NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

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NEDLAC REPORT ON THE CONDUCT OF FINANCIAL INSTITUTIONS BILL
22 JULY 2022

1. BACKGROUND

1.1. National Treasury gazetted the draft CoFI Bill on 28 October 2021 for public comments. The objective of the Bill is to provide for a regulatory framework for the conduct of financial institutions.

1.2. On 11 February 2022, National Treasury presented the CoFI Bill to the Public Finance and Monetary Policy Chamber (PFMPC). The purpose of the presentation was to outline what the Bill entailed and for the chamber to provide guidance on process of engagement on the Bill.

1.3. The chamber agreed that a CoFI Bill workshop would provide an opportunity for social partners to provide input into the Bill. It was further agreed at the workshop that social partners will not engage line-by-line on the Bill, but rather engage on its principles of the Bill. A Nedlac Report would then be developed at the conclusion of the workshop for approval by the relevant structures within Nedlac.

2. OBJECTIVE OF THE CONDUCT OF FINANCIAL INSTITUTIONS BILL

2.1. The objective of the CoFI Bill is to establish a consolidated, comprehensive, and consistent regulatory framework for the conduct of financial institutions that will support the FSCA in the achievement of its objective and functions as set out in sections 57 and 58 of the Financial Sector Regulation Act (FSRA).

3. PROCESS AT NEDLAC

3.1. The workshops were convened on the following dates:

- 11 March 2022
- 16 March 2022
- 06 April 2022

3.2. Government tabled the CoFI Bill for engagement at the workshop meeting held on 11 March 2022. The workshops engaged on the Bill and provided inputs. This Nedlac Report was subsequently developed, and it constitutes the outcome of the Nedlac deliberations on the draft CoFI Bill. The Nedlac Report further provides a summary of the process, agreements reached and detailed inputs provided by social partners.

3.3. The following documents were submitted by the Government:

- CoFI Bill 2021
- Socio Economic Impact Assessment

4. SECTION A: BACKGROUND AND FUNDAMENTAL PRINCIPLES UNDERPINNING THE BILL

4.1. Background

(a) The reform of financial sector regulation towards a Twin Peaks model seeks to improve outcomes by placing equal and dedicated focus on managing key risks in the financial sector.

(b) Two new authorities were established, i.e. a Prudential Authority (PA) to manage prudential risk, and the Financial Sector Conduct Authority (FSCA) to manage market conduct risk.

(c) The Twin Peaks model is designed to garner the benefits of an integrated model of regulation (including regulatory consistency, jurisdictional clarity and informational efficiency), while better addressing the inherent conflicts between prudential regulation and consumer protection.

(d) An improved legal and regulatory framework was developed to support broader objectives in the financial sector, including ensuring that the sector grows in a more transformed and inclusive manner.

(e) The improved regulatory environment can better support the entry of new institutions into the market, and facilitates the growth and development of existing institutions, in line with government's overall empowerment objectives.

(f) This, in turn, supports the transformative effect of the financial sector in the lives of South African customers, through providing greater access to appropriate and suitable financial products and services to more South Africans.

(g) In this regard, the first piece of legislation that establishes the Twin Peaks model was the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (FSRA). The FSRA was adopted by Parliament in June 2017 and signed into law by the President in August 2017.

(h) The next phase of the reform process, from a market conduct perspective, is to streamline and harmonise the legal landscape that financial institutions will operate within. This entails a comprehensive review of existing financial sector laws, with the aim of developing a single, holistic legal framework for market conduct regulation in South Africa that is consistently applied to all financial institutions.

(i) The Conduct of Financial Institutions Bill represents this new legal framework.

(j) The 2014 discussion document, "*Treating Customers Fairly in the financial sector: A Draft Market Conduct Policy Framework for South Africa*" sets out the draft policy approach for developing a new market conduct framework in South Africa. This document highlighted the poor outcomes being produced in the financial sector, and the weaknesses in the regulatory framework that contributed to this. The discussion document proposed a multi-faceted approach to reforming the market conduct framework in South Africa. In this regard, the CoFI Bill was drafted.

