

**EXPLANATORY MEMORANDUM ON THE PAYMENT SYSTEM MANAGEMENT BILL,
2023**

BANK OF NAMIBIA

1 February 2023

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1. PURPOSE

The purpose of this explanatory memorandum is as follows:

- To explain the rationale for the proposed amendments to the Payment System Management Act, 2003 (Act No. 18 of 2003) and the Payment System Management Amendment Act, 2010 (Act No. 6 of 2010);
- To consolidate the proposed amendments into a single legislation; and
- Lastly, the memorandum will also serve as institutional memory for future reference.

This memorandum serves to list and elaborate on some of the most prominent legal gaps identified in the Payment System Management Act, 2003 (Act 18 of 2003), as amended by the Payment System Management Act, 2010 (Act No. 6 of 2010) and propose legislative amendments to address those gaps. Equally the proposed changes are also in response to the changing payment systems landscape.

The process led up to the drafting of this memo and entailed a review of the domestic and global payments law. This is critical given local and global developments in the field of payments and related areas i.e. technology, innovation, evolving business models, security but equally to ensure that the domestic payments law is well aligned with the SADC Payment Systems model law.

Further to the above, the National Payment System industry as well as the World Bank were consulted to review the draft Bill and provide input and comments for consideration and possible incorporation. This stakeholder engagement was conducted extensively to ensure that the stakeholders were afforded sufficient time and context in providing their feedback.

It is important to note that with the consolidation of payment laws as stated above, the intention is to ultimately repeal the previous versions of the Payment System Management Act by introducing the Payment System Management Bill of 2021. Therefore, the reader should take note that the explanatory memorandum will maintain the provisions of the existing Payment System Management Act, 2003 (Act No. 18 of 2003), as amended by the Payment System Management Act, 2010 (Act No. 6 of 2010) [the Act].

2. BACKGROUND

One of the key responsibilities of the Bank, as a regulator of banking institutions, non-bank financial institutions and financial market infrastructure, is to ensure that the applicable legal framework for the regulation and oversight of these institutions in Namibia remains effective and relevant.

To this end, the legal framework is constantly benchmarked against applicable international best regulatory standards and practices, as well as developments in both local and international financial markets. During the 2017 review of the payments legislation, the Bank identified sections that required to be amended to ensure that the legal framework is brought in line with international developments in the regulatory sphere and to ensure that it remains effective and relevant. In short, the issues identified include, but is not limited to:

- Certain definitions in the Act needed to be streamlined to provide more clarity;
- New definitions that were omitted from the current Payment System Management Act needed to be inserted into the draft Bill;
- Sections needed to be expanded upon in line with the various World Bank Reports, recent payments legislation passed between 2018 and 2020), guidance received from World Bank experts on international best practice, comments from National Payment System (NPS) industry etc.;
- The Companies Act, 2004 (Act No. 28 of 2004) came into effect on 1 November 2010 and repealed the Companies Act, 1973 (Act No. 61 of 1973), among others. Therefore, the reference in the Act to sections of the repealed Companies Act 1973 should be changed to read the Companies Act of 2004, which is an amendment to the 1973 Companies Act;
- The Bank of Namibia Act, 2020 (Act No. 1 of 2020) came into effect 15 June 2021 and repealed the Bank of Namibia Act, 1997 (Act No. 15 of 1997), as amended. Thus, reference to this Act needed to be changed given this update.
- Financial Sector Assessment Program (FSAP) revealed that the Bank did not have adequate powers in respect of the promotion of competition and innovation in the National Payment System and the recognition in law of the oversight role of the Bank over the Central Securities Depository.
- Overall, the changes introduced to the legal framework of the Bill aim to ensure that the Bank continues with its endeavours to ensure financial inclusion, financial stability and consumer protection within the NPS.
- Ultimately, as a matter of principle, the single legislation will upon promulgation result in the repeal of the Payment System Management Act, 2003 (Act No. 18 of 2003) and the Payment System Management Amendment Act, 2010 (Act No. 6 of 2010) in their entirety, to ensure that there is a single law governing all payments related matters.

The above-mentioned background is the basis for the current proposed amendments to the Act.

3. PROPOSED AMENDMENTS

3.1. Long Title

3.1.1 By the insertion of the word ‘establishment’ into the long title

Issue: The current Act does not make provision for the establishment of payment, clearing and settlement systems in the long title and only speaks to the regulation of those systems. This is an omission as one cannot speak to regulate or oversee any system if provision has not been made to pronounce their establishment.

Proposal: The word establishment to be inserted in the Act.

Amendments to be included in the Bill: *To provide for the establishment, management, administration, operation, regulation, oversight and supervision of payment, clearing and settlement systems in Namibia; and to provide for incidental matters.*

3.2 Definitions (section 1)

3.2.1 By the insertion of the definition of Administrative Penalties

Issue: The Act states that the Bank may issue administrative penalties for delay in compliance, but it does not define what administrative penalties are.

Proposal: A definition for administrative penalties to be inserted in the Act.

Amendments to be included in the Bill: *“administrative penalties” refers to penalties imposed by the Bank of Namibia for non-compliance with the provisions of this Act or with a determination, directive or other subordinate legislation issued by the Bank, without the intervention of a court, subject to right of appeal as per section 39 of the Act and the to the High Court.*

3.2.2 By the insertion of the definition of Agent

Issue: The Bill makes specific reference to agents throughout. Given that the players within the national payment system have been defined, e.g. system participants, payment service providers and payment system operators, it only makes sense that a definition is provided in respect of agents. In this way, legal certainty is provided.

Proposal: A definition for Agent to be inserted in the Act.

Amendments to be included in the Bill: *“Agent” means an entity appointed by a payment service provider or system participant to perform certain payment services on its behalf.*

3.2.3 By the insertion of the definition of authorised officer

Issue: The Bill makes specific reference to authorised officer and this is a crucial term, especially under section 34 (powers to inspect). To avoid an open-ended interpretation, a definition is warranted. In doing so, legal certainty is provided on the term.

Proposal: A definition for Agent to be inserted in the Act.

Amendments to be included in the Bill: *“authorised officer” means a staff member of the Bank authorised in writing to exercise the powers conferred on such officer by sections 34.*

3.2.4 By the insertion of the definition of Association and deletion of the definition of Body

Issue: In line with international best practice to ensure a single regulator for the National Payment System as well as to address the current inefficiencies noted with having two regulatory authorities within the National Payment System, the current regulatory powers delegated to PAN need to be taken back by the Bank. Thus, PAN will be an association as opposed to a regulatory body and hence the need for swapping Body with Association. Furthermore, the current Payment System Management Act specifically asserts that the Body shall be known as the Payment System Management Body, however the entity registered is an association known as the Payments Association of Namibia. Thus, this contradiction with the law also needed to be addressed.

Proposal: A definition for Association to be inserted in the Act to replace the current definition of Body.

Amendments to be included in the Bill: *["Body" means the Payment System Management Body] "Association" means the Payments Association of Namibia established in terms of section [3] 6 of this Act.*

3.2.5 Amendment of the definition of Bank

Issue: The new Bank of Namibia Act was enacted in 2020, hence all references to the 1997 Act would need to be amended, including the definition of Bank.

Proposal: Amend the definition of the Bank to be in line with the definition provided in for the Bank of Namibia Act (Act No. 1 of 2020).

Amendments to be included in the Bill: *“Bank” means the Bank of Namibia as referred to in section 2 of the Bank of Namibia Act, 2020 (Act No. 1 of 2020), and any subsequent amendments thereto.*

3.2.6 Amendment of the definition of Bank of Namibia

Issue: The new Bank of Namibia Act was enacted in 2020, hence all references to the 1997 Act would need to be amended.

Proposal: Amend the definition of the Bank of Namibia to be in line with the definition provided in for the Bank of Namibia Act (Act No. 1 of 2020).

Amendments to be included in the Bill: *“Bank of Namibia Act” means the Bank of Namibia Act, [1997, (Act No. 2 of 1997)] 2020 (Act No. 1 of 2020), and any subsequent amendments thereto.*

3.2.7 By insertion of a definition for beneficial ownership

Issue: The International Monetary Fund (IMF) carried out a scoping mission to Namibia during November 28–December 6, 2022. The objective of the mission was, among others, to provide legislative drafting support to address technical compliance deficiencies identified in Namibia’s Mutual Evaluation Report adopted in September 2022.

One of the identified deficiencies was the absence of a legal definition of “beneficial ownership” in the legislation. A definition of beneficial ownership is necessary particularly when assessing the application for payment service providers and payment system operators, to ensure that the natural persons who are beneficial shareholders of applicants are subject to fit and proper assessment to determine their fitness to hold shares in a payment service provider or payment system operator.

In order to address the identified shortcoming, the Bank proposes that a definition of “beneficial ownership” be inserted in the Bill and reference thereto made under the relevant provisions i.e, sections 11 and 14 of the Payment System Management Bill. With this intervention, the Bank would ensure that Namibia meets the Anti-Money Laundering/Combating the Financing of Terrorism requirements and avoid a possible grey listing by the IMF.

Proposal: Insert the definition of beneficial ownership into the Payment System Management Bill.

Amendments to be included in the Bill: *“beneficial owner” in respect of a payment service provider or a payment system operator, means a natural person who, independently or together with a connected person, directly or indirectly, including through bearer share holdings -*

(a) owns the payment service provider or payment system operator or the controlling company of such payment service provider or payment system operator; or

(b) exercises effective control of the payment service provider or payment system operator or the controlling company of such payment service provider or payment system operator.”

3.2.8 Amendment of the definition of Board

Issue: The new Bank of Namibia Act was enacted in 2020, hence the correct sections or provisions of the new Act should be cited.

Proposal: Amend the definition of the Board to be in line with section 9 of the Bank of Namibia Act (Act No. 1 of 2020).

Amendments to be included in the Bill: *“Board” means the Board of the Bank referred to in section [4] 9 of the Bank of Namibia Act.*

3.2.9 Amendment of the definition of business day

Issue: This definition was limiting in the sense that it confined business days to any other day except for Saturday, Sunday or a public holiday; however, the Namibia Interbank Settlement System (NISS) and system participants operate on Saturdays as well. Thus, this had to be taken into account and hence the repeal of this definition.

Proposal: Amend the definition by removing the limitation attached to Saturdays.

Amendments to be included in the Bill: *“business days” [means] refers to any day of the week other than [Saturday] Sunday or public holiday referred to in or declared under, the Public Holidays Act, 1990 (Act No. 26 of 1990), and any subsequent amendments thereto.*

3.2.10 Amendment of the definition of clear or clearing

Issue: The current definition is ambiguous and requires revision.

Proposal: Amendment of the existing definition of clear or clearing by the deletion of unnecessary words and insertion of appropriate wording.

Amendments to be included in the Bill: *“clear” or “clearing” means [the exchange of payment instructions between system participants with a view to reconciling and confirming payment instructions] the process of transmitting, reconciling and confirming the transfer of funds or securities prior to settlement and includes the netting of payment instructions and the establishment of final positions for settlement.*

3.2.11 Amendment of the definition of clearing system

Issue: The current definition is ambiguous and requires revision and further expansion in order to clearly articulate what a clearing system is.

Proposal: Amendment of the existing definition of clearing system by the deletion of unnecessary words and insertion of appropriate wording.

Amendments to be included in the Bill: *means a system [whereby system participants can exchange data, documents and payment instruments and instructions relating to funds or securities transfers to other system participants] with a set of rules and procedures through which participants agree and must comply with in exchanging instructions to transfer funds or securities to other participants through a centralised system or at a single location, and may include a mechanism for establishing the final positions of participants for settlement of obligations.*

3.2.12 Amendment of the definition of Companies Act

Issue: The Companies Act, 1973 has been repealed in its entirety and replaced by the Companies Act, 2004. As such, the correct reference/citation needs to be reflected in the Act.

Proposal: Amend the definition of the Companies Act to have the correct reference/citation.

Amendments to be included in the Bill: *“Companies Act” means the Companies Act, [1973 (Act No. 61 of 1973)] 2004 (Act No. 28 of 2004), and any subsequent amendments thereto.*

3.2.13 Deletion of the definition of cost-effectiveness

Issue: Through its engagements with banking institutions, the Bank through the Payment and Settlement Systems Department noted that banking institutions do not charge prices of payment services in a manner which accurately reflects the cost of producing such services, as that would cost the user (consumer) much more. Hence, this definition is not practical as it is not a true reflection of the pricing experience of banking institutions.

Proposal: Deletion of the definition for cost-effectiveness in its entirety.

