



The Banking (Amendment) Act, 2016: To whom does it apply?

The Banking (Amendment) Act, 2016 was assented to by the President on 24 August 2016 and became effective on 14 September 2016. The gist of the amendment is that it puts a ceiling on the interest that can be charged on a “credit facility” and a floor on the interest payable in respect of deposits in an interest earning account. This article seeks to provide clarity on three critical questions. First, to which lenders does the amendment apply? Second, does it apply to lending through mobile platforms? Third, does it apply to existing loans? This article proceeds on the assumption that the term “credit facility” as used in the amendment has the same meaning as the word “loan”.

Lenders Affected

The amendment was made to the Banking Act, Chapter 488 of the Laws of Kenya. As such, the amendment applies only to institutions regulated under the Banking Act, namely banks, financial institutions and mortgage companies. Under Section 54 of the Banking Act, certain institutions, which having regard to the nature of their activities ought to be regulated under the Banking Act, are expressly excluded from regulation. These are: (i) the Kenya Post Office Savings Bank (regulated under the Kenya Post Office Savings Bank Act); (ii) the Agricultural Finance Corporation (regulated under the Agricultural Finance Corporation Act); (iii) cooperative societies including SACCOs (regulated under the Cooperative Societies Act and the SACCO Societies Act); and (iv) microfinance institutions (regulated under the Microfinance

Act). By dint of this provision, the amendment does not apply to these institutions.

The wording of the amendment narrows its application further. The two new sections introduced into the Banking Act, Sections 31A and 33B, make reference only to “a bank or a financial institution”. Whilst the Banking Act as a whole applies to banks, financial institutions and mortgage companies, it seems that the two provisions do not apply to mortgage companies. This should not be interpreted to mean that the amendment does not apply to mortgages. If a mortgage is advanced by a bank or financial institution, the amendment still applies.

In summary, the amendment does not apply to telecommunication companies, shylocks, SACCOs and other cooperatives, mortgage companies, Post Bank, Deposit Taking Microfinance (DTM) and non DTM institutions, NGOs, insurance companies, chamas, other associations, etc.

Mobile Lending

Does the amendment apply to mobile lending? It depends. If the person doing the lending is a person to whom the amendment applies, as discussed above, then the amendment applies to such lending. Mobile loans provided by banks in partnership with telecom companies are therefore affected by the amendment.

The wording of Section 33B(2) expands the application of the law to “indirect” lending. This has the effect of regulating entities which are not regulated under the Banking Act but which are owned by institutions regulated under the Banking Act. Some banks have subsidiaries and associates operating as DTMs and non DTMs. Construed strictly, the amendment applies to lending by banks through these institutions because their lending activities can be seen as indirect lending by the

banks that own them. If the institutions violate the amendment, the banks that own them will be responsible for the violation.

Existing Loans

To say that the amendment is applicable to existing loans would be to say that it applies retrospectively. There is a general principle of law that on the face of them, civil statutes apply prospectively and not retrospectively. However, a statute can be applied retrospectively if parliament has made it clear by implication or express words that it was its intention to have the statute apply as such. In the absence of expression of such an intention, a statute must be interpreted as applying only prospectively.

The amendment does not expressly state whether or not it applies to existing loans and no words can be read as implying that retrospective application was intended. However, we take note of the banks' endeavor to reduce interest rates on existing loans and we join the general public in welcoming this move.



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