

# Fintech 2022

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# Fintech

# 2022

**Contributing editors****Angus McLean and Penny Miller****Simmons & Simmons LLP**

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Fintech*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Mexico and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Angus McLean and Penny Miller of Simmons & Simmons LLP, for their continued assistance with this volume.



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## FINTECH LANDSCAPE AND INITIATIVES

### General innovation climate

1 | What is the general state of fintech innovation in your jurisdiction?

The fintech space in Kenya is vibrant. Investment in the sector has been focused on digital-based lenders, peer-to-peer payment providers, crowdfunding platforms, initial coin offerings and the spread of the use of cryptocurrency. Across the globe, Kenya is gaining a reputation as a leading fintech hub and was recently ranked as number 63 in the global top 100 rankings in the 2020 report of the Findexable Global Fintech Rankings.

The steady growth of fintech in Kenya can be largely attributed to not only market forces but also the interaction and cooperation between industry players, end users and an enabling regulatory framework. There has also been an increase in the use of fintech in the delivery of public services; for instance, the Kenyan government has issued mobile-based treasury bonds and has set up a taskforce to explore how Kenya can leverage blockchain and internet of things technology.

Following the covid-19 pandemic, the financial sector has also witnessed a proliferation of Fintech solutions to ensure customer convenience and business continuity while adhering to the covid-19 safety protocols.

### Government and regulatory support

2 | Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

Regulators and government bodies provide support to financial innovation balanced against consumer protection. For example, the Ministry of Information Communication and Technology set up the Distributed Ledgers Technology and Artificial Intelligence Taskforce, which delivered a report on how the emerging technological revolution could be leveraged to enhance ICT adoption and development in Kenya. The government also collaborates with other governments and monetary agencies.

The Capital Markets Authority has signed a cooperation agreement with the Abu Dhabi Global Market and the Australian Securities and Investments Commission, which provides a framework for cooperation to support financial innovation between Kenya and the United Arab Emirates and between Kenya and Australia. The Capital Markets Authority is also a member of the Global Financial Innovation Network, an international network of 29 financial services regulators and related organisations that is committed to supporting financial innovation.

The Capital Markets Authority has also set up a regulatory sandbox to test innovative products and services relevant to capital markets in Kenya in a controlled and monitored environment under a more

flexible regulatory regime. The Authority has accepted several applications for participation in the sandbox from innovators whose ideas have been developed to a level of operational testing. These applications are with respect to innovations in robo-advisory, tokenisation of real estate, crowdfunding platforms, Regtech solutions, data analytics and blockchain technology. Moreover, the Authority is also working with existing innovation or incubation centres that are in a position to support innovators to develop capital market-related innovative ideas to a level of maturity that can be admitted to the sandbox. In April 2021, the Capital Markets Authority published the CMA Regulatory Sandbox -Milestones Report, which covers the milestones achieved by the innovators and the lessons learnt and the opportunities that have been identified for the development of a regulatory framework for fintech.

The Insurance Regulatory Authority has set up a regulatory sandbox to facilitate the testing of new ideas and innovations in the insurance sector. The Insurance Regulatory Authority is currently receiving applications for the first cohort of applicants.

The Central Bank of Kenya has signed a fintech cooperation agreement with the Monetary Authority of Singapore to support digital infrastructure development in Kenya and has agreed to collaborate in developing basic digital infrastructure services in Kenya, based on a set of common standards. The two authorities also launched the Global Fintech Hackcelerator, a platform for start-ups to showcase sustainable financial services innovations. In addition, they organised the Afro-Asia Fintech Festival, a first of its kind in the region, which seeks to explore sustainable financial services innovations from emerging Afro-Asian markets.

The Central Bank of Kenya partnered with five commercial banks to facilitate the launch of a mobile application dubbed Stawi, which is a lending platform targeted towards small and medium-sized enterprises. It will offer loans of up to 250,000 Kenyan shillings at a preferential lending rate.

In August 2020, the Central Bank of Kenya held the Virtual Africa Hackathon whose theme was 'Harnessing Fintech in addressing COVID-19 effects on healthcare, digital payments and recovery'. The Hackathon had 14 finalists from seven African countries. Eight of the Hackathon participants were featured in the Afro-Asian Fintech Festival Nairobi Online City (AAFF). The AAFF was also hosted by the Central Bank of Kenya in December 2020 in collaboration with Monetary Authority of Singapore, Huawei and some local banks.

## FINANCIAL REGULATION

### Regulatory bodies

3 | Which bodies regulate the provision of fintech products and services?

They include the following:

- the Ministry of ICT is generally responsible for setting policy to govern the fintech landscape;

- the Central Bank of Kenya, established under the Central Bank of Kenya Act 1984 (revised edition 2019), is primarily responsible for formulating and implementing monetary policy and regulates the banking and payments sectors;
- the Capital Markets Authority, established under the Capital Markets Act 2012 is responsible regulating and maintaining capital markets in Kenya;
- the Communications Authority of Kenya, established under the Kenya Information and Communication Act 1998 is in charge of overseeing and developing the information and communication sectors;
- the Competition Authority, established under the Competition Act 2010, is purposed with promoting and maintaining fair competition in markets within Kenya;
- the Data Commissioner whose office, the Office of the Data Protection Commissioner is established under the Data Protection Act 2019, and is in charge of administering and enforcing data protection regulation in Kenya; and
- other regulators, such as the Insurance Regulatory Authority, regulate fintech products to the extent they are used in connection with the activities regulated by those regulators.

