mitigating or corrective actions already

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<sup>1819</sup> See Rec 6L(b) below.

<sup>1820</sup> See Ch 5.4.3.1 to Ch 5.4.3.3 above.

<sup>1821</sup> See Ch 5.4.3.1 to Ch 5.4.3.3 above.

taken, the quantum of benefits or gain as a result of the contravention, and the financial or reputational impact on a particular subscribing bank and the entire banking or financial system.<sup>1822</sup>

**Rec 6D** Based on similar provisions in the NCA with regard to the right to apply for credit,<sup>1823</sup> a specific provisions must be inserted in the Banks Act to provide for the right of everyone to apply for basic banking products and services such as BBAs, similar to the Banks Acts of Canada and France.<sup>1824</sup> As this right is conditional on specific requirements that must be met before opening it such as the eligibility of a customer the Act must, in addition, indicate that the right is not to “require” the products and services from bank, but to “apply” to a bank to open such products and services with customers, subject to meeting the prescribed requirements. The specific provisions must further refer to the Conduct Standards for Banks and the proposed Product Standards for Banks in terms of the FSRA and the CoFI Bill, as recommended in **Rec 6J** in this research. The right should be inserted as follows:

**Right to apply for access, and to open and use basic banking products and services**

- (1) Every citizen has the right to apply for access to and to open and use basic banking products and services offered by banks regulated in terms of this Act.
- (2) Subject to subsections (4), nothing in this Act establishes a right of any person to require a bank to provide a basic banking service or product to that person.
- (3) A bank must create platforms that raise awareness of each type of banking products and service and give the relevant information about the ease of access to them, and offer them once they have conducted the eligibility assessments in accordance with the standards provided by the Financial Sector Conduct Authority in terms of the Financial Sector Regulations Act (9 of 2017).
- (4) A bank may only refuse a customer with a banking product or service if;
  - (i) the customer does not satisfy the eligibility requirements in subsection 3;
  - (ii) opening such banking service or product would result in an infringement of the provisions governing the prevention of money-laundering and the countering of terrorist financing in terms of the Financial Intelligence Centre Act (38 of 2001);  
or
  - (iii) there are reasonable grounds to believe that the customer will use such an account for illegal or fraudulent purposes.

**Rec 6E** The following recommendations relate to the improvements and amendments to the FICA to address the lack of FI and the inclusion of the majority into the formal

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<sup>1822</sup> See Ch 5.4.4 above for similar factors.

<sup>1823</sup> See Ch 6.3.1.4 above.

<sup>1824</sup> See Ch 5.5.2.1 and Ch 5.5.2.2 above.

financial systems as one of its objectives. It also addresses the gap identified with lack of specific publication of transgression as one of its administrative sanctions. It is recommended that:

(a) the following wording that seeks to establish access to formal financial sectors and the promotion of FI as an objective of FICA be added to the Preamble and section 42(2)(a), aligned with the recommendations in **Rec 4D(e)**.<sup>1825</sup>

(i) In the Preamble:

to provide for measures that prevent money-laundering and the financing of terrorism in line with the promotion of financial inclusion and access to the formal financial sector.

(ii) To include the underlined words in section 42(2)(a) that deals with the Risk Management and Compliance Programme.<sup>1826</sup>

(2) A Risk Management and Compliance Programme must—

(a) enable the accountable institution to —

- (i) identify;
- (ii) assess;
- (iii) monitor;
- (iv) mitigate; and
- (iv) manage,

the risk that the provision by the accountable institution of products or services may involve or facilitate money-laundering activities or the financing of terrorist and related activities; taking into account the objective of promoting financial inclusion and to create access to financial products and services in the formal financial sector.

(b) The following recommendations relate to the enforcement and the coordination of FIC with other supervisory bodies.<sup>1827</sup>

(i) Section 45C(c) of FICA must be amended to add the publication of contraventions as part of the administrative sanctions.

(ii) Schedule 2 to the FICA must be amended to add other supervisory bodies discussed in this chapter such as the National Credit Regulator in terms of the NCA and the Financial Sector Transformation Council in terms of

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<sup>1825</sup> See Ch 4.6.2 above.

<sup>1826</sup> See Ch 6.3.1.2(a) above.

<sup>1827</sup> See Ch 6.3.1.2(b) above.

the B-BBEE Act, that play an important role in promoting FI, together with their specific objectives. This will enable the FIC and the relevant supervisory bodies in the financial sector to coordinate on fulfilling its AML/CFT objectives, including the proposed objective of preventing money-laundering and terror financing by promoting access to and the use of the formal financial sector. This adds to the list which already includes the FSCA and the South African Reserve Bank.

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10. The Financial Sector Transformation Council established in terms of the Financial Sector Code and endorsed in terms of the Broad-Based Black Economic Empowerment Act (53 of 2003).
11. The National Credit Regulator established in terms of the National Credit Act (34 of 2005).

**Rec 6F** The following recommendations relate to the amendment and the improvement of the Financial Sector Code and the B-BBEE Act.

- (a) It is recommended that the minimum product and access standards that apply to banks as a sub-subcategory of access to the financial services elements in the FS Code must not be outlined specifically in this Code or the B-BBEE Act, but they must refer to the *Conduct Standard for Banks* and the proposed *Product Standards for Banks* in terms of the FSRA and the proposed CoFI Act, as outlined in **Rec 6J** below. This will require the FSTC to determine whether a bank has met the transformation target by providing access to retail financial products and services by determining whether its financial products meet the product standards set in the proposed *Product Standards for Banks*. Banks will still be required to apply to the FSTC for the approval of any existing or new financial products as "Access Qualifying Products", provided they meet the minimum product standards or their features exceed the minimum standards outlined in the proposed *Product Standards for Banks*. This will allow banks to continue to develop financial products that serve to promote FI. The proposed Product Standards for Banks should, therefore, not inhibit innovations in financial products and service. Based on this



recommendation, paragraphs 3.5.3 and 3.5.4 of Amended FS Code Series FS700, Statement FS701<sup>1828</sup> must be amended as follows:

(i) Paragraph 3.5.3

Products: Any product will qualify as an Access Product if it conforms to the minimum access and product standards which have been negotiated as part of the Sector Code process, and developed [in accordance with applicable law] by and in collaboration with the Financial Sector Conduct Authority from time to time as Product Standards for Banks in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct of Financial Institutions Act (.....).

(ii) Paragraph 3.5.4

Participation: Any bank may apply to the Council to have any number of products approved as access qualifying products for the purposes of meeting their access targets. The Council shall approve such products if the product meets the minimum access and product standards[.] as developed by the Financial Sector Conduct Authority from time to time as Product Standards for Banks in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct of Financial Institutions Act (.....).

- (b) The FSTC must still enforce compliance with the provisions of the FS Code as outlined in the B-BBEE Act, and in collaboration with the FSCA as one of the financial sector regulators in terms of the FSRA as proposed in **Rec 6L(a)** below.

**Rec 6G** The following recommendations relate to the improvements and amendments in the FSRA and the proposed CoFI Act and the requirements to establish conduct standards.

- (a) The definition of FI in section 1 of the FSRA must be amended to include different dimensions of the definition as recommended in **Rec 2E** above.<sup>1829</sup>
- (b) It is recommended that section 106 of the FSRA which empowers the FSCA to adopt conduct standards also add "ensuring the promotion of financial inclusion" as one of the reasons for establishing the conduct standards. This will support its general objective of achieving a stable financial system that functions in the interests of financial customers, by establishing a regulatory

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<sup>1828</sup> See Ch 6.2.2 .2 for a discussion of this part of the FS Code.

<sup>1829</sup> See Ch 2.7.2. above.

and supervisory framework that promotes FI, among others, in terms of section 7.

**Rec 6H** Similar to the FSCA’s power to establish conduct standards in terms of section 106 of the FSRA and clause 67 of the draft CoFI Bill, it should have the power to develop product standards in terms of the proposed CoFI Act and not as part of the regulatory strategies in terms of the FSRA. Product standards and the specific measures to promote the sale, design, and marketing of products fall squarely within the purview of regulating conduct of financial institutions in terms of the proposed CoFI Act and not the FSRA. Therefore, it is recommended that, rather than the FSCA developing product standards only as part of its regulatory strategies,<sup>1830</sup> the proposed CoFI Act should specifically require it to establish such standards. The following clause should be inserted into the Draft CoFI Bill.

**Product Standards developed by the Authority [Referring to the FSCA]**

- (1) Subject to the Authority’s powers to develop conduct standards in terms of section 67 of this Act read with section 106 of the Financial Sector Regulations Act (9 of 2017), the Authority may develop product standards for and in respect of -
  - (a) financial institutions required to be licensed under this Act; and
  - (b) persons referred to in section 106(1) of the Financial Sector Regulation Act who are subject to this Act as provided in section 4.<sup>1831</sup>
- (2) Product standards prescribed for the purposes of this Act must be aimed at achieving the object of this Act, including the promotion of financial inclusion.

**Rec 6I** It is recommended that the FSCA develop product standards for banks in terms of the provisions recommended in **Rec 6H** above which incorporate the basic principles required for conduct standards in terms of section 106 of the FRSA and clause 67 of the Draft CoFI Bill. Generally, they must address the key FSCA’s strategy of achieving “a more intrusive, rule-based approach, including prescribing product features” by introducing product standards to outline “[p]rescribed minimum products features”.<sup>1832</sup> For purposes of this research, product standards must address specific gaps identified in this research relating to the promotion of FI through retail financial services, including access to BBAs. Such standards must complement and be in line

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<sup>1830</sup> See Ch 6.3.1 (b) for the proposal of the FSCA to develop product standards in the Regulatory Strategies.

<sup>1831</sup> Persons referred to in s 106 include financial institutions; representatives of financial institutions; key persons of financial institutions; and contractors.

<sup>1832</sup> See Ch 6.2.3(b) above.

with the broad principles of treating customers fairly outlined in section 58 of the FSRA and clauses 67 of the second Draft CoFI Bill regarding the design, advertising, and promotion of financial products and services.<sup>1833</sup> For purposes of this research, the standards must include retail financial products by taking into account the interests of financial customers generally, and specifically target groups of these customers.<sup>1834</sup> They must, among others, specifically address the gaps identified in the FS Code as to the need to set minimum access and product standards, including “qualifying access products”.<sup>1835</sup> Such standards must also provide minimum standards for the eligibility criteria for the BBAs, maximum limits on fees, features that must be included with the accounts, such as credit facilities, cross-selling of products within the account, migration, marketing, and creating awareness of these accounts.

