Digital Lending
Kenya

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Relevant Regulations

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The Cambridge Centre for Alternative Finance (CCAF) and BFA Global have produced this deck to support fintech startups working in Kenya and those seeking to enter the Kenyan fintech market in navigating the regulatory environment.

This deck provides **an overview of Kenya's regulation of digital lending**. Not all regulations included in the deck may be relevant based on the nuances of your particular business model.

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01 Credit

Credit: **Financial institutions**

- The provisions relating to the licensing of and applications for banks (deposit taking institutions) discussed in slides on "Banking: Financial Institution Licensing" also apply to their credit business.
- The CBK Prudential Guidelines on Consumer Protection restricts "Institutions" from lending recklessly or negligently and additionally provides guidelines for prudent lending.
- As of November 2019, there is no longer an interest rate cap for banks and financial institutions. This was removed with the enactment of the Finance Act 2019.

Sources: [The CBK Prudential Guidelines 2013/ Guidelines on Consumer Protection], [Kenya scraps its bank lending cap and grants the IMF its wish]

Credit: **Treatment of digital credit**

Regulatory treatment of digital credit **varies by business model:**

- Digital credit providers are not defined as financial institutions under the Banking Act.
- Where a digital credit provider does not take deposits, but instead lends their own funds against their balance sheet, they may not be licensed or regulated.
- A CBK license is required only where funds used for lending constitute deposits held from members of the public.
- Some may be categorized as credit-only MFIs and operate on this basis.
- Where a digital credit lenders leverages mobile money platforms/services, this may fall under the National Payments Systems (NPS) Act.

Regulatory intervention

- To address challenges relating to the proliferation of unlicensed and unregulated financial services and products, six regulators issued in 2018 a joint public notice highlighting the risk of unregulated mobile lenders. Following the notice, the government warned the public against dealing with digital credit providers
- In April 2020, the CBK banned unregulated digital and credit-only lenders from submitting names of loan defaulters for blacklisting at the Credit Reference Bureaus (CRB). This also introduced a minimum threshold of KES1,000 ($9)for negative credit information that is submitted to CRBs by lenders.
- The CBK has announced plans to implement further regulations on digital credit, including provisions governing the interest rates charged for digital lenders' loans and requiring prior approval of the launch new products or the increase of interest rates by online lenders.

Sources: CBK Press Release on Credit Bureaus, The Central Bank of Kenya Amendment Bill 2020, FSDK Digital Credit Audit Report, Regulators Cautions Public against Mobile Loan Providers, Central Bank of Kenya Set to Regulate Digital Borrowing Platforms

Credit: **Microfinance banks and businesses**

Key regulation:

The Microfinance Act (2006) provides a regulatory and supervisory framework for microfinance banks and specified non-deposit taking microfinance business

Licensing process: Licensing requirements are in Section 5 of the Microfinance Act.

- The application is required to be made to the CBK in prescribed form, together with the submission of:
  - Company incorporation documents
  - Verified official notification of registered place of business
  - Proposed place of operation, including head office and branches
  - A feasibility study
  - Evidence that the firm can meet capital requirements outlined in the Schedule
  - Prescribed fees (see Schedule II of the Microfinance Regulations, 2008)
- The CBK issues a license if satisfied that requirements have been met.

Credit-only MFIs: Although the Ministry of Finance is empowered to issue regulations for credit-only Microfinance Institutions (MFIs) under the Microfinance Act, credit-only MFIs still have not been regulated.

Pipeline: A proposed revised law would enable the regulation of all categories of MFIs and impose similar rules for all credit providers. The CBK invited comments in May 2019 but there have been no further updates on this.

Sources: Microfinance Act 2006, Draft Microfinance Bill 2019, Invitation to Comment on Draft Microfinance Bill 2019, Microfinance (Deposit Taking Microfinance Institutions) Regulations, 2008.

Credit: **Credit Bureaus**

- The **Credit Reference Bureau Regulations (2013)** (issued by the CBK) provide for the exchange of negative information between Credit Reference Bureaus (CRBs), such as Credit Info and Metropol, and institutions to whom the regulations apply.
- Negative or adverse information is defined as adverse information relating to a customer and includes non-performing loans and credit defaults or late payments.*
- Institutions licensed under the Banking Act are additionally required to share positive information, which is defined as "any information on performing loan or other credit."
- Non-banks are required to share negative information and in addition are permitted to (voluntarily) share positive information with prior written customer consent.
- Information exchange between CRBs and third parties, including government agencies, public entities, and other credit information providers is also permitted.
- For third party credit information providers, the provision of customer information to CRBs is subject to obtaining prior written customer consent.

