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ASIRI

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RADAR & SCOPE

ASIRI AFRICA NEWSLETTER



O&M LAW



Mawji Sennik & Co
CERTIFIED PUBLIC ACCOUNTANTS



management services

ADAPTING TO THE 'New Normal'

There was certainly not much to laugh about in 2020 as the COVID-19 pandemic threw human life into total disarray, leaving behind a trail of unprecedented effects that will, albeit permanently, influence human interaction, economic activity and global sustainability.

One year on, the world is slowly settling into some semblance of normalcy - not without a few hiccups here and there - as the roll-out of COVID-19 vaccines takes course. It is yet to be seen how much global stability can be achieved in the coming months but what's certain is that there's nothing normal about the 'new normal'.

The great news is that this is not the first time the human race has faced an extinction threat, thanks to our high ability to adapt, and adapt we have. In this issue of our flagship newsletter, Radar and Scope, we discuss the impact of the COVID-19 pandemic on global and local economic activity highlighting some of the key responses that governments, policy makers and businesses have since adopted to address the systemic imbalances and inefficiencies that were ever so vividly exposed in the pandemic period.

The valiant Alison Ndikwe sets us off with an in-depth analysis of the impact of data governance regulations on businesses as technology and big data undoubtedly continue to rank among the most critical business levers in the post-pandemic economy. Gabriel Mwendwa then goes on to empty his think tank as he explores the effects of the pandemic on local industries in a year where all projections failed. Oscar Matheka, our resident tax priest closes with a peek into the rush to cash in on the burgeoning digital economy by global tax administrations; will playing catch up against the gig economy do it for the tax man? Keep reading to find out.

We also continue to highlight Asiri's journey as the first of its kind, fully-integrated professional services firm. From exciting changes to our leadership to notable closed transactions, we keep you up to date with some of our latest and unmissable firm news.

Enjoy the read and keep safe!

Maureen Mujera
Editor.



Maureen Mujera

Partner | O&M Law LLP

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Why Your Business Must Have A Privacy Policy In The New Data Governance Dispensation



Alison Ndikwe

Associate, O&M Law LLP



Introduction

Following the outbreak of the Covid 19 pandemic in 2020, technology has cemented its position as the main protagonist for people living in the 21st Century. The strict lock down measures implemented by various governments across the globe aimed at curbing the spread of the Covid 19 virus has rapidly accelerated existing trends: e-commerce, at-home entertainment and also working remotely.

Whereas most industries and sectors were on a steady path towards digitization, studies have shown that these efforts have now been expedited to ensure that businesses and organizations improve on and/or remain visible in the market.

In addition to the enhanced digitization of various industries, data today is seen by many as the most lucrative commodity of the new global economy. Data analytics and self-teaching algorithms are projected to continue to disrupt every imaginable market as well as to create new ones. With

this increased demand for data, governments are putting in place stricter data governance regulations aimed at safeguarding the privacy of their citizens and ensuring that data is collected and processed in line with the universal principles of data protection.

Data Protection Governance

The most recent and notable global step towards safeguarding data privacy was the enactment of the General Data Protection Regulations (the **GDPR**) in 2016 by the European Union Parliament. The GDPR is hailed as the toughest privacy and security law in the world. Though it was drafted and passed by the European Union (EU), it imposes obligations onto organizations worldwide, so long as they target or collect data related to people in the European Union. The consequence for non-compliance with the GDPR is harsh fines which will be levied against those who violate its privacy and security standards.

The Data Protection Act No. 24 of 2019

As the heart of East Africa's technology ecosystem, Kenya has taken a lead in enacting data protection legislation being the Data Protection Act No. 24 of 2019 (the DPA) whose provisions largely borrow from the provisions of the GDPR. The objectives of the DPA are inter alia to:

- 1** Regulate the processing of personal data;
- 2** Ensure that the processing of personal data of a citizen is in line with principles of data protection;
- 3** protect the privacy of individuals;
- 4** establish the legal and institutional framework to protect personal data; and
- 5** provide citizens with rights and remedies to protect their personal data from processing that is not in accordance with the DPA.

