


1-1-2013

M-Payments in Brazil: Notes on How a Country's Background May Determine Timing and Design of a Regulatory Model

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Recommended Citation

Gilberto M. de Almeida, *M-Payments in Brazil: Notes on How a Country's Background May Determine Timing and Design of a Regulatory Model*, 8 WASH. J. L. TECH. & ARTS 347 (2013).

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WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 8, ISSUE 3 MOBILE MONEY SYMPOSIUM 2013

M-PAYMENTS IN BRAZIL: NOTES ON HOW A COUNTRY'S
BACKGROUND MAY DETERMINE TIMING AND DESIGN OF A
REGULATORY MODEL

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Cite as: 8 WASH. J.L. TECH. & ARTS 347 (2013)

<http://digital.law.washington.edu/dspace-law/handle/1773.1/1203>

ABSTRACT

Extended periods of high-inflation in Brazil have resulted in a sophisticated platform for payment methods and a vast network of banking correspondents all over the country. Social policies have encouraged increased access to telecommunications, with the number of mobile phones exceeding the nearly 200 million inhabitants. Governmental programs intend to combine such strengths to achieve massive financial inclusion and integrity, an effort that is expected to reach dozens of millions of new beneficiaries. In that endeavor, authorities wish to foster rapid popularization of mobile payments (m-payments) while keeping sound financial controls. Availability of current technological and legal platforms has allowed that a mature process develops in the selection of proper regulation. This Article discusses how Brazil's background has determined the timing and design of a regulatory model, and points out a case of prudent approach by a developing country in the subject matter.

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This Article was presented at the Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity Conference held in April 2012 at the University of Washington School of Law with the support of the Linden Rhoads Dean's Innovation Fund.

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INTRODUCTION

“In short consumers only have confidence in cash tokens issued by, and/or guaranteed by either the central bank or government of the issuing state. This was the problem with cyberspace. There was no government, no central bank, and no pre-existing financial framework: only private organisations and competing technologies.” – Andrew Murray¹

¹ ANDREW MURRAY, INFORMATION TECHNOLOGY LAW: THE LAW AND SOCIETY 444 (2010).

A. Background: Challenges Concerning E-Payments, Financial Inclusion, and Financial Integrity

Mobile payments (m-payments) have been developed as a step forward in the process of dematerialization of money, following notarization, electronic fund transfer, automated teller machines, financial electronic data interchange, and Internet-based electronic payments.²

The introduction of m-payments³ is usually associated with expectations of enormous social outreach,⁴ assuming the number of mobile devices used in a given country far exceeds the number of local computers.⁵

However, the myriad of applications which may use m-payments—public services, transportation, convenience stores, payment of small amounts, and countless others—do not necessarily promote financial inclusion and financial integrity.

Depending on the regulatory model selected for a given environment, the social divide may deepen, e-government may become less effective, money laundering may become easier, and tax collection and foreign exchange control may become more difficult.⁶

² CLÁUDIA LIMA MARQUES, *CONFIANÇA NO COMÉRCIO ELETRÔNICO E A PROTEÇÃO DO CONSUMIDOR* 127-28 (2004).

³ “M-payments” may have different meanings (electronic fund transfers, payment for goods or services, or other financial services); given the absence of uniformity in research and data on the subject, this Article refers to m-payments as comprising mostly (though not only) mobile payments in exchange for acquisition of goods or services.

⁴ Claire Alexandre et al., *Regulating New Banking Models That Can Bring Financial Services to All*, *CHALLENGE*, May-June 2011, at 166, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664644.

⁵ New mobile equipment technology rivals personal computers in the making of electronic payments, and has a greater portability advantage over them. See ÉTIENNE WERY, *PAIEMENTS ET MONNAIE ÉLECTRONIQUES – DROITS EUROPEEN, FRANÇAIS ET BELGE* 22 (2007).

⁶ There are different taxonomies of regulatory models. For instance, Marc Bourreau and Marianne Verdier identify five models: “light” model, bank-centric model, mobile-centric model, partial-integration model, and full-integration model. Marc Bourreau & Marianne Verdier, *Cooperation for Innovation in Payment Systems: The Case of Mobile Payments* 3 (Telecom

Experience⁷ has shown that the more a country emphasizes accelerated popularization of m-payments, the more likely it may lose financial controls, and vice-versa.⁸ The right balance between those opposing goals seems to hinge on specific public policies, designed on a country-by-country basis.

Notwithstanding, the phenomenon of global access to acquisition of goods or services in today's society requires development of consistent, efficient international platforms. Technical and procedural standardization⁹ is key to building such common grounds.

In this regard, new harmonization of technological infrastructure must be struck between mobile network operators (MNOs) and banks, and between members of each category. Media convergence and m-payments' exciting business prospects have turned this axis into an even more pivotal one.

The above aspects seem to indicate how the challenges posed by m-payments are both national *and* international, and how coordination will necessarily be the focus of associated legal and technical regulatory issues.

ParisTech, Working Paper No. ESS-10-02, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1575036.

⁷ Reference is made here especially to the cases of Kenya and of European countries, as described, respectively, by Ignacio Mas & Daniel Radcliffe, *Mobile Payments Go Viral: M-PESA in Kenya*, 32 J. FIN. TRANSFORMATION 169 (2011), *available at* http://www.capco.com/sites/all/files/journal-32_article-16.pdf and by MURRAY, *supra* note 1, at 446.

⁸ In 2006, six years after the first specific Directives, there were only nine active electronic money issuers in Europe, while seventy-two institutions were in operation under the waiver set forth in the Electronic Money Directive for institutions that engaged in more limited financial operations. MURRAY, *supra* note 1, at 446.

⁹ Although most standards are formally qualified as technical, some are essentially procedural in nature, such as the Information Security standards developed by entities such as ISO, IEC, and ITU. *See* INT'L TELECOMM. UNION, GUIDELINES FOR CYBERSECURITY (2012), *available at* http://www.itu.int/itu-t/security/task_details.aspx?isn=4097&isnView=1&from=b1_-1!b2_-1!b3_-1!t1_-1!k_procedural.

B. M-Payments: Nature, Modalities, and Characteristics

M-payments are, fundamentally, technology-based payment methods comprising three basic modalities: (1) mobile phone as a wallet (storing money downloaded via Internet, or “reading” it from a smartcard); (2) payment ordered via short messaging service (SMS);¹⁰ and (3) payment effected by bringing mobile phone into contact or close proximity with some tagged device (using technologies such as Near Field Communication (NFC))¹¹.¹²

Terminology surrounding m-payments varies considerably, however it seems fair to split m-payments into two categories: (1) a means of communicating payment orders, and (2) a means of storing and transmitting digital cash.¹³ The former may also be completed by computers, thus the latter appears to be the more unique category.