4.2. **Agreed fundamental principles underpinning the CoFI Bill.**

4.2.1. Activity-based approach

(a) Currently there are thirteen different financial sector laws applicable to financial institutions. These laws regulate and supervise financial institutions based on their institutional definitions, e.g. institutions defined as banks have been regulated in terms of one law, and institutions defined as insurance companies have been regulated under a different law.

(b) The range of laws have often been implemented in a 'silo' manner. The new legal framework under the CoFI Bill will shift away from this sectoral approach, and instead provide for an activity-based approach.

4.2.2. Principle based approach

(a) A narrow focus on rigid rules and compliance reporting has often led to the letter of the law being followed while there is non-compliance with the spirit of the law. A principles-based approach specifies key principles that capture the intention of regulation, rather than setting out detailed requirements that a financial institution must comply with.

(b) A focus on principles should see a shift in both industry and the regulator towards ensuring that their actions and processes are geared towards driving the attainment of certain desired outcomes in the financial sector, and not only on technical compliance with the law.

(c) A principles-based approach does not mean an absence of rules. It is well-recognised that an appropriate mix of principles and rules are required to achieve the correct outcomes.

(d) Rules may be required to protect highly vulnerable consumers, where market dynamics create poor incentives for service providers (example of the consumer credit insurance market) or to respond to sustained egregious behaviour and practices.

(e) The approach is, therefore, towards a more effective balance between principles-based and rules-based measures to achieve desired outcomes, in contrast to the current framework's heavy reliance on rules.

(f) Principles enable supervisors and enforcers to police the spirit of the rules as well as the letter, avoiding "creative compliance", regulatory arbitrage, and the need for the rules to anticipate every possible situation. The CoFI Bill entrenches principles in law.

4.2.3. Outcomes-focused approach

(a) A strong market conduct policy framework should support the delivery of desired policy outcomes in the financial sector, enable the monitoring of the extent to which those outcomes are being achieved, ensure that preventative action is taken to mitigate the risk of poor outcomes, and ensure remedial action is taken when poor outcomes are in fact produced.

4.2.4. Risk-based and proportionate approach

(a) A proportionate approach is important in ensuring that the outcomes-focused approach is appropriately applied to the different levels of risk arising from different types of activities being supervised.

(b) The new framework must enable the regulator to identify areas that pose greatest market conduct risks and use proportionate regulatory capacity to address these risks.

(c) A risk-based approach will require the regulator to be forward-looking, and to have the skills and resources to identify, collect and analyse market information and trends.

4.3. **The structure and content of the Bill**

The CoFI Bill is divided into 10 Chapters.

4.3.1. ***Chapter 1 (clauses 1-7)*** deals with the interpretation, object, and application of the Bill.

(a) Part 1 (***clauses 1 and 2***) provides for definitions of terms used in the Bill, and the interpretation of the Bill.

(b) Part 2 (***clauses 3-6***) addresses the object of the Bill and the application of the Bill, including the power of the Authority to grant exemptions from the application of the Bill (clause 6).

(c) Part 3 (***clause 7***) highlights the requirement of compliance by financial institutions, governing bodies of financial institutions, key persons, representatives, and contractors with the requirements of the Bill, and imposes an obligation to report to the Authority instances of non-compliance with those requirements.

4.3.2. ***Chapter 2 (clauses 8-11)*** addresses representatives and provides for requirements relating to the appointment of representatives (clause 8), requirements relating to representatives and financial institutions in relation to representatives (clauses 9 and 10), and the debarment of representatives (clause 11).

4.3.3. ***Chapter 3 (clauses 12-19)*** focuses on business principles, culture, and governance. Part 1 focuses on business principles. Clause 12 stipulates key business principles that all financial institutions must comply with, and clause 13 addresses principles relating to the fair treatment of retail and small enterprise financial customers. Part 2 highlights culture and governance. Clause 14 sets out requirements relating to the culture of financial institutions, clause 15 places specified obligations on the governing bodies of financial institutions, and clause 16 stipulates the types

of governance arrangements that must be in place. Part 3 deals with transformation policy, and clause 17 requires that financial institutions must have a transformation plan in place to meet its transformation commitments, that it has undertaken in terms of promoting transformation of the financial sector in line with the requirements of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) and the Financial Sector Code for Broad-Based Black Economic Empowerment issued in terms of section 9(1) of that Act, and must take all reasonable measures to implement those plans. Part 4 addresses key persons, in particular compliance with requirements relating to fitness and propriety by key persons (clause 18) and addressing non-compliance by key persons (clause 19).