In addition to the enactment of the DPA, the government has taken additional steps towards operationalizing this Act. In November 2020, Immaculate Kassait was appointed as Kenya's first Data Commissioner under the DPA. Further in January 2021, the Cabinet Secretary in charge of ICT appointed a taskforce to develop the Data Protection General Regulations which will bring into effect the provisions of the DPA.

Organizations collecting and processing data, known as data collectors and data processors, are obligated to comply with the provisions of the DPA.

What is a privacy policy?

A privacy policy can simply be defined as a document that explains what kind of personal information an organization would be gathering from its customers, employees and or business associates, how such information would be utilized and how the information will be kept safe. A privacy policy would also include information relating to data storage, security and access, details of data transfers and affiliated organizations.

The contents of a privacy policy may vary depending on the nature of the data collected, the purpose of processing and the audiences to whom the information is directed.

Why do organizations require Privacy Policies?

The DPA has introduced the principle of data protection by design. The privacy by design approach is characterized by proactive rather than reactive measures. It anticipates and prevents privacy invasive events before they happen. Privacy by design does not wait for privacy risks to materialize, nor does it offer remedies for resolving privacy infractions once they have occurred, it aims to prevent them from occurring. In short, Privacy by design comes before the fact and not after.

Organizations that fall under the category of data processors and data controllers shall be required to implement appropriate technical and organizational measures which are designed to proactively implement the data protection principles in an effective manner and to integrate necessary safeguards for that purpose into the processing. Having a privacy policy is the first step towards actualizing this principle.

In addition to the principle of data protection by design and by default, the DPA has also introduced the aspect of obtaining consent from a data subject for purposes of collection and processing of personal information. The DPA has placed such



...Having a privacy policy is the first step towards actualizing this principle...

high importance on consent that data processors and data collectors shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

Consent under the DPA is defined as any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject. Without this consent, a data subject's information may not be processed. It is therefore important that an organization's privacy policy include a provision for the data subject to give their consent.

Consequences of non-compliance.

In the event of an infringement of the provisions of the DPA, the offending organization would be liable to pay penalties as prescribed under the DPA. The maximum amount of the penalty that may be imposed by the Data Commissioner in a penalty notice is up to five million shillings (Kshs

