Easy Money? Mobile banking, mobile money and Myanmar’s financial regulations

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By all accounts, there are two sectors of industry that are poised for extraordinary growth in Myanmar: telecommunications and financial services. One can only imagine how exciting the prospects might be for the overlap between the two: mobile financial services.

The liberalization of the telecommunications market in under-banked Myanmar, the forthcoming opening of the financial services sector to foreign banks and the rise of micro-finance investment set the stage for a stellar rise of electronic money. Paying for groceries with a wave of a NFC-equipped phone or an SMS, sending some cash to a relative in another region or receiving one’s Government pension per mobile bank account may soon become a part of every-day life in Myanmar.

But none of this is going to happen without proper regulation. In this client briefing note we explore how Myanmar has begun, for the first time, to regulate mobile banking with the Central Bank’s Directive 4-2013 of 3 December 2013 (the Mobile Banking Directive). We consider the implications of that landmark regulation. Furthermore, we touch upon the other main Myanmar laws and regulations which will play a major role as Myanmar moves into the realm of financial inclusion.

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Bank-led or non-bank model?

There are different ways how one can use a mobile phone to do a financial transaction. One of the fundamental questions is to which degree a bank is, or legally has to be, involved in the process. From our perspective it is the simplest to distinguish between the non-bank model and the bank-led model.

In the non-bank model, there is no direct transaction between the person using the service and a bank. For example, in Vodaphone's M-PESA system, the Kenyan success story which is the poster boy for the non-bank model, subscribers of the mobile operator can pay just about anyone with a PIN number. A retailer displays his payee account next to the cash register. The customer can basically just use his pre-paid mobile card to pay to that account. In the bank-led model, such as Barclay's "Pingit" in the United Kingdom, a customer of Barclay's can use his mobile phone on any network to make a payment or withdraw money.

Each model, at least in its simplest form, comes with its own restrictions. In the bank-led model, you need to become a customer of the bank to use the service but the service is open to the subscribers of all mobile operators. In the non-bank model the user does not need an actual account with any particular bank in his own name, but he and most often the people he wants to purchase from have to be subscribers. The dominant brand in the bank-led model is that of the bank, while in the non-bank model the dominant brand is the telecom operator or a specialized non-bank mobile money company.

Put another way, the fundamental question which regulation needs to address is whether a mobile operator will be allowed to use the top-up credit for things that have nothing to do with making calls and that involve transferring money. Some would call this allowing the mobile operators to carry out financial services, particularly if one can "cash out" the credit again, or even earn an interest. That is the essence of the regulatory weak spot of the non-bank model: most countries only allow banks or other regulated financial institutions to perform financial services. In countries where the non-bank model is used, special precautions are taken to make sure that the mobile operators are not deemed to perform financial services in the sense of their laws and regulations.

The Myanmar Directive chooses for the bank-led model, but…

In Myanmar, in following of examples in India and particularly Bangladesh, the Mobile Banking Directive concerns mobile banking system that follows the bank-led model. The role of the mobile operator in the Mobile Banking Directive is, the way the Central Bank of Myanmar (CBM) sees it for the moment, that of an "agent or a partner" to the bank who can sign up customers for the service, whose branches can be cash-in and cash out withdrawals. Nevertheless, it is the bank who carries out the remittances, and it is the bank who contracts with the customer. Others, including technical service providers, financial service providers and of course mobile network operators can be appointed as agents of such bank in relation to mobile banking.

The Mobile Banking Directive states that "mobile banking services shall be run using a bank-led model" (s. 3 Mobile Banking Directive) and that operations can commence "only when the permission of the Central Bank has been obtained" (s.4 Mobile Banking Directive). The Mobile Banking Directive lists the scope of financial services which can be carried out by means of mobile banking (see below), and this list of services, the Mobile Banking Directive continues, "shall be run by a bank-led model".