**Rec 6J** The following recommendations relate to specific product standards that the FSCA must develop for banks for the design, sale, marketing and creating awareness of BBAs as a measure to promote FI in South Africa.

- (a) The *Product Standards for Banks* must provide a specific section that deals with standards for providing BBAs titled “Basic Bank Savings and Deposit Account” (BBSDA), similar to BBAs provided in terms of the Reserve Bank of India’s BBSDA Circular.<sup>1836</sup>
- (b) Banks must be required to design, provide, and advertise BBSDAs in order to fulfil the right of access and to open these accounts as recommended in **Rec 6D** above.
- (c) The *Product Standards for Banks* relating to BBSDAs must incorporate some of the features outlined in the defunct Exemption 17 generally to set some maximum limits on key features and to align them with the tiered-based RBA

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<sup>1833</sup> See Ch 6.3.2(b) above.

<sup>1834</sup> Ss 5(1) of the Conduct Standards for Banks 2020.

<sup>1835</sup> See Ch 6.2.2 above.

<sup>1836</sup> See Ch 6.4.2 above. Although the BBSDA does not specifically provide for the provision of two purses in one account (ie, the transactional and savings purses), the choice of this name takes into account the need to incorporate these two purses as indicated in Rec 6J(v) below.

with regard to low-cost “accounts-based products”.<sup>1837</sup> They must also draw lessons from key features of the payment account with basic features in terms of the EU PAD,<sup>1838</sup> with necessary adjustments for the local context. Importantly, they must further take into account the need to design these accounts in a manner that balances product flexibility and discipline as discussed in this research,<sup>1839</sup> and to avoid the direct or indirect fixing of purchase or sale prices or any condition in contravention of competition law.<sup>1840</sup> BBSDAs must therefore incorporate the following conditions and features:

- (i) To prevent the stigma associated with these types of accounts such as Mzansi, as “poor man’s account”,<sup>1841</sup> everyone must be eligible to apply for a BBSDA, irrespective of customer income level. Product standards must prohibit the holder of the BBSDA from opening any other account categorised as BBSDA at any bank in South Africa, unless he or she first closes the account.<sup>1842</sup>
- (ii) Subject to the relevant AML/CFT measures, they must be eligible for this account irrespective of whether or not the customer’s source of income derives from the formal economic sector.
- (iii) The BBSDA must offer customers facilities to deposit and withdraw money at the counter or the ATM, debit, card payment, purchases, and transfer facilities, including electronic transfers at the point-of-sale.
- (iv) With regard to monthly fees on this account, product standards must require banks to offer these accounts free of charge or at a reasonable fee. Factors such as the national income levels and the average fees charged by national banks for services provided on conventional accounts must be taken into account to determine reasonable fees.<sup>1843</sup> The FSCA in collaboration with the FSTC in terms of the reporting required in terms

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<sup>1837</sup> See Ch 6.3.1 1.2 and Ch 6.5 above for a discussion of the Mzansi account and key features.

<sup>1838</sup> See Ch 4.3.1.4, Ch 5.5.2.3 on the implementation of the EU “PAD” (2014) in the UK and Ireland, and Ch 6.4.2 above on key features of the payment account with basic features.

<sup>1839</sup> See Ch 2.3.2.2 above.

<sup>1840</sup> See Ch 6.5 above for the discussion of the possible contravention of the Competition Act.

<sup>1841</sup> See Ch 6.6.2 above.

<sup>1842</sup> See Ch 6.4.2 above for a similar requirement in the RBI “BBSDA Circular” (2019).

<sup>1843</sup> See Ch 6.4.2 above for a similar requirement in terms of the EU “PAD” (2014).

of the B-BBEE Act must publish reasonable monthly fees that may be levied for the BBSDAs annually, and take these factors into account.

- (v) Another provision that can address this stigma is to require banks specifically to provide BBSDA with two types of purse embedded in the account, to emulate the defunct Standard Bank E-Plan.<sup>1844</sup> As part of the cross-selling of products in the accounts as recommended below,<sup>1845</sup> standards should require banks to notify the customer of the maximum amount required to be in the account at any particular time and advise him or her to consider putting the surplus amount in the saving purse and be incentivised with a certain percentage of positive interest if saved over a prescribed period.
- (vi) The standards should also set a ceiling on the balances and the maximum deposits that should be in the transactional purse and the saving purse of the BBSDA at a particular time. To avoid the deposit of cash amounts in contravention of the prescribed limit of R24 999 set for cash transaction reporting in terms of FICA, standards should set the minimum according to this limit in each purse. The limits will also determine whether the bank must contact the customer to consider migrating to advanced accounts. In addition, standards should also allow customers to have unlimited “numbers” of monthly cash deposits into both purses of the account. However, it is recommended that the standards must allow for three free cash deposits up to the above prescribed limit of R24 999.
- (vii) Product standards should allow for competition between banks by permitting them to offer BBSDAs with reasonable minimum opening balance while allowing each bank not to impose this requirement if it deems fit.
- (viii) The standards should also encourage cross-selling of different products, either within the BBSDA or linked to other products as a further measure to eradicate the “poor man’s account” stigma attached to the Mzansi account, to limit the dormancy of these accounts, to address the cash-

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<sup>1844</sup> See Ch 6.6.1 above.

<sup>1845</sup> See Rec 6J(viii) below.

in/cash-out patterns, while also making these accounts profitable for banks. For instance, credit facilities such as ATM instant loan and overdraft facilities should be made optionally available to BBSDA holders. However, any such additional products must not form integral parts or conditions for opening a BBSDA.

- (ix) Product standards must address the concern of immediate withdrawals from these accounts. Standards should prevent this by incentivising customers with a specified percentage of positive interest for keeping a certain amount of money in the account or keeping it for a certain time such as provided by the defunct E-plan.<sup>1846</sup> Product standards must address the concern of immediate withdrawals from these accounts. Standards should prevent this by incentivising customers with a specified percentage of positive interest for keeping a certain amount of money in the account or keeping it for a certain period of time, such as provided by the defunct E-plan. Another important requirement is to instil financial discipline while ensuring flexibility in relation to withdrawals. Standards should provide for unlimited withdrawals. However, they should prescribe three free monthly withdrawals from the account. Banks should charge amounts of withdrawal fees that are prescribed from time to time to deter customers from spontaneous withdrawals.<sup>1847</sup>
- (x) Product standards must also incorporate the requirements for migrating or upgrading BBSDAs to current accounts. Banks must be required to review portfolios of BBSDAs periodically and determine whether to migrate or upgrade. Banks must consider the following factors when considering whether or not to migrate the account: the eligibility criteria for an improved account; customers' financial circumstances; and the pattern of usage on the account.<sup>1848</sup> A bank must give the customer at least two months' notice and explain the reasons for such migration. Where the customer resolves not to upgrade the account, the bank must advise him or her to adhere to the terms and conditions applicable to

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<sup>1846</sup> See Ch 6.6.1 above.

<sup>1847</sup> See Ch 2.3.2.2 above.

<sup>1848</sup> See Ch 6.6.4.2 above for similar factors in the UK "BBA Agreement" (2014).

BBSDAs, including the limited ceiling balances in each purse, the number of free withdrawals, and charges on additional withdrawals.

- (xi) Product standards must also require banks to offer education campaigns, advertising and marketing that create awareness specifically tailored for the BBSDAs. It is recommended that as online marketing platforms are developing rapidly, banks should be permitted to use all forms of marketing platforms available.<sup>1849</sup> Standards should, therefore, not set a specific standard for educating customers and marketing these accounts. Banks must, however, be able to provide the FSTC and FICA with their marketing and awareness campaign strategies created for these accounts in their annual reporting.

**Rec 6K** By adhering to the standards as recommended in **Rec 6J** above, banks are likely to be in contravention of section 4 of the Competition Act, as designing BBAs may constitute direct or indirect fixing of a purchase or selling price or any other trading conditions in relation to these accounts. It is, therefore, recommended that “the provision of retail financial products and services for the purpose of promoting financial inclusion and to achieve transformation in the financial sector in terms of the B-BEEE Act” should specifically be added as one of the objectives in section 10(3) of the Competition Act in terms of which the promotion of FI and the transformation of the financial sector are not regarded as “restrictive practices” and, therefore, exempted from the provisions of section 4.<sup>1850</sup>

**Rec 6L** As indicated above, save for monitoring the extent to which the financial system delivers fair and appropriate financial products, the FSRA relies on the enforcement mechanisms in the relevant financial sectors laws.<sup>1851</sup> The following recommendations relate to improving the enforcement measures in the FSRA:

- (a) To reinforce the monitoring and the enforcement of these laws, the following amendments to the FSRA are recommended:

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<sup>1849</sup> See Ch 6.6.4.3 above for various marketing strategies applied for these accounts.

<sup>1850</sup> See Ch 6.5 above on the prohibition and the exemptions.

<sup>1851</sup> See Ch 6.3.1.6(c) above.

- (i) the definition of “financial sector regulators” in section 1 must add the Financial Sector Transformation Council
  - (ii) Schedule 1 must include the B-BBEE Act as one of the “financial sector laws”.
- (b) To enforce voluntary codes of practice in the financial sector, it is recommended that the FSRA should provide for the general approval of voluntary codes of conduct by the FSCA in this sector such as the *BASA Code of Banking Practice*, similar to the approval of codes of practice by the ASIC, in terms of the Australian Corporation Act 2001 and *the Approval of Financial Services Sector Codes of Conduct Regulatory Guideline 183*.<sup>1852</sup> For purposes of this research, the approval process is necessary to enforce compliance with the *BASA Code of Banking Practice* and to make it effective as an enforced-self-regulation in terms of the RR theory and the PRS. Therefore, the FSRA must be amended and a new section be inserted as follows:

#### **Approval of Codes of Practices**

- (1) The Authority shall have the power to approve all codes of practice developed for the financial institutions in terms of the applicable financial sector law.
- (2) The Authority shall approve a code of practice if it is satisfied that:
  - (a) the obligations of subscribers to the code are capable of being enforced;
  - (b) the code is consistent with this Act or any other financial sector law under which the Authority has regulatory responsibilities; and
  - (c) there exists an independent body that is empowered to administer and enforce the code and is able to impose sanctions.

