# The Inclusion-Stability, Integrity and Protection (I-SIP) Methodology and the Legal Framework to Promote Financial Inclusion in South Africa

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## Abstract

Studies have established that promoting financial inclusion in tandem with traditional financial sector policy and regulatory objectives such as financial stability and integrity, and consumer protection requires policymakers and regulators to take into consideration the need to minimise possible trade-offs and to maximise synergies between these objectives. However, current policies on financial inclusion do not provide a specific approach or methodology to assess the impact that these trade-offs and synergies have on new financial inclusion frameworks. This article discusses policies and regulatory frameworks to promote financial inclusion in the last 30 years since the advent of democracy in South Africa and the developing (Inclusion-Stability, Integrity and Protection) methodology to assess the impact that these trade-offs and synergies have on new financial inclusion frameworks. It begins by discussing the financial inclusion framework in the country. It also discusses the financial sector laws that promote financial stability, integrity and consumer protection, and whether these measures include the promotion of financial inclusion. It identifies the need to adopt the evolving I-SIP methodology to ensure that policymakers and regulators balance the importance of promoting financial inclusion against equally important financial sector policy and regulatory objectives, such as financial stability, integrity and consumer protection.

## Keywords

Financial inclusion; financial exclusion; I-SIP methodology; national financial inclusion strategies; financial stability; financial integrity; consumer protection.

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## 1 Introduction

Financial inclusion policy and regulatory frameworks have become important initiatives for poverty alleviation and economic growth among other strategies such as basic social security protection, unemployment reduction, and philanthropic aid.[1] Different institutional, legal and policy measures have been developed and implemented in various countries across the globe, including South Africa, to eradicate different practices that differentiate between who do or don't have the privilege to access and use certain financial services. There are several examples of the prevailing initiatives to make financial services accessible to most of the world's population. These include the provision of basic bank accounts and microcredits, the establishment and regulation of microfinance institutions, and the enforcement of civil-rights laws to prevent discriminatory practices.[2] Fairly recently, however, many of these initiatives have been brought together under one policy priority, called "financial inclusion" or its antithesis, "financial exclusion". The South African financial sector has been rated on aggregate as inclusive for several years.[3] An estimate of 89 per cent of the population above the age of 16 has access to some type of financial account in either a formal or an informal financial initiative.[4] However, the latest global financial inclusion database projected that 84.1 per cent of the adult population in South Africa hold bank accounts.[5] The projected figures may be lower when financial inclusion is measured according to both access to and the use of financial services.[6] The reason is that it includes 34.1 per cent of adults who open bank accounts only to

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1 UNDP 2016 https://hdr.undp.org/content/human-development-report-2016 43. For the significance of financial inclusion policies as poverty alleviation strategies, see Zahanogo 2017 *International Journal of Economics and Finance* 212; See Demirgüç-Kunt *et al* 2017 https://openknowledge.worldbank.org/handle/10986/26479.

2 Examples of civil rights legislation are the *Community Reinvestment Act*, 1977, and the *Home Mortgage Disclosure Act*, 1975 which regulate the prevention of redlining practices in the United States of America.

3 See CGAP 2012 http://www.cgap.org/publications/financial-inclusion-linkages-stability-integrity-and-protection.

4 World Bank *Global Findex Database 2021* 2.

5 World Bank *Global Findex Database 2021* 118.

6 See AFI 2013 https://www.afiglobal.org/sites/default/files/publications/fidwg-core-set-measuring-fi.pdf 2, that requires the measuring of financial inclusion to focus on both access and the usage dimension.

receive government grant payments and often withdraw all the money in the accounts immediately.[7]

Currently, there are no specific legislative measures to regulate the promotion of financial inclusion in many countries.[8] There are, however, global standard-setting bodies that have developed policies and guidelines to promote financial inclusion. These policies and guidelines focus on possible trade-offs and synergies and how they should be minimised and maximised to promote financial inclusion. In passing, the introduction and expansion of financial inclusion policies often require some trade-off with the reinforcement of the more established objectives of maintaining the stability and the integrity of the financial sector, as well as consumer protection. A detailed discussion of these trade-offs and synergies falls outside the scope of the present article. We discuss a few examples of those that relate to the application of the I-SIP methodology in 3 below.

There is also a developing trend for national policy and regulatory frameworks to adopt the Inclusion-Stability, Integrity, and Protection (I-SIP) approach/methodology that seeks to ensure that possible trade-offs and synergies are considered.[9] The purpose of this article is, therefore, to critically discuss the financial inclusion regulatory framework in South Africa. The discussion in this article generally addresses the important question of whether financial inclusion is promoted in South Africa and, if so, whether traditional financial sector laws and policies adopt an approach that regulates financial inclusion in conjunction with these laws through the I-SIP methodology. It specifically determines, firstly whether South Africa has effective financial-sector laws that form part of the I-SIP objectives to address these synergies and trade-offs, and, secondly, whether they incorporate the I-SIP methodology to assess the direct effects that financial inclusion policy interventions have on existing I-SIP objectives.

## 2 The definition and the importance of financial inclusion

Financial inclusion has emerged as a new paradigm for economic growth and poverty alleviation to address various historical patterns of financial

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7 FinMark Trust 2016 https://www.finmark.org.za/finscope-south-africa-2016-leave-behind-note/.

8 However, the ever first reference to FI in South African legislation is to be found in the *Financial Sector Regulation Act* 9 of 2017 (FSRA) discussed in 6 below.

9 CGAP 2017 https://www.cgap.org/sites/default/files/Working-Paper-Financial-Inclusion-Stability-Integrity-and-Protection-Jul-2017.pdf; See National Treasury 2020 http://www.treasury.gov.za/comm_media/press/2020/Financial%20Inclusion%20Policy%20%20An%20Inclusive%20Financial%20Sector%20For%20All.pdf (hereafter the South African 2020 Draft Financial Inclusion Policy) 39, where the policy stresses the need for "[t]he pursuit of the balanced (or I-SIP) approach" to financial inclusion in South Africa.

exclusion.[10] However, there is no universal definition of financial inclusion or financial exclusion. Financial inclusion generally refers to the promotion of and access to the use of financial services and products.[11] The definition of these concepts is important in guiding the regulatory framework that is suitable for addressing the challenges of financial exclusion. It is also important to reforming policy and regulatory frameworks and to measuring the progress and outcomes of such reforms.[12] The Alliance for Financial Inclusion (AFI) has established a correlation between defining financial inclusion and setting appropriate policies and regulations to promote it.[13] The AFI provides key elements that should assist in defining financial inclusion and guiding the formulation of national policy and regulatory frameworks. These elements include 1) the relevant dimensions to measure, such as access to, the use of, and the quality of a financial service; 2) the types of financial services that should be under the inclusion banner, such as credit, savings insurance, and pensions; and 3) the type of institutions that should provide these services, such as banks, formal or semi-formal microfinance institutions, or informal institutions.[14] What is needed, according to the *Consultative Group to Assist the Poor*'s (CGAP) Guideline Statements, is "[a] clear definitional framework for financial inclusion that includes definitions at the national, policy and product levels … to establish priorities, to avoid both irresponsible and misguided inclusion, and to measure progress".[15] Therefore, it is important that there

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10 The discussion of the history of different pattens of financial exclusion falls outside the scope of this discussion. For such a history, see Hoggson *Banking Through the Ages* 27; Ferguson *The House of Rothchild,* and Richards *Early History of Banking in England*; Geisst *Beggar Thy Neighbour*; Goddard *Credit and Trade*; Rothbard *History of Money and Banking in the United States*; See Graeber and Piketty *Debt* 22-24.

11 See Sarma and Pais 2011 *Journal of International Development* 614; Howell and Wilson 2005 *Macquarie Law Journal* 148.

12 AFI "Defining and Measuring Financial Inclusion" 32. See also Aduda and Kalunda 2012 *Journal of Applied Finance and Banking* 99.

13 AFI 2010 https://www.afi-global.org/sites/default/files/afi_policypaper_data measurement_en.pdf 1. AFI is a network of financial inclusion policymakers comprising of central banks and other financial regulatory institutions from developing countries; See AFI date unknown https://www.afi-global.org/about-us. South Africa is a member of AFI through the National Treasury and South African Reserve Bank (SARB), as a principal member and associate member, respectively; See AFI 2018 https://www.afi-global.org/sites/default/files/inline-files/AFI%20 Official%20Members_9%20April%202018.pdf.

14 AFI 2017 https://www.afi-global.org/wp-content/uploads/publications/2017-07/FIS_GN_28_AW_digital.pdf 2; See the World Bank date unknown http://siteresources.worldbank.org/FINANCIALSECTOR/539914-1118439900885 /20700929/Indicators_of_Financial_Access_Household_Level_Surveys.pdf.

15 CGAP 2012 https://openknowledge.worldbank.org/bitstream/handle/10986/ 13095/75157020120CGA0Box0374307B00PUBLIC0.pdf?sequence=1&isAllowed= y 6.

should be a clear definition at the national level and that it should include specific elements, identify priorities and measure progress.

Financial inclusion is defined by the National Treasury as "the delivery of financial services at an affordable cost to vast sections of the population that are historically excluded or under-served by the formal financial sector".[16] The statutory definition of financial inclusion incorporates some of the important elements in the AFI guideline. Financial inclusion in terms of the *Financial Sector Regulation Act* 9 of 2017 (FSRA) "means that all persons have timely and fair access to appropriate, fair and affordable financial products and services".[17] However, while it does not limit the types of financial product and services, the legislative definition is limited solely to the "access" dimension. It also does not refer to the legal status of the service provider or to the specific impact of financial inclusion on society. There is therefore a major gap in the definitional framework of financial inclusion in South Africa that must be filled with reference to the AFI guidelines, and the inclusion of the impact of financial inclusion on society.

With regard to its importance, financial inclusion is not an end in itself but a means for the achievement of a particular end.[18] As the United Nations Secretary-General's Special Advocate for Inclusive Finance for Development notes, "[t]hat end is human development [and] improving lives of those who need help the most".[19] Financial inclusion is also an ongoing process rather than a static state.[20] In addition, financial inclusion is generally linked to socio-economic development.[21] It is a process for facilitating social welfare and economic growth rather than a process of having or not having certain financial services at a particular period.

In addition to promoting financial inclusion and preventing continuing patterns of exclusion, several issues are important and must be considered. Firstly, ensuring the stability of the financial systems and institutions. Secondly, the need to ensure that financial institutions are not conduits for financial crimes. Thirdly, if the systems and institutions are trustworthy, it is important that effective consumer protection measures should be in place. Finally, policymakers and regulators must take stock of possible trade-offs and the need to maximise the synergies between several financial sector

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16 South African 2020 Draft Financial Inclusion Policy 1.

17 See section 1 of the FSRA.

18 UNSGAIFD 2017 https://www.unsgsa.org/files/4915/1853/4029/UNSGSA_report_2017-2.pdf 15.

19 UNSGAIFD 2017 https://www.unsgsa.org/files/4915/1853/4029/UNSGSA_report_2017-2.pdf 15.

20 Aduda and Kalunda 2012 *Journal of Applied Finance and Banking* 100.

21 World Bank 2021 https://documents1.worldbank.org/curated/en/099045106142226430/pdf/P16287007a0d6b0680a7420dafe7fbc767d.pdf. See also Shailesh and Ragabiruntha 2018 *International Journal of Social Economics* 1123.

policy and regulatory objectives (FSPROs) and the financial inclusion framework.

## 3 Trade-offs and synergies between the I-SIP regulatory objectives

There are several FSPROs that must be taken into account in the efforts to promote financial inclusion. These include financial integrity, financial stability and consumer protection. An isolated approach to each objective may not appreciate possible trade-offs and synergies between these objectives. The following is a brief discussion of the trade-offs and synergies.

