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**Payment Systems Act, 2014**

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ACT NO. 11 OF 2014

**Payment Systems Act, 2014**

An Act to make provision for the management of interbank payment systems, clearing houses and securities settlement systems, inclusive of collateral and netting arrangements; and for related purposes.

Enacted by the the Parliament of Lesotho.

PART I - PRELIMINARY

**Short title and commencement**

1. This Act may be cited as the Payment Systems Act, 2014 and shall come into operation on the date of its publication in the Gazette.

**Interpretation**

2. In this Act, unless the context otherwise requires:

“bank” means a bank within the meaning of the Financial Institutions Act, 2012;

“bilateral netting” means an arrangement between 2 parties to net their bilateral obligations which obligations may arise from financial contracts, transfers or both;

“Body” means the Payment Systems Management Body referred to in section 6;

“book entry system” means an accounting system that permits the transfer of claims including but not limited to, electronic transfer of securities, without the physical movement of paper documents or certificates;

“book entry securities collateral” means financial instruments and precious metals provided under a financial collateral arrangement, title to which is evidenced in entries in a register or account maintained by or on behalf of an intermediary;

“cash” means money credited to an account in any currency or similar claims for the repayment of money, such as money market deposits;

“Central Bank” means the Central Bank of Lesotho established by the Central Bank Act, 2000;

“central bank settlement system” means a system established and operated by the Central Bank for the discharge of payment or settlement obligations or the discharge of payment and settlement obligations between system participants in that system;

“central bank settlement system participant” means -

- (a) the Central Bank of Lesotho;
- (b) a bank;
- (c) a co-operative bank; and
- (d) a branch of a foreign banking institution,

that participates in the central bank settlement system;

“clearing” means the process of transmitting, reconciling and confirming of payment or securities transfer orders prior to settlement;

“clearing house” means an entity responsible for the calculation of the net positions of system participant institutions;

“close-out netting provision” means a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise -

- (a) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; or

- (b) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party;

“collateral” means an asset or third-party commitment that is accepted by the collateral taker to secure an obligation of the collateral provider as against the collateral taker;

“collateral provider” means a person or an entity providing financial collateral under a title transfer arrangement, or a pledgor;

“collateral taker” means a person or an entity being provided with financial collateral under a title transfer arrangement, or a pledgee;

“enforcement event” means an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realise financial collateral or a close-out netting provision comes into effect;

“financial collateral” means cash, financial instruments or precious metals;

“financial collateral arrangement” means a title transfer arrangement or a pledge, whether or not these are covered by a master agreement or general terms and conditions, and which applies to financial collateral;

“financial institution” means a financial institution within the meaning of the Financial Institutions Act, 2012;

“financial instruments” means domestic or foreign shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments, if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement, excluding payment instruments, including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing;

“insolvency proceedings” means any collective measure provided for in the laws of Lesotho or another country either to wind up a person or re-organise it, where such measure involves the suspending of, or imposing limitations on transfers or payments; in Lesotho, insolvency proceedings encompass the winding-up and judicial management under Part XVI, XVII, XVIII and XIX of the Companies Act, 2011 as well as the winding-up and seizure under Part IX of the Financial Institutions Act, 2012;

“interbank payment system” means a formal arrangement or a framework which is binding between 2 or more participants, with common rules and standardised arrangements for the execution of money transfer orders between the participants;

“netting” means the determination of the net payment obligations between 2 or more settlement system participants within a payment clearing house or the determination of the net settlement obligations between 2 or more settlement system participants within the payment and settlement system;

“netting arrangement” means an arrangement in writing to convert several claims or obligations into one net claim or one net obligation and includes bilateral netting, multilateral netting, close out netting, payments netting or a combination;

“multilateral netting” means an arrangement among 3 or more parties to net their obligations which obligations are covered by an arrangement that may arise from financial contracts, transfers or both.

