

REPUBLIC OF KENYA



NATIONAL TREASURY & ECONOMIC PLANNING

**SUPPORTING ACCESS TO FINANCE AND ENTERPRISE RECOVERY
(SAFER)**

PROJECT IMPLEMENTATION UNIT

**COMPONENT 3: TECHNICAL ASSISTANCE AND PROJECT
MANAGEMENT**

BENEFICIARY – CENTRAL BANK OF KENYA (CBK)

TERMS OF REFERENCE

**CONSULTANCY TO UNDERTAKE REVIEW AND LEGAL DRAFTING
OF THE NATIONAL PAYMENT SYSTEM ACT, 2011 AND NATIONAL
PAYMENT SYSTEM REGULATIONS, 2014**

January 2024

1. INTRODUCTION

1.1 Project

Supporting Access to Finance and Enterprise Recovery (SAFER) project development objective is to increase access to financial services and support COVID-19 recovery of Micro, Small, and Medium Enterprises (MSMEs) in Kenya.

SAFER is a five-year \$100 million IDA Credit that effective in May 2022 that seeks to address market failures in access to finance by MSMEs that have been exacerbated by the negative impact of the COVID-19 pandemic.

1.2 Project Components

The SAFER Project comprises 3 components (with sub-components) as listed below:

- a) **Component 1 – Innovation and Liquidity support to MSMEs**
 - i. Liquidity support to microenterprises through digital channels
 - ii. Liquidity support to MSMEs through SACCOs and Micro Finance Banks (MFBs)
- b) **Component 2 – De-risking lending to MSMEs**
 - (i) De-risking through support to the Partial Credit Guarantee Scheme (CGS) and company (CGC)
- c) **Component 3 – Technical Assistance and Project Management**
 - (i) TA to the National Treasury to set up the Credit Guarantee Company (CGC)
 - (ii) TA to Participating Financial Institutions (PFIs)
 - (iii) TA to financial sector regulators
 - (iv) Project Management

Component 3 of the SAFER focuses on providing technical assistance to build the resilient capacity of the MSME finance ecosystem beyond the lifecycle of SAFER.

1.3 Overview

The Central Bank of Kenya (CBK) is established under Article 231 of the Constitution of Kenya (2010). Its mandate is set out the Central Bank of Kenya (CBK) Act. The core mandate of the CBK is to:

- a) Formulate and implement Monetary Policy directed to achieving and maintaining stability in the general level of prices.
- b) Foster the liquidity, solvency and proper functioning of a stable market-based financial system.
- c) Subject to (a) and (b), support the economic policy of the Government, including its objectives for growth and employment.
- d) Formulate and implement policies to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems.
- e) Issue currency notes and coins.

Other mandates of the CBK include: formulating and implementing foreign exchange policy; effective management of the nation's foreign exchange reserves; licensing and supervising authorised dealers, digital credit providers and mortgage refinance companies; act as banker and advisor to, and fiscal agent of the Government. In 2003, the Central Bank of Kenya (CBK) Act was amended to introduce an explicit mandate relating to the National Payments System (NPS), namely: Section 4(A)(1)(d) to “formulate and implement such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems.”

The amendment also supported the modernisation of the NPS and to firmly anchor NPS policy, regulation and supervision on a clear legal basis. Following the enactment of Section 4(A)(1)(d), the National Payment System Act, 2011 was enacted followed by the National Payment System Regulations, 2014. To date, a number of Guidelines and Circulars have been issued to further operationalize and implement the NPS Act and Regulations. Together, the NPS Act, 2011 and NPS Regulations, 2014, guidelines, directives and circulars constitute the “NPS legal and regulatory framework.”

Since the emergence of the current NPS legal and regulatory framework, the payments sector has changed in significant ways both domestically and globally. These developments set the broader context to the review of the NPS framework. Additionally, following the launch of the National Payments Strategy 2022 - 2025 in February 2022, CBK committed to review the current NPS legal and regulatory framework, to update it in line with emerging developments in the domestic, regional and global payments arena.