*The regulation provides a list of examples of types of negative information (Regulation 2)

Sources: [The Credit Reference Bureau Regulations 2013]

02 Data protection

Data protection: **National provisions**

Key Laws: Constitution of Kenya & The Data Protection Act (2019) – modelled on the EU's GDPR

Main provisions:

- **Constitution of Kenya** guarantees the right to privacy for every citizen. This right includes the right not to have information relating to a person's private life unnecessarily revealed or required, or the privacy of one's communications infringed.
- **Data Protection Act** sets out restrictions on how personally identifiable data obtained by firms and government entities can be handled, stored and shared, as well as details of the role of the Data Commissioner. Data controllers and processors must be registered, but implementation details of the Act have yet to be released (as of Jan 2021). The first Data Commissioner was appointed and took office on 16 November 2020.

On cross border transfers:

- Part VI of the Data Protection Act stipulates provisions on cross border transfers and data localisation requirements.
- Cross border transfers are contingent on data controllers and processors evidencing to the Data Commissioner that appropriate safeguards are in place to ensure the security and protection of personal data. Safeguards include providing proof that jurisdictions where data is to be transferred have commensurate data protection laws, and the transfer is necessary e.g., as part of a contractual performance.
- The Cabinet Secretary may specify that certain types of data processing can only be done through a server or data centre located in Kenya.

Sources: Data Protection Act (2019), GDPR, Constitution of Kenya, Welcoming The Appointment of Kenya's First Data Commissioner

Data protection: **Sectoral provisions**

There are also data protection provisions in sector specific financial service regulation that apply to specific types of financial service providers

PSPs:

- National Payment System Regulations requires that PSPs, their agents, and cash merchants, keep customer data collected in connection with the services they provide confidential (Regulation 42).
- The CBK is empowered to suspend or revoke a PSPs license where it fails to protect confidentiality of the data that it collects.

Institutions:

- CBK's Prudential Guidelines on Consumer Protection requires "Institutions" to protect consumer's personal and financial information through the establishment of appropriate control and protection mechanisms. These mechanisms must define the purpose of data collection, processing, and disclosure to third parties, as well as customer rights, such as informed data sharing.

Telecom licensees:

- The Kenya Information and Communications (Consumer Protection) Regulations 2010 provides for a customer's right to personal privacy and protection against unauthorized use of personal information (Regulation 3(1)(d)).
- Licensees are required to keep subscriber information confidential and are prohibited from monitoring/disclosing this information or allowing others to do so (Regulation 15).

Central depositories:

- The Central Depositories Act (2000) prescribes secrecy obligations (Part VI).

Sources: National Payment System Regulations 2014, CBK's Prudential Guidelines on Consumer Protection, The Kenya Information and Communications (Consumer Protection) Regulations 2010, The Central Depositories Act (2000)

Data sharing: **Open banking**

- There are currently no prescribed requirements for open banking.
- The recent released draft of “Kenya National Payments System Vision and Strategy, 2021 – 2025” contains some provisions on open API frameworks, and suggests that CBK may mandate data portability in financial services as well as facilitate the development of an industry wide standard for open APIs (sections 5.4.3 and 5.5.1). However, this draft is up for public consultation and the final version may be substantially different.
- Firms interested in introducing initiatives in this area should check with their regulator.

Sources: [Draft Kenya National Payments System Vision and Strategy, 2021 – 2025]

03 Consumer protection

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Consumer protection: **National provisions**

Key Laws: Constitution of Kenya, Consumer Protection Act (2012), The Access to Information Act (2016)

Main provisions:

- Article 46 of the **Constitution of Kenya** specifies consumers right to:
  - Goods and services of reasonable quality
  - The information necessary for them to gain full benefit from such goods and services
  - Compensation in case of loss or injury emerging from defects with goods or services
- The **Consumer Protection Act** contains further obligations on providers, including:
  - Confidentiality
  - Provisions relating to the performance of credit agreements* and agreements executed over the Internet
  - Disclosures to be made for remote agreements
- The **Access to Information Act** (2016) was enacted to implement Article 35 of the Constitution. It provides that every citizen has the right to access information held by public entities and private bodies (Section 3 and 4, and Part II more generally). Fintechs will need to ensure they provide information requested pursuant to the Act.