“notify” means to inform by a registered letter;

“operator” means a payment system operator or an entity which is in charge, alone or with other entities, of the proper functioning of the system and which may, jointly with the promoter, act as a point of contact with the Central Bank;

“participant” means a party who participates in a transfer system;

“payment card” means a debit card, credit card, prepaid card or any other card that is issued to an authorised card user and that allows the user to

obtain goods, services, money or anything of value from a merchant or service provider;

“payment instruments” means but not limited to a cheque, a bill of exchange or a promissory note, electronic money, electronic payments, credit cards and debit cards;

“payment system” means a set of instruments, banking procedures and rules utilising interbank funds transfer systems that ensure the circulation of money;

“payment clearing house” means an arrangement between 2 or more clearing system participants and central bank settlement system participants, governing the clearing or netting of payment instructions between those clearing system participants and central bank settlement system participants;

“payment clearing house operator” means a person, that clears on behalf of any 2 or more central bank settlement system participants;

“promoter” means a person taking the necessary steps in order to obtain a license to establish a system and who acts as a point of contact with the Central Bank ;

“re-encoder” means an electronic device that reads identity and other confidential information from smartcard payment card onto another or uses information to duplicate smartcard payment card that allows authorised transaction to occur without the permission of the owner;

“relevant account” means in relation to book entry securities collateral, the register or account which may be maintained by the collateral taker in which the entries are made by which that book entry securities collateral is provided to the collateral taker;

“securities settlement system” means a formal arrangement between three or more participants, with common rules and standardised arrangements for the execution of securities transfer orders between the participants;

“settlement” means the completion of a transaction, wherein the seller



transfers securities or financial instruments to the buyer and the buyer transfers money to the seller;

“settlement account” means an account in the books of a settlement agent used to hold funds and securities and to settle transfer orders between participants in a system;

“settlement agent” means an institution that manages the settlement process including the determination of settlement positions, monitoring of the exchange of payments, among others, for transfer systems or other arrangements that require settlement;

“settlement instruction” means an instruction given to a settlement system by a settlement system participant or by a payment clearing house system operator on behalf of the central bank settlement system participant to effect settlement of one or more payment obligations or to discharge any other obligations of one system participant to another system participant;

“skimming device” means an electronic device that reads identity and other confidential information from magnetic stripe payment card onto another or uses information to duplicate magnetic stripe payment card that allows authorised transaction to occur without the permission of the owner;

“system” means an interbank payment system, a securities settlement system or a clearing house;

“systemic risk” means the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment obligations or their settlement obligations may result in any or all of the other settlement system participants being unable to meet their respective payment or settlement obligations;

“title transfer arrangement” means an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of guaranteed obligations;

“transfer order” means -

- (a) an instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry or electronic transfer on the accounts of a participant, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system; or
- (b) an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;

“truncation” means a procedure in which the physical movement of paper payment instruments within a bank, between banks or between a bank and its customer is curtailed or eliminated, and replaced, in whole or in part, by electronic records of their content for further processing and transmission.

### **Object**

- 3. The object of this Act is to lay down a legal framework for -
  - (a) ensuring the reliability, soundness and efficiency of interbank payment systems, clearing houses and securities settlement systems; and
  - (b) facilitating and regulating the safe and secure issuance and use of payment instruments,

with the aim of promoting the stability of the national payment system, and generally, the soundness of the financial system of Lesotho.

### **Application**

- 4. This Act shall apply to interbank payment systems, clearing houses, securities settlement systems and all payment systems operating in Lesotho.

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## PART II - GOVERNANCE

### Functions of the Central Bank

5. (1) The Central Bank shall have the functions and the powers conferred on it by this Act and the functions and powers shall be in addition to those conferred under the Central Bank of Lesotho Act, 2000 and it may delegate such functions and powers.

(2) The functions of the Central Bank are -

- (a) to oversee, inspect and monitor the national payment system, the operations of the payment system body, system participants and service providers;
- (b) to establish and operate a settlement system, the operations of the payment system and to authorise persons and service providers to participate in the clearing and settlement system activities and to withdraw such authorisation; and
- (c) to authorise the operation of the Body by issuing a certificate of recognition to commence and operate the business, after having satisfied itself with the constitution, rules, competence and readiness of the Body to manage the payment system.

(3) The Central Bank may appoint a person who is not an officer of the Central Bank to perform any or all of its functions or render such assistance in the performance of its functions under this Act as the Central Bank may specify.

### Payment System Management Body

6. (1) The Central Bank and institutions referred to under section 6 shall establish a body to be known as the Payment Systems Management Body, which shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name.