Mobile phones may have built-in features—such as a smartcard or credit or debit card reader, and NFC capabilities—or may work in conjunction with an attached device. The volume of equipment produced with built-in NFC capabilities has grown rapidly,¹⁴ and NFC capabilities are expected to become an industry standard.¹⁵

Such payment methods usually include banks, Mobile Network Operators (“MNOs”) (which provide the telecommunications infrastructure), accredited merchants (which accede to communication and security protocols), subscribing users (who perform the m-payment transactions), and may include some

¹⁰ Or via web-based Wireless Application Protocol (WAP).

¹¹ NFC is based on radio communication making use of Radio Frequency Identification (RFID) standards.

¹² Other modalities may be used, such as electronic checks or digital images of regular checks sent via e-mail.

¹³ Rogério Montai de Lima, *Relações Contratuais na Internet e Proteção Jurídica do Consumidor 166* (2007) (unpublished LL.M. dissertation, Univ. of Marília), available at <http://www.unimar.br/pos/trabalhos/arquivos/f34d414290f9257d207b099780f3623a.pdf>.

¹⁴ Christina Nickolas, *Cell Phones with NFC Set for Takeoff This Year*, DIGI-KEY CORP. (Feb. 14, 2011), <http://www.digikey.com/us/en/techzone/wireless/resources/articles/Cell-Phones-with-NFC-Set.html>.

¹⁵ Hussein Issa, *Assessment and User Adoption of NFC in Comparison to Other Mobile Payments Systems 11* (Rutgers Bus. Sch., Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910471.

intermediaries, such as electronic money¹⁶ issuers and electronic payment service providers.

The concern which inspires the safety to be added to m-payments—that is, two-way communication between the mobile equipment and the tagged end (either an object, or a network)—may turn the mobile phone into a device used for a wide range of applications, ranging from making payments to controlling household facilities to performing identity management.

Once mobile phones include all or most of those features, they may cause a paradigm shift in terms of convenience for their users, necessary for purposes of effectively changing cultural habits.¹⁷ In fact, credit cards have long been accepted as a payment method, and although m-payments have advantages over credit cards for ensuring a practical way to make small payments and for enabling peer-to-peer direct transactions,¹⁸ mobile phones are not expected to replace the possession of credit cards unless they convert into a multifunction wallet including a credit card application.

C. Legal and Regulatory Implications

Given that m-payments constitute a matter that pervades various areas of social, economic, and political repercussion, their legal and regulatory implications mirror this wide spectrum.

The relevant issues include privacy, consumer protection, money laundering, tax evasion, by-pass of foreign exchange controls, anti-trust, intellectual property, legal recognition of e-transactions, cybercrime,¹⁹ and several others.

¹⁶ “‘Electronic money’ means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer.” Council Directive 2009/110, E-Money Directive, 2009 O.J. (L 267) 7, 11, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:267:0007:0017:EN:PDF>.

¹⁷ Bourreau & Verdier, *supra* note 6.

¹⁸ THOMAS J. SMEDINGHOFF ET AL., ONLINE LAW: THE SPA’S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET 114 (Thomas J. Smedinghoff ed., 1996).

¹⁹ “With respect to the state of the regulatory environment, the modus

Most of these issues are intertwined (for instance, privacy and consumer protection, and money laundering and tax evasion), and may be dealt with by the same authorities. Other issues are more closely related to certain regulatory areas (as in the case of anti-trust or intellectual property).

The issues associated with telecommunications and those related to banking have been understood to form a couple of microcosms. The integrated view required by the phenomenon of technological convergence shall include joint consideration of both microcosms (as in the hypothesis of joint ventures between MNOs and banks, encouraged by commingling interests and practices).

Given the novel character of m-payments as a tool for serving a wide array of applications, the frontiers between competent statutory legislation and competent regulatory norms tend to overlap. The same occurs with the frontiers between the competence of different regulatory agencies, such as the Monetary Supervisory Authority and the Central Bank of Brazil, or between the Central Bank and the Telecommunications Authority.

In view of globalized electronic money transfers, payments, and financial services in general, the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) becomes of even greater interest as guidance, and as a possible uniform legislative backbone,²⁰ in connection with

operandi for agencies is playing catch-up at this point. Cyber crime laws and regulation, especially when it comes to the financial/banking sector, are not moving at the same pace as the technological advancement that has taken place within the past ten years. More and more banking services and transactions are moving away from the physical bricks-and-mortar space to embracing a new business model based on the philosophy of a customer gaining access to and utilizing his or her finances whenever and wherever he or she wants. Mobile banking and in general wireless data transmission appear like a target in the spotlight for cyber criminals.” ZEINAB KARAKE SHALHOUB & LUBNA AL QASIMI, *CYBER LAW AND CYBER SECURITY IN DEVELOPING AND EMERGING ECONOMIES* 35-36 (2010).

²⁰ Luca Castellani, Secretary, U.N. Comm’n on Int’l Trade Law, UNCITRAL Texts as the Backbone of a Uniform Legislative Framework for Cross-Border Electronic Transactions, *available at* http://www.unece.org/fileadmin/DAM/trade/Trade_Facilitation_Forum/ConferencePPTs/D02_09AM_LucaCastellani_UNCITRAL_GTFC.pdf.

legal validity and enforcement of electronic communications associated to m-payments.

I. FINANCIAL INCLUSION²¹ IN BRAZIL

A. *Concept and Outreach of Banking Correspondents*

Banking correspondents were originally created with the primary purpose of working as payment vehicles that could be accessed by the poor and those in distant localities of a country with huge geographic size and diversity. Thus, from inception, banking correspondents were expected to meet goals of different natures: the public of financial inclusion, and the private goal of an increased “banked” population.

Several examples could be selected to illustrate this dual character. Perhaps the most important of these is given by a multi-purpose²² state-owned institution, Caixa Econômica Federal (Caixa), which increased its network of correspondents by 21 percent from mid-2010 to mid-2011 (then reaching 35,900 correspondents), three times its growth of branches in the same period.²³ Caixa is one of the institutions accredited by the Brazilian Federal Government to channel financial support to social programs such as Bolsa Família,²⁴ which helps 11 million families

²¹ For a discussion regarding the definition of financial inclusion, see FIN. ACTION TASK FORCE, FATF GUIDANCE ON ANTI-MONEY LAUNDERING AND TERRORIST FINANCING MEASURES AND FINANCIAL INCLUSION 12 (2011), available at <http://www.fatf-gafi.org/media/fatf/content/images/AML%20CFT%20measures%20and%20financial%20inclusion.pdf>.

