

# Financial Services Sector Report

Q2 2020

MMAN  
ADVOCATES



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## BANKING

Digital credit and financial products were a key focus of regulation during the quarter, with the Central Bank of Kenya curtailing digital credit-only lenders' access to credit reference agencies and a proposed expansion of the CBK's statutory mandate to include the regulation and supervision of providers of digital financial products and digital credit service providers.

### I. Acts of Parliament

**Tax Laws (Amendment) Act 2020 published 27.4.2020 ([find link here](#))**

#### *Excise duty on other fees charged by financial institutions*

The **Excise Duty Act, 2015** imposes an excise duty of 20% of the excisable value of "other fees" charged by financial institutions.

The Tax Laws (Amendment) Act amended the definition of "other fees" to read: "*fees, charges or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions specified in the Insurance Act or regulations made thereunder*".

This change provides greater clarity on which fees, charges or commissions charged by financial institutions are excisable and effectively means that fees for unlicensed activities will not be excisable.

#### *Appointment of licensed institutions as KRA agents for revenue banking services*

The Tax Laws (Amendment) Act introduced a new provision of the **Kenya Revenue Authority Act, 1995** that empowers the KRA to appoint a person registered under the Banking Act to act as an agent for revenue banking services. Any person appointed shall be required to transfer the funds to Central Bank of Kenya within two days from the date of collection, failure to which a compounded penalty of 2% will apply.

**Finance Act 2020 published 30.6.2020 ([find link here](#))**

#### *Exemption of currency notes and coins from RDL*

The Finance Act amended the **Miscellaneous Fees and Levies Act, 2016** to exempt currency notes and coins imported by the Central Bank of Kenya from payment of railway development levy charged on imported goods or purchases.

#### *KRA a preferential creditor for agency sums in bank insolvency*

The Finance Act amended the **Insolvency Act, 2015** to include the Kenya Revenue Authority as a preferential creditor having second priority in respect of all amounts held on behalf of the KRA by a person licensed under the Banking Act who has been appointed as an agent for revenue banking services by the Commissioner, at the point of receivership or liquidation of the bank or institution.

### II. Subsidiary Legislation

**Banking (Credit Reference Bureau) Regulations 2020 published 8.4.2020 ([find link here](#))**

The Central Bank of Kenya ("CBK") published these regulations to advance a structure for the exchange of borrowers' credit information between banks, microfinance institutions, SACCOs, credit information providers approved by the CBK and licensed credit reference bureaus. The regulations will

enhance Kenya's credit information sharing system by strengthening consumer protection for borrowers and expanding the sources of information to determine a borrowers' creditworthiness.

Against the backdrop of data sharing concerns and in order to ensure safe data sharing practices, the Regulations also envisage data collections standards and reciprocal cross border credit information sharing of various persons. The CBK as the primary regulator is also set to put in place a list of reciprocal arrangements for purposes of effecting cross border transfer of data.

### III. Guidelines, Notices & Circulars

#### **CBK withdraws access to CRBs by digital credit-only lenders**

In its press release dated [14 April 2020](#), the CBK noted that the Banking (Credit Reference Bureau) Regulations, 2020 seek to enhance consumer protection for borrowers, strengthen the Kenya Credit Information System by expanding the sources of information and ensuring the sustainability of the system as a tool for bridging the information gap regarding a borrower's creditworthiness. Notably, the CBK also withdrew approvals granted to the digital credit-only lenders as third-party credit information providers to CRBs and also recommended the suspended listing of negative credit information for borrowers whose loans were performing but had since become non-performing from 1st April 2020.

#### **Mobile money transactions (COVID-19 pandemic)**

On [16 March 2020](#) the CBK issued an announcement introducing a number of measures effective until 30 June 2020 to enable the increased use of mobile money

transactions instead of hard cash in light of the Covid-19 pandemic. The press release highlighted a set of emergency measures including:

1. an increase on the limit on single mobile money transactions to KES 150,000.00;
2. an increase on the daily limit on mobile money transactions to KES 300,000.00;
3. an increase on the limit on mobile money wallet capacity to KES 300,000.00; and
4. elimination of charges by payment service providers and commercial banks for transfers between mobile money wallets and bank accounts.

Through a press release of [24 June 2020](#) an extension of application of the emergency measures application was granted from 1 July 2020 to 31 December 2020. The extension seeks to cushion 80 percent of the mobile money transactions in the country even though the CBK noted a marginal decrease of business-related transactions.

