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LEGAL ALERT

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THE CENTRAL BANK OF KENYA AMENDMENT BILL, 2021

Introduction

In August 2021, the Finance and National Planning Committee approved the Central Bank of Kenya (Amendment) Bill 2021, following public consultations. The amendment sought to regulate lending rates for digital lenders, and empower the Central Bank of Kenya (“CBK”) to license digital lenders. It also sought to regulate the types of digital loan products offered by digital lenders in Kenya.

The amendment also sought to empower the Central Bank of Kenya to make regulations on:

- i. Requirements as to registration of digital lenders;
- ii. requirements as to capital adequacy;
- iii. licence fees;
- iv. permissible and prohibited activities; and
- v. reporting requirements.

This Legal Alert highlights the developments in law, affecting various businesses and the intended effects as follows:

IMPORTANT PROVISIONS

PROVISION	EFFECT
<p>Clause 2</p>	<p>An amendment of Section 2 of the Act to include the following new definitions;</p> <p>"digital channel" means the internet, mobile devices, computer devices, applications and any other digital systems as maybe prescribed by The Bank;</p> <p>"digital credit" means a credit facility or arrangement where money is lent or borrowed through a digital channel;</p> <p>"digital credit business" means the business of providing credit facilities or loan services through a digital channel;</p> <p>"digital credit provider" means a person licensed by The Bank to carry on digital credit business;</p> <p>"specified digital credit provider" means a licensed digital credit provider within the meaning of section 33R;</p> <p>The Amendment introduces clearer definitions, leading to a defined scope of application of the Act.</p>
<p>Clause 3</p> <p>Amending Section 4A</p>	<p>An amendment of Section 4A of the Act to include:</p> <ul style="list-style-type: none"> i. Licensing; and ii. Supervision <p>of digital credit providers not regulated under any written law.</p> <p>The Amendment introduces the scope of regulation of all persons licensed by the CBK to carry on digital credit business.</p>
<p>Clause 4</p> <p>Amending Part VI C;</p> <p>and</p>	<p>An amendment of Section 33 by inserting a new Clause to provide for the regulation of digital lenders.</p> <p>Section 33R empowers the CBK to:</p> <ul style="list-style-type: none"> a) Licence digital credit providers;

<p>inserting Section 33R</p>	<ul style="list-style-type: none"> b) determine the capital adequacy for digital credit providers; c) determine the minimum liquidity requirements for digital credit providers; d) approve digital channels and business models through which digital credit business may be conducted; e) supervise digital credit providers; and f) suspend or revoke a licence. <p>The Amendment introduces the powers of the CBK to regulate operations of digital lenders.</p>
<p>Clause 4</p> <p>Amending Part VI C;</p> <p>and</p> <p>inserting Section 33S</p>	<p>An amendment of Section 33 to provide that digit lenders may only carry out digital credit business upon being licensed by CBK.</p> <ul style="list-style-type: none"> ✓ An application for a licence is made to the CBK upon payment of the requisite fee. ✓ Any person who contravenes the provisions of section 33S is liable upon conviction to imprisonment for a term not exceeding 3 years or a fine not exceeding 5 Million shillings or both. <p>The Amendment makes it an offence to offer digital loans without a licence.</p>
<p>Clause 5</p> <p>Amending Section 43</p>	<p>An amendment of Section 43 to include “specified credit providers’ thereby allowing CBK to obtain information and data from the specified credit providers, it may reasonably require to discharge its functions under the Act.</p> <p>The Amendment empowers the CBK to look into the operations of the special credit providers.</p>
<p>Clause 6</p> <p>Amending Section 57</p>	<p>An amendment of Section 57 to authorize the CBK to make necessary regulations to give full effect to provisions of the Act including:</p> <ul style="list-style-type: none"> a) The registration requirements for digital credit businesses; b) the management requirements for digital credit providers; c) the permissible and prohibited activities

	<p>d) anti -money laundering and measures for countering financing terrorism; e) data protection; f) consumer protection; g) reporting requirements for digital credit providers.</p> <p>The Amendment empowers the CBK to make specific regulations in the industry, affecting digital lenders.</p>
<p>Clause 7 Amending Section 59</p>	<p>This new Section requires that regulations to give effect to digital lending to be made within 3 months of coming into effect of the Act and registration of digital credit businesses be done within 6 months.</p> <p>The Amendment provides for timelines for the Regulations and the registration of digital credit businesses.</p>

DIGITAL LENDING AND DATA PROTECTION

The Central Bank of Kenya, the Communications Authority of Kenya and the Office of the Data Protection Commissioner, as regulators in the industry have been empowered by sectoral laws, to coordinate in ensuring digital credit borrowers’ data is adequately protected.

A review of Clause 3 (da) of the Bill presents a challenge of double regulation, considering that multiple players have been empowered to regulate digital lenders. The Data Protection Act 2019, at Section 18 and the Third Schedule of the draft Registration of Data Controllers and Processors Regulations 2021, require digital lenders to be registered as data processors and/or controllers.

Similarly, the amendment empowers the CBK to make similar regulations on data protection under Clause 57 of the Bill.

The Bill does not cross-reference the Data Protection Act, 2019 in relation to regulating digital credit providers by the CBK. What is definite however, is that the business of digital lending in Kenya involves processing of both personal and sensitive personal data of digital credit borrowers (data subjects).¹

CONCLUSION

The right to privacy under article 31 of the Constitution of Kenya 2010, is now considered a fundamental consumer protection right, as read together with Article 46. Enforcement of the laws requires to be done in a way that does not introduce barriers to the ease of doing business in Kenya. Relevant players should therefore encourage technological innovations taking into consideration the existing laws, to avoid stifling the growth of businesses and access to credit.

The regulators should also work together, to develop a common acceptable code, to guarantee data protection and avoid over-regulation of digital credit providers.

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¹ Report of the Departmental Committee on Finance and National Planning on the consideration of the Central Bank of Kenya Amendment Bill (National Assembly Bill No. 10 of 2021, available at: <http://www.parliament.go.ke/sites/default/files/2021-08/Report%20of%20the%20Central%20Bank%20of%20Kenya%20%28Amendment%29%20Bill%20No.%2010%2C%202021.pdf>)