* Not all credit agreements are covered by the Consumer Protection Act. Part VII of CP Act applies only to supplier credit arrangements where a supplier extends fixed credit to a consumer to assist the consumer in obtaining goods or services, other than credit or a loan of money from the supplier.

Sources: Constitution of Kenya, Consumer Protection Act (2012), The Access to Information Act (2016)

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Consumer protection: **Sectoral provisions**

There are consumer protection provisions in sectoral regulation that apply to specific financial service providers:

PSPs:

- National Payment System Act & Regulations include consumer protection provisions, such as on misleading advertisements (Sec. 29 NPS Act)

Institutions:

- CBK's Prudential Guidelines on Consumer Protection
- Banking Act contains consumer protection provisions, including a restriction on the imposition of charges on savings, seven day call, or fixed deposit accounts (Section 16A), and limits on interest recoverable in the event of customer default (Sec. 44A)

Telecom licensees:

- The Kenya Information and Communications (Consumer Protection) Regulations 2010 include consumer protection provisions, i.e., customers have the right to receive clear and complete information about rates, terms, and conditions for products and services from telecom providers (Reg 3)

Insurers:

- The Insurance Act contains consumer protection provisions i.e., a dispute resolution for consumers (Sec. 204A) and establishes a fund to compensate policyholders for insurance firm collapse (Sec 179)

Capital Markets Authority (CMA) licensees:

- The Capital Markets Authority Act stipulates the protection of investor interests (Sec 11) and establishes a fund to compensate investors where a CMA licensee fails (Sec 18)

Sources: National Payment Systems Act 2011, National Payment System Regulations 2014, CBK's Prudential Guidelines on Consumer Protection, The Kenya Information and Communications (Consumer Protection) Regulations 2010, the Banking Act, The Insurance Act, 1987 (as amended), The Capital Markets Authority Act

04 Anti-money laundering (AML)/know your customer (KYC)

AML/KYC: **Key laws & main provisions**

Key Laws: The Proceeds of Crime and Anti Money Laundering Act (2009, as amended)(POCAMLA), Proceeds of Crime and Anti Money Laundering Regulations (2013), Prevention of Terrorism Act (2012), & The National Payments Systems Regulations (2014)

Main provisions:

- The **Terrorism Act** stipulates that entities must monitor products and services for possible use in aiding and supporting terrorist activities
- The **POCAMLA** and **related Regulations:**
  - Categorize financial Institutions as reporting Institutions, who are obligated to put measures in place to combat money laundering and register with the Financial Reporting Centre (FRC)
  - Impose AML obligations such as monitoring and reporting to the FRC (Section 44), verification of customer identity (Section 45), maintaining customer records (Section 46), and the maintenance of internal reporting procedures (Section 47)
- The **National Payments Systems Regulations** provides for AML measures for PSPs and their agents, including cash merchants, who are also required to comply with the Proceeds of Crime and Anti-Money Laundering Act (2009) and the Prevention of Terrorism Act (2012)
- The CMA has also issued **Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets**

Sources: The Proceeds of Crime and Anti Money Laundering Act (2009, as amended), Proceeds of Crime and Anti Money Laundering Regulations, 2013, Prevention of Terrorism Act, 2012, National Payment System Regulations 2014, Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets

AML/KYC: **Customer due diligence requirements**

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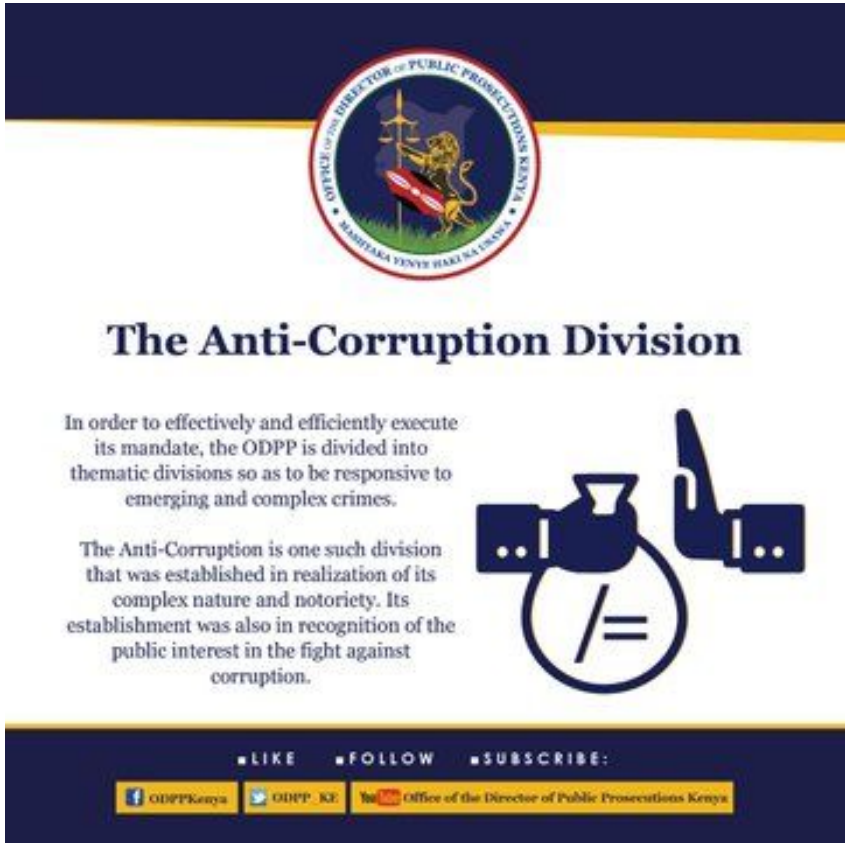
- Customer Due Diligence (CDD) requirements for institutions licensed under the Banking Act are contained in the **CBK Prudential Guidelines on AML/CFT** (Part V).
- The Guidelines prescribe Know Your Customer (KYC) requirements, processes for customer identification and verification, situations that call for enhanced due diligence and applicable measures, transactions monitoring and reporting, and record keeping.
- **At a minimum the mandatory KYC requirements for an individual are:**
    - A birth certificate
    - Passport
    - National identity card
    - Drivers license
- Additional due diligence measures that may be used to verify the identity of the customer include: a) Address of current residence verified by a referee, a utility bill; b) Verified employment and/or source(s) of income; and c) Where applicable, written confirmation from customer's prior bank attesting to customer's identity and history of account relationship (bank referee).
- The **POCAMLA and Regulations** do not provide for simplified CDD nor overtly provide a tiered approach to KYC. However, given that firms such as mobile money providers are permitted to incorporate additional KYC information incrementally, a risk-based approach may be inferred.
- A number of providers employ remote (i.e., non face-to-face) CDD by mobile phone like M-Shwari

Sources: Prudential Guidelines For Institutions Licensed Under the Banking Act, GSMA Proportional risk-based AML/CFT regimes for mobile money

05 Other economic crimes

Other economic crimes: **Relevant legislation**

- The Anti-Corruption and Economic Crimes Act (2003, as amended) provides for the prevention, investigation, and punishment of corruption, economic crime, and related offences. See particularly Part IV on investigation, and Part V on offences and penalties.
- The Bribery Act (2016) stipulates provisions relating to prevention, investigation, and penalties for bribery. The applicability of the Act includes both public and private entities and is therefore relevant to fintech providers and are obliged to take steps to prevent bribery by establishing procedures proportionate to their size, scale, and operations (Section 9).



Sources: [Anti-corruption and Economic Crimes Act (2003, as amended)], [Bribery Act (2016)],

06 Cybersecurity

Cybersecurity: **Relevant legislation**

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National legislation:

- The Computer Misuse and Cybercrimes Act (2018) stipulates several key objectives including protecting the confidentiality, integrity, and availability of computer systems, programs, and data (Section 3(c)), and facilitating the prevention, detection, investigation, prosecution, and punishment of cybercrimes (Section 3(e)).
- The Act also prescribes several offences, and penalties for non-compliance under Part III. Examples of offences include unauthorized access, interference, disclosure of passwords and access codes, and interception of electronic messages or money transfers. Firms are obliged to put in place adequate cybersecurity measures to ensure adherence.

Banking sector:

- CBK's note on Cybersecurity for Banking Sector sets out minimum standards with respect to cybersecurity risks for the banking sector.