Amendment to be included in the Act: *[“cost-effectiveness” means the pricing of payment or other connected service in a manner that accurately reflects the cost of producing such service]*

3.2.14 By the insertion of the word currency and the deletion of reference to money

Issue: Given the changes effected to the Bank of Namibia Act, 2020 whereby the Bank's Act no longer refers to money but currency, an amendment was thus required in this regard.

Proposal: Exchanging the reference to money with currency.

Amendments to be included in the Bill: [*“money”*] *“currency” means notes and coins issued in terms of section [20] 38 of the Bank of Namibia Act and any other currency being legal tender in Namibia.*

3.2.15 By the insertion of the definition of designation

Issue: Designation is an integral part of payment systems given the fact that the Bank may designate payment instruments, designate participants and financial market infrastructure. The existing Act does not make provision for it nor does it define it.

Proposal: A definition of designation to be inserted in the Bill.

Amendment to be included in the Bill: *“designation” means the process of designation of a payment, clearing or settlement system as systemically important systems to regulate and manage systemic risk so that the key functions of the system, its rules, procedures, governance structures, including the identity of owners or individuals on the board of governing committees of such payment systems, meet appropriate international standards; and review risk procedures, including disaster recovery.*

3.2.16 A definition of dispute resolution to be inserted in the Bill

Issue: Although the Act makes provision for dispute resolution, it has not clearly defined the concept. Thus, a definition is required to provide legal certainty.

Proposal: A definition of dispute resolution to be inserted in the Bill.

Amendment to be included in the Bill: *“dispute resolution” means the process of solving a dispute using alternative dispute resolution mechanism as per the High Court Act and Rules of the High Court of Namibia as amended from time to time.*

3.2.17 A definition of electronic money to be inserted in the Bill

Issue: The Bill has a part dealing with electronic money in detail. Given this addition, a definition is thus required to provide legal certainty.

Proposal: A definition of electronic money to be inserted in the Bill.

Amendment to be included in the Bill: “electronic money” means monetary value as represented by a claim on its issuer, which is –

(a) stored electronically, magnetically or digitally;

(b) issued on receipt of funds (legal tender) of an amount equivalent to the monetary value issued;

(c) accepted as a means of payment by persons other than the issuer; and

(d) redeemable upon demand for cash in Namibia dollar;

3.2.18 By the insertion of the definition of electronic money issuer

Issue: The Bill has a part dealing with electronic money in detail, which also makes reference to electronic money issuers. Given this addition, a definition is thus required to provide legal certainty.

Proposal: A definition of electronic money issuer to be inserted in the Bill.

Amendment to be included in the Bill: “electronic money issuer” means a payment service provider authorised under this Act to issue electronic money.

3.2.19 Amendment of the definition of fees and charges

Issue: Given the existing mandate for the Bank to set standards on fees and charges on payment services and the further expansion of this provision in the Bill, it was identified that the existing definition needed rewording to address the existing.

Proposal: Amendment of the current definition for fees and charges to be inserted in the Bill.

Amendments to be included in the Bill: “fees or charges” means costs payable by a user of a payment services or [other] another connected service.

3.2.20 Insertion of the definition of Financial Intelligence Act

Issue: Given the reference to the Financial Intelligence Act in the draft Bill, a definition is thus warranted as its an important piece of legislation for purposes of executing the draft Bill.

Proposal: Insertion of the definition of Financial Intelligence Act.

Amendment to be included in the Act: “Financial Intelligence Act” means the Financial Intelligence Act 2012 (Act No. 13 of 2012) and any subsequent amendments thereto.

3.2.21 By the insertion of the definition of Financial Market Infrastructure

Issue: There is reference made to financial market infrastructure (FMI) in the Act, however, no definition is provided for it. FMIs are a key stakeholder in payment systems and thus require definition.

Proposal: A definition for day to be inserted in the Bill.

Amendments to be included in the Bill: “Financial Market Infrastructure” means a multilateral system among participating institutions, including the operator of the system, used for purposes of clearing, settling, or recording payments, securities, derivatives, or other financial transactions.

3.2.22 By the insertion of the definition of Government Gazette

Issue: There is reference made to the Government Gazette, however, no definition is provided for it. The Government Gazette is a key stakeholder in the Bank’s legislative drafting process and thus requires definition to clearly articulate the function.

Proposal: A definition for day to be inserted in the Bill.

Amendments to be included in the Bill: “Government Gazette” means the official publication of the Government of the Republic of Namibia.

3.2.23 By the insertion of the definition of High Court

Issue: The High Court is referenced in the existing Act but no definition has been provided for it, such as is in the Banking Institutions Act, 1998 (Act No. 2 of 1998), as amended. This definition thus seeks to align the Act to the Bank’s other laws and ensure that there is uniformity in respect of some of these matters.

Proposal: A definition for High Court to be inserted in the Bill.

Amendments to be included in the Bill: “High Court” means the High Court of Namibia constituted by Article 80(1) of the Namibian Constitution and referred to in the High Court of Namibia Act, 1990 (Act 16 of 1990), and any subsequent amendments thereto.

3.2.24 Amendment of the definition of Holding Company

Issue: Given the fact that laws are subject to amendments, the current definition does not extend the definition of the Companies Act to any subsequent amendments that they follow. Thus, this amendment is necessary with regards to all legislation referenced in the Bill, including the Companies Act.

Proposal: Amendment of existing definition of Insolvency Act to be inserted in the Bill.

Amendments to be included in the Bill: *“holding company” means a holding company contemplated in section 1(4) of the Companies Act 2004, and any subsequent amendments thereto.*

3.2.25 Amendment of the definition of Insolvency Act

Issue: Given the fact that laws are subject to amendments, the current definition does not extend the definition of the Insolvency Act to any subsequent amendments that they follow. Thus, this amendment is necessary with regards to all legislation referenced in the Bill, including the Insolvency Act.

Proposal: Amendment of existing definition of Insolvency Act to be inserted in the Bill.

Amendments to be included in the Bill: *“Insolvency Act” means the Insolvency Act, 1936 (Act No. 24 of 1936), and any subsequent amendments thereto.*

3.2.26 By the insertion of the definition of interoperability

Issue: A new section (section 20) has been introduced in the Bill dealing with the concept of interoperability as it relates to payment instruments and/or system participants. Due to the technical nature of this concept, it is thus important to define it for purposes of legal certainty.

Proposal: A definition for interoperability to be inserted in the Bill.

Amendments to be included in the Bill: *“interoperability” means the ability of different payment systems, networks, applications and other infrastructure of participants to connect or interface.*

3.2.27 By the insertion of the definition of Minister

Issue: The existing Act does not have a definition for Minister. Although it is implied that it is the Minister of Finance, the lack of a definition creates legal uncertainty and opens up the word to interpretation. Also, it is a drafting principle to state the minister responsible for the particular legislation through a definition.

Proposal: A definition of Minister to be inserted in the Bill.

Amendments to be included in the Bill: *“Minister” means the Minister responsible for finance.*

3.2.28 Amendment of the definition of national payment system

Issue: With the revision of the Act, a need was identified to adopt a comprehensive and clear definition of the national payment system in line with international best practice.

Proposal: The definition of national payment system to be revised by deleting the previous definition and replacing it with a new definition in line with international best practice.

Amendments to be included in the Bill: *“national payment system” means the [payment system as a whole, and includes any payment system, settlement system, clearing system, and payment system arrangement used in the process of effecting payment between payers and beneficiaries] entire payments ecosystem and includes all the payment systems, clearing systems, settlement systems and the rules, standards, arrangements, procedures, laws, agreements, technologies, payment instruments and institutions that are used in the processing and transferring of funds and securities.*

3.2.29 By the insertion of the definition of non-bank financial institution

Issue: Given the fact that definitions have been provided for other types of participants e.g. payment service provider, system participant, etc., a definition is thus warranted for non-bank financial institution as well.

Proposal: A definition of non-bank financial institutions to be inserted in the Bill.

Amendments to be included in the Bill: *“non-bank financial institutions” refers to institutions other than licensed or registered banking institutions that offer payment services.*

3.2.30 Amendment of the definition of payment instruction

Issue: The current definition is superfluous and requires revision.

Proposal: Amendment of the existing definition of payment instruction by the deletion of unnecessary words.

Amendments to be included in the Bill: *“payment instruction” means an [instruction by a payer to] order to make payment or transfer funds.*

3.2.31 Amendment of the definition of payment instrument

Issue: Reference to a process in the current definition provided in the Act is confusing and serves no purpose as the focus should strictly be placed to the actual instruments.

Proposal: Amend the definition of the payment instrument by deleting reference to a process in the existing definition.

Amendments to be included in the Bill: *“payment instrument” means [an instrument or a process enabling a payer to issue a payment instruction] any device, procedure or a process by which a payment instruction is issued for the purpose of obtaining money, making payments or transferring funds.*

3.2.32 By the insertion of the definition of payment intermediation

Issue: Payment intermediation is an integral process in payment systems and is provided for under section 7 of the existing Act. The rationale for a definition is necessary as it provides clarity to the reader and the payments industry. Also, although section 7 has now been deleted in its entirety, it is still referenced under the Second Schedule.

Proposal: A definition for payment intermediation issuer to be inserted in the Bill.

Amendments to be included in the Bill: *“payment intermediation” means the act of holding onto funds when providing payment services or facilitating payment instructions.*

3.2.33 By the insertion of the definition of payment services

Issue: Payment services are referenced in the Bill as well as in the Act, however no definition was provided in the current Act. Given the number of participants who provides payment services, the broad range of payment services that exists and their overall importance to the national payment system, a definition is therefore warranted to provide legal certainty.

Proposal: Insert a definition of payment services in the Bill. .

Amendments to be included in the Bill: *“payment services” means services relating to the facilitation of payment instructions, the issuance and acquiring of payment instruments or electronic money and any other services incidental to executing payments or transferring of funds, as specified under Second Schedule of this Act.*

3.2.34 Amendment of the definition of service provider

Issue: Following international best practice based on guidance received from the World Bank as well as input from the national payment system industry, the current definition of service provider in the Act needed to be amended to accommodate all the players or participants (both banking institutions and non-banks) who provide payment services. The Bank will only issue a payment service provider license and specify the type of payment service provider license i.e. gateway, payment instrument issuer, e-money issuer, switch, facilitator etc. Of course, different types of service providers will have their own technical requirements at licensing but that distinction will be made in a Payment Service Provider Determination (which will be a consolidation of the Bank’s

Determination on Issuing of a Payment Instrument (PSD-1), Determination on Issuing of Electronic Money in Namibia (PSD-3) and the Payments Association of Namibia's Entry and Participation Criteria). This approach will make it easier for the Bank and eliminates the need to have various licenses for entities providing payment services in the NPS. This will also assist with licensing FINTECHs that provide a myriad of payment services that may require different licences otherwise. In addition thereto, banking institutions also provide payment services but the current Act does not automatically allow them to provide payment services and thus the proposed approach would also remedy this issue. Thus, the amendment seeks to align the term to the international best practice and clarify the type of payment service provider offering payment services in the national payment system.

Proposal: Amend the definition of the service provider by expanding it to align to international best practice.

Amendments to be included in the Bill: *“payment service provider means a person [registered as contemplated in section 3(6)(a)] including a banking institution authorised under this Act to provide payment services as specified under the Second Schedule of this Act.*

3.2.35 By the insertion of the definition of payment system operator

Issue: Following international best practice, the Bank will no longer authorise system participants in terms of its *Determination on the Criteria for authorisation of Participants in the Clearing and Settlement Systems (PSD-6)* to access and participate in a payment system and will leave this power with the system operators. As such, system operators will now be required to have their own access and participation criteria to take-on participants. However, the Bank will be responsible for approving the respective entry and participation criteria prior to their implementation as well as endorsing the operators' decisions to either grant access or decline access to an applicant. Currently, the Namibia Interbank Settlement System (NISS) has take-on procedures and operational guidelines. The expectation is that all payment systems will have their own procedures and operational guidelines and thus the regulator will have to approve these documents, and also endorse the operators' decisions to either give access or deny access to an applicant. System Operators will be subject to renewals where the regulator will review the access and participation criteria and any other documents it deems necessary. In light of this substantive change, a definition of payment system operators is required given the authorisation function they will render to applicants who wish to access and participation in the respective payment systems.

Proposal: A definition for person to be inserted in the Bill.

Amendments to be included in the Bill: *“payment system operator” means a person authorised under this Act to operate an authorised systemically important payment system including clearing systems, settlement systems or central securities depositories.*

3.2.36 Amendment of the definition of payment system

Issue: Following international best practice, a broader and clearer definition of payment system is required to ensure that it covers the various types of payment systems in existence.

Proposal: Amend the definition of the payment system by expanding it to align to international best practice.