In this respect, the Mobile Banking Directive seems to follow the same approach as the Bangladesh "Guidelines on Mobile Financial Services for the Banks" (DCMPS (PSD) Circular Letter no. 11 – hereafter the Bangladesh Circular). The Bangladesh Circular is by the way quite clearly the basis of the Myanmar Mobile Banking Directive. They are largely identical. On the choice for the bank-led model the Bangladesh Circular notes quite clearly: "[…] mainly two types of mobile financial services, bank-led and non-bank led are followed worldwide. From legal and regulatory process, only the bank-led model will be allowed to operate." (s. 6.0 Bangladesh Circular).

When does a mobile operator or a non-bank provide "financial services" in the sense of Myanmar law?

There is no general definition of what constitutes a "financial service" in Myanmar banking legislation. In a round-about way, Myanmar banking law provides that a number of "financial services" including "transmitting money", "receiving deposits" and "other financial services" are activities which are reserved for one of four types of "financial institutions" which exist under the Financial Institutions of Myanmar Law (s. 5, s. 8, s. 12 and s. 25 SLORC Law no. 16/90). Such institutions must be licensed by the Central Bank of Myanmar (CBM).

Whether a mobile operator or any other non-bank is indeed performing some kind of a financial service in the sense of the Financial Institutions Law, is a matter of interpretation. We think it is fairly clear that in most mobile wallet systems, the mobile operator/non-bank is more a *payment service provider* than a financial institution as commonly understood. In Kenya's M-PESA system the credit of the users is held in a separate trust (and is thus not owned by the operator of the system) exactly to steer clear of the financial services predicate.

Payment service providers are separately regulated in the European Union under the EU Payment Services Directive (Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, hereafter the EU PS Directive), and these rules also apply to mobile operators if they collect payments as an intermediary between the user of the service and a third-party supplier of goods or services (par. (6) and s. 7 Annex EU Directive). These are basically the same legal rules that apply when a supermarket's branch network is used to pay a utility bill, for example.

But in Myanmar, unlike in the EU, there is no separate status for payment service providers, or for issuers of electronic money (see Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009, hereafter the EU E-Money Directive; it is perhaps interesting to note that up to the change in definition prompted by the EU PS Directive, issuers of e-money were captured by the definition of "credit institution" in Directive 2006/48/EC).

So, even though an argument can be made that certain mobile payment systems should not be seen as the type of financial services reserved for banks, the interpretation of the regulator, in this case the CBM, is practically speaking determinative.

Would a semi-closed system also have to be bank-led?

Say that a mobile operator concludes an agreement with a movie-theatre chain so that a movie ticket can be purchased online with pre-paid mobile credits. Can a mobile operator, or for that matter any non-bank undertake such a scheme without a bank in Myanmar?

Myanmar's Mobile Banking Directive does not explicitly address such systems where, for example, pre-paid mobile credits can only be used to pay a few suppliers (semi-closed).

Although we do have discussions with the CBM on this issue, the text of the Mobile Banking Directive can be read in different ways. For the Mobile Banking Directive to apply here too, one would have to take the view that the use of pre-paid credits to buy goods or services from a limited number of suppliers under a special agreement with the mobile operator or other non-bank also constitutes "transmitting money" or at least "other financial services" in the sense of the Financial Institutions of Myanmar Law. By the same token, a cash-in would have to be tantamount to "receiving a deposit" in the sense of the same law.

It seems to us that such an interpretation would be too much of a stretch. Not all "transfers" or "deposits" are financial services. Money has to be involved. The Financial Institutions of Myanmar Law primarily regulates persons that are intermediaries in the money or capital markets. The essence of "money" is that it is accepted by everyone, and not just by a few suppliers of goods or services which have an agreement with the issuer. The pre-paid credit is not accepted by any third party, except under a special arrangement. In other words, much like vouchers issued by retailers, the pre-paid credit is not "money". Such arrangement might be seen as a "payment system" which could be regulated separately from a "financial institution", but in our view it would be difficult to argue that this constitutes a "remittance of money" as defined in Myanmar law applicable to the supervision of financial services.