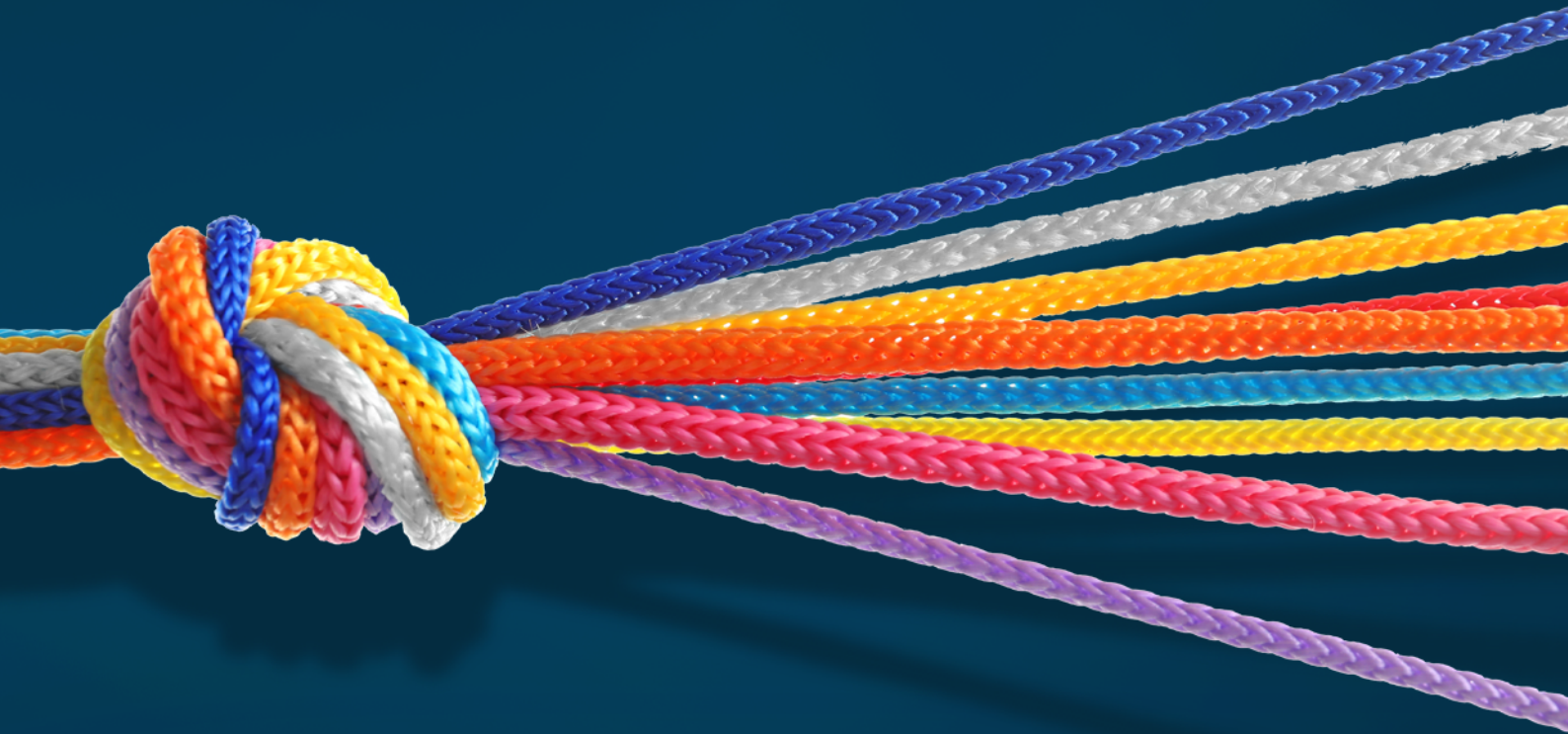
5,000,000.00), or in the case of an undertaking, up to one per centum (1%) of its annual turnover of the preceding financial year, whichever is lower. In addition to the monetary fines imposed by the regulator for breach of data privacy provisions, organizations stand to lose valuable goodwill that comes with such violations.

What next?

From the foregoing, we have established that data privacy and protection should be prioritized by every business, large or small, regardless of sector. Data collection is now a critical component of all business operations, whether it is client data to perform a simple service or enterprise data to ensure operations of critical infrastructure. Organizations should therefore invest in development and/or improvement of their privacy policies in order to avoid the consequences on non-compliance with data protection principles.

O&M Law has a robust intellectual property department that is well versed with data protection principles and obligations and would be happy to assist clients either in an individual or corporate capacity to safeguard their privacy.

**Alone we can do so little;
together we can do so much.**



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The Year Projections Failed



Gabriel Mwendwa

CFA, Associate, Horizon Africa Capital Ltd

In the months following the onset of the Covid-19 pandemic in Kenya, every business owner, investor, employee, and all other stakeholders went into self-preservation mode; cutting expenses, stocking up on necessities, increasing product prices in some cases, seeking critical reprieves on their financial obligations among many other strategies. The inability to predict the future, near and far, was suddenly more evident.

One year on, we are not entirely out of the woods. The silver lining may be the fact that businesses and individuals are slowly adapting to the 'new normal' by enacting the necessary mitigation strategies to cushion them against COVID-19 related disruptions.

As is the case with any crisis, we have businesses that survive while others are unable to ride the wave. Some die a rather untimely death while others spread their wings and ride the turbulent winds to unprecedented success. In this article, we present a quick overview of what 2020 was like for some sectors of the Kenyan economy.