Amendments to be included in the Bill: *“payment system” [means a system that enables payments to be effected between a payer and a beneficiary] includes a clearing system, settlement system or central securities depositories and means an authorised system that enables the payment and transfer of funds or value, and includes the rules, procedures, standards, technologies, instructions, institutions, participants, infrastructure and persons related to that system.*

3.2.37 Amendment of the definition of payment system arrangement

Issue: In line with international best practice, this definition required rewording to ensure that a clearer definition of payment system arrangement is inserted into the law to avoid ambiguities.

Proposal: Amend the definition of the payment system arrangement by rewording it to align to international best practice.

Amendments to be included in the Bill: *“payment system arrangement” means [procedures and services for the processing of payment transactions] rules and procedures for the processing of payment instructions.*

3.2.38 By the insertion of the definition of person

Issue: The word person is used quite extensively in the existing Act and the proposed Bill. It is therefore important to define it so that it is clear to the reader the type of person being referred to.

Proposal: A definition for person to be inserted in the Bill.

Amendments to be included in the Bill: *“person” means a natural or juristic person.*

3.2.39 Amendment of the definition of settlement

Issue: The current definition of settlement needed rewording to align to international best practice. Furthermore, some salient aspects such as the settlement system were omitted from the current definition and thus this gap needed to be addressed.

Proposal: Amend the definition of the settlement.

Amendments to be included in the Bill: *“settlement” means the [payment or discharge of outstanding obligation that a system participant owes to another system participant] act of discharging obligations in respect of funds transfer from one system participant to another system participant in the settlement system.*

3.2.40 By insertion of the definition of settlement account

Issue: The existing Act has not provided a definition for this important term. Hence, a definition is warranted to remedy this omission.

Proposal: A definition for settlement account to be inserted in the Bill.

Amendments to be included in the Bill: *“settlement account” means a settlement account at the Bank.*

3.2.41 By insertion of the definition of settlement obligation

Issue: The existing Act has not provided a definition for this important term. Hence, a definition is warranted to remedy this omission.

Proposal: A definition for settlement obligation to be inserted in the Bill.

Amendments to be included in the Bill: *“settlement obligation” means the amount due to be settled as a result of payments, securities or other financial instruments.*

3.2.42 Amendment of the definition of settlement system

Issue: The current definition of settlement system does not extend the establishment and operation of a settlement system to any other entity outside of the Bank. Thus, given the evolving payments landscape and international best practice, the definition requires rewording.

Proposal: Amend the definition of the settlement system.

Amendments to be included in the Bill: *“settlement system” means a system established and operated by the Bank or any other authorised payment system operator to facilitate the transfer of funds for the discharge of payment and settlement obligations between system participants.*

3.2.43 By insertion of the definition of systemic subordinate legislation

Issue: The existing Act has not provided a definition for this important term. Given that subordinate legislation is referenced in both the existing Act and in the Bill, it is important to provide a definition and remedy this omission.

Proposal: A definition for subordinate legislation to be inserted in the Bill.

Amendments to be included in the Bill *“subordinate legislation” means any determination, directive, guideline, standard, circular, specification, order or notice issued under any provision of this Act by the Bank;*

3.2.44 By insertion of the definition of systemic risk

Issue: The existing Act has not provided a definition for this important term. Given the impact that systemic risk can have on the national payment system in comparison to other forms of risk, a definition is thus warranted to remedy this omission.

Proposal: A definition for systemic risk to be inserted in the Bill.

Amendments to be included in the Bill: *“systemic risk” – means the risk that failure of one or more system participants, for whatever reason, to meet their payment obligations, including the payment obligations of clearing system participants, or their settlement obligations may result in any or all of the other settlement system participants being unable to meet their respective payment or settlement obligations.*

3.2.45 Amendment of the definition of system participant

Issue: In terms of international best practice, access and participation to a payment system should be authorised by the payment system operator and not the central bank. The role of the central banks is confined to approving the rules to the system. Thus, in aligning to international best practice, the Bill has been amended to reflect this and hence, the definition also required amendment.

Proposal: Amend the definition of the system participant.

Amendments to be included in the Bill: *“system participant” means [a person authorised by the Bank under section 4(1)(b) to participate in the clearing and settlement systems] a member of a payment system that is authorised and recognised in the rules of that payment system or is otherwise recognised by the operator of that payment system.*

3.2.46 Amendment of the definition of this Act

Issue: The present Act only extends the definition of this Act to determinations and excludes all other subordinate legislation which may be issued under this Act. In fact, the Payment System Management Amendment Act, 2010 places all subordinate legislation on the same level given that the Bank may impose administrative penalties for any non-compliance noted. Hence, this omission needed to be addressed

Proposal: Amend the definition of this Act by extending the list of subordinate legislation to all the types that may be issued by the Bank.

Amendments to be included in the Bill: *“this Act” includes [determinations made under section 14] any determination, directive or other subordinate legislation made or issued under any provision of this Act.*

3.2.47 By insertion of the definition of tiered participation arrangements

Issue: The present Act will be amended with a section which deals with tiered indirect participation arrangements within Financial Market Infrastructures. Given this unique arrangement, a definition is thus warranted to provide legal certainty.

Proposal: A definition for tiered participation arrangements to be inserted in the Bill.

Amendments to be included in the Bill: *“tiered participation arrangements” means arrangements whereby a system participant who is authorised as an indirect participant in either the clearing or settlement systems relies on the services provided by another system participant who is authorised as a direct participant in clearing or settlement to either clear or settle on their behalf.*

3.2.48 By insertion of the definition of trust account

Issue: The present Act will be amended with provisions speaking to e-money and the safe storage thereof under a trust account. Given this important and extensive change introduced to the legal framework, a definition is thus warranted.

Proposal: A definition for trust account to be inserted in the Bill.

Amendments to be included in the Bill: *means a trust banking account referred to in sections 23, 24 and 25 of this Act;”.*

3.2.49 Amendment of the definition of user

Issue: The Bank has concerns with the current definition in that it specifically lists system participants and services providers as users, as opposed to simply stating that user refers to persons who use payment services. The current definition is unfortunately ambiguous in some respects and resulted in interpretative issues. Thus, a simpler and clear-cut definition was needed. Furthermore, the reference to person is catered for under the definition which extends to both natural and juristic persons.

Proposal: Amend the definition of user by deleting the words system participant or service provider and inserting participant in their stead.

Amendments to be included in the Bill: *“user” means [a system participant or a service provider, and includes a customer or client of the system participant or service*

provider] any person that uses a payment service in their capacity as a payer or a payee or both.

3.2.50 By insertion of the definition of virtual assets

Issue: Prudential regulators are required by the Financial Action Task Force (FATF) to regulate the activities of virtual assets popularly known as cryptocurrencies. Unfortunately, the present Act does not provide for this nor does it provide for a definition of the term virtual asset. Hence, a definition is necessary to ensure common understanding of the term and in so doing provide legal certainty.

Proposal: A definition for virtual assets to be inserted in the Bill.

Amendments to be included in the Bill: *“virtual assets” means any digital representation of value (whether called a digital payment token or by any other name) that can be digitally stored, traded, or transferred, and can be used for payment or investment purposes and satisfies such other characteristics as specified by the Bank.*

3.3 General amendment to the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Division of the various sections into parts (Part I to Part XII)

Issue: Owing to the fact that the Act will be expanded upon with the introduction of additional definitions and sections, there would be a need to divide the provisions into separate parts so as to ensure that the flow of Act reads soundly. Also, with larger pieces of legislation, it is a general drafting principle to sub-divide sections into either Chapters or Parts.

Proposal: Insertion of Parts I to XIII in the Bill with their respective unique titles.

Amendments to be included in the Bill: Division of sections into the respective Parts (I to XII).

3.4 Insertion of new section of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Application of the Act

Issue: The insertion of this section has become the norm in more recent payments laws. Furthermore, at regional level, the SADC Payment Systems model law which was introduced to harmonise the various jurisdictions payments laws, also has a provision in this regard. In addition, the Banking Institutions Act, 1998 has a similar provision. Thus, the insertion of this provision seeks to further harmonise the Bank’s various legislation in this regard.

Proposal: Insertion of new section in the Bill in respect of the application of the Act.

Amendments to be included in the Bill:

2. Application of the Act

- (1) This Act applies to the national payment system of Namibia.
- (2) This Act applies to payment service providers, operators of payment systems, users and any other stakeholders involved in the issuance of payment services as set out under the Second Schedule of this Act.
- (3) The Bank may by notice in the Government Gazette amend, either by addition or deletion, the list of persons to whom the Act applies, as specified under subsection (2).

3.5 Amendment of section 2 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Powers and functions of the Bank

Issue: A need was identified to split the power and functions of the Bank into two separate provisions so as to provide the necessary expansion and clarity to each provision. This manner of drafting has become the norm in more recent payments laws and also at regional level - the SADC Payment Systems model law which was introduced to harmonise the various jurisdictions payments laws, has also clearly demarcated between the mandate, function and powers of a central bank.

Proposal: Splitting the powers and functions of the Bank into two separate sections, namely the mandate and functions of the Bank.

Amendments to be included in the Bill:

Section 2 of the principal Act is amended by separating the provisions that speak to the powers of the Bank from the provisions that speak to the functions of the Bank. The section is further amended with the insertion of new provisions, namely, sections 3(2) and 4(1)(f) - (r). The final amendment pertains to the Bank taking over the regulatory function that is presently overseen by Payment System Management Body in regards to service providers. Given the guidance provided by the World Bank and international best practice as noted from recent payments laws, the authorisation and oversight of service providers as currently understood in the existing law will be conducted by the Bank. This significant change is necessitated by the fact that central banks should not delegate powers that are inherently theirs and also there should only be one regulator for the national payment system. Thus any Body or Association should rather play an advisory role.

3. Powers [and functions] of the Bank

- (1) [The Bank may exercise the powers and must perform the functions conferred] The Bank must exercise the powers conferred and imposed on it by this Act, the Bank of Namibia Act and any other law to ensure the safe, secure, efficient and [cost-] effective operation of the national payment system, and accessibility thereof to the public.
- (2) The Bank must ensure fair, open and equitable access to the national payment system.

4. **Functions of the Bank**

(1) *The Bank must **[oversee, inspect and monitor]** regulate, supervise and oversee the operations of the national payment system [the operation of the Body, system participants and service providers] and all matters relating to payment, clearing and settlement services and systems.*

(2) *For purposes of subsection (1) the functions of the Bank are –*

- (a) *to promote the safety, security, efficiency and accessibility of the national payment system;*
- (b) *to regulate, supervise and oversee payment service providers, payment services and payment system operators. In fulfilling this function, the Bank has the power to authorise a payment service provider or a payment system operator and cancel any such authorisation conferred upon such payment service provider or payment system operator in accordance with this Act ;*
- (c) *to establish and operate any payment or settlement system[, and to authorise persons to participate in the clearing and settlement systems and to withdraw such authorisation; and];*
- (d) *to authorise and oversee the operations of the Association [Body] by issuing to the [Body] Association a certificate of commencement of business, after having satisfied itself with the [Body's] Association's constitution, rules, [competence] and readiness to [manage the payment system] report on matters relating to the operations of the national payment system;*
- (e) *to authorise payment instruments and payment systems as financial market infrastructures in the interest of the national payment system and the public, and to withdraw such authorisation, in accordance with this Act;*
- (f) *to authorise payment systems and approve the rules, membership criteria, arrangements, agreements, technical specifications, procedures and standards relating to the operations of payment systems;*
- (g) *to issue any determination, directive or other subordinate legislation to govern the operations of the national payment system;*
- (h) *to set standards and conditions for payment services, payment instructions and related fees and charges;*
- (i) *to conduct payment systems related policy research and advice on financial stability and macro-prudential related matters;*
- (j) *to investigate and deal with unlawful and improper practices in the national payment system and impose administrative penalties for non-compliance with the Act and any subordinate legislation made in terms of this Act; and*
- (k) *to perform all such acts that are necessary to implement its powers.*

(3) *The Board, in writing, may delegate any power or assign any function conferred or imposed on the Bank by or under this Act to the Governor, the Deputy Governors or any officer of the Bank, subject to such conditions as the Board may determine.*

[(4) The Bank is not divested or relieved of a power or function delegated or assigned under subsection (3).]

(4) *The Board may withdraw a power or function delegated or assigned under subsection (3) at any time.*

3.6 Insertion of new section in the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Co-operation with other authorities

Issue: The insertion of provisions speaking to co-operation with other authorities has become the norm in more recent payments laws, particularly due to the collaborative regulatory efforts both at domestic and regional level. Thus, a provision was required to give the Bank these powers from a payment systems perspective.

Proposal: Insertion of a new section in the Bill in respect of the co-operation with other Authorities.

