University of Miami International and Comparative Law Review

Volume 21
Issue 1 *Volume 21 Issue 1 (Fall 2013)*

Article 4

10-1-2013

Financial Inclusion in Peru: Lessons From Kenya's Regulatory Approach on E-Money

David E. Rodrigues Gonçalves

Follow this and additional works at: https://repository.law.miami.edu/umiclr

Part of the Comparative and Foreign Law Commons, and the Law and Society Commons

Recommended Citation
David E. Rodrigues Gonçalves, *Financial Inclusion in Peru: Lessons From Kenya's Regulatory Approach on E-Money*, 21 U. Miami Int'l & Comp. L. Rev. 31 (2013)
Available at: https://repository.law.miami.edu/umiclr/vol21/iss1/4

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

FINANCIAL INCLUSION IN PERU: LESSONS FROM KENYA'S REGULATORY APPROACH ON E-MONEY

*David E. Rodrigues Gonçalves**

I. INTRODUCTION

The war to liberate Latin America from financial exclusion has begun and Peru has the potential role of Simon Bolivar's second coming. In a country where only 20% of the population has a formal bank account,[1] but 98% of its people own a mobile phone,[2] Peru

* Legal Manager of Mobile Financial Services Holding Sprl, a MasterCard and Telefónica Joint Venture. J.D. '12, University of Miami School of Law, LL.M '09, Harvard Law School, Abogado '06, Universidad Católica Andrés Bello. Licensed to practice law in Florida and Venezuela.

believes that electronic money ("e-money") is as effective as Bolivar's sword. While the rest of the region seems to be stalling regulatory efforts, hoping for a success story that would justify e-money as a financial inclusion tool, Peru has dedicated an important part of its political agenda to creating an e-money regulatory framework that would lure both bank and non-bank providers to invest in this project as well as protect Peruvians' money. The result has been an intricate scheme of rules that provide an interesting approach to the e-money business, but that at the same time is oblivious to key aspects of the business that are necessary to lead this effort to success.

Fortunately, many of the pieces forming that complex regulatory scheme are located in resolutions that do not have the rank of a law enacted by Peru's Congress, meaning that they can be easily amended without going through the complex political process that law amendments entail.[3] With a few key corrections, Peru's e-money laws and regulations can become the boilerplate for many other regional e-money regulatory projects. However, in order to claim victory, the rules of the game must afford business players a chance to be profitable while providing acceptable levels of protection to consumers. Fortunately, Peru can find guidance for all those key corrections in Kenya, a country that is, thus far, the only unquestionable e-money success story in the world.[4]

Since 2007, Kenya has been the cornerstone of the e-money world. That year, the telecommunications operator Safaricom launched its M-PESA service, an electronic wallet linked to a mobile phone that allowed Kenyans to deposit and transfer funds from mobile to mobile,

---

[1] THE WORLD BANK, THE LITTLE DATA BOOK ON FINANCIAL INCLUSION 119 (2012), available at https://openknowledge.worldbank.org/bitstream/handle/10986/12252/68169.pdf?sequence=1.

[2] *See* ROBERTA PRESCOTT, RCR WIRELESS NEWS, PERU: A MOBILE MARKET SET FOR GROWTH 2 (2013).

[3] *See* Constitución Política del Perú [Peru's Political Constitution], Diario Oficial El Peruano [E.P.], 1 Jan. 1994 art. 103–109 (Peru) (detailing the process that a law amendment must go through before it becomes binding).

[4] *See* Wolfgang Fengler, *How Kenya Became a World Leader for Mobile Money*, THE WORLD BANK BLOGS (Jul. 16, 2013), http://blogs.worldbank.org/africacan/how-kenya-became-a-world-leader-for-mobile-money.

among other things.[5] M-PESA's success opened the door for other providers to enter the market.[6] The rest of the story would put Kenya into the e-money Hall of Fame, if one existed: in a country were only 19% of its population had a formal bank account, 74% of adult Kenyans have subscribed to some kind of e-money service; today, there are more e-money accounts than actual bank accounts, carrying out more than 50 million transactions a month.[7] This is financial inclusion at its finest.

In the shadows of M-PESA's rise to stardom, the Kenyan government, through its central bank ("CBK"), played a fundamental role. The CBK patiently studied e-money providers' every move, learning from their practices, exposing their weaknesses, all while subtly exercising control. It was only after extensive analysis that it decided to regulate, more than six years after M-PESA's launch. This laissez-faire approach created an environment ripe for financial inclusion and allowed for smart regulation that benefits the entire ecosystem.

Peru's approach is completely at odds with Kenya's method. The Peruvian government, mostly through its banking regulatory agency ("SBS"), entered into a regulatory frenzy with the aim of protecting Peruvians from all possible risk, thereby overburdening e-money investors with excessive controls. While it is too late to replicate Kenya's laissez-faire environment in Peru, there remain three key lessons to be learned from Kenya's expertise. If Peru listens to Kenya's success story and acts promptly, the promise of financial inclusion in Peru, and perhaps Latin America, may be fulfilled.