The 2008 financial crisis had both positive and negative impacts on the economy and on financial systems in general. It accelerated the need for the smooth operation of the financial system and the flow of funds between depositors and investors. It also tested the stability of financial intermediation and how it can withstand possible financial shocks.[22] A broader and unregulated access to credit services may increase over-indebtedness.[23] Liquidity shortages and payment-system failures that result in panic and run-on banks may also cause financial instability.[24] Equally, the proliferation of unregulated financial institutions may adversely affect the stability of the regulated financial intermediaries.[25] Therefore, financial systems secure financial stability by implementing strict regulation and supervision requirements for the safety and soundness of financial institutions.[26] Such regulations include allocating savings to more productive investments and providing sustainable payment systems and restrictions on banking activities.[27] Tightening the entry requirements for new applicant institutions to obtain banking licences has had a significant impact on ensuring the stability of the financial system.[28] The restrictions on

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22 Saha and Dutta 2021 *Competitiveness Review* 671; See Ramlall *Understanding Financial Stability* ch 2, for the discussion of different definitions of financial stability. Generally, financial stability requires that the financial systems withstand financial distresses that may pose systematic risks.

23 Koong *et al* 2017 *Economic Modelling* 342; See De Sousa 2015 https://www.cigionline.org/sites/default/files/new_thinking_g20_no7.pdf 7.

24 Moenjak *Central Banking* 47; See Allen 2014 *Georgetown Journal of International Law* 932; García 2016 *Economic Issues* 86. Other potential risks that financial inclusion may pose to financial stability stem from the nature of the low-income clients its targets, new financial product innovations, and initiatives to outsource financial activities.

25 Atellu *et al* 2021 *Journal of Financial Regulation and Compliance* 515.

26 CGAP and The World Bank Group *Financial Access 2010* 16; See García 2016 *Economic Issues* 84.

27 Kima *et al* 2013 *Journal of Financial Stability* 665; See Dittus and Klein 2011 https://www.bis.org/publ/work347.pdf 16.

28 Kima *et al* 2013 *Journal of Financial Stability* 665; See Dittus and Klein 2011 https://www.bis.org/publ/work347.pdf 16.

the capital and financial liquidity requirements and their adequacy are further measures to ensure stability.[29]

Measures to counter money laundering and the financing of terrorism that safeguard the integrity of the financial system may also fall foul of the financial inclusion objective.[30] Financial inclusion usually requires the introduction of new customers to the financial system, especially the unbanked.[31] The majority of these customers often have no records of documents obtained from the formal financial sector that are required by financial institutions.[32] Banks are required to apply customer due diligence measures to identify and verify the identity of their customers.[33] Before the introduction of the risk-based approach, financial institutions applied a strict tick-box (rule-based approach) to customer due diligence.[34] A rigid requirement to submit documents such as identity documents might exclude the majority of the population from accessing formal financial services. They may eventually use financial services in the informal sector, which would limit the efficacy of the anti-money laundering framework and nullify the controls over the financing of terrorism (AML/CFT).[35]

Similarly, there can be a trade-off between consumer protection regulation in the financial sector and the financial inclusion policy objective.[36] Consumer protection regulations promote financial disclosure and transparency and prevent fraud and other customer abuses.[37] These regulations also enable consumers to make informed choices on similar products from different providers.[38] These measures level the playing field

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29 Kima *et al* 2013 *Journal of Financial Stability* 665; See Dittus and Klein 2011 https://www.bis.org/publ/work347.pdf 16.

30 De Koker and Jentzsch 2013 *World Development*; See Whisker and Lokanan 2019 *Journal of Money Laundering Control*.

31 On the distinction between the unbanked and the underbanked, see Djankov *et al* 2008 https://openknowledge.worldbank.org/bitstream/handle/10986/6666/wps4647.pdf?sequence=1&isAllowed=y.

32 Gelb 2016 https://www.cgdev.org/publication/balancing-financial-integrity-financial-inclusion-risk-based-approach 4.

33 See Recommendation 10 of the FATF Recommendations 2012-2020 (FATF 2012-2020 https://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf); See De Koker 2014 *Journal of Money Laundering Control* for the discussion of the customer due diligence.

34 Bello and Harvey 2017 *Security Journal* 25-26; See De Koker 2009 *Journal of Financial Crime* 349.

35 De Koker 2009 *Journal of Financial Crime* 349; See Batsaikhan *et al* 2019 *Journal of Banking Regulation* 262.

36 Alber 2019 https://ssrn.com/ abstract=3335904 10.

37 Johnson 2019 *Cato Journal* 492.

38 Zywicki "Market-Reinforcing Versus Market-Replacing Consumer Finance Regulation" 335. See also Pearson *et al* 2017 *PELJ*, on different approaches to financial literacy in Australia and South Africa; See further Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 158.

between consumers and financial-service providers. They also protect consumers against unfair, deceptive, or discriminatory practices and enhance consumer trust.[39] However, measures that provide greater awareness and access may run counter to promoting financial inclusion. Access to financial products information may dissuade low-income consumers from signing up for financial services.[40] One example is access to information on the high costs associated with stringent requirements to open and use a bank account. Extensive credit affordability assessment procedures that prevent over-indebtedness are another example.[41] They may exclude the majority with poor credit records, no credit history, or no formal or regular income.[42]

There are several benefits for promoting financial inclusion together with traditional FSPROs. These objectives and financial inclusion can be mutually reinforcing and have positive impacts on each other. To be inclusive, a financial sector must adopt regulatory approaches that accommodate emerging institutional and product innovations.[43] Mobile and fintech service providers are examples of innovations in this sector. The sector can become inclusive by easing or introducing tiered bank licensing frameworks.[44] Minimum entry requirements must also be adjusted based on an institutional risk assessment.[45] This allows for a more diversified and stable retail deposit base and efficient intermediation of financial resources that make financial services more accessible.[46] It also improves the resilience of deposit funding in the banking sector during financial crises and ultimately supports financial stability.[47]

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39 Elsayed 2020 https://ssrn.com/abstract=3745874 12; See AFI 2010 https://www.ifc.org/wps/wcm/connect/46c1d129545748ab94432d530d0d2383/Tool+5.10.+AFI+Report++Consumer+Protection+Policy.pdf?MOD=AJPERES&CVID=joIM9S6 2. See, for instance, 15 USC §16930-2(a)(2) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* 12 USC 5301 of 2010 (Dodd-Frank Act).

40 Allen 2014 *Georgetown Journal of International Law* 944.

41 See Wazvaremhaka and Osode 2019 *LDD.*

42 European Commission 2008 https://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0807.pdf 108. See also Tomilova and Valenzuela 2018 https://www.cgap.org/sites/default/files/publications/Technical-Guide-ISIP-Policy-Making-Nov-2018.pdf 6.

43 Arner *et al* 2020 *EBOR* 16-17; See Rauniyar 2021 *International Journal of Innovative Science and Research Technology* 1420.

44 Anarfo *et al* 2020 *Research in International Business and Finance* 447; See Staschen 2014 https://www.cgap.org/sites/default/files/researches/documents/Working-Paper-I-SIP-Pakistan-June-2014l.pdf 33.

45 Anarfo *et al* 2020 *Research in International Business and Finance* 447; See Staschen 2014 https://www.cgap.org/sites/default/files/researches/documents/Working-Paper-I-SIP-Pakistan-June-2014l.pdf 33.

46 García 2016 *Economic Issues* 87-95; See Hannig and Jansen "Financial Inclusion and Financial Stability" 310.

47 Han and Melecky 2013 https://openknowledge.worldbank.org/bitstream/handle/10986/16010/WPS6577.pdf 20.

An increased introduction of new financial institutions and services in the formal financial system also contributes positively to financial integrity and the combating of money laundering and the financing of terrorism. More formal institutions reduce the number of informal financial services that operate outside the law enforcement purview. This also increases the monitoring and improves the transparency of transactions and the effective and consistent application of AML/CFT controls.[48] The introduction and use of electronic accounts and fintech services in the formal financial sectors that facilitate the easy tracking and monitoring of suspicious transactions are often hampered by the anonymity of cash transactions.[49] Maintaining the integrity of the financial system also increases the trust in financial institutions. At the same time, it promotes savings and smoothens the operation of credit markets.[50] Equally, consumer protection laws also improve the trust and confidence in the financial market. These laws further increase the adoption of financial services.[51] Information disclosure requirements and financial literacy programmes address the financial services information imbalances between different types of consumers. Such programmes also create a better understanding of the services, rights and obligations associated with financial services.[52] Consumers can use the information to make informed financial decisions. They can also protect themselves from abusive practices or conducts such as predatory lending and exorbitantly high prices.[53] Consumer protection measures further advance competition in the market. These measures enable consumers to compare various financial products from different service providers and to make informed choices.[54] Therefore, both AML/CFT and consumer-protection laws are important to advancing financial inclusion and ensuring that most of the population is included in the national financial system.

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48 Shehu 2012 *Crime Law Social Change* 313. See also De Koker and Jentzsch 2013 *World Development* 267; Staschen 2014 https://www.cgap.org/ sites/ default/files/researches/documents/Working-Paper-I-SIP-Pakistan-June-2014l.pdf 34.

49 Dittus and Klein 2011 https://www.bis.org/publ/work347.pdf 17; See Alexandre and Eisenhart 2013 *Washington Journal of Law, Technology and Arts* 285.

50 Alexandre *et al* 2011 *Challenge* 126-127; See also Alber 2019 https://ssrn.com/ abstract=3335904 13.

51 Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 160; See also Tomilova and Valenzuela 2018 https://www.cgap.org/sites/default/ files/publications/Technical-Guide-ISIP-Policy-Making-Nov-2018.pdf 44.

52 Alber 2019 https://ssrn.com/ abstract=3335904 3; See Zhang and Valle-Sison "Financial Inclusion and Regulatory Implications" 613.

53 Johnson 2019 *Cato Journal* 493; See Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 157.

54 Johnson 2019 *Cato Journal* 492-493; See Bongomin and Ntayi 2020 *Digital Policy, Regulation and Governance* 157.

# 4 International financial inclusion regulatory framework and the I-SIP methodology

## *4.1 Brief discussion of the international framework*

A discussion of the international framework on financial inclusion falls outside the scope of this discussion. However, we briefly discuss the current measures at international level that inform the promotion of the I-SIP approach. It should be noted that there is currently no international instrument that specifically regulates access to financial services and financial inclusion.[55] However, the establishment of the Alliance for Financial Inclusion, and the developments of various policy frameworks by the Group of 20 (G20) and the World Bank are gradually providing some guidance on how measures should be implemented at the national level.[56] It is important for the purpose of this discussion that the declaration, principles, and frameworks developed by these bodies emphasise the need to promote financial inclusion by "implementing a sound and proportional regulatory framework that achieves the complementary goals of financial inclusion, financial stability, and financial integrity",[57] and to apply the I-SIP objectives.[58]

55 See, however, the obligation on state parties to eliminate discrimination in providing "bank loans, mortgages and other forms of financial credit" in the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979).

56 For the development of this framework, see World Bank 2012 http://documents.worldbank.org/curated/en/801151468152092070/Financial-inclusion-strategies-reference-framework. See also World Bank 2016 http://pubdocs.worldbank.org/en/379031452203008464/WBG-FMGP-Template-for-Designing-a-NFIS-Jan-2016-FINAL.pdf. AFI date unknown https://www.afi-global.org/sites/default/files/inline-files/AFI%20Official%20Members.pdf. AFI's members comprise central banks and other financial regulatory institutions in more than 90 developing countries, including South Africa. AFI organises annual Global Policy Forums that serve as platforms for leaders of different member institutions to discuss and exchange ideas on how to develop and improve their national financial strategies and policies.