It is perhaps worth noting that policy in India states that mobile operators can –without a bank- issue pre-paid semi closed system payment instruments, which are defined as:

> *"These are payment instruments which can be used for purchase of goods and services, including financial services at a group of clearly identified merchant locations/ establishments which have a specific contract with the issuer to accept the payment instruments. These instruments do not permit cash withdrawal or redemption by the holder" (s. 2.5.Issuance and Operation of Pre-Paid Payment Instruments in India - Consolidated Revised Policy Guidelines, Reserve Bank of India; DPSS.COPDNo. 2074.14.006/2013-14, dated 28 march 2014 (PPI India Policy Guidelines)*

However, to protect consumers the Reserve Bank of India has regulated the use of such payment systems as well. A "Pre-Paid Instrument Issuer" would have to keep the funds collected in a special escrow account with a bank, which will pay the retailers that sign up for the scheme with the mobile operator or other non-bank (s. 8.3 PPI India Policy Guidelines). Some KYC requirements and consumer protection measures are also provided.

Which transactions are allowed through mobile banking in Myanmar?

The Mobile Banking Directive lists a number of activities which banks and financial institutions may undertake through mobile banking, provided they receive permission from the CBM. This list is the following:

(a) *Domestic remittance and remittance from other countries;*
(b) *Cash-in and cash-out in MMK through agents, bank branches, ATMs, or branches of a mobile operator;*
(c) *Payments made to a business by individuals (e.g., payments of bills and payments for goods and services);*
(d) *Payments made by a business to individuals (e.g. salary, dividend)*
(e) *Payments made to individuals by the Government (e.g., salaries and wages, pensions and other allowances);*
(f) *Payments made to the Government by individuals (e.g., taxes);*
(g) *Payments between individuals (e.g., payments and transfers of money between bank accounts);*
(h) *Microfinance, overdraft and other small payments like insurance premium.*

There is a limit of 500,000 MMK (about 500US$) on the amount that can be transferred by means on mobile banking. In addition, no more than 3 payments may be made per day. Nevertheless, the maximum amount per day is 1,000,000 MMK (about 1,000 US$).

It is also provided that mobile accounts which are savings accounts are interest bearing in accordance with the CBM regulations.

Cashpoints, agents and partners

Quite few provisions in the Mobile Banking Directive are dedicated to the selection and monitoring of the cashpoints, agents and partners that the banks can use for mobile banking.

There is no exhaustive list of who can act in any of these capacities. Mobile operators, NGOs, and Government post offices are mentioned by name as possible cashpoints. Presumably, any person that meets the qualitative criteria can be an agent or a partner (s. 11 Mobile Banking Directive)

> *When selecting a partner or agent to collaborate with, banks and financial institutions shall base their selection on the following items:*
> (a) *Ability to implement the work;*
> (b) *Financial stability;*
> (c) *Good reputation within its field of business;*
> (d) *Measures taken for monetary security, inspection of accounts, reporting and supervision.*

Liability for loss and damage under Myanmar law

From the CBM's perspective the bank is liable for losses caused by its agents. The Mobile Banking Directive provides in s. 22 that:

> *“banks and financial institutions shall take responsibility for the losses of customers that occur as the result of inappropriate actions of their branches, cashpoints, agents and partners”.*

Presumably, s. 22 Mobile Banking Directive is meant to displace the freedom to contract between the bank and his agent, and the consumer. In other words, in view of protecting the consumer, the consumer and the bank cannot agree that the bank will not be liable for losses resulting from certain acts of the agent.

But, it is unlikely that all liabilities will end up with the bank. It is safe to say that the contractual framework between the bank and its agents will require careful preparation. The issue of liability for losses (both losses to the bank and losses incurred by third parties) is likely to become one of mobile banking’s hot potatoes. It remains to be seen how s. 22 Mobile Banking Directive must be read in conjunction with Myanmar law in general. For example, the Myanmar Contract Act also provides rules with respect to the liability of agents. The authority the agent has under the agreement with the bank will be very important with respect to any potential liability towards third parties.