II. LESSON 1: WAIT, STUDY, ACT. THE ISSUE OF OVERREGULATION

The CBK remained silent but aware of e-money providers for over six years. Rather than being a regulatory period, this was an

---

[5] Simone di Castri & Lara Gidvani, The Kenyan Journey to Digital Financial Inclusion, GSM ASS'N (Aug. 1, 2013) http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/07/MMU-Infographic-The-Kenyan-journey-to-digital-financial-inclusion.pdf.

[6] Other e-money providers in Kenya include Zap (Zain), Yu Mobile (Essar Telecom), Iko Pesa (Orange), Tangaza Pesa (Mobile Pay Ltd.), and Airtel Money (Bharti Airtel).

[7] ALLIANCE FOR FIN. INCLUSION, CASE STUDY: ENABLING MOBILE MONEY TRANSFER: THE CENTRAL BANK OF KENYA'S TREATMENT OF M-PESA 1–2 (2010).

analysis period during which the new market developed. Once this development was underway, the CBK regulated in a smart, no-nonsense fashion, tailored to the needs of both Kenyans and providers. On the other hand, way before the first e-money provider launched in the country, Peru went on to regulate extensively.[8] The result has been a long period of adaptation, confusion, and concern for those interested in entering the market.

Kenya's experience teaches Peru that, when dealing with novel markets like e-money, it might be better to wait for it to develop, study how providers operate, and then act with regulation that considers the business' reality, while providing an acceptable level of protection for consumers. After all, without successful providers, there would be no market to regulate.

A. *Kenya's regulatory approach*

Kenya's approach to regulating e-money was to simply not regulate until sufficient information about the business became available; after all, e-money was still in its formative stages, at least in Kenya.[9] The development of this approach runs parallel to the rise of M-PESA, so much so that it was actually Safaricom who first engaged the CBK to talk about an e-money service accessed through mobile phones in June of 2006.[10] The time could not have been more appropriate. Just a few months before, the CBK received a Financial Access Survey that remarked on Kenya's poor financial inclusion forecast, indicating that only one third of Kenyans were formally banking.[11] Coupled with statistics showing that for every Kenyan with access to a bank account, at least two others had access to a mobile phone,[12] Safaricom's proposal created a potential win-win situation: the incumbent Kenyan government would benefit politically by helping the less privileged, Kenyans would benefit by gaining access to financial services previously out of reach and Safaricom would obtain a healthy return on their investment while boosting customer loyalty.

---

[8] *See infra* notes 22–35 and accompanying text.
[9] DI CASTRI & GIDVANI, *supra* note 5, at 1.
[10] ALLIANCE FOR FIN. INCLUSION, *supra* note 7, at 1, 3.
[11] *Id.* at 1–2.
[12] *Id.* at 2.

Once the CBK knew about Safaricom's project, it acted. Instead of locking itself up in a room to conceive painstaking regulation, it used a far wiser tactic of waiting and studying. For almost a year, the CBK engaged M-PESA on several occasions, inquiring about as many details as possible regarding its platform and business case, even asking M-PESA to modify certain aspects of its intended operations model in order to mitigate risks and preparing a risk mitigation program that Safaricom applied to M-PESA's pilot program.[13] The purpose of this investigative effort was not to create a basis upon which a regulatory scheme would be built; instead, the CBK opted to issue a "No Objection Letter," the equivalent of patting Safaricom's shoulder and wishing them good luck with its new e-money business.[14]

M-PESA went on to become an astounding success and the e-money market flourished. Today, there are more than 23 million mobile money users, representing 74% of Kenya's adult population.[15] But throughout this process, Kenya's government did not remain idle. M-PESA, and other providers that came after, were constantly monitored. For instance, in the midst of money laundry allegations, the Minister of Finance urged the CBK to audit M-PESA;[16] also, the CBK was granted express power to monitor all payments systems, including electronic ones, by the National Payments Systems Bill.[17]

The CBK finally became more proactive in 2013 by issuing a draft E-Money Regulation (the "CBK's Regulation").[18] Judging by all the time spent and information gathered since M-PESA's launch, it would not have been preposterous to think that the CBK would come up with not one but several pieces of regulation, each with the level of complexity of a space shuttle navigation manual. Nevertheless, the CBK came up with a simple fifteen-page document, fifteen clauses long, filled with broad mandates a compilation of all the basic precepts gathered throughout the years to conduct healthy e-money operations.

---

[13] Di Castri & Gidvani, *supra* note 5.
[14] *Id.*
[15] *Id.*
[16] ALLIANCE FOR FIN. INCLUSION, *supra* note 7, at 1, 12.
[17] The National Payment System Act, (2011) Cap. 39 § 7 (Kenya).
[18] CENTRAL BANK OF KENYA, http://www.centralbank.go.ke/index.php/public-consultations (last visited Aug. 15, 2013).