57 AFI 2011 https://www.afi-global.org/publications/879/Maya-Declaration-The-AFI-network-commitment-to-financial-inclusion.

58 AFI 2011 https://www.afi-global.org/publications/879/Maya-Declaration-The-AFI-network-commitment-to-financial-inclusion; See G20: GPFI 2011 https://www.gpfi.org/sites/default/files/documents/G20%20Principles%20for%20Innovative%20Financial%20Inclusion_Bringin%20the%20Principles%20to%20Life.pdf 2; See World Bank 2012 http://documents.worldbank.org/curated/en/801151468152092070/Financial-inclusion-strategies-reference-framework 11.

### 4.2 Introduction of the I-SIP methodology

To achieve the necessary link among different FSPROs, the CGAP has proposed the use of an Inclusion-Stability, Integrity, and Protection (I-SIP) model.[59] The CGAP refers to the I-SIP methodology as an approach that

> [a]ssesses the direct effect(s) a policy intervention has on an I-SIP objective and the potential synergies and trade-offs that this effect might trigger between each pair of the four I-SIP objectives, such as inclusion and stability or stability and protection.[60]

The CGAP proposes the I-SIP methodology as a "structured approach" that identifies material links that may arise between them during the implementation of the relevant interventions.[61] The CGAP adopts this methodology as a tool to assist different regulators and policymakers to espouse a common regulatory mind set. Each of the I-SIP objectives is a goal to be maximised as part of a larger scheme of financial policy and regulatory frameworks.[62] The CGAP requires financial inclusion to reinforce and be reinforced by three other objectives.[63] Regulators must, therefore, manage the link among these objectives. Disregarding this link "can lead to

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59 CGAP 2012 https://openknowledge.worldbank.org/bitstream/handle/10986/13095/75157020120CGA0Box0374307B00PUBLIC0.pdf?sequence=1&isAllowed=y 7. The CGAP is a global partnership of more than 30 leading development organisations based in Washington DC, USA that promotes financial inclusion as a vehicle to advance the lives of poor people, including women (CGAP date unknown https://www.cgap.org/about/contact); See Tomilova and Valenzuela 2018 https://www.cgap.org/sites/default/files/publications/Technical-Guide-ISIP-Policy-Making-Nov-2018.pdf ii, where the authors identify Martin Alsop, David Porteous, and Timothy Layman as the original developers of the concept; see further Chuen and Low *Inclusive Fintech* 415.

60 Tomilova and Valenzuela 2018 https://www.cgap.org/sites/default/files/publications/Technical-Guide-ISIP-Policy-Making-Nov-2018.pdf 5.

61 CGAP 2012 https://openknowledge.worldbank.org/bitstream/handle/10986/13095/75157020120CGA0Box0374307B00PUBLIC0.pdf?sequence=1&isAllowed=y 6. See also De Sousa 2015 https://www.cigionline.org/sites/default/files/new_thinking_g20_no7.pdf 10, who refers to a "constructive approach" to promote the principles of proportionality; and Elsayed 2020 https://ssrn.com/abstract=3745874 1, who identifies the I-SIP theory adopted by the Arab Monetary Fund as an integrated framework for financial inclusion. See Twin-Peaks model in Louis and Chartier 2017 *Journal of Comparative Urban Law and Policy*.

62 CGAP 2012 https://openknowledge.worldbank.org/bitstream/handle/10986/13095/75157020120CGA0Box0374307B00PUBLIC0.pdf?sequence=1&isAllowed=y 33.

63 CGAP 2012 https://openknowledge.worldbank.org/bitstream/handle/10986/13095/75157020120CGA0Box0374307B00PUBLIC0.pdf?sequence=1&isAllowed=y 10; See Russian Microfinance Center and Bankable Frontier 2011 https://www.findevgateway.org/sites/default/files/publications/files/financial_inclusion_and_the_linkage_to_financial_stability_integrity_and_consumer_protection_insights_from_the_russia_experience.pdf accessed 7.

under or overestimation of certain benefits and risks".[64] Each of the traditional FSPROs is irrefutably independent. However, an effective national policymaking and regulation process that seeks to promote financial inclusion should consider all these objectives as the main essence of the I-SIP methodology.[65]

# 5 Financial inclusion framework and the I-SIP methodology in South Africa

## *5.1 South African financial inclusion policy measures*

South Africa's approach to financial inclusion policy formulation and regulation is generally linked to the government's socio-economic development and economic transformation agenda.[66] Two important policy initiatives were introduced to facilitate access to basic banking services. First, the *Financial Service Charter 2000* paved the way for a basic banking account called the *Mzansi* account.[67] A second important milestone in furthering financial inclusion came with the *Financial Sector Charter 2003* (*FS Charter*).[68] It is a black economic empowerment (BEE) transformational charter as provided for in the *Broad-Based Black Economic Empowerment Act*.[69] One of the main aims of the *FS Charter* is for financial institutions to "substantially increase effective access to first-order retail services to a greater segment of the population".[70] These include savings and transactional bank facilities, personal credits, and insurance for the low-

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64 Staschen 2014 https://www.cgap.org/sites/default/files/researches/documents/Working-Paper-I-SIP-Pakistan-June-2014l.pdf 32.

65 See Mminele "Remarks by Daniel Mminele" 3.

66 South African 2020 Draft Financial Inclusion Policy 89.

67 The Mzansi account is an entry-level bank account based on a magnetic stripe debit card platform, developed by the South African banking industry and launched collaboratively by the four largest commercial banks together with the state-owned Postbank in October 2004. By December 2008 more than six million Mzansi accounts had been opened a significant number in a country with an adult population of approximately 32 million. By 2009 at least one in ten South African adults currently had an Mzansi account and one in six banked people were active Mzansi customers; See FinMark Trust 2009 http://finmark.org.za.dedi517.jnb2.host-h.net/the-mzansi-bank-account-initiative/.

68 National Treasury 2003 https://www.treasury.gov.za/comm_media/press/2003/2003101701.pdf (hereafter the *FS Charter*). The *FS Charter* was agreed upon and voluntarily developed by the major commercial banks in South Africa for the transformation of the financial sector.

69 *Broad-Based Black Economic Empowerment Act* 53 of 2003, section 12.

70 The *FS Charter* defines the following financial services offered by banks as so-called "first-order retail products and services". These products refer to the basic means of accessing and transferring cash for day-to-day purposes, and savings products and services. The latter products refer to the financial means of accumulating funds over time, including savings accounts, collective investments, and community-based savings schemes. See para 2.27.

income society.[71] In promoting access to these services, the *FS Charter* takes cognisance of the central role of ensuring the stability and soundness of the financial sector.[72]

In 2020 the National Treasury introduced a Draft Policy Paper called, *An Inclusive Financial Sector for All in 2020* (South African 2020 Draft Financial Inclusion Policy) for public comment.[73] This is the first comprehensive financial inclusion policy in South Africa. The draft policy seeks to pave the way for the introduction of the first South Africa's National Financial Inclusion Strategies.[74] In addition to promoting financial inclusion,[75] the South African 2020 Draft Financial Inclusion Policy deals with all the I-SIP objectives and recognises their interdependence.[76] It commits to balancing financial regulatory objectives and minimising any ensuing trade-offs by ensuring that financial inclusion efforts are not proportionately detrimental to these objectives.[77] Principle 3, for example, emphasises the need to consider promoting financial stability, consumer protection, and financial integrity as critical FSPROs for promoting financial inclusion.[78] This requires the Draft Financial Inclusion Policy to "consider other critical financial sector policy objectives of promoting financial stability, consumer protection and financial integrity" in its approach to the promotion of financial inclusion.[79]

The policy document specifically requires a balance between financial inclusion and these objectives, importantly, using the I-SIP approach. Principle 3 specifically highlights that

> [t]he pursuit of these objectives and any resulting trade-offs must be balanced and proportionate, an approach referred to as I-SIP. The pursuit of the balanced (or I-SIP) approach encapsulated in this principle highlights that financial inclusion efforts should not be to the detriment of the other components (and vice versa).

### *5.2 Legislative measures that promote I-SIP objectives*

Apart from two financial charters and a new financial inclusion policy, several legislative and other regulatory measures have been introduced in

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71 See paras 2.22.4-2.22.7 of the *FS Charter*.

72 Paragraphs 1.1 and 3.3 of the *FS Charter*; See GN 977 in GG 35914 of 26 November 2012.

73 National Treasury 2022 http://www.treasury.gov.za/comm_media/press/2020/Financial%20Inclusion%20Policy%20%20An%20Inclusive%20Financial%20Sector%20For%20All.pdf (the South African 2020 Draft Financial Inclusion Policy).

74 South African 2020 Draft Financial Inclusion Policy 3.

75 South African 2020 Draft Financial Inclusion Policy 43, Policy Pillar One. On page 2, the draft policy specifically indicates that the proposal made in it "will be followed by the drafting of the National Financial Inclusion Strategy".

76 South African 2020 Draft Financial Inclusion Policy 36.

77 South African 2020 Draft Financial Inclusion Policy 38.

78 South African 2020 Draft Financial Inclusion Policy 36.

79 South African 2020 Draft Financial Inclusion Policy 37-39.

the last 30 years since the advent of democracy to increase the level of financial inclusiveness in South Africa. We will refer to some of these legislative initiatives, indicating their role in improving financial inclusiveness in the banking sector. The measures that we briefly explain below represent but a selection of the more important and far-reaching initiatives of what has been achieved in the field of access to banking and banking-related products, and specific legislative measures that incorporate the four pillars of the I-SIP methodology.[80]

### *5.2.1 Legislative measures on financial stability (the Banks Act and the FSRA)*

Several South African Acts of Parliament deal with the stability of the financial systems and institutions such as banks. The *Banks Act*[81] and the FSRA are the primary legislation. The *Banks Act* regulates the registration and prudential supervision of commercial banks.[82] The Act, among others things, regulates the scope of banking activities, the adequacy of their capital and the requirements for their liquidity, and measures that protect consumers.[83] In contrast with similar legislation in France[84] and Canada,[85] South Africa's *Banks Act* does not specifically deal with promoting financial inclusion or access to financial services.[86] It limits banking activities in the definitions of "the business of a bank" or "deposit".[87] It generally requires the person who accepts, solicits or advertises for deposits from the general

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80 Because we have limited our discussion to a selection of legislative initiatives from the last 30 years, the following Acts of Parliament, the *Friendly Societies Act* 12 of 1956 and the *Banks Act* 94 of 1990 are excluded from our discussion. We have also excluded those Acts which will eventually be replaced by the Conduct of Financial Institutions Bill (for a list of these Acts see para 6 below) as well as a number of Acts that are marginally relevant to the purposes of the topic of financial inclusion and which did come into force during the last 30 years, but for considerations of direct relevance to retail banking are excluded from the present discussion: the *National Payment Systems Act* 78 of 1998; the *Collective Investment Schemes Control Act* 45 of 2002; the *Financial Services Ombud Schemes Act* 37 of 2004; the *Financial Markets Act* 19 of 2012 to mention but a few.

81 *Banks Act* 94 of 1990 (the *Banks Act*).

82 See section 2 of the *Banks Act*, which excludes other types of banks such as mutual banks and cooperative banks from the provisions of this Act.

83 Pienaar 1992 *TSAR* 475-486. Other measures include the prevention of the undue concentration of risks; and the disclosure of the positions of banks in connection with certain market-related risks.

84 *Banking Act* 84-46 of 24 January 1984 (unofficial translation).

85 *Bank Act* SC 1991 c 46.