Anti-money laundering and KYC

In a bank-led model, it is not surprising that the banks must exercise the normally applicable anti-money laundering (AML) measures. After all, the user just opens a (mobile) bank account. A KYC form, which is identical to the one used in Bangladesh, is provided as an annex to the Mobile Banking Directive. The bank is liable for the accuracy of the information, also when the forms are completed by their cashpoints, agents or partners.

In addition, banks need to use IT systems which allow the identification of suspicious activity, which must be reported.

It is interesting to note that most of the technical specifications in the Bangladesh regulations, general as they were, were not taken over in the Myanmar Mobile Banking Directive.

What is the role of micro-finance institutions (MFI) in the Mobile Banking Directive?

The Mobile Banking Directive states that “microfinance” is one of the financial services which may be carried out by means of mobile banking. MFIs can certainly be agents and partners of banks in a bank-led model, which is suggested with the reference to “Non-Governmental Organizations having a network across the country” in s. 10 of the Mobile Banking Directive. For the moment, it is not entirely clear from the text of the regulation if a Micro-Finance Institution (MFI) can actually replace the role of a bank in the bank-led model in Myanmar. We are in discussions with the CBM to clarify the policy.

In the future, from a Myanmar legal perspective there is no reason why an MFI cannot replace the role of the bank in a bank-led mobile banking system. After all, under Myanmar’s Microfinance Law, an MFI can be permitted to carry out financial remittances and take deposits. The MFL notes the following five activities as constituting microfinance: (1) extending micro-credit, (2) accepting deposits, (3) carry out remittances, (4) borrow domestically and from abroad, and (5) carry out other financial activities. Per directive no. 2/2011 issued by the Committee, at this time, only the first two activities may be performed.

Required steps before a bank can be licensed to provide mobile banking

The CBM considers mobile banking, as envisaged in the Mobile Banking Directive, to be an “other financial service” as referred to in s. 25 (o) Financial Institutions of Myanmar Law. As such, a bank can only commence with this service after having been specifically licensed to do so.

In order to receive the license the bank would have prepare a plan for mobile banking which is to be reviewed by the CBM. The bank must also select agents and partners, sign agreements with them, and submit a list to the CBM which is updated monthly. It is unclear if the list of agents must be ready before applying for the license.

In practice, one of the more detailed points of inquiry of the CBM is the safety of the mobile banking technology. The CBM will request detailed information on the hardware, the safety protocols, the integrity of the transmissions that are being processed and authorizations.

In certain other countries where mobile banking and mobile wallets have been introduced, the strength of the network in certain areas showed to be a problem. In Afghanistan, for example, the network is not always reliable. If the connection cannot be established when a payment processed, the integrity of the data cannot be assured.

Consumer protection laws

The Mobile Banking Directive does not state so, but it goes without saying that the Consumer Protection Act of 14 March 2014 (CPA) also applies to mobile banking. The CPA provides in a number of rights of consumers and restrictions for businesses. We think a few of those provisions are of particular interest when it comes to mobile banking. For example, the CPA specifies that businesses may not advertise or offer services that are actually not available, which raises some questions with respect to the performance of the networks and platforms needed to operate mobile banking.

Another example is the requirement for a receipt for the performance of a service (s. 7 a CPA), which obviously raises a number of questions with respect to the nature of a “receipt” in case of a service with is processed electronically.

More specifically, under the Mobile Banking Directive the bank has to build in a few minimum protections for users, such as:

- There must be a dispute resolution system with the users. It is in this respect noteworthy that consumers also have a statutory right of access to the Consumer Dispute Settlement Committee under the CPA
- Any risks must be clearly informed to users before signing up for the service
- There must be a grievance and compensation policy
- Fees must be approved by the CBM
- The ICT system supporting mobile banking must be secure
- Banks must use at least one security protocol (PIN numbers) and the system must be able to stop access for stolen or lost PINs

Exclusivity and competition law aspects: can a bank choose only one mobile operator as a partner? Or vice-versa?

Mobile banking regulations in India provide clearly that banks *must* provide a mobile banking platform which is *network neutral*, i.e. it works with any mobile operator (s. 9 . Master Circular on Mobile Banking Transactions in India dated 1 July 2013).