Moreover, the CBK opened this draft to comments and questions so e-money providers had a chance to persuade the CBK to cure any undesired deviation from their status quo.[19]

B. *Peru's regulatory approach*

If Kenya's approach was to wait, study, and attack, then Peru's approach was to attack, wait, and study. Peru's President Ollanta Humala won the election on a campaign that promised social inclusion and this promise fitted perfectly with the notion of financial inclusion through e-money.[20] His administration had the opportunity to quickly deliver on this campaign promise, without investing too much effort, by taking advantage of an existing e-money law draft that was presented to Congress prior to President Humala's rise to power.[21] Seizing the opportunity, on January 16, 2013, he was finally able to announce, during a televised national address, that Congress enacted the Law Regulating the Basic Characteristics of Electronic Money as a Financial Inclusion Instrument ("Peru's E-Money Law" or "Law").[22] Peru's E-Money Law is very short—only seven articles long—but it covers most of the basics that would concern a regulator, namely: the definition of e-money,[23] entities that may be authorized to issue e-money,[24] rules for non-bank e-money issuers,[25] limits to transactions,[26] customer protection and funds safety.[27] Soon after its enactment, the law was followed by E-Money Law Regulation ("Regulation"),[28] six

---

[19] CBK's consultation period ended on May 10, 2013.

[20] Fox News Latino, http://latino.foxnews.com/latino/politics/2011/06/06/ollanta-humala-wins-peru-election-over-keiko-fujimori/ (last visited Aug. 15, 2013).

[21] El Analista, http://www.elanalista.com/?q=node/142 (last visited Aug. 17, 2013).

[22] Ley No. 29985, 16 Jan. 2013, Ley que Regula las Características Básicas del Dinero Electrónico Como Instrumento de Inclusión Financiera [Law Regulating the Basic Characteristics of Electronic Money as a Financial Instrument], DIARIO OFICIAL EL PERUANO [E.P.], 17 Jan. 2013 (Peru).

[23] *Id.* at art. 2.

[24] *Id.* at art. 3.

[25] *Id.* at art. 4.

[26] *Id.* at art. 5(b).

[27] *Id.* at art. 6.

[28] Regulation to Law Nº 29985 [E-Money Law Regulation], DIARIO OFICIAL EL PERUANO [E.P.], 14 May. 2013 (Peru).

provisions that focused on defining e-money accounts,[29] e-money issuing,[30] and introducing the concept of correspondent cashiers (in Spanish, cajeros coresponsales), Peru's version of e-money agents.[31]

This was the closest Peru ever came to emulating Kenya. After the Law and the Regulation, Peru went on a regulatory spree. First, the telecommunications governmental agency, OSIPTEL, composed a detailed, 57-article draft resolution to ensure the Law's mandate that all telecom services to e-money issuers be rendered on equal conditions.[32] Then, in June 2013, the SBS put the icing on the cake by issuing two draft regulations: one dealing with e-money issuer's operations ("Regulation on Operations")[33]and one dealing with non-bank e-money issuers ("Regulation on EEDEs");[34] while also modifying an existing regulation to include draft e-money related provisions on correspondent cashiers ("Regulation on Correspondent Cashiers").[35] A grand total of six regulatory enactments were issued before the first official launch of e-money in the country.

C. *What should Peru do?*

It may seem that learning from the lesson to wait, study and act is now impossible for Peru, given its issuance of the Law and the Regulation before the start of any e-money business in the country; however, it can still make a few moves to reach a middle point between its excessive regulation and Kenya's laissez-faire approach

---

[29] *Id.* art. 4.
[30] *Id.* art. 2.
[31] *Id.* art. 6.
[32] Resolución de Consejo Directivo No. 043-2013-CD/OSPITEL de 21 March 2013, DIARIO OFICIAL EL PERUANO [D.O.], April 1, 2013, p. 491957 (Peru).
[33] Reglamento de Operaciones con Dinero Electrónico, Resolución S.B.S. No. 6283-2013 [Regulation on E-Money Operations] Oct. 18, 2013 (Peru) [hereinafter Regulation on Operations].
[34] Reglamento de Las Empresas Emisoras de Dinero Electrónico [Regulation on E-Money Issuing Companies], Resolución S.B.S. No. 6284-2013, Oct. 18, 2013 (Peru) [hereinafter Regulation on EEDEs].
[35] Reglamento de Apetura, Conversión, Traslado o Cierre de Oficinas, Uso de Locales Compartidos, Automáticos y Cajeros Corresponsales [Regulation on Opening, conversion, transferring or closing of offices, the use of shared premises, ATMs and tellers], Resolución S.B.S. No. 6285-2013, October 18, 2013 (Peru) [hereinafter Regulation on Correspondent Cashiers].

that can actually create an optimal e-money environment by affording more predictability than Kenya while enabling a light regulatory ecosystem that would lure investors.

Thus, Peru should put the e-money provisions in the Regulation on Correspondent Cashiers and the entire Regulation on EEDEs on hold, leaving only the Regulation on Operations in force and subject to changes that this article will discuss subsequently. This does not mean that the SBS should throw away all work done on correspondent cashiers and non-bank e-money issuers. Rather, it should keep this work on the backburner to give the market time to develop; then, as it becomes more knowledgeable about the business and Peruvians' needs, the SBS can go back to both drafts and issue piecemeal regulations, addressing particular concerns that may arise and tailoring the drafts to the practices of the market. This would relieve providers from so many requirements in critical areas that are necessary to start operations, such as authorization process for non-bank e-money issuers under the Regulation on EEDEs[36] and the agent authorization process under the Regulation on Correspondent Cashiers.[37]

While it is important for the SBS to ensure non-bank e-money issuers comply with minimal operating requirements, at this point, there is no need to have such a sophisticated authorization process, especially because the SBS does not have a clear idea about what is actually required to operate an e-money business in Peru. The SBS should simply mimic the CBK in its treatment of M-PESA: engage non-bank e-money issuers, study their processes, make sure the issuers comply with the minimums set by law, and authorize them.[38]

The same premises apply to the issue of agent authorization, but rather than implementing a less rigid authorization process, the SBS should simply do away with it altogether. The Regulation already

---

[36] Regulation on EEDEs, *supra* note 34, at Second Final Disposition (enlisting a total of twenty-one requirements to receive authorization from the SBS to operate as non-bank e-money issuer under the Second Final Disposition of the Regulation on EEDEs, most of them similar or equal to those financial institutions must comply with in order to operate as banks).