#### **Increase in bank depositors' insurance coverage**

In a press statement dated [30th June 2020](#), as well as in a letter to all CEOs of Commercial Banks, Mortgage Finance Banks and Deposit-taking Microfinance Banks, the Chief Executive Officer of the Kenya Deposit Insurance Corporation (KDIC) highlighted market interventions the corporation is implementing as part of its mandate of risk minimization especially in light of the COVID-19 pandemic as follows:

1. Effective 1st July 2020, the KDIC increased depositors' coverage limit from KES 100,000.00 to KES 500,000.00. This was attributed to the country's sustained economic growth over the years.

2. The KDIC extended the payment period of annual premiums by six (6) months allowing member institutions to procure payment by the end of December 2020.
3. The risk-based model of assessing annual premiums payable by banks scheduled to be effected in July 2020 has been deferred by one year to July 2021. The model would have seen an increase in the premiums chargeable to banks. However, owing to the negative effect the pandemic has had on cash-flows of businesses around the country, the corporation has allowed room for recovery.

### **Request for comment: Kenya Development Bank Bill, 2020**

On 25th May 2020, Treasury requested for comments on the draft [Kenya Development Bank Bill, 2020](#). This was against the backdrop of a recommendation by the 2013 Presidential Taskforce on Parastatal Reforms approving the merger of the Industrial and Commercial Development Corporation, IDB Capital Limited and the Tourism Finance Corporation to form a single cross-sector Development Finance Institution to facilitate industrial and economic development through financial, investment and business advisory services and to provide long-term financing. Submission of comments was closed on 19th June 2020.

## **Parliamentary Bills**

### **The Central Bank of Kenya (Amendment) Bill, 2020 published 19<sup>th</sup> June 2020 ([find link here](#))**

This private member's Bill seeks to amend the Central Bank of Kenya Act, 2014 to include

regulation and supervision of the following by the CBK:

1. providers of digital financial products and services;
2. digital credit providers and digital credit service providers;
3. providers of financial products and services;
4. the conduct of financial services.

### **Pandemic Response and Management Bill, 2020 published 17.4.2020 ([find link here](#))**

The Pandemic Response and Management Bill proposes to introduce a number of temporary relief measures during a pandemic, some of which touch on the financial services sector.

The Bill seeks to vest the Cabinet Secretary in charge of finance with powers of initiating tax measures to cushion affected borrowers and lenders. Notably, the Bill seeks to mitigate adverse economic effects during a pandemic until two months after the end of the pandemic in the following manner:

- a) requiring borrowers and lenders to enter into arrangements that review the repayment terms;
- b) suspending the imposition of penalties on account of default; and
- c) suspending the listing of defaulters by a credit reference bureau.

The Bill also seeks to introduce a moratorium on penalties, fees and interest by lending institutions on account of non-payment or late payment of obligations during a pandemic. It remains under debate at the Senate

## INSURANCE

The introduction of VAT on insurance agency and insurance brokerage commissions was the most significant legislative development of the quarter. The potential impact on the profits of insurers which do not charge VAT on income and therefore cannot benefit from setting off against VAT paid on commissions cannot be ignored. This legislative amendment has been challenged in Court.

### I. Acts of Parliament

**Tax Laws (Amendment) Act 2020**  
published 27.4.2020 ([find link here](#))

*VAT introduced on insurance agency, insurance brokerage, securities brokerage services*

The Tax Laws (Amendment) Act 2020 scrapped the exemption from VAT previously granted to insurance agency, insurance brokerage and securities brokerage services under the **VAT Act 2013**.

**NB:** On 16<sup>th</sup> July 2020 the Association of Kenya Insurers obtained conservatory orders staying/suspending further implementation, administration, application and/or enforcement of this amendment to the VAT Act 2013 pending hearing of a constitutional petition challenging the amendment.

*Withholding tax introduced on premium payments to non-residents*

The **Income Tax Act** (Chapter 470) was amended to introduce withholding tax on payments to a non-resident person not having permanent establishment in Kenya of insurance or reinsurance premium, at 5% of the gross amount payable. This does not apply to insurance or reinsurance premium paid in respect of aviation insurance.

*Preferential tax rate for resident life insurance business scrapped*

The Tax Laws (Amendment) Act also repealed the preferential tax rates that were available to resident life insurance companies under the **Income Tax Act** which previously provided that the that part of the chargeable income of a

resident insurance company which relates to its life insurance business where the rate shall be eight shillings in each twenty of chargeable income.