**Rec 6M** For the purpose of enforcing the provisions of the proposed CoFI Act in relation to the conduct standards and *Product Standards for Banks* to promote FI, it is recommended that the provisions relating to the service test in the US Community Reinvestment Act (CRA) be incorporated into this Bill for the purposes of enforcing compliance with the proposed product standards.<sup>1853</sup> In addition to conducting independent reviews of existing arrangements and requesting relevant information from financial institutions in relation to their activities or financial products,<sup>1854</sup> reporting and publication of information in clauses 48 and 49 must be improved by

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<sup>1852</sup> See Ch 5.4.1 and Ch 5.4.2 above.

<sup>1853</sup> See Ch 5.5.3 above for the CRA.

<sup>1854</sup> See Ch 6.3.2 9(c) above.



performance evaluation as a service test following the CRA model. It is specifically recommended as follows:

- (a) that a new clause be inserted after clause 49 of the CoFI Bill as follows:

**Financial Institution Evaluation and the Service Test**

- (1) The provisions of this section apply to the Authority's power to develop the product standards in terms of this Act.
- (2) Subject to the provisions of section 49 and the requirements for financial institutions to report annually to the Authority on their activities and financial products or services, the Authority must evaluate the performance of a financial institution and determine how the standards of its financial products and services promote financial inclusion in terms of this Act.
- (3) The Authority must rate the performance of each financial institution using the following scale of ratings:
- (a) substantial non-compliance;
  - (b) needs to improve;
  - (c) satisfactory; or
  - (d) outstanding.
- (b) to enhance the effectiveness of the performance evaluations and the service test, it is recommended that clause 49 of the CoFI Bill must in addition to publishing information on non-compliance, also incorporate the restrictions on certain facilities based on the outcome of these evaluations. Rather than adopting all the sanctions in the CRA,<sup>1855</sup> the proposed CoFI Bill must empower the FSCA to refuse the expansion on non-compliant banks in addition to other similar restrictions under the B-BBEE Act. As discussed above,<sup>1856</sup> it must require other regulators, organs of state, and public entities to establish the qualification criteria for issuing licences, concessions in respect of economic activities, the sale of state enterprises, and awarding of incentives, grants, and investment schemes based on the performance in terms of the service test.

The next chapter summarises and concludes the discussion in this research and provides key recommendations to the relevant government institutions and regulatory bodies for the improvement of the FI and access to BBAs frameworks in South Africa.

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<sup>1855</sup> See Ch 5.5.3.3 above for the sanctions.

<sup>1856</sup> See Ch 6.3.1.3 above.

## CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

*There is a lot of truth in the old rule, "First you say what you are going to say, say it and then say what you have said". The introduction and the conclusion are as important as book covers.*

**Curti *et al* Introduction to Perfumery (2001) 657**<sup>1857</sup>

### 7.1 INTRODUCTION

This research was embarked on against the backdrop of the important role of FI in poverty alleviation and its impact on the social welfare and economic growth of every South African citizen with a particular focus on the poor and low-income households.<sup>1858</sup> It was also driven by a number of concerns with the current levels of FI and FE in South Africa.<sup>1859</sup> Historical patterns of banks tailoring financial products and services for their elite clientele,<sup>1860</sup> global statistics on FI that continue to project a slow increase in universal access to financial services,<sup>1861</sup> the increasing impacts of the Covid-19-related lockdowns hampering the achievement of the National Development Plan targets by 2030,<sup>1862</sup> are some of the major concerns that prompted the need to analyse the effectiveness and responsiveness of the current policy and regulatory frameworks to promote FI in South Africa. This research established FI as multidimensional with regard to the type of products and services – eg, credit, insurance, remittance, and payment services. However, it focused on BBAs due to the importance of a savings and deposit account as a gateway for access and the use of other financial products and services.<sup>1863</sup> The position of the poor and low-income households is exacerbated by the current features of conventional current accounts which have the potential of excluding the majority of this sector.<sup>1864</sup> It, therefore, became important to embark on research that outlines measures contributing to FE and to identify alternative measures that will improve FI and access to basic financial services in South Africa, notably BBAs. By

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<sup>1857</sup> Curtis, Curtis and Williams *Introduction to Perfumery* (2001) 657.

<sup>1858</sup> See Ch 1.1.1 above.

<sup>1859</sup> See Ch 1.1.3 above.

<sup>1860</sup> See Ch 1.2.1 above.

<sup>1861</sup> See Ch 1.1.2 above.

<sup>1862</sup> See Ch 1.1.3 and Ch 1.1.4 above.

<sup>1863</sup> See Ch 2.3.2 on different financial products that form part of the FI initiatives.

<sup>1864</sup> See Ch 6.4.1 above.

identifying these specific issues relating to FI, the scope of this research was limited to the FI policy and regulatory frameworks in South Africa with a specific focus on BBAs.<sup>1865</sup>

The purpose of this research was, consequently, to analyse critically whether or not existing policies and regulatory frameworks are effective in and responsive to promoting FI and facilitating access to BBAs for every citizen, including the poor and low-income households.<sup>1866</sup>

There is a myriad of financial services providers that offer products and services in the formal and informal sectors of the economy and that may promote FI and access to savings and deposit facilities. The importance of promoting FI in a regulated environment which reinforces stability and the integrity of the financial system, while also protecting consumers, emerged as a central theme in this research and an appropriate guide to identifying commercial banks as deposit-taking and one of the highly regulated institutions in the formal financial sector when it comes to the promotion of FI.<sup>1867</sup> As a result, the main objective of this research was to establish whether the regulatory frameworks applicable to commercial banks specifically require them to promote FI and impose an obligation to provide access to BBAs for consumers.<sup>1868</sup> This research applied both Ayres and Braithwaite's RR theory and the smart regulation<sup>1869</sup> to determine how current measures may be improved to promote FI and access to BBAs, by developing and amending certain regulations, improving the capacity, collaboration, and enforcement mechanisms of the relevant regulatory bodies, and developing, designing, and marketing BBAs.<sup>1870</sup>

Achieving this objective through a desktop analysis of the relevant literature, case law, policy, and other relevant legal sources, would as a rule reveal whether such frameworks in fact exist.<sup>1871</sup> However, and as this research has established, the existence of well-developed policies and meticulously drafted legislative frameworks are not sufficient to establish whether these frameworks will indeed provide access to and improve the use of financial products and services. It would also not ensure that such access and use will promote economic growth and create the necessary social welfare impact on every South African citizen, particularly the

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<sup>1865</sup> See Ch 1.4 above on the scope of the research.

<sup>1866</sup> See Ch 1.3 above.

<sup>1867</sup> See Ch 1.4 and Ch 2.3.4 above.

<sup>1868</sup> See Ch 1.3 above.

<sup>1869</sup> See Ch 3.2 and Ch 3.3 above.

<sup>1870</sup> See Ch 1.3 and Ch 3 above.

<sup>1871</sup> See Ch 1.5 above for the research methodology.

poor and low-income households. To establish the necessary link between the existing frameworks and the main aim of FI, this research adopted Ayres and Braithwaite's RR theory and applied their PRS to assess how existing measures may be improved to promote FI.<sup>1872</sup> The RR theory and this pyramid alone can only make regulatory measures effective if each one of these measures is escalated to more rigorous alternatives depending on its effectiveness and responsiveness to the promotion of FI and access to BBAs. However, this research has noted that the escalation of one regulatory instrument to the apex of the regulatory pyramid is not always sufficient if a smart and pluralistic form of regulation may equally be applied to combine various relevant instruments that complement each other due to the inherent strengths and weaknesses of every single regulatory instrument.<sup>1873</sup>

The research further took cognisance of a haphazard approach to FI frameworks that may possibly disregard possible synergies and the inherent trade-offs that FI policy and regulatory frameworks can bring to the promotion of equally important and traditional financial sector policy and regulatory objectives such as financial stability, integrity, and consumer protection.<sup>1874</sup> To address this challenge, this research introduced the I-SIP Methodology, which is taking root the world over, as an additional measure in establishing the efficacy of FI frameworks and which views the FI framework as an important aspect in financial sector regulation.<sup>1875</sup>

The purpose of this chapter is, therefore, to provide the key findings of this research based on an analysis of the main findings of each of the chapters. The chapter will, therefore, provide a synopsis of the main recommendations outlined in each chapter. It summarises specific recommendations that are proposed to the government departments and regulatory bodies responsible for the relevant policies to ensure compliance or enforce their provisions.

## **7.2 CONCLUSION AND KEY FINDINGS**

This research began with a conceptual definition of FI so as to identify a definitional framework for FI that sets specific national priorities to enable policymakers and legislatures to measure

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<sup>1872</sup> See Ch 1.3 and Ch 3 above.

<sup>1873</sup> See Ch 3.3.2 above for smart regulation.

<sup>1874</sup> See Ch 3.4.1 to Ch 3.4.3 above.

<sup>1875</sup> See Ch 3.4.4 above.