Amendments to be included in the Bill:

Therefore, the Act is amended by the insertion of a new provision:

5. Co-operation with other authorities

(1) The Bank may -

- (a) co-operate with local or foreign authorities to ensure effective oversight and supervision of the national payment system and any component thereof.
- (b) collaborate with foreign authorities to adopt measures to integrate the domestic national payment system with cross border payment systems in the promotion of regional and international integration of payment systems.
- (c) co-operate with other relevant authorities, both local and foreign and as may be appropriate, in promoting the safety and efficiency of financial market infrastructures.

(2) The Bank may enter into a memorandum of understanding with the authorities specified in subsection (1).

3.7 Amendment of section 3 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Payment System Management Body

Issue: The existing section 3 had lumped every aspect of the Payment System Management Body (the Body) into a single section, which at times made it difficult to differentiate between the mandate and functions of the Body, amongst

other interpretation challenges, and hence the amendment. Furthermore, the provision needed to be amended so as to insert relevant provisions into the Act relevant to the Body and its operations. Lastly, as stated above under section 3.5, the regulatory powers given to the Body to authorise and oversee service providers has been removed and given to the Bank to align to international best practice and guidance as received from the World Bank and reflected in recent payment laws.

Proposal: Separation of the section 3 into five different sections, namely, section 6 (Establishment of the Association), section 7 (Mandate of the Association), section 8 (Membership of the Association), section 9 (Constitution and rules of the Association) and section 10 (Functions of the Association).

Amendments to be included in the Bill:

Section 3 of the principal Act is amended by separating the provisions into five separate section. The section is further amended by the insertion of the sections 7(1), 7(2), 8(2) and 10(f); ad with the substitution of section 3(4)(a) with section 10(1)(a).

6. Establishment of the Association

- (1) *The Bank [and banking institutions must cause to be established by a constitution a juristic person to be known as the Payment System Management Body with the object of managing the national payment system, and organizing, setting technical standards, regulation the participation of its members in the national payment system and all matters affecting payment obligations and the clearing and netting of payment obligations] must by constitution establish a juristic person to be recognised as the Payments Association of Namibia.*
- (2) *The Association may not –*
 - (a) *commence with its business operations before it is issued with the certificate referred to under section 4(2)(d);*
 - (b) *effect any amendment to its constitution or rules before such amendment is approved by the Bank; and*
 - (c) *dissolve without the approval of the Bank.*

7. Mandate of the Association

- (1) *The mandate of the Association is to –*
 - (a) *report to the Bank on matters affecting the national payment system;*
 - (b) *act as a collaborative platform;*
 - (c) *set standards for member participation in payment systems and forums, that will be subject to the Bank's approval; and*
 - (d) *participate in relevant regional and international initiatives and platforms in the promotion of regional and international integration of payment systems.*
- (2) *Pursuant to subsection 7(1), the Association must ensure that the standards, criteria and conditions determined by it promote –*
 - (a) *efficiency, transparency, interoperability, effectiveness and safety of the national payment system;*

- (b) co-operation amongst members and facilitate collaborative efforts by its members;
- (c) fair access by its members to payment system services; and
- (d) competition in the provision of payment system services, in line with the applicable domestic competition laws.

8. Membership to the Body

(1) [Subject to subsection (3),] Membership to [for] the Association [Body] is compulsory for –

[the Bank and every banking institution]

- (a) payment service providers; and
- (b) other relevant stakeholders as may be determined by the Association,

part-taking in payment services as per the Second Schedule to this Act.

(2) Membership to the Association may be extended to such other third parties as may be deemed necessary by the Association in consultation with the Bank.

(3) A system participant in a clearing or settlement system will automatically become a member of the Association.

(4) The Association must appoint an independent non-executive chairperson and at least two independent non-executive directors with the relevant expertise pertaining to payment systems, as well as various disciplines, as may be determined in the Association's constitution.

(5) Members of the Association must at all times act in the interest of the national payment system and must further exercise the necessary care, skill and diligence in handling the affairs of the national payment system, as may be determined by the Association from time-to-time and approved by the Bank if need be.

(6) All members of the Association are liable for annual subscription fees to the Association as may be determined by the Association, subject to approval by the Bank.

(7) The appointment, removal, duration and duties of the members, as well as the funding model for the operations of the Association, must be stipulated in the Association's constitution and such other governance documents, as may be determined by the Association in consultation with the Bank.

9. Constitution and rules of the Association

(1) The [Body] Association [shall] must have a constitution that stipulates its governance and operational arrangements, which [shall be] is subject to approval by the Bank.

(2) *The constitution and rules of the [Body which may] Association must not be inconsistent with this Act, the Bank of Namibia Act [and], the Banking Institutions Act and any other applicable law. [must be fair, equitable, transparent and must among others]*

(3) *The constitution and rules of the Association must be fair, equitable and transparent.*

[, and must, among others –

(e) *provide for the terms and conditions for admission as a member of the Body that must be complied with before admission is granted, and the circumstances under which such membership may be suspended or terminated;*

provide for the terms and conditions for the establishment of any committee or forum of the Body to deal with various

(f) *[register a person who is not a system aspects of the national payment system;*

(g) *enable the Bank, when discharging its responsibilities regarding the monitoring, regulation, and supervision of payment, clearing and settlement systems, to adequately oversee the affairs and operation of the Body and its members.]*

register a participant as a payment service provider, and authorise such person to provide payment system services if that person meets the requirements and conditions set out in the Body's criteria and rules;

cancel the registration of a payment service provider if the payment service provider contravenes or fails to comply with any term or condition of its registration;

determine and administer operational and technical policies; operational and technical criteria, conditions and standards; payment instrument standards; electronic notification and message standards; and format for electronic files pertaining to the national payment system;

The Body must ensure that the standards, criteria, and conditions determined by it under section subsection [4(a)] 1(d) have the effect of encouraging appropriate payment system co-operation and competition in the provision of payment system services, ensuring fair access by [system] participants to payment system services, and facilitating oversight of the national payment system by the Bank

(h) *act as a forum for the consideration of matters of mutual interest concerning its members, and deal with and promote any other matter of interest to its members and foster co-operation between them;*

(i) *perform such further functions relating to the payment, clearing or settlement systems, as the Bank may assign to it.]*

3.8 Insertion of new licensing and authorisation provision

Issue: Following extensive engagements with the World Bank, review of recent payments laws and engagements with the national payment system's industry, on international

best practice, the Bank introduced provisions within the Bill whereby the national payment system will be overseen and managed by a single regulator i.e. the Bank. This thus means that all regulatory powers given to the Payment System Management Body has been given to the Bank. Ultimately, even with the current arrangements, the Bank has always been expected to endorse the Body's decisions and the Body cannot act without such endorsement from the Bank. Furthermore, having two regulators has over the years created confusion amongst industry, which can have unwarranted results for those involved. Overall, the need to ensure alignment to international best practice has been addressed with the insertion of new provisions, section 11 (Prohibition to provide payment services), section 12 (Licensing of payment service providers), section 13 (Authorisation of payment system operators), section 14 (Rules of a payment system) and section 15 (Rules of a payment system to the Bill). It's also important to note that the provision further introduces the concept of a single term (payment service providers) in reference to all the participants that will be authorised by the Bank. The various payment service providers are further expanded upon in the Second Schedule to the Bill. This single term approach is also in line with best international practice as noted in both the feedback from the World Bank as well as from recent payments laws.

Proposal: Insertion of new provisions empowering the Bank as the sole regulator within the national payment system.

Amendments to be included in the Bill:

The Act is amended by the insertion of sections 11 to 14 and the accompanying Schedule in respect of payment services:

PART IV

LICENSING AND AUTHORISATION

10. Prohibition to provide payment services

(1) A person must not provide any type of payment services or operate a payment system unless such a person is authorised by the Bank in accordance with this Act.

(2) Subsection (1) will not apply to –

- (a) a payment system operated by the Bank; or
- (b) a payment service offered by the Bank; or
- (c) a payment instrument issued by the Bank.

(3) A person that contravenes subsection (1) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

11. Licensing of payment service providers

(1) A person that wishes to offer any of the payment services stated in the Second Schedule of this Act must apply to the Bank for authorisation and specify the type of payment services they intend to offer.

- (2) An application for authorisation referred to in subsection (1), must be made in accordance with a determination, directive or other subordinate legislation issued by the Bank and must be accompanied by the prescribed non-refundable fee.
- (3) An application for authorisation referred to in subsection (1), must further include the submission of information related to the beneficial ownership of the applicant as detailed in the Financial Intelligence Centre's Industry Guidance Note No. 1 of 2015 on Identification and Verification of Beneficial Ownership Information, as may be amended from time-to-time, and such other subordinate legislation as the Bank may issue in respect of beneficial ownership.
- (4) In issuing authorisation, the Bank must specify the type of payment services such person is authorised to issue and further stipulate the terms and conditions accompanying such authorisation.
- (5) The Bank may suspend, revoke or vary the conditions of an authorisation granted to a person to provide payment services under this Act.
- (6) The Bank may prescribe the operational requirements, reporting and disclosure conditions, permissible activities and other oversight and supervisory requirements as may be determined by the Bank in respect of the provision of payment services.
- (7) The Bank may amend the Second Schedule either by adding or deleting the types of payment services permissible within the national payment system. Any amendments to the Second Schedule must be done in consultation with affected persons.
- (8) Any amendments effected to the Second Schedule must be published by notice in the Government Gazette to give effect to the particular payment service and distributed to affected persons.
- (9) A person who knowingly or recklessly furnishes a document or information which is false or misleading in connection with an application for authorisation or a license, commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such a fine and such imprisonment.

12. Use of agents

- (1) A payment service provider may appoint an agent to undertake services on its behalf by entering into an agency agreement.
- (2) The agency agreement must provide for –
 - (a) non-exclusive use of an agent;
 - (b) compliance with anti-money laundering and combating financing of terrorism laws;
 - (c) consumer protection mechanisms; and
 - (d) any other requirement that the Bank prescribes.
- (3) A payment service provider will be liable to its users for the acts and omissions of its agents, performed within the scope of the agency agreement.
- (4) A payment service provider must publish on its website an updated list of its agents and provide the Bank with an updated list of agents on a quarterly basis.
- (5) A payment service provider must comply with such guidelines as may be issued by the Bank.

13. Liability of Third Parties

- (1) Where a payment system operator or a payment service provider relies on third parties for the performance of operational functions, it must take steps to ensure that this Act is complied with.
- (2) A payment system operator or a payment service provider will be liable for any acts of its employees, or any agent, branch or entity from which activities are outsourced.

14. Authorisation of Payment System Operators

- (1) A person must not operate a payment system, without authorisation from the Bank.
- (2) An application for authorisation as a payment system operator referred to in subsection (1) must be made in accordance with a determination, directive or other subordinate legislation issued by the Bank and must be accompanied by the prescribed non-refundable fee.
- (3) An application for authorisation referred to in subsection (1), must further include the submission of information related to the beneficial ownership of the applicant as detailed in the Financial Intelligence Centre's Industry Guidance Note No. 1 of 2015 on Identification & Verification of Beneficial Ownership Information, as may be amended from time-to-time, and such other subordinate legislation as the Bank may issue in respect of beneficial ownership.
- (4) In issuing the authorisation, the Bank must specify the terms and conditions which a payment system operator must comply with.
- (5) The Bank may suspend, revoke or vary the conditions of an authorisation granted to a payment system operator under this Act.
- (6) The Bank may prescribe the operational requirements, reporting and disclosure conditions, permissible activities and other oversight and supervisory requirements as may be determined by the Bank in respect of the authorised payment system operator and its participants.
- (7) A person who knowingly or recklessly furnishes a document or information which is false or misleading in connection with an application for authorisation, commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such a fine and such imprisonment.

15. Rules of a payment system

- (1) A payment system operator must have written rules to govern the payment system, which rules should provide for –
 - (j) the governance, management and operations of the payment system;
 - (k) the access criteria and conditions for suspension, exclusion or termination of system participants;
 - (l) rules on the management of payment systems related risks;

- (m) rules determining when a payment instruction is final and irrevocable;
 - (n) common rules and standards for the execution, clearing and settlement of payment instructions;
 - (o) risk management and business continuity procedures;
 - (p) fees, charges and penalties payable by system participants; and
 - (q) rights and obligations of the system participants.
- (2) The Bank may prescribe other matters that may be specified in the rules of a payment system.
 - (3) Any rules made under subsection (1) are subject to the approval of the Bank and must comply with the requirements of this Act and any subordinate legislation issued by the Bank.
 - (4) The Bank may vary or revoke any rules made by a payment system operator under subsection (1) where it considers it appropriate to do so having regard to the public interest, the interest of the system participants and any other matter the Bank considers relevant.
 - (5) The rules on access to a payment system, including clearing systems and settlement systems must be objective, fair, effective.