**Finance Act 2020** published 30.6.2020 ([find link here](#))

*Time limit on appeals to the Insurance Tribunal*

The Finance Act 2020 amended the **Insurance Act** (Chapter 487) to limit the time within which a person aggrieved by a decision of the Commissioner of Insurance on a customer complaint against a regulated entity in relation to the provision of its services may appeal to the Insurance Tribunal, to thirty days from the date of the Commissioner's decision.

### II. Guidelines, Notices & Circulars

**COVID-19 Guidance Notes (Insurance Regulatory Authority)**

On [21st April 2020](#), the IRA issued a guidance note to the insurance industry in light of the disruptions caused by the Covid-19 virus. The guidance note, among other things, requires insurers to:

1. promptly process and settle claims related to COVID-19;
2. avail policyholders a 3-month grace period over and above any contractual premium holidays and payment of premiums in instalments; and
3. not introduce product exclusions or alter product terms and conditions for

existing approved products without prior approval from the IRA.

By a second guidance note of [30th April 2020](#), the IRA clarified that:

1. the 3-month grace period would not be a payment freeze on premiums but would be granted so as to avoid policy lapses or policies becoming paid-up;
2. the proposed contingency measures would only be put in place to enhance customer service; and
3. insurers would have to set up measures to support insurance agents and brokers by paying commissions immediately business is transacted and in accordance with the Insurance Act.

### III. Judicial Decisions

**Nairobi Civil Suit 373 of 2003 Cannon Assurance (Kenya) Limited v Mohansons Food Distributors Limited Judgment delivered on April 2, 2020 ([find link here](#))**

#### *Insurance related issues for determination*

- Under what circumstances would a valid contract of insurance be in existence despite the absence of a written contract or policy of insurance?
- Whether in light of section 156 of the Insurance Act an insurer could demand payment for premiums after the expiry of an insurance policy.

#### *Held*

1. A valid insurance contract existed between the parties. The defendant requested to be covered from time to time and the plaintiff provided cover as evidenced by debit notes on terms under its usual policies.
2. Under section 156(1) of the Insurance Act, the insurer would only assume the risk if the premium had been paid and received by it or where the premium had been guaranteed by such person or where a deposit of a prescribed amount was made in advance. The plaintiff's claim for outstanding premiums belied the fact that the plaintiff assumed risk without payment of any premium.
3. Section 156(1) of the Insurance Act did not disentitle the insurer from claiming unpaid premiums nor did it state that a contract of insurance entered into by the parties would become void. Additionally, that provision did not prescribe penal consequences. An insurance policy was not invalidated merely for non-payment of premiums unless the policy itself stated so.

#### *Implications of the decision*

This decision affirmed the legal principle that ordinarily, a policy of insurance remains valid once issued and liability attaches despite non-payment of premiums, so that non-payment of a premium does not amount to a failure of consideration vitiating the contract of insurance unless the policy itself provides as such.

## INVESTMENTS

The scrapping of preferential income tax rates for newly listed companies is likely to further damage a struggling capital markets sector which has seen a dearth of new listings over the past few years.

### I. Acts of Parliament

**Tax Laws (Amendment) Act 2020**  
published 27.4.2020 ([find link here](#))

***Preferential tax rate for recently listed companies scrapped***

The Tax Laws (Amendment) Act repealed the preferential tax rates that were available under the **Income Tax Act** (Chapter 470) to newly listed companies for the first 5 years where at least 30 or 40% of the issued share capital of the company is listed and for the first 5 years in respect of a company introducing its shares through listing or any securities exchange.

**Finance Act 2020 (published 30.6.2020)**  
([find link here](#))

***Private equity and venture capital funds now subject to CMA mandate***

An amendment to the **Capital Markets Act** (Chapter 485A) has given the Capital Markets Authority the statutory mandate to license, approve and regulate private equity and venture capital companies that have access to public funds.

***Payment of unclaimed dividends excluded from the Investor Compensation Fund***

The **Capital Markets Act** was further amended to exclude beneficiaries of unclaimed dividends from accessing the Investor Compensation Fund established under that Act. This would appear necessary to align the Capital Markets Act with the provisions of the Unclaimed Financial Assets Act which has placed unclaimed dividends within the mandate of the Unclaimed Financial Assets Authority.