Banking industry

As of December 2019, the Kenyan banking sector was headed for another peak with the lifting of interest rate caps. Investors were bullish following an average Return on equity of 12% reported by the industry, whereas market leaders like Kenya Commercial Bank (KCB) and Equity reported a Return on Equity above 35% demonstrating a strong performance year.

Gross non-performing loans represented 12.5% of the KES 2.7 trillion gross loans outstanding at the end of the year.

Key among the countermeasures instituted by the Central bank of Kenya in 2020 involved enabling banks to restructure customer loans as well as extend grace periods on loan repayments within the pandemic period. Since then, a total of 1.7 trillion worth of loans have been restructured. Whether repayments on these loans can resume will be seen from March 2021 when the reprieve period ends.

Airline Industry

The global airline industry has been worst affected by the pandemic with global travel almost coming to a stand-still for the better part of 2020. According to IATA, most airlines have 51% of their expenses as fixed and semi-fixed which reduced their ability to respond to the reduced revenues by cutting expenses.

70% of the 1.8 million passengers flown in the year were those flown between January and March, the remaining 9 months shared the 30% balance. In 2019, KQ ferried over 5 million passengers.

Kenya airways reported a 59% decline in revenues (from KES 128 B to KES 52 B), while the airline managed to reduce operating expenses by 40% (from KES 130 B to 79 B) it yet again reported record breaking losses of KES 36 billion.

Interest expenses alone made up 36% of the cash generated from operations leaving no cash for the acquisition and maintenance of the fleet which is more critical. KES 7 B worth of leased assets were impaired further weakening a balance sheet on its knees.

To bridge the gap, KQ took on additional debt of KES 11 billion as it waits for yet another government bailout.

Real estate

The long-term nature of real estate sector makes it impractical to make a call on the sector's status in just 1 year. However, the disruption from the pandemic was evident.

Properties currently under development continued at full speed on the expectation that by the time they complete demand will be back. Developments in planning phases are likely to have taken a wait and see approach.

Residential developers and financiers were worst hit as homeowners were unable to meet their obligations and sort for extended and more flexible payment terms. A share of the homeowners will not be able to resume payments due to loss of income resulting in an increased supply of homes

for resale in a sector that already had a large number of assets up for auction.

Rent concessions and failure to increase rents for the next one to two years is also likely to affect investors.

On the positive side, Centum PLC which has over the last 5 years embarked on multiple real estate developments in Nairobi, Vipingo and Entebbe remains optimistic on the sector's performance. In 2020, the company successfully raised a KES 3.0 billion zero-coupon bond paying an attractive rate of 12.5%. The bond was expected to bridge the delay in receiving deposits from customers and to allow the company to complete all projects on time.

Interestingly the company reported that it had already sold 72% of the 1,478 units under construction with the KES 10 billion earnings expected to be reported in the 2021 financial year.

With a solid financing structure, real estate companies may just weather the storm.

Conclusion

We thought we had a massive number of profit warnings in 2019, 2020 has proven us wrong with even the fastest growing industries expected to have steep profit declines while the weak and dying continue to battle certain death. The future remains, as it has always been, uncertain.

Taxing The Digital Economy



Oscar Matheka

Tax Manager, Mawji Sennik & Co

Digitalization has significantly transformed many aspects of our everyday lives, more so during the past one year as businesses embrace the various initiatives instituted to combat the spread of the Covid-19 pandemic. Innovation is with no doubt the foremost catalyst to technological progress and sustainable, long-term economic growth. With continued growth, digital technology has enabled businesses to operate in distant geographies and further eliminated the need for physical proximity to their target markets. This advancement in technology and its impact on modern-day business operations has, however, unearthed a myriad of challenges for traditional taxation. Notable among the innovations arising from the ongoing digital transformation include the tracking of both vehicles and cargo across continents as well as the ability to monitor production processes remotely for manufacturing companies.

Globally, digital transformation is taking place at unprecedented speeds. As a result, revenue administrations are being forced to play catch up in tailoring their existing policy frameworks to encompass the ever-changing digital market place or in some cases, to legislate new rules for the digital economy revenue streams.