### Regulated activities

#### 4 | Which activities trigger a licensing requirement in your jurisdiction?

The following activities trigger a requirement to be licensed by the Capital Markets Authority if the investments in question relate to securities issued to the public:

- arranging (bringing about) deals in investments;
- making arrangements with a view to transact in investments;
- dealing in investments as principal or agent; and
- advising on investments.

Foreign exchange trading also requires a licence issued by the Capital Markets Authority.

Deposit-taking business and provision of payment services require licensing and authorisation by the Central Bank of Kenya. Lending, factoring and invoice discounting do not require licensing.

### Consumer lending

#### 5 | Is consumer lending regulated in your jurisdiction?

Consumer lending constitutes a financial service that does not require licensing in Kenya. However:

- if the funds used for lending constitute deposits held from members of the public, a license issued by the Central Bank of Kenya is required;
- persons undertaking consumer lending must comply with the business set-up requirements in Kenya, including the obligation to obtain a business permit from the applicable county government where their business premises are located; and
- persons undertaking consumer lending must comply with the requirements of the Consumer Protection Act 2012, which include disclosure requirements and restrictions against imposition of penalty charges and prepayment penalties

There have been a number of statements by the Central Bank of Kenya on the issue of regulating consumer lending by digital platforms. The first attempt to do this was through the Financial Markets Conduct Bill 2018, which sought to introduce a new prudential regulator in the financial services sector. The Bill went through public participation but is yet to be introduced to Parliament. In addition to the Financial

Market Conduct Bill 2018, there have also been proposed amendments to the Central Bank of Kenya Act through two Central Bank of Kenya (Amendment) Bills in 2020 and the Central Bank of Kenya (Amendment) Bill 2021 to provide for the regulation of digital lending by the Central Bank of Kenya. These Bills are under consideration in parliament.

### Secondary market loan trading

#### 6 | Are there restrictions on trading loans in the secondary market in your jurisdiction?

There are no regulatory restrictions on trading loans in the secondary market. If the loans constitute debt securities issued to the public, however, the requirements of the capital markets legislation with regard to issuance of securities to the public apply. These include the need to obtain the approval of the Capital Markets Authority.

### Collective investment schemes

#### 7 | Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

Collective investment schemes are regulated by the Capital Markets Authority under the Capital Markets Act 2012 and the Capital Markets (Collective Investment Schemes) Regulations 2001 issued thereunder.

These laws regulate any alternative financial products or services that fall within the definition of a CIS. This means that any platform or marketplace that satisfies the following would be considered a CIS:

- the platform or marketplace collects and pools funds from the public or a section of the public in Kenya for the purpose of investment; and
- the funds collected are managed by or on behalf of the scheme by the promoter.

Considering the above definition, there is a greater likelihood of a crowdfunding platform being deemed a collective investment scheme than a peer-to-peer or marketplace lending platform. To the extent that the fintech innovation will be regarded as a collective investment scheme, it must be registered with the Capital Markets Authority, which will regulate the activities of the scheme if approved.

The Capital Markets Authority, on 28 May 2020, published a note titled 'Guidance for Collective Investment Schemes on Valuation, Investment Performance Measurement Reporting and other Related Matters' in recognition of the need to standardise practices in the sector. The Guidance is in draft form and is awaiting public participation. It seeks to ensure that fund managers of collective investment schemes have developed comprehensive investment policies and procedures to govern the valuation of assets. In addition, the fund manager would be required to prepare and submit to the Authority a performance measurement report quarterly in addition to the existing reporting obligations.

### Alternative investment funds

#### 8 | Are managers of alternative investment funds regulated?

Yes. If the alternative investment fund is a collective investment scheme as defined in the Capital Markets Act 2012, it may only appoint a person who is licensed by the Capital Markets Authority as a fund manager to manage it.

If the alternative investment fund does not constitute a collective investment scheme and is, therefore, not regulated by the Capital Markets Authority, the manager may still have to be regulated as a licensed investment adviser or fund manager, depending on the amount of the portfolio managed on behalf of the fund. An investment adviser

may manage a portfolio of up to 10 million Kenyan shillings, whereas a fund manager's licence would be required to manage a portfolio exceeding 10 million Kenyan shillings.

### Peer-to-peer and marketplace lending

9 | Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

Except to the extent that peer-to-peer or marketplace lending constitute collective investment schemes, these are not generally regulated activities in Kenya.

If these activities are provided in conjunction with a regulated entity (such as banks, financial institutions or payment service providers), the product may be subject to approval by the relevant regulator (being the Central Bank of Kenya), as well as compliance with regulations or guidelines issued by the regulator.

### Crowdfunding

10 | Describe any specific regulation of crowdfunding in your jurisdiction.