### II. Guidelines, Notices & Circulars

**COVID-19 Circular (Capital Markets Authority)**

On 27th May 2020, the CMA issued a circular providing guidance on holding virtual general meetings to issuers of securities to the public. In light of government directives on the COVID-19 pandemic, if an issuer finds it impracticable to conduct general meetings in the manner prescribed in their articles of association, the issuer ought to obtain a 'No Objection' from the CMA prior to issuing a statutory notice of the general meeting to its members. The processing of the 'No Objection' would allow the CMA to review shareholder questions and explanations from the management of directorship to ensure shareholder rights are upheld.

**Request for comments: Draft Guidance Note for Collective Investment Schemes**  
([find link here](#))

By a public notice of 28th May 2020, the CMA issued an invitation for comments from the general public and stakeholders with respect to a proposed guidance note for collective investment schemes on valuation, investment performance management, reporting and other related matters. In its press release, the CMA noted that market dynamics and increased competition necessitated standardized practices in the sector to ensure that investors are adequately informed on the performance of funds. The guidance note seeks to enhance the comparability and consistency

of information disclosed in a performance measurement report across the industry to boost investor confidence. Fund managers will be tasked with establishing and implementing comprehensive policies and procedures, compliant with the guidance note, to govern the valuation of assets held by an investment scheme. Submission of comments was closed on 15th June 2020.

**Request for comments: Draft Income Tax (Real Estate Investment Trusts) Rules, 2020 ([find download here](#))**

On 2nd June 2020, the Capital Markets Authority issued a public notice requesting stakeholder and public consultation regarding the Income Tax (Real Estate Investment Trusts) Rules, 2020. With section 20 (1 - c, d) of the Income Tax Act exempting REITs and investee companies wholly owned by REITs from income tax, the draft regulations propose that the exemption would apply to REITs and/ or REITs' investee companies registered by the Commissioner-General of the Kenya Revenue Authority. Furthermore, failure to satisfy requirements for purposes of maintaining the exemption status would lead to a cessation of exemption. Submission of comments closed on 2nd July 2020.

**Request for comments: Draft Guidelines on Share Buybacks for Listed Companies ([find download here](#))**

On 29th June 2020, the CMA published a notice inviting comments from stakeholders and the

general public on proposed guidelines on share buybacks for listed companies. Part XVI of the Companies Act, 2015 contains provisions for a limited company's acquisition of its own shares. The CMA's proposed guidelines provide for, among other things,:

- i. authorisation to undertake a share buyback;
- ii. contents of the shareholders' circular;
- iii. conditions for undertaking, cancelling or suspending share buybacks; and
- iv. reporting and disclosures of a share buyback transaction

Submission of comments will be closed on 31 July 2020.

### III. Judicial Decisions

**Miscellaneous Application No. E680 of 2020 – In the Matter of WPP Scangroup PLC order dated 29.4.2020 ([find download here](#))**

Pursuant to this decision the High Court allowed any company listed on the Nairobi Securities Exchange which finds it impracticable to conduct its general meeting in the manner required by its Articles of Association on account of the COVID-19 pandemic to hold shareholder meetings using alternative means including electronic means.

## RETIREMENT BENEFITS

Access to retirement benefits to purchase a residential house was introduced by the Tax Laws (Amendment) Act 2020, providing an alternative source of funding towards achieving the Government's Big 4 agenda on affordable housing to improve the living conditions of Kenyans.

### I. Acts of Parliament

#### Tax Laws (Amendment) Act 2020 published 27.4.2020 ([follow link here](#))

The Tax Laws (Amendment) Act amended section 38 of the **Retirement Benefits Act, 1997** to allow members of retirement benefit schemes to access retirement benefits for purposes of purchasing a residential house. This amendment intends to provide an alternative source of funding for members who want to purchase a house using their benefits.

### II. Guidelines, Notices & Circulars

#### COVID-19 Guidance to Trustees (Retirement Benefits Authority)

On 4th April 2020, the RBA announced that an exemption from compliance was gazetted through the **Retirement Benefits Act (Exemption From Compliance) Order, Legal Notice 44 of 2020** ([follow link here](#)) which exempted the trustees of retirement benefit schemes whose financial year ended on 31st December 2019 from complying with the requirement to submit a copy of scheme's audited accounts to the Chief Executive Officer of the Retirement Benefits Authority by 31st March 2020. The exemption lapsed on 31st May 2020.