4.3.4. ***Chapter 4 (clauses 20-25)*** deals with business conduct by financial institutions. Part 1 stipulates key principles for the provision of financial products and financial services to financial customers (clause 20) and addresses the design and review of financial products and financial services (clause 21), the ongoing review of financial products and financial services (clause 22), and oversight arrangements relating to product design and the development of financial services (clause 23). Part 2 provides for principles relating to advertising and disclosure (clause 24). Part 3 sets out principles relating to ongoing obligations of financial institutions to financial customers.

4.3.5. ***Chapter 5 (clauses 26-36)*** focuses on funds of, and trust property held by, financial institutions and operational requirements. Part 1 (clause 26) sets out the application of the Chapter. Part 2 sets out requirements in relation to the handling of funds and trust property that are held by financial institutions. Principles for persons dealing with trust property or funds of financial institutions are stipulated (clause 27), an obligation is imposed on members of governing bodies, employees and agents of financial institutions, to disclose their interests (clause 28), requirements relating to investments of trust property are provided for (clause 29), and the segregation of trust property from the property of the financial institution is required (clause 30). Part 3 sets out requirements to ensure that the operational capital (clause 31) and operational ability (clause 32) of financial institutions is consistently maintained. Part 4 addresses certain transactions made by and the structure of financial institutions. Conducting activities other than those for which a financial institution is licensed and authorised is prohibited without authorisation by the FSCA (clause 33).

Approvals are required by the Authority in respect of changes of institutional form, certain acquisitions and disposals, conversions and amalgamations, the registration of shares in the name of a nominees, as well as for the change of name of a financial institution.

4.3.6. ***Chapter 6 (clauses 37-45)*** addresses reporting, audit and accounting matters. Part 1 (clause 37) deals with the application of the Chapter. Part 2 deals with public reporting and disclosure, including information for supervisory purposes (clause 38), public disclosures by financial institutions (clause 39), and information concerning beneficial interests (clause 40). Part 3 addresses the financial year of financial institutions (clause 41), accounting records and financial statements (clause 42), auditing and independent review of financial statements (clause 43), and retention of records (clause 44). Part 4 deals with the appointment and duties of auditors (clause 44).

4.3.7. ***Chapter 7 (clauses 46-62***) provides for specific requirements for collective investment schemes in participation bonds. This Chapter provides for the institutional form of collective investment schemes, and specific requirements that are necessary to provide for in primary legislation. The Chapter will replace the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002) (CISCA), which will be repealed. The Chapter is streamlined in comparison with the existing CISCA, as some requirements will be covered in cross-cutting requirements in the CoFI Bill, and other requirements will be specified in standards. Part 1 (clause 46) deals with the interpretation and application of the Chapter.

4.3.8. ***Chapter 8 (clauses 62 to 79)*** deals with friendly societies, and provides for the institutional form of friendly societies, and specific requirements that are necessary to provide for in primary legislation. The Chapter will replace the Friendly Societies Act, 1956 (Act No. 25 of 1956), which will be repealed. The Chapter is streamlined in comparison with the existing Friendly Societies Act, as some requirements will be covered in cross-cutting requirements in the CoFI Bill, and other requirements will be specified in standards. Definitions are provided for (clause 62), the establishment of friendly societies is provided for (clause 63), the application of the Chapter is specified (clause 64). The licensing of friendly societies and the effect of licensing is addressed. The role of the principal officer (clause 66) and the rules of the friendly societies (clause 67) are addressed. Business principles, culture and governance are dealt with in

clause 68, business conduct and the provision of friendly society benefits are dealt with in clause 69.

4.3.9. ***Chapter 9 (clauses 80-84)*** contains general provisions, relating to conduct standards (clause 80), the application of the Act in relation to conduct standards and rules (clause 81), applications (clause 82) and notifications (clause 83) in terms of the Bill, and offences (clause 84).