... tax rules ought to be aligned to reflect and ensure that the location of the users determines where businesses owe and eventually pay their taxes...

Due to the mismatch in the current distribution of internet users and the location of digital production, tax rules ought to be aligned to reflect and ensure that the location of the users determines where businesses owe and eventually pay their taxes. Businesses will thus, be obligated to remit taxes in tax jurisdictions where their users are based unlike in the past where physical presence was the guiding criteria for imposition of tax. To offer guidance and ensure that multinational entities achieve tax compliance and at the same time foster multilateral tax co-operation, the organization for Economic Co-operation and Development (OECD) and the G20 have been addressing these challenges proactively through the base erosion and profit shifting project of 2015. Specifically, Action plan 1 was to address the tax challenges of the digital economy. In January 2020, the OECD/G20 inclusive framework published a progress statement specifically addressing the approach and measures to ensure that the challenges arising from digitalization of the digital economy.

Undeniably, the digital world continues to exploit some of the existing soft spots in the international tax regime. Whereas the sale of goods provides a transactional audit trail from the port of exit to door steps of the end consumer or purchaser, digital cross border transactions are intangible in nature and can-not be easily identified or even taxed by some of the existing conventional tax laws.

This has led to the legislation of rules specific for the digital marketplace including redefining permanent establishments to include digital companies that have no physical presence within

a jurisdiction where there is engagement with the local market. Globally, digital taxes are levied on the gross revenue generated from a given jurisdiction or geographical location in which case it will be based on the number of digital users within a country.

At the moment countries that have already implemented Digital Service Tax (DST) include, Austria, France, Hungary, Italy, Poland, Spain, Turkey, and the United Kingdom. Kenya's DST became effective on 1st January 2021. The DST is applicable on any income generated from a digital platform such as downloading of mobile applications, e-books and movies, subscription-based media such as TV shows and music, podcasts and online gaming, software, website hosting, e-filing services, supply of music, films and games, e-ticketing, e-learning, digital media, transport hailing platforms, among others.

Persons operating within the digital market place are now required to register for value added tax and will pay a DST tax of 1.5% of the gross turnover by 20th of the subsequent month. The monthly DST payment will be an advance tax which will be netted off against final tax payable on the profits made by Kenya entities. For offshore entities DST paid is a minimum non-refundable tax payable for their operations in Kenya. DST paying entities are exempt from the provisions of the newly introduced Minimum Tax.

Going forward, the imposition of both DST and VAT on the digital market place by the Kenya Revenue Authority will make significant contributions to the exchequer.

The Asiri Journey; Our Quarterly Update

Introducing our newly appointed partners at O&M Law

O & M Law is proud to announce the promotion of the following team members into its partnership. These promotions are most well deserved and they represent positive organic growth of a Firm that was founded in April 2013 as a sole proprietorship.

Over the years since; the Firm has experienced both growth and evolution by deepening its client interactions and developing expertise in specialized areas of legal practice.

Each of the new partners have worked diligently to pursue the collective objective of providing quality and professional legal services to our clients.

These promotions illustrate the Firm's commitment to building a practice that promotes inclusivity, embraces diversity and rewards merit.



Awa Muhindi

Partner

Awa is well versed in matters of dispute resolution, construction, finance, corporate and commercial transactions, public and administrative law. He has a reputation for being exceedingly thorough and has been commended for being extremely conscientious and highly responsive to his clients' requirements. Awa has extensive experience appearing before various courts and tribunals and is well respected by peers and seniors.



Andrew Ndikimi

Partner

Andrew is an Intellectual Property Law expert with over 10 years of legal experience wherein he has also gathered expertise in corporate commercial and real estate matters. He acts as the Kenyan Intellectual Property Agent for several international law firms based in China, South Africa, UAE, Netherlands, USA, and India. Andrew won the Client Choice Award 2019 by Lexology, Intellectual Property Law, Copyright Category in Kenya.