SECOND SCHEDULE

(Section 12 (1))

PAYMENT SERVICES

1. The issuance of a payment instrument such as card, electronic fund transfer and electronic money or any other type of payment instrument issued as may be deemed as legal tender.
2. Payment intermediation services.
3. Payment services that enable or facilitate the depositing of cash, withdrawal of cash and transfer of funds.
4. The facilitation of payment instructions and provision of gateway services at merchant point of sale, electronic commerce platforms including mobile applications and websites.
5. The transfer of funds from one account to another using digital and electronic means.
6. The provision of digital payment services in the form of tokens, quick response codes application programming interfaces and other digital instruments.
7. The provision of technological services to facilitate switching, routing and acquiring of payment instructions.
8. The provision of technological services to aggregate payment instructions and intergrade payment systems and payment services.

9. The issuance of virtual assets for purposes of facilitating payments or transfers.
10. Any other payment service that is functional to the transfer of funds, the issuance of electronic money and other payment instructions.

3.9 Deletion of section 5 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Payment provisions

Issue: Given the changes introduced to the Bill with the new licensing and authorisation provisions (sections 11 to 14), this rendered this provision as irrelevant as the payment provisions are well encapsulated in the aforementioned provisions.

Proposal: Deletion of the entire provision.

Amendments to be included in the Bill:

Section 5 of the principal Act is deleted in its entirety.

[5. Payment provisions

1. ***A person may not issue a payment instrument unless such –***
 - (a) ***instrument is registered with the Bank upon application made to it by such person in writing;***
 - (b) ***person is a system; or***
 - (c) ***person is exempted by the Minister under subsection (2) or is one of a category of persons so exempted.***
2. ***The Minister, after consultation with the Bank, by notice in the Gazette may exempt any person or category of persons from the provisions of subsection (1), if the Minister is satisfied that such exemption is in the public interest and will not cause undue risk to the national payment system.***
3. ***A person who is not a system participant may not provide any of the payment services unless such person-***
 - (a) ***is registered as a service provider; or***
 - (b) ***is authorised by the Bank under subsection (4)***
4. ***The Bank, after consultation with the Body, and upon such conditions as it may determine, may authorise a person referred to in subsection (3) to provide any of the payment system services without being registered with the Body as service provider.***
5. ***A person who contravenes subsection (1) or (3) commits an offence.]***

3.10 Deletion of section 7 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Payment intermediation

Issue: Given the proposed change in licensing whereby the Bank will be responsible for the licensing/authorisation of all players in the national payment system, this provision is no longer relevant.

Proposal: Deletion of the entire provision.

Amendments to be included in the Bill:

Section 7 of the principal Act is deleted in its entirety

[7.Payment intermediation provisions

(1)[A person may not accept money or payment instructions, as a regular feature of such person's business, from any other person for purposes of making payment on behalf of that other person to a third person to whom that payment is due, unless the person so accepting money or payment instructions

- (a) is a system participant or its agent;***
- (b) is the Namibia Post Limited established by section 2(1)(a) of the Posts and Telecommunications Companies Establishment Act, 1992 (Act No. 17 of 1992), or the Post Office Savings Bank referred to in section 1 of that Act, or its agent; or***
- (c) is a person or one of a category of persons exempted by the Minister under subsection (3).***

(2)Subsection (1) may not be construed as prohibiting the acceptance of money or payment instructions –

- (a) by a holding company from its subsidiary, or by a subsidiary from its holding company, or by a subsidiary from another subsidiary of the same holding company; or***
- (b) by an agent of the holding company or subsidiary referred to in paragraph (a).***

(3)The Minister, by notice in the Government Gazette, after consultation with the Bank and Body may exempt any person or category of persons from subsection (1), if the Minister is satisfied that such an exemption is in the public interest and will not cause undue risk to the national payment system.

(4)A person who contravenes subsection (1) commits an offence.]

3.11 Amendment of section 6 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Clearing provisions

Issue: Due to the ever-evolving payments landscape, it is important that legislation be robust so as to fit the ecosystem as it evolves. The provision presently does not have a provision that empowers the Bank to grant exemptions as may be

deemed necessary by the Bank. As such, the insertion of subsection (1)(c) seeks to remedy this gap. Furthermore, the some of the provisions needed to be expanded upon, notably, (1)(b) and (2). to agents of system participants needs to be deleted as it does not serve any purpose under clearing provisions. Lastly, the penalty for non-compliance needed to be expanded upon.

Proposal: Deletion of reference to agents, insertion of subsection (1)(c) and expansion of sections (1)(b) and (2).

Amendments to be included in the Bill:

The Act is amended by the deletion of the phrase ‘or its agent’ under subsection 1(a) and with the insertion of subsection (1)(c). The Act is further amended with the expansion of sections (1)(b) and (2).

16. Clearing provisions

(1) A person [may] must not participate in a clearing system unless such a person is –

- (a) The Bank;
- (b) a system participant [or its agent] authorised by the operator of the clearing system; or
- (c) a person exempted by the Bank to participate in the clearing system.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

3.12 Amendment of section 4 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Settlement provisions

Issue: In the current Act, the provisions dealing with insolvency/winding up are scattered across various provisions, including under this section. As such, a need was identified to introduce them all under a single chapter (Part) and expand them upon them as may be necessary under that particular chapter. Furthermore, given the new Bank of Namibi Act, 2020, we needed to amend the section so that the reference to money is substituted with the reference to currency, as money is no longer defined the BoN Act but currency is. Additionally, two new provisions were introduced, subsections (2) and (8) to provide guidance on settlement accounts as well as the penalty for committing an offence under this provision. Lastly, given the new licensing and authorisation provisions, reference to consultations with the Body have been removed under subsection (6).

Proposal: Deletion of subsection (5) from this section, substitution of the word ‘money’ with ‘currency’, insertion of subsections (2) and (8) and deletion of reference to consultations with the Body.

Amendments to be included in the Bill:

Section 4 of the principal Act is amended by the deletion of subsection (5), substitution of 'money' with 'currency', insertion of subsections (2) and (8) and deletion of reference to consultations with the Body.

17. Settlement provisions

- (1) A person **[may] must** not participate in a settlement system unless such person is the Bank or a system participant authorised by the operator of the settlement system.
- (2) Every system participant must open and maintain settlement accounts in the books of the system operator, on such terms and conditions as the Bank or the operator of the settlement system may specify.
- (3) A system participant must effect the discharge of any payment obligation or settlement obligation in **[money] currency** or by means of an entry passed through the settlement system to the credit of the settlement account of the beneficiary system participant.
- (4) A discharge of a [payment obligation or settlement obligation] settlement instruction that has been duly effected in terms of subsection [(2)] (3) is final and irrevocable.
- (5) Despite the provisions of the Insolvency Act, a settlement instruction that has been finally and irrevocably effected in terms of subsection (4) may not be revoked, reversed, netted, set-off or set aside.
[When a system participant is wound up –
 - (a) **the Registrar of the High Court must lodge with the Bank a copy of the application for winding-up if it was made, and the winding-up order within 14 business days of issuance of the order; and**
 - (b) **despite sections 341(2) and 348 of the Companies Act, the winding-up order does not affect any settlement that has become final and irrevocable before the lodgement of the copy of that order with the Bank in terms of paragraph (a).]**
- (6) The Bank **[after consultation with the Body]** may determine such conditions, rules and procedures, regarding the **[issuing] discharging** of settlement instructions and **[discharging] determination** of settlement obligations.
- (7) The conditions, rules or procedures determined in terms of subsection (6) must be incorporated in settlement **[contracts] agreements** to be entered into between the settlement system operator and system participants.
- (8) A person who contravenes subsection (1) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

3.13 Insertion of new section in the Payment System Management Act– Recognition of financial collateral arrangements

Issue: The present Act does not make provision for financial collateral arrangements, which is an integral part in settlement operations. The lack of a provision would thus make it difficult for the Bank to issue subordinate legislation in respect thereof.

Proposal: Insertion of new section in the Act.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provision:

18. Recognition of financial collateral arrangements

- (1) A settlement system operator may, in its rules and procedures, have collateral arrangements whose value may be realised for the satisfaction of outstanding rights and settlement obligations within the settlement system.
- (2) A system participant must pledge eligible collateral to a settlement system operator for any advance that a settlement system operator may provide to that participant, in accordance with the Bank's lending arrangements as stipulated under the applicable agreements, procedures and policies, as may be amended from time to time, to enable the settlement of the participant's negative multilateral position, if any, or to enable that participant to meet its additional settlement obligations.
- (3) The collateral referred to in subsection (2) must be in the form of financial and non-financial assets eligible collateral issued by the Government of Namibia or determined by the Bank from time-to-time.
- (4) The Bank may determine financial collateral arrangements in a payment system.

3.14 Amendment of section 8 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Netting agreements and netting rules

Issue: In the current Act, the provisions dealing with insolvency/winding up are scattered across various provisions. As such, a need was identified to introduce them all under a single chapter (Part) and expand on them thereunder. Also, the provision has been expanded upon to further qualify the expectation of the Bank in as far as netting agreements and netting rules are concerned.

Proposal: Deletion of the entire section and substitution of the deleted provisions with subsection (1).

Amendments to be included in the Bill:

The Act is amended by the deletion of the entire section and substitution of the deleted section with subsection (1):

19. Netting agreements and netting rules

- (1) A clearing or settlement system must have netting agreements and rules which must stipulate the rights and obligations of participants and the clearing or settlement system operator.
- (2) A netting arrangement in a payment system will be valid and enforceable, and both the system operator and participants in such a payment system must fulfil their respective obligations in order to give effect to the netting arrangement.
- (3) A system operator may amend the netting agreements and rules of a payment system in consultation with its participants. Any amendment effected to the netting agreements and rules is subject to the approval of the Bank.

[Despite anything to the contrary in the Insolvency Act or Banking Institutions Act, if a system participant is wound up or placed under judicial management, or a curator is appointed to a system participant, any provision contained in a written netting agreement to which the system participant is a party, or any netting rule or practice applicable to the system participant, is binding upon the liquidator, judicial manager or curator, in respect of –

- (a) *any payment or settlement instruction which has been delivered to another system participant, a service provider or the Bank before the winding-up order, judicial management order or appointment of the curator, and which instruction –*
 - i. *is subject to calculation and determination through clearing or netting; or*
 - ii. *may result in a payment or settlement obligation, which obligation is to be discharged on or after the date of the winding-up order, judicial management order or appointment of the curator, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator, as the case may be; or*
- (b) *any payment or settlement obligation –*
 - i. *which has been determined through netting before the issue of the winding-up order or judicial management order or appointment of the curator; or*
 - ii. *which is to be discharged on or after the date of the winding-up order, judicial management order or the appointment of the curator, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator.]*

3.15 Insertion of new section in the Payment System Management Act– Tiered participation arrangements

Issue: It has been noted that tiered arrangements are becoming more and more prevalent in payment systems. Unfortunately, the present Act does not make provision for them. Hence, this section was introduced so as to address this gap.

Proposal: Insertion of new section in the Act.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provision:

20. Tiered participation arrangements

- (1) A person may not participate in a clearing or settlement system under a tiered participation arrangement without authorisation from the Bank.*
- (2) Under subsection (1), the Bank will issue the relevant determination, directive or other subordinate legislation in respect of tiered participation arrangements.*
- (3) A person who contravenes subsection (1) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.*

3.16 Insertion of new section in the Payment System Management Act– Interoperability and efficiency

Issue: The Act does not contain a provision that speaks to interoperability and efficiency in the national payment system. Both interoperability and efficiency are important concepts in ensuring seamless payments given the direction (digital financial services agenda) noted in the payments fraternity both at a domestic and regional level.

Proposal: Insertion of new section in the Act.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provision:

21. Interoperability and efficiency

- (1) The Bank must ensure interoperability in the national payment system.*
- (2) Pursuant to subsection (1), the Bank may determine the conditions, rules, and criteria for interoperability in the national payment system.*
- (3) Save for statutory deductions, all other forms of preferential treatment in the national payment system are prohibited.*
- (4) The Bank may determine efficiency in the national payment system.*

3.17 Insertion of new sections in the Payment System Management Act– Issuance of electronic money and operations of trust and pool account

Issue: The current Act presently does not afford any protection to electronic money (e-money) funds nor does any existing legislation at this moment. Thus,

should an e-money issuer be liquidated, the e-money funds would form part of the e-money issuer's estate, which would be detrimental to the customers of the e-money scheme. As such, the proposed provisions seek to address this gap.

Secondly, there is a global drive towards the exploration of digital currency by central banks (CBDC). Unfortunately, the existing Act does not allow for this. In this regard, the provision is necessary to also address this gap.