The 2023 Budget Policy Statement published by the National Treasury and Economic Planning in February 2023 noted that: “To continue leveraging the potential of digital technologies, the Government will work with key agencies such as the Central Bank of Kenya to continue rolling out cost-effective and innovative payment services and protecting vulnerable Kenyans from risks that may arise from emerging technologies. Over the short-to medium-term, the Government will be forwarding and supporting proposals by the Central Bank of Kenya to update the national payments legal and regulatory framework, aimed at strengthening oversight, bolstering affordability and improve service delivery to Kenyans.” In the Budget Statement for the Financial Year 2023/2024, the National Treasury also noted that: “In the FY2023/24, the Central Bank together with other stakeholders will undertake a comprehensive review of the National Payment System Act, 2011 and National Payment System Regulations, 2014, to modernize Kenya’s payments legal and regulatory framework in line with emerging trends, innovations and enhance oversight for improved service delivery to Kenyans.”

In summary, the NPS legal and regulatory review will enable the CBK to accelerate delivery of wider reforms in the financial sector, develop a robust framework that is fit for purpose and fit for future, improve service delivery and achievement of Government’s current and future priorities. More importantly, a successful and timely conclusion of the review will enhance Kenya’s global leadership and competitiveness in the payments space.

2.0 SERVICES TO BE RENDERED

2.1 Objectives of the Law Review

The principal objective of the NPS laws review is: To comprehensively review the national payments legal and regulatory framework in line with current developments and emerging realities in the payments sector, domestically and globally.

The secondary and supportive objectives of the review are:

- a) To enhance the current framework in terms of addressing key gaps not provided for presently or that are not sufficiently clear in the current NPS Act and Regulations;
- b) To make provision for emerging issues, given the rapid changes in the payments industry, locally and globally, e.g., business models, technology, data, AML/CFT, cybersecurity, etc;
- c) To improve the adequacy and effectiveness of the entire lifecycle of payments policy, regulation, licensing, oversight, compliance, enforcement, surveillance, and resolution of payment institutions, systems, and services;
- d) To create a framework that can accelerate the realisation of the National Payments Strategy 2022 - 2025 vision, strategic objectives and principles;

- e) To align the legal and regulatory framework with relevant international standards and global best practices, customized to Kenya's context;
- f) To ensure that the revised NPS legal and regulatory framework provides sufficient support for CBK's vision of being 'A World Class Modern Central Bank.'

2.2 Scope of the Work

The overall objective of the consultancy is to undertake initial and preliminary legal drafting of the zero draft NPS Bill, NPS Regulations and any other applicable Standard or Guideline, in line with the discussions and engagements for the NPS review process, and as guided by CBK from time to time.

The scope of work under this assignment will be to:

- a) Submit an Inception Report detailing the consultant's understanding of this assignment and the proposed methodology of delivering the TOR, and the respective timeframe for each task and or milestone;
- b) Undertake an in-depth audit and review of the National Payment System Act, 2011 and the National Payment System Regulations, 2014, to identify and document the gaps, challenges and areas that warrant revision, amendment or inclusion;
- c) Undertake initial and preliminary drafting of various drafts of the envisaged National Payment System Bill(s), draft National Payment System Regulation(s) and any other applicable Standard(s) or Guideline(s) in line the discussions, proposals and recommendations emanating from the NPS law review process. The various versions of the draft Bills and Regulations will be the basis for engaging stakeholders, with subsequent versions reflecting changes and recommendations made on an ongoing basis.
- d) Undertake the drafting in line with the Kenyan drafting conventions, style and techniques, while also conforming to international best practice and global best practice;
- e) Review and assess which other laws, regulations, guidelines and standards could be affected by, or will affect, the revised legal and regulatory framework, and propose ways and specific proposals are address these cross-linkages or areas of conflict/duplication;
- f) Advise on the policy, regulatory and operational requirements necessary for a successful enactment and implementation of the revised legal and regulatory framework;
- g) Support legal drafting and provide recommendation to CBK Technical Committee on Kenya's legal standards for legislative review by highlighting clear procedures for enactment of legislation and policy in the context of Kenya;
- h) Participate in the review process both at the internal and external phases of the project;
- i) Advise CBK and draft the necessary amendments to such other laws as may be required;
- j) Undertake capacity building on drafting by providing knowledge transfer to CBK Technical Committee;
- k) Support the development of various briefs, papers and output as may be required within the NPS laws review process;
- l) Undertake other tasks as requested which serve the objectives of this assignment, or as may be specified by the CBK from time to time;
- m) Present draft NPS Bill, NPS Regulations and any other applicable Standard or Guideline to a stakeholders' forum/workshop, and upon incorporation of the views/comments, prepare the Final draft legislation.