There are no specific laws or regulations concerning crowdfunding in Kenya. However, the laws governing the financial services sector are, in many instances, broadly drafted. Consequently, crowdfunding may be considered a regulated activity thereunder. For instance:

- dealing in securities, offering securities to the public or a section thereof, and marketing securities are regulated activities under the Capital Markets Act 2012 and the subsidiary legislation issued thereunder; thus, equity crowdfunding and, depending on the nature of the rewards, reward-based crowdfunding would be regulated; and
- by virtue of the fact that crowdfunding facilitates the transfer of value, it may fall within the regulatory ambit of the anti-money laundering and countering the financing of terrorism regulator, the Financial Reporting Centre, and would be subject to the Proceeds of Crime and Anti-Money Laundering Act 2009 and the Prevention of Terrorism Act 2012.

### Invoice trading

11 | Describe any specific regulation of invoice trading in your jurisdiction.

There is no specific regulation that governs invoice trading in Kenya.

### Payment services

12 | Are payment services regulated in your jurisdiction?

Yes. Payment services are regulated by the Central Bank of Kenya under the National Payment System Act 2011 and the regulations issued thereunder.

These laws require individuals to obtain the authorisation of the Central Bank of Kenya to carry on a payment services provider business in Kenya. The laws also empower the Central Bank of Kenya to designate a payment system, which will be subject to regulation.

### Open banking

13 | Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

No. Local laws do not require the mandatory sharing of information by financial institutions to make customer or product data available to third parties. However, there is a credit referencing framework set up under

the Central Bank of Kenya Act 1984 (revised edition 2019) and the Credit Reference Bureau Regulations (2020).

Kenya passed the Data Protection Act 2019, which requires data controllers and processors (in this case, financial institutions), as far as practicable before collecting personal data, to inform the data subject of, among other things, the third parties with whom their personal data may be shared. Customers should be notified of any anticipated sharing of their data, including for purposes of open banking or credit referencing.

### Robo-advice

14 | Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

There is no specific regulation pertaining to robo-advisers or other companies that provide retail customers with automated access to investment products in Kenya.

However, where the investments in question relate to securities issued to the public, the company must comply with the capital market legislation and must obtain a licence.

### Insurance products

15 | Do fintech companies that sell or market insurance products in your jurisdiction need to be regulated?

Yes. The Insurance Act (revised edition 2020) and the subsidiary legislation issued thereunder regulates all persons carrying out insurance or reinsurance business.

The Act requires persons carrying out insurance or reinsurance business to be licensed by the Commissioner of Insurance. Insurance intermediaries, such as agents, motor assessors, insurance investigators and loss adjusters, must also be registered under the Act. There is no distinction or exemption in place for fintech companies that carry on any of these regulated activities.

### Credit references

16 | Are there any restrictions on providing credit references or credit information services in your jurisdiction?

Yes, only entities that are licensed by the Central Bank of Kenya under the Banking Act (Credit Reference Bureau) Regulations 2020 to conduct credit reference business may provide credit reference checks.

## CROSS-BORDER REGULATION

### Passporting

17 | Can regulated activities be passported into your jurisdiction?

No, regulated activities cannot be passported into Kenya.

### Requirement for a local presence

18 | Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

No. To provide regulated financial services in Kenya, a fintech company must establish a local presence in Kenya. In addition, as part of the licensing process and ongoing compliance requirements, they often require a confirmation of the physical address of the applicant or licensee.

Additionally, the Companies Act 2015 prohibits a company from carrying out business in Kenya unless it has been registered as a foreign company.

## SALES AND MARKETING

### Restrictions

19 | What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

The marketing of financial services in Kenya is generally restricted to licensed entities. Various prudential regulators have sector-specific restrictions on marketing. For instance, the Central Bank of Kenya requires marketing communication issued by its licensees to indicate that they are regulated by the Central Bank of Kenya. On the other hand, the Capital Markets Authority grants prior approval of public communication by its licensees and issuers of securities.

The Consumer Protection Act 2012 also sets out criteria for the marketing of products and services, which require that communication be clear and true.

## CHANGE OF CONTROL

### Notification and consent

20 | Describe any rules relating to notification or consent requirements if a regulated business changes control.

The consent of the Competition Authority is required if the acquisition of shares, business or other assets results in a change of control of a business under the Competition Act 2010. The Rules of the Determination of Merger Notification Thresholds and Method of Calculation provide guidelines on the transactional limits that require a merger notification and an application for the exclusion or approval of the Competition Authority.

In addition to the approval of the Competition Authority, if certain regulated entities change control, they must obtain approval or notify the relevant regulator. For example:

- a regulated telecommunications entity must notify the Communications Authority of any change of control, and where the change of control affects at least 15 per cent of the shareholding, the approval of the Communications Authority must be sought;
- a person who intends to acquire at least 5 per cent of the share capital of any licenced bank must obtain the approval of the Central Bank of Kenya;
- any amalgamation of a bank or financial institution, or arrangement to transfer any part of the assets or liabilities, must obtain the written approval of the Cabinet Secretary of National Treasury and Planning;
- a transfer of more than 10 per cent of a deposit-taking microfinance institution requires the prior approval of the Central Bank of Kenya;
- a person who intends to acquire or dispose of 10 per cent or more of the share capital of an insurance company must obtain the approval of the Insurance Regulatory Authority;
- for listed entities, the takeover regime requires the purchaser to notify the Capital Markets Authority, the target and the Nairobi Securities Exchange if it intends to acquire effective control of the target entity; and
- every company carrying out business in Kenya must inform the Kenya Revenue Authority of any changes in the case of persons with a shareholding of 10 per cent or more of the issued share capital.

