RESOLUTION POWERS OVER E-MONEY PROVIDERS

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I INTRODUCTION

This article considers how policymakers might provide an appropriate regulator with powers over providers of electronic money or 'e-money' in the event those providers experience financial distress. Where a bank begins to experience financial distress, there is generally statutory provision for 'resolution powers'[1] which enable a responsible authority ('the resolution authority') to intervene to facilitate the orderly winding down of the bank, thereby mitigating losses and averting more severe systemic disruption.[2] However, these resolution powers generally apply only to institutions that conduct 'banking business' (defined in terms of accepting deposits and financial intermediation) and do not extend to non-bank e-money providers, even though the failure of a large provider could cause major disruption to the economies of a few nations.[3]

In recent years, e-money has experienced substantial growth in a number of countries, gaining particular importance for some nations that have historically relied heavily on costly cash transfers and suffered from low levels of financial inclusion.[4] In simple terms, e-money is monetary value stored electronically

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1 European Commission, 'EU Bank Recovery and Resolution Directive (BRRD): Frequently Asked Questions' (Memo No 14/297, 15 April 2014) 1 defines 'resolution' as 'the restructuring of a bank by a resolution authority, through the use of resolution tools, to ensure the continuity of its critical functions, preservation of financial stability and restoration of the viability of all or part of that institution, while the remaining parts are put into normal insolvency proceedings'. See further Part VI below.

2 See Janis Sarra, 'Bank Groups and Financial Conglomerates, Retooling Resolution Regimes' (2014) 30 *Law in Context* 7; Financial Stability Board ('FSB'), 'Second Thematic Review on Resolution Regimes' (Peer Review Report, 18 March 2016) 11, annex B.

3 As explained in Part V below. See also Juan Carlos Izaguirre et al, 'Deposit Insurance and Digital Financial Inclusion' (Brief, CGAP, October 2016) 4.

4 See Claudia McKay, 'New Data Finds Mobile Money "On the Cusp" in Rwanda and Ghana' on *CGAP* (15 December 2015) <http://www.cgap.org/blog/new-data-finds-mobile-money-cusp-rwanda-and-ghana>; Reserve Bank of Fiji, 'Trust Deed to Provide Added Assurance for Mobile Money' (Press

which can be used to make payments with multiple suppliers and redeemed for cash.[5] Well-known examples include the Octopus card in Hong Kong, PayPal balances, prepaid cards offered by Visa and Mastercard, and M-PESA in Kenya.

While e-money may be issued by banks or non-banks, this article focuses on issuers that do not conduct a 'banking business' or act as a financial intermediary.[6] We refer to these entities as 'Providers', which include telecommunications companies, mobile network operators, internet service providers and transport companies.[7] Interestingly, the growth of e-money has often been driven by these Providers, which may have competitive advantages in the form of existing customer bases, network economies of scale, economies of scope, and expertise in fields other than financial services, enabling innovations in e-money which would be unlikely to emanate from traditional financial institutions.[8]

Many countries have passed specific e-money regulations to improve the security of e-money services, and particularly to protect the e-money 'float'.[9] These regulations assist in guarding against Provider illiquidity or insolvency and operational risks, as well as protecting the e-money float if a Provider does become insolvent.[10] But what is the position when a Provider is experiencing difficulties short of insolvency? Is a regulator constrained to stand by while the Provider flounders and customers move en masse to redeem their e-money? What can be done in the face of the imminent demise of a Provider which supplies a pervasive payment method, the loss of which would have economy-wide effects?

Where a bank begins to experience financial distress, statutory resolution powers may include the power for the responsible authority – often the main banking supervisor – to sell assets and liabilities to a viable third party; transfer the systemically significant functions or viable operations of the firm to a temporary bridge entity that can continue these operations; and terminate burdensome contracts of the firm, subject to conditions and compensation.[11]

Release, 21/2014, 17 July 2014). Cf Kevin P Donovan, 'Mobile Money, More Freedom? The Impact of M-PESA's Network Power on Development as Freedom' (2012) 6 *International Journal of Communication* 2647.

5 See Ben Fung, Miguel Molico and Gerald Stuber, 'Electronic Money and Payments: Recent Developments and Issues' (Discussion Paper No 2014-2, Bank of Canada, April 2014) 3–4. We provide a more detailed definition of 'e-money' in Part III below.

6 That is, they do not take deposits from the public and use those deposits to make loans. See Committee on Payments and Market Infrastructures ('CPMI') and Bank for International Settlements ('BIS'), 'Non-banks in Retail Payments' (Report, September 2014) 4, 27.

7 Ibid 15; see CPMI and BIS, 'Payment Aspects of Financial Inclusion' (Consultative Report, September 2015).

8 See Michael Tarazi and Paul Breloff, 'Nonbank E-Money Issuers: Regulatory Approaches to Protecting Customer Funds' (Focus Note No 63, CGAP, July 2010) 1; CPMI and BIS, 'Non-banks in Retail Payments', above n 6, 15. See also Ignacio Mas and Jim Rosenberg, 'The Role of Mobile Operators in Expanding Access to Finance' (Brief, CGAP, May 2009) 1.

9 See the definition of the 'float' in Part III below and an outline of e-money regulations in various jurisdictions in Part IV below. See also CPMI and BIS, 'Non-banks in Retail Payments', above n 6, 33.

10 See Part IV below. See also Jonathan Greenacre and Ross P Buckley, 'Using Trusts to Protect Mobile Money Customers' [2014] (July) *Singapore Journal of Legal Studies* 59.

11 See FSB, 'Second Thematic Review on Resolution Regimes', above n 2. See also Part V below.

These powers permit the resolution authority to avert more serious systemic disruption, but do not generally extend to Providers.

To be sure, e-money services currently pose significantly less systemic risk than banking and other financial services, given that, even where they are widely used, they account for a very small percentage of the total value of funds in accounts and electronic payments in a country.[12] Nonetheless, the failure of a large Provider could cause major disruption to a nation's economy – including financial losses and the disruption of trade and government payments – as well as posing a reputational risk to the relevant regulator,[13] and potentially undermining consumer confidence in e-money services and electronic payment instruments, and possibly in the financial system more generally.[14]

This article considers how policymakers might provide a relevant regulator with resolution powers over Providers to respond to these risks. We propose that this can be achieved by legislative amendment or, where there are obstacles to such amendment, by non-legislative means, either by the imposition of conditions on the grant of an e-money licence or (to more limited effect) by the appointment of the regulator or its nominee as a 'protector' under the e-money trust where that instrument is used.