2.3 Expected Deliverables

The consultant shall provide the following deliverables:

- a) Draft and final Inception Report, to cover the following areas:
 - (i) Outline in detail the activities that the Consultant will undertake to provide the required legal and advisory services;
 - (ii) Provide a detailed timetable for the delivery of the required legal drafting and outputs, with clear timeframes; and
 - (iii) Identification of the key risks to timely and successful delivery of the TOR, and respective mitigants.
- b) Drafts of the envisaged National Payment System Bill(s), draft National Payment System Regulation(s) and any other applicable Standard(s) or Guideline(s) in Microsoft Word – Various versions of the draft NPS Bill(s) and Regulation(s) should provide the text, with explanatory notes, of the proposed legislation described. The consultant will provide various versions of the Revised Draft NPS Bill and Revised Draft NPS Regulations based on comments provided on the proposed clauses over the course of the review process. The revised/subsequent versions of the NPS Bill and NPS Regulations will need to be delivered within the timelines specified by the CBK;
- c) Presentations – Make presentations and deliver assignment reports to the CBK Technical Committee, partners and stakeholders in the course of the review process;
- d) Training and capacity building – Knowledge transfers stakeholder during workshops and meetings that will be organized by CBK and its partners.

2.4 Estimation of Effort

The assignment is expected to be carried out over a period of between 8 to 12 months. The number of consultancy days will depend on the specific deliverable or task being undertaken as per the scope of work. The duration of the assignment may be reviewed from time to time at CBK's sole discretion. Billing and payment will be done as per number of days consumed for each deliverable and against timesheet filled by the consultant(s) and approved by the Banking and Payment Services Department.

2.5 Reporting Requirements

The Consultant will work and coordinate with the CBK Law Review Technical Committee, World Bank Group experts, and any other Technical Consultants that CBK may engage from time to time. This coordination is essential for seamless working, synergy, complementarity, eliminating duplication and ensuring that work under this TOR is fully and successfully completed within the specified timeframe.

The consultant will report to the Director, Banking and Payment Services (BPS) Department, CBK and as an alternate, to the BPS Legal Counsel in the CBK Technical Committee.

3.0 QUALIFICATIONS OF THE CONSULTANT

The assignment requires an individual consultant with the following minimum requirements:

- a) An advocate of the High Court of Kenya in good standing;
- b) Demonstrable practical experience and understanding of Kenya's legal system, and in particular, financial sector and payment laws of Kenya;

- c) A minimum of ten (10) years' domestic experience in providing legal research, legal drafting and advisory services and revision of at least three (3) sets of a legislation;
- d) Demonstrable and practical knowledge of domestic drafting norms, practices and conventions;
- e) Proven track record in legislative drafting and development of statute, regulation and other legal instruments from a Kenyan point of view;
- f) Proven experience in development of training material as well as conducting research and training;
- g) Proven working experience with state agencies and related review processes;
- h) Conducted previous related assignments within the banking sector and/or financial services sector for regulatory or similar institutions;
- i) Consultant(s) must be based in Kenya.