## FINANCIAL CRIME

### Anti-bribery and anti-money laundering procedures

21 | Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

Yes. Fintech companies, as is the case of all other companies offering regulated financial services in Kenya, must have procedures to combat bribery or money laundering, including procedures to maintain robust know-your-customer procedures and to report any suspicious activity by customers that may be indicative of money laundering activities.

### Guidance

22 | Is there regulatory or industry anti-financial crime guidance for fintech companies?

Kenya does not have an industry anti-financial crime guidance. Nonetheless, all entities operating in Kenya and their officers fall under the purview of laws relating to anti-financial crime, including fintech companies. The anti-financial crime laws require entities to comply with the:

- Bribery Act 2016, which requires private entities to put in place procedures appropriate to their size and nature of their operations for the purposes of preventing bribery and corruption;
- Proceeds of Crime and Anti-Money Laundering Act 2009 and the Prevention of Terrorism Act 2012, which prohibit the use of property for money laundering purposes. They specifically target money laundering, tax evasion, theft, fraud, terrorist financing, drug trafficking, piracy, bribery and corruption;
- Anti-Corruption and Economic Crimes Act 2003, which provides for the prevention, investigation and punishment of corruption, economic crime and related offences;
- National Payment System (Anti-money Laundering Guidelines for the Provision of Mobile Payment Services) Guidelines 2013, which provide guidance to mobile payment services on the monitoring and reporting of suspected money laundering activities on their platforms; and
- Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets (Gazette Notice 1421), which emphasise the need for due diligence, record-keeping, the establishment of policies and procedures to address specific risks associated with the use of new technology and business relations or transactions conducted at a distance, and reporting to the Financial Reporting Centre.

Fintech businesses that fall within the definition of reporting institutions under the Proceeds of Crime and Anti-Money Laundering Act 2009 and the Prevention of Terrorism Act, 2012 should register with the Financial Reporting Centre, actively exercise due diligence and conduct legal compliance audits to avoid violating the law.

## PEER-TO-PEER AND MARKETPLACE LENDING

### Execution and enforceability of loan agreements

23 | What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Under the general Contract Law, it is advisable for parties to execute an agreement that is valid, certain and provable. Execution formalities in relation to corporate entities largely depend on the constitutive



documents and applicable laws. For instance, the Companies Act provides that in respect of companies and for any agreement to be validly executed, it must be either signed by a director in the presence of a witness or by any two authorised signatories.

Additional execution requirements, such as attestation, may apply, particularly for security documents. Pursuant to recent changes under the law, electronic signatures are acceptable as valid signatures to the extent that they meet the requirements regarding the reliability of advanced electronic signatures. These requirements are set out under the Kenya Information and Communications Act 2010.

An internet agreement should comply with the provisions of the Consumer Protection Act 2012. An internet agreement is defined as an agreement that is formed by text-based internet communications. The Act requires full disclosure of all prescribed information to a customer. However, it is not clear what prescribed information is to be provided as this has not been provided under the Act. An online loan agreement will be enforceable if a customer is given an opportunity to accept, decline or correct any errors before concluding the agreement. Moreover, the internet agreement will be validly executed by the use of an electronic signature.

In addition, unless exempted from payment of stamp duty, agreements must be stamped with the relevant stamp duty to be enforceable. Stamp duty payment and assessment may be done using the online Kenya Revenue Authority platform. Failure to stamp the agreements does not render them invalid, but the lack of stamping means that they may not be admissible before the Kenyan courts as evidential documents. Further, security agreements should be registered at the relevant registries in accordance with applicable laws.

### Assignment of loans

**24** What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

The assignment of loans that originated on a peer-to-peer or marketplace lending platform should be registered on the online collateral registry, in accordance with the Movable Property Security Rights Act 2017, for the assignment to be effective against third parties. The registration is done online on the eCitizen online platform. It is fairly straightforward, and it requires the registrant to have a user account, that is, an eCitizen account that allows access to the eCitizen online platform.

Where registration is not undertaken, the assignment may not be enforceable against a receiver or creditors of the assignor or other parties.

It is also necessary to inform or notify the borrowers or debtors about the assignment to ensure that they are bound to channel repayments in accordance with the assignee's instructions. Borrowers or debtors who have been notified can only be discharged by making payment as instructed in the notification.

### Securitisation risk retention requirements

**25** Are securitisation transactions subject to risk retention requirements?

The regulation governing securitisation transactions requires that, as key features of asset-backed securities, the special purpose vehicle used in the securitisation be bankruptcy or insolvency-remote, and that there should be a true sale of the assets to the special purpose vehicle or a direct origination of assets into the special purpose vehicle. Other than those, there are no risk retention requirements.

### Securitisation confidentiality and data protection requirements

**26** Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Yes. Article 31 of the Constitution of Kenya 2010 guarantees the right to privacy for every Kenyan, including the right not to have information relating to a person's family or private affairs be required unnecessarily or the privacy of their communications be infringed.