86 See the preamble of the *Banks Act*.

87 See section 1 of the *Banks Act*. "The business of a bank" is defined as including the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business, the soliciting of or advertising for deposits; and the utilisation of money, or the interest for granting a loan, investing, or obtaining money through the sale of assets. "Deposit" is defined as "money paid by one person to the other subject to an agreement that such money or part of it will be repaid with or without interest".

public to register as a bank.[88] With regard to the prudential requirements, the *Banks Act* requires banks to maintain a minimum share capital and reserve funds in compliance with international standards to protect consumers against bank failures and financial system crises.[89] It requires an application for a bank licence to meet the R250 million minimum capital requirement.[90] This amount has been identified as a barrier to entry for new banks in South Africa and as the reason why a very limited number of new banks has entered the market.[91] Such a restriction to entry, while effectively ensuring the stability of the financial system, is one factor that contributes to bank concentration and the paucity of competition in the South African banking system.[92]

Some of the provisions of the *Banks Act* also contribute to the promotion of financial inclusion by ensuring the protection of consumers and the protection of the integrity and stability of banks and the financial system. The *Banks Act* established the Registrar of Banks (now the Prudential Authority, established by the FSRA). The Act vests the Prudential Authority with the power to inspect the operation of banks and to request relevant

88 Section 11 of the *Banks Act*.

89 Sections 70-75 of the *Banks Act*; See s 72. See also Pienaar 1992 *TSAR* 478; Moloi 2014 *Journal of Governance and Regulation* 35. For international standards by the Bank for International Settlements, see BIS 2012 www.bis.org/publ/bcbs213.pdf.

90 See section 70(2) of the *Banks Act*; See s 72 which deals with the minimum liquid assets that the bank must hold; See SARB date unknown https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation/functions-of-the-prudential-authority. The Act specifically requires the branch capital at all times to be at least the greater of ZAR 250 million or 8% (or such higher percentage prescribed by the Prudential Authority) of the number of assets and other risk exposures of the branch. In the case of Mutual Banks, the minimum capital required is R10 million; See s 48(2)(a) of the *Mutual Banks Act* 124 of 1993.

91 Falkena *et al* date unknown http://www.treasury.gov.za/publications/other/Access%20to%20Finance%20in%20South%20Africa%20-%20A%20Supply-Side%20Regulatory%20Review.pdf; See also Makhanya *et al* 2015 https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/58905653197aea6ab40b00ce/1485854300736/Barriers%2Bto%2Bentry%2B%2Bretail%2Bbanking%2B%2BFinal%2B031215.pdf.

92 Makhanya *et al* 2015 https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/58905653197aea6ab40b00ce/1485854300736/Barriers%2Bto%2Bentry%2B%2Bretail%2Bbanking%2B%2BFinal%2B031215.pdf 6; See also Staff Writer 2020 https://businesstech.co.za/news/banking/416057/south-africas-banking-sector-is-dominated-by-5-names-who-control-almost-90-of-all-assets/; See Hollander and Van Lill 2019 www.ekon.sun.ac.za/wpapers/2019/wp112019 16, who argues that "[t}he high concentration within the banking sector can be attributed to the high barriers to entry imposed by the Banks Act of 1990". On bank competition and financial inclusion; See Pham *et al* 2019 *Applied Economics Letters* 1134-1135; See Owen and Pereira 2018 *Review of Development Finance*, whose study established that the greater banking industry concentration is associated with more access to deposit accounts and loans, provided that the market power of banks is limited.

information,[93] to authorise the establishment and registration of banks,[94] to supervise their management, ownership, and control, and to cancel or suspend their registrations.[95] In addition, where the registration of a bank lapses as a result of its cancellation by the Prudential Authority, it may direct such a bank to repay all the monies deposited with customers while it was still registered.[96]

The FSRA was introduced following regulatory reforms proposed by the National Treasury's policy called *A Safer Financial Sector to Serve South Africa Better* (The Red Book).[97] The Red Book is a roadmap to address the challenges to financial stability arising from the 2008 global financial crisis.[98] In addition to dealing with the aftermath of the crisis, the Red Book aims to "provide a comprehensive review" of the key challenges facing the financial sector by focussing on broader financial sector policy priorities.[99] These priorities are financial stability, consumer protection, protecting the integrity of the financial sector, and more importantly "ensuring that efficient, effective and inexpensive financial services are more accessible".[100] Its main priority was to introduce a Twin-Peaks model of regulation to make the financial sector safer. It also introduces a tougher prudential and market conduct framework that prioritise transparency, market integrity, and consumer protection.[101] The Red Book requires these objectives to be implemented through clear and enforceable regulations.[102] It does not outline specific regulations to promote financial inclusion, but it does highlight the necessity for the government to support the existing financial inclusion initiatives "through legislative and regulatory changes".[103] It, therefore, paved the way for the introduction of the FSRA.

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93 Section 12(3) of the *Banks Act.*

94 Sections 11-13 read with s 17 of the *Banks Act*.

95 Sections 23 and 24 of the *Banks Act*.

96 Section 32 of the *Banks Act*.

97 National Treasury 2011 https://www.treasury.gov.za/twinpeaks/20131211%20%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf (hereafter the National Treasury 2011 Red Book). The FSRA went through a number of drafts until it was passed by the National Assembly on 22 June 2017 and was signed into law on 21 August 2017. See also GN R169 in GG 41549 of 29 March 2018; National Treasury 2013 http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%203%20Roadmap.pdf; Godwin *et al* 2017 *SALJ* 670. The policy document is known as the Red Book due to the red colour of its cover page.

98 National Treasury 2011 Red Book 2. The formal review of the financial regulatory system began in 2007 and was accelerated and expanded only after 2008; See Gordan 2011 http://www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf, where the policy document was first officially introduced.

99 National Treasury 2011 Red Book 2.

100 National Treasury 2011 Red Book 2.

101 National Treasury 2011 Red Book 29.

102 National Treasury 2011 Red Book 42.

103 National Treasury 2011 Red Book 62.

The aim of the FSRA is to promote financial stability, the safety and soundness of financial institutions, the fair treatment and protection of financial customers, and the transformation of the financial sector.[104] The FSRA enacted financial inclusion as a clearly stated statutory objective, the first in South Africa.[105] The FSRA introduced a Twin-Peaks model of regulation and supervision of the financial sector. This model adopts a twin regulators approach with the Prudential Authority regulating the safety and soundness of financial institutions, and the Financial Sector Conduct Authority supervising financial services providers in the conduct of their businesses and treatment of customers.[106] In particular, the Prudential Authority manages prudential risk (financial health), and the Financial Sector Conduct Authority manages the market conduct risk across all financial providers.[107]

The FSRA specifically requires the Prudential Authority to "support", and the Financial Sector Conduct Authority to "promote", financial inclusion among their main objectives by imposing a number of duties on financial institutions.[108] For instance, it requires the Prudential Authority to "support sustainable competition in the provision of financial products and financial services".[109] It further requires the Financial Sector Conduct Authority to ensure that financial services providers protect their customers by treating them fairly.[110] The Financial Sector Conduct Authority must monitor the fairness and appropriateness of financial products and services and the extent to which financial institutions meet the needs and reasonable

104 Section 7(1) of the FSRA; See Van Heerden *et al* 2020 *THRHR* 505.

105 Section 7(1)(*f*) of the FSRA; See ss 34(1)(*e*) and 57(1)(*e*); See further Van Niekerk and Phaladi 2021 *PELJ* 10.

106 See sections 32-34 of the *Banks Act* regarding the Prudential Authority and ss 56-58 regarding the Financial Sector Conduct Authority. This marked a transition from a "silo sectoral model" of financial regulation to one that focusses on the aim of the regulation, rather than solely on the type of institutions involved; See Godwin *et al* 2017 *SALJ* 667; Van Niekerk and Van Heerden 2020 *SALJ* 111; See further Schmulow 2015 *JBFLP* 151-165 who identified four regulatory systems, including the institutional silos approach (which focusses on the form of the legal entity under regulation and accordingly, assigns a particular regulator), functional (focuses on the types of transaction or product under the regulation rather than the type of the legal entity), and the Twin Peaks model , which is exemplified by regulation by objective; See further Millard 2016 *PELJ*; National Treasury 2018 http://www.treasury.gov.za/twinpeaks/Press%20release%20Twin%20Peaks%20implementation%20March2018_FINAL.pdf.

107 Both regulators became operational on 1 April 2018.

108 Sections 34(1)(*e*) and 57(1)(*e*) of the FSRA; See Chitimira and Ncube 2020 *Acta Universitatis Danubius* 27.

109 Section 34(1)(*d*) of the FSRA.

110 The duty to treat customers fairly is scattered across the Act; See sections 7(1)(c), 57(b)(i), 58(1)(i), 106(2)(b) and (c) and (4) of the FSRA; See Millard and Maholo 2016 *THRHR* 598.

expectations of financial customers.[111] The FSRA has thus incorporated the promotion of financial inclusion and consumer protection in its main aim of protecting the stability of the financial systems and institutions.

#### *5.2.2 Consumer protection legislative measures: The NCA, CPA, and the CoFI Bills*

Prior to the legislation reform in the early 2000s aimed at enhancing consumer protection, South Africa did not have specific consumer protection legislation that established the rights of consumers when buying or using financial products or services.[112] The government has promulgated several legislative measures that regulate the protection of consumers generally. We will restrict the discussion to the *National Credit Act* (NCA),[113] the *Consumer Protection Act* (CPA),[114] and the *Draft Conduct of Financial Institutions Bills* (CoFI Bills).[115]

The NCA[116] was introduced to address several challenges in the credit market. These included outdated consumer credit legislation,[117] reckless credit-granting, the exploitation of consumers by credit providers, and more importantly, the existence of limited access to credit for the majority of the population in the country.[118] The NCA does not specifically provide for the promotion of financial inclusion and the prevention of financial exclusion.[119] However, its specific purposes, among others, are "to promote and advance the social and economic welfare of South Africans … and accessible credit market and industry, and to protect consumers".[120] The NCA has to play the

111 Sections 57(*b)* and 58(1)(*d*) and (*i*) of the FSRA. Financial products in terms of s 3 of the FSRA include a deposit as defined in the *Banks Act* and a credit agreement in terms of the *National Credit Act* 34 of 2005 (subject to certain exemptions in ch 4 of this Act).

112 See similar legislation, *Financial Consumer Protection Act* 7 of 2022 (Lesotho), *Financial Consumer Protection Act*, 2011 (Taiwan), *Financial Consumer Protection Act* 6 of 2022 (Seychelles). See also *National Consumer Credit Protection Act*, 2009 (Australia), and the *Dodd-Frank Act* (USA).

113 *National Credit Act* 34 of 2005 (the NCA).

114 *Consumer Protection Act* 68 of 2008 (the CPA).

115 See GN 808 in GG 42114 of 14 December 2018 (as the First Draft CoFI Bill) and GN 519 in GG 43741 of 29 September 2020 (as the Second Draft CoFI Bill).

116 The provisions of the NCA came into effect piecemeal and the whole Act effectively came into operation on 1 June 2007. On the background to the NCA, see Kelly-Louw and Stoop *Consumer Credit Regulation* 3-18; Otto and Otto *National Credit Act Explained* 1-2; Scholtz *et al Guide to the National Credit Act* (1-2 – 1-4).

117 See the preamble to the NCA; See the *Credit Agreements Act* 75 of 1980 and the *Usury Act* 73 of 1968.

118 See the preamble to the NCA (emphasis added); See De Wet *et al* 2015 *Journal of Economic and Financial Sciences* 83; Wazvaremhaka and Osode 2019 *LDD* 3.