FI progress.<sup>1876</sup> Based on the AFI guideline and the important elements that must inform the FI definition, this research has established that there is still a focus on “access” to financial products and services as the main dimension in measuring FI.<sup>1877</sup> While different definitions provided in the literature, policy, and regulatory measures gradually incorporate other dimensions such as usage and the quality of products and services, access still dominates the assessment of whether or not financial products and services are available to society.<sup>1878</sup> This research has also identified the use of credit as an important financial product for the purpose of promoting FI. However, the provision of financial services and products does not only require prioritising one financial product or service but also identifying the financial problems that the society experiences based on its financial needs.<sup>1879</sup> The triple-whammy situation proposed by Collins *et al* dictates that a holistic effort to promote FI must reflect the society’s financial need to save-up, save-down, and save-through.<sup>1880</sup> Therefore, an FI framework must consider access to credit and saving facilities together with the ability to provide insurance facilities against possible risks that may negatively affect savings or the eligibility for credit and alongside other financial facilities that improve the use of these products such as money remittance and payment systems. Furthermore, identifying financial products and services for the purposes of promoting FI without identifying the suitability of such products runs counter to the full financial inclusion that Regan and Paxton propose and the need to have appropriate financial products and services that allow the society to make informed decisions about their financial circumstances.<sup>1881</sup> To incorporate this important aspect, this research has identified the need to find a balance between flexibility and discipline as important principles for the design of financial products and services that are suitable for the financial needs of society.<sup>1882</sup> The research has also established the importance of establishing the subject that is targeted by the FI policy and regulatory frameworks. Although the poverty line and income levels have remained determinants in identifying specific sectors in the community that FI frameworks must target, this research has established that individual financial circumstances change over time and a person may be well-off at a particular point but experience financial difficulties down the line and need the support provided by FI policy and regulatory frameworks.<sup>1883</sup> It,

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<sup>1876</sup> See Ch 2 above.

<sup>1877</sup> See Ch 2.3 above.

<sup>1878</sup> See Ch 2.3.1 above.

<sup>1879</sup> See Ch 2.3.2.1 above.

<sup>1880</sup> See Ch 2.3.2.1 above.

<sup>1881</sup> See Ch 2.3.3.3 above.

<sup>1882</sup> See Ch 2.3.2.2 above.

<sup>1883</sup> See Ch 2.3.3.1 and Ch 2.3.3.2 above.

therefore, becomes important for these frameworks to empower everyone as “financial citizens” and allow every citizen who is eligible to use these products and services to have a choice to use them if they so wish.<sup>1884</sup>

Two further elements often ignored by policymakers and regulators were identified. Achieving the required level of FI must also identify the main causes of FE. Policymakers and regulators must draw some lessons from the dimensions of FE revealed by Kempson and Whyllie.<sup>1885</sup> As a growing trend in many FI policies, the accessibility and affordability of financial services should not be singled out as the only indicators of whether the majority are included or excluded from accessing and using financial products and services. The terms and conditions attached to the products that make them inappropriate for the needs of certain sectors of society, and selective and targeted marketing of financial products and services, are equally important in identifying key factors that result in the exclusions of the majority.<sup>1886</sup> Equally, it is important to incorporate the causes that contributed to voluntary self-exclusion which, as this research has established, arise in the main from demand and supply factors which move members of the society not to take up these services based on a poor relationship with the financial service providers or the perceived complexity of using financial products and services.<sup>1887</sup>

In promoting FI, policies and regulatory frameworks often disregard another important dimension that must form part of the definition. This research has established the need for policymakers and regulators to acknowledge the link between FI and a broader social inclusion and the importance of FI in addressing social challenges and promoting economic growth.<sup>1888</sup> While such a link has been established in the literature, very few definitional frameworks include this additional dimension as a yardstick to measure progress and the impact that FI initiatives have on society. A definitional framework for FI must, therefore, include all financial products and services, focus on promoting FI in the formal financial sectors that are stable, are conducted with integrity, and are able to protect consumers.<sup>1889</sup> It must further make

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<sup>1884</sup> See Ch 2.3.3.3 above.

<sup>1885</sup> See Ch 2.4 above.

<sup>1886</sup> See Ch 2.4 above for a discussion of access exclusion, price exclusion, condition exclusion, and marketing condition.

<sup>1887</sup> See Ch 2.4 above.

<sup>1888</sup> See Ch 2.5 above.

<sup>1889</sup> See Ch 2.3.4 above for a discussion of the distinction between formal and informal financial service providers.

financial products and services available for everyone, focus on citizens, and must be measured and tailored to facilitate social welfare and economic growth in the society.

This research has also exposed a lack of concrete international FI regulatory and institutional frameworks and how different GSSBs are developing policy measures to deal with FI. A number of commitments made by the AFI, the G20, and the World Bank to develop FI frameworks and principles that facilitate the adoption of NFIS are commendable. However, the inclusion of additional principles in these frameworks to establish a “lead agency” to coordinate with other regulatory bodies to promote FI, are important steps in promoting FI through measures adopted internationally.<sup>1890</sup> The emphasis on the role that the private sectors should play in promoting FI is one of key elements that will guide collaboration on the promotion of FI between national policymakers, the financial sector, and regulators.<sup>1891</sup> However, it emerged from this research that the GSSBs’ FI standards are adopted haphazardly and lack the necessary enforcement mechanisms to ensure that countries apply them at national levels.<sup>1892</sup>

This research has identified the promotion of FI within the larger scheme of the FATF’s prevention of money-laundering and the financing of terrorism.<sup>1893</sup> This notwithstanding, the FATF has not incorporated FI as a key commitment in terms of the AML/CFT standards. The mechanisms that the FATF applies to ensure that countries apply the necessary AML/CFT measures, in particular the grey and black listing of countries which are not adhering to these standards, should be adopted as an approach to enforce international FI standards identified in this research.<sup>1894</sup> The UN should endorse the AFI as an international FI regulatory institution responsible for the implementation of the proposed IFIRS.<sup>1895</sup>

This research also uncovered a lack of FI frameworks on the Africa continent, and specifically in the SADC region, which would be necessary to guide national governments such as South Africa in formulating FI policy and regulatory frameworks.<sup>1896</sup> It has, however, identified the

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<sup>1890</sup> See Ch 4.2.1 and Ch 4.2.4.2 above.

<sup>1891</sup> See Ch 4.2.6.2 above.

<sup>1892</sup> See Ch 4.2.6.5 above.

<sup>1893</sup> See Ch 4.2.3 above.

<sup>1894</sup> See Rec 4A(b) in Ch 4.6.2 above.

<sup>1895</sup> See Rec 4A(b) above.

<sup>1896</sup> See Ch 4.3.2 and Ch 4.4 above.

regulation of FI by the EU as an effective model that the AU should adopt, particularly in the way it resembles a pyramidal approach by gradually adopting different levels of regulatory instruments towards EU PAD starting from fact-finding studies to non-binding standards to binding measures, such as Directives, depending on member countries' implementation of the necessary national measures.<sup>1897</sup> On the African continent, the AU should also develop full FI measures that go beyond its current focus on postal financial services, and should consider adopting and cascading the EU model of regulations to the Regional Economic Communities such as the SADC which are responsible for developing relevant measures to ensure effective adoption and implementation.<sup>1898</sup> In the SADC region it will be particularly important to use the Draft SADCFIS as an initial step toward concrete FI measures once fully adopted.<sup>1899</sup> The Draft SADCFIS measures will also need to provide specific implementation and enforcement measures in addition to supplementing current measures such as research and development, capacity building, and the dissemination of data and knowledge about FI.<sup>1900</sup>

It is clear – subject to a number of improvements in international, continental, and regional FI measures proposed in this research – that there are no concrete international FI measures that national policymakers and regulators can use to adopt and implement nation FI measures. The EU and the FATF-specific measures on FI are context-specific to the challenges on the European continent and to a focus on FI within the context of the AML/CFT measures, respectively. In order to provide the necessary regulatory tools to develop or improve the FI policy and regulatory measures in South Africa, this research considered FI measures in selected countries with a specific focus on access to BBAs and institutional and enforcement mechanisms that may be adopted to enforce compliance with national measures.<sup>1901</sup> A selection of specific countries was informed by the best models as regards access and use of BBAs, the relevant enforcement bodies in place, as well as specific enforcement measures. The measures in these countries were applied to benchmark key issues that should be adopted to promote FI effectively and provide access to BBAs in South Africa. Key lessons from these countries are that both voluntary codes of banking practice and specific regulatory measures may be adopted in developing national FI framework to provides access to BBAs.<sup>1902</sup> These,

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<sup>1897</sup> See Ch 4.3.1.1 to Ch 4.3.1.4 above.

<sup>1898</sup> See Ch 4.3.2.1 and Ch 4.3.2.2 above.

<sup>1899</sup> See Ch 4.4.1 and Ch 4.4.2 above.

<sup>1900</sup> See Ch 4.4.2.3 above.

<sup>1901</sup> See Ch 5 above.

<sup>1902</sup> See Ch 5.2 to C 5.4 above.



therefore, enable the involvement of both the public and private sectors in the process of developing the necessary FI measures. With regard to the voluntary codes of banking practice by the banking associations in different countries, this research established that banks specifically make commitments to provide basic retail financial products or BBAs as measures to promote FI.<sup>1903</sup> The effectiveness of purely voluntary codes without specific compliance and enforcement measures, raises a concern as regards the choice of measures that must be adopted to promote FI. Although the levels of FI in countries with purely voluntary codes of banking practice provide mixed results, it remains pertinent that customers cannot enforce banks' compliance with the commitments to provide retail financial products.<sup>1904</sup> Therefore, this research also identified a number of countries with voluntary codes that established specific regulatory bodies to ensure compliance through specific enforcement measures.<sup>1905</sup> The choice with enforcing codes of practice that these countries have made rests solely on assigning enforcement to a general code of practice regulatory body such as the Australian ASIC or a specific banking code of practice enforcement body such as the BCSBs of India and the UK.<sup>1906</sup> This research has established a lot of similarities in the enforcement mechanisms used by these bodies. Generally, such measures encourage frequent reporting, inspections, disclosures, publication of progress and transgressions, and severe punishments only in extreme cases of transgression.<sup>1907</sup> One unique measure is identified in Australia. The legislative empowerment of ASICs to take the responsibility for the approval of all codes of practice in the country provided they are binding on subscribers and provide for independent bodies to administer and enforce the code and impose sanctions is one form of enforcement that may be adopted.<sup>1908</sup>

This research has also identified a need for mandatory legislative provisions to promote FI or provide the right of access to BBAs.<sup>1909</sup> A few countries such as France and Canada have provided for these rights over the years. The EU PAD also makes this right mandatory for EU member states to include the right in their national legislative measures.<sup>1910</sup> The legislative measures also require effective enforcement mechanisms to achieve this specific goal. This

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<sup>1903</sup> See Ch 4.5.2 read with Ch 5.3.2 to Ch 5.3.4 above.

<sup>1904</sup> See Ch 5.2.1 above.