[37] Regulation on Correspondent Cashiers, *supra* note 35, at Annexes C and D (providing a list of 16 requirements that e-money issuers must comply with in order to receive authorization to operate with agents).

[38] The Second Supplementary Disposition of the E-Money Law already empowers the SBS to authorize non-bank e-money issuers to operate.

states that e-money issuers are liable for any violation of the law caused by its agents.[39] Moreover, the SBS has the authority to conduct inspections of these agents and ensure compliance.[40] This should provide enough incentive for issuers to self-regulate.

III. LESSON 2: KNOW YOUR CUSTOMER. THE ISSUE OF CUSTOMER REGISTRATION AND TRANSACTION LIMITS

Just as entrepreneurs must know the characteristics and needs of their customers to thrive, regulators must be mindful of the nuances behind the subjects who will be targeted by the precepts emanating from their rule-making power. But when it comes to e-money services, regulators must be mindful of an additional kind of customer knowledge, this time involving customary financial due diligence principles that they impose on financial institutions to have them gather identification information about their customers (commonly referred to as Know your Customer or "KYC" principles)[41] and monitor transactional behavior to identify potential money laundry operations (commonly referred to as Anti Money Laundry or "AML" principles).[42] The CBK masterfully dealt with these two faces of customer knowledge by recognizing that uncontrolled user registration and no transaction limits would not pass muster under even the most lenient KYC and AML principles, and by understanding that financial inclusion would be impossible unless providers could massively enroll Kenyans into e-money services and allow them to freely dispose off their money.[43] The CBK's approach consisted of

---

[39] E-Money Law Regulation, *supra* note 28, at art. 6.

[40] *Id.*

[41] *See, e.g.*, 31 U.S.C. 5318(I)(2) (2002) (laying down some mandatory KYC principles to be adopted by the United State's Secretary of Treasury when regulating on the area of customer identification).

[42] *See, e.g.*, 31 USC 5311 (2002) (enlisting certain AML reports applicable to United State's financial institutions).

[43] E-money service providers require large amounts of transactions in order to be profitable. This is due to several factors, the most important being that the fees are based on transaction amounts that are generally low. Fees charged to e-money customers are usually expressed in cents of a dollar, leaving very small profit margins to providers. Another important factor is the fees e-money providers pay to for services they need to reach customers (e.g. telecommunications companies, transaction

giving providers just enough freedom to conduct registrations in a way that would allow for massification, while ensuring that each customer could be properly identified.[44] The CBK also imposed no limits to transaction amounts while relying on providers' self-regulation and reserving the power to investigate potential fraud concerns.[45]

Contrary to Kenya's experience, the SBS did not give itself sufficient time to get to know its "customers." By imposing unnecessarily rigid KYC and AML requirements for customer registration and transaction limits without being sensitive to the needs of providers and the status quo of the market, the SBS is potentially shutting the door for Peruvians' to join e-money services, thereby hampering financial inclusion.

A. *Kenya's customer registration and transaction limits approach*

The CBK's strategy of overseeing without over-regulating customer registration paid large dividends once the e-money business became a legitimate success. This freedom allowed providers to enroll clients without being constrained by rules that could burden their internal registration procedure and annoy customers. A first impression of this approach may denote neglect or overindulgence towards big private providers, but as it turns out, the CBK did exercise control over such providers. The difference being that the CBK's control over providers did not manifest itself in the conventional way, i.e. through clear-cut regulatory mandates.

The CBK opted for a 'knowledge and oversight' strategy. Prior to M-PESAS's launch, the CBK worked together with Safaricom and asked them to explain how they would conduct the client registration process and how they planned to address all potential KYC concerns; by doing this, the CBK gathered knowledge.[46] After its analysis, the

---

processing companies and banks), *see infra* note 51 (showing that an e-money provider's income per transaction is very small).

[44] *See* Simone di Castri, Tiered Risk-Based KYC: M-Shwari Successful Due Diligence, GSMA (Jul. 8, 2013), http://www.gsma.com/mobilefordevelopment/tiered-risk-based-kyc-m-shwari-successful-customer-due-diligence.

[45] ALLIANCE FOR FIN. INCLUSION, *supra* note 7, at 1, 6.

[46] Ignacio Mas & Daniel Radcliffe, Mobile Payments Go Viral: M-PESA in Kenya, 32 CAPCO INST. J. FIN. TRANSFORM. 169, 172 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593388.