4.3.10. ***Chapter 10 (clauses 85-90)*** contains the final provisions, including the review of the Act (clause 85), savings (clause 86), transitional arrangements regarding repealed legislation (clause 87), the Amendment of Schedule 1 (clause 88), the amendment of laws (clause 89), and the short title and commencement (clause 90).

5. SECTION D: AREAS OF AGREEMENTS: *The following areas were deliberated and agreed by the social partners.*

5.1. The social partners agreed on the principles and objectives of the Bill as presented by government.

5.2. Input made by labour was also responded to and the following was agreed:

5.2.1. **Current policy and legislative framework for transformation**

5.2.1.1. The B-BBEE Act is the main regulatory framework for transformation in SA. The Financial Sector Code (issued in terms of the B-BBE Act) sets targets for fostering B-BBEE in the financial sector.

5.2.1.2. The Financial Sector Regulation Act includes the support of transformation as an objective of the Act.

5.2.1.3. The Insurance Act was the first financial sector law to provide for transformation requirements; but to only apply to insurance companies.

5.2.1.4. The Financial Sector Conduct Authority (FSCA's) role in promoting transformation of the sector has been limited, due to the lack of enabling legislation.

5.2.2. **CoFI Bill transformation provisions**

5.2.2.1. In the CoFI Bill, promoting transformation is made an explicit function of the FSCA through consequential amendments to section 58 of the FSR Act.

5.2.2.2. Section 17 of the CoFI Bill requires all licensed financial institutions to develop a transformation plan.

5.2.2.3. Section 12 requires all financial institutions to promote transformation in a manner consistent with its transformation plan. The plan must be aligned to the achievement of targets in the Financial Sector Code.

5.2.2.4. The FSCA is empowered to make standards relating to transformation, in terms of consequential amendments to the section 108 of the FSR Act. The FSCA is further empowered to issue directives in relation to transformation plans and to use its supervisory and enforcement powers to ensure that a financial institution's transformation frameworks are adequate and adhered to**.**

5.2.3. **FSCA draft strategy for promoting financial sector transformation**

5.2.3.1. Phase 1 will focus on the role that the FSCA will operate within the current legislative framework.

5.2.3.2. Phase 2 will focus on the role that the FSCA will play within the CoFI Act legislative framework once the Act is implemented, amongst others:

i. Considering transformation plans during the licensing process and supervising the progress of financial institutions against their plans.

ii. Setting minimum B-BBEE levels (e.g. Level 4) that must be targeted by each firm and documented in the transformation plan and requiring progression through the levels of transformation over defined periods of time.

iii. Act when there is a lack of commitment.

5.2.4. Key persons for purposes of the CoFI Bill includes (as defined in the FSR Act):

5.2.4.1. A member of the governing body of the financial institution (e.g. board member);

5.2.4.2. Chief Executive Officer (CEO) or other person in charge of the financial institution; and

5.2.4.3. A person other than a member of the governing body of the financial institution who makes or participates in making decisions that:

i. affect the whole or a substantial part of the business of the financial institution; or

ii. have the capacity to affect significantly the financial standing of the financial institution;

5.2.4.4. A person other than a member of the governing body of the financial institution who oversees the enforcement of policies and the implementation of strategies approved or adopted by the governing body of the financial institution;

5.2.4.5. The head of a control function of the financial institution (e.g., Compliance, Risk Management); and

5.2.4.6. The head of another function of the financial institution that a financial sector law requires to be performed.

5.2.5. Representatives include a person that can only provide an activity listed in Schedule 6 if:

5.2.5.1. It is a licensed financial institution in its own right and authorized to render the relevant activity; and

5.2.5.2. The person is a representative of a financial institution and renders the activity on behalf of the financial institution.

5.2.6. A representative:

5.2.6.1. Cannot perform an activity in its own right, i.e. it must always act on behalf of a financial institution (similar to the current FAIS approach);

5.2.6.2. Is limited to specific activities as set out in Schedule 2 of the COFI Bill;

5.2.6.3. Is restricted in respect of certain activities (e.g. asset management);

5.2.6.4. Can impose a variety of requirements on representatives through conduct standard, including fit and proper requirements which entail requirements relating to honesty, integrity, and competency.