119 Chitimira 2022 *Acta Universitatis Danubius* 279.

120 See the preamble and section 3 of the NCA. In terms of s 8(2), the definition of "credit agreements" does not include a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel. See Scholtz *et al Guide to the National Credit Act* 8-21; See Goodwin-Groen and Kelly-Louw 2006

dual roles of making the credit market accessible and protecting consumers.[121] Consumer protection is at the heart of a number of rights provided in the NCA.[122] Section 60 of the NCA affords every person the "right to *apply*" to a credit provider for credit.[123] It does not grant consumers an entitlement to "receive" credit, but merely a right to apply for credit, and a duty is placed on the credit provider to duly consider such an application. The credit provider may refuse to provide credit under only certain conditions as regulated and explained in the NCA.[124] The NCA prohibits credit providers from refusing to enter into a credit agreement with any prospective consumer, unless there are reasonable commercial grounds that are consistent with the credit provider's customary risk management and underwriting practices.[125] For instance, the credit provider may establish the affordability for a credit applied for as a reasonable ground.[126] The NCA therefore provides consumers with a "conditional right" to credit.[127]

The NCA provides this right by balancing access to credit with other consumer rights such as the prevention of over-indebtedness and protection from reckless credit granting by credit providers. The Act requires credit providers to establish the consumer's capacity to afford credit before entering into or amending a credit agreement with him or her by considering

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https://finmark.org.za/system/documents/files/000/000/298/original/NCA_AccesstoFinance_2006.pdf?1614582083 49.

121 Kawadza 2018 *De Jure* 171.

122 Kelly-Louw and Stoop *Consumer Credit Regulation* 158; See *ABSA Bank v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) para 15 where the court interpreted the NCA as "directed more for the protection and in the interests of credit consumers than of credit providers". These rights are scattered throughout the NCA. A number of them are provided in sections 60-66 and include the right to receive information in an official, plain, and understandable language and to receive documents relating to credit agreements. See also s 103 which regulates the maximum interest, fees, or charges that may be payable, and seeks to address the interest rate caps regulation that was dealt with under the *Usury Act*. The NCA applies a different maximum rate of interest to different types of agreements (see s 103 of the NCA); See GN 1080 in GG 39379 of 6 November 2015. Notably, Goodwin-Groen and Kelly-Louw 2006 https://finmark.org.za/system/documents/files/000/000/298/original/NCA_AccesstoFinance_2006.pdf?1614582083 28, correctly opine that the maximum rates of interest are so high that it is unlikely to curtail any form of credit; See further Kelly-Louw and Stoop *Consumer Credit Regulation* ch 9.

123 Section 60(1) of the NCA (emphasis added). The right is specifically afforded to an adult natural person, a juristic person, or an association of persons.

124 See section 60(3) of the NCA (emphasis added); See also Kelly-Louw and Stoop *Consumer Credit Regulation* 159; Scholtz *et al Guide to the National Credit Act* 6-2; Schmulow 2016 *Competition and Consumer Law Journal* 232.

125 Section 60(3) of the NCA.

126 Kelly-Louw and Stoop *Consumer Credit Regulation* 159.

127 See Meyer 2018 *Journal of Political Philosophy* 306, who advocates a right to credit which is a conditional right to which only creditworthy applicants are entitled.

the consumer's "financial means, prospects and obligations".[128] The court has emphasised the need to balance the right to access credit with other consumer rights in the NCA. In *SA Taxi Securitisation (Pty) Ltd v Mbatha*[129] the court warned against an "over-critical armchair approach by the [c]ourts" towards credit providers when evaluating reckless credit "[which] would significantly chill the availability of credit, especially to the less affluent members of our society". In the *Truworths Limited v Minister of Trade and Industry*[130] the Western Cape High Court further stated that a balance must be struck between preventing reckless credit and promoting an accessible credit market when applying the affordability assessment criteria to determine the consumer's affordability for credit before entering into or amending a credit agreement with him or her.[131] It held that the criteria might in certain instances not only frustrate the aim of promoting the development of an accessible credit market, particularly for those historically unable to access credit, but might eliminate any credit being granted to many in this category.[132] These views of the courts, correctly analysed, play a significant role of balancing two important objectives that form part of the I-ISP methodology: financial inclusion and consumer protection. They outline the need not to overly protect consumers against over-indebtedness at the expense of totally excluding consumers from accessing credit.

The CPA is a single, comprehensive legal framework that guarantees a market that is fair, accessible, efficient, sustainable, and responsible to

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128 Section 81(2) of the NCA. The affordability assessment criteria determine whether a consumer can afford the credit by establishing whether he or she has the financial means and prospects to pay the proposed credit instalments, by validating the gross income with specified documents. This can be done by either producing the latest three months' pay slips, the latest bank statements, the latest three documented proof of income, or the latest financial statements depending on whether or not the consumer receives a salary from an employer or is self-employed or informally employed; See reg 23A(3) and (4) of GN R202 in GG 38557 of 13 March 2015 (Affordability Assessment Regulations); See also the *National Credit Regulator v Gaba Cash Loans CC* (NCT/91475/2017/57(1)) [2018] ZANCT 76 (24 May 2018) para 24.

129 *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2010 6 SA 557 (GSJ) para 37; See Scholtz *et al Guide to the National Credit Act* 11-17.

130 *Truworths Limited v Minister of Trade and Industry* 2018 3 SA 558 (WCC). The case dealt with a challenge on the basis of unfair discrimination to the Affordability Assessment Regulation reg 23A(3) which deals with the requirement to submit the latest three months' statements or financial statements to validate the gross income of consumers who are informally or self-employed.

131 For the criteria, see the Affordability Assessment Regulations. Section 82 of the NCA allows the credit provider to conduct the assessment using its determined evaluative mechanism and modes, provided it complies with mechanisms or models and procedures and provided they result in a fair and objective assessment and are not inconsistent with the affordability assessment regulations made by the Minister; See Kawadza 2018 *De Jure* 163.

132 *Truworths Limited v Minister of Trade and Industry* 2018 3 SA 558 (WCC) paras 52 and 53.

consumers.[133] The purpose of the CPA is to promote and advance the social and economic welfare of South African consumers.[134] It also aims to reduce the disadvantages that low-income consumers may experience "in accessing any supply of goods or services".[135] Chapter 2 of the CPA introduces eight fundamental consumer rights, which impact to a larger or lesser extent on the right to financial inclusion.[136] Suffice it to say that two of these rights may directly apply to financial services and products and thus enhance financial inclusion.[137] These are the right to honest dealing and fair agreements; and the right to fair, just, and reasonable terms and conditions.

The CPA defines "services" to include "any banking services or related or similar financial services" that are not credit agreements,[138] financial advice[139] or insurance.[140] Despite the inclusion of banking services in the definition of "services", it has become clear with the introduction of the FSRA that the CPA does not cover general financial products and services. The FSRA specifically excludes the application of the CPA in relation to any function, act, transaction, financial product, or service that is subject to

133 Section 3(1)(*a*) of the CPA.

134 On the CPA, see generally, Naudé and Eiselen *Commentary on the Consumer Protection Act*; Schulze *et al General Principles of Commercial Law* 551.

135 Section 3(1)(*b*) of the CPA.

136 These rights are the right to equality in the consumer market (sections 8-10); the right to confidentiality and privacy (ss 11-12 of the CPA); the right to choose (ss 13-21); the right to disclosure and information (ss 22-28); the right to honest dealing and fair agreements (ss 40-47); the right to fair, just, and reasonable terms and conditions (ss 48-52).

137 For a more detailed discussion of these eight fundamental consumer rights, see Schulze *et al General Principles of Commercial Law* 556.

138 Under the NCA, see section 5(2)(*d*) of the CPA; See further Melville and Palmer 2010 *SA Merc LJ* 272. The exclusion covers transactions that constitute credit agreements but not the goods and services that are the subject of the agreement. For the discussion on the application of the CPA, see the World Bank date unknown https://www.treasury.gov.za/publications/other/Achieving%20Effective%20Financial%20Inclusion%20in%20South%20Africa.pdf para 85; Sharrock 2010 *SA Merc LJ* 301. See further Van Eeden and Barnard *Consumer Protection Law* 45; Lawack-Davids and Marx 2010 *Obiter* 456, who are of the view that "banking services" include credit cards and internet payments; Naude 2010 *Journal of European Consumer and Market Law*, regarding the need to protect low-income consumers in relation to financial services; See further Itzikowitz and Gunning 2021 https://www.mondaq.com/southafrica/dodd-frank-consumer-protection-act/1130670/the-application-of-the-consumer-protection-act-to-open-banking, who argue that the definition of "services" should be read to specifically exclude services provided by the supplier that constitute "advice" or "intermediary services" as defined in the *Financial Advisory and Intermediary Services Act* 37 of 2002, or services regulated in terms of the insurance legislation. These services are regulated by their own legislation and not by the CPA. They argue, however, that the CPA applies to general banking products and services not regulated under the Financial Sector Conduct Authority legislation.

139 In terms of the *Financial Advisory and Intermediary Services Act* 37 of 2002.

140 Regulated in terms of both the *Long-term Insurance Act* 52 of 1998 and the *Short-term Insurance Act* 53 of 1998.

financial sector law – such as the NCA, the *National Payment System Act*[141] and the *Banks Act*.[142] These exclusions have cast some doubt on the application of the CPA to financial services since the introduction of the FSRA which, among others things, provides for the development of conduct standards in the treating customer fairly policy principles. As discussed below, the Draft CoFI Bills specifically provide for the enhancement of these rights in one of its aims of promoting financial inclusion.

On 20 November 2020 the National Treasury published the second draft CoFI Bill for public comment.[143] The CoFI Bill is the next phase of the legislative reforms aimed at strengthening the regulation of how the financial services industry treats its customers.[144] The CoFI Bill follows the FSRA which established the Prudential Authority and the Financial Sector Conduct Authority as new industry regulators with dedicated mandates. The main aims of the CoFI Bill are to establish a consolidated, comprehensive and consistent regulatory framework for the conduct of financial institutions that will protect financial customers; to promote the fair treatment of financial customers by financial institutions; to support fair and efficient financial markets; to promote innovation and the development of and investment in innovative technologies, processes and practices; to promote competition; to promote financial inclusion, and to promote the transformation of the financial services sector.[145] Importantly, the specific promotion of financial inclusion also forms an integral part of these aims.[146]

The CoFI Bill introduces far-reaching changes to the financial institution environment. These include a proposal for a new licensing framework for financial institutions and replacing the myriad of different registrations and authorisations in the financial sector with a single market conduct licence from the Financial Sector Conduct Authority.[147] The Bill also sets out the general principles underlying the fit and proper governance and operational

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141 *National Payment Systems Act* 78 of 1998.

142 *Banks Act* 94 of 1990. See Schedule 1 to the FSRA for legislation that is included in the list of "financial sector law". See also section 10 of the FSRA. Section 85(1) of the FSRA allows the Minister to request the Inter-Ministerial Council to consider whether the provision of the proposed or existing financial sector laws, including regulations, may set standards and protection that is equivalent to or higher than the protection in the NCA and CPA.

143 See GN 519 in GG 43741 of 29 September 2022 (Second Draft CoFI Bill) and Draft Dedicated Banks Bill, 2004.

144 For an overview of the first draft of the Second Draft CoFI Bill, see Visagie-Swart and Lawack 2020 *SA Merc LJ* 129 in general.

145 See clause 3 of the Second Draft CoFI Bill; See further Visagie-Swart and Lawack 2020 *SA Merc LJ* 129 and the accompanying memorandum to the CoFI Bill in GN 519 in GG 43741 of 29 September 2022.