The RBA issued a further communique on 23rd April 2020 ([follow link here](#)) deliberating on issues such as:

1. employer and employee contributions depending on the status of employment e.g where employees are on unpaid leave, members of a scheme are considered as temporarily absent from work and contributions of both the employer and employee shall be suspended for the period they remain unpaid or a maximum period defined in the scheme's rules;
2. postponement of scheme Annual General Meetings; and
3. allowing deferral of schemes' compliance with Good Governance guidelines.

#### Request for comment: Draft Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 ([find download link here](#))

On 4th May 2020, the RBA invited comments from the public and stakeholders regarding the draft Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020. An amendment to the Retirement Benefits Act introduced section 38 (1A) to enable members of a retirement benefits scheme to employ a portion of their accrued benefits to secure a mortgage loan or to purchase a residential home from institutions and on terms prescribed by the regulations. The proposed amendments provide for, among other things:

1. a scheme member's application for approval;

2. the limits of the proportion available for the purchase of a residential house;
3. the general structure and rules governing the utilization of the accrued benefits; and
4. the duties of scheme trustees in relation to purchase of a residential house.

Submission of comments was closed on 13th May 2020.

### III. Judicial Decisions

**Kisumu Civil Appeal No. 56 of 2016 Kenya Commercial Bank -vs- Isaac Ingati Abong' & Another [2020] eKLR-Judgment delivered 3.4.2020 ([find link here](#))**

#### *Issues for determination*

- Whether pension money can form part of the estate of a deceased person.
- Whether it was an error for a court to issue orders to an administrator of a pension scheme where a dispute arose when money from a deceased person's bank account had been credited into the pension scheme's account.
- Whether section 36A of the Retirement Benefits Act, which provides that benefits payable under a pension scheme would not be part of the estate of a member for purposes of administration, was applicable to pension money that had already been paid to a deceased member of a pension scheme.

#### *Held*

1. Section 36A of the Retirement Benefits Act relates to money that is payable or is accruing to beneficiaries and not what had already been disbursed. The Respondents' claim was not for benefits from a pension scheme but funds that had already been deposited into the deceased's bank account.
2. Despite the assertion that the pension scheme had deposited KES. 2,111,447.35 into the deceased's bank account allegedly erroneously, the said sum, after being deposited, was no longer bound by the rules and regulations of the pension scheme or the Retirement Benefits Act. The funds formed part of the estate of a deceased person as provided for in section 3 of the Law of Succession Act.
3. It is apparent that there was a legal lacuna as the Retirement Benefits Act and the Trust Deed and Rules did not clearly provide that the death of a pensioner would automatically lapse the contract. That meant that the Appellant had no legal right to debit the deceased's account in favour of the pension scheme. The funds in that account formed part of the deceased's estate.

#### *Implication of the decision*

Pension money that has already been paid, as opposed to pension money that is payable, is part of the estate of a deceased person.

## SACCO SOCIETIES

The Sacco Societies Regulatory Authority’s mandate to oversee the licensing, regulation and supervision of non-deposit taking business, was reinforced by the publication of the Sacco Societies (Non-Deposit Taking Business) Regulations, 2020.

### I. Subsidiary Legislation

**SACCO Societies (Non-Deposit Taking Business) Regulations, LN 82/2020 published 5.5.2020 ([follow link here](#))**

These Regulations provide a framework for the conduct of non-deposit taking business and the licensing, regulation and supervision of non-deposit taking Sacco Societies. Among other things, the Regulations define non-deposit taking business, prescribe capital adequacy and liquidity requirements, prescribe the contents of a non-deposit taking Sacco’s credit management policy, products and practices, and provide for how the Saccos are to be governed, approved investments, and financial reporting, and protection of members.

**Banking (Credit Reference Bureau) Regulations, 2020 published 8.4.2020 ([follow link here](#))**

These Regulations have notably included Sacco’s as authorised subscribers of credit data to credit reference bureaus. (For more about these Regulations see the [Banking Sub-Sector](#))

### II. Guidelines, Notices & Circulars

**COVID-19 Guidance (Sacco Societies Regulatory Authority)**

On 14th April 2020, the Business Daily reported that SASRA directed saccos holding more than KES 766 billion in deposits to file daily liquidity reports to enable the regulator gauge the impact of the COVID-19 pandemic on the sector, and assess and propose practical intervention measures. The regulator also requested Saccos to go slow on lending to avert liquidity challenges.

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