Proposal: Insertion of new sections in the Act in respect issuance of electronic money and operations of trust and pool accounts.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provisions:

PART VI

ISSUANCE OF ELECTRONIC MONEY AND OPERATIONS OF TRUST ACCOUNT

22. Eligibility to issue electronic money

(1) A person must not issue electronic money unless such person is –

- (a) the Bank; or
- (b) a payment service provider licensed in accordance with section 12(3) of this Act.

(2) Save for the Bank or a banking institution, a payment service provider permitted to issue electronic money must not –

- (a) engage in banking business within the meaning of the Banking Institution Act;
- (b) treat funds received in exchange for electronic money as deposits within the meaning of the Banking Institution Act; or
- (c) engage in any other activity prohibited by the Bank.

(3) For purposes of electronic money issued by the Bank under subsection (1)(a), electronic money refers to central bank issued digital currency as defined in the Bank of Namibia Act.

(4) A person who contravenes subsection (1) commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

23. Opening of trust account

(1) Save for the Bank or a banking institution, a payment service provider licensed to issue electronic money must open and maintain a separate trust account at a banking institution to hold and facilitate funds exchanged for electronic money solely for the benefit of the electronic money users.

- (2) A trust account created in terms of subsection (1) must contain a reference to this section.
- (3) A payment service provider must ensure that the trust accounts referred to under subsection (1) are audited on an annual basis by a qualified independent auditor and in line with generally accepted accounting principles and good governance practices.
- (4) A payment service provider must submit the results or report from the audit conducted on its trust account to the Bank.
- (5) Pursuant to subsection (3), the Bank may for review purposes request a payment service provider to provide additional information or records the Bank considers necessary in order to evaluate the audit results or audit report submitted. The Bank may further review the internal audit programme of a payment service provider to ensure that sufficiently trained and skilled officers of appropriate standing, to the satisfaction of the audit committee, in the payment service provider undertake and implement the internal audit programme of the payment service provider;
- (6) A person who contravenes this section commits an administrative offence and will be liable to an administrative sanction or penalty as determined under section 39(2) of this Act.

24. Separation of trust account from the assets of payment service provider

- (1) In the event that a payment service provider is wound-up, all funds held in the trust account referred to in subsection 23(1) and subsection 23(2) will be exempted from the provisions of the Insolvency Act, the Banking Institution Act or any other applicable domestic law.
- (2) Funds in the trust account must not be liable to the attachment at the instance of or on behalf of a creditor of that payment service provider.
- (3) A person who contravenes this section commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

25. Control of operation of the trust accounts

- (1) If a payment service provider –
 - (a) becomes insolvent; or
 - (b) is liquidated or placed under judicial management, whether provisionally or finally; or
 - (c) has its bank license or payment service provider license revoked or transferred by the Bank; or
 - (d) is declared by a court of competent jurisdiction to be incapable of managing its affairs; or
 - (e) abandons the payment service provider operations or ceases to issue electronic money,

the Master of the High Court may, upon application made by the Bank or by a person having an interest in the trust account of that payment service provider, appoint a representative to control

and administer that trust account with such prescribed rights, duties and powers in relation thereto as the Master may deem fit.

- (2) A person aggrieved by a decision of the Master in terms of subsection (1), may, within 30 days after the decision becomes known to him or her, appeal against that decision to a competent court, and the court may confirm or vary the decision or give such other decision as in its opinion the Master ought to have given.

3.18 Insertion of new sections in the Payment System Management Act – Designation of payment, clearing and settlement systems

Issue: The Bank by virtue of its mandate is expected to designate payment, clearing and settlement systems in terms of the Principles for Financial Market Infrastructure. Unfortunately, the Act presently does not have empowering provisions to enable the Bank to designate the relevant systems or to grant such exemptions as may be required. Hence, there is a need to ensure that the proposed Bill has the necessary empowering provisions.

Proposal: Insertion of new sections in the Act in respect designation of payment, clearing and settlement systems.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provisions:

PART VII **DESIGNATION OF PAYMENT, CLEARING AND SETTLEMENT SYSTEMS**

26. Powers to designate

- (1) If the Bank is of the opinion that a payment, clearing or settlement system is a systemically important system, it must designate it as a designated payment, clearing or settlement in the national payment system under terms and conditions as the Bank may determine.
- (2) In determining whether to designate as per subsection (1), the Bank must consider:
- (a) whether a disruption in the operation of the payment system could further disrupt or impact the efficient functioning of the national payment system, its participants and affect public confidence in the financial system of Namibia;
 - (b) whether the payment system is widely used in Namibia and the designation is necessary to ensure efficiency or competitiveness in any of the services provided by the payment system operator or payment service providers;
 - (c) whether the designation is in the interest of the national payment system as per the objectives of this Act referred to under section 4 of this Act; and
 - (d) whether the designation is in the public interest.

(3) Pursuant to subsection (1), the Bank may determine the criteria for -

- (a) designation and access to the national payment system; and
- (b) designation and authorisation to participate in the clearing and settlement systems.

(4) The notice referred to under subsection (1) must specify-

- (a) the type of payment system that is subject to designation; and
- (b) the terms and conditions to which the designation is subjected by the Bank.

(5) A participant in, or operator of, a designated clearing or settlement system is for purposes of this Act deemed to be a designated system participant or operator.

27. Variation and revocation of designation

(1) The Bank may vary or revoke any designation made under section 26, including any terms or conditions of the designation by-

- (a) giving notice in the prescribed form and manner to the designated entity to show cause within a 30 day period why its designation, or any terms or condition of designation applicable to it may not be revoked by the Bank; and
- (b) considering such submissions, if any, by publishing the variation or revocation in a notice in the Government Gazette.

(2) In determining whether or not to vary or revoke a designation, the Bank may have regard to any, or all, of the following factors -

- (a) failure to comply with any conditions to which the designation is subject to;
- (b) whether or not the designated entity has ceased to operate;
- (c) whether or not the designated entity has knowingly furnished information or documents which are false or misleading in any material respect to the Bank in connection with the designation of the entity;
- (d) whether the system is no longer relevant; and
- (e) any other matters that the Bank considers appropriate.

(3) Any variation or revocation made under subsection (1) does not affect -

- (a) the validity or enforceability of any rules of the payment, clearing or settlement system;
or
- (b) any payment to or out of the account of a settlement system or netting or settlement that took place before the notice in the Government Gazette.

28. Exemptions

- (1) The Bank, by notice in the Government Gazette may exempt any person or category of persons from the provisions of this Act, subject to such conditions as the Bank may prescribe and whether the Bank is satisfied that such an exemption is in the public interest and will not cause undue risk to the national payment system.
- (2) The Bank may at any time vary or revoke an exemption provided under subsection (1) if doing so will allow the Bank to execute its functions, as specified under this Act.

3.19 Insertion of new sections in the Payment System Management Act – Consumer Protection

Issue: The Act currently does not have any consumer protection principles to protect users of payment instruments as well as clients of system participants and service providers. This legislative gap at times makes it difficult for the Bank to thoroughly address some of the concerns noted from a customer experience. Thus, as part of the Bank’s mandate towards consumer protection and financial inclusion, the Bank has inserted provisions in the Bill in this regard. Furthermore, given the drive towards digitalisation, the Bank will in the foreseeable future issue standards on Open Banking and hence the need to introduce a provision empowering the Bank to be able do so (Section 33: Sharing of Data).

Proposal: Insertion of new section in the Act in respect of Consumer Protection.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provisions:

PART VIII

CONSUMER PROTECTION

29. Principles of consumer protection

- (1) The Bank must prescribe consumer protection principles applicable to all payment service providers, which principles will include provisions of treating users fairly and equitably in the provision of payment services.
- (2) payment service provider should ensure transparency and the disclosure of clear, sufficient and timely information on the fundamental benefits, risks and terms and conditions of a payment service offered in an objective and accessible form.
- (3) Payment service providers should ensure sufficient and accessible information to users on their rights and responsibilities.
- (4) A person who contravenes this section commits an administrative offence and will be liable to an administrative sanction or penalty as determined under section 39(2) of this Act.

30. Transparency of fees and charges

- (1) A payment service provider which imposes a fee or charge on a payment service is required to give notice to the user that a fee or charge is being imposed.
- (2) A person who contravenes this section commits an administrative offence and will be liable to an administrative sanction or penalty as determined under section 39(2) of this Act.

31. Determining standards for fees and charges

- (1) The Bank may determine standards and impose conditions on fees or charges related to the provision of payment services, where it determines that it is in the public interest to do so. [The functions of the Bank are to ensure that the fees or charges payable by a user are in the public interest, promote competition, efficiency and cost-effectiveness in service delivery and comply with the standards determined by the Bank;]
- (2) The Bank may take remedial actions if the Bank is of the opinion that fees or charges are not in the public interest, do not promote competition or efficiency in payment service delivery, or do not comply with the standards determined by the Bank.

32. Complaints

- (1) A user of a payment service provider who is aggrieved by an act or omission of the payment service provider may make a complaint in writing to the payment service provider for remedial action.
- (2) A complaint made under subsection (1) must be dealt with by the payment service provider and a written reply, stating the decision of the payment service provider, must be given to the complainant as soon as practicable, but not later than 15 business days from the date of receipt of the complaint.
- (3) Where the complainant is dissatisfied with the decision of the payment service provider, or does not receive the decision within the period referred to in subsection (2), such user may lodge a complaint with the Bank.
- (4) The Bank may issue such instructions or guidelines as may be necessary for purposes of this section.

33. Sharing of Data

The sharing of data between payment service providers, payment system operators and such other third parties as authorised by the Bank, may only be conducted in accordance with standards as determined by the Bank from time-to-time

3.20 Insertion of new section in the Payment System Management Act – Power to inspect and access information/amendment of section 10 in the Payment System Management Act

Issue: The Act currently does not have any provisions which provide the Bank with powers to inspect the premises of participants, whether for purposes of onsite

or *ad hoc* inspections/investigations. Also, the existing section on Information (section 10) does not sufficiently cover the aspect of information, particularly with regards to late submissions of requested information as well as the process involved in conducting inspections. As such, the Act requires the necessary amendments to address this gap.

Proposal: Insertion of new section in the Act in respect of power to inspect.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provisions:

For purposes of this part –

“Participant” refers to payment system operators, system participants and payment service providers as defined under section 1.

34. Powers to inspect

- (1) The Bank must regulate, supervise and oversee the operations of the national payment system.
- (2) The Bank may, with or without prior notice, enter and inspect the premises of a payment system operator or a payment service provider and its agents to carry out its functions under this Act. The Bank may during an examination or inspection –
 - (c) inspect and retain, during an examination or inspection, any book, account, other documents, equipment, apparatus, machinery, and any other item or record of a payment system operator or payment service provider for purposes of such examination or inspection; and
 - (d) interview any staff of such a payment system operator or payment service provider to conduct an examination or inspection.
- (3) An authorised officer of the Bank who seeks to exercise any power or perform any function under this section in relation to any person must produce his or her written authorisation by the Bank for examination or inspection when so requested by that person.
- (4) A person in charge or in control of premises entered by an authorised officer under subsection (2) must provide such reasonable facilities and assistance as the authorised officer may require for performing a function under this section, including -

- (a) providing access to any computer on the premises and rendering assistance to the authorised officer to search any data contained in such computer, and
 - (b) on request of the authorised officer, provide any data contained in that computer in printed form to the authorised officer.
- (5) This section, in so far as it provides for a limitation on the fundamental rights contemplated in sub-article (1) of Article 13 of the Namibian Constitution by authorising interference with the privacy of any person's home, correspondence or communication, is enacted upon the authority conferred by sub-article (2) of that Article.
- (6) An authorised officer executing the powers conferred under subsections (4) to (6) may be accompanied by police officials where warranted.
- (7) A person must not, without just cause –
- (a) refuse to permit an authorised officer of the Bank to enter premises or to conduct an examination or inspection in terms of this section;
 - (b) fail or refuse to produce any book, record, statement or other document which the authorised officer requires to be produced to him or her for examination or inspection;
 - (c) fail or refuse to explain any entry in a book, record, statement or other document which the authorised officer requires him or her to explain;
 - (d) subject to Article 12(1)(f) of the Namibian Constitution, refuse or fail to answer any question which the authorised officer lawfully directs at such person in exercising, performing or executing the authorised officer's powers, duties or functions under this section.
 - (e) fail or refuse to provide the authorised officer with reasonable facilities and assistance required by the authorised officer;
 - (f) knowingly furnish false or misleading information to the authorised officer; or
 - (g) remove or tamper with any book, record, statement or other document seized by the authorised officer; or
 - (h) hinder or obstruct or interfere with an authorised officer of the Bank in exercising, performing or executing his or her powers, duties or functions under this section.
- (8) A person who contravenes this section commits an administrative offence and will be liable to an administrative sanction or penalty as determined under section 39(2) of this Act.

