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Draft Non-Deposit Taking Credit Providers Regulations 2025: An Opportunity for Clarity

A recent High Court decision (*Stichting Rabo Bank Foundation v Ava Chem Limited & Another [2024] KEHC 9931 (KLR)*) has reignited debate on whether foreign companies not locally registered can sue and presumably be sued in Kenyan courts. This decision was based on interpretation of provisions of the Companies Act, 2015 on the threshold for registration of a foreign company carrying on business in Kenya. The definition of which under the Act is intentionally broad to capture everything under the sun.

For avoidance of doubt, carrying on business in Kenya includes specific matters which may not ordinarily be considered as such including issuing debentures and guarantees. The Companies Act defines debentures as any borrowing by a company. In our view, the simple reason for this is these activities while not strictly done with the intention to generate a profit as a business require registration for protection of local lenders and beneficiaries of such guarantees.

Foreign companies lending in Kenya and mostly fund vehicles that use debt instruments to provide much needed funding will seemingly bear the brunt of these decisions. This is particularly so because funds invest in multiple jurisdictions across geographies based on their investment mandates. In this respect, a decision to invest is made based on an assessment of a funding opportunity either from an investment or impact perspective or both. Registration and its corresponding compliance requirements may therefore deter rather than encourage such investments by introducing an additional consideration over and above a fund's permissible investment classes, geographies, and objectives. This is particularly concerning when the 2024 Africa Tech Venture Capital Report by Partech Africa shows Kenya led in debt funding and debt deals. In 2024, Kenyan companies are reported to have raised a total of USD 382m through 24 deals accounting for 38% of the total debt funding and 31% of debt transactions in Africa.

For these institutions, the recently published draft Central Bank of Kenya (Non-deposit-taking Credit Providers) Regulations, 2025 (**draft Regulations**) provide an optimal forum to address the uncertainty created by these decisions. The draft regulations follow the recent enhancement of the Central Bank of Kenya Act (**CBK Act**) to include a definition for non-deposit taking credit business. The CBK Act defines non-deposit taking credit providers (**NDTCPs**) as businesses lending **to the public or a section of it**.

The publication of the draft Regulations for public participation, allows the executive and legislature to guide policy while the courts focus on interpretation of laws. As currently drafted, the draft Regulations differentiate between registration and licencing. Licensing and the attendant reporting obligations and monitoring by the Central Bank of Kenya (CBK) will be automatically triggered where the capital, borrowings, or loan book of an NDTCP exceeds KES 20m.

It would be useful, in our view, for the draft Regulations to differentiate between retail lending — which typically requires greater protections for the public— and institutional lending. Institutional borrowers are typically sophisticated with greater resources and bargaining power, as well as access to professional advisors. The draft Regulations would therefore differentiate between retail non-deposit taking credit business and institutional lenders which

would be exempted from both registration and licencing requirements.

For instance, in 2015 the Consumer Protection Act was amended to exclude lending by bilateral or multilateral foreign financial institutions to allow this type of lending proceed with ease. This was a great first step and should also extend to exemptions for funds or investment vehicles that elect to invest in businesses through debt rather than equity.

For purposes of the draft Regulations, a simple way of doing this is through exempting foreign registered institutions that lend to persons, preferably corporates, with an asset base or a turnover beyond a certain threshold, from licencing or registration. Jurisdictions such as South Africa and the United Kingdom have adopted this approach, which in our view aligns with the purposive approach of the Kenyan regulatory approach that seeks to protect retail borrowers.

While these changes will still leave the question open as to the threshold for registration of foreign companies in Kenya, we think it is essential in providing guidance to courts and avoiding creating additional uncertainty.

In a recent High Court decision (*Bruton Gold Trading LLC vs Anne Atieno Amadi & Others (HCCC No. E211 of 2023))* a purposive approach was applied in recognising a foreign company's right to sue in Kenyan courts notwithstanding it is not registered in Kenya. The High Court departed from the decisions discussed above in finding that foreign companies acquire legal personality upon incorporation in their country of origin. This simple act grants such entities the capacity to sue and be sued.

The lens through any entity or person is denied the Constitutional right to be heard by a Kenyan court should in our view be very narrow. Kenya is a commercial hub and a gateway into Africa and prohibiting foreign companies from accessing justice through Kenyan courts is counterproductive. It will not only decrease foreign direct investments, which will shift to more favourable jurisdictions, but also penalize Kenyan companies by forcing them to incur greater costs in litigating their disputes before foreign dispute resolution forums.

Failure to comply with licencing or registration provisions should be penalised through the sanctions provided in the Companies Act which include penalties and fines. Additionally, before invoking drastic remedies, such companies should be granted the opportunity to correct their position as contemplated by the Act.

More, however, still needs to be done preferably through legislative intervention. While the *Bruton Gold* decision is welcome, it was issued by a court of similar status as the earlier restrictive decisions. Accordingly, as it stands, there are two schools of thought within the High Court, which position needs urgent clarification. This, in our view, is best done by involving industry players in the law and policy making process.

KN LAW LLP

Legal Alert

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