²² For a discussion on Caixa’s dual purpose (social and economic), see GETULIO BORGES DA SILVA, CAIXAS ECONÔMICAS: A QUESTÃO DA FUNÇÃO SOCIAL 194 (2004).

²³ *Número de Correspondentes Bancários na Caixa Sobe em um Ano Três Vezes Mais Que o de Agências*, CREDINFO (Sept. 29, 2011), http://www.credinfo.com.br/index.php?option=com_content&view=article&id=20055:numero-de-correspondentes-bancarios-na-caixa-sobe-em-um-ano-tres-vezes-mais-que-o-de-agencias&catid=1:canoticias&Itemid=100049.

²⁴ Sixty-five percent of those who enjoy Bolsa Família benefits possess a mobile phone, but only a minority of them have a bank account. Fernando Paiva, *Inclusão Financeira*, TELETIME, June 2010, <http://www.teletime.com.br/6/2010/inclusao-financeira/tt/193052/revista.aspx>.

(of monthly per capita income up to BRL70 (US\$40), or up to BRL140 (US\$80) where children through age 17 are members of the family) with financial aid for schooling, food, and gas.²⁵ In December 2011, Caixa started testing the adoption of m-payments,²⁶ and may extend their use to social programs such as Bolsa Família,²⁷ to implement the Federal Government's goal of using mobile technologies to improve the reach of social benefits.²⁸

This example shows that competition between private banks and public institutions in establishing their network of banking correspondents may be "asymmetrical," and not free from questioning. Such problem has contaminated the structuring of a split of activities between banks and MNOs regarding the offering of m-payments as well.

Recently, the role of banking correspondents has been enlarged by the Central Bank,²⁹ which has generated criticism,³⁰ and shall be evaluated by the Committee on Finance and Taxation of the Chamber of Deputies. The criticism basically refers to the fact that the more banking correspondents are required to work similarly to banks, the less flexibility they have to operate without banking constraints³¹ such as shortened daily working hours, increased

²⁵ CAIXA – BOLSA FAMÍLIA, http://www.caixa.gov.br/voce/social/transferencia/bolsa_familia/index.asp (last visited Aug. 14, 2012).

²⁶ MasterCard has developed application software to be downloaded into smartphones and features phones of subscribers to MNO Vivo, for use in SMS debit transactions for retail purchases. Mariana Mattiuzzo, *Caixa Inicia Testes de Pagamentos Móveis*, MOBILEPEDIA (Dec. 9, 2011), <http://www.mobilepedia.com.br/noticias/caixa-inicia-testes-de-pagamentos-moveis>.

²⁷ *Bolsa Família Será Pago Pelo Celular*, FOLHA DE S. PAULO (Nov. 15, 2010), <http://www1.folha.uol.com.br/mercado/830720-bolsa-familia-sera-pago-pelo-celular.shtml>.

²⁸ Danilo Fariello, *Governo Planeja o Bolsa Celular Para 11,9 Milhões de Famílias*, O GLOBO (Nov. 11, 2009), <http://oglobo.globo.com/economia/governo-planeja-bolsa-celular-para-119-milhoes-de-familias-3160285>.

²⁹ Resolution CMN 3954 (Feb. 24, 2011), available at http://www.bcb.gov.br/Nor/Denor/Resolution_CMN_3954_English.pdf.

³⁰ In the form of Bill of Legislative Decree No. 214/2011.

³¹ "Although the framework for the use of agents by financial institutions is based on CBB's regulations, CBB does not have a clear mandate under law to

reporting formalities, and others, which might put at risk the success reached in terms of the number of accredited banking correspondents.

Inclusion of banking correspondents in the chain of mobile payments brings certain issues: would provision of electronic money (for instance, by selling value-stored cards) qualify as a grant of credit, performance of which is allowed only to banks, or would that characterize “consigned stocking” of money? Should the role of banking correspondents be limited, otherwise, to local credit analysis on behalf of the accrediting bank? These questions illustrate the complexity and comprehensiveness of the agenda to be covered by referenced regulation.

B. Payment Systems in Brazil

Brazil is known for having a banking industry which accounts for an advanced technological platform, and has, for more than a decade, provided overnight clearing of checks, real-time electronic transfer of funds, and other state-of-the-art facilities.

This is due to the so-called Brazilian Payments System (SPB),³² which established a specific network for the flow of electronic messages (National Financial System Network), used by banks, clearinghouses, the Central Bank, and by other supervisory authorities, for money transfers and for processing and clearing of payment orders.

Initially developed during times of high inflation, with particular focus on the fast processing of money transfers, the emphasis of the SPB has, since 2002, shifted towards risk-management³³ and fostering new methods of payment for retail.

regulate outsourcing. The Labor Law therefore has precedence over CBB’s regulations on agents. As a consequence, there are several actions against banks (brought by agents and by bank employee unions) demanding wage equality between bank employees and agents.” CONSULTATIVE GRP. TO ASSIST THE POOR [CGAP], UPDATE ON REGULATION OF BRANCHLESS BANKING IN BRAZIL 11 (2010), available at http://www.cgap.org/gm/document-1.9.42396/Updated_Notes_On_Regulating_Branchless_Banking_Brazil.pdf.

³² *Introdução*, BANCO CENTRAL DO BRASIL, <http://www.bcb.gov.br/?SPBINTROD> (last visited Aug. 14, 2012).

³³ Louis de Koker points out the need for improvements to the risk-based

In 2008, the system comprised 131 banks, 19,100 bank branches, and 125.7 million bank accounts.³⁴ The banking chain is complemented by an estimated 160,000 banking correspondents (institutions accredited primarily for performing bill payment services, and which have also been used for conveying loan requests, credit analysis, and other functions).

Also in 2008, efficient credit transfers (same day funds), made available via ATMs, Internet banking, and mobile banking, constituted 44 percent of the total transactions and 85 percent of the total amounts.³⁵ Comparatively, payment cards (credit, debit, retailer, charge) reached respectively 37 percent and 2 percent, checks 13 percent and 12 percent, and direct debits (automatic, recurring debts) 6 percent and 1 percent.³⁶

On the telecommunications side, the number of active mobile accounts reached 245 million in January 2012. Out of the total number of accesses via mobile phones, 81.62 percent were pre-paid.³⁷

approach, which certainly extends to Brazil's implemented risk-management: "The FATF advises that its risk-based approach enables countries and institutions to further financial inclusion. It is, however, not clear what the FATF means when its [sic] uses the terms 'risk' and 'low risk.' It is also unclear whether current proposals for financial inclusion regulatory models will necessarily limit money laundering . . . as well as terror financing risks to levels that can be described as 'low.'" Louis de Koker, *Aligning Anti-Money Laundering, Combating of Financing of Terror and Financial Inclusion: Questions to Consider when FATF Standards are Clarified*, 18 J. FIN. CRIME 361, 361 (2011), available at <http://www.emeraldinsight.com/journals.htm?articleid=1954576&show=pdf>.