The Data Protection Act 2019 is the overarching legislation in Kenya that regulates collection, processing and related actions in the handling, use and storage of personal data. It applies to the processing of personal data by resident and non-resident data controllers and processors where the data subjects are located in Kenya. A special purpose company used to purchase and securitise peer-to-peer or marketplace loans must comply with the provisions of the data protection legislation if it collects or processes any personal data.

## ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTO-ASSETS

### Artificial intelligence

**27** Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

There are no specific rules governing the use of artificial intelligence, including in relation to robo-advice. However, under the Data Protection Act 2019, a data subject has a right not to be subject to a decision based solely on automated processing, including profiling, that produces legal effects concerning or significantly affecting the data subject.

### Distributed ledger technology

**28** Are there rules or regulations governing the use of distributed ledger technology or blockchains?

There are no rules or regulations governing the use of distributed ledger technology or blockchains.

### Crypto-assets

**29** Are there rules or regulations governing the use of crypto-assets, including digital currencies, digital wallets and e-money?

There are currently no regulations that regulate the use of crypto-assets in Kenya. However, the Central Bank of Kenya has warned the Kenyan public against dealing in virtual currencies, and the Capital Markets Authority has cautioned that it has not approved any initial coin offerings because of the perceived volatility and the lack of specific regulation.

The notice by the Central Bank of Kenya stated that virtual currencies are not acceptable since they are not legal tender in Kenya. However, it is unclear what the legal position is in respect of virtual currencies that have been designated as legal tender in foreign jurisdictions as they would fall within the definition of foreign currency, which is acceptable in Kenya.

Digital wallets and e-money constitute payment instruments under the National Payment System Act 2011, which defines a payment instrument as an instrument that enables a person to obtain money, goods or services or to otherwise make payments. Accordingly, the use of digital wallets and e-money is regulated and governed by the Act and would need to comply with the conditions contained within it, including the requirement of the digital wallet or e-money provider to register with the Central Bank of Kenya.

## Digital currency exchanges

### 30 | Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

There are no rules or regulations governing the operation of digital currency exchanges or brokerages. However, the Central Bank of Kenya has issued a press release noting that those currencies are not legal tender in Kenya and warning the public against dealing in digital currencies.

## Initial coin offerings

### 31 | Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

There are no rules or regulations governing initial coin offerings or token generation events. However, the Capital Markets Authority has cautioned the public that it has not approved any initial coin offerings. The court's recent ruling in the case of *Wiseman Talent Ventures v Capital Markets Authority* [2019] eKLR (available here) with respect to ICOs indicates the restrictive approach to ICOs and the uptake of cryptocurrencies generally.

## DATA PROTECTION AND CYBERSECURITY

### Data protection

#### 32 | What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

Article 31 of the Constitution guarantees the right to privacy for every Kenyan, including the right not to have information relating to a person's family or private affairs be required unnecessarily or the privacy of their communications be infringed.

The Data Protection Act 2019 is the overarching legislation in Kenya that regulates collection, processing and related actions governing the handling, use and storage of personal data. The Act applies to the processing of personal data by resident and non-resident data controllers and processors where the data subjects are located in Kenya. There are certain restrictions related to the processing of sensitive personal data.

Fundamentally, all processing of personal data should only be carried out in accordance with the data protection principles under the Data Protection Act 2019. A data controller or processor is not permitted to process personal data unless it has a lawful basis for the processing, such as consent or necessity, or the processing is for the performance of a contract. However, where the data constitutes sensitive personal data, it should only be processed if the processing is necessary for the purpose of carrying out the obligations and exercising specific rights of the controller or the data subject. A data controller or processor must obtain the personal data directly from the data subject and may only collect the data from a third party in accordance with the provisions of the Data Protection Act 2019.

A data controller or processor that transfers personal data outside Kenya should ensure that it obtains the data subject's consent or have in place appropriate safeguards for the protection of the data that is subject to the transfer. Where the personal data being transferred constitutes sensitive personal data, the consent of the data subject must be obtained, and adequate data protection safeguards must be put in place.

It is also useful to note that as per the recently issued draft Data Protection (General) Regulations, 2021 (available here) (the 'draft General Regulations'), the processing of personal data for purpose of actualising a public good such as managing any electronic payments

systems licensed under the National Payment Systems Act should be done through a server and data centre located in Kenya.

The draft General Regulations also sets out the following conditions to be met prior to the transfer of personal data outside Kenya:

- the recipient of the personal data subject of cross-border transfer is bound by legally enforceable obligations to ensure the same level of protection to the received personal data as that provided under the Data Protection Act and the draft General Regulations;
- the data subject is informed of the safeguards and the implications and risks involved in the cross-border transfer and the data subject has consented to the transfer to that recipient;
- the transferring entity has taken reasonable steps to ensure that the transferred personal data is not used for any unintended purposes; and
- the data subject's rights are safeguarded.

Cross-border transfers of personal data may however be allowed unrestricted where:

- transfer requirements arbitrarily or unjustifiably discriminate against any person;
- transfer imposes a restriction on trade;
- restrictions on transfers of personal data are greater than are required to achieve the objective; and
- necessary as provided under section 48 of the DPA (ie, the performance of a contract; implementation of pre-contractual measures taken at the data subject's request; the conclusion or performance of a contract concluded in the interest of a data subject; any matter of public interest; the establishment, exercise or defence of a legal claim; for the purpose of compelling legitimate interests.)