Given that our proposal is intended to be applicable across various jurisdictions, we present high-level policy options rather than suggesting any specific drafting or statutory amendments. Any legislative response would necessarily take into account the context of the particular jurisdiction. To the extent that our proposal makes recommendations in respect of trust-based solutions, it is also generally limited to jurisdictions with a common law tradition and established trust law. We do note that many countries with a non-common law tradition also have laws on trust arrangements, which can achieve similar outcomes while operating differently to common law trusts.[15] Our proposals may also be relevant in these jurisdictions, depending on the terms of the particular trust law.

This article proceeds as follows. Part II explains the significance of e-money and Providers, especially in the context of financial inclusion objectives for developing countries. Part III defines 'e-money' in more detail and explains the process by which e-money is issued, used and redeemed, and risks in the issuance of e-money. Part IV outlines the features of e-money regulations passed in a number of jurisdictions to promote the security of these services, as well as the general absence of regulatory measures to address the financial distress of a Provider. Part V explains legislation in various jurisdictions which provide resolution authorities with resolution powers in respect of banks and financial institutions in both developed and developing countries. Part VI proposes a legislative approach to providing resolution powers in respect of Providers, by

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12 See Part VI below.

13 Fung, Molico and Stuber, above n 5, 2, 15.

14 See Directorate-General for Economic and Financial Affairs, European Commission, 'Non-bank Financial Institutions: Assessment of Their Impact on the Stability of the Financial System' (Economic Paper No 472, November 2012) 1, 124, 188–9.

15 See Maurizio Lupoi, *Trusts: A Comparative Study* (Cambridge University Press, 2000) 4, 6–7.

the amendment of existing resolution powers legislation or by the amendment of specific e-money regulation. Recognising the impediments to legislative reform in many countries, Part VII puts forward non-legislative approaches, including the imposition of conditions on the grant of e-money licences and the appointment of the resolution authority or its nominee as a 'protector' under the e-money trust, although we consider the latter to be less desirable due to the limited powers it provides.

II THE SIGNIFICANCE OF E-MONEY AND PROVIDERS

In the last two decades, e-money has experienced tremendous growth in a number of markets, particularly in some countries with cash-intensive economies in East Asia, Africa and Europe.[16] By 2015, the Global System for Mobile Communications ('GSMA') reported that e-money was available in 93 countries, with 134 million active e-money accounts and issuers processing an average of 33 million transactions per day.[17]

While e-money is issued by both banks and Providers, Providers often have the advantage of a substantial existing customer base and networks, providing a large number of potential users of, and channels for marketing, e-money.[18] The offer of e-money as an additional service can increase the attractiveness of the Provider's core services, while the Provider's expertise in the provision of those services may allow it to find new markets and to innovate in ways banks have not.[19]

The increasing availability of e-money has been especially important in improving access to financial services in some developing countries,[20] where people are more likely to have a mobile phone than a bank account.[21] The GSMA reported that in 19 markets there were more e-money accounts than bank accounts.[22] In addition to the lift in financial inclusion provided by these e-money accounts, in the words of the BIS, 'some of these products may help individuals in getting acquainted with more sophisticated financial products, thus potentially contributing to financial inclusion'.[23] Governments have also encouraged the growth of e-money as an efficient alternative to cash (especially where there are

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16 Fung, Molico and Stuber, above n 5, 4–5.

17 GSMA, 'State of the Industry Report: Mobile Money' (Report, 2015) 6–7.

18 CPMI and BIS, 'Non-banks in Retail Payments', above n 6, 15.

19 Ibid 15, 19–20.

20 See CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 12, noting that 'properly regulated e-money payment services through mobile phones seem to be especially well suited for rural and isolated areas, where providing physical points of access to payment services can be expensive relative to the potential revenue streams'. See also GSMA, 'State of the Industry Report: Mobile Money', above n 17; Mas and Rosenberg, above n 8.

21 GSMA, 'State of the Industry Report: Mobile Money', above n 17, 14. Cf the situation in the EU, where '[c]ompared with other electronic payments, the relative importance of e-money purchase transactions in the euro area is limited, with a 2.62% share in 2013': CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 14.

22 GSMA, 'State of the Industry Report: Mobile Money', above n 17, 7.

23 CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 14.

substantial costs and risks in the transport and holding of cash), as a measure to reduce levels of corruption in government to person payments, and as a source of competition for more traditional electronic retail payment instruments.[24]

The combination of these opportunities to improve financial inclusion and the competitive advantages offered by Providers explain the concern of governments to ensure that regulation of this activity promotes consumer confidence, the security of the service, and broader financial stability, without unnecessarily stifling rivalry and innovation.[25]

III E-MONEY: DEFINITION, PROCESS AND RISKS

E-money may be defined as electronically stored[26] monetary value represented by a claim on the issuer,[27] which is issued on receipt of funds for the purpose of making payment transactions and which is accepted as a means of payment by persons other than the issuer.[28] Important features of this definition are that e-money is monetary value (and not, for example, a means of accessing funds in a credit or savings account with a bank), that the value can be used to pay for goods or services from suppliers other than the issuer (as opposed to mobile airtime or transport credit which can only be used on one network, for example), and that the value can be redeemed for cash.

The mechanics of e-money issuance by an issuer are as follows. Customers transfer funds or pay cash to the issuer (sometimes via an agent). The corresponding value in e-money is stored on a card, mobile phone, hard drive or other electronic device. The stored value may be used to purchase goods and services, pay bills and transfer value to others, depending on the scope of the product. Some governments have also adopted the policy of making payments to citizens in e-money, partly to expand and encourage use of these services, and partly to reduce the opportunities that abound for 'leakage' of government-to-

24 See, eg, The National Team for the Acceleration of Poverty Reduction, *Government Launches Family Welfare Deposit, KIP and KIS Programmes in Stages* (4 November 2014) <http://www.tnp2k.go.id/en/artikel/government-launches-family-welfare-deposit-kip82038203-and-kis-programmes-in-stages/>. Regarding e-money as a source of competition, see CPMI and BIS, 'Non-banks in Retail Payments', above n 6, 31.

25 See Fung, Molico and Stuber, above n 5, 20–1; Ruth Halpin and Roksana Moore, 'Developments in Electronic Money Regulation – The Electronic Money Directive: A Better Deal for E-Money Issuers?' (2009) 25 *Computer Law & Security Review* 563, 564; Narda L Sotomayor, 'Setting the Regulatory Landscape for the Provision of Electronic Money in Peru' (2011) 6(4) *Innovations: Technology, Governance, Globalization* 105, 108. Cf Chris Reed, 'How to Make Bad Law: Lessons from Cyberspace' (2010) 73 *Modern Law Review* 903, 912–13, 918–19.

26 Including magnetically or in any other tangible or intangible device (such as a SIM card or software).

27 The term 'issuer' is used in this Part where the relevant statement applies to all types of e-money issuers, whether banks, financial institutions or non-banks, and not just to Providers.