³⁴ *O Papel Dos Intermediários Financeiros*, BANCO CENTRAL DO BRASIL, <http://www.bcb.gov.br/?SPBINTER> (last visited Aug. 14, 2012).

³⁵ In a comparative table with several countries (Germany, Belgium, Spain, United States, Finland, France, Holland, Italy, Japan, Portugal, Great Britain, Sweden, and Switzerland), credit transfers in Brazil (in 2009) show a high relative weight (49 percent), second only to Switzerland (54.7 percent). BANCO CENTRAL DO BRASIL, *DIAGNÓSTICO DO SISTEMA DE PAGAMENTOS DE VAREJO DO BRASIL 10* (2010), available at <http://www.bcb.gov.br/htms/spb/Diagnostico-Adendo-2010.pdf> [hereinafter CENTRAL BANK DIAGNÓSTICO].

³⁶ *Instrumentos de Pagamento*, BANCO CENTRAL DO BRASIL, <http://www.bcb.gov.br/?SPBEST2005> (last visited Sept. 13, 2012).

³⁷ *Brasil Fecha Outubro com Mais de 231,6 Milhões de Acessos Móveis*, AGÊNCIA NACIONAL DE TELECOMUNICAÇÕES (Nov. 18, 2011),

For purposes of reference vis-à-vis the above data, the current total number of inhabitants is about 190 million.³⁸

Change in the portfolio of payment methods used in the country may cause systemic impact, as more attractive payment methods may attract the unbanked population,³⁹ increasing the flow of money in the formal economy.

Recent statistics point to substantial change in the popularity level of different payment methods. The period of 2004 to 2008 saw a growth of 129 percent in the number of transactions with debit cards, while the growth in the use of retailer cards was 108 percent, credit cards 101 percent, and direct debits 32 percent.

The impressive growth in the number of debit cards and retailer cards seems to indicate an increasing preference for handy tools that simply make payments and are not associated with credit. This phenomenon apparently favors the future growth of m-payments, as they are an even more convenient tool in this respect.

More recent data, from the period of 2005 to 2010, confirms such trends, as the number of debit card transactions increased 157 percent, while the use of credit transfers grew only 62 percent, and the use of checks decreased 34 percent.⁴⁰

The potential or actual systemic impact expected from such changes is dependent upon the Central Bank's competence for providing framework regulation.⁴¹

Statutory law⁴² gives the Central Bank exclusive powers to,

<http://www.anatel.gov.br/Portal/exibirPortalNoticias.do?acao=carregaNoticia&codigo=24227>.

³⁸ In October 2011, the ratio was 118.62 accesses per 100 inhabitants. *Id.*

³⁹ Probir Roy, *Mobile: Silver Bullet to Target the Non-Banked*, THE FIN. EXPRESS (Jan. 21, 2010), <http://www.financialexpress.com/news/Mobile--silver-bullet-to-target-the-non-banked/569707/>.

⁴⁰ CENTRAL BANK DIAGNÓSTICO, *supra* note 36, at 8.

⁴¹ "Unlike legal tender, electronic cash may not be generated by central banks; rather, some of it may circulate outside the Federal Reserve-monitored banking system. Once it is outside that system, it may become 'untraceable, unmeasurable and, as a result, a threat to economic stability.'" Ellen d'Alelio & John T. Collins, *Electronic Cash Under Current Banking Law*, in THE INTERNET AND BUSINESS: A LAWYER'S GUIDE TO THE EMERGING LEGAL ISSUES 91, 105 (Joseph F. Ruh Jr. ed., 1996).

⁴² Federal Law No. 4.596 (Dec. 31, 1964) (Braz.) (updated on several occasions).

among other things: (1) issue paper money and metallic money; (2) render services for providing the financial environment; (3) control every sort of credit; (4) control foreign capital; and (4) supervise financial institutions. Grounded on such attributions, the Central Bank's by-laws⁴³ established, in Article 15(VIII), that it shall evaluate risks and impacts of the monetary or exchange policies, as well as immediate or potential systemic impacts which may affect clearing chambers.⁴⁴

Among the aspects deemed systemically material by the Central Bank are fund transfer systems with average daily financial flow higher than 4 percent of the average daily flow of the Reserves Transfer System, or those transfers which may put at risk the fluidity of payments in the context of the SPB.⁴⁵

With regard to possible future popularity of m-payments, a recent survey⁴⁶ detected that 71 percent of respondents would consider replacing credit or debit cards with mobile phones,⁴⁷ and 66 percent would be willing to use mobile phones to manage bank accounts, while 59 percent were suspicious about the safety of the service, and 15 percent have mentioned fear of suffering mobile phone cloning.⁴⁸

⁴³ CENTRAL BANK, REGIMENTO INTERNO DO BANCO CENTRAL DO BRASIL (2005), available at http://www.bcb.gov.br/Adm/RegimentoInterno/RegimentoInterno_2.5.pdf.

⁴⁴ *Id.* at 5 (Art. 11(VI)(q)), 25 (Art. 21(XIV)(f)), 96 (Art. 109-A).

⁴⁵ *Aspectos Legais*, BANCO CENTRAL DO BRASIL, <http://www.bcb.gov.br/?SPBLEG> (last visited Aug. 14, 2012).

⁴⁶ Sandra Turchi, *Fique por Dentro do Mobile Commerce e Mobile Payment*, BLOG DO E-COMMERCE (Mar. 21, 2011), <http://www.blogdoecommerce.com.br/mobile-commerce-e-mobile-payment/> (last visited Aug. 14, 2012).

⁴⁷ This result seems consistent with other research carried out by KPMG, which has indicated that 83 percent of respondents believe m-payments will be the main method of payment within four years. Marcelo Brandão, *Pagamentos Móveis Serão "A Bola da Vez"*, CONSUMIDOR MODERNO (July 19, 2011), <http://consumidormoderno.uol.com.br/parceiros/pagamentos-moveis-ser-o-a-bola-da-vez>.

⁴⁸ Turchi, *supra* note 46.

C. Mobile Money Policy

In a country where estimates point to 50 percent of salaries being paid in cash⁴⁹ and 70 percent of transactions involving “physical” money,⁵⁰ there seems to be general consensus on the need for public policies and programs that promote higher social inclusion in mobile banking.