Further, the draft General Regulations set out the conditions to be met for a country to be deemed to have appropriate safeguards for purposes of processing sensitive personal data outside Kenya. A country will be taken to have appropriate safeguard where that country (1) has ratified the African Union Convention on Cyber Security and Personal Data Protection; (2) has a reciprocal data protection agreement in place with Kenya; and (3) has adequate data protection laws, as shall be determined by the Data Commissioner.

While the Draft Regulations are still undergoing public participation, they serve as a useful guide and show the general direction that the Office of the Data Protection Commissioner will take in terms of the implementation of the Data Protection Laws in Kenya.

### Cybersecurity

#### 33 | What cybersecurity regulations or standards apply to fintech businesses?

All companies in Kenya, including fintech businesses, are subjected to the Computer Misuse and Cybercrimes Act 2018, which aims to protect the confidentiality, integrity and availability of computer systems, programs and data, as well as facilitate the prevention, detection, investigation, prosecution and punishment of cybercrimes. The Act provides for various offences including, inter alia, system interference; unlawful interception of computer data, traffic data or signals; unlawful interception of electronic messages or money transfers; and wilful misdirection of electronic messages.

In addition, the Central Bank of Kenya issued the Guideline on Cybersecurity for Payment for Service Providers 2019. The Guideline sets out the minimum requirements that payment service providers should build on in the development and implementation of strategies, frameworks, policies and procedures to mitigate cyber risk and enhance cybersecurity governance and risk management. This Guideline builds on a 2017 guidance note issued by the Central Bank of Kenya in August

2017, which set the minimum requirements that regulated institutions must factor into their standards, policies and procedures.

For fintech businesses that are also telecommunications licensees, they are mandated, at all times, to ensure the integrity of their communications infrastructure and to desist from unlawful interception of any messages or correspondence between users.

## OUTSOURCING AND CLOUD COMPUTING

### Outsourcing

**34** Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

Yes, where financial services companies are regulated, various prudential statutes have legal requirements in respect of outsourcing. For instance, the National Payment System Act 2011 requires prior approval of the Central Bank of Kenya for material outsourcing and prior notification where the outsourcing is not material. The Banking Act (revised edition 2019) also requires that licensees apply for the prior approval of the Central Bank of Kenya for any material outsourcing.

### Cloud computing

**35** Are there legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The ICT Authority of Kenya published the Cloud Computing Standard 2019 (the Standard), which outlines various considerations for ministries, counties or agencies in the selection of services and models for online storage services, applications and data, such as software as a service, infrastructure as a service, public cloud, private cloud, community cloud and hybrid cloud. It is recommended that fintech service providers model their products in accordance with the Standard to allow for the use of the products and solutions by government agencies. In addition, where cloud computing involves the transfer of personal data to data servers located outside Kenya, fintech companies should ensure compliance with the Data Protection Act 2019.

## INTELLECTUAL PROPERTY RIGHTS

### IP protection for software

**36** Which intellectual property rights are available to protect software, and how do you obtain those rights?

Kenya is a party to the following international treaties and agreements on the protection of intellectual property:

- the Agreement on Trade-Related aspects of Intellectual Property;
- Madrid Agreement Concerning the International Registration of Marks;
- Protocol relating to the Madrid Agreement Concerning the International Registration of Marks;
- Banjul Protocol for the Registration of Marks;
- Patent Co-operation Treaty; and
- Paris Convention for the Protection of Industrial Property.

### Copyright

The ownership of copyright to a computer program belongs to the creator of the software. Subject to the provisions of the Copyright Act 2001, and any subsequent contractual agreements (for example, pursuant to any contract of employment or consultancy agreement), the copyright-holder enjoys the right to copy the software, create derivative or modified versions of it and distribute copies to the public for

sale or licence. The rights come into existence immediately upon the production of the work in a tangible medium of expression. Copyright owners also have the option to register the copyright with the Kenya Copyright Board.

### Patent

Patent protection is available for inventions of novel software that, beyond being novel, also disclose an inventive step that is machine linked and is industrially applicable. Patent protection is not available for software that comprises business methods or results in a score. A patent holder will enjoy the right to exclusive use, sale and distribution of the software.

An eligible applicant should submit their claims and the prescribed Form IP3 to the Registrar of Patents at the Kenya Industrial Property Institute, requesting the Registrar to grant a patent under the Industrial Property Act 2001. Kenya operates a substantive examination process that includes a worldwide novelty search. Patent holders' rights may be subject to compulsory licensing where certain conditions under the Act are met for reasons of public interest or are based on the interdependence of patents.

Patent holders are prohibited from including unjustified restrictions in licences on the licensee where the restrictions are harmful to the economic interests of Kenya. The restrictions are put in place to ensure that the terms of licensing are fair, reasonable and non-discriminatory.

### Trademarks

Although trademarks do not protect the software or technology itself, they can be used to protect the names or symbols used to distinguish a particular software or product in the marketplace.