3.21 Amendment of section 10 of the Payment System Management Act, 2003 (Act No. 18 of 2003), as amended – Information

Issue: The current provision does not sufficiently address this aspect. For example, matters pertaining to non-submission of requested information or submission of incomplete information are not catered for under the existing provision. As such, a need was identified to introduce a comprehensive provision catering for all known possibilities based on experience.

Proposal: Deletion of the entire section and substitution of the deleted provisions with section 33.

Amendments to be included in the Bill:

The Act is amended by the deletion of the entire section and substitution of the deleted section with section 33:

35. Information

(1) *The Bank has access to any information relating to –*

(r) *payment, clearing and settlement systems; and*

(s) *The [Body] Association, a system participant and a payment service provider in respect of any matter regulated by or under this Act.*

[Any person in possession of information referred to in subsection (1) must provide such information to the Bank at any time and in such form, as the Bank may require from such person in writing.]

(2) *The Bank may, by notice in the form or manner prescribed, require any person to provide to the Bank, within the period specified in the notice, all such information in its possession relating to their participation in the national payment system.*

(3) *Without prejudice to the generality of subsection (2), the Bank may in a notice issued under that subsection, require the Association, any payment service provider or payment system operator to provide, whether in the form of a periodic return or otherwise –*

(f) *any information relating to:*

(i) *the operation of the payment, clearing or settlement system in which they participate; and*

i. *the pricing of, or other forms of consideration for, payment and related services offered by that payment service provider;*

(g) *information relating to the participation or other involvement of that payment service provider in the payment, clearing and settlement system; and*

(h) *such other information as the Bank may require for the purposes of this Act.*

- (4) The information requested by the Bank under subsection (3) must be requested:
- (a) in the course of performing functions under any law;
 - (b) for the purpose of legal proceedings;
 - (c) when required to do so by a competent court;
 - (d) if in the opinion of the Bank, disclosure is in the public interest, or it is already publicly available.
- (5) The Bank may impose a fine not exceeding of N\$100 000 on a payment service provider or payment system operator for every day during which contravention or non-compliance continues for -
- (a) non-submission; or
 - (b) incomplete submission; or
 - (c) inaccurate submission, of the required information, data, statement or returns.
- (6) Despite anything to the contrary in any law relating to the retention of records, the Bank, payment system operators and [system participants] payment service providers must retain all records obtained by them during the course of the operation and administration of the payment, clearing and settlement systems for a period of [five] 5 years as from the date of record and for longer upon specifically being requested to do so by the Board and/or any other competent authority as defined in the Financial Intelligence Act, 2012 as amended.

3.22 Amendment of section 16 of the Payment System Management Act – Retention of records

Issue: This section is no longer relevant as a standalone provision in that its content has been added onto section 29(6) in the proposed Bill.

Proposal: Deletion of section 16 of the Payment System Management Act.

Amendments to be included in the Bill:

Deletion of section 16 of the Payment System Management Act:

[16. Retention of records

Despite anything to the contrary in any law relating to the retention of records, the Bank, system participants and service providers must retain all records obtained by them during the course of the operation and administration of the payment, clearing and settlement systems for a period of five years as from the date of record.]

3.23 Insertion of new section in the Payment System Management Act – Insolvency proceedings

Issue: The insolvency/winding up provisions in the current Act are reflected under various sections. A need was identified to have them all reflected under a single chapter (part) to ensure that the Bill had an orderly flow in respect of this matter. The orderly arrangement would further enable the Bank to insert the necessary provisions to better guide this process, based on past experiences (SME Bank). Furthermore, given the change to collectively refer to all players who issue payment services as listed under the Second Schedule to the Bill as payment service providers, reference to system provider was deleted in the below provisions and replaced with payment service providers, and only used in the applicable context.

Proposal: Insertion of new section in the Act in respect of Insolvency proceedings.

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provisions on insolvency. The Act is further amended by the deletion of section 9(b) and insertion of sections 30(2) and 32:

PART IX **INSOLVENCY PROCEEDINGS**

36. Winding up of a Payment Service Provider

- (1) *Notwithstanding anything in the Insolvency Act, Companies Act, Banking Institutions Act or any other law, a payment service provider is not permitted to apply for winding-up or judicial management, unless such payment service provider has given the Bank 14 business days written notice of its intention to apply for winding up or judicial management.*
- (2) *When a payment service provider is wound up –*
 - (t) *the Registrar of the High Court must lodge with the Bank a copy of the application for winding-up if it was made, and the winding-up order within ~~[14]~~ 15 days of issuance of the order; and*
 - (u) *despite sections 346(2) and 353 of the Companies Act, the winding-up order does not affect any settlement that has become final and irrevocable before the lodgement of the copy of that order with the Bank in terms of paragraph (a).*
- (3) *A settlement account of any system participant must not be liable to attachments, garnishee proceedings or seizures under the Insolvency Act, Banking Institutions Act or any other law.*
- (4) *Despite anything to the contrary in the Insolvency Act ~~[or]~~, the Banking Institutions Act or any other law, if a system participant is wound up or placed under judicial management, or a curator is appointed to a system participant, any provision contained in a written netting agreement to which ~~[the system participant]~~ a service provider is a party, or any netting rule or practice applicable to the system participant, is binding upon the liquidator, judicial manager or curator, in respect of –*

- (a) *any payment or settlement instruction which has been delivered to another system participant, a payment service provider or to the Bank prior to the winding up order, judicial management order or appointment of the curator, and which instruction –*
 - (i) *is subject to calculation and determination through clearing or netting; or*
 - (ii) *may result in a payment or settlement obligation, which obligation is to be discharged on or after the date of the winding-up order, judicial management order or appointment of the curator, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator, as the case may be; or*
- (b) *any payment or settlement obligation –*
 - (i) *which has been determined through netting prior to the issue of the winding-up order or judicial management order or appointment of the curator; or*
 - (ii) *which is to be discharged on or after the date of the winding-up order, judicial management order or the appointment of the curator, or the discharge of which was overdue on the date of the winding-up order, judicial management order or appointment of the curator.*

37. *Utilisation of assets provided as security*

Despite anything to the contrary in the Insolvency Act or any other law, any asset of a **[system participant] service provider** which the **[system participant]** service provider, prior to the issue of its winding-up order, has provided to the Bank as security for a loan in respect of its settlement obligation, may be utilised by the Bank to the extent required for the discharge of that settlement obligation.**[or]**

[(b) in terms of a written agreement with a service provider, to the service provider as security in respect of its payment obligation, may be utilised by the service provider to the extent required for the discharge of that payment obligation.]

38. Winding up notice

- (1) The Bank upon receipt of the notice referred to under section 34(2) must notify –
 - (a) all relevant domestic or foreign payment system operators and regulatory bodies; and
 - (b) other system participants, payment service providers or agents required to be notified.
- (2) The clearing system operator and settlement system operator must enforce the winding-up order immediately upon being notified by the Bank of the order under subsection (1).
- (3) Any system participant in respect of whom a winding-up order has been effected must cease to participate in any clearing or settlement system in the national payment system.
- (4) In the event of insolvency of a foreign system participant, the rights and obligations of that foreign participant relating to settlement will be governed by the laws of Namibia.
- (5) The provisions of this section must not restrict or preclude any person from enforcing his rights under the law in so far as it does not affect the finality of payment instructions or settlement obligations or the validity and enforceability of a netting arrangement under this Act.

3.24 Insertion of new section in the Payment System Management Act – Settlement of disputes amongst participants

Issue: The current Act only make provision for settlement of disputes with the Bank but does not have a provision for the settlement of disputes amongst participants. The Bank often times gets seized with disputes amongst participants, however, there is no existing provision which governs those arrangements in the Act.

Proposal: Insertion of new section in the Act in respect of settlement of disputes amongst participants.

Amendments to be included in the Bill:

The Act is amended by the insertion of a new section:

PART X

DISPUTE RESOLUTION

39. Settlement of disputes amongst payment service providers

- (1) Any dispute arising among payment service providers must be settled in accordance with this section.
- (2) Any payment service provider who is aggrieved by another payment service provider must submit a written statement setting out full particulars of the grievance to the other party to which the grievance relates, and the parties must attempt to settle the matter by conciliation within 15 business days from date of the written statement.
- (3) If the parties are unable to settle the matter as contemplated in subsection (2), they must attempt to settle the matter within a further period of 30 business days through mediation whereby-
 - (a) the parties must agree on a mediator;
 - (b) the mediator must familiarize him or herself with the parties' respective contentions;
 - (c) the mediator and all parties must discuss the matter at one or more meetings attended by all of them and attempt to settle the matter by consensus; and
 - (d) the parties must share the mediator's costs equally between them.
- (4) If the parties are unable to settle the matter by conciliation under subsection (2), or by mediation under subsection (3), the matter may be referred to arbitration by a single arbitrator, and where the parties fail to agree on an arbitrator, the parties must notify the President of the Namibia Law Society who then must appoint an arbitrator on their behalf.
- (5) The arbitrator referred to in subsection (4) must, as far as possible, be a person appointed on account of his or her knowledge of the law and payment systems.

- (6) Save for instances where the arbitrator awards costs to a particular party, the parties involved in an arbitration will be jointly liable for equal settlement of the arbitrator's fees and any other costs associated to the arbitration proceedings.
- (7) The Arbitration Act, 1965 (Act No. 42 of 1965) will govern arbitration proceeding as contemplated in this section.
- (8) The arbitrator must reach his or her decision in the matter within 30 days after his or her appointment unless the parties agree to an extension of that period.
- (9) A decision of the arbitrator must be final and binding on the parties.
- (10) Where the participants to a dispute have entered into an agreement, the dispute resolution provisions of the said agreement must take precedent over the provisions of this section.

3.25 Amendment of section 15 of the Payment System Management Act – Settlement of disputes

Issue: The provision has been amended by increasing the conciliation process from 7 days to 15 days and the mediation process from 10 days to 30 days so as to ensure that the parties and the respective processes are awarded sufficient/reasonable time to resolve disputes as they may arise. The provision has further been expanded upon by introducing new provisions, subsections 6 and 7. Reference to Body and system participant has been replaced by Association and payment service provider, given the proposed changes to the regulatory environment. Lastly, the definition for mediation has been amended to rather cross-reference section 39 as it would mean the same thing for both dispute processes.

Proposal: Amendment of section 15 of the Payment System Management Act.

Amendments to be included in the Bill:

The Act is amended by the deletion of the word business from subsections (2) and (3), and by the substitution of 10 days with 30 days:

40. *Settlement of disputes with the Bank*

- (1) *If the **[Body] Association** or a **[system participant] payment service provider or a payment system operator** considers itself aggrieved by a decision taken by the Bank under this Act and a dispute arises between them, it must be settled as provided in this section.*
- (2) *If the **[Body] Association** or a **[system participant] payment service provider or a payment system operator** desires to settle the dispute, it must furnish the Bank with full particulars of its grievance in writing, and thereafter the parties must attempt to settle the dispute by **[agreement] conciliation** within **[seven] 15** business days of receipt of particulars by the Bank.*
- (3) *If the parties **[do not succeed in settling the dispute]** are unable to settle the matter as contemplated in subsection (2), they **[may] must** attempt to settle the dispute **[by mediation]** within a further period of **[10] 30** business days through mediation.*

- (4) “Mediation” as contemplated in subsection (3) means a process as prescribed by section 39(3) - [whereby -
- (v) *the parties agree on a mediator;*
 - (w) *a mediator familiarises himself or herself with the position held by each party;*
 - (x) *a mediator and the parties discuss the dispute at their meeting convened for that purpose;*
 - (y) *the parties at or following their meeting with a mediator attempt to settle the dispute by agreement; and*
 - (z) *the parties share the mediator’s costs equally.]*
- (5) If the parties are unable to settle the matter by [agreement through mediation] conciliation under subsection (2), or by mediation under subsection (3), [the dispute, if it is to continue, must be referred to] the matter may be referred to arbitration by a single arbitrator, and where the parties fail to agree on an arbitrator, the parties must notify the President of the Namibia Law Society who then must appoint an arbitrator on their behalf.
- [If the parties are unable to settle [a dispute by agreement through mediation in accordance with subsection (3), the dispute, if it is to continue, must be referred to –*
- (a) *a single arbitrator appointed by both parties; or*
 - (b) *an arbitrator or arbitrators appointed, at the request of both parties, by a credible body whose business is the facilitation and promotion of disputes resolution by means of mediation or arbitration.]*
- (6) The arbitrator referred to under subsection (5) must, as far as possible, be a person appointed on account of his or her knowledge of the law and payment systems.
- (7) Save for instances where the arbitrator awards costs to a particular party, the parties involved in an arbitration will be jointly liable for equal settlement of the arbitrator’s fees and any other costs associated to the arbitration proceedings.
- (8) The Arbitration Act, 1965 (Act No. 42 of 1965) [applies with the necessary changes to an arbitration contemplated in this section] will govern arbitration proceeding as contemplated in this section.
- (9) *A decision of the arbitrator must be final and binding on the parties.*

3.26 Amendment of section 16A of the Payment System Management Act – Administrative penalties

Issue: Although the current Act makes provision for the imposition of administrative penalties, it does not give the Bank powers to issue regulations in respect thereof. Furthermore, the existing provision needs to be amended to rather

Speak to non-compliance as opposed to delayed compliance as non-compliance is easier to define and delayed compliance is a form of non-compliance. Lastly, it was important to also stipulate the penalty associated with non-compliance as the current Act does not speak to this in respect to section 42 below.