A bill of law was submitted to the Brazilian Congress in 2011 addressing this objective, and the Central Bank has convened financial institutions and defined some basic operational standards (e.g., use mobile line number as standard pattern of identification, establish financial limit for individual transactions, and others), which must be agreed upon by the telecommunications sector and the retail sector in order to be ultimately implemented.

The Central Bank has developed a Financial Inclusion Project, the latest Report of which is dated 2011.⁵¹ The 2009 Report pointed out that,⁵² “Mobile banking in Brazil will only reach material role if those who are currently excluded are able to use it for transactions linked to electronic accounts, which, on their turn, shall be of simple access and management,” and that “mobile operators shall establish alliances with banks, or offer, on their own account, services which are not deemed exclusive of banks.”⁵³

The 2009 Report lists several actions planned by the Central Bank, which include: (1) clarifying and creating rules for the issuance of pre-paid instruments and electronic money by banks

⁴⁹ Only 30 percent of the adult population possesses bank accounts. CGAP, *supra* note 31, at 4.

⁵⁰ According to Claudio Prado, coordinator of the Mobile Payments Committee of the Federal Association of Banks. See Ana Paula Lobo, *BC e Bancos Acertam Política Nacional para Pagamentos Móveis*, CONVERGÊNCIA DIGITAL (June 17, 2011), <http://convergenciadigital.uol.com.br/cgi/cgilua.exe/sys/start.htm?inford=26671&sid=102>.

⁵¹ This Report is later than CGAP’s study UPDATE ON REGULATION OF BRANCHLESS BANKING IN BRAZIL (see CGAP, *supra* note 31), which mentioned the lack of an official document outlining the financial inclusion policy.

⁵² Free translation from Portuguese to English.

⁵³ CENTRAL BANK, PERSPECTIVAS E DESAFIOS PARA INCLUSÃO FINANCEIRA NO BRASIL: VISÃO DE DIFERENTES ATORES 252 (2009), available at http://www.bcb.gov.br/Nor/Deorf/projincfin/livro_inclusao_financeira_internet.pdf.

and by non-bank entities; (2) requiring interoperability and efficiency of the retail payment systems; (3) providing better regulation on money remittances services; and (4) ensuring greater flexibility for selection of the kinds of institutions allowed to capture deposits.⁵⁴

In April 2012 the Central Bank and the Ministry of Communications jointly created a working group aimed to propose guidelines for mobile payment regulation in the country.⁵⁵ According to the Central Bank's officers, the group's first report was expected to be released in 2012, and will provide general concepts for individual responsibility of companies and regulatory bodies involved in mobile payment processes. The report will leave details such as tariffs to be addressed by eventual regulation, along with rules on security of financial and of non-financial parties, money laundering prevention, and financial inclusion.

D. Integration of Banks, MNOs, Retail, and e-Government Interests

The Central Bank has stated that it considers the lack of interoperability and absence of sufficient cooperation to be the major obstacle preventing effective take-off of m-payments in Brazil.⁵⁶

Negotiation between banks, MNOs, and respective supervisory authorities is essential for overcoming this impediment. Today, major banks and major MNOs have their own systems, which are incompatible with one another.

⁵⁴ “Although prepaid cards may not fall under the definition of deposit (because the prepaid funds may not be repayable), the Banking Law requirement that only CBB-licensed and supervised institutions are permitted to *collect* funds from third parties is generally viewed as prohibiting nonbanks from issuing e-money or other stored-value instruments, such as electronic accounts stored in mobile phones.” CGAP, *supra* note 31, at 13.

⁵⁵ Filipe Pacheco, *Sistema de Pagamento Móvel Entra na Pauta do Governo e Banco Central*, VALOR ECONÔMICO (Apr. 12, 2012), <http://bancariosbaixada.org/sistema-de-pagamento-movel-entra-na-pauta-do-governo-e-banco-central/>.

⁵⁶ CENTRAL BANK DIAGNÓSTICO, *supra* note 36.

Therefore, a model where m-payment offerings of each bank work in conjunction with the systems of each individual MNO, and where a banking correspondent has no exclusivity ties with certain banks or MNOs, has been considered fundamental to proliferation of mobile banking in Brazil.⁵⁷

The first joint ventures formed by banks and MNOs were not the product of mature discussions between interested parties. Such nascent ventures have not been maintained, arguably due to pressures by regulatory or supervisory authorities. These authorities may have considered the initiatives premature, for issues such as the sharing of banking and telecommunications data and eventual commingling of associated statutory securities had not yet been discussed or regulated.

More recent joint ventures have had varied scopes and have not yet been subject to scrutiny by supervisory authorities.

Given this context, a bill of law on m-payments may harmonize remaining divergences between banks, MNOs, retail, and government.

II. FINANCIAL INTEGRITY CONCERNS FOR FINANCIAL INCLUSION

A. Money Laundering Concerns

Together⁵⁸ with terrorism⁵⁹ and its financing,⁶⁰ money

⁵⁷ Lobo, *supra* note 50.

⁵⁸ Combat terrorism and money laundering are intertwined, as exemplified by the USA Patriot Act, whose provisions against terrorism are inspired by FATF-GAFI's Recommendations. AGUSTÍN ZBAR, TERRORISMO INTERNACIONAL Y DERECHOS HUMANOS: APUNTES PARA UNA LEGISLACIÓN ANTITERRORISTA 94 (Fundación Abravanel ed., 1st ed., 2008).

⁵⁹ For a discussion on the difficulty of characterizing terrorism and determining its motivation, see Juan Bustos Ramirez, *In-seguridad y Lucha Contra el Terrorismo*, in EL DERECHO ANTE LA GLOBALIZACIÓN Y EL TERRORISMO 403, 408 (Mario G. Losano & Francisco Muñoz Conde eds., 2004), available at <http://www.scribd.com/doc/52626523/8/Inseguridad-y-lucha-contra-el-terrorismo>.

⁶⁰ A report in March 2008 by the U.S. Bureau for International Narcotics and Law Enforcement Affairs has identified the risk of terrorism financing via m-payments, for instance, through "smurfing," a technique of making numerous low-value deposits in order to evade detection by law enforcement and

laundering is one of the major m-payments issues affecting financial integrity.

Brazil's Federal Law 9.613 of March 3, 1998, establishes the legal framework governing money laundering by defining relevant offenses, setting forth preventive measures, outlining a reporting system, and contemplating procedures for international cooperation. It also includes a non-exhaustive list of predicate offenses, such as terrorism and its financing. The contents of such legislation is consistent with a number of international initiatives, such as the Vienna Convention, Palermo Convention, U.N. Convention against the Financing of Terrorism, U.N. Convention Against Corruption, the FATF 40+9 Recommendations, and others.