CBK simply authorized M-PESA to operate, while it retained the power to oversee and ensure Safaricom's procedures were being followed as agreed.[47]

M-PESA answered CBK's trust by self-regulating. It created client registration rules that allowed for easy but controlled registration. Any Kenyan could open an M-PESA account by simply presenting to the agent his Safaricom phone number plus any official identification document—a Kenyan National ID, Passport, Military ID, Diplomatic ID or Alien ID.[48] From these official documents M-PESA could obtain all basic information required to identify a customer—first and last name, and date of birth. When the CBK finally went on to actively regulate by issuing the CBK Regulation, it maintained the status quo by not including any rules pertaining to customer registration.

The CBK applied the same passive regulatory strategy regarding transaction limits, at least initially. M-PESA went on to impose limits that have been updated regularly.[49] For instance, the maximum account balance at any time is KES100,000 (USD 1,144.42 at the exchange rate of 87,38 KES per USD);[50] the maximum single-transaction amount is KES70,000 (USD 801.10 at the exchange rate of 87,38 KES per USD)[51] and the maximum daily transaction limit is KES140,000 (USD 1,602.20 at the exchange rate of 87,38 KES per USD).[52]

Recently, the CBK has been more active it is control of e-money providers' transaction limits. For instance, Clause 7.1 of the CBK Regulation establishes a single-transaction limit of KES 75,000 (USD 858.34 at the exchange rate of KES 87,38 per USD) and a maximum monthly transaction limit of KES 1,000,000 (USD 11,444.45 at the exchange rate of KES 87,38 per USD);[53] furthermore, on April 15, 2013,

[47] di Castri & Gidvani, *supra* note 5.
[48] How to Register for M-Pesa, SAFARICOM, http://www.safaricom.co.ke/personal/m-pesa/how-to-register (last visited Aug. 15, 2013).
[49] M-Pesa Tariffs, SAFARICOM, http://www.safaricom.co.ke/personal/m-pesa/m-pesa-services-tariffs/tariffs (last visited Aug. 15, 2013).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] E-Money Regulation, CENTRAL BANK OF KENYA, http://www.centralbank.go.ke/index.php/public-consultations (last visited Aug. 15, 2013) (at clause 7.1).

the Kenyan press announced that the CBK would propose regulation that would allow it to investigate daily transactions exceeding KES 100,000.[54]

B. Peru's customer registration and transaction limits approach

Without consulting aspiring bank or non-bank e-money issuers, both the Law and the Regulation on Operations specifically targeted customer registration procedures and transaction limits.

Regarding customer registration, e-money issuers must comply with these KYC rules: under article 7 of the Regulation on Operations, to open simplified e-money accounts,[55] e-money issuers must obtain from customers their full name, as contemplated in their National Identification Number, Foreign Citizen's ID or Passport.[56] Issuers must also check the accuracy of this information against Peru's National Identification and Legal Status Registry Database (known in Peru as RENIEC) or the Immigration Central Registry Database of the General Office of Migration and Naturalization ("ICRD").[57] Article 7 also provides that whenever e-money services are rendered through mobile phones, issuers must also obtain the customer's mobile phone number.[58]

Transaction limits are addressed in both the Law and the Regulation on Operations. The Law only imposes one limit, specifically, Article 5 imposes a per transaction limit of one Tax Unit,[59] the equivalent today of 3,700 Peruvian Soles (USD 1,322.38 at the exchange

---

[54] Geoffrey Irungu, CBK Issues Rules to Curb Mobile Money Laundering, BUSINESS DAILY AFRICA (Apr. 15, 2013), http://www.businessdailyafrica.com/CBK+issues+rules+to+curb+mobile+money+laundering/-/539552/1749304/-/69edoj/-/index.html.

[55] *See* Regulation on Operations, supra note 33, art. 5–6 (creating two kinds of e-money accounts: simplified and ordinary. Simplified accounts require less customer information to be opened but are subject to the amount limits explained in Lesson II B. Ordinary accounts require more customer information but are only subject to the limitation in Article 5 of the E-Money Law).

[56] *Id.* at art. 7.

[57] *Id.*

[58] *Id.*

[59] Ley No. 29985 [Peru E-money Law], *supra* note 22, art. 5.

rate of USD 2.79 per Sol).[60] The Regulation on Operations expanded on the Law's sole mandate, imposing limits more complex than those M-PESA placed on itself. Article 5, subsections (b), (c), (d) and (e) lays them out: no transaction can surpass 1,000 Peruvian Soles (USD 357.4 at the exchange rate of USD 2.79 per Sol);[61] the consolidated balance on e-money accounts held at the same issuer cannot surpass 2,000 Peruvian Soles (USD 714.79 at the exchange rate of USD 2.79 per Sol);[62] cash deposits into an e-money account held at the same issuer cannot surpass 2,000 Peruvian Soles per month;[63] and overall transactions from an e-money account held at the same issuer cannot surpass 4,000 Peruvian Soles per month (USD 1,429.60 at the exchange rate of USD 2.79 per Sol).[64]

C. *What should Peru do?*

With such detailed regulation, access to e-money services is severely restricted, negatively affecting financial inclusion. It seems the country is overstating the KYC and AML risks involved in the e-money business and forgetting that the amounts customers would be moving around are very small. As the Kenyan experience indicates, these amounts are unlikely to represent a big chunk of Peru's banking system's float.[65] Fortunately, the regulator can provide a huge boost to financial inclusion without the need to emulate Kenya's self-regulation strategy. As suggested later in this article, a couple of minor tweaks to articles 5 and 7 of the Regulation on Operations would surely put to rest all concerns regarding customer registration and transaction limits.