PSPs:

- Pursuant to the National Payments Systems Act, the CBK has issued guidelines on cybersecurity for PSPs. These detail the minimum requirements to be adopted in the development of effective frameworks for cybersecurity governance and risk management.
- All PSPs are required to review their cybersecurity strategy, policy, and framework annually based on a threat and vulnerability assessment (Part IV).

Sources: The Computer Misuse and Cybercrimes Act (2018), Note on Cybersecurity for Banking Sector, National Payment Systems Act 2011,

07 Competition

Competition: **Relevant legislation & competition issues**

Relevant legislation:

- The Competition Act (2010) established the Competition Authority of Kenya (CAK), which is mandated to provide oversight over market conduct aspects such as price transparency and consumer recourse
- The Competition Act prohibits restrictive practices and "unconscionable business conduct"
- The Communications Authority of Kenya (CA) also has a mandate to ensure "fair competition and equal treatment" and this jurisdiction applies to payment providers who use communication channels to deploy products and services
- The Competition Act prevails in areas of concurrent jurisdiction, and there is a non-statutory MoU between CBK and Competition Authority

Competition issues in mobile financial services:

- These include issues with channel access, transparency, interoperability, regulatory coordination, and data sharing — these may also be present across other fintech sectors
- Several regulatory interventions have been introduced to address competition issues, including a ban on agent exclusivity, and requirements for disclosure of mobile money transaction costs at point of usage

Sources: The Competition Act (2010), CGAP Competition in Mobile Financial Services Lessons from Kenya and Tanzania, National Payment System Regulations 2014, Kenya Ends Hidden Costs for Digital Financial Services, The Kenya Information and Communications Act, 1998, The Kenya Information And Communications (Fair Competition And Equality Of Treatment) Regulations, 2010

08 Telecommunications regulation

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Telecommunication regulation: **Licensing**

Key regulations:

- The Kenya Information and Communications Act (KICA, 1998, as amended) empowers the Communications Authority of Kenya (CA) to license and regulate information and communications services (Section 5)
- The KICA Regulations (2001) also apply
- The Competition Authority has a Unified Licensing Framework (ULF), which is technology and service neutral

Main provisions:

- The Act regulates respective sub-sectors, including telecommunications (Part III), radio communication (Part IV), and broadcasting services (Part IVA)
- The ULF provides the licensing procedures for Network Facilities Providers, Application Service Providers, and Content Service Providers

Application to fintech:

- The Competition Authority may license a fintech where its operating model incorporates a technological aspect and the implementation of the innovation requires the fintech business to establish its own telecommunications infrastructure or results in content generation
- In such a cases, the Competition Authority will issue (i) an approval or license, (ii) a letter of no objection, or (iii) confirmation that a firm does not require a telecommunications license

Sources: The Kenya Information and Communications Act (1998, as amended), The KICA regulations (2001), Unified Licensing Framework, The International Comparative Legal Guide to: A practical cross-border insight into Fintech law 2nd Edition Fintech 2018

09 Taxation of financial services

Taxation: **Financial services**

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Relevant taxes:

- In 2013, taxes on financial transactions, mobile and computer hardware, and software were introduced in Kenya as well as the wider East Africa region
- For example, the VAT Act of 2013 imposes 16% VAT tax on phone sales
- The Finance Act of 2018 increased excise duties to 15% on airtime, 20% for money transfer by banks /MTOs/ other financial institutions, and to 12% on mobile phone based financial transactions
- The Finance Act of 2018 also introduced a 15% tax on internet data services and fixed-line telephone services, while removing a 2009 exemption on mobile phones

Application to fintech:

- These taxes may impact fintech businesses, and fintechs are encouraged to consult the Kenya Revenue Authority regarding the implications of the measures cited, as well as other requirements that may be relevant for their business model

Sources: The Finance Act of 2018, VAT Act 2013

10 Foreign exchange

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Forex: **Key regulations & main provisions**

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Key regulations:

- Part VI A of the Central Bank of Kenya Act
- Foreign Exchange Guidelines issued by CBK

Main provisions:

- All foreign exchange transactions must be carried out through authorized forex dealers
- Dealers are required to obtain and retain appropriate documents for all transactions above the equivalent of US$ 10,000 — these transactions are required to be reported to the CBK

Sources: The Central Bank of Kenya Act (Cap 491) (as amended), Foreign Exchange Guidelines

For more information and further guidance on engaging with regulators see [Fintech Regulation in Kenya]

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