In the Brazilian Public Administration, anti-money laundering relies on the Council for Control of Financial Activities (Conselho de Controle de Atividades Financeiras, "COAF"), which is a central authority in charge of providing financial intelligence for the system, and on sector-specific authorities (local SEC, Central Bank, etc.) and is responsible for supervising all entities in the banking and financial sectors.

Supplementary Law No. 105 of January 20, 2001, authorized COAF's access to data protected by banking secrecy, and Federal Law 10.701 of 2003 has established a national registry of bank accounts. COAF belongs to the structure of the Ministry of Finance, and has both policy and operational missions. COAF is in charge of coordinating Brazil's participation in forums such as FATF, GAFISUD, Egmont Group, and CICAD/OAS, all in accordance with a strategic plan referred to as "ENCLA." ENCLA congregates all relevant ministries and agencies at Federal and State levels, as well as Congress, Attorneys General, and the Judiciary, as mentioned in COAF's Management Report of 2011.⁶¹

supervisory authorities. U.S. BUREAU FOR INT'L NARCOTICS & LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: VOLUME II 12-13 (2008), *available at* <http://www.state.gov/documents/organization/102588.pdf>.

⁶¹ CONSELHO DE CONTROLE DE ATIVIDADES FINANCEIRAS [COAF], PRESTAÇÃO DE CONTAS ORDINÁRIAS ANUAL RELATÓRIO DE GESTÃO DO EXERCÍCIO DE 2011 16-17 (2012), *available at* <https://www.coaf.fazenda.gov.br/>

Record-keeping, know-your-customer requirements, and suspicious transaction reporting (STR) provisions have been widespread throughout such formal and organizational structure. Newly established Federal Courts specialized in prosecuting relevant cases have enhanced anti-money laundering (AML) efforts.

The definition on AML controls applicable to m-payments requires: (1) new technology capable of tracking transactions and of processing massive extra amounts of data; and (2) sensitive criteria for establishing investigation parameters⁶² suitable for a variety of geographic regions, business sectors, and social classes.

The principle of know-your-customer must be complied with by the banking sector as determined⁶³ by Federal Law No. 9.613, as well as by the telecommunications industry as similarly required⁶⁴ by Federal Law No. 10.703 of 2003.⁶⁵

Central Bank's 2009 Ruling ("Circular") No. 3.461 consolidated applicable AML requirements, including those regarding banking correspondents.

An example of implemented AML controls in the financial industry has been given by Redecard, a local private company⁶⁶

downloads/relatorio-de-gestao-coaf/Relatorio%20de%20Gestao%20de%202011_COAF_final.pdf.

⁶² Today banks are required to keep records of electronic transfers of BRL1,000 (US\$600) or higher.

⁶³ Requiring complete data (inclusively, data of people authorized to manage accounts of legal entities): commercial or residential address, phone number, consulted sources of reference, data of account opening, and signature.

⁶⁴ Name of subscriber, identity card, and serial number and code of the associated mobile phone.

⁶⁵ Pursuant to the telecommunications regulatory and supervisory authority (Anatel), one year after the entering into force of Law 10.703—which imposed the duty of keeping updated enrollment data on subscribers of prepaid mobile accounts—92 percent of the latter were enrolled. Accuracy of the enrollment data, however, was not sufficiently verified by MNOs. PEDRO AUGUSTO ZANIOLO, *CRIMES MODERNO: O IMPACTO DA TECNOLOGIA NO DIREITO* 73 (2007).

⁶⁶ Redecard is present throughout Brazil in every municipality with electricity and telecommunications. It is considered one of the ten largest electronic payments companies in the world and is worth BRL15 billion (almost US\$10 billion) in market value. REDECARD, *SUSTAINABILITY ANNUAL REPORT 2010* 8 (2010), available at <http://www.mzweb.com.br/redecard/web/arquivos/>

that integrates the SPB and is the leader in credit, debit, and retailer cards services in the market, offering a great number (22) of different “flagships,” as a result of investment in commercial and technical interoperability.

Redecard has launched “Redecard Celular,” a system that enables the use of credit cards in mobile phones, and “Redecard Móvel,” which converts mobile phones into credit card reading machines that has rapidly become a market leader.⁶⁷ Redecard has mapped risks all across its operations, and received a B+ rating in the GRI Checked rating system developed by the Global Reporting Initiative. Its Sustainability Yearly Report mentions implementation of compliance with AML laws and regulations and monitoring, analysis, and reporting to COAF regarding transactions entered into via its accredited correspondents.

In fact, current regulation (Central Bank’s Resolution 3954) on banking correspondents establishes accountability of financial institutions for performance by their correspondents: “Section 2. The correspondent operates on behalf and under guidance from the contracting institution, which undertakes full liability for the services rendered before customers and users through the contracted party, which shall ensure integrity, reliability, safety, and secrecy of the transactions (. . .) as well as compliance with the legislation and regulation applicable to such transactions.”

On February 29, 2012, the local Securities Exchange Commission published a draft adaptation of its rules to the recommendations issued by the GAFI/FATF (CVM Instruction 301/99).⁶⁸ Criticism and suggestions from the public were accepted until March 30, 2012, having been submitted by a number of entities.⁶⁹ After analyzing these public comments, the local

rdcd3_rao_2010_eng.pdf.

⁶⁷ *Id.* at 7.

⁶⁸ Edital de Audiência Pública SDM N° 01/2012, Comissão de Valores Mobiliários (Mar. 30, 2012), *available at* <http://www.cvm.gov.br/port/audi/ed0112sdm.pdf>.

⁶⁹ The company Plural Capital Gestão de Recursos Ltda. proposed to establish an initial term (“after and as of the beginning of the relationship with the financial institution”) for determining a client’s political exposure, and suggested that CVM replaces “responsibility to identify the origin of resources” with “responsibility to implement internal control mechanisms with the

Securities and Exchange Commission issued Instruction 523/12, amending Instruction 301/99 and incorporating several suggestions.⁷⁰

Furthermore, on March 12, 2012, the Central Bank significantly increased the list of suspicious operations that may constitute money laundering. The new list, contemplated in Normative Letter (“Carta-Circular”) 3.542, jumped from 43 kinds of transactions to 106. All listed categories of transactions must be reported to the Central Bank. Such regulation has received criticism by specialists who claim that the list is too broad and its criteria too subjective, leading to comprehensive presumption of illegality.⁷¹

On that same date, the Central Bank also approved Normative Letters 3.583 and 3.584. Among other provisions, Normative Letter 3.583 determined that financial institutions shall only enter into or maintain business relations with clients that are fully identifiable. Although the Central Bank is not able to regulate institutions abroad, the Normative Letter has also determined that financial institutions shall inform the Central Bank whenever they are unable to comply with the rules provided for in that Normative Letter in any other country.