146 See the preamble and section 3(g) of the Second Draft CoFI Bill.

147 See ch 2 of the Second Draft CoFI Bill; See Staff Writer 2018 https://businesstech.co.za/news/banking/290414/new-legislation-outlines-rules-for-how-south-african-banks-should-be-treating-customers/.

requirements with which financial institutions must comply. It also allows the Financial Sector Conduct Authority to set requirements to support the development of an appropriate corporate culture that focusses on the fair treatment of customers, improves customer confidence and enhances transparency and discipline in the industry. Chapter 4 of the CoFI Bill provides for measures that will promote financial inclusion while also ensuring the fair treatment and protection of customers. This requires financial institutions to have clear processes and procedures regarding the design of financial products marketed and sold. It further aims to ensure that products consider the needs of identified financial customers and are targeted accordingly. Clause 27 requires a financial institution that provides retail financial products or services to enter into and act within the mandate of a written agreement with the customer.[148] It lays down specific principles that require financial institutions to design, develop or make material changes to these products. In doing so, financial institutions must ensure that these products, among others, are appropriate and target customers for whose needs the products or services are likely to be appropriate, taking into account the fair treatment of retail financial customers.[149] They must also advertise, market, and promote these products in a way that is fair and not misleading.[150] Another important development that the CoFI Bill brings is the provision that the Financial Sector Conduct Authority will be able to appropriately accommodate smaller players in the financial sector (for example, burial societies and stokvels) which pose low conduct risk and should not be subject to onerous regulatory compliance costs.[151] These measures are important to promote financial inclusion by ensuring the adequate development of products and institutions while ensuring that consumers are protected and treated fairly.

### *5.2.3 Financial integrity and the prevention of financial crimes: FICA*

The international AML/CTF framework enlists the financial services industry as the key partner to combat money laundering and terror-financing.

148 Clauses 26 and 27 of the Second Draft CoFI Bill.

149 Clause 26(2) of the Second Draft CoFI Bill. Clause 28 further requires a financial institution to establish and implement oversight arrangements to approve, monitor, and review the design, development, suitability, and provision of its financial products and services on an on-going basis.

150 Clauses 29 and 30 of the Second Draft CoFI Bill. See also ch 6 which addresses the provision of adequate, clear information by financial institutions to financial customers before, during, and after the point of sale. The Bill requires financial institutions to ensure that their distribution models are appropriate to ensure the delivery of appropriate products and services and, where applicable, to provide access to suitable advice. Customers should be able to understand and compare the costs and contractual implications associated with sales and distribution models. Ch. 10 sets out the reporting obligations of financial institutions.

151 See clause 97(4) and (5) of the Second Draft CoFI Bill. On stokvels and their role in furthering financial inclusions, see para 6 below.

AML/CFT standards such as the customer due diligence and the know-your-customer (KYC) obligations imposed on these institutions have a considerable impact on the promotion of financial inclusion.[152] It has also become imperative for countries to tailor their AML/CFT measures in a manner that does not prevent financial institutions from providing access to financial services to the majority who are excluded from accessing these services.[153]

South Africa has introduced a number of statutory measures to combat money laundering and terror-financing since 1992.[154] FICA, in particular, introduced the customer due diligence with customer identification and verification (CIV) as the main AML/CFT deterrent measure.[155] CIV requires banks to identify and verify the identity of customers before taking or continuing with their relationship with customers.[156] This process requires customers to produce certain information.[157] The identification of South African natural citizens or residents requires banks to verify the identity documents or any document that bears certain required information.[158]

Before 2017 FICA and its regulations were mainly prescriptive and primarily rule-based.[159] A rule-based approach required banks to adopt a tick-box

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152 Other relevant AML/CFT prevention measures include cash transaction reporting and suspicious transaction reporting.

153 De Koker 2006 *Journal of Financial Crime* 27; See Kruger 2022 https://www.moneyweb.co.za/news/companies-and-deals/sa-banks-remarkably-healthy-gcr-ratings/, on the recent rating of South African banks.

154 *Drugs and Drug Trafficking Act* 140 of 1992 in section 10(13); *Proceeds of Crime Act* 76 of 1996; the *Prevention of Organised Crime Act* 121 of 1998; See the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act* 33 of 2004, relating to terrorist activities. On common law measures that outlawed and prosecuted money laundering; See Chitimira 2021 *Journal of Money Laundering Control* 790; De Koker 2009 *Journal of Money Laundering Control* 325.

155 See section 21 (CIV) read with regs 3-19 in GN 456 in GG 1595 of 20 November 2002, as amended (FICA Regulations); s 28 (CTR) read with reg 22B and s 29 of the *Financial Intelligence Centre Act* 38 of 2001 (FICA). Other relevant measures include ss 22-26 (record keeping) and s 30 (conveyance of cash to or from South Africa); See s 29 of FICA which requires businesses, their managers, and their employees to identify and report suspicious transactions to the FIC.

156 Section 21(1)(a) read with Schedule 1 of FICA. Other provisions in s 21 include the re-identification of customers who have established a business relationship with a client before the commencement of the Act. S 21 also requires them to identify the person on whose behalf the client is acting or another person acting on behalf of the client.

157 FICA Regulations. This includes South African citizens and residents (regs 3 and 4), foreign nationals (regs 5 and 6), close corporations and South African companies (regs 7 and 8), foreign companies (regs 9 and 10), other legal persons (regs 11 and 12), partnerships (regs 13 and 14), and trust (regs 15 and 16).

158 Regulation 3(a)-(e) of the FICA Regulations. Reg 4 allows an accountable institution to accept documents that bear a photograph of the person, his or her full name and surname, date of birth, and identity number.

159 De Koker *South African Money Laundering* 207. A risk-based approach was provided only in FIC 2004 https://www.fic.gov.za/Documents/note%

standard to CIV, irrespective of the risks of money laundering posed by the customers, transactions or products.[160] A strict application of the CIV created barriers to accessing financial services for the low-income and undocumented sectors of the population, such as the rural population, refugees, and asylum seekers.[161] Since 2017 FICA specifically requires accountable institutions to develop, maintain, and implement a Risk Compliance and Management Programme (RCMP) and to conduct customer due diligence that takes different risk levels into account.[162] Accountable institutions are required to apply enhanced due diligence for higher risks and reduced or simplified measures where there are lower risks.[163] The reinforcement of a risk-based approach is in line with continuing practices and policies to adopt a tiered KYC.[164] Tiered KYC requires banks either to exempt certain marginalised groups up to a certain transaction or value limit or to apply regulatory adjustments for complying with documentary requirements.[165] The application of the risk-based approach poses some challenges with regard to assessing the level of risk that a particular financial service may pose for money laundering. Gelb and Castrillon identify the main challenge of determining "how small [a particular bank's] accounts need to be, how the risk-based assessments are to be done, and exactly what the requirements should be for such low-risk accounts".[166] According to De Koker, the assessment will require financial institutions "to compare the risk profile of the low-risk products with those of standard and higher risk products".[167] In so doing, the risk-based approach

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201%2016.Guidance%20concerning%20identification%20of%20clients.pdf, which prohibits the application of "a one-size-fits-all approach" to clients.

160 Unger "Money Laundering Regulation" 24-25.

161 De Koker 2004 *TSAR* 745. See also Gelb and Castrillon 2019 https://www.cgdev.org/sites/default/files/identifying-and-verifying-customers-when-are-kyc-requirements-likely-become-constraints.pdf; Batsaikhan *et al* 2019 *Journal of Banking Regulation* 260.

162 Section 21 of FICA; See also ch 3 pt 1 on the customer due diligence obligations and different levels of this obligation; See further s 42(2)*(a)* of FICA on RCMP as a "risk-based framework". See further Chitimira 2020 *Acta Universitatis Danubius* 33.

163 See sections 21B, 21C, and 21E of FICA on different levels of customer due diligence; See FinMark Trust 2019 https://finmark.org.za/system/documents/files/000/000/149/original/FMT_Product-Risk-Assessment_v5_final_18092019.pdf?1594736892 4.

164 See AFI 2019 https://www.afi-global.org/sites/default/files/publications/2019-03/KYC-Innovations-Financial-Inclusion-Integrity-Selected-AFI-Member-Countries.pdf 6.

165 See AFI 2019 https://www.afi-global.org/sites/default/files/publications/2019-03/KYC-Innovations-Financial-Inclusion-Integrity-Selected-AFI-Member-Countries.pdf 6.

166 Gelb and Castrillon 2019 https://www.cgdev.org/sites/default/files/identifying-and-verifying-customers-when-are-kyc-requirements-likely-become-constraints.pdf.

167 De Koker 2009 *Journal of Money Laundering Control* 335.

will serve to improve the efficacy of the AML/CFT measures while also promoting financial inclusion.[168]

Financial inclusion is considered only as one of the factors that should be "taken into account" when assessing the lower risk of money laundering and terror-financing.[169] Guidance Note 7 specifically considers financial inclusion objectives and how exploring "more innovative ways of offering financial services to a broader range of clients and bringing previously excluded sectors of society into the formal economy" may contribute to a more accurate assessment of money laundering and terror-financing risks.[170] The lack of a specific mandate to bring the majority into the formal financial system raises a major concern for both the promotion of financial inclusion and the prevention of money laundering and terror-financing. The FATF mutual evaluation of South Africa in 2021 focussed, among other aspects, on assessing the country's efforts to combat money laundering and terror-financing in the informal sector and how money laundering and terror-financing risks are "managed in the context of financial inclusion initiatives".[171] It identified financial exclusion as one of the factors that impacts the effectiveness of AML/CFT in the country, particularly as the large majority of the people remain unbanked and a sizable number in the informal economy is still using cash as payment.[172] This in effect requires a proper balance between the country's AML/CFT measures and the promotion of financial inclusion, which is one step towards adopting the I-SIP methodology.

## 6 Other relevant financial inclusion initiatives

In addition to specific legislative measures that have a bearing on promoting the I-SIP policy objectives, there are several legislative measures that directly and indirectly promote financial inclusion. Importantly, some of them have the effect of addressing the trade-offs between traditional FSPROs and financial inclusion. A few of these measures are discussed briefly below, while focusing on their effect on promoting financial inclusion.

One lesson to draw from the historical discussion above is that ordinary commercial banks tend to focus on high-value businesses and clients.

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168 FIC 2017 https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20 Note%2007.pdf para 30 (FIC Guidance Note 7).

169 FIC Guidance Note 7 paras 30 and 41. Guidance Note 7 specifically identifies how the correct application of the RBA will improve the efficacy of measures to combat money laundering and terrorist financing while promoting financial inclusion without undermining AML/CFT objectives.

170 FIC Guidance Note 7 para 30.

171 FATF 2021 https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf para 53.

172 FATF 2021 https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf para 62.

Financial products, systems, and service outlets are generally geared to cater for an up-market clientele. Also, their cost structure is inappropriate and unaffordable for lower-income communities. A number of new types of banks have been introduced over the last three decades to cater for the lower-income segment of the market.

The *Mutual Banks Act* (MBA)[173] was promulgated as the Registrar of Banks identified a need for banks not based on corporate membership. For the purposes of this discussion, a mutual banks model facilitates financial inclusion in a number of identifiable ways. Such banks follow an African concept of shared values: when investors make deposits they obtain ownership stakes in the bank and can vote at shareholders' and members' meetings. They also provide a meaningful financial model in developing countries, encouraging saving and uplifting poorer communities.[174] Importantly, they are exempted from the application of the *Banks Act* relating to the requirements to be complied with before carrying out the business of a bank.[175] The MBA addresses the challenge of bank concentration and the restricted diversification of banks. The prudential requirements for mutual banks are less stringent than those applicable to banks registered in terms of the *Banks Act*. A mutual bank is required to meet capital adequacy requirements only by maintaining unimpaired reserve funds of at least R10 million or up to 8 per cent of its risk exposure.[176] The Registrar of Banks may exempt a mutual bank from these requirements if it has obtained an undertaking from a guardian bank.[177] This allows for the establishment of other types of banks in addition to existing commercial banks in terms of the *Banks Act*.[178]

Other related initiatives to make finance accessible to the lower-income community are the formalisation of financial co-operative institutions in terms of the *Cooperatives Banks Act* (CBA).[179] The CBA was introduced as one of the government's initiatives, among others, to promote access to financial services, particularly to those groups of people characterised by low incomes and lack of access to conventional banking and other financial

173 *Mutual Banks Act* 124 of 1993 (the MBA). On mutual banks, see generally Itzikowitz and Du Toit "Banking and Currency" para 297; Schulze "Banks and Banking Law" 6-7.