28 Based on the definition of 'electronic money' in the *EU E-Money Directive*: *Council Directive 2009/110/EC of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions* [2009] OJ L 267/7, art 2(2) ('*EU E-Money Directive*').

citizen payments in a paper-based payments system with often illiterate recipients.[29]

The e-money issuer has an obligation to redeem e-money, that is, to pay its equivalent in cash, upon the demand of the e-money holder. The e-money holder may be the original purchaser of the e-money or a subsequent transferee of the e-money.

The aggregate of funds an e-money issuer receives from customers in exchange for the issue of e-money is known as the 'float'.[30] Crucial to any e-money business is that the funds in the float at any given time should equal the e-money in circulation (which will be the total amount of e-money issued by the issuer less the e-money which has been redeemed), so that all requests for redemption by e-money holders can be honoured. Using the classification of risks put forward by Greenacre and Buckley, there are three main threats to the e-money float and thus the security of e-money customers' funds, namely: that the issuer may have insufficient liquid assets to meet customers' demands for cash ('illiquidity risk'); that the issuer may become insolvent such that customers will be unable to redeem their e-money at all or in full ('insolvency risk'); and that customers' funds may be lost through fraud, theft or negligence ('operational risk').[31]

These risks are more pronounced due to two features of e-money in particular. First, Providers are not subject to the same supervision and prudential regulations that apply to banks and other financial institutions.[32] Second, and related to this feature, the funds an e-money issuer receives from a customer in exchange for the issue of e-money are not a 'deposit' and are therefore rarely covered by deposit insurance schemes.[33]

From the customer's perspective, in the absence of a regulatory solution, these features may make e-money a less secure option than a traditional savings account or, to some minds, holding cash.[34] Accordingly, many countries have

29 See, eg, The National Team for the Acceleration of Poverty Reduction, above n 24; Jamie M Zimmerman and Kristy Bohling, 'Evaluating Partnerships with Existing National Safety Nets for Emergency Payments: Assessing the Potential for WFP Engagement in Indonesia with an Existing Government Safety Net' (Report, Bankable Frontiers Associates, 27 April 2015) 11–15. Cf Guy Stuart, 'Government to Person Transfers: On-Ramp to Financial Inclusion?' (Report, Centre for Financial Inclusion) 4, 12, 18. See also Jamie M Zimmerman, Kristy Bohling and Sarah Rotman Parker, 'Electronic G2P Payments: Evidence from Four Lower-Income Countries' (Focus Note No 93, CGAP, April 2014).

30 CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 65.

31 Greenacre and Buckley, above n 10, 61. See also Jeremiah Grossman, 'Safeguarding Mobile Money: How Providers and Regulators Can Ensure that Customer Funds are Protected' (Research Paper, GSMA, January 2016) 14–16.

32 See Tarazi and Breloff, above n 8, 1.

33 CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 27–8; Izaguirre et al, above n 3. See, eg, *EU E-Money Directive*, above n 28, which provides that electronic money does not constitute a deposit-taking activity under *Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006* [2006] OJ L 177/1 'in view of its specific character as an electronic surrogate for coins and banknotes, which is to be used for making payments, usually of limited amount and not as means of saving': at recital 13; Bangko Sentral ng Pilipinas, 'Circular No 649: Series of 2009' (Guidelines, 9 March 2009) s 4(C) ('Guidelines on the Issuance of E-Money').

34 See, eg, Stuart, above n 29, on Colombian customers' reluctance to leave e-money in their 'm-wallet' and the perceived security of withdrawing the cash amount instead: at 12–15.

passed specific e-money regulations to improve the security of e-money services, and particularly to protect the e-money float.[35]

IV PROTECTING THE E-MONEY FLOAT: E-MONEY REGULATIONS

E-money regulations generally establish a licensing or authorisation regime to ensure that issuers meet certain threshold standards – for example, with respect to security measures and capital requirements – before they commence e-money operations.[36] They also provide for the protection of the float, for instance, by setting minimum liquidity requirements, obligations regarding the use of agents, and restrictions on the use and investment of funds in the float.[37]

In countries with a common law tradition in particular, policymakers have used trust law as part of the regulation of e-money to avert the risks associated with the issuance of e-money.[38] Providers receiving customer funds in exchange for issuing e-money may be required by regulation to deposit those funds in a trust account.[39] The trustee of these funds may be the Provider itself or sometimes a bank or a professional trustee. The intention is that requiring the float to be held on trust will ensure that e-money customers' funds are kept separate from the Provider's own funds and from the funds of its other businesses so that e-money holders will be able redeem their e-money for cash at any time.

The key benefit of the common law trust for these purposes is that it creates a legally recognised segregation of property, imposing obligations on the trustee to use the trust property (in this case, the float) for the benefit of the beneficiaries of the trust (the e-money holders) alone, as well as removing or reducing the risk that the float will be subject to claims by other creditors if the Provider or trustee becomes insolvent.[40]

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35 See CPMI and BIS, 'Non-banks in Retail Payments', above n 6, 33. See, eg, 'Guidelines on the Issuance of E-Money', above n 33.

36 See Fung, Molico and Stuber, above n 5, 17.

37 See, eg, 'Guidelines on the Issuance of E-Money', above n 33, s 5(A), (D). See also Part I above, regarding the existence of trusts in non-common law jurisdictions.

38 See Greenacre and Buckley, above n 10; Grossman, above n 31, 14–16; CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 13–14, 28 regarding Turkey and India.

39 See, eg, Bank of Ghana, 'Guidelines for E-Money Issuers in Ghana' (Guidelines, 6 July 2015) art 7(4)(b), (d); *National Payment System Regulations 2014* (Kenya) reg 25; National Payment System Division, Central Bank of Lesotho, 'Guidelines on Mobile Money' (Guidelines, May 2013) app 10; Reserve Bank of Malawi, 'Guidelines for Mobile Payment Systems' (Guidelines, March 2011) cl 8; Bank of Namibia, 'Guidelines for Issuers of Electronic Money & Other Payment Instruments in Namibia' (Guidelines, March 2012) s 7; *Electronic Money Regulations 2015* (Tanzania) regs 26–30. Cf, in Fiji, there is no e-money regulation or guideline, but the two e-money providers signed a 'Trust Deed Instrument' with the Reserve Bank of Fiji under which the Providers 'undertake to hold customers funds in trust and also commit to other safeguards such as the establishment of a Trust Fund with strict rules to govern its operations': Reserve Bank of Fiji, above n 4.

40 See CPMI and BIS, 'Payment Aspects of Financial Inclusion', above n 7, 28. The effectiveness of this segregation protecting customers' funds in the event of the Provider's insolvency may largely depend on the solvency of the supporting entities, such as the bank or custodian: at 28.