### IP developed by employees and contractors

**37** Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

The Industrial Property Act 2001 and the Copyright Act 2001 provide that intellectual property developed by an employee during the course of employment belongs to the employer. This notwithstanding, the Industrial Property Act also recognises and provides for 'technovations' and grants an employee who develops a technovation the right to a technovation certificate where it can be shown that the degree of creative contribution of the employee exceeds what would normally be expected of the employee performing such his or her normal employment duties. Such an employee has the right to remuneration for his or her employer's use or communication of the technovation to a third person.

Intellectual property developed by a contractor or consultant while executing a commission belongs to the person who commissioned the work unless otherwise agreed between the parties in writing.

### Joint ownership

**38** Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

Yes, a joint owner must obtain the consent of the other joint owner of the intellectual property right to use, license, charge or assign its right in the intellectual property.

It is recommended that joint owners set out each party's rights and obligations in an agreement.

## Trade secrets

### 39 | How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

In Kenya, protection of trade secrets is mostly by way of common law and equity (and there are a few judicial decisions on this topic). Some form of protection of trade secrets can also be found in various pieces of legislation, such as those relating to employment and contracts.

Kenya does not have a statute dedicated to the protection of trade secrets. However, Kenya is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights, which regulates the unauthorised use and disclosure of trade secrets.

To protect trade secrets, non-disclosure agreements may be used, and information that is confidential should be marked as such and kept confidential, and its circulation should be limited to restricted persons.

Regarding whether trade secrets are kept confidential during court proceedings, there is currently no clear judicial precedent on the handling of evidence containing a trade secret while still maintaining its confidentiality. A review of the available case law shows that such matters are determined on a case-by-case basis, and one must demonstrate that the trade secret is indeed useful and applicable in the relevant trade or industry; is not public knowledge or public property; is of economic value to the business seeking to protect it and that the disclosure of such information would be prejudicial to the business.

## Branding

### 40 | What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

Branding is protected in Kenya by registration of a brand as a trademark under the Trade Marks Act 1982 (revised edition 2012). A trademark is defined as a mark, which includes a guise, slogan, device, brand, heading, label, ticket, signature, word, letter or numeral or any combination of these, that is used to distinguish a product or service.

To be afforded protection under the Act, an applicant is required to register the trademark with the Registrar of Trademarks at the Kenya Industrial Property Institute, using the prescribed Form TM2 and providing a specimen of the trademark. Trademark protection is available for product names, logos, dress, certification marks and collective marks. Trademarks must be distinctive for them to be registrable and enforceable against third parties unless acquired distinctiveness through use can be proven. Additionally, holders of international registrations of a trademark may extend their registrations to cover Kenya by designating Kenya through the Madrid System or ARIPO System.

Upon registration of a trademark, the proprietor of the trademark will enjoy the right to exclusive use of the trademark. Upon infringement of the right, the proprietor can institute a claim for damages and may obtain an injunction preventing future use of the infringing mark.

A fintech business seeking to avoid infringing on any existing brands should conduct a search of the particular mark they propose to use at the trademarks registry to determine whether a brand is available for use or registration prior to use in Kenya.

## Remedies for infringement of IP

### 41 | What remedies are available to individuals or companies whose intellectual property rights have been infringed?

In terms of copyright infringement under the Copyright Act 2001, an aggrieved party should alert the Kenya Copyright Board to seize the infringing materials and initiate appropriate criminal proceedings. Civil proceedings may also be initiated by aggrieved parties, and some of the remedies that may be sought include injunctions and damages.

In respect of trademarks, enforcement proceedings can be filed against any infringing action before the High Court of Kenya upon registration of the trademark. If successful, the aggrieved party may be entitled to an injunction to prevent the future use of the trademark, damages, an account for profits by the infringer, delivery up and destruction of goods, products or material bearing the infringing marks. Where the trademark is yet to be registered, enforcement proceedings (opposition or expungement) should be brought before the Kenya Industrial Property Institute.

Patent infringement proceedings are instituted before the Industrial Property Tribunal, which sits within the Kenya Industrial Property Institute. The aggrieved party may be entitled to an injunction to prevent the future use of the patent and damages.

## COMPETITION

### Sector-specific issues

#### 42 | Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

The Competition Act 2010 provides the statutory framework governing competition within Kenya. Specific to fintech companies, the Act provides that in the provision of banking, microfinance, insurance and other services, the services provider is not permitted to impose unilateral charges and fees if these have not been brought to the attention of the consumer prior to their imposition or prior to the provision of the service.

In addition, fintech companies must ensure not to engage in restrictive trade practices that are prohibited by the Competition Act, including entering into any agreements or undertakings, the effect of which prevent or weaken competition in the trade of any goods and services.

## TAX

### Incentives

#### 43 | Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are currently no tax incentives specifically available to fintech companies in Kenya.

### Increased tax burden

#### 44 | Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

Under the Income Tax Act (revised edition 2019) (the Income Tax Act), income that is derived from or that accrues in Kenya is subject to income tax at the prescribed rates, namely 30 per cent for Kenya tax residents and 37.5 per cent for permanent establishments for non-resident persons.