(2) Subject to section 8(4), membership is compulsory for the Central Bank and banking institutions.

(3) The constitution and the rules of the Body shall not be inconsistent with this Act, the Central Bank Act, 2000 or the Financial Institutions Act, 2012 and shall be fair, equitable, transparent, and among others:

- (a) 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;
- (b) provide for the terms and conditions for the establishment of any committee or working group of the Body to manage various aspects of the payment system;
- (c) provide for the requirements and conditions for the registration of a person who is not a system participant as service provider to provide one or more payment system services;
- (d) fairly represent and promote the technical and related interests of all banking institutions and participants.

#### **Recognition and membership of the Body**

7. (1) The Central Bank may recognise the Body referred to in section 6 by issuing a certificate to that effect if -

- (a) the Body is established with the object of organising, managing and regulating the participation of its members in the payment system; and
- (b) if the Central Bank is satisfied that -
  - (i) the Body as constituted fairly represents the interests of its members;
  - (ii) the Body allows open access and participation to the system by its members;

- (iii) the Body has a deed of establishment or a constitution, and rules which include matters relating to admission as members of the Body;
- (iv) the deed of establishment or the constitution and the rules are fair, equitable and transparent;
- (v) the Body will enable the Central Bank to adequately oversee the affairs of the Body and its members and will assist the Central Bank in the discharge of its responsibility specified under section 6 of the Central Bank of Lesotho Act, 2000, regarding the monitoring, regulation and supervision of payment, clearing and settlement systems.

(2) Besides the Central Bank, the following may also be members of the Body -

- (a) a bank;
- (b) a branch of a foreign banking institution; and
- (c) an institution or body referred to in section 6 of the Central Bank of Lesotho Act, 2000 that complies with the entrance and other applicable requirements laid down in the rules of the Body.

(3) The institutions or bodies referred to in subsection (2)(c) that comply with the entrance criteria for limited membership as recommended by the Body and approved by the Central Bank in terms of subsection (1)(b)(iii), may be granted limited membership by the Body.

(4) The Body may not -

- (a) commence with its business operations before it is issued with the certificate to do so;
- (b) effect any amendment to its constitution or rules before such amendment is approved by the Central Bank; and

- (c) dissolve without approval of the Central Bank.

### **Withdrawal of recognition**

8. (1) The Central Bank may, if it is no longer satisfied that the Body complies with the requirements specified in section 6(1) and after it has consulted with the Body, withdraw the recognition of the Body.

(2) The withdrawal of recognition shall in no way affect any arrangements made, including rules and agreements, or authorisations given by the Body prior to such withdrawal, unless otherwise specified by the Central Bank.

### **Functions of the Body**

9. (1) The Body shall -

- (a) manage the payment system;
- (b) organise, set technical standards and regulate the participation of its members in the payment system; and
- (c) deal with all matters affecting payment obligations and the clearing and netting of payment obligations.

(2) In the performance of the functions under subsection (1), the Body shall -

- (a) provide a forum for the consideration of matters of policy;
- (b) act as a medium for communication by its members with the Lesotho Government, the Central Bank, any financial or other exchange, other public bodies, authorities and officials, the news media, the general public and other private associations and institutions; and
- (c) deal with and promote any other matter of interest to its members and to foster co-operation between them.

(3) In addition to any other provision the rules of the Body referred to in section 7(1)(b)(iii) shall empower the Body -

- (a) to admit members and to regulate, control and, with the approval of the Central Bank, terminate membership;
- (b) to prescribe circumstances under which the Body may recommend termination of membership of a participant in the system;
- (c) to constitute, establish or dissolve any body, committee or forum consisting of its members and which has an impact on, interacts with, has access to or makes use of payment, clearing or settlement systems or operations;
- (d) to -
  - (i) recommend for approval by the Central Bank, criteria subject to which any person is granted limited membership of the payment system management body or is to be authorized to act as a system operator or a payment clearing house system operator within a payment clearing house; and
  - (ii) authorize that person to act as a system operator or a payment clearing house system operator in accordance with those criteria; and
- (e) to recommend for approval by the Central Bank criteria subject to, and in accordance with which a member that is also a central bank settlement system participant may be authorized to -
  - (i) allow a bank, or branch of a foreign financial institution that is not a central bank settlement system participant to clear; or
  - (ii) clear on behalf of a bank, or a branch of a foreign financial institution that is not a central

bank settlement system participant:

Provided that the member shall settle payment obligations on behalf of such bank, or branch of a foreign banking institution referred to in subparagraphs (i) and (ii).