5.2.7. More detailed requirements on representatives relating to fit and proper will therefore be imposed through conduct standards and will be consulted on as and when made. Work in this regard is currently underway. In developing these requirements there will be a need to harmonise requirements across the sector as a whole and to shift the framework to a slightly more outcomes- and principles-based approach.

5.2.8. **Background on Debarment by Financial Service Providers (FSP)**

5.2.8.1. Debarment by FSPs were first introduced in the FAIS Act in 2002.

5.2.8.2. The FSPs debarments were amended and improved three times through the years, and most notably in 2018 through the FSR Act. The last amendment was to ensure that the process followed by the FSPs was lawful, reasonable and procedurally fair**.**

5.2.8.3. The FSR Act also ensured that aggrieved debarred persons had timely and efficient remedies to address unfair debarments, namely the right to apply for reconsideration to the Tribunal.

5.2.8.4. FAIS Guidance Note 1 of 2019 highlighted the 2 relationships:

i. Between FSP as employer and representative as employee governed by the Labour Relations Act (LRA); and

ii. Withdrawal of authority of representative governed by the FAIS Act.

5.2.8.5. The FAIS Act provisions were for the most part copied in clause 11 of the CoFI Bill; the only changes were alignment with s153 of the FSR Act. The rationale for the debarment process was enunciated by the SCA in *FSB v Barthram*: "A *representative who does not meet [the fitness and propriety or competency] requirements lacks the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public*…"

5.2.9. **Comparison between the FAIS Act and COFI Bill Debarment process**

FAIS Act Section 14	CoFI Bill Clause 11
(1)(a) An authorized financial services provider must debar a person from rendering financial services who is or was, as the case may be- (i) a representative of the financial services provider; or (ii) a key individual of such representative, if the financial services provider is satisfied on the basis of available facts and information that the person- (iii) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or (iv) has contravened or failed to comply with any provision of this Act in a material manner;	11.(1)(a)A financial institution must debar a person from rendering financial services if the person is or was, as the case may be, a representative of the financial institution, if the financial institution is satisfied on the basis of available facts and information that the person— (i) does not meet, or no longer complies with, the requirements referred to in section 9(1)(a); (ii) contravened this Act or another financial sector law in a material way; (iii) attempted, or conspired with, aided, abetted, induced, incited or procured another person to contravene a financial sector law in a material way; or

FAIS Act Section 14	CoFI Bill Clause 11
b) The reasons for a debarment in terms of paragraph (a) must have occurred and become known to the financial services provider while the person was a representative of the provider. (2) (a) Before effecting a debarment in terms of subsection (1), the provider must **ensure that the debarment process is lawful, reasonable and procedurally fair.** (b) If a provider is unable to locate a person in order to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.	(iv) contravened in a material way a law of a foreign country that corresponds to a financial sector law. (b) The reason for a debarment in terms of paragraph (a) must have occurred while the person was a representative of the financial institution. (2)(a) Before effecting a debarment in terms of subsection (1), the financial institution **must ensure that the debarment process is lawful, reasonable and procedurally fair**
(3) A financial services provider must- (a) before debarring a person- (i) give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for the debarment, and any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of clients; (ii) provide the person with a copy of the financial services provider's written policy and procedure governing the debarment process; and	(b) If a financial institution is unable to locate a person in order to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient. (3) A financial institution must— (a) before debarring a person— (i) give adequate notice in writing to the person stating its intention to debar the person, the grounds and reasons for

FAIS Act Section 14	CoFI Bill Clause 11
(iii) give the person a reasonable opportunity to make a submission in response; (b) consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and (c) immediately notify the person in writing of- (i) the financial services provider's decision; (ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and (iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal.	the debarment, and any terms attached to the debarment, including, in relation to unconcluded business, any measures stipulated for the protection of the interests of financial customers; (ii) provide the person with a copy of the financial institution's written policy and procedure governing the debarment process; and (iii) give the person a reasonable opportunity to make a submission in response; (b) consider any response provided in terms of paragraph (a)(iii), and then take a decision in terms of subsection (1); and
(4) Where the debarment has been effected as contemplated in subsection (1), the financial services provider must- (a) immediately withdraw any authority which may still exist for the person to act on behalf of the financial services provider; (b) where applicable, remove the name of the debarred person from the register referred to in section 13(3); (c) immediately take steps to ensure that the debarment does not prejudice the interest of clients of the debarred person, and that any unconcluded business of the debarred person is properly attended to;	(c) immediately notify the person in writing of— (i) the financial institution's decision; (ii) the person's rights in terms of Chapter 15 of the Financial Sector Regulation Act; and (iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal. (4) After effecting a debarment as contemplated in subsection (1), the financial institution must— (a) immediately withdraw any authority which may still exist for the person to act on behalf of the financial institution; (b) where applicable, remove the name of the debarred person from the register referred to in section 9(4);