The trust imposes obligations on the Provider, or other trustee, to keep e-money customers' funds strictly separate from the funds of its other businesses. The regulated terms of the trust instrument may provide further protection by requiring that the customer funds only be invested in certain safe and liquid investments, such as commercial bank deposits and low-risk government securities,[41] and that the Provider deliver audited financial statements for the trust to the regulator.[42]

In this way, e-money regulations often provide significant protection against the three risks to the e-money float identified earlier, namely illiquidity risk, insolvency risk and operational risk.[43] These regulations, however, do not tend to address the broader consequences of a Provider becoming insolvent or experiencing financial distress prior to insolvency. If a regulator forms the opinion that the Provider has breached the e-money regulation or is not operating in the interests of the public, the regulator frequently has the power to withdraw or cancel a Provider's e-money licence or approval,[44] or impose sanctions on the Provider.[45] However, these measures, in themselves, do not address the potential economy-wide disruption which may result from the abrupt withdrawal of the Provider's e-money service.

In the following parts, we first describe resolution regimes put in place in various jurisdictions to provide for the orderly winding down of distressed banks and other financial institutions. We then outline the case for similar powers to be granted to the resolution authority in respect of Providers that issue e-money.

V RESOLUTION POWERS: BANKS AND FINANCIAL INSTITUTIONS

A Introduction to Resolution Powers

In the case of banks and other financial institutions, statutory powers are often granted to a resolution authority or authorities to take steps to ensure the orderly 'resolution' of the institution if it 'is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so'.[46] Described as 'triage for financial institutions after they experience problems',[47] resolution powers aim to enable authorities to address the liquidity and solvency problems of financial institutions through early intervention, while protecting the savings

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41 Grossman, above n 31, 9.

42 See, eg, Bank of Ghana, above n 39, art 24(4); *National Payment System Regulations 2014* (Kenya) reg 29(3); *Electronic Money Regulations 2015* (Tanzania) reg 33; Bank of Uganda, 'Mobile Money Guidelines' (Guidelines, 1 October 2013) art 13.

43 See Part III above.

44 See, eg, Bank of Ghana, above n 39, art 25(2); Reserve Bank of Malawi, above n 39, cls 7.3–7.4; Bank of Namibia, above n 39, s 11.2; National Payment System Division, Central Bank of Lesotho, above n 39, app 5.

45 See, eg, 'Guidelines on the Issuance of E-Money', above n 33, s 7; *National Payment System Regulations 2014* (Kenya) regs 10(4), 56–8.

46 FSB, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (October 2011) 7.

47 Sarra, above n 2, 50.

of deposit holders, minimising systemic disruptions and promoting market efficiency.[48] The resolution authority is often the main banking supervisor, but that supervisor may be required to consult with other authorities before exercising resolution powers or resolution powers may be shared between more than one authority.[49]

A special resolution regime is usually considered necessary for banks and financial institutions since normal protracted insolvency proceedings would give rise to unacceptable risks to financial stability and interruptions in critical services.[50] When such an institution is in financial distress, resolution authorities must often act very quickly to avoid losses in the value of the firm, disruption to the institution's services, and a rapid loss of customer confidence which could lead to a run on deposits and contagion effects for other institutions.[51] A typical situation involves the resolution authority and other relevant authorities holding urgent meetings over the course of a weekend to determine how the institution's operations, assets and liabilities should be held and managed, and then announcing the solution before the market opens the following Monday. For example, in 2008, when the British bank Bradford & Bingley showed signs of failing, over the course of a single weekend United Kingdom authorities sold off the bank's deposits, branches and associated systems to a Spanish banking group reserving its other businesses for nationalisation, such that 'Bradford & Bingley branches opened for business as usual on Monday morning with no interruption in service'.[52]

B International Reform of Resolution Powers

Since the 2008 Global Financial Crisis ('GFC'), there has been a move internationally to reform national resolution regimes, by providing a more comprehensive range of resolution powers and mechanisms for cross-border coordination between relevant authorities where institutions operate in a number of jurisdictions.[53] The International Monetary Fund,[54] the Basel Committee on

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48 Ibid 7, 13.

49 FSB, 'Second Thematic Review on Resolution Regimes', above n 2, 11, annex B.

50 See European Commission, 'Bank Recovery and Resolution Proposal: Frequently Asked Questions' (Memo No 12/416, 6 June 2012) 1, 2, 5 ('Bank Recovery and Resolution Proposal').

51 See Steven A Seelig, 'Techniques of Bank Resolution' in David S Hoelscher (ed), *Bank Restructuring and Resolution* (Palgrave MacMillan, 2006) 109; Augustin Landier and Kenichi Ueda, 'The Economics of Bank Restructuring: Understanding the Options' (Staff Position Note No SPN 09/12, International Monetary Fund, 5 June 2009) 8–9, 19.

52 European Commission, 'Bank Recovery and Resolution Proposal', above n 50, 15.

53 See Emilios Avgouleas, 'Banking Supervision and the Special Resolution Regime of the Banking Act 2009: The Unfinished Reform' (2009) 4 *Capital Markets Law Journal* 201, 203; Emilios Avgouleas, Charles Goodhart and Dirk Schoenmaker, 'Bank Resolution Plans as a Catalyst for Global Financial Reform' (2013) 9 *Journal of Financial Stability* 210, 214–15; FSB, 'Key Attributes of Effective Resolution Regimes', above n 46; Stephanie P Massman, 'Developing a New Resolution Regime for Failed Systemically Important Financial Institutions: An Assessment of the Orderly Liquidation Authority' (2015) 89 *American Bankruptcy Law Journal* 625, 627–30; FSB, 'Second Thematic Review on Resolution Regimes', above n 2.

54 Legal and Monetary and Capital Markets Department, International Monetary Fund, 'Resolution of Cross-Border Banks – A Proposed Framework for Enhanced Coordination' (Paper, 11 June 2010).

Banking Supervision,[55] and the FSB have each made recommendations in this regard.[56]

According to the FSB, a resolution regime 'should allow authorities to resolve financial institutions in an orderly manner without taxpayer exposure to loss from solvency support, while maintaining continuity of their vital economic functions'.[57] The FSB has recommended a range of resolution powers to G20 nations which would apply to 'any financial institution that could be systemically significant or critical in the event of failure'.[58] Systemic risk can be defined as the risk that 'the failure of one … institution causes related institutions to fail, harming the entire market or entire market segment and the economy as a whole'.[59]

The resolution powers recommended by the FSB to G20 countries include, in broad terms, the power to:

- remove and replace the senior management and directors;
- appoint an administrator to take control of and manage the affected firm;
- operate and resolve the firm, including powers to terminate contracts, continue or assign contracts, purchase or sell assets and write down debt;
- override rights of shareholders of the firm in resolution, including requirements for approval by shareholders of particular transactions;
- transfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party;
- establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm;
- impose a moratorium with a suspension of payments to unsecured creditors and customers; and
- effect the closure and orderly wind-down (liquidation) of the whole or part of a failing firm with timely payout or transfer of insured deposits and prompt access to transaction accounts and to segregated client funds.[60]

In a number of G20 countries, legislated resolution powers are now extensive, including the various powers listed above.[61]

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55 Basel Committee on Banking Supervision, BIS, 'Report and Recommendations of the Cross-Border Bank Resolution Group' (Report, March 2010).