(4) In the performance of the functions referred to in subsection (1), the Body shall -

- (a) determine and administer for the benefit of the payment clearing houses -
  - (i) operational and technical policies;
  - (ii) operational and technical criteria, conditions and standards;
  - (iii) payment instrument standards;
  - (iv) failure to settle arrangements;
  - (v) electronic notification and message standards; and
  - (vi) formats for electronic files pertaining to the national payment system;
- (b) act as a forum for the consideration of matters of policy and mutual interest concerning its members and participants, manage and promote any other matter of interest to its members and foster co-operation between them;
- (c) from time to time, certify to the Central Bank that payment systems and payment system services, and their providers meet all standards, criteria and conditions determined under paragraph (a); and
- (d) perform such further functions relating to payment, clearing or settlement system as the Central Bank may assign to it.



(5) The Body shall ensure that the standards, criteria and conditions determined by it under section 6(4)(a) have the effect of -

- (a) encouraging appropriate payment system co-operation and competition in the provision of payment system services;
- (b) ensuring fair access by system participants to payment system services; and
- (c) facilitating oversight of the national payment system by the Central Bank.

(6) The Body -

- (a) shall register a person who is not a system participant as service provider, and authorise such person to provide one or more payment system services if that person meets the requirements and conditions set out in the rules of the Body;
- (b) may cancel the registration of a service provider if the service provider contravenes or fails to comply with any term or condition of its registration.

### PART III - LICENSING

#### **Licensing**

10. (1) A person shall not operate a system in Lesotho, unless the person is in the possession of a licence for this purpose, obtained from the Central Bank.

(2) A licence shall not be granted to a banking institution or a company which is not incorporated under the laws of Lesotho.

#### **Licensing requirements**

11. The licensing requirements for operating a system in Lesotho shall be as may be prescribed in the regulations.

**Grant or refusal of licence**

12. (1) The Central Bank may either grant or refuse the application for a licence to operate a system.

(2) The Central Bank shall exercise its powers in terms of subsection (1) within 3 months after receipt of the application:

Provided that in the event of the Central Bank requesting further information after receipt of the application the period of 3 months shall commence to run from the time such further information is received.

(3) Where the Central Bank has refused to grant a licence, it shall, in writing, state the reasons for the decision.

(4) A licence granted under this Act shall be for a period of one year and may be renewed for further periods of 12 months.

(5) The Central Bank may grant the licence, subject to such terms and conditions as may be prescribed in the regulations.

(6) The Central Bank shall publish and update a list of systems in respect of which he or she has granted licences.

**Withdrawal or suspension of the licence**

13. (1) The Central Bank may decide to suspend or withdraw a licence of a system at any time if -

- (a) the holder has not commenced to operate within 12 months of the date on which the licence was granted;
- (b) the holder has ceased operating for a period of more than 30 days;
- (c) the holder has obtained the approval of the Governor through false statements or any other irregular means;
- (d) the licensing requirements as shall be prescribed in the regulation are no longer met;

- (e) the terms and conditions of the license are not met;
- (f) where the operation of the system endangers the stability of the financial system in Lesotho;
- (g) if the holder becomes insolvent.

(2) The Central Bank shall publish a suspension or withdrawal of a licence in the media, Government Gazette or local newspapers of wide circulation.

### **Systems operated by the Central Bank**

14. Sections 10, 11, 12, 13 and 16 do not apply to the systems operated by the Central Bank.

## **PART IV - OVERSIGHT OF SYSTEMS**

### **Oversight by the Central Bank**

15. (1) The Central Bank shall oversee the systems, as well as the issuance and use of the payment instruments, and may impose norms and standards for the reliability, soundness and efficiency of the instruments.