Forgetting for a moment whether a Myanmar bank would uberhaupt want to sign such an exclusivity, there is no such rule in the Mobile Banking Directive in Myanmar. The Mobile Banking Directive and its text as it stands today does not address whether a bank would be free to make only one mobile operator its partner, and no others. However, such exclusivity does raise some other legal questions.

Firstly, although the Mobile Banking Directive does not actually state that the CBM gets to *approve* the list of cashpoints, agents and partners, it is difficult to imagine any bank signing up such a partnership without the blessing of the regulator. Most likely, knowing how things usually work in Myanmar, the CBM will consult with the Ministry of Communications and Information Technology (MCIT) on any such arrangement. The MCIT would be able to raise any concerns with respect to an exclusive arrangement between a bank and a mobile operator.

Secondly, Myanmar’s laws and regulations on competition law might, depending on the circumstances, come into play. Competition rules are meant to prevent market operators from engaging in behavior that lessens a free and fair competition between different suppliers of a good or a service. Myanmar is still in course of preparing its general competition law. Nevertheless, a number of legal provisions about competition can be found in various laws and regulations.

In terms of competition law, there are two perspectives: (1) could it be a violation of competition rules in Myanmar *banking law* for a bank to allow access to its mobile banking platform only to the subscribers of one mobile operator; and (2) is it a violation of competition rules in Myanmar *telecommunications law* for a mobile operator to sign an exclusive agreement with one bank, which excludes the other mobile operators from the mobile banking platform?

Section 38 of the Financial Institutions of Myanmar Law provides that banks are prohibited from "entering into contracts or agreements which would secure them a position of dominance on the money, financial or exchange markets". This provision forms a prima facie basis for the CBM to act in case they would believe that an exclusive deal with an operator would lead to a dominant market position. However, "dominant market position" is not defined, at least not for this particular purpose.

The other way around, s. 36 of the Telecommunications Law prohibits Licensees from entering into any understanding, agreement, or arrangement with any person, department or organization which provide for price fixing, market sharing, or boycotting of a competitor, supplier or Licensee. The Draft Competition Rules which are in preparation under the Law on Telecommunication indeed also cover agreements between telecom operators and non-licensees, such as between mobile operators and banks. Under the Rules, an agreement that lessens free competition, if that is indeed the case, might be targeted. Much will depend on whether the bank in question is considered to have a "dominant position" in the mobile banking market. As is stated in the Draft Competition Rules "the Department may assess whether any other Agreements between Licensees or between a Licensee and third parties, including joint-ventures or similar Agreements, have the object of significantly preventing, restricting, or distorting competition in any telecommunications market (s. 10 c) Draft Competition Rules).

Under the Telecommunications Law and s. 15 of the Draft Competition Rules, a licensee mobile operator "will be classified as being in a Dominant Position if:

1) *it is licensed to operator controls Essential Facilities used for the provision of telecommunication services in Myanmar; or*

2) *it holds a degree of Market Power that affords it the ability to behave to an appreciable extent independently of competitors and Consumers in any market in which it provides telecommunications services pursuant to its license".*

Finally, we think that any type of contractual exclusivity will have to steer clear of the wide-reaching prohibition on restraint of trade in the Myanmar's Contract Act, an anti-competition rule of sort *avant la lettre*.

What can we expect in Myanmar in the next few months in terms of mobile banking?

It is fair to say that the recent surge of negotiations and vying for position is likely to continue for quite a while. We think that a number of banks will secure the CBM license.

The Mobile Banking Directive has created some degree of regulatory certainty, at least for the bank-led model. But a successful mobile banking operation needs more than just a bank. Banks, operators, MFIs, payment service providers, device suppliers, software providers, distributors and retailers will try to secure an advantageous position on the ground. And for some market actors that means, among other things, the widest possible network of agents and partners.

We also expect that the regulatory framework as it stands today will almost certainly be subject to further change sooner rather than later. Experience in other countries such as India and Bangladesh demonstrates the need for frequent adjustments. As the regulator builds up experience, we think they may relax some of the current restrictions such as the 3 transaction per day limit.

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