Kenyan authorities set to regulate free-and-easy fintech

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20 May 2021

The regulatory net is closing on Kenya's fintech industry.

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Fintech is one of the least regulated segments of the country's financial services sector, but the industry's unregulated days are numbered.

Recent signals from various regulatory authorities indicate that change is coming – and it might be more constraining than some industry actors might like.

There were several events in 2020 likely to have a significant impact on the growth and development of fintech in Kenya. These range from the introduction of new taxes to the drafting of legislative amendments to bring digital service providers into the regulatory net as well as the ongoing pandemic which is pushing businesses to provide innovative solutions and services to their customers.

Nonetheless, we believe that the mainstream use of fintech will continue gaining traction in Kenya in 2021.

The fintech space in Kenya is vibrant, with significant development in digital lending, digital banking, insurtech and payment services solutions and Kenya rising up the global rankings. It was ranked 63 in the global top 100 of the 2020 Findexable Global Fintech Rankings. But, as in the case of most technologies, laws are always playing catch-up with technological advances. In Kenya, the law may be starting to catch up with the sector.

Laws catching up with technology

Fintech products and services are currently regulated under Kenya's existing financial services regulatory framework, which was designed for more traditional products and services.

As a result, there are instances where certain fintech players, products and services are not regulated.

This has tied the hands of regulators to some extent. When picking up dubious practices – as has happened in the digital lending domain – they have been limited to issuing warnings or cautionary notices to the public.

More concrete action is now in the offing.

The proposed Central Bank of Kenya (Amendment) Bill, 2020 (National Assembly Bill No. 21) is aimed at introducing direct regulation of the digital financial sector in Kenya, bringing it under the jurisdiction of the Central Bank of Kenya (the CBK). This Bill underwent its first reading on 28 July 2020 and was referred to the relevant committee.

However, it is not only digital financial services and credit providers who stand to be affected. Financial products and services are very broadly defined under the Bill. When read in the context of the CBK's enhanced jurisdiction, the implication is that expanded supervisory jurisdiction will affect any financial service and product, including many fintech products and services. This broad scope could be counterproductive.

In addition, the proposed Central Bank of Kenya (Amendment) Bill, 2020 (National Assembly Bill No. 47) seeks to introduce the licensing of mobile money lender platforms. This Bill underwent its first reading on 25 February 2021and was referred to the relevant committee.

A third Bill, the Central Bank of Kenya (Amendment) Bill, 2021 was gazetted 16 April 2021.

It is important that current regulation evolves to meet changing consumer protection and public interest concerns, while maintaining an environment conducive to innovation. Unfortunately, the proposed Bills introduce provisions that give the regulator wide discretionary power which, if not judiciously exercised, could stifle innovation. Similarly, there is need to ensure that there is concerted efforts to harmonise the proposed Bills into one piece of legislation.

New tax could dampen development

Meanwhile, the fintech industry also stands to be affected by Kenya's new Digital Service Tax (DST) and Value Added Tax on Digital Marketplace Supply (VAT-DMPS).

These taxes are aimed at entities that offer in-scope digital services to Kenyan consumers, such as artificial intelligence, cloud computing, digital streaming and digital marketplaces.

The taxes are likely to have an impact on fintech development in Kenya and may act as a deterrent.

In addition, there is the Data Protection Act 2019 to take into account.

It is clear that fintech service providers will be affected by the Data Protection Act as they do rely on processing personal data to offer services.

More clarity on their position can be expected through the work of the Taskforce for the Development of the Data Protection (General) Regulations, appointed on 15 January 2021. The draft regulations were recently published.

Some positive developments

Meanwhile, fintech players also have some positive developments to look forward to. Greater collaboration among multiple players can only do the fintech industry good.

In the mobile payment sector, the CBK has been working with fintech players and other regulators such as the Communications Authority of Kenya.

Another positive trend is the progress of the Capital Markets Authority's regulatory sandbox for emerging technologies in the capital markets space. The regulatory sandbox has also paved the way for a potential multisector regulatory sandbox for cryptocurrency and evolving payment technologies to be operated as a collaboration between the Capital Markets Authority and the CBK.

To date, seven fintech firms have been admitted to the sandbox to test various fintech solutions. One participant, Pezesha Africa Limited successfully exited the sandbox in October 2020, enabling it to operate a debt-based crowdfunding platform.

The Capital Markets Authority is also joining 23 other regulators under the Global Financial Innovation Network in testing innovative financial products, services, business models and regulatory technology.

All in all, fintech in Kenya is well placed for the future and hopefully legal and regulatory changes will be measured, clear and targeted to achieve the balance needed to ensure industry growth, innovation and consumer protection.

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