(2) The Central Bank may -

- (a) make regulations regarding the establishment, the operation and the oversight of systems as well as the issuance and use of payment instruments, with a view to promoting their reliability, soundness, efficiency and development;
- (b) issue directives to any person regarding the payment system or the application of this Act;
- (c) designate, by way of regulations, widely accepted international standards and principles.

**Investigative powers of the Central Bank**

16. (1) Systems, operators and participants shall provide the Central Bank with the information and documents required by this Act or by regulations issued under this Act, and any additional information deemed appropriate in order to verify the compliance with this Act, or regulations issued under this Act, and more generally to contribute to the reliability, soundness and efficiency of these systems.

(2) The Central Bank may request explanations, have own auditors or inspectors carry out on-site inspections in the premises of operators of systems, issuers of payment instruments and participants, seize or take copy of any relevant documents.

**Directives by the Central Bank**

17. (1) The Central Bank may, after consultation with the Body, issue directives to any person regarding the application of the provisions of this Act.

(2) In considering whether or not to issue a directive in terms of subsection (1), the Central Bank shall have regard to any or all of the following aspects -

- (a) that reasonable grounds exist to believe that any person is engaging in or is about to engage in any act, omission or course of conduct, with respect to the payment system, that may result in systemic risk;
- (b) that reasonable grounds exist to believe that any person is engaging in or is about to engage in any act, omission or course of conduct, with respect to the payment system, that may result in systemic risk;
- (c) national financial stability; or
- (d) any other matters that the Central Bank considers appropriate.

(3) The Central Bank may, in writing, despite any directive contemplated in subsection (1), issue a directive to a person requiring such person,

within the period specified in the directive, to -

- (a) cease or refrain from engaging in the act, omission or course of conduct or perform such other acts as are necessary to remedy the situation;
- (b) perform such acts as are necessary to comply with the directive or to effect the changes; or
- (c) provide the Central Bank with such information and documents relating to the matter as specified in the directive.

(4) The Central Bank may, after consultation with the Body, cancel in writing any previously issued directives.

(5) In considering whether or not to cancel a directive in terms of subsection (4), the Central Bank shall have regard to the factors referred to in subsection (2).

(6) A directive issued by the Central Bank shall not have any retroactive effect.

(7) A person who neglects, refuses or fails to comply with a directive issued under subsection (1) or (3) commits an offence and is liable on conviction to a term of imprisonment of 12 months or a fine of M10,000.00, or both.

### **Sanctions**

18. (1) If a system, an operator or a participant does not comply with this Act or any regulation made under this Act, the Central Bank shall request the operator of the system or participant to remedy the infringements within a period to be determined by the Central Bank.

(2) If the operator of the system or the participant does not fully remedy the infringements described under subsection (1), the Governor may impose an administrative penalty not exceeding M50,000.00.

(3) If the infringement, in respect of which an administrative penalty was imposed, is continued after the imposition of such administrative penalty, the

operator of the system or participant shall be liable to an additional administrative penalty not exceeding M100,000.00 for the continuing infringement.

(4) The administrative penalties mentioned under subsections (2) and (3) shall be retained by the Central Bank for exclusive employment in the system.

(5) The Central Bank may obtain the payment of the administrative penalties under subsections (2) and (3) by automatic debit of the account of the system, the operator or the participant held with the Central Bank.

(6) If, notwithstanding subsections (1), (2), (3) and (5) the operator of the system or the participant remains in breach, the Central Bank may suspend or withdraw the licence to operate the system from the promoter or operator or may prohibit the participant from participating in the system.

(7) The Central Bank shall notify the operator of the system or the participant of the decision.

#### PART V - INSOLVENCY

##### **Exemption from effects of the insolvency event**

19. (1) Nothing in the Insolvency Proclamation of 1957 shall invalidate or affect the rights and obligations of any participant in respect of any transaction made 6 months prior to the issuance of an insolvency order against any participant in terms of this Act.

(2) The following are valid, enforceable and binding against the liquidator or third parties:

- (a) cash or securities transfer orders and the payments resulting from such transfer orders, which have been entered into the system in accordance with its rules prior to the issuance of an insolvency order; and
- (b) the netting of cash or securities transfer orders and of the debts and obligations resulting from such transfer orders when the former have been entered into a system in accordance with its rules prior to the issuance of an

insolvency order.