Proposal: Amendment of section 16A of the Payment System Management Act.

Amendments to be included in the Bill:

Section 16A of the Act is hereby amended by the insertion of subsection (4) and the deletion of business from subsection (3):

PART XI

ADMINISTRATIVE PENALTIES AND OFFENCES

41. Administrative penalties

- (2) *The Bank may impose administrative penalties on any person for **[any delay] non-compliance [in complying]** with any **[directive, determination, guideline, standard, circular, specification, order or notice]** subordinate legislation issued by the Bank [in] this Act.*
- (3) *The Bank may determine in a determination, directive or other subordinate legislation the appropriate administrative sanction or penalties for non-compliance with section 23, section 30 and section 32 of this Act.*
- (4) *Before making a decision to impose any administrative penalty on a person, the Bank must serve on the person a written notice calling on the person to show cause as to why the penalty should not be imposed on the person.*
- (5) *If a **[satisfactory explanation]** response is not received within 14 business days from the date of receipt of the written notice referred to in subsection (2), the Bank may impose an administrative penalty in an amount not exceeding N\$100 000 for each day of non-compliance, which amount may not exceed N\$1 000 000 in total.*
- (6) *Despite the provisions of subsection (1), persons are not precluded from approaching the High Court or any competent court to appeal against the decision taken by the Bank to impose an administrative penalty. In such instances, the appeal process must be conducted in accordance with the Rules of the relevant court and such person must ensure that it issues the Bank with the relevant notice of its intention to appeal the Bank's decision.*
- (7) *In the event that a person appeals against a decision taken by the Bank to impose an administrative penalty, the Bank must reserve such a decision until the appeal process is concluded and waive the administrative penalty amount calculated during the appeal process.*

42. Offence relating to instruments, devices, software, digital apparatus or material or components thereof

- (1) A person who –

- (a) *makes, adapts or repairs;*
- (b) *buys or sells;*
- (c) *exports from or imports into Namibia; or*
- (d) *possesses or uses,*

any instrument, device, apparatus, material or a component thereof that the person knows or reasonably ought to have known that it has been used or is intended for use in forging or falsifying a payment instrument, or for use in defrauding a lawful holder of a payment instrument, commits an offence.

(2) A person who contravenes this section commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

3.27 Amendment of section 11 of the Payment System Management Act – Confidentiality

Issue: The provision is for the most part sufficient, however, it was amended to reflect the wording in the new Bank of Namibia Act, 2020 and also further expanded on to make enable the sharing of information that would be otherwise confidential with lawfully authorised persons, such as individuals who have a particular assignment to fulfil on behalf of the Bank, for example, consultants from the World Bank or other central banks/supervisory authorities.

Proposal: Amendment of section 11 of the Payment System Management Act.

Amendments to be included in the Bill:

Section 11 of the Act is hereby amended by the insertion of subsection (1)(c):

PART XII

GENERAL PROVISIONS

43. Confidentiality

(1) The Governor, a Deputy Governor, a member of the Board or committee established under this Act, an agent of the Bank, a staff member or any other person exercising a power or performing a function under this Act may not disclose to a person information or data relating to the affairs of the Bank, except –

- (a) for purposes of exercising a power or performing a function under this Act;
- (b) *for the purposes of the performance of his or her functions in terms of this Act, the Bank of Namibia Act or the Banking Institutions Act;*
- (c) *when the disclosure of such information is necessary to protect the integrity, effectiveness and security of the national payment system;*

- (d) where it is disclosed to a person who is lawfully authorised to receive the information;
 - (e) for purposes of complying with an agreement or an understanding between the Bank and other central banks, supervisory authorities or any other person; or
 - (f) **[when required to do so on authority of the Board or under any law or by a court of law.]** when required to do so by a court of law or under any new law.
- (2) Subsection (1) applies to any other person who receives information disclosed under paragraph (a) or (b) of that subsection.
 - (3) The Bank may share information or data with other central banks and international institutions subject to such conditions as the Bank may impose.
 - (4) A person who contravenes subsection (1) commits an offence and is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 5 years, or to both such fine and such imprisonment.

[(1) A person may not directly or indirectly disclose to another person any confidential information that he or she has obtained in the performance of his or her functions for or on behalf of the Bank, except -

(c)when required to do so on authority of the Board or under any law or by a court of law.

(2) A person who contravenes subsection (1) commits an offence section .]

3.28 Amendment of section 12 of the Payment System Management Act – Indemnity

Issue: The provision is for the most part sufficient, however, it does not extend to persons or agents rendering services to the Bank in terms of any power or function of the Act. As a result thereof, they are deemed to be rendering services on behalf of the Bank (i.e. they are an extension of the Bank) and should be afforded the same protection as an employee of the Bank. The provision also needed to be reworded given the number of people it extends.

Proposal: Amendment of section 12 of the Payment System Management Act.

Amendments to be included in the Bill:

Section 12 of the Act is hereby amended by the insertion of subsection (2):

44. Indemnity

- (1)*The Governor, a Deputy Governor, a member of the Board or an employee of the Bank or the [Body] Association or any other person performing a function or exercising a power under this Act is not personally liable for any loss or damage arising out of any act done or omitted to be done in good faith under this Act, unless it is established that the act or omission was committed in a grossly negligent manner or intentionally. [such damage or loss is due to the Governor’s, Deputy Governor’s, member of the Board, or employee of the Bank or the Body’s negligence or failure to comply with this Act.]*

(2) The provisions of subsection (1) must extend to persons and agents employed by the Bank in the exercise or performance or purported exercise or performance of any power or function under this Act.

3.29 Amendment of section 13 of the Payment System Management Act – Directives by Bank

Issue: Subsection (2) makes non-compliance with this provision an offence, which would warrant criminal prosecution by the Office of the Prosecutor General. However, non-compliance in this instance should ideally be dealt with in line with the Bank’s administrative penalties. As such, the provision warrants amendment.

Proposal: Amendment of section 13 of the Payment System Management Act.

Amendments to be included in the Bill:

Section 13 of the Act is hereby amended by the insertion of subsection (2):

45. Directives by Bank

(1) If the Bank knows or reasonably believes that any person participating in the national payment system engages in or is about to engage in any act, omission or course of conduct, that –

(a) results or is likely to result in systemic risk; or

(b) is detrimental to or may be detrimental to the national payment system; or

(c) is or will be contrary to the public interest [in], the integrity, effectiveness or security of the national payment system; or

(d) [is contrary to any provision of this Act,]

the Bank may issue a directive in writing requiring the person, within the period specified in the directive –

(i) to cease or refrain from engaging in the act, omission or course of conduct, or to perform such acts specified in the directive as are necessary to remedy the situation;

(ii) to provide the Bank with such information and documents relating to the matter as specified in the directive; and

(iii) to conform to the requirements set out in the directive.

(2) Any person who [neglects, refuses or fails to comply with] contravenes a directive issued under subsection (1) [commits an offence] is liable to an administrative penalty as determined by the Bank.

(3) [Irrespective of whether criminal proceedings have been or may be instituted against a person in respect of an offence referred to in subsection (2),] The Bank may apply to the High

Court for an order directing such person to comply with a directive issued under subsection (1).

3.30 Amendment of section 14 of the Payment System Management Act – Determinations

Issue: Subsection (2) makes non-compliance with this provision an offence, which would warrant criminal prosecution by the Office of the Prosecutor General. However, non-compliance in this instance should ideally be dealt with in line with the Bank’s administrative penalties. As such, the provision warrants amendment.

Proposal: Amendment of section 14 of the Payment System Management Act.

Amendments to be included in the Bill:

Section 14 of the Act is hereby amended by the insertion of subsection (2):

46. Determinations

(1) *The Bank, by notice in the Government Gazette, may make determinations [and any other subordinate legislation] not inconsistent with this Act relating to –*

- (a) *any matter which is required or permitted by this Act to be determined by the Bank; and*
- (b) *all other matters which the Bank considers necessary or expedient to determine for the efficient functioning of the national payment system.*

(2) *A person who contravenes a determination made under subsection (1) [commits an offence] is liable to an administrative penalty as determined by the Bank.*

3.31 Insertion of a new section in the Payment System Management Act – Enforceability of subordinate legislation

Issue: There has over the years been a debate on the enforceability of subordinate legislation, from an interpretation perspective. Hence, this provision serves to provide clarity in this regard and ensure that there is a common understanding going forward.

Proposal: Insertion of new section in the Act in respect of enforceability of subordinate legislation

Amendments to be included in the Bill:

The Act is amended by the insertion of the following provisions:

47. Enforceability of subordinate legislation

(1) Despite the provisions of section 43 and section 44 of the Act, the Bank may issue any other subordinate legislation to enforce any provision of this Act.

- (2) Pursuant to subsection (1), the Bank must ensure that the issuance of such subordinate legislation is not inconsistent with this Act;
- (3) A person who contravenes this provision is liable to an administrative penalty as determined by the Bank.

3.32 Insertion new section in the Payment System Management Act – Repeal of laws

Issue: Owing to the fact that the existing Act will be repealed by the proposed Bill in its entirety, it is a drafting principle to insert a repeal of laws provision in an Act.

Proposal: Insertion of section 45 in the Payment System Management Act.

Amendments to be included in the Bill:

The Act is amended by the insertion of section 46 and the accompanying Schedule in respect of the relevant laws to be repealed:

48. *Repeal of laws*

- (1) *The Payment System Management Act, 2003 (Act No. 18 of 2003) and the Payment System Management Amendment Act, 2010 (Act No. 6 of 2010) are hereby repealed in their entirety.*

SCHEDULE

(Section 46)

LAWS REPEALED

<i>No and year of law</i>	<i>Short title</i>	<i>Extent of repeal</i>
<i>Act No. 18 of 2003</i>	<i>Payment System Management Act</i>	<i>The whole</i>
<i>Act No. 6 of 2010</i>	<i>Payment System Management Amendment Act</i>	<i>The whole</i>

3.33 Insertion of new section in the Payment System Management Act – Transitional provisions

Issue: Owing to the fact that the existing Act will be repealed by this Bill in its entirety, it is a drafting principle to insert a transitional provisions clause to provide guidance for pending applications, the treatment of existing subordinate legislation as well as authorised or existing participants in the national payment system.

Proposal: Insertion of section 46 in the Payment System Management Act.

Amendments to be included in the Bill:

The Act is amended by the insertion of section 46 in respect of repeal of laws:

49. Transitional provisions

- (1) Subject to the provisions of section 47, the laws specified in the First Schedule are hereby repealed to the extent set out in the third column of the First Schedule.
- (2) Any determination, directive, guideline, circular, exemption, notice, standard, specification or instructions made or in force, under any provision of any law repealed by subsection (1) must be deemed to have been made under the corresponding provision of this Act.
- (3) Any person who immediately before the commencement of this Act, was—
- (a) a system participant for the clearing of payment instructions or the netting or settlement of obligations arising from the clearing of payment instructions; or
 - (b) issuing payment instruments; or
 - (c) conducting the business of a payment service provider,
- may continue to operate the system or issue the payment instrument or conduct the business of a payment service provider.
- (4) All applications which had been submitted to the Bank prior to the commencement of this Act must be assessed in terms of this Act.

3.34 Amendment of section 18 of the Payment System Management Act– Short title and commencement

Issue: Owing to the fact that the existing Act will be repealed by this Bill in its entirety, the gazetting year will no longer be 2003 and hence the substitution.

Proposal: Substitution of the year 2003 with the year 2021.

Amendments to be included in the Bill:

The Act is amended by the substitution of the year 2003 with the year 2021:

47. Short title and commencement

- (1) *This Act -*
- (a) *is called the Payment System Management Act, [2003] 2022; and*
 - (b) *commences on a date to be determined by the Minister by notice in the Gazette.*