<sup>1905</sup> See Ch 5.4 above.

<sup>1906</sup> See Ch 5.2.2 read with Ch 5.4.3.1 to Ch 5.4.3.3 and Ch 5.4.4 above.

<sup>1907</sup> See Ch 5.4.3.1 to Ch 5.4.3.3 above.

<sup>1908</sup> See Ch 5.4.2 above.

<sup>1909</sup> See Chs 5.5.2.1 to 5.5.2.3 above.

<sup>1910</sup> See Ch 5.5.2.3 above.

research has identified similar measures adopted to enforce codes of banking practice also being adopted to implement the EU PAD at national level.<sup>1911</sup> However, as financial penalties and sanctions are proposed for extreme cases of transgression, this research notes a unique form of disclosure that was introduced in the USA's CRA legislation and the service test as an additional mechanism that should be considered.<sup>1912</sup> Although it relies heavily on reporting, the evaluation of performance and the possibility of a financial institution being denied certain financial facilities will go a long way in ensuring that financial institutions comply to avoid losing profitable business opportunities.<sup>1913</sup> Therefore, national FI measures should require both financial sectors to enforce voluntary codes of practice by the private sector and complements their weaknesses with specific legislative rights that also provide effective compliance and enforcements bodies and mechanisms. The mechanisms must require the relevant financial regulatory bodies to measure the performance of financial institutions using the services test.

The discussion of the definitional framework, FI measures, and the international, continental, regional, and national levels were useful to test both the availability of FI measures in South Africa and whether they are effective in promoting FI and access to BBAs. The South African government is commended for gradually adopting FI policy and legislative measures.<sup>1914</sup> Equally, the private sector initiatives taken by BASA in the Code of Banking Practice 2012 are a clear indication of the sector's commitment to promoting FI.<sup>1915</sup> As indicated, the inquiry into the existence of national FI measures is inadequate and must be followed by identifying how effective such measures are in achieving this objective. The FI framework in South Africa is also haphazard with different measures dealing with FI within the bigger scheme of existing financial sector regulatory and policy objectives such as financial sector transformation, general consumer protection, specific consumer credit protection, AML/CFT prevention, financial sector supervision, and market conduct regulation. This research in Chapter six, therefore, discussed key aspects of FI in the existing legislation and how the measures promoting these objectives can reinforce the promotion of FI. It has benchmarked the FI framework in South Africa against the international FI principles and framework and draws some lessons from the EU and other national regulations discussed in Chapter five. Although

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<sup>1911</sup> See Ch 5.5.2.3 above for the implementation of the EU in the UK and Ireland.

<sup>1912</sup> See Ch 5.5.3 above.

<sup>1913</sup> See Ch 5.5.3 2 and Ch 5.5.3.3 above.

<sup>1914</sup> See Ch 6.2.4 above for the discussion for the Draft FI policy 2020.

<sup>1915</sup> See Ch 6.2.3 above.

the Draft FI Policy adopts evolving international principles and standards for developing NFISs, this research has revealed the need to finalise these policy measures and to formulate South Africa's NFIS that fully adopts the *NFIS Reference Framework* to provide the necessary roadmap for FI. Importantly, it should address the existing "cash-in/cash-out" patterns, and lack of knowledge about retail financial services, and also adopt a relevant institutional framework that implements its objectives.<sup>1916</sup> Banks in South Africa are not indifferent to promoting FI and access to basic financial products and services, such as BBAs. Except for the required reporting in terms of the FS Code and the B-BBEE Act,<sup>1917</sup> this research also recognises the private sector initiatives to promote access to retail financial services and BBAs in the BASA Code of Banking Practice 2012.<sup>1918</sup> The Code should, however, be redeveloped to make it specifically binding on subscribers, commit banks to open and make BBAs accessible to customers, and to provide for a specific compliance body with specific enforcement measures.

This research also takes stock of the government's efforts to promote access to basic retail financial services through the FS Charter which facilitated the provision of BBAs such as Mzansi account.<sup>1919</sup> The adoption of the FS Code backed by the B-BBEE Act has also indicated government's efforts to realising access to these services.<sup>1920</sup> However, what is needed to achieve the B-BBEE reporting obligations by financial sectors is to outline in detail the minimum access standards for what constitute "product access" which will guide banks to develop "access qualifying products" for the purpose of approval by the FSTC.<sup>1921</sup> This will help them meet the overall access to financial services target and provide the FSTC with the necessary power to encourage compliance.

Lack of a right in the Banks Act also raises concern about the banks' commitment to providing BBAs in South Africa.<sup>1922</sup> Although the legislature has identified the need for a similar right in the NCA,<sup>1923</sup> the effectiveness of having such rights as indicated by the adoption in the EU PADs, and the Banks Acts of Canada and France justifies the necessity of the right in South

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<sup>1916</sup> See Ch 6.2.4 above.

<sup>1917</sup> See Ch 6.2.2 read with Ch 6.3.1.3 above.

<sup>1918</sup> See Ch 6.2.3 above.

<sup>1919</sup> See Ch 6.2.1 above.

<sup>1920</sup> See Ch 6.2.2 read with Ch 6.3.1.3 above.

<sup>1921</sup> See Ch 6.2.2 above.

<sup>1922</sup> See Ch 6.3.1.1 above.

<sup>1923</sup> See Ch 6.3.1.4 above.

Africa's Banks Act.<sup>1924</sup> Such a right will also require policymakers and regulators to align the promotion of FI and access to basic financial services with the customer identification and verification requirements under the FICA.<sup>1925</sup> This will also require the legislator to align the FICA with the proposed FI objectives in the international AML/CFT measures by including provisions in the FICA to promote FI by ensuring that the formal financial sector can be monitored by the regulatory bodies.<sup>1926</sup> Specific risk assessment of basic financial services that pose a lower risk of money-laundering and the financing of terror is equally important.

This chapter has revealed that the step taken by the legislature to introduce statutory provisions in the FSRA and the Draft CoFI Bill will go a long way in advancing FI initiatives in South Africa.<sup>1927</sup> The promotion of financial stability and ensuring fair market conduct by financial institutions will now be implemented in conjunction with the FI objective. Much, however, is still required within the scheme of this research to promote access to BBAs. Improving this access does not, however, require the private sector, policymakers, or the legislature to look completely outside the current regulatory framework. Important lessons can be learned from the work already done in terms of the FS Charter through Mzansi and Exemption 17 in terms of FICA,<sup>1928</sup> as well as specific private bank initiatives such as tailoring BBAs based on the features of similar products such as the defunct Standard Bank E-Plan. From a regulatory perspective, this research has established that regulations to provide for BBAs product standards in the FS Charter, the current FS Code, and Exemption 17 focus on making the products accessible and affordable. They, however, do not provide specific standards for other important features which allow long-term savings with positive interest, cross-selling of other products, eligibility for the migration of customers to better products, and proper marketing to create awareness.<sup>1929</sup> The BASA Code also does not provide such standards and leaves it to the banks to decide on the features of their financial products and services.<sup>1930</sup> This research has used the current reporting requirements, the need to develop minimum standards under the FS Code,<sup>1931</sup> and the requirements to develop conduct

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<sup>1924</sup> See Ch 5.5.2.1 to Ch 5.5.2.3 for a discussion of these Acts and the Payment Accounts Regulations in the UK and Ireland.

<sup>1925</sup> See Ch 6.3.1.2 for a discussion of FICA.

<sup>1926</sup> See Rec 6E in Ch 6.7.2 above.

<sup>1927</sup> See Ch 6.3.1.6 and Ch 6.3.2 above.

<sup>1928</sup> See Ch 6.5 read with Ch 6.1.1 and Ch 6.1.2 above.

<sup>1929</sup> See Ch 6.6.4.1 to Ch 6.6.4.2 for the improved features in the BBAs.

<sup>1930</sup> See Ch 6.2.3 above.

<sup>1931</sup> See Ch 6.2.3 read with Ch 6.3.1.6 above.

standards and strategies, as well as the proposed “product standards” in the Draft CoFI Bill as important measures that should be effectively employed to establish important standards for BBAs.<sup>1932</sup> As there are no such standards, the proposal to provide Product Standards for Banks that include standards for the proposed BBSDA is aimed at standardising features for BBAs based on lessons from the UK BBA Agreements, the EU PADs, and the Reserve Bank of India’s BBSDA Circular.<sup>1933</sup> The development of Product Standards for Banks in terms of the proposed CoFI Act will allow both the FSTC and other relevant regulatory bodies such as FIC, NCR, and the FSCA to apply these standards where necessary.

This research has applied the following general approaches as the mechanisms to ensure that the adoption of FI policy, regulations, and standards on access to BBAs is effective. The effectiveness of these measures will be tested by how FI policies accommodate other financial sector regulatory objectives based on the proposed I-SIP Methodology.<sup>1934</sup> As the promotion of FI and access to BBAs is not static or a once-off exercise, the adoption of the RR theory and the PRS should be used to determine whether there are needs to be an escalation of regulation.<sup>1935</sup> Lastly, this research has established that due to the haphazard policy and regulatory measures currently in place, the existence of compliance and regulatory bodies with effective enforcement mechanisms is important. Equally, relevant legislative measures must provide for collaboration and coordination of efforts by these bodies to promote FI in order to prevent regulatory arbitrage.<sup>1936</sup> The standards they adopt to promote access to retail financial services such as BBAs must accommodate product flexibility and instilling discipline as important principles.<sup>1937</sup> They must further allow the private sector to innovate and not prevent competition. The following recommendations summarise key recommendations focusing on the type of legislative measures and the responsible government departments or regulatory bodies.

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<sup>1932</sup> See Ch 6.3.2 above.

<sup>1933</sup> See Ch 6.3.1.6 and Ch 6.3.2 read with Ch 4.1.3.4, and Ch 6.4.2.

<sup>1934</sup> See Ch 3.4.4 above.

<sup>1935</sup> See Ch 3.2.2 above.

<sup>1936</sup> See Ch 4.2.3.4 and Ch 4.2.4.2 read with Ch 4.3.1.6 above.

<sup>1937</sup> See Ch 2.3.2.2 above.