(3) A transfer order entered into a system shall not be revoked by a participant in the system, nor by any third party, including the liquidator, from the moment defined by the rules of that system.

(4) Notwithstanding the event of insolvency against a participant in a system, the operator of the system or the settlement agent may, if it is so authorised under the applicable contractual provisions, make use of funds and financial instruments available on the settlement account of the participant in order to settle outstanding transfer orders and any net debit balance the participant may owe after netting, thus allowing for final settlement of the system.

(5) For the purpose of subsection (4) and notwithstanding the event of insolvency against a participant in a system, the operator of the system or the settlement agent is also authorised, subject to section 31, and under the applicable contractual conditions, to make use of credit lines granted to the participant and to realise any collateral provided with the aim to secure such credit lines.

#### **Duty to inform**

20. (1) A copy of an application for insolvency against a system participant shall be served forthwith on the Central Bank by the applicant.

(2) The Central Bank shall ensure that a copy of the insolvency process is served as soon as reasonably possible to the domestic systems and operators and, if required under international co-operation arrangements with competent foreign authorities, to foreign systems or operators.

(3) The Central Bank shall keep a record of compliance with the provisions of subsection (2).

(4) Notification of insolvency proceedings initiated against a foreign system, operator or participant received by the Central Bank from a foreign competent authority under international co-operation arrangements shall be provided as soon as reasonably possible by the Central Bank to domestic systems, operators and participants.

(5) The Central Bank shall keep a record of compliance with the provisions of subsection (4).

**Protection of settlement accounts against attachments and seizure**

21. The balances of settlement accounts held with a system may not be subject to attachment, except by the operator or settlement agent of the system.

**PART VI - COLLATERAL ARRANGEMENTS****Scope of application**

22. For purposes of this Part, financial collateral arrangements include present, future, actual, contingent or prospective obligations owed to a collateral taker, or his or her principal, by a collateral provider or by another person.

**Validity and enforceability of financial collateral arrangements**

23. A financial collateral arrangement under this Act is valid and enforceable against third parties, including a liquidator, and takes effect in accordance with its terms:

Provided that -

- (a) it is in writing;
- (b) the possession of the financial instrument or precious metal subject to the financial collateral arrangement is transferred to the collateral taker;
- (c) the possession of the cash subject to the financial collateral arrangement is transferred to the collateral taker.

**Validity and enforceability of close-out netting provisions**

24. Close-out netting provisions shall take effect upon the Central Bank notifying the operators of the system of the event of institution of insolvency proceedings.



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**Protection of substitution and topping-up of collateral**

25. (1) A financial collateral arrangement may contain -
- (a) an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the guaranteed obligations;
  - (b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value.
- (2) Execution of a financial collateral under subsection (1) is valid and enforceable against third parties, including a liquidator.

**Realisation of pledged financial collateral**

26. On the occurrence of an enforcement event and notwithstanding the institution of insolvency proceedings in respect of the collateral taker or collateral giver, the collateral taker may realise, in the following manner, a financial collateral provided under this Act, and subject to the terms agreed -

- (a) by sale and setting off the value of the financial instrument or precious metal against the guaranteed obligations; or
- (b) by sale and setting off the value of the financial instrument or precious metal by applying its value in the discharge of the guaranteed obligations;
- (c) cash by setting off the amount against or applying it in discharge of the guaranteed obligations.

**Prevalence of rights of a collateral taker**

27. The rights of a collateral taker to a financial collateral arrangement shall prevail over the rights of any other creditor.

## PART VII - EVIDENCE

### **Admissibility of electronic and optical evidence**

28. The existence, the content and the timing of any transfer order, its entry into a system, as well as its execution shall be admissible evidence in all cases, be it civil, commercial, criminal or administrative, against any participants or third parties in writing or in a durable medium ensuring its traceability, be it in an electronic or optical form, including the out print of such electronic or optical document.

### **Admissibility of electronic and optical archives**

29. The archives of a bank may be held in the form of a durable medium ensuring their traceability, be it in an electronic or optical form, including the out print of such electronic or optical document.

