

# Finance & Banking

ALERT | 23 May 2024



## In this issue

KENYA

Enhancing supervision in the banking sector: A review of the Draft Banking (Penalties) Regulations, 2024



For more insight into our expertise and services

## Enhancing supervision in the banking sector: A review of the Draft Banking (Penalties) Regulations, 2024

The Central Bank of Kenya (CBK) plays a fundamental role in maintaining stability within Kenya's banking sector. According to the Banking Act (Act), the CBK is empowered to make regulations for carrying out the purposes and provisions of the Act. The CBK may make regulations or prescribe penalties to be paid by banks, financial institutions, mortgage finance companies, credit reference bureaus and any other persons that fail or refuse to comply with its directions under the Act or Prudential Guidelines. In exercising this power, the CBK recently published the Draft Banking (Penalties) Regulations, 2024 (Proposed Regulations) whose defining features are a marked departure from the Banking (Penalties) Regulations, 1999 (Existing Regulations) which they will be seeking to repeal. In this article, we highlight some noteworthy features that the Proposed Regulations will introduce.

### Key features

#### *Enhanced penalties*

The Existing Regulations provide that any institution or person who fails or refuses to comply with any directions given by the CBK under the Act shall be liable to a penalty not exceeding KES 1 million in the case of an institution, or KES 100,000 in the case of a natural person. There is

a further provision to the effect that the relevant Cabinet Secretary may prescribe additional penalties not exceeding KES 10,000 in each case for each day or part thereof if such a failure or refusal continues. The penalties prescribed by the Existing Regulations are limited in nature, especially because of their blanket application to all violations with little variation.

The Proposed Regulations, on the other hand, provide specific penalties for specific violations. The penalties range from KES 2 million to KES 20 million for artificial persons and KES 1 million for natural persons. This represents a case of widened scope of violations and enhanced penalties.

#### **Assessment of violations**

The Existing Regulations do not describe with much detail the processes of assessing violations and imposing penalties. They simply state that when the CBK becomes aware of the violations, the next step is for it to review all the available information and advise the relevant institution of its findings before making a decision to assess penalties. Additionally, they provide for an allowance for rectification of the violations by the parties committing the offences.

The Proposed Regulations detail how violations will be assessed. Notably, they expressly incorporate the principles of natural justice. This manifests primarily through the right to be heard, which is granted to any institution that is suspected of a violation. In a scenario where the CBK suspects violation by an institution or a person, it will be required to issue sufficient notice of the violation and invite the person or institution to show cause why a penalty should not be imposed. The notice must contain a

## Enhancing supervision in the banking sector: A review of the Draft Banking (Penalties) Regulations, 2024

CONTINUED



description of the facts or circumstances that constitute the violation, the direction which was not complied with, the period when the violation is suspected to have occurred, and the evidence relied on by the CBK to suspect the violation, among other things.

The Proposed Regulations also necessitate that an affected institution or person should make a verbal or written response within the time frame provided in the notice and attach any relevant evidence. Upon receipt of the response, the CBK is to carry out an assessment of the suspected violation and within 30 days determine if a penalty is payable and the exact amount to be paid. The CBK is then required to notify the institution or person of the outcome and specify the penalty, if any, and the period of payment.

### ***Penalty considerations and review processes***

While the Existing Regulations do not outline the considerations taken by the CBK when imposing penalties and a review process, the Proposed Regulations delve into various factors at length. Some of the proposed considerations to be made during the imposition of penalties include:

- whether a violation is committed by an institution or not;
- the nature of the direction which has been violated;
- the severity of the violation;
- the benefit that may have derived from the commission of the violation; and
- the financial loss likely to be suffered by depositors, creditors or shareholders of the institution or person who committed the violation.

An institution or person who is dissatisfied by a decision of the CBK will, under the Proposed Regulations, be able to submit to it a written request for review. Such a request is to be made within 14 days from the receipt of a decision. The CBK is then required to decide on the review request within 30 days, notify the applicant and outline the reasons for the decision. A person or institution that is further aggrieved by the decision may appeal to the High Court.

### **Conclusion**

If they are enacted, the Proposed Regulations will be a significant milestone in the effective regulation of the banking sector. With the new approach of imposing specific and enhanced fines for different kinds of offences, financial institutions are likely to tread cautiously and make concerted efforts to comply with relevant banking laws. It is also advantageous to all stakeholders that the Proposed Regulations expressly provide the mechanisms through which violations will be assessed going forward, the factors to be considered when imposing penalties, and the steps to be considered by the affected parties when requesting a review.

**Sammy Ndolo, Brandon Otieno and Nicholas Owino**



## OUR TEAM

For more information about our Finance & Banking practice and services in South Africa and Kenya, please contact:



### Mashudu Mphafudi

Practice Head & Director:  
Finance & Banking  
T +27 (0)11 562 1093  
E mashudu.mphafudi@cdhlegal.com



### Johan de Lange

Deputy Practice Head:  
Finance & Banking  
Director: Projects & Infrastructure  
T +27 (0)21 481 6468  
E johan.delange@cdhlegal.com



### Sammy Ndolo

Managing Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E sammy.ndolo@cdhlegal.com



### Sabelo Goma

Director:  
Finance & Banking  
T +27 (0)11 562 1602  
E sabelo.goma@cdhlegal.com



### Dr Adnaan Kariem

Director:  
Finance & Banking  
T +27 (0)21 405 6102  
E adnaan.kariem@cdhlegal.com



### Mbali Khumalo

Director:  
Finance & Banking  
T +27 (0)11 562 1765  
E mbali.khumalo@cdhlegal.com



### Jacqueline King

Director:  
Finance & Banking  
T +27 (0)11 562 1554  
E jacqueline.king@cdhlegal.com



### Pitso Kortjaas

Joint Sector Head:  
Consumer Goods, Services & Retail  
Director: Finance & Banking  
T +27 (0)11 562 1589  
E pitso.kortjaas@cdhlegal.com



### Koketso Maake

Director:  
Finance & Banking  
T +27 (0)11 562 1618  
E koketso.maake@cdhlegal.com



### Phetole Modika

Director:  
Finance & Banking  
T +27 (0)11 562 1625  
E phetole.modika@cdhlegal.com



### Stella Situma

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E stella.situma@cdhlegal.com



### Deon Wilken

Director:  
Finance & Banking  
T +27 (0)11 562 1096  
E deon.wilken@cdhlegal.com

### Kuda Chimedza

Senior Associate:  
Finance & Banking  
T +27 (0)11 562 1737  
E kuda.chimedza@cdhlegal.com

### Brian Muchiri

Senior Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E brian.muchiri@cdhlegal.com

### Thato Sentle

Senior Associate:  
Finance & Banking  
T +27 (0)11 562 1844  
E thato.sentle@cdhlegal.com

### Michael Bailey

Associate:  
Finance & Banking  
T +27 (0)11 562 1378  
E michael.bailey@cdhlegal.com

### Damaris Muia

Associate | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E damaris.muia@cdhlegal.com

### Stephanie Goncalves

Professional Support Lawyer:  
Finance & Banking  
T +27 (0)11 562 1448  
E stephanie.goncalves@cdhlegal.com



**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2024 13499/MAY