## 7.3 KEY RECOMMENDATIONS

The preceding chapters concluded with specific recommendations for the redevelopment of principles, frameworks, strategies, as well as the addition and amendment of relevant legislative provisions to promote FI. They have provided specific reasons for each of the recommendations based on international, continental, regional, and selected national frameworks to benchmark FI policy and regulatory frameworks in South Africa.

### 7.3.1 Broad and Guiding Recommendations

Key recommendations that were made in each chapters may be summarised broadly to capture the followings regarding FI policy and regulatory frameworks:

- (a) A definitional framework that includes all elements of the AFI guidelines, different FE dimensions, and extended to include social inclusion and economic welfare.<sup>1938</sup>
- (b) Developing a FI framework by applying the RR Theory and the PRS, supplemented by smart regulation and the I-SIP Methodology.<sup>1939</sup>
- (c) Including the following for international framework to guide national FI frameworks:<sup>1940</sup>
  - (i) Adopting an inclusive and comprehensive NFIS based on the proposed IFIRS.<sup>1941</sup>
  - (ii) NFIS that incorporates key FI principles such as stakeholder involvement, assigning proper leadership including assigning a lead agency, diversifying financial products and service providers, adopting a proportionality principle particularly to measure the level of risk posed by AM/CFT measures, and encouraging proper coordination and collaboration among regulatory bodies.

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<sup>1938</sup> See Rec 2A to Rec 2E in Ch 2.7.2 above.

<sup>1939</sup> See Rec 3A to Rec 3F in Ch 3.5.2 above.

<sup>1940</sup> See Rec 4A to 4H in Ch 4.6.2 above.

<sup>1941</sup> See Rec 4C in Ch 4.6.2 above.

- (d) Benchmarking the national FI framework based on similar frameworks in other countries by incorporating the following:
- (i) Providing for commitments and the right of access and to open basic financial services and products such as BBAs.
  - (ii) Implementing FI in both voluntary self-regulatory measures with proper legislative measures and enforcement and compliance mechanisms.
  - (iii) Enhancing the efficacy of voluntary codes of banking practice by adopting approval and enforcement mechanisms, and by establishing internal and external code compliance bodies.
  - (iv) Reinforcing compliance with statutory measures through the CRA-type performance evaluation and the service test in case of BBAs.

### **7.3.2 Specific Recommendations, Relevant Authorities and Bodies**

Based on the overarching recommendations that guide the FI framework in South Africa, the following recommendations are summarised with specific references to the relevant instruments and the responsible public authority or the regulatory body.<sup>1942</sup>

#### **1. An Inclusive Financial Sector For All 2020 (Draft FI Policy 2020)** (National Treasury)<sup>1943</sup>

- (a) It is recommended that National Treasury formulate and redevelop the Draft FI Policy and adopt it as the country's National Financial Inclusion Strategies (NFIS) that implement the internationally recognised FI standards and principles proposed in the NFIS Reference Framework and the NFIS Principles.
- (b) The newly developed NFIS must, in addition to incorporating the NFIS Principles and the I-SIP Methodology, also address the following:

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<sup>1942</sup> Each recommendation refers to the recommendation number in the relevant chapter.

<sup>1943</sup> See Rec 6B in Ch 6.7.2 above.

- (i) Redefine FI in South Africa and expand the current definition to include all the dimensions discussed in Chapter two above, in accordance with the definition recommended in **Rec 2E** above.
- (ii) Expand the policy target from extending access to financial services for small, medium, and micro-sized enterprises to include the general poor and low-income members of the public as the main target of FI.
- (iii) Address the cash-in/cash-out problem and the lack of available, appropriate, and affordable financial products, including entry-level accounts with store-of-value aspects, by outlining specific basic financial products and services such as BBAs which in the policy must encourage financial institutions to provide for the low-income households. The NFIS must outline a key policy objective of the government to make access to apply for financial products and services at financial institutions as a right. It must also emphasise as important policy objectives the need to cross-sell and migrate accounts and provide for specific marketing of BBAs to create awareness.

**2. Code of Banking Practice 2012 (Banking Association of South Africa)<sup>1944</sup>**

The following recommendations relate to the improvements to and enforcement of the current purely voluntary Code of Banking Practice 2012 by the Banking Association of South Africa to address the gaps identified in Chapter seven. It is recommended that:

- (a) The Code must incorporate FI as an additional objective in Clause 2.5 as follows:

**2. Objectives**

This Code has been developed to:

2.1.....

2.5 promote financial inclusion and access to basic banking products and services.

- (b) Expand banks' commitment to provide access to banking services including basic banking services, to address the gap identified regarding the lack of specific standards and conditions for providing retail financial products and services such as BBAs. Banks

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<sup>1944</sup> See Rec 6C in Ch 6.7.2 above.



must commit to provide such services and products based on the conduct and product standards developed by the FSCA from time to time in terms of the FSRA and the proposed Conduct of Financial Institutions Act, once promulgated, as recommended in **Rec 6J**. Clause 5 of the Code must be revised as follows:

“We” refers to banks and “you” refers to the customer.

## **5. Access to Basic Banking Products and Services**

- (1) We are committed to providing affordable and accessible basic banking products and services to all South Africans.
  - (2) We will provide you with a basic bank[ing] account, if you meet our minimum requirements, and after conducting the eligibility assessments.
  - (3) We are committed to creating platforms that raise awareness on these types of products and accounts and to give you the relevant information about the ease of access to these services and products.
  - (4) We may refuse to open and allow access to financial services or products or close an existing account with you if;
    - (i) you do not satisfy the eligibility requirements in subclause 2 above;
    - (ii) opening an account or providing access would result in an infringement of the provisions on the prevention of money laundering; and the countering of terrorist financing in terms of the Financial Intelligence Centre Act (38 of 2001); or
    - (iii) there are reasonable grounds to believe that you will use such account for illegal or fraudulent purposes.
  - (5) If any of the grounds for refusal or closure in subclause (4) are established, and a bank refuses to open a basic financial service or product, we commit to ensure that such bank will provide you with a written notice of refusal within a reasonable time.
  - (6) We commit to provide basic financial products and services that adhere to the standards, terms, and conditions published from time to time by the Financial Sector Conduct Authority in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct for Financial Institutions Act (...).
- (c) Develop and improve the enforcement of and compliance with the Code through measures aligned with the approval and enforcement measures adopted by the ASIC and proposed for the FSCA in terms of the FSRA in this research, as follows:
- (i) Establish a “Financial Inclusion Internal Compliance, Monitoring and Inspection Function” (FIICMIF) in the Code similar to the Australian Banking Code Compliance Committee and the Banking Code Standard Boards of India and the UK that will serve to enforce compliance with the Code by all subscribers.
  - (ii) The enforcement and compliance measures that the FIICMIF must impose must take a number of factors into account. These include the need to have an

independent government agency with inspectors to the Code and the approach adopted by other compliance bodies to reserve harsher penalties in exceptional circumstances. Rather than imposing harsh penalties for every non-compliance with the promotion of FI, the Code must provide the FIICMIF with a choice and a combination of enforcement mechanisms such as mystery shopping, incognito visits to the premises of Code subscribing members, and periodic reporting of compliance that must be applied to monitor and evaluate compliance with the Code. The Code must require the regulatory body to publish details of the bank and its breach of the Code in its annual report or publicly censure the Code's subscribers as measures to name and shame banks that do not meet the requirement to provide access to basic financial products and services, including BBAs, in exceptional circumstances only. The FIICMIF must impose progressively harsher measures by taking into account the severity and the impact of the contravention, mitigating or corrective actions already taken, the quantum of benefits or gain as a result of the contravention, and the financial or reputational impact on a particular subscribing bank and the entire banking or financial system.

### **3. The Banks Act 94 of 1990** (National Treasury and the South Africa Reserve Bank)

- (a) It is recommended that National Treasury and the South African Reserve Bank insert a specific provision in the Banks Act to provide for the right of everyone to apply for basic banking products and services such as BBAs. As this right is conditional on specific requirements that must be met before opening it such as the eligibility of a customer, the Act must, in addition, indicate that the right is not to "require" the products and services from bank, but to "apply" to a bank to open such products and services with customers, subject to meeting the prescribed requirements. The specific provisions must further refer to the Conduct Standards for Banks and the proposed Product Standards for Banks in terms of the Financial Sector Regulations Act, as recommended in **Rec 6J** in this research. The right should be inserted as follows:

### **Right to apply for access, and to open and use basic banking products and services**

- (1) Every citizen has the right to apply for access to and to open and use basic banking products and services offered by banks regulated in terms of this Act.
- (2) Subject to subsection (4), nothing in this Act establishes a right of any person to require a bank to provide a basic banking product and service to that person.
- (3) A bank must create platforms that raise awareness of each type of basic banking product and service and give the relevant information about the ease of access to these products and services and offer them once they have conducted the eligibility assessments in accordance with the standards provided by the Financial Sector Conduct Authority in terms of the Financial Sector Regulations Act (9 of 2017).
- (4) A bank may only refuse a customer basic banking products and services if;
  - (i) the customer does not satisfy the eligibility requirements in subsection 3.
  - (ii) opening such financial service or product would result in an infringement of the provisions on the prevention of money-laundering and the countering of terrorist financing in terms of the Financial Intelligence Centre Act (38 of 2001).
  - (iii) there are reasonable grounds to believe that the customer will use such an account for illegal or fraudulent purposes.
- (5) If any of the grounds for refusal or closure in subclause (4) are established, and a bank refuses to open a basic financial service or product, such bank must provide the customer with a written notice of refusal within a reasonable time.
- (6) A bank must provide basic banking products and services that adhere to the standards, terms, and conditions published from time to time by the Financial Sector Conduct Authority in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct for Financial Institutions Act (...).