FAIS Act Section 14	CoFI Bill Clause 11
(d) in the form and manner determined by the Authority, notify the Authority within five days of the debarment; and (e) provide the Authority with the grounds and reasons for the debarment in the format that the Authority may require within 15 days of the debarment. (5) A debarment in terms of subsection (1) that is undertaken in respect of a person who no longer is a representative of the financial services provider must be commenced not longer than six months from the date that the person ceased to be a representative of the financial services provider.	(c) immediately take steps to ensure that the debarment does not prejudice the interests of financial customers, and that any unconcluded business of the debarred person is properly attended to; (d) in the form and manner determined by the Authority, notify the Authority of the debarment within five days of the debarment; and (e) provide the Authority with the grounds and reasons for the debarment in the format that the Authority may require within 15 days of the debarment.
(6) For the purposes of debarring a person as contemplated in subsection (1), the financial services provider must have regard to information regarding the conduct of the person that is furnished by the Authority, the Ombud or any other interested person.	(5) A debarment in terms of subsection (1) in respect of a person who is no longer a representative of the financial institution must be commenced within six months from the date the person ceased to be a representative of the financial institution, and must be completed promptly. (6) A financial institution must immediately notify the Authority of any circumstances that result in the financial institution not being able to debar a representative due to the expiry of the six months period referred to in subsection (5). (7) For the purposes of debarring a person as contemplated in subsection (1), the financial institution must have regard to information relating to the conduct of the person that is furnished

FAIS Act Section 14	CoFI Bill Clause 11
	by the Authority, an ombud scheme, the Prudential Authority or another regulator, or any other interested person.

5.2.10. **Application of Competition Act and Companies Act in relation to CoFI Bill provisions on mergers and acquisitions**

5.2.10.1. Section 10(2) of the Financial Sector Regulation Act, 2017, provides for the involvement of the Minister of Finance in relation to mergers and acquisitions in the Competition Act, and as addressed in terms of the Companies Act, 2008 (Act No. 71 of 2008) as follows:

i. "(2) (*a*) Section 18 (2) and (3) of the Competition Act, 1998 (Act No. 89 of 1998) applies, with the necessary changes required by the context, to a merger which requires the approval of the Minister, the Prudential Authority or the Financial Sector Conduct Authority in terms of a financial sector law.

ii. (*b*) For the purposes of paragraph (a), "**merger**" means a merger as defined in section 12 of the Competition Act.

iii. (*c*) Section 116 (4) and (9) of the Companies Act applies, with the necessary changes required by the context, to an amalgamation or a merger which requires the approval of the Minister, the Prudential Authority or the Financial Sector Conduct Authority in terms of a financial sector law.

iv. (*d*) For the purposes of paragraph (c), "**amalgamation or merger**" means an "**amalgamation or merger**" as defined in section 1 of the Companies Act.".

5.2.10.2. These provisions provide clearly for the involvement of the Minister of Finance in relation to mergers and acquisitions in the financial sector that are addressed in terms of the financial sector laws, it expands the scope of involvement of the Minister slightly to refer to financial sector laws, and not only the Banks Act, 1990 (Act No. 94 of 1990), and the Financial Markets Act, 2012 (Act No. 19 of 2012), as those provisions currently provided. Otherwise, relevant provisions of the Competition Act, 1998, and the Companies Act, 2008, related to mergers and

acquisitions would be applicable in relation to transactions referred to in clause 34 of the CoFI Bill (which is the only clause in the Bill that addresses mergers and transactions).