The other Normative Letter (3.584) has regulated financial institutions that operate in the exchange market through financial institutions located abroad. It has established, among other provisions, that Brazilian banks shall certify that the financial institutions with which they operate abroad actually exist in the

objective of identifying the origin of resources,” among other suggestions. BSM (BM&F Bovespa - Supervisão de Mercados) suggested several modifications in order to enforce the continuous monitoring of the operations addressed in the regulation. Banco do Brasil suggested terminology changes, such as to replace “clients” with “situations,” as well as change of the term for notification to local SEC.

⁷⁰ COMISSÃO DE VALORES MOBILIÁRIOS, RELATÓRIO DE ANÁLISE: AUDIÊNCIA PÚBLICA SDM Nº 01/2012 (2012), available at http://www.cvm.gov.br/port/infos/Relatorio_audpub_percent20_nst_523.pdf.

⁷¹ Marcos de Vasconcellos, *Banco Central Aumenta Lista de Operações Suspeitas*, CONSULTOR JURÍDICO (Mar. 20, 2012), <http://www.conjur.com.br/2012-mar-20/banco-central-aumenta-lista-operacoes-suspeitas-43-106-itens>.

countries where they are incorporated and licensed, and indeed have offices.

B. Tax Evasion Concerns

The ease of entering into “informal” transactions makes m-payment a threat from the tax evasion standpoint.

In Brazil, banking secrecy may be breached upon request by the Central Bank to financial institutions whenever there is suspicion of tax evasion. Suspicion may be indicated by a customer’s statements of transactions in an amount lower than their market value, loans obtained from sources external to the financial system, operations in “tax havens,” expenses or investments exceeding stated available income, remittances abroad through non-resident accounts in amounts which exceed stated available income, and cancellation of taxpayer’s number of legal entities. In addition, the federal Internal Revenue Service has issued Normative Ruling 811/2008, which requires financial institutions to communicate on certain domestic transactions informing deposits, payments, credit orders, and withdrawals.

Main States in Brazil have also developed electronic tax invoicing,⁷² which may be instrumental for purposes of tracking tax evasion in m-payments, provided new technologies are created to ensure appropriate monitoring.

C. Foreign Exchange Concerns

Foreign exchange operations conducted by banks, securities brokers, and other institutions in Brazil are subject to control by the Central Bank (after relevant closing by commercial banks is performed) and must report to the federal Internal Revenue Service (envisaging the monitoring on collection of associated taxes over remittances abroad, and over exports or imports).

The Central Bank makes available application software for the

⁷² The electronic tax invoicing is expected to reduce tax evasion by at least 30 percent. Clóvis Panzarini, *A Sonegação Fiscal e a nota Fiscal Eletrônica*, AFRESP, <http://www.afresp.com.br/noticias/artigos.asp?codigo=3> (last visited Sept. 13, 2012).

closing of the exchange, which facilitates the monitoring activity, and private clearing of exchange is forbidden by applicable regulation.

The definition on financial parameter for tracking m-payments will be an important tool also for the monitoring of infringing foreign exchange operations.

D. Mandatory Acceptance

In Brazil, credit cards and checks do not enjoy mandatory acceptance⁷³ that is afforded to paper money and coins.

Although the ease for falsifying paper money and coins is well-known, and may be greater than the perils associated with other means of payment, they seem to enjoy traditional social acceptance at higher levels than credit cards and checks.

Therefore, compulsory acceptance of m-payments shall—at least, at the initial phases of their popularization—be restricted to the government, applying to e-government, social programs, and to other public initiatives.

E. Consumer Protection Issues

The Brazilian Supreme Court has decided that banking activities are within the reach of the local Consumer Protection Code, which is a very stringent statute combining strict product liability, contractual protection, and other items of consumer defense.

There has never been any doubt that MNO's activities are also subject to the Consumer Protection Code.

Given the fact that mobile phones have been compromised by viruses and by other kinds of attacks from hackers or crackers, full disclosure on associated risks is fundamental for meeting the duty of information.⁷⁴ For instance, there is already certain technology

⁷³ MOEMA AUGUSTA SOARES DE CASTRO, *CARTÃO DE CRÉDITO: A MONÉTICA, O CARTÃO DE CRÉDITO E O DOCUMENTO ELETRÔNICO* 136 (1999).

⁷⁴ Based on the precedent of the lack of adequate disclosure by banks on their web sites regarding security exposures of tokens offered in connection with internet banking, one may expect this to extend to the offering of m-payment

capable of preventing “electronic pickpocketing”⁷⁵ (credit card data—and, possibly, stored electronic money—swiped with contactless scanners from RFID-enabled cards), of which consumers should be made aware.⁷⁶ Unencrypted SMS messages used for m-payments may constitute another source of concern. On the other end, it is important to point out that encryption, authentication, data checking and disclosure, and other means of consumer protection may affect interfacing and user experience, making mobile payment applications less user-friendly.⁷⁷ Therefore, the proper balance must be struck in order to reconcile security and performance goals.

Liability for m-payment services is another topic subject to controversies, as m-payments involve liabilities inherent both to banking and telecommunications, and such merger may produce confusion for those who will be subject to liability. The Local Consumer Protection Code attributes joint liability to all members of the supply chain. If a telecommunications-centered model of m-payments is adopted, should banks be considered liable for ultimately providing funds to a MNO that has commercialized electronic money? Conversely, should interruption of airtime availability by a MNO that has partnered with a bank in a joint venture for selling m-payment services be subject to the bank’s liability in the event airtime is deemed to integrate the financial package of m-payments service? It is important to consider that the systemic impact m-payments will have in the near future may extend liability of m-payment services suppliers across the chain.

services.

⁷⁵ Aaron Saykin, *Consumer Alert: How to Prevent “Electronic Pickpocketing”*, WGRZ (Nov. 27, 2010), <http://www.wgrz.com/news/local/story.aspx?storyid=97211>.

⁷⁶ In the event of theft of a mobile phone which had electronic money stored in it, should this be deemed as money theft? Irrespective of whether access to the electronic money is protected with password and other possible (biometric) precautions? This may also be a point of concern regarding the need of proper advice to consumers on how they should react.

⁷⁷ Amrik Heyer & Ignácio Mas, *Fertile Grounds for Mobile Money: Towards a Framework for Analyzing Enabling Environments*, 22 ENTER. DEV. & MICROFINANCE 30, 37 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593389.