#### **4. Financial Intelligence Centre Act 38 of 2001** (National Treasury and the Financial Intelligence Centre)

It is recommended that National Treasury in collaboration with the FIC improve and amend the FICA to address the lack of FI and the inclusion of the majority in the formal financial systems as one of its objectives. They are also recommended to address the gap identified with lack of specific publication of transgression as one of their administrative sanctions. The following specific recommendations are made:

- (a) The following underlined words that seek to make access to formal financial sectors and the promotion of FI as one of the objectives of FICA should be added to the Preamble and section 42(2)(a).
  - (i) In the Preamble:  
to provide for measures that prevent money-laundering and the financing of terrorism in line with the promotion of financial inclusion and access to the formal financial sector.
  - (ii) To include the underlined words in section 42(2)(a) that deal with Risk Management and Compliance Programme:

- (2) A Risk Management and Compliance Programme must—
- (a) enable the accountable institution to —
    - (i) identify;
    - (ii) assess;
    - (iii) monitor;
    - (iv) mitigate; and
    - (v) manage,the risk that the provision by the accountable institution of products or services may involve or facilitate money-laundering activities or the financing of terrorist and related activities; taking into account the objective of promoting financial inclusion and enhancing access to financial products and services in the formal financial sector.

(b) The followings are recommended for the enforcement of the FICA and the coordination of the FIC with other supervisory bodies.

- (i) Section 45C(c) of the FICA must be amended to add the publication of contraventions as part of the administrative sanctions.
- (ii) Schedule 2 to the FICA must be amended to add other supervisory bodies such as the National Credit Regulator in terms of the NCA and the Financial Sector Transformation Council in terms of the B-BBEE Act that play an important role to promote FI together with their specific objectives. This will enable the FIC and the relevant supervisory bodies in the financial sector to coordinate on fulfilling its AML/CFT objectives, including the proposed objective of preventing money-laundering and the financing of terrorist and related activities by promoting access to and the use of the formal financial sector. This adds to the list that already includes the FSCA and the South African Reserve Bank. The following must be added to Schedule 2:

- 9. ....
- 10. The Financial Sector Transformation Council established in terms of the Financial Sector Code and endorsed in terms of the Broad-Based Black Economic Empowerment Act (53 of 2003).
- 11. The National Credit Regulator established in terms of the National Credit Act (34 of 2005).

**5. Financial Sector Code Issued under the Broad-Based Black Economic Empowerment Act 53 of 2003** (Department of Trade, Industry and Competition and the Financial Sector Transformation Council (FSTC))

It is recommended that the Department of Trade, Industry and Competition in collaboration with the Financial Sector Transformation Council amend and improve the Financial Sector Code and the B-BBEE Act.

(a) It is recommended that the minimum product and access standards applicable to banks as a sub-category of access to the financial service elements in the FS Code, not be included in this Code or the B-BBEE Act, but that reference rather be made to the Conduct Standards for Banks and the proposed Product Standards for Banks in terms of the FSRA and the draft CoFI Bill, as outlined in **Rec 6J** in this research. This will require the FSTC to establish whether a bank has met the transformation target of providing access to retail financial products and services by determining whether its financial products meet the product standards set in the proposed Product Standards for Banks. A bank will still be required to apply to the FSTC for the approval of any existing or new financial products as “access qualifying products”, provided it meets the minimum product standards or its features exceed the minimum standards outlined in the proposed Product Standards for Banks. This will allow banks to continue to develop financial products that serve to promote FI. The proposed Product Standards for Banks should, therefore, not inhibit innovations of financial products and services. Based on this recommendation, paragraphs 3.5.3 and 3.5.4 of Amended FS Code Series FS700, Statement FS701 must be amended as follows:

(i) Paragraph 3.5.3

Products: Any product will qualify as an Access Product if it conforms to the minimum access and product standards which have been negotiated as part of the Sector Code process, and developed **[in accordance with applicable law]** by and in collaboration with the Financial Sector Conduct Authority from time to time as Product Standards for Banks in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct of Financial Institution Act (...).

(ii) Paragraph 3.5.4

Participation: Any bank may apply to the Council to have any number of products approved as access qualifying products for the purposes of meeting their access targets. The Council shall approve such products if the product meets the minimum access and product standards[.] as developed by the Financial Sector Conduct Authority from time to time as Product Standards for Banks in terms of the Financial Sector Regulation Act (9 of 2017) and the Conduct of Financial Institution Act (...).

- (b) The FSTC must continue to enforce compliance with the provisions of the FS Code as outlined in the B-BBEE Act and in collaboration with the FSCA as one of the financial sector regulators in terms of the FSRA as proposed in **Rec 6L(a)** in this research.

**6. The Conduct of Financial Institutions Bill 2020** (National Treasury and the Financial Sector Conduct Authority)

It is recommended that National Treasury in collaboration with the FSCA improve and amend the second Draft Conduct of Financial Institutions Bill and the requirements to develop conduct standards.

- (a) Similar to the FSCA's power to establish conduct standards in terms of section 106 of the FSRA and clause 67 of the draft CoFI Bill, it should have the power to develop product standards in terms of the proposed CoFI Act and not as part of the regulatory strategies in terms of the FSRA. Product standards and the specific measures to promote the sale, design, and marketing of products fall squarely within the purview of regulating conducts of financial institutions in terms of the proposed CoFI Act, and not the FSRA. Therefore, it is recommended that, rather than the FSCA developing product standards only as part of its regulatory strategies,<sup>1945</sup> the proposed CoFI Act should specifically require it to establish such standards. The following clause should be inserted into the Draft CoFI Bill.

**Product Standards developed by the Authority** [Referring to the FSCA]

- (1) Subject to the Authority's powers to developed conduct standards in terms of section 67 of this Act read with section 106 of the Financial Sector Regulations Act (9 of 2017), the Authority may develop product standards for and in respect of -  
(a) financial institutions required to be licensed under this Act; and  
(b) persons referred to in section 106(1) of the Financial Sector Regulation Act who are subject to this Act as provided in section 4.  
(2) Product standards prescribed for the purposes of this Act must be aimed at achieving the object of this Act, including the promotion of financial inclusion.<sup>1946</sup>

- (b) It is recommended that the FSCA develop product standards for banks in terms of the provisions incorporating the basic principles required for the conduct standards in terms of section 106 of the FSRA and clause 67 of the draft CoFI Bill. Generally, these standards must address the key FSCA's strategy following "a more intrusive, rule-based

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<sup>1945</sup> See Ch 6.3.1 (b) for the proposal of the FSCA to develop product standards in the Regulatory Strategies.

<sup>1946</sup> See Rec 6H in Ch 6.7.2 above.

approach” of introducing product standards that include “prescribing product features”. Product standards must, among others, address specific gaps identified in this research relating to the promotion of FI through retail financial services, including access to BBAs. Such standards must complement and be in line with the broad principles of treating customers fairly outlined in section 58 of the FSRA and clause 67 of the second Draft CoFI Bill regarding the design, advertising, and promotion of financial products and services. The standards must include retail financial products by taking into account the interests of financial customers generally, and specifically targeted groups of these customers. They must, among others, specifically address the gaps identified in the FS Code regarding the need to set minimum access and product standards, including “qualifying access products”. Such standards must also provide minimum standards for the eligibility criteria for BBAs, maximum limits on fees, features that must be included in the accounts, such as credit facilities, cross-selling of products within the account, migration, marketing, and creating awareness of these accounts.

- (c) The following recommendations relate to specific product standards that the FSCA must develop in terms of the CoFI Bill for banks to design, sell, market, and create awareness of BBAs as a measure to promote FI in South Africa.
- (i) The Product Standards for Banks must include a specific section that addresses standards for providing BBAs titled “Basic Bank Savings and Deposit Account” (BBSDA), similar to BBAs provided in terms of the Reserve Bank of India’s BBSDA Circular.<sup>1947</sup>
  - (ii) Banks must be required to design, provide, and advertise BBSDAs in order to fulfil the right of access and to open this account as recommended in **Rec 6D** of this research.
  - (iii) The Product Standards for Banks relating to BBSDAs must incorporate certain of the features outlined in the defunct Exemption 17 to set maximum limits on certain key features and to align them with the tiered-based RBA with regard to low-cost “accounts-based products”. They must also draw lessons from key features of the payment account with basic features in terms of the EU PAD, with necessary adjustments for the local context. Importantly, they must further take into account the need to design these accounts in a manner that balances product flexibility

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<sup>1947</sup> See Rec 6J in Ch 6.7.2 above.

and discipline as discussed in this research, and to avoid the direct or indirect fixing of purchase or selling prices or any condition in contravention of competition law. BBSDAs must therefore incorporate the following conditions and features:

- ◇ To prevent the stigma associated with these types of accounts such as Mzansi as a "poor man's account", all customers must be eligible to apply for a BBSDA irrespective of their income level. Product standards must prohibit the holder of a BBSDA from opening any other account categorised as BBSDA at any bank in South Africa, unless he or she first closes the existing account.
- ◇ Subject to the relevant AML/CFT measures, customers must be eligible for this account irrespective of whether or not the customer's source of income derives from the formal economic sector.
- ◇ A BBSDA must offer customers facilities to deposit and withdraw money at the counter or at an ATM, debit, card payment, purchases, and transfer facilities, including electronic transfers at the point-of-sale.
- ◇ With regard to monthly fees on this account, product standards must require banks to offer these accounts free of charge or at a reasonable fee. Factors such as the national income levels and the average fees charged by national banks for services provided on conventional accounts must be taken into account in determining reasonable fees. The FSCA, in collaboration with the FSTC, must in terms of the reporting required by the B-BBEE Act publish reasonable monthly fees that may be levied for the BBSDAs annually by taking the above factors into account.
- ◇ Another provision that can address this stigma is specifically to require banks to provide BBSDA with two types of purse embedded in the account, to emulate the defunct Standard Bank E-Plan. As part of the cross-selling of products in the accounts as recommended in this research, standards should require banks to notify the customer of the maximum amount required to be in the account at any particular time and advise him or her to consider



moving the surplus amount to the savings purse and incentivise such action with a certain percentage of positive interest if maintained over a prescribed period.