56 FSB, 'Key Attributes of Effective Resolution Regimes', above n 46.

57 Ibid 1. See also *Council Directive 2014/59/EU on Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms* [2014] OJ L 173/190, 191 ('*Bank Recovery and Resolution Directive*').

58 FSB, 'Second Thematic Review on Resolution Regimes', above n 2, 9.

59 Simone di Castri, 'Mobile Money: Enabling Regulatory Solutions' (Paper, GSMA, February 2013) 25.

60 FSB, 'Second Thematic Review on Resolution Regimes', above n 2, 20–31.

61 Ibid 5. See also Daniel K Tarullo, 'Toward an Effective Resolution Regime for Large Financial Institutions' (Speech delivered at the Symposium on Building the Financial System of the 21st Century: An Agenda for Europe and the United States, Armonk, New York, 18 March 2010) 3–8 on the need for ongoing coordination between national authorities beyond resolution regimes.

A well-known approach to the exercise of such resolution powers is the 'good bank'/'bad bank' split in which the distressed or 'bad' assets of the institution are transferred to a separate entity to be liquidated or sold to 'vulture fund' managers, allowing the institution or another entity to focus on the 'good' assets and operations, minimising disruption to important services.[62] For example, in 2008, UBS and Swiss authorities arranged for UBS's 'toxic' assets to be transferred to a special purpose vehicle set up by the Swiss National Bank, while the good assets continued to be operated and managed by UBS.[63]

C Resolution Powers in Developing Countries

The laws of many developing countries also grant resolution powers to the central bank or similar regulator,[64] although they tend not to have been the subject of the same post-GFC reform efforts or be as detailed as those in G20 nations. These resolution powers are generally triggered when the institution becomes insolvent or is likely to become insolvent, or when it is unable or likely to become unable to meet its obligations.[65] In particular, the powers are triggered if the institution notifies the resolution authority of its predicament, or an audit report required under the legislation provides this notice, or the resolution authority itself forms the opinion that such a state of affairs has arisen.[66] The powers tend not to be limited to systemically significant, or systemically important, institutions, but apply to all banks or financial institutions.

Resolution powers in these countries commonly include the power to:

- direct the institution to take certain actions or refrain from taking certain actions;[67]
- appoint an advisor to advise the institution on the proper operation of its business;[68]
- appoint the resolution authority itself, or a nominee of the authority, to act as the controller or statutory manager of the institution with the power to operate the business of the institution;[69] and

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62 See Seelig, above n 51, 113–14; Landier and Ueda, above n 51, 20–1; European Commission, 'Bank Recovery and Resolution Proposal', above n 50, 6, 9. See also Claire L McGuire, 'Simple Tools to Assist in the Resolution of Troubled Banks' (Toolkit, The World Bank) 3.

63 See Landier and Ueda, above n 51, 29.

64 See, eg, *Banking Act 1995* (Fiji); *Banking Act 2009* (Malawi); *Banking Institutions Act 1998* (Namibia); *Financial Institutions Act 1998* (Solomon Islands); *Financial Institutions* (Vanuatu, cap 254, 2006 rev ed).

65 See, eg, *Banking Act, 1995* (Fiji) s 30; *Banking Act 2009* (Malawi) s 27; *Banking Institutions Act, 1998* (Namibia) s 56; *Financial Institutions Act 1998* (Solomon Islands) s 17; *Financial Institutions Act* (Vanuatu, cap 254, 2006 rev ed) s 46. See also McGuire, above n 62, 6.

66 See, eg, *Banking Act 1995* (Fiji) s 30; *Financial Institutions Act 1998* (Solomon Islands) s 17; *Financial Institutions Act* (Vanuatu, cap 254, 2006 rev ed) s 46.

67 See, eg, *Banking Act 1995* (Fiji) s 31; *Banking Act 2009* (Malawi) s 26; *Banking Institutions Act 1998* (Namibia) s 56; *Financial Institutions Act 1998* (Solomon Islands) ss 17–18; *Financial Institutions Act* (Vanuatu, cap 254, 2006 rev ed) ss 46–7.

68 See, eg, *Banking Act 1995* (Fiji) s 30; *Banking Institutions Act 1998* (Namibia) s 56; *Financial Institutions Act 1998* (Solomon Islands) ss 17–18; *Financial Institutions Act* (Vanuatu, cap 254, 2006 rev ed) ss 46–7.

- apply to the court for the winding up of the institution.[70]

The resolution authority's powers in this respect tend to be limited to institutions conducting a 'banking business', which is generally defined in terms of financial intermediation.[71] Thus the resolution powers do not extend to Providers. The authority typically could not, for example, exercise its resolution powers in respect of a mobile network operator if its e-money business became illiquid or showed other signs of failing.

VI A CASE FOR LEGISLATED RESOLUTION POWERS IN RESPECT OF E-MONEY PROVIDERS

It is generally accepted that e-money services pose less systemic risk to the financial sector than banking and other payment systems.[72] Di Castri has pointed out that e-money services are not subject to the same regulation as Systemically Important Payment Systems ('SIPS') because 'it is believed that they would not endanger the rest of the economy if they failed'.[73] He gave the example that, as at 2010, even M-PESA, the world's largest e-money deployment, represented just 0.2 per cent of bank deposits by value, and 2.3 per cent of electronic transactions by value, in Kenya.[74]

Nonetheless the failure of a large Provider could cause major disruption to a nation's economy.[75] For example, although M-PESA represents a small percentage of the value of bank deposits and the value of transactions, M-PESA transactions account for around 70 per cent of all electronic transactions in Kenya.[76] The failure of such a significant Provider of an essential service could significantly disrupt trade and government payments if its services are used for government-to-person ('G2P') payments.[77]

Although e-money transaction values are typically small relative to the total of all transactions, financial losses would also be significant for individual

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69 See, eg, *Banking Act* (Kenya) s 34(2) (power to appoint Kenya Deposit Insurance Corporation); *Banking Act 2009* (Malawi) ss 26–7 (power to place under statutory management); *Banking Institutions Act, 1998* (Namibia) s 56 (power to assume control); *Bank and Financial Institutions Act 2000* (Papua New Guinea) ss 36–48; *Financial Institutions Act 1998* (Solomon Islands) ss 17–18 (power to apply to court for Central Bank or nominee to take control); *Financial Institutions Act* (Vanuatu, cap 254, 2006 rev ed) ss 46–7 (power to apply to court for court-appointed manager).