Kenya recently introduced various provisions with respect to the taxation of income derived from the digital marketplace. A digital marketplace is defined as an electronic platform that enables users to sell or provide services, goods or other properties to other users.

The Income Tax Act as amended by the Finance Act 2020 introduced a digital services tax (DST), payable by a person whose income is derived from or that is accrued in Kenya through a digital marketplace. The DST is payable at the time of transfer of the payment for the services to the services provider. The rate of DST is 1.5 per cent of the gross transactional value. The Tax Procedures Act also provides for the appointment of a digital services agent by the Kenya Revenue Authority (KRA) for the purpose of collecting the DST.

The Finance Act 2021 (the Finance Act) has also introduced the following changes to the Income Tax Act (effective 1 July 2021):

- clarifying that income accrued from a business carried out over the internet or an electronic network including a marketplace is subject to tax. This change is geared towards ensuring that all sales made through a digital platforms are captured under the DST regime. Previously, only sales made through a marketplace (see change in definition of a marketplace below) were chargeable to DST;
- the definition of a digital marketplace has been amended to mean a platform that enables users to provide goods, services and property to other users. Previously, a digital marketplace had been defined as platform that enables the direct interaction between buyers and sellers of goods and services through electronic means. This is aimed at widening the scope of application of the DST laws; and
- the DST will only be payable by non-resident persons (without permanent establishment) who accrue and derive income from a digital marketplace in Kenya. The Finance Act also deleted the provisions on offsetting of DST paid against the tax payable by a person since DST would no longer be applicable for resident persons and permanent establishments of a non-resident person. The effect of the change is that DST would be a transaction tax applicable to non-residents and would not apply to resident and permanent establishments of non-resident persons.

Under the Value Added Tax Act 2013, (the VAT Act) services in relation to the issue, transfer, receipt and any other dealing with money, including money transfer services and telegraphic money transfer services, are exempt from value added tax (VAT).

For the supply of electronic services, these are subject to VAT at the standard rate, which is 16 per cent. Electronic services comprise the following services when offered through a telecommunications network, to a recipient who is not a registered person and delivered to a person in Kenya at the time of supply:

- websites, web-hosting, or remote maintenance of programmes and equipment;
- software and the updating of software;
- images, text and information;
- access to databases;
- self-education packages;
- music, films and games, including games of chance; and
- political, cultural, artistic, sporting, scientific and other broadcasts and events, including broadcast television.

Additionally, VAT is chargeable on supplies made through a digital marketplace. The regulations providing for the applicability and rules for charging VAT on the digital marketplace were issued by the Cabinet Secretary and approved by Parliament (the VAT (Digital Market Supply) Regulations) (the Regulations) on 10 September 2020. The Regulations provide for a number of matters, including taxable services chargeable to VAT when supplied through a digital marketplace and registration of non-resident digital services providers under a simplified registration regime or appointment of a tax representative where necessary.

The key issue in the Regulations is the fact that VAT on the digital market place transactions are only applicable in business-to-consumer transactions and not business-to-business transactions. A business-to-business transaction is defined as a transaction between a supplier from an export country to a tax registered or non-registered business entity in Kenya while a business to customer transaction is defined as a transaction between suppliers of services from an export country to a consumer in Kenya. A digital marketplace is defined as an online platform that enables users to sell or provide services, goods or other property to other users.



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The taxes target both the parties transacting in a digital marketplace as well as the operator of the digital marketplace platform.

## IMMIGRATION

### Sector-specific schemes

45 | What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

There are no immigration schemes available for fintech businesses to recruit skilled staff from abroad. There is also no special regime specific to the technology or financial sectors. Any person can apply under the Kenya Citizenship and Immigration Act 2011 for a work permit. However, ICT experts require clearance from the ICT Ministry to support their application for a work permit from the Immigration Department.

There is in place a draft Information Communication Technology Practitioners Bill 2020, which seeks to, among other things, establish an ICT Practitioners Institute that will provide training, registration, licensing and standards of ICT practitioners. However, the Bill in its current form does not clarify whether there will be any requirements with respect to recruiting ICT specialists from abroad.

## UPDATE AND TRENDS

### Current developments

46 | Are there any other current developments or emerging trends to note?

The mainstream use of fintech is gaining traction in Kenya, and both commercial enterprises and government entities are exploring the

adoption of fintech to improve service delivery; for instance, blockchain solutions are being explored to streamline and update the land registration process.

At the same time, fintech innovation has led to the development of various platforms, such as Kopa Link, that aim to bridge the financial gap by making financial products more accessible to a larger population.

An emerging trend is the taxation of the digital economy with the introduction and proposal of digital taxes on supplies of digital services and the revenues of digital services providers.

The growth of the fintech industry has been accelerated by the covid-19 pandemic as the Kenyan government has discouraged cash transactions, leading to an increase in use of other payment services, especially mobile-based payment solutions.

### Coronavirus

47 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Most of the tax measures instituted by the government to cushion the economy against the adverse effects of the pandemic have since expired or repealed. For instance, the corporate tax rate, which had been reduced from 30 per cent to 25 per cent, was restored to 30 per cent with effect from 1 January 2021; and the rate of VAT that had been reduced from 16 per cent to 14 per cent was restored to 16 per cent from 1 January 2021.

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