- ◇ The standards should also set a ceiling on the balances and the maximum deposits that should be in the transactional purse and the saving purse of the BBSDA at a particular time. To avoid the deposit of cash amounts in contravention of the prescribed limit of R24 999 set for the cash transaction reporting obligation in terms of the FICA, standards should set the minimum for each purse in accordance with this limit. The limits will also determine whether the bank must contact the customer to consider migrating to advanced accounts. In addition, standards should also allow customers to have an unlimited “number” of monthly cash deposits in both purses of the account. However, it is recommended that the standards allow for three free cash deposits up to the above prescribed limit of R24 999.
- ◇ Product standards should allow for competition between banks by permitting them to offer BBSDAs with a reasonable minimum opening balance while allowing each bank not to impose this requirement as it deems fit.
- ◇ The standards should also encourage cross-selling of different products, either within the BBSDA or linked to other products as a further measure to eradicate the “poor man’s account” stigma attached to the Mzansi account, to limit the dormancy of the accounts, to address the cash-in/cash-out patterns, while also ensuring that these accounts remain profitable for banks. For instance, credit facilities such as ATM instant loans and overdraft facilities should be options available to BBSDA holders. However, any such additional products must not form an integral part of or a condition for opening a BBSDA.
- ◇ Product standards must address the concern of immediate withdrawals from these accounts. Standards should prevent this by incentivising customers with a specified percentage of positive interest for keeping a certain amount of money in the account or keeping it for a certain period of time, such as

provided by the defunct E-plan. Another important requirement is to instill financial discipline while ensuring flexibility in relation to withdrawals. Standards should provide for unlimited withdrawals. However, they should prescribe three free monthly withdrawals from the account. Banks should charge amounts of withdrawal fees that are prescribed from time to time to deter customers from spontaneous withdrawals.

- ◇ Product standards must also incorporate requirements for migrating or upgrading BBSDAs to current accounts. Banks must be required to review portfolios of BBSDAs periodically and determine whether to migrate or upgrade. Banks must consider the following factors when deciding whether or not to migrate the account:
  - the eligibility criteria for an improved account;
  - customers' financial circumstances; and
  - the pattern of usage on the account.

A bank must give the customer at least two months' notice and explain the reasons for such migration. Where the customer resolves not to upgrade the account, the bank must advise him or her to adhere to the terms and conditions applicable to BBSDAs, including the limited ceiling balances in each purse, the number of free withdrawals, and charges on additional withdrawals.

- ◇ Product standards must also require banks to offer education campaigns, advertising, and marketing that create awareness specifically tailored for the BBSDAs. It is recommended that as online marketing platforms are developing rapidly, banks should be permitted to use all forms of marketing platform available. Standards should, therefore, not set specific requirements for educating customers and the marketing of these accounts. Banks must, however, be able to provide the FSCA and the FSTC with their marketing and awareness campaign strategies created for these accounts in their annual reporting.

- (d) For the purpose of enforcing the provisions of the proposed CoFI Bill in relation to the conduct standards and Product Standards for Banks to promote FI, it is recommended

that the provisions relating to the service test in the US Community Reinvestment Act (CRA) be incorporated into this Bill to enforce compliance with the proposed product standards. In addition to conducting independent reviews of existing arrangements and requesting relevant information from the financial institutions in relation to their activities or financial products, reporting and publication of information in clauses 48 and 49 must be improved by the inclusion of performance evaluation as service test following the CRA model. It is specifically recommended as follows:<sup>1948</sup>

- (i) That a new clause be inserted after clause 49 of the CoFI Bill as follows:

**Financial Institution Evaluation and the Service Test**

- (1) The provisions of this section apply to the Authority's power to develop the product standards in terms of this Act.
  - (2) Subject to the provisions of section 49 and the requirements for financial institutions to report information relating to their activities and financial products or services, annually to the Authority, the Authority must evaluate the performance of a financial institution and determine how the standards of its financial products and services promote financial inclusion in terms of this Act.
  - (3) The Authority must rate the performance of each financial institution using the following scale of ratings:
    - (a) substantial noncompliance;
    - (b) needs to improve;
    - (c) satisfactory; or
    - (d) outstanding.
- (ii) To improve the effectiveness of the performance evaluations and the service test, it is recommended that clause 49 of the CoFI Bill must, in addition to publishing information on non-compliance, incorporate the restrictions imposed on certain facilities based on the outcome of the evaluations. Rather than adopting all the sanctions in the CRA, the proposed CoFI Bill must empower the FSCA to impose a denial of expansion on non-compliant banks in addition to other similar restrictions in terms of the B-BBEE Act. It must require other regulators, organs of state, and public entities to determine the qualification criteria for issuing licences, concessions in respect of economic activities, the sale of state enterprises, and awarding incentives, grants, and investment schemes based on the performance obtained in the service test.

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<sup>1948</sup> See Rec 6M in Ch 6.7.2 above.

**7. The Financial Sector Regulations Act 9 of 2017** (National Treasury and the Financial Sector Conduct Authority)

It is recommended that National Treasury in collaboration with the Financial Sector Conduct Authority improve and amend the FSRA as follows:

- (a) It is recommended that National Treasury amend the definition of FI in section 1 of the FSRA to include different dimensions of the definition as recommended in **Rec 2E** of this research.<sup>1949</sup>
- (b) It is also recommended that section 106 of the FSRA which empowers the FSCA to set conduct standards adds "ensuring the promotion of financial inclusion" as one of the reasons for making the conduct standards. This will support its general objective of achieving a stable financial system that works in the interests of financial customers, by establishing a regulatory and supervisory framework that promotes FI, among others, in terms of section 7.
- (c) The following recommendations relate to improving the enforcement measures in the FSRA.<sup>1950</sup>
  - (i) To reinforce the monitoring and the enforcement of financial sector laws such as the B-BBEE Act, the following amendments to the FSRA are recommended:
    - ◇ The definition of "financial sector regulators" in section 1 must add the Financial Sector Transformation Council.
    - ◇ Schedule 1 to add the B-BBEE Act as one of the "financial sector laws".
  - (ii) To enforce voluntary codes of practice in the financial sector, it is recommended that the FSRA provide for the general approval of voluntary codes of practice by the FSCA in this sector such as the *BASA Code of Banking Practice*, similar to the approval of codes of practice by the ASIC, in terms of the Australian Corporation

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<sup>1949</sup> See Ch 2.7.2 above.

<sup>1950</sup> See Rec 6L in Ch 6.7.2 above.

Act 2001 and the *Approval of Financial Services Sector Codes of Conduct Regulatory Guideline* 183. The approval process is necessary to enforce compliance with the *BASA Code of Banking Practice* and to make it effective as an enforced-self-regulation. Therefore, the FSRA must be amended and a new section must be inserted as follows:

#### **Approval of Codes of Practice**

- (1) The Authority shall have the power to approve all codes of practice developed for the financial institutions in terms of the applicable financial sector law.
- (2) The Authority shall approve a code of practice if it is satisfied that:
  - (a) the obligations of subscribers to the code are capable of being enforced;
  - (b) the code is consistent with this Act or any other financial sector laws under which the Authority has regulatory responsibilities; and
  - (c) there exists an independent body that is empowered to administer and enforce the code and is able to impose sanctions.

#### **8. The Competition Act 89 of 1998** (Department of Trade, Industry and Competition)

It is recommended that the Department of Trade, Industry and Competition amend and improve the Competition Act as follows. By adhering to the Product Standards for Banks relating to BBSDA as recommended in **Rec 6J** in this research, banks are likely to be in contravention of section 4 of the Competition Act as designing BBAs may constitute direct or indirect fixing of a purchase or selling price or any other trading conditions in relation to these accounts. It is, therefore, recommended that "the provision of retail financial products and services for the purpose of promoting financial inclusion and to achieve transformation in the financial sector in terms of the B-BEEE Act" should specifically be added as one of the objectives in section 10(3) of the Competition Act in terms of which the promotion of FI and the transformation of the financial sector are not regarded as "restrictive practices" and, therefore, exempted from the provisions of section 4.

#### **7.4 CONCLUDING REMARKS**

The current statistical levels of FI and the FE challenges experienced across the globe and in South Africa could not all be addressed in this research due to its focus on access to BBAs in South Africa. FI and FE raise a number of issues that future researches will need to explore in order to provide a holistic study to inform FI policies and regulatory frameworks globally

and in South Africa. Technology is constantly developing and new financial technologies that may affect FI efforts negatively or promote FI are developing. Continuous research is therefore required to identify the benefits that these new developments bring and how policy and regulatory frameworks must be developed to accommodate these developments and embrace their potential to promote FI. Therefore, researchers who go beyond focusing on basic financial products and services are needed. They must start by exploring the potential of other financial services such as credit, insurance, pensions, remittance facilities, mobile payments, and virtual currencies which can improve FI and whether policy and regulatory frameworks are in place to support them. As this research was based on the problem identified by Ferguson in relation to a lack of deposits and savings in reliable banks,<sup>1951</sup> it remains important to note that a bigger problem that requires collaborative efforts by the society, private, and the public sectors to prevent FE and to promote FI through various measures, including policy and regulatory frameworks still lies ahead. Riley and Kulathunga capture the challenge aptly when they state that:

[F]inancial inclusion is not static, but rather dynamic, and that different individuals or groups find themselves in different stages of the financial inclusion process, at times temporarily, recurrently, or continuously. Moreover, financial exclusion can occur in one or more of the essential markets, that is, transaction banking, savings, credit, and insurance. One can therefore argue that no single intervention can address all of these complexities and achieve the desired state of inclusiveness. Hence, even well-developed financial markets have their own financially excluded segments of the population. Developing countries should assess the rapidly changing financial and social landscapes and focus on whether vulnerable groups face increased risks of financial exclusion.<sup>1952</sup>

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<sup>1951</sup> See the quote by Ferguson at the beginning of Ch 1.

<sup>1952</sup> Riley and Kulathunga *Bringing E-Money to the Poor: Successes and Failures* (2017) 19.

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### ***Australia***

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National Payment System Act 39 of 2011

### ***South Africa***

Banks Act 94 of 1990

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Mutual Banks Act 124 of 1993

National Credit Act 34 of 2005

National Payment Systems Act 78 of 1998

Prevention of Organised Crime Act 121 of 1998

Proceeds of Crime Act 76 of 1996

Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

Public Finance Management Act 1 of 1999

Short-term Insurance Act 53 of 1998

Usury Act 73 of 1968

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Treaty of the Southern African Development Community 1992

### ***United Kingdom***

Financial Service and Market Act 2000

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### ***United States of America***

Bank Enterprises Act 1991

Community Reinvestment Act 1977

Dodd–Frank Wall Street Reform and Consumer Protection Act 2010

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