70 See, eg, *Banking Act 1995* (Fiji) s 30; *Banking Act 2009* (Malawi) s 29; *Bank and Financial Institutions Act 2000* (Papua New Guinea) ss 36–48; *Financial Institutions Act 1998* (Solomon Islands) ss 17–18.

71 See, eg, *Banking Act 1995* (Fiji) s 30(1) ('financial institution', defined as 'any company doing banking business'); *Banking Act 2009* (Malawi) s 26(1)(a) ('bank'); *Banking Institutions Act 1998* (Namibia) s 56(1) ('banking institution', defined as a public company authorised to conduct 'banking business'); *Financial Institutions Act 1998* (Solomon Islands) s 17(1) ('financial institutions', defined as any body corporate doing 'banking business'); *Financial Institutions Act* (Vanuatu, cap 254, 2006 rev ed) ss 1, 46 (licensed financial institution, defined as a body corporate that carries on a 'banking business').

72 Di Castri, above n 59, 9.

73 Ibid.

74 Ibid.

75 Fung, Molico and Stuber, above n 5, 2, 15.

76 See di Castri, above n 59, 9.

77 Fung, Molico and Stuber, above n 5, 2, 15.

households, particularly vulnerable low-income households, if a substantial portion of the household's assets are held in e-money.[78] Such events are likely to undermine consumer confidence in e-money services and electronic payment instruments more generally and may affect confidence in the financial system more broadly, working against objectives of financial inclusion and the adoption of efficient financial services.

In countries where the use of e-money is relatively limited, there may be little or no contagion effect for other payment systems if a Provider fails. However, in countries where e-money services are pervasive, and part of the fabric of the broader financial system, the distress or demise of a large Provider could cause significant contagion effects, conceivably in an extreme case leading to a run on deposits on banks and financial institutions.[79]

There is also considerable reputational risk to the relevant regulator if a Provider fails.[80] Fung et al point out that there may be harm to the reputation of a regulator 'perceived to be responsible for the well-being of the financial system and for public confidence', noting that '[g]lobally, there seems to be an increased public expectation for central banks to prevent disruptions and defaults of major retail payments systems'.[81] This risk is likely to be heightened in emerging economies if the regulator plays an active role in promoting access to financial services, including relatively new digital financial services, as many developing country central banks do, in seeking to discharge their financial inclusion mandate.

Given the real risks posed by the collapse or uncertain viability of a significant Provider, there is a case for the amendment of existing legislation which grants resolution powers in respect of financial institutions, to expand these powers to cover any entity that provides e-money. In this way, the resolution authority would have the same tools available, and follow the same processes, if a Provider begins to experience financial difficulties as for a bank or financial institution.

Alternatively, these powers could be granted under the specific e-money regulation. The amendment of such regulations, as subsidiary legislation, is likely to be less complex and lengthy than the amendment of a statute granting resolution powers. The grant of resolution powers under e-money regulation also allows policymakers to tailor these powers to the context of e-money or payment service providers.

Kenya provides a rare example of the government taking this course. The *National Payment System Regulations 2014* (Kenya) grant resolution-style powers to the Central Bank of Kenya ('CBK') in respect of payment service

78 See Tanai Khiaonarong, 'Oversight Issues in Mobile Payments' (Working Paper No WP/14/123, International Monetary Fund, July 2014) 18, 27.

79 See 'Why Does Kenya Lead the World in Mobile Money?', *The Economist* (online), 2 March 2015 <http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-18> reporting that by 2015, M-PESA was used by 'over 17 [million] Kenyans, equivalent to more than two-thirds of the adult population; [and] around 25% of the country's gross national product flows through it'.

80 Fung, Molico and Stuber, above n 5, 2, 15.

81 Ibid 15.

providers, which include e-money providers.[82] The Regulations provide that CBK 'may, by notice to an authorized payment service provider, suspend an authorization for such period as the Bank may specify or revoke an authorization' in a number of circumstances, including where the authorised payment service provider:[83]

> (f) becomes insolvent or is unable to effectively conduct its operations;
>
> (g) through its activities, the public trust is compromised; …
>
> (k) has a winding-up order made against it or a resolution for voluntary winding passed against it; …
>
> (o) fails to ensure that the trust account is managed in a manner consistent with Trust legislation and this regulation; …

The Regulations go on to provide the CBK 'shall, upon revoking or suspending an authorisation under this regulation … take over control of the business of the payment service provider to safeguard and facilitate distribution of the money in the Trust Fund'.[84] According to the wording of the regulation, this is not a mere discretion granted to CBK. Rather, CBK has an obligation to take control of the business where it has revoked or suspended the payment service provider's authorisation.

In these circumstances, CBK shall also, inter alia, 'notify the institution holding the Trust funds to cease forthwith further dealing with the funds until the institution receives directions from [CBK]'.[85] Further, CBK may 'appoint any person, including another payment service provider, to distribute the balances held in the Trust Fund of the revoked payment service provider at the time of revocation'.[86]

These regulations demonstrate how resolution powers can be adapted to the specific context of the e-money sector under e-money regulations. For example, it is possible for such regulations or guidelines to make specific provision for actions to be taken in respect of the e-money trust (where this forms part of the e-money regulation) and the trustees of that trust.

Resolution regimes frequently include the power for the resolution authority or its nominee to take control of the business of the failing institution. However, if the authority were to take control of a Provider, there may be significant ramifications for other markets or sectors in which the Provider operates and for the regulators which supervise those activities.[87] For instance, the telecommunications regulator would probably be seriously concerned about a central bank taking control of the business of a significant telecommunications company.

One solution to this problem is to routinely require Providers to incorporate a subsidiary which engages solely in the e-money business, such that actions taken

82 *National Payment System Regulations 2014* (Kenya) reg 10.

83 *National Payment System Regulations 2014* (Kenya) reg 10(1).

84 *National Payment System Regulations 2014* (Kenya) reg 10(5).

85 *National Payment System Regulations 2014* (Kenya) reg 10(7).

86 *National Payment System Regulations 2014* (Kenya) reg 10(8).

87 See CPMI and BIS, 'Non-banks in Retail Payments', above n 6, 26 regarding the involvement of other regulators.

by the resolution authority in respect of the subsidiary would not directly affect the other parts of the business of the Provider. Some e-money regulations already require an e-money business to be conducted by a separate entity incorporated solely for the purpose of providing e-money.[88] We strongly recommend this approach (i) to limit regulatory overlap, (ii) to aid in ring-fencing the e-money business from other businesses and liabilities of the Provider in the event of insolvency, and (iii) to aid the efficient application of resolution powers.