5.2.10.3. Clause 34 of the CoFI Bill ensures that these transactions are also clearly required to be subject to approval. It is intended that this provision is akin to section 166 of the FSRA, which provides for the approval of transactions in relation to conglomerates by the Prudential Authority.

5.2.10.4. It was acknowledged that Clause 34 in the CoFI Bill is not as detailed as section 166 of the FSRA, but it is envisaged that detail would be provided in conduct standards.

5.2.10.5. Clause 19(2) of the Bill provides potential for certain functions and duties of a key person to be outsourced if the functions and duties are determined are not being performed appropriately by the key person.

5.2.10.6. In relation to section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995). It was acknowledged that this was not intended that this provision should be able to provide a mechanism to evade the application of section 189 of the LRA. It is more intended to provide a mechanism to ensure that key functions and duties are carried out by a person who complies with the requirements of the CoFI Bill in relation to fit and proper requirements, in order to protect the interests of financial customers.

5.2.11. **Transitional licensing Schedule 7 of the FSRA**

5.2.11.1. A mechanism that may assist to minimise employment impacts for financial institutions resulting from the CoFI Bill is the transitional licensing Schedule 7 that will be inserted in the FSRA.

5.2.11.2. All currently licensed financial institutions in terms of the different sector laws will be licensed under Section 8 of the FSRA.

5.2.11.3. The FSCA must within 3 years after a date that will be determined by the Minister, grant all previously licensed institutions their new licenses. Until then those financial institutions may continue with their business as if licensed under the FSRA.

5.2.12. **Licensing requirements, exemptions and a risk based and proportionate approach to regulation as supportive of new entrants**

5.2.12.1. Licensing requirements that will be empowered to be set in a proportionate manner for different types and sizes of financial institutions

and the types of activities that they are conducting can potentially make it easier for new entrants to get a licence for transformation purposes.

5.2.12.2. In terms of clause 6, the FSCA may exempt any person or class of persons from the application of this Act, or a part, provision or requirement of this Act:

i. to promote the proportional application of this Act or a part, provision or requirement of this Act;

ii. where any existing Act of Parliament also wholly or partially regulates an activity;

iii. for the objectives of development financial inclusion and transformation of the financial sector, in order to facilitate the progressive or incremental compliance with this Act by a financial institution or other person to whom the exemption would relate; or

iv. in order to provide scope for innovation, including the development and investment in innovative technologies, processes, and practices.

5.2.12.3. The exemption provision and the overall emphasis on a risk based and proportionate approach to regulation that are fundamental principles of the Bill will assist new entrants to be able to become licensed and operate successfully under the regulatory framework.

5.2.13. **Extensive cross-referencing to other legislation in the Bill, and impacts on reading and understanding the Bill**

5.2.13.1. Social partners agreed that there was extensive cross-referencing in the CoFI Bill, and it was agreed that the impact on the readability and comprehensibility of the users of the legislation will be carefully considered.

5.2.13.2. The rationale for utilising cross-referencing in the Bill is to:

i. Avoid having to repeat legislative provisions in multiple pieces of legislation, which contributes to a voluminous statute book, and also, when any amendments to provisions that share the same content are made, it would require amendments to multiple provisions, instead of only one provision.

ii. Ensure alignment and integration with all other legislation, particularly with the Financial Sector Regulation Act, which is the overarching framework legislation that the CoFI Bill must be

aligned with. It also has been important to ensure integration with other legislation that regulates activities in the financial sector which are not financial sector laws that fall under the ambit of the FSRA, most notably the National Credit Act, 2005 (Act No. 35 of 2005).

iii. Alert and point users of legislation to other relevant applicable legislative provisions that are relevant, which they might not otherwise be aware of.

iv. Direct the users to other provisions within the legislation that are relevant in relation to the interpretation and implementation of the particular provision.

5.2.13.3. It was noted and recommended that cross-referencing should not be over-used, and should be used when it clearly is beneficial and serves a necessary purpose, and assists with the overall interpretation and effectiveness of the legislation.