174 See Coetzee and Cross 2002/2003 https://eldis.org/document/A16996, who argue that mutual banks have not effectively increased access to financial services in South Africa.

175 See s 2 of the *Banks Act*.

176 Section 48(2) read together with s 92(1)(*b*) of the MBA.

177 Section 11(1) of the MBA.

178 Currently three mutual banks are registered with the SARB: Finbond Mutual Bank, GBS Mutual Bank, and Bank Zero Mutual Bank which obtained its licence in 2018 and launched at the beginning of 2020. See Bank Zero date unknown https://www.bankzero.co.za. VBS Mutual Bank was placed under liquidation in 2018.

179 *Cooperatives Banks Act* 40 of 2007 (CBA) as amended by the FSRA.

products.[180] It is part of the government's broader strategy for promoting access to financial services in addition to the *FS Charte*r and the Mzansi initiative.[181] The CBA has not introduced a new concept but seeks to formalise an old international tradition of institutionalised self-help practices. Co-operatives support empowerment and development by offering a range of products, including a low-cost, safe savings channel; the ability to make and receive payments in competition with large corporate banks; and the provision of productive credit to the community for home improvements, education and SMME financing.[182] The aims of the CBA are achieved through the registration of deposit-taking financial service co-operatives (FSCs) as co-operative banks. The CBA requires any co-operative financial institution registered in terms of its provisions to be subject to prescribed requirements. These requirements are that the institution that takes deposits must have 200 or more members and hold deposits of members to the value of R1 million or more.[183] By setting the requirements to register and setting specific criteria, the CBA establishes an appropriate regulatory framework to protect members of co-operative banks and co-operative financial institutions.[184]

In 2010 the *South African Postbank Limited Act*[185] (SAPLA) corporatised the Postbank Division of the Post Office as a legal person (the Postbank) authorised to conduct the business of a bank. The object of SAPLA in the main is to incorporate the Postbank Division of the Post Office as a legal person with the aim of conducting the business of a bank. This has the more specific aims of expanding the range of banking services and developing the bank into a bank of first choice, in particular to the rural and lower-income markets as well as communities that have little or no access to commercial banking services or facilities; to promote universal and affordable access to banking services; to ensure that the rates and charges of the company take into consideration the needs of the people in the lower income market; and to ensure lending to rural and lower income markets.[186] Because of the existing infrastructure of the Post Office it can provide a range of banking services to the rural and lower-income markets as well as to communities that have little or no access to mainstream banking

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180 See Schulze *et al General Principles of Commercial Law* 379.

181 See 6.1 above for the discussion of Mzansi account.

182 South African 2020 Draft Financial Inclusion Policy 75.

183 See s 3 of the CBA as amended by s 76 of the *Financial Services Laws General Amendment Act* 27 of 2008, read with s 5A of the *Co-operatives Act* 14 of 2005.

184 See s 2 of the CBA.

185 *South African Postbank Limited Act* 9 of 2010 (SAPLA).

186 Section 2 of the SAPLA. The Postbank performs several of the services traditionally offered by commercial banks and acts as a deposit-taking institution. Cash and other forms of deposits and withdrawals can be made over the counter at any post office branch and at any automatic teller machine.

services.[187] Notably, the Postbank is exempted from the provisions of the *Banks Act*, including the stringent and solvency requirements with which ordinary commercial banks must comply.[188] It is also a participant in the National Payment System.[189] It was specifically identified as one of the financial institutions that were responsible for promoting the Mzansi account, a bank account that provided access to basic savings to the low-income communities.[190]

In 2004 government introduced the Dedicated Banks Bill (the Bill)[191] to improve access to basic banking services for low-income and traditionally disadvantaged persons (the unbanked). This is sought to be achieved by lowering the barriers for large companies such as large retail outlets and cellular or telecommunication companies to provide banking services to the unbanked. Many of these entities are already competing with banks in offering certain of these services.[192] The object of the Bill is to make banking services available in areas where or to consumers to whom such services have up to the present not been readily available.[193] The promulgation of this Bill will create an enabling environment for companies interested in entering the banking system as "Savings" and "Savings and Loans Banks" (so-called "Dedicated Banks") by lowering the entry requirements as currently prescribed in the *Banks Act*.[194] The licensing of these special types of banks and their consequent provision of financial services will assist the banking industry by improving access to financial services to a broader market. The prudential requirements for these dedicated banks will be much lower than those required for banks registered under the *Banks Act* or mutual banks. Companies may provide these loans and savings services by lowering the existing requirements provided for in the *Banks Act*.[195]

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187 See Schulze *et al General Principles of Commercial Law* 379-380 and 414.

188 Section 4(3) of the SAPLA.

189 See Volker *Essential Guide to Payments* 314.

190 See a brief introduction of the Mzansi account in 6.2 above. Early in 2023 Government again confirmed that they plan to convert the Post Bank to a State Bank to promote financial inclusion among other things. Visit Gounden 2023 https://ewn.co.za/2023/01/10/.

191 Draft Dedicated Banks Bill, 2004 (the Dedicated Banks Bill).

192 See Schulze *et al General Principles of Commercial Law* 382.

193 See the accompanying Memorandum to the Bill.

194 In terms of clause 1 of the Dedicated Banks Bill, a "dedicated bank" is defined as "a public company registered as a dedicated bank in terms of [this Bill] and any reference in [this Bill] to a dedicated bank shall be construed as a generic reference to both savings banks and savings and loan banks ...". The Bill provides for two classes of dedicated banks, namely "savings banks" and "savings and loan banks". Both categories will be able to receive deposits and to provide payment services. A savings and loans bank may also, subject to conditions, invest money deposited with it.

195 See Schulze *et al General Principles of Commercial Law* 415.

Access to financial services has also been facilitated by two exemptions that relate to specific financial services. In order to facilitate access to first-order retail services in terms of the *FS Charte*r,[196] it was necessary to make provision for overcoming the impact that the customer due diligence measures may have on opening these accounts for low-income communities. Exemption 17 was issued to provide for tiered customer due diligence measures.[197] It generally exempted banks from complying with more onerous CIV obligations in respect of limited banking facilities which are aimed at low-income clients. It addressed the difficulties that arise from the CIV requirements in terms of FICA that have the potential to exclude these clients from accessing certain services, due to a lack of formal identifying documents. In particular Exemption 17 relieved certain financial institutions from the general CIV obligation in respect of complying with strict documetary requirements with regard to certain types of accounts that do not pose a high risk of money laundering.[198] With the introduction of the risk-based approach and the RCMP in the FICA, Exemption 17 became obsolete and has been withdrawn. However, FIC requires accountable institutions to continue to be guided by the contents of the exemptions as "additional factors that may indicate lower [money laundering/terrorist financing] risks in a given scenario".[199]

Another important exemption is in terms of the *Banks Act*. This Act empowers the Minister of Finance to exclude certain activities from the definition of "the business of a bank".[200] In 2014 the Minister by notice excluded the "activities of a group of persons between the members of which exists a common bond".[201] This notice has achieved the main goal of recognising the importance of making finance available through group-based rotational and savings associations such as stokvels.[202] Including other requirements, the exemption applies if a stokvel holds subscriptions

196 See the discussion in 6.1 above.

197 See FIC Exemption 17 in GN R1353 in GG 27011 of 19 November 2004.

198 See Exemption 17(a)-(e); See Lawack 2013 *Washington Journal of Law, Technology and Arts* 337.

199 See FIC Guidance Note 7 paras 32 and 42 (own insertion).

200 See section 1(*cc*) on the definition of "the business of a bank".

201 See "Designation of an Activity Not Falling Within the Meaning of 'the Business of a Bank' (A Group of Persons Between the Members of Which Exists a Common Bond)" in GN 620 in GG 37903 of 15 August 2014 (the Common Bond Exemption Notice).

202 The Common Bond Exemption Notice generally excludes the activities of co-operative financial institutions and other savings groups. It specifically refers to stokvels. See paras 2 and 3 of the Notice. For a detailed discussion of the legal nature of stokvels, as well as the different types of stokvel and practices of a stokvel see Schulze Part 1 1997 *SA Merc LJ* 18; See Schulze Part 2 1997 *SA Merc LJ* 153 and Lukhele *Stokvels.*

of its members up to R30 million, and if it exceeds this amount, such a stokvel must register as a bank.[203]

## 7 Analysis

Financial exclusion remains a policy and regulatory challenge across the globe. Although South Africa seems to be doing well in terms of the percentage of the population that is financially included, the need to develop and align policies as well as to formulate effective regulatory measures remains important. Notably, access to and the use of financial services is neither about promoting access for financial inclusion' sake, nor for the individual headcounts. While statistical overviews are important indicators, the discussion above indicates that there will always remain a need for policy makers, regulators and all other relevant stakeholders to develop, define, and redefine their objectives by ensuring that most of the population is included in the financial system. To addressing this objective the discussion in this article has clearly established the need to identify and define financial inclusion as an important objective, and secondly, that it is necessary to have proper policies and regulatory measures in place to promote financial inclusion. This would help to identify targets and responsibilities but would not be sufficient to determine the effectiveness of the financial inclusion policies and regulations. In addition, the discussion has established the necessity to adopt and implement a proper approach that avoids treating financial inclusion policies and regulations in isolation from one another or prioritising them over other traditional FSPROs such as financial stability, integrity and consumer protection. Such an approach is important due to the necessity to promote financial inclusion while also equally balancing its effects against the need to keep the financial systems stable, promoting their integrity and protecting consumers. These issues are important as the I-SIP methodology is gradually being recognised for ensuring that the promotion of financial inclusion balances possible trade-offs and synergies with the existing laws and policies in the financial sector.

The discussion in this article has specifically identified how at the national level promoting financial inclusion frameworks that accommodate other FSPROs should be informed by international best practices and policy. Although there is still a lack of enforceable international measures that require countries to promote financial inclusion, current policies, guidelines, declarations and principles established by global standards-setting bodies are steps in the right direction to inform the formulation of national policies and regulatory measures. They are important to guide countries on how to

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[203] See GN 620 in GG 37903 of 15 August 2014. The 2014 government notice referred to above, is a revolving one. The first such notice was published in 1994, and it has been renewed in subsequent notices, the most recent of which is the 2014 one; See Schulze *et al General Principles of Commercial Law* 406.

promote financial inclusion and incorporate their financial sector objectives in their financial inclusion frameworks. Current financial inclusion measures by global standards-setting bodies importantly identify the need to balance the risk and benefits in promoting financial inclusion with traditional FSPROs. A huge gap that still exists in these measures is to identify the approach or methodology to balance these risks and benefits. This article notes that adopting the I-SIP methodology as introduced by the CGAP is becoming, important in addition to simply having all the key regulatory elements and objectives that form part of the I-SIP methodology in place. Applying it in National Financial Inclusion Strategies would ensure that financial inclusion or any other of the objectives are not prioritised but are all treated equally in the regulation of the financial sector. The methodology is important to also ensure that the effect of both the benefits and risks associated with introducing financial inclusion policies and regulatory measures are correctly assessed. This methodology should therefore be adopted as a yardstick upon which national policymakers and regulators could assess possible trade-offs and synergies between new financial inclusion frameworks and traditional FSPROs and to ensure that all I-SIP objectives are given the same priority.