VII NON-LEGISLATIVE APPROACHES

A Conditions Imposed on E-Money Licence or Approval

In some jurisdictions, there may be resistance to the amendment of the resolution powers legislation or to the e-money regulation in this respect, particularly given that Providers – for example, telecommunications companies – may already be subject to comprehensive regulation by another regulator. Even where legislative change is possible, its negotiation and passage into law could be a lengthy process.

E-money regulations often provide that the regulator may impose conditions on, or set terms for, the grant of an e-money licence, registration or approval.[89] In the absence of legislative provision for resolution powers in respect of Providers, it may be possible for the resolution authority, or its nominee, to be given similar powers by incorporating them into the e-money licence or approval.

B Appointment of a 'Protector' under the E-Money Trust

In other cases, it may not be practical or possible to amend either the resolution powers legislation or e-money regulation, or to impose conditions on an e-money licence or approval. In Fiji, for example, there is no specific e-money regulation or guideline. Rather, the two e-money providers have signed a 'Trust Deed Instrument' with the Reserve Bank of Fiji under which the Providers 'undertake to hold customers' funds in trust and also commit to other safeguards such as the establishment of a Trust Fund with strict rules to govern its operations'.[90]

In the absence of a legislative amendment or the imposition of conditions on an e-money licence or approval, we propose that the regulator may be provided with resolution-style powers as a 'protector' under an e-money trust deed, although, as explained below, these powers would necessarily be narrower than the resolution powers outlined earlier. This approach would also be limited to

88 See, eg, 'Guidelines on the Issuance of E-Money', above n 33, s 5(B); Bank of Ghana, above n 39, art 7(4)(e); *Electronic Money Regulations 2015* (Tanzania) reg 12. Cf *National Payment System Regulations 2014* (Kenya) reg 25(2) which only require the Provider to establish a separate 'business unit' with a separate 'management structure' and account-keeping.

89 See, eg, Bank of Ghana, above n 39, art 7(4)(h); Bank of Uganda, above n 42, art 6(d). Cf *Electronic Money Regulations 2015* (Tanzania) which seem not to provide for the regulator to impose conditions on the grant of an approval.

90 Reserve Bank of Fiji, above n 4.

those jurisdictions with an established law of trusts, where Providers can be required to place the e-money float in a trust account.[91]

A trust is an equitable obligation imposed on the legal owner of the trust property ('the trustee') to hold that property for the benefit of another person ('the beneficiary').[92] Although the trustee is the legal owner of the trust property, the trustee's interest is a bare legal estate and the trustee is not permitted to use the trust property for its own purposes.[93] Beneficial ownership of the trust property rests with the beneficiary and equity will uphold the beneficiary's interest in that property against the trustee and almost everyone else in the world.[94] The 'settlor' is the person who creates the trust by manifesting the intention that the trust is intended in favour of the beneficiary, usually by executing a trust deed.

The 'protector' is a further role in trust law, although most trusts do not involve a protector. While there are statutory definitions of the term 'protector' in some jurisdictions,[95] there is no consensus on the definition of the term at common law. Commentators have defined a trust protector as 'a person who is not a trustee but who holds powers under the terms of a trust instrument not entirely for his own benefit',[96] or 'the holder of one or more powers capable of affecting what the trustees are to do with the trust property'.[97]

A protector may be a person or corporation who the settlor knows and trusts, and to whom the settlor grants powers over the trustee. These powers commonly include the power to remove and appoint trustees, to veto decisions of the trustee, to direct trustee decisions about distributions to beneficiaries under the trustee, or to advise the trustee on how to invest the assets of the trust.[98] But this list is not exhaustive. In the absence of legislation,[99] settlors are free to determine the powers given to a protector under the trust instrument.[100]

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91 As described in Part IV above.

92 See Adam S Hofri-Winogradow, 'The Stripping of the Trust: A Study in Legal Evolution' (2015) 65 *University of Toronto Law Journal* 1, 3. Lupoi, above n 15, highlights exceptions to this definition, including in respect of trusts for purposes, discretionary trusts, and trusts where one party is both trustee and beneficiary or trustee and settler: at 1–4. While we acknowledge these exceptions, we adopt this definition as a useful explanation of the type of trust under consideration here.

93 Denis Ong, *Trusts Law in Australia* (Federation Press, 4th ed, 2012) 2.

94 Ibid. The exception is a bona fide purchaser of legal estate in the trust property for value without notice, whose claim is superior to that of the beneficiary.

95 Tsun Hang Tey, 'Trust Protector' (2008) 20 *Singapore Academy of Law Journal* 99, 103–4, citing *International Trusts Amendment Act 1989* (Cook Islands).

96 Mark Hubbard, *Protectors of Trusts* (Oxford University Press, 2012) 7.

97 See Alexander A Bove Jr, 'The Case against the Trust Protector' (2011) 37 *ACTEC Law Journal* 77, 78, citing Donovan W M Waters, 'The Protector: New Wine in Old Bottles?' in A J Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 63, 64. Mitchell M Gans, 'Trust Protector Powers: Fiduciary Duty and Tax Issues' (2011) 63 *Tax Notes* 1133, 1133, defines a 'protector' as 'a person appointed by the settlor to direct the actions of the trustee regarding specified functions'.

98 See Lawrence A Frolik, 'Trust Protectors: Why They Have Become "The Next Big Thing"' (2015) 50 *Real Property, Trust and Estate Law Journal* 267, 274–5.

99 Tey, above n 95, 103–11.

100 See Peter B Tiernan, 'Evaluate and Draft Helpful Trust Protector Provisions' (2011) 38 *Estate Planning* 24, 26.

In the present context, we propose that the resolution authority, or its nominee, may be appointed as a protector under the trust instrument of an e-money trust. To date, protectors have tended to be drawn from the ranks of a settlor's trusted friends or family, or from professional trustee companies, legal firms or accounting firms; we are not aware of any case in which a regulator has been appointed to this role. However, the categories of person who may act as a protector are not closed and, in the absence of statutory provision, there is no legal impediment to a resolution authority acting as a protector. The settlor's choice of protector is only limited to 'those who are qualified to undertake the responsibilities of the position, and within that group, those who are willing to serve'.[101]

Hubbard lists a wide range of persons who may be appointed to this role, including 'a corporation or other entity recognized as having legal personality under the law of the settlement'.[102] A statutory body will have legal personality if it is capable of suing and being sued, as determined by the statute under which the body is constituted.