---

[60] Known in Peru as "UITs," Tax Units have a government-assigned value that is updated periodically to adjust it to inflation and is mostly used to determine the price of certain government services.

[61] Regulation on Operations, *supra* note 33, art. 5(b).

[62] *Id.* art. 5(c).

[63] *Id.* art. 5(d).

[64] *Id.* art. 5(e).

[65] Claire Alexandre, 10 Things you Though you Knew About M-PESA, CGAP (November 22, 2010), http://www.cgap.org/blog/10-things-you-thought-you-knew-about-m-pesa; see Simone di Castri, Mobile Money: Enabling Regulatory Solutions, GSM ASS'N (Feb. 2013), at 9, (Explaining in detail why KYC and AML risks involved with e-money are much lower that with regular banking), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302726.

Peru has a great opportunity to get ahead of Kenya and provide remote customer registration, that is, enrollment without having to pay a visit to an e-money service provider's authorized agent. To achieve this, all Peru needs to do is eliminate the requirement of obtaining a customer's full name from Article 7 of the Regulation on Operations and allow customer registration by simply obtaining the customer's DNI. The reason is merely technological: e-money issuers are likely to reach their customers through mobile phones. In order to render financial services through these devices, the issuer's transaction processing platform must communicate with the telecom platform and the phone. The most effective communication tool to achieve this is the USSD technology because of its capacity to effectively operate even in the simplest of mobiles devices by communicating through short messages in real time.[66] E-money service providers target mostly low-income citizens that lack purchasing capacity for a smartphone; therefore, being able to reach customers in any kind of device, regardless of its sophistication, is an absolute must.

USSD can be used to conduct the entire registration process remotely, but it has its limitations. As it is generally configured to operate through numerical codes that prompt a response from the telecom company, redesigning the system to be able to handle a long alphabetic message containing a person's full name may require a significant investment that telecom companies may not be willing to make unless their fess are increased accordingly. This is an expense that e-money issuers, especially non-bank ones, may not be able to afford without passing on the costs to consumers. Given that the DNI is just a number, it would fit perfectly into any telecom's existing USSD gateway.

But how does opening an e-money account by just providing the customer's DNI number address Peru's KYC concerns? The answer is RENIEC. The Regulation on Operations already requires a crosscheck of customer information against this database. It contains information on the vast majority of Peruvians, including their full name and it works by being linked to each person's DNI. Accordingly, e-money issuers can enroll a customer with just their DNI number and

[66] Introduction, MOBICENTS, http://www.mobicents.org/incubator/ussd/intro.html (last visited Aug. 15, 2013).

then they can obtain more specific identification information by running a search on RENIEC, including the customer's full name.[67] It does not make sense to increase e-money services costs on Peruvians by forcing telecoms to modify their USSD gateways when the solution is already in Article 7 of the Regulation on Operations,[68] all that is needed is a few pinpoint subtractions to its wording.

Appropriate transaction limits on e-money accounts are important because they reduce money laundry risks and enable customer registration through simpler processes than those existing for regular bank accounts; however, Peru's limits on transactions go too far. Here again, its Kenyan counterpart can provide useful guidance and not specifically on how to approach regulation. Yes, Peru's regulatory approach is more complex that Kenya's, but that is not were the problem is. The problem is in the insufficiency of the e-money account total balance cap that the Regulation on Operations imposes, severely affecting e-money account's usefulness.

Peru's limit on e-money account's total balance at any time is USD 357.4;[69] M-PESA's self-imposed limit triples that amount, USD 1,144.42.[70] It is hard to understand the rationale behind this difference especially considering that Peru's per capita GDP is much higher than Kenya's (USD 6,573 for Peru vs. USD 862 for Kenya).[71] Also, the Law imposed a per-transaction limit of USD 1,322.38[72] while the Regulation on Operations severely reduced that limit to USD 357.4.[73] These limits derive from the presumption that e-money customers are low income users. While that assumption may be true for the majority, e-money services would be open to all Peruvians, even those with higher income. Also, once customers become well-acquainted with the service

[67] This does not solve the problem for foreign citizens but the Regulation on Operations does not allow them to open simplified e-money accounts, instead, foreign citizens can only hold ordinary e-money accounts.
[68] Regulation on Operations, supra note 33, art. 6.
[69] *Id.* art. 5(b).
[70] Safaricom, http://www.safaricom.co.ke/personal/m-pesa/m-pesa-services-tariffs/tariffs (last visited Aug. 15, 2013).
[71] The World Bank, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last visited Aug. 15, 2013).
[72] Law Regulating the Basic Characteristics of Electronic Money as a Financial Instrument, *supra* note 22, art. 5(b).
[73] Regulation on Operations, *supra* note 33, at art. 5(b).

and their trust grows, it is only natural that they would want to use their e-money accounts to conduct more and larger transactions, especially once international remittances are available.[74] It is better not to impose such stiff limits at the outset and instead create broader, ceiling-like limitations, allowing providers to move up and down as the business demands. The Law's per transaction limit can be used as a starting point to set the remaining ceilings.