This article has established that South Africa is continuously developing financial inclusion polices and regulatory measures. Although the South African Draft Financial Inclusion Policy is still in a preliminary form, it is a necessary starting point for the adoption of the National Financial Inclusion Strategies and should eventually lead to putting measures in place to regulate the promotion of financial inclusion. Importantly, the policy specifically identifies the adoption of the I-SIP methodology, that would inform the development of regulatory measures. As it stands, however, the promotion of financial inclusion in conjunction with other FSPROs takes a haphazard approach to the regulation of financial inclusion. Notably, and as in many countries, there is in South Africa currently no specific legislation that has the regulation of financial inclusion as its sole objective.[204] A preliminary observation from the discussion of various statutes reveals that financial inclusion forms a marginal part of many pieces of legislation that focus on traditional FSPROs as their main objectives. This raises a concern regarding the need to identify possible trade-offs and synergies, and to minimise and maximise them respectively. A number of lessons may be learnt from the current financial sector legislation. An observation of various

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204 On legislative measures that include financial inclusion as one of their main objectives, see Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the Comparability of Fees Related to Payment Accounts, Payment Account Switching and Access Payment Accounts with Basic Features (28 August 2014) *Official Journal of the European Union* L 257/214; See also the *Payment Accounts Regulations* No 2038 of 2015, and the Republic of Ireland's *European Union (Payment Accounts) Regulations* No 482 of 2016.

financial sector regulatory frameworks in South Africa reveals that the relevant financial sector statutes are replete with promoting financial stability, consumer protection and protecting the integrity of the financial system. Each acknowledges to some degree the need to promote financial inclusion in the process of achieving one of the FSPROs.

The *Banks Act* and the FSRA are responsible for fulfilling financial stability as one important leg of the I-SIP. In the absence of a specific provision for access to finance in the *Banks Act*, unlike its counterparts in France and Canada,[205] the current requirement in the *Banks Act* to meet the R250 million minimum capital requirement remains solely to ensure that banks can withstand any financial shock. However, the requirement remains a barrier to the entry of new institutions with less risk of financial stability to create the necessary competition in the market and to eventually promote financial inclusion. As a result, the *Banks Act* remains focussed on protecting the stability of the banking systems and less on promoting financial inclusion. The common bond exemption and other initiatives created under the CBA and the MBA relieve potential bank owners from fulfilling this onerous requirement by exempting them from raising or lowering the capital requirements below the minimum required for banks. Also, although it has yet to find its way into the statute book, the Dedicated Banks Bill would probably provide alternative financial institutions with a lesser minimum capital requirement, and therefore enhance access to more financial services and providers. That would be relevant if such alternatives are what the majority of the population wants. Studies have established that commercial banks are still largely considered the orthodox platforms for including the majority in the national financial systems.[206] The CBA, MBA, SAPLA and the common-bond exemption facilitate the establishments of effective alternative institutions, but they do not make it easier for the majority to access similar financial services. They serve communities that need to be accommodated with specific types of banking. For many who still recognise commercial banks as the main institutions to promote financial inclusion, they will still be left out if establishing banks in terms of the *Banks Act* remains restricted to few individuals who can raise the required initial capital requirement.

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205 The *Banking Act* 84-46 of 24 January 1984 (unofficial translation) of France, art 58 guarantees a right to open a current account for any natural or legal person domiciled in France at a financial provider of his or her choice, and the section 448.1(1) of the *Bank Act* SC 1991 c 46 of Canada mandates banks to open retail bank accounts "through and on request by a natural person or an individual who meets the prescribed conditions".

206 Raihanath and Pavithran 2014 *Journal of Business Management and Social Sciences Research* 77; See Nkuna *et al* 2018 *Open Journal of Business and Management* 813.

Similarly, the specific provisions for financial inclusion in the FSRA, as with the CoFI Bill, is welcomed. This will ensure the promotion of a safer, stable and a sound financial sector and takes cognisance of an equally important objective of promoting financial inclusion. Nonetheless, placing the promotion of financial inclusion solely under these pieces of legislation will always run counter to the promotion of financial inclusion, particularly as they are the only South African legislative measures to specifically refer to the financial inclusion objective. The following observation supports this view. Like the *Banks Act*, the FSRA's main objective is the stability and soundness of the financial sector, and financial inclusion is simply one of the add-ons to this objective. If the need arises during the policymaking or regulatory process to assess the possible adverse effects of financial inclusion on the FSRA's main objectives, the stability, the safety and the soundness of the financial sector will likely be prioritised. To balance these competing objectives, both the Prudential Authority and the Financial Sector Conduct Authority must ensure that the promotion and the support of financial inclusion are not side-lined in ensuring the stability and safety of the financial sector.

The CPA, the NCA and the Draft CoFI Bill are examples of the ample legislative measures that exist in South Africa to protect consumers and to treat them fairly. All these legislative instruments incorporate the provision of access to financial services, including consumer credit, as one their objectives. For instance, unlike all the relevant financial sector laws, the CoFI Bill will require the Financial Sector Conduct Authority to support financial inclusion. In addition, it provides for specific measures that must be put in place, such as the proposal for the new licensing framework for financial institutions and for laying down specific principles on how these institutions must design and develop financial services and products, taking into account the targeted customers who need them most. Nonetheless, the CPA, the NCA and the CoFI Bill suffer the same fate as the *Banks Act* and the FSRA in relation to their position as measures that promote financial inclusion. They are mainly consumer-protection laws, and this will always remain their primary objective.

The FICA also serves an important policy objective in the financial sector. Amidst the continuous practices of using the financial system to legitimise illicit financial gains, it remains imperative to reinforce the regulatory stances to prevent money laundering, terror-financing and other related crimes. In compliance with international standards, FICA's main objective remains one of protecting financial integrity by applying the CIV procedures and following the money trail. The specific introduction of the risk-based approach and the obligation to develop the RCMP will ensure that accountable institutions take possible risks into account and require strict documentary compliance only in high-risk cases. This is important to ensure that members of the

public who do not possess the necessary documents and who do not pose a high risk of money laundering or terror-financing are not excluded from accessing financial services. However, absent a mandatory recognition for promoting financial inclusion during the risk-based approach assessments, it remains uncertain whether the assessment factors in the importance of financial inclusion. Also, with the withdrawal of Exemption 17, which created a platform for promoting financial inclusion through basic bank accounts such as Mzansi, the need to balance AML/CFT measures against the promotion of financial inclusion will always fall off the track of the risk-based approach and the development of RCMP.

A key lesson can be drawn from the analysis of the current haphazard approach to promoting financial inclusion and the relation of this objective with that of other FSPROs. In the current dispensation of promoting financial inclusion as a subset of other FSPROs, it is likely that in a policy battle between financial inclusion and any one or more of the traditional FSPROs the former will always succeed, unless a proper approach to assessing the effects of each is properly adopted. Some lessons on how to achieve this can be discerned from the case law in *SA Taxi Securitisation* and *Truworths* in relation the interpretation of the NCA. By promoting the need to balance consumer rights against the need to promote access to consumer credits in the NCA, it is quite clear that such assessment is equally relevant for assessing the effect of promoting financial inclusion against promoting other FRSPOs. Having policies and regulatory measures in place to promote financial inclusion is not sufficient. Similarly, identifying possible trade-offs and synergies between financial inclusion and FSPROs is also not an end. Assessing the effects that it may have on promoting them, and vice versa, is an important additional step. In the context of the current policy and regulatory measures in South Africa, the proposed adoption of the I-SIP methodology in the South African Draft Policy is long overdue. Correctly implemented, this methodology will direct both the policy and the regulatory processes to introduce financial inclusion measures. It will ensure that financial inclusion no longer remains but one objective under the wing of financial stability and integrity, as well as consumer protection measures. A regulatory exercise that seeks to introduce financial inclusion measures – and considering possible trade-offs and the need to maximise synergies – will take the following sequence. First, it will begin by identifying the need for a financial inclusion measure. Secondly, it will determine whether effective measures are in place to implement the I-SIP objectives. Thirdly, it will then take an assessment of the effects and a link between potential isolated FSPROs, applying the I-SIP methodology. As things stand, the haphazard approach to and the treatment of financial inclusion as an objective marginal to other FSPROs makes the I-SIP methodology more relevant. The National Treasury should therefore finalise the South African

Draft Policy and adopt it as South Africa's National Financial Inclusion Strategy with the I-SIP methodology as an important approach for its implementation. This will provide the necessary guide on how current legislative measures should be redeveloped. Those that have not recognised financial inclusion or access to specific financial services as one of their objectives should consider incorporating it. Regulators and policymakers must apply the I-SIP methodology in all legislative measures that have already achieved this to create a link and balance financial inclusion and these objectives. This will ensure that financial inclusion no longer remains an add-on but becomes an integral part of the I-SIP objectives.

## 8 Conclusion

South Africa has not yet adopted a National Financial Inclusion Strategy that conforms to the financial inclusion policies, declarations, and guidelines by the relevant global standards-setting bodies. The country is in the process of developing policies and has also begun to adopt measures to promote financial inclusion. Importantly, such policy measures recognise the need to have traditional FSPROs that are implemented by policies and financial second laws. Currently, a great deal of legislation in the financial sector reinforces these objectives. However, few of these pieces of legislation have adopted financial inclusion as a specific goal or access to specific financial services treat financial inclusion as an element of their main objectives. Merely having these measures in place is not enough. Equally, acknowledging the existence of possible trade-offs and synergies between financial inclusion and these objectives, without more, cannot make promoting financial inclusion effective. The I-SIP methodology must therefore be implemented to interpret current financial-sector laws and to develop policies that impact on promoting financial inclusion. This methodology must be applied to promote and support financial inclusion in the CPA, the FSRA, the CoFI Bill, and the NCA, as an integral part of promoting financial stability and consumer protection, including a fair treatment of customers. Equally, it should be a tool to determine how FICA prevents money laundering and terror-financing risks and how it assesses the level of risks posed by customers who may be excluded by not having proper documentation. With the current haphazard approach to financial inclusion in South Africa, which treats financial inclusion as an objective isolated from other traditional FSPROs, the I-SIP methodology is also a proper tool to provide a link between all these FSPROs and that ensure that minimising trade-offs and maximising the synergies among them are prioritised.

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## List of Abbreviations

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|---|---|
| AFI | Alliance for Financial Inclusion |
| AML/CFT | Anti-Money Laundering and Countering the Financing of Terrorism |
| BIS | Bank of International Settlements |
| BEE | Black Economic Empowerment |
| CBA | Cooperatives Banks Act 40 of 2007 |
| CGAP | Consultative Group to Assist the Poor |
| CIV | Customer Identification and Verification |
| CoFI | Conduct of Financial Institutions Bill |
| CPA | Consumer Protection Act 68 of 2008 |
| EBOR | European Business Organization Law Review |
| FATF | Financial Action Task Force |
| FIC | Financial Intelligence Centre |
| FICA | Financial Intelligence Centre Act 38 of 2001 |
| FSRA | Financial Sector Regulation Act 9 of 2017 |
| FSPROs | Financial Sector Policy and Regulatory Objectives |
| GPFI | Global Partnership for Financial Inclusion |
| G20 | Group of 20 |
| I-SIP | Inclusion-Stability, Integrity, and Protection |
| JBFLP | Journal of Banking and Finance Law and Practice |
| KYC | know-your-customer |
| LDD | Law, Democracy and Development |
| MBA | Mutual Banks Act 124 of 1993 |
| NCA | National Credit Act 34 of 2005 |
| PELJ | Potchefstroom Electronic Law Journal |

| | |
|---|---|
| RCMP | Risk Compliance and Management Programme |
| SA Merc LJ | South African Mercantile Law Journal |
| SALJ | South African Law Journal |
| SAPLA | South African Postbank Limited Act 9 of 2010 |
| SARB | South African Reserve Bank |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg |
| UNDP | United Nations Development Programme |
| UNSGSAIFD | United States Secretary-General's Special Advocate for Inclusive Finance for Development |