In the absence of legislative provision to the contrary, the settlor is entitled to grant whatever powers it desires to a protector under the trust deed.[103] The protector could be granted powers in respect of the trust in which the e-money float is held, including the power to:

- direct the trustee to take certain actions or refrain from taking certain actions in respect of the trust property – that is, the float – including directions as to where and how the funds should be invested;
- appoint an advisor to advise the trustee on the proper operation of the trust or the management of the e-money float;
- remove the trustee and appoint a new trustee;
- make distributions to the beneficiaries of the trust, that is, the e-money holders; and
- terminate the trust.

Whether any of these powers conflict with the insolvency laws of the relevant jurisdiction will need to be investigated.

Such protector powers may provide the resolution authority or its nominee with the ability to exercise prompt and effective control over the e-money float where the Provider is in financial distress, reducing illiquidity risk. However, a protector under an e-money trust deed could not be granted resolution powers which precisely align with those commonly granted to a resolution authority in respect of failing banks or financial institutions since these resolution regimes generally give the regulator power over the *institution itself and its business*. In the case of an e-money trust, only the float is held in trust. The Provider and its

101 Frolik, above n 98, 282.

102 Hubbard, above n 96, 21.

103 Peter Hodson, 'The Trust Protector: Friend or Foe?' (2006) 12(6) *Trusts & Trustees* 8, 9; Tey, above n 95, 124, 132. The settlor is 'free to empower a protector as the settlor sees fit': Frolik, above n 98, 268, 274.

broader business are not held in the e-money trust and could not therefore be subject to the control of the protector.

There are other potential disadvantages to a regulator exercising resolution powers as a protector. The most significant of these is that a protector may be exposed to liability for breach of its obligations, including liability for:

- knowingly inducing a breach of trust by the trustee if the protector's advice or direction to the trustee induced such a breach;[104]
- breach of the protector's duty of care and skill; and
- breach of fiduciary duty.

There has been ongoing debate about the nature and scope of the duties owed by a protector, and particularly whether a protector owes fiduciary duties.[105] The question of whether a certain power is a fiduciary power is a question of the construction of the trust deed.[106] In a number of cases concerning international trusts, courts have found the protector did hold the powers in question as a fiduciary.[107] The consequences of a court holding that powers are held in a fiduciary capacity would include that:

- the protector must exercise the power in good faith;
- the protector is required to exercise its discretion properly, as a trustee would be required to do; and
- the power in question is a permissive power, such that the protector must consider whether to exercise that power from time to time.[108]

A resolution authority may be reluctant to assume the duties and potential liabilities which attach to the role of protector. However, there are ways to avoid, or greatly reduce, these duties and liabilities. First, it is possible for these obligations to be altered by the trust instrument itself, which may include a clause excluding or reducing the duties or liability of the protector.[109] The effectiveness of such an exclusion clause would depend on the applicable law and the interpretation of the clause by the court.[110] However, subject to any statutory

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104 Hodson, above n 103, 11.

105 See, eg, ibid 8–9; Tey, above n 95, 112–20. In the US context, see Bove, above n 97, 79.

106 See *Blenkinsop v Herbert* [2017] WASCA 87, [95]–[117] where the Western Australian Court of Appeal clarified the position in Australia, holding that whether the protector is a fiduciary depends on the construction of the trust instrument.

107 See, eg, Hubbard, above n 96, citing *Jurgen von Knieriem v Bermuda Trust Company Ltd* [1994] Bda LR 50; *Re Freiburg Trust* (2003–04) 6 ITELR 1078. However, Hubbard, above n 96, contends that in some of these cases, the power in question should in fact have been characterised not as a fiduciary power but as a 'limited personal power' – that is, a power conferred on the protector on terms that no fiduciary duty is owed to the object of the power, but which the holder may only use for the benefit of a limited class of object or for particular purposes: at 51, 58.

108 Hubbard, above n 96, 59; Hodson, above n 103, 8–9. In the US context, see Natalie B Michalek, 'Trust Protector: Roles and Liability' [2010] *Journal of Financial Service Professionals* 33, 35; Frolik, above n 98, 293–5. Tiernan, above n 100, argues that protectors in the US have a duty to be informed and take action when necessary to protect the interests of the beneficiaries: at 29.

109 Tey, above n 95, 124.

110 Ibid. Bove, above n 97, argues that US courts would strike down as against public policy a clause in a trust deed that attempted to 'draft away' the *existence* of fiduciary duties on the part of a protector: at 83, 88. Cf Gans, above n 97, arguing that the commentary under the Uniform Trust Code s 808 'makes clear

prohibition or rule of equity, the trust deed should be able to validly limit the protector's liability for any breach of duty to cases of fraud or wilful misconduct.[111]

Alternatively, the protector's obligations may be altered by statute, either by providing that a protector is not a fiduciary, or by establishing the default position that a protector is not a fiduciary unless the parties specify otherwise in the deed,[112] or by limiting the extent of fiduciary obligations owed by a protector. It is possible, for example, to legislate to limit the protector's fiduciary obligations to the duty to exercise its powers under the trust instrument in good faith, or to exclude liability to beneficiaries for 'a bona fide exercise of a power'.[113]

VIII CONCLUSION

E-money has shown great promise as an efficient means of making payments and transferring funds and as an aid to improving financial inclusion in developing countries. Providers have played a key role in the growth of e-money in a number of countries and policymakers have tailored regulatory solutions to address the risks inherent in the issuance of e-money by Providers. While these regulations tend to provide for the sanctioning of Providers or the revocation of their authorisation in the event of Provider misconduct, there is, beyond Kenya, generally no provision for a resolution authority to take measures to ensure the orderly resolution of a Provider that experiences financial distress. We propose that there may be relatively simple solutions available to policymakers to fill this 'gap' in e-money regulation. This may be achieved by legislative amendment or, where there are obstacles to such amendment, by non-legislative means, including by the imposition of conditions on the grant of an e-money licence or (to more limited effect) by the appointment of the regulator or its nominee as a 'protector' under the e-money trust with specific powers conferred upon it in the event of the Provider encountering difficulties.

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that the settlor can negate the protector's fiduciary duty': at 1133. Cf Hubbard, above n 96, seems to consider that, in jurisdictions which base their trust law on English law, if a protector holds its power in a fiduciary capacity, liability for fraud and willful misconduct may not be excluded: at 166–7.

111 See Hubbard, above n 96, 166–7; Bove, above n 97, 88–9. See also Frolik, above n 98, arguing that the trust deed may specifically 'provide that an act of ordinary negligence does not violate good faith', but that a settlor could not exculpate a protector from liability from acts in bad faith or with reckless indifference: at 292.

112 See, eg, Hubbard, above n 96, 167, citing *Trusts (Guernsey) Law 2007* s 15(2)(b).

113 Hodson, above n 103, 11 with reference to the British Virgin Islands and the Bahamas.