IV. LESSON 3: PROTECTION WITHOUT SUFFOCATION. THE ISSUE OF CUSTOMER MONEY PROTECTION

It is not difficult to understand why a government would be apprehensive of a project involving taking money away from people in order to virtually store it in electronic accounts not necessarily controlled by banking institutions. Any fraud scandal involving loss of funds belonging, in most part, to the least affluent sector of the population could spell political disaster for any administration. But there is a fine line between the desire to avoid political Armageddon and suffocating e-money initiatives. The CBK's customer fund protection strategy constitutes an excellent example of how to properly walk that line. Once again, its strategy consisted in imposing customer fund protection measures only after e-money providers had been fully operative, while maintaining passive oversight of them.

Peru is already putting too much tension on that fine line by adopting a regulatory approach towards protecting e-money customer's funds that imposes rigid customer fund protection rules that make it almost impossible for providers to find cost-effective alternatives that would be just as protective.

A. *Kenya's customer funds protection approach*

Key to any e-money operation is ensuring that customers' money is adequately protected. E-money is merely a virtual representation of actual cash and this cash needs to be stored in safe place. The safe place of choice is, predictably, a financial institution. Keeping customers' money in one of these institutions enables providers to tackle one of the main obstacles that this new business faces: customer

---

[74] With the ever-growing disparity between the Peruvian Sol and the United States dollar, international remittances can be severely limited.

trust. This is because financial institutions count with regulatory protections ensuring customer money is safe, at least to a certain amount, in case they go belly-up.[75]

Putting customer money in a bank does not end the discussion. The conundrum is to find a financial product that would keep this money safe while at the same time allow providers to thrive. This is an especially sensitive issue in the case of non-bank e-money issuers like M-PESA, due to the fact that they are unlikely to have the financial strength their bank counterparts have. Therefore, the regulator faces complex questions: should the money be kept in one or more banks? Should it be kept in a savings or checking account? Should it be held in a trust account instead? Are customer funds deposits? If so, are they entitled to interests?

Once again, CBK tackled all these issues by staying true to its strategy of exercising control through oversight and self-regulation. As a result of CBK's and Safaricom's joint efforts prior to launch, M-PESA kept customer funds in a trust account held at a financial institution, constituting Kenya's approach to fund protection until the CBK's Draft Regulation came along.[76] The way this regulation deals with the issue evidences how Kenya learned from a now well-developed market to improve its stand. Instead of keeping the trust account requirement, Clause 8 only requires e-money issuers to keep customer funds in a bank approved by the CBK.[77] Therefore, if the regulation passes into law, its Clause 8.1(a) would allow an e-money issuer to maintain the money at a checking or savings account, as long as the e-money balance is held separate from balances relating other operations of the issuer.[78]

While the CBK has not officially explained the rationale behind this change, it is likely that the reason was to benefit both non-bank e-money issuers and consumers. Under the trust account model, these issuers had to pay the trustee bank its services fee, entailing additional costs on issuers that negatively affected its pricing. With this new approach, issuers are not only exempted from paying trustee fees but

[75] The Banking Act, (2010) Cap. 488 § 36 (Kenya).
[76] ALLIANCE FOR FIN. INCLUSION, *supra* note 7, at 1, 7.
[77] CENTRAL BANK OF KENYA, http://www.centralbank.go.ke/index.php/public-consultations (last visited Aug. 15, 2013) at clause 8.
[78] *Id.* clause 8.1(a).

also, under Clause 8.4, issuers are now entitled to keep for themselves the interest yielded by a savings account.[79]

B. *Peru's customer funds protection approach*

Peru specifically addresses the issue of customer funds protection in Articles 15 to 17 of the Regulation on Operations and, as expected, its approach is far more detailed than Kenya's strategy.[80] The following are four aspects stand out: first, there is a rigid mandate for all e-money issuers—banks and non-banks alike—to form a trust account and hold within it all cash derived from e-money issuances, this means there are no alternatives, no possibility to hold funds in checking or savings accounts;[81] second, it defines who must be the trust's settlor (the e-money issuer) and who must be the trustee (the bank where the trust account is formed);[82] third, e-money issuers are allowed to invest the funds in the trust account but only to a certain extent;[83] and fourth, perhaps its most controversial aspect, all e-money issuers must set up this trust account at a financial institution other that themselves. This is likely to be problematic for banks because they are entities allowed under Peruvian law to hold trust accounts and serve as trustees[84] but, if they decide to enter the e-money business, Article 15 would force them to open their trust account at one of their competitors.[85]

C. *What should Peru do?*

Peru's thirst for protection is likely to result in increased costs for providers and higher prices for customers. This is because holding a trust account will carry with it the additional expense of paying for trustee's fees and obtaining deposit insurance entails purchasing a

[79] *Id.* clause 8.4.
[80] Regulation on Operations, *supra* note 33, art. 15–17.
[81] *Id.* art. 15.
[82] *Id.*
[83] *Id.* art. 17.
[84] Ley No. 26702, art. 221, 16 Jan. 2013, Ley General del Sistema Financiero y del Sistema de Seguros y Orgánica de la Superintendencia de Banca, Seguros, DIARIO OFICIAL EL PERUANO [E.P.], 17 Jan. 2013 (Peru).[Financial System Law] art. 221 (Peru).
[85] Regulation on Operations, *supra* note 33, art. 15.

policy; two costs that providers surely will pass on to consumers. Peru can easily dodge this bullet and still provide enough protection to consumers by completely redrafting Article 15.