Several other matters oppose consumer protection to m-payments,⁷⁸ implying a great challenge for applying generic concepts to certain peculiarities of m-payments, which include inverted burden of proof (applicable where consumers are “less knowledgeable” than supplier according to “ordinary rules of experience”), contractual limitation of liability (allowed only where consumer is a legal entity and there is “justifiable situation”), statutory warranty (generically qualified as of “fitness”), duty of care (which may recommend use of advanced electronic signature and certified electronic time-stamping), and right of repent (recognized to sales at distance, and not originally aimed at addressing the offering of electronic money downloading).

III. PERSPECTIVES AND POSSIBLE FUTURE DIRECTIONS

A. *Singular Local Environment*

The long-standing advanced level of automation in the banking industry in Brazil has implied a two-fold effect: on one side, it has prompted banks and MNOs to cooperate effectively, in the context of implementation of the SPB, generating an interesting tracking record of mutual cooperation; on the other side, it has inspired banks’ and MNOs’ plans to compete for the offering of m-payments services with a greater deal of individual participation and profit. Consumers have already been served with local availability of convenient electronic payment services. This environment has delayed regulation of m-payments in the country, as well as acceptance of joint ventures between banks and MNOs to exploit such market.

Recent initiatives have touched m-payment issues, as in the case of securities home-brokering. Broker Ágora has announced

⁷⁸ According to some authors, the more electronic money resembles paper money, the more consumers’ liability for cautious possession of currency shall apply. See Teresa Rodríguez de Las Heras Ballel, *El Reparto de Riesgos y la Atribución de Responsabilidad en el Uso de Tarjetas en la Contratación Electrónica*, in *DERECHO DE LAS NUEVAS TECNOLOGÍAS* 319, 364 (Mariliana Rico Carrillo ed., 2007); d’Alelio & Collins, *supra* note 41, at 103.

that consumers may make withdrawals and transfers via mobile phones and smartphones in its portal.⁷⁹ This is in line with the local SEC's Instruction 505/2011,⁸⁰ which regulates electronic customers' enrollment and payment methods, in connection with securities brokerage.

Despite delayed introduction of m-payments in the country, a number of business alliances between banks, MNOs, and high-technology companies have rapidly grown, bringing different options of products and services to the market.⁸¹ Such developments have coincided with submission to the Congress of the first bill of law on m-payments.

B. *The Bill of Law at the Congress*

The bill of law purports to create STDM, a system of payments and transfers via mobile devices, and to establish the role of a clearinghouse and of services suppliers, which is to be further regulated by the monetary authority. It clarifies the intended scope by excluding Internet banking accessed via mobile phones from its reach.

The legal entities authorized to offer mobile payment services will have such activity as their sole corporate purpose, and will depend upon license from competent authority to operate.

Such legal entities will maintain individual electronic accounts associated with a number of mobile phone accounts, to which the

⁷⁹ *Portal Móvel Ágora*, ÁGORA, <https://www.agorainvest.com.br/portal-movel/portal-movel.asp> (last visited Aug. 15, 2012).

⁸⁰ In effect since April 2, 2012.

⁸¹ Oi Paggo has provided SMS m-payments and recharge, separate from Oi's airtime invoices; Cielo has offered a "plug" (Square Card Reader) to be connected to an iPhone, iPad, or iPod, for any person to receive payments made via credit card, upon a fee of 2.75 percent per transaction, without monthly fees, and being the amounts deposited in the user's account on the following day; MasterCard's NFC-based PayPass has been used in trial tests in Rio de Janeiro; Visa's PayWave was launched, associated with Bradesco bank and Nokia mobile phones for contactless payment at merchants such as Starbucks, as well as Visa's Mobile Pay, in association with Banco do Brasil, for payment via mobile of credit card and debit card; Buscapé Company has introduced DinheiroMail, apportioning electronic clearing of credits and expenses; Wappa has presented WappaTaxi for m-payment of transportation services.

user shall make deposits in order to be able to: acquire credits for use of the mobile phone; make payments; make transfers to other electronic accounts; make transfers to bank accounts held by the user; and make withdrawals before accredited establishments. Grant and possession of the electronic accounts may not be remunerated.

The legal entities may intermediate the offering of financial services such as credit, financial investments, insurance, and others to clients, and will be liable to the customers for the services they provide.

The clearinghouse will settle transactions on a real-time basis, and will be in charge of accrediting the establishments where money withdrawal may be available. It will be set up as a nonprofit private entity, and integrate the SPB.

The monies deposited by users in the electronic accounts will be maintained in accounts and financial investments within the National Financial System (SFN), and will not be considered as assets belonging to the legal entities that provide mobile payment services. The latter will own the earnings derived from investing referenced monies. Such operations shall be regulated and monitored by the monetary authority.

The justification of the bill of law mentions the objective of financial inclusion, pointing out that the banking system has high costs, bureaucracy, and limited geographic distribution. It emphasizes that legal entities allowed to offer mobile payment services may be subsidiaries of banks or of MNOs, and will contribute to expansion of the financial system and of convenience to users, who will be able to use mobile phones to make and receive payments. It also highlights the goals of reducing overall costs of the financial system, diversifying payment methods, and increasing competition in the offering of financial services by providing a low-cost alternative to credit and debit cards and enhancing security and efficiency.

CONCLUSION

Most business initiatives launched in the Brazilian territory demonstrate certain alliances between banks and MNOs, indicating

market assumption that this hybrid model better fits the local environment.⁸²

Consultancies hired by the National Association of Banks (Febraban) and the IFC's Report have also suggested that this kind of alliance should be especially recommended.⁸³

The precedent of standardized procedures in SPEC upon cooperation between banks and MNOs, and legal constraints which require segregated management of the duty of secrecy and of exclusive activities, tend to drive efforts towards the solution set forth in the bill of law, that is, of a highly efficient (real-time settlement) clearinghouse and legal entities responsible for providing mobile payment services, being backed by solid controls in effect within the SFN.

Taking into account the dimension of Brazil's market and targeted population, as well as the complexity and potential outreach of its banking and telecommunications industries, local legislators may prefer to await the outcome of initial private business initiatives and of preliminary administrative regulations in order to determine the best course of action for the normative process.

The impressive network of banking correspondents may be used in conjunction with providers of mobile payment services, possibly as accredited establishments for money withdrawals.

A virtual clearing system of mobile payments, coupled with regular banking structures, may be the solution selected by Brazil to implement mobile payments.

⁸² For further discussion, see INT'L FIN. CORP., IFC MOBILE MONEY STUDY 2011: BRAZIL 2 (2011), available at <http://www1.ifc.org/wps/wcm/connect/f43621804a0550ab8eccffdd29332b51/MobileMoneyReport-Brazil.pdf?MOD=AJPERES>.

⁸³ For further discussion, see *id.* at 34.

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