## PART VIII - SETTLEMENT AND CLEARING

### **Participation in the settlement system**

30. A person may not participate in the Central Bank settlement system unless the person is the Central Bank, a bank, or a branch of a foreign institution and, in the case where the Body has been recognised by the Central Bank as contemplated in section 7, such person is a member of the Body so recognized.

### **Payments to third persons**

31. A person may, as a regular feature of the person's business, accept money or payment instructions 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, if -

- (a) it is in writing -
  - (i) the Central Bank;
  - (ii) a bank;
  - (iii) a branch of a foreign financial institution; or

- (b) the first-mentioned person is a postal company; or the money is accepted or payment made in accordance with directives issued by the Central Bank from time to time.

### **Settlement provisions**

32. (1) Settlement is effected in central bank money or by means of entries passed through the central bank settlement system or a designated settlement system.

(2) A settlement that has been effected in central bank money or by means of an entry to the credit of the account maintained by a settlement system participant in the central bank settlement system is final and irrevocable and may not be reversed or set aside by the system operator.

### **Clearing provisions**

33. (1) A person may not clear payment instructions unless the person is a -

- (a) central bank settlement system participant; or
- (b) bank, or branch of a foreign institution that is allowed to clear in terms of section 9(3)(d)(i).

(2) A person who contravenes subsection (1) commits an offence and on conviction shall be liable for a period of 12 months imprisonment or fine of M50,000.00 or both.

## **PART IX - OFFENCES**

### **Offences**

34. (1) A person who operates a system without a licence commits an offence and shall on conviction be liable to imprisonment for a term of 12 months or a fine of M50,000.00 or both.

(2) A person who issues a payment card or operates a payment card system without a licence commits an offence and shall on conviction be liable to imprisonment for a term of 12 months or a fine of M50,000.00 or both.

(3) A person who uses a skimming device to access, read, obtain copy temporarily or permanently, store, the information encoded on a smartcard or chip card or magnetic strip payment card without permission of the owner of the card and with the intent to defraud the owner of the card commits an offence and shall be liable on conviction to imprisonment for a term of 12 months or a fine of M50,000.00 or both.

(4) A person who uses a re-encoder to encode information on a smartcard or chip card or magnetic strip payment card onto another smartcard, chip card or magnetic strip card without permission of the owner of the card from which the information is being encoded and with the intent to defraud the owner of the card commits an offence and shall be liable on conviction to imprisonment for a term of 12 months or a fine of M50,000.00 or both.

(5) Notwithstanding the penalties in this section, the court may impose a higher or a lower penalty.

(6) Where the person who commits an offence under this section is a legal person, the term of imprisonment shall apply to any director, officer or person responsible for committing the offence.

### **Regulations**

35. The Central Bank may make regulations for the implementation of this Act.

## SCHEDULE 1

DOCUMENT AND INFORMATION REQUIRED FOR  
AN APPLICATION FOR A LICENCE

- (a) Certificate of Incorporation;
- (b) Company code and articles of Incorporation;
- (c) the draft rules of the system which shall at least -
  - (i) define the access criteria and conditions for suspension or exclusion of participants;
  - (ii) define the rights and obligations of participants deriving from their participation to the system;
  - (iii) define the moment when a transfer order is entered into the system;
  - (iv) determine the moment in time from which the transfer order may be irrevocable by participant to the system, the operator, the system itself or a third party;
  - (v) determine the common rules and standardised arrangement for the execution and settlement of the transfer orders, in normal circumstances as well as in crisis situations;
  - (vi) set up risk management procedures;
  - (vii) identify the competent jurisdiction or mechanisms in case of dispute;
  - (viii) determine the persons acting as a point of contact in the relationships between the system and the Central Bank; and
- (d) the manual of operation of the system;

- (e) risk identification, management and mitigation practices or procedures;
- (f) the identity and resume of the directors of the promoter or of the operator of the system or of the operator, of the system
- (g) a description of internal organisation, internal control and audit of the promoter or of the operator, of the system
- (h) the identification of the shareholders of the entity establishing or operating the system
- (i) the identity of the interested participants of the systems;
- (j) a financial plan for the three coming years;
- (k) a plan of activity with the type and expected volumes of transactions it intends to carry out; and
- (l) if the promoter and the operator are two different entities, the contract entered into between the former and latter for the operation of the system.