Article 15 must be completely overhauled for two reasons. First, it does not provide for alternatives to trust accounts. Trust accounts are neither the only nor the best device to protect customer funds. Not only do they result in increased prices to consumers, as explained in the previous paragraph, but also, the way Article 15 defines the roles in this trust account makes its existence futile. The point in having e-money funds deposited in a trust account is to have a trustee manage the funds under the instructions of consumers, thus taking cash management away from providers; however, under Article 15, providers are the trust account's mandatory settlors.[86] Consequently, Peruvian consumers are not enjoying any enhanced protection by having funds deposited in a trust account. Consumers are just as effectively served by allowing providers to deposit the funds in any regular bank account. Kenya certainly learned this lesson as evidenced in Clause 8.1(a) of CBK's Draft Regulation.[87]

Second, Article 15 overlooks the difference between bank and non-bank e-money providers by forcing all e-money issuers to open a trust account. If bank e-money issuers as opposed to non-bank issuers are already subject to banking regulations that protect their customer's funds in case of insolvency,[88] what is the purpose of forcing bank e-money issuers to open a trust account? Moreover, if SBS's interpretation of Article 15 explained in III B is accurate, then bank e-money issuers would be forced to open this trust account at a financial institution other than itself. What increased protection does this provide? What if the strongest bank in Peru decides to become an e-money provider? Does this mean that customers would be more protected by forcing that bank to open a trust account in a less secure option? What if that option is a direct e-money competitor? This would make sense if all issuers were forced to deposit funds in at least a couple trust accounts, in an effort to avoid keeping all eggs in one basket, but that is not what the Regulation on Operations provides.

---

86 *Id.*

87 CENTRAL BANK OF KENYA, http://www.centralbank.go.ke/index.php/public-consultations (last visited Aug. 15, 2013) at clause 8.1(a).

88 *Financial System Law*, *supra* note 87, art. 144.

Moreover, with Article 15, the SBS did not consider that processing e-money transactions requires reconciliation between the electronic account and the account where the actual funds are held (to ensure all e-money issued is backed by real money), if funds are at a bank different from that processing transactions, then a new contractual relationship must exist between these two parties, entailing additional costs for bank issuers and, ultimately, their customers.

This mess can be cleared with two simple amendments. First, regulators should alter Article 15 to require that all non-bank e-money issuers present a customer's e-money funds security proposal as a prerequisite to obtaining SBS' approval as an e-money issuer. This way, the SBS can leave the door open for different viewpoints on customer fund security that may actually lead to enhanced protection while allowing non-bank e-money issuers to operate in a cost-effective way. Second, bank e-money issuers must be categorized separately and granted freedom to deposit e-money funds in any way that they see fit, subject to two limitations: the money must be placed in a financial institution (including itself) and that the bank e-money issuer must remain subject to the investment limitations that Article 17 already contemplates.[89]

V. CONCLUSION

Kenya recognized its financial inclusion issue and acted properly when a potential solution presented itself.. It was wise to acknowledge that e-money initiatives would not survive without a thriving market. While Kenya could not, by itself, ensure that such market would rise and succeed, it was careful to ensure that failure would not be through its own doing. With this in mind, Kenya stepped out of the way of a business it knew little about, while it kept a vigilant eye on providers to help make sure Kenyan's received what was expected.

Peru's premises are exactly the same. Its financial inclusion numbers are troubling, it has several e-money providers offering solutions to the problem but it has very limited knowledge about how to make this financial inclusion project gain national prominence. If all the ingredients are there and M-PESA's recipe for success is open for

[89] Regulation on Operations, *supra* note 33, art. 17.

the world to see, why is Peru's regulatory reaction so radically different from Kenya's? Although logic does not provide an answer for Peru's deviation, politics may likely be responsible. For president Humala, being credited as the first leader to successfully tackle the problem of financial exclusion in the country is an accomplishment that promises to pay sizeable political rewards. Judging by its behavior, it seems his administration believes that the most effective way to attain this goal is by extensively regulating; however, as the Kenyan experience suggests, president Humala's political interest could be best served if his administration relaxes its regulatory stands, focusing on creating an environment proper for e-money providers to prosper.

Despite having extensive regulation already in force, Peru can still create this environment by, first, changing its overall strategy and follow Kenya's "laissez-faire" approach, relying on provider's self-regulation, guided by market experience. This should help establishing an e-money market from which all parties involved can benefit. Second, easing customer registration requirements and transaction limits to boost e-money services' penetration; financial inclusion is just a chimera unless e-money services reach as many Peruvians as possible. Lastly, freeing providers from fund protection measures that would only suffocate them while increasing customer prices.

In sum, as Kenya shows, e-money as a financial inclusion tool can go a long way by simply being less active, focusing on passive oversight and inviting providers to self-regulate. Only time will tell if Peru is willing to learn from Kenya's recent history; in the meantime, millions of Peruvians have no other option than to keep transacting in cash, excluded from the financial world.