5.2.14. **Complexity – How can the FSCA support small business and new entrants**

5.2.14.1. It was agreed that the COFI Bill highlights the current degree of legal and supervisory fragmentation for the financial sector, rather than bringing new complexity. Consider example of a new bank entrant, applicable financial sector laws include: FSRA, Banking Conduct Standard, Financial Institutions (Protection of Funds) Act, FAIS Act (various subordinate regulation), Financial Markets Act, Banks Act, National Credit Act, NPS Act… implies multiple laws and licenses.

5.2.14.2. The COFI Bill will consolidate laws in relation to conduct and consumer protection.

5.2.14.3. Possible solutions to SMMMEs.

i. Licensing manual, a how to guide, that explains process and requirements;

ii. Legal mapping: a simplified guide to financial sector laws to support understanding of the law and expectations of the regulator (being the FSCA);

iii. Important role of Guidance Notices and Interpretation Rulings, plus increased business support (financial education, network other business development initiatives);

iv. Single digital portal to complement access to direct support; and

v. For Parliament – a summary collection of CoFI Bill or FSRA provisions that impact financial institutions directly.

5.2.15. **The CoFI Bill as stand-alone legislation, its purpose, and its inter-relationship with the FSRA**

5.2.15.1. The social partners requested to clarity why the CoFI Bill has been drafted as stand-alone legislation, given the extensive integration with and cross-referencing of the FSRA. The FSRA was originally envisaged as being, and substantially remains, regulator-facing legislation that provides for the establishment, powers and functions of the regulators, and addresses other aspects important overall to the financial sector regulatory framework.

5.2.15.2. It was noted that the CoFI Bill is very much customer facing and institution facing, as opposed to regulator-facing. In this regard a separate piece of legislation that particularly focuses on the conduct of financial institutions in relation to financial customers, and in particular sets out principles in relation to the fair treatment of financial customers, would be more accessible to financial customers in particular, than if it were part of the FSRA.

5.2.15.3. Its particular focus and message would be very clear, and would not be diluted in a much larger piece of legislation that primarily covers regulator facing aspects.

5.2.15.4. The drafting style and the structure and detail of legislative provisions in the CoFI Bill is different from the style in which the FSRA is drafted.

5.2.15.5. The primary objectives of the legislation, and their different purposes, focuses, and approaches, and also the different users of the legislation, means that communication of the regulatory purpose of the legislation is best conveyed through significantly differing drafting styles, and this in turn has motivated that the regulatory message of the CoFI Bill and its primary principles and outcomes is better achieved as a stand-alone Bill, rather than as a Chapter in the FSRA.

5.2.16. **The CoFI Bill as streamlining legislation**

5.2.16.1. An important objective of the CoFI Bill has been to streamline the legislation. Currently there are thirteen different financial sector laws applicable to financial institutions. These laws regulate and regulate financial institutions based on their institutional definitions.

5.2.16.2. The range of laws have often been implemented in a ‘silo’ manner. The new legal framework under the CoFI Bill will shift away from this sectoral approach, and instead provide for an activity-based approach.

5.2.16.3. The FSCA currently is responsible for a framework consisting of 11 Acts, all cross referencing to the FSRA, and the FSRA cross-references to the definitions in these Acts.

5.2.17. **Scope of coverage of CoFI Bill**

5.2.17.1. It was highlighted by the social partners that the notion that *stokvels* are small entities was a myth and that there should be protection provided in relation to this regard, however *stokvels* (and other informal member-based groups) are not subject to financial sector regulation, on the understanding that a common bond exists between members within the group.

5.2.17.2. It is acknowledged that as *stokvels* increase in size, they may be less able to self-regulate using the common bond between members and the growth in size could leave customers at risk of mismanagement of their funds. It is important that customers understand what levels of protection do and do not apply to them when engaging in stokvel groups and inclusive consumer financial education and awareness campaigns are crucial to ensure consumers can make informed financial decisions that are suitable for their personal circumstance.

6. CONCLUSION

The process of engagement concluded with no areas of disagreement. This report therefore, concludes considerations at Nedlac on the Conduct of Financial Institutions Bill, 2021. The report is submitted to the Ministers of Finance, and Department of Employment and Labour in terms of Section 8 of the NEDLAC Act, 1994 (Act No. 35 of 1994). It is acknowledged that the Nedlac Social Partners may continue to advocate their views in the public consultation and other structured processes with due regard to the Bill.