Agnes Kanjejo

Partner

Agnes specializes in Real Estate and Securities. She has acquired this expertise over years spent representing homeowners, developers, investors and financiers in handling various aspects of Real Estate practice. Agnes is the steady hand behind various transactions handled by the Firm involving the acquisition, financing, development and disposition of commercial, residential, and mixed-use property developments



Kevin Kwasa

Partner

Kevin has a wealth of knowledge in corporate commercial law having cut his teeth advising both local and international clients on a wide range of corporate and commercial matters. Kevin has been involved in a number of complex commercial transactions including large cross border M & A deals as well as advising on complex finance and securitization matters relating to Information Technology and Oil & Gas.

Notable Transactions; Winning in the Pandemic

1

Asiri Africa successfully conducted a fundraiser for an international schools operator. The deal which was valued at over USD 5 million involved the sale of a minority stake as well as a restructuring of the business' existing debt. Horizon Africa acted as the lead transaction advisor providing valuation advisory services and oversaw the negotiations on all commercial aspects of the transaction. O&M Law LLP was the legal advisor did a splendid job in reviewing both debt and equity legal agreements as well as advising on the property transfers and curve-outs. D&M associates undertook all share transfers in what was a complex restructuring exercise involving holding companies domiciled outside the Country.

2

Horizon Africa assisted a leading local FMCG with a debt raise of USD 6.5 million to support the expansion of the Client's manufacturing operations. The team at Horizon was involved in engaging local financiers and securing the best terms possible within a highly competitive process.

3

Patrick Ogola (Managing Partner, O&M Law LLP) and Dedan Wachira (Associate, O&M Law LLP) acted for a consortium made up of a leading European IT Solutions and Services Group and its local subsidiary. They commenced proceedings the Public Procurement Administrative Review Board on 9th February 2021 seeking to have a tender process undertaken by the National Hospital Insurance Fund NHIF for the Supply, Delivery, Installation, Testing and Commissioning of ERP and Claims Management System (which the Consortium had participated in and whose value was upwards of Kshs. 520 million) cancelled for want of procedure. The tender had been awarded to two other tendering companies on 26th January 2021. The team was successful in its arguments that the tender prices submitted by the successful bidders were not indicative quotes; that the tender document was incurably flawed; that NHIF had breached procurement rules; and that NHIF had not treated and evaluated all the tenderers fairly.

On 2nd March 2021, the Public Procurement Administrative Review Board cancelled NHIF's decision to award the tender to the two other tendering companies. Based on arguments submitted by the O&M Law team before the aforesaid Board, NHIF subsequently revoked the entire tender, and announced that it will issue a new tender document (addressing the flaws we had pointed out) and begin the procurement process afresh in the near future.

4

O&M Law LLP acted for a private equity fund in relation to the proposed equity investment in a Kenyan based health tech startup through its holding company based in the US. Our engagement in this matter entailed conducting a detailed due diligence on the Kenyan subsidiary including undertaking a review of the Kenyan subsidiary's corporate structure, organization and related corporate matters, material contractual obligations, financial arrangements and borrowing, material assets, potential and actual litigation liabilities, licenses and regulatory compliance.

5

O&M Law successfully advised a venture capital investor in the USD 6 million capital raising undertaken by Pula Advisors, an agricultural insurance start up with operations in East and West Africa. The scope of work involved acting as lead counsel in the completion of a legal due diligence process undertaken on the target company of its operations in Kenya, Zambia and Nigeria whereby we coordinated the due diligence process in liaison with prominent legal firms in these jurisdictions and compiled and reported to the client on the outcome of the due diligence process.

Recent Acollades



Horizon Africa

was honored to emerge as the winners for the Best Mergers and Acquisitions Financial Advisor (by deal flow) at the DealMakers AFRICA Awards for 2020. In a year that was marked by uncertainty and dampened market activity, the Horizon team closed a number of high-profile transactions. This award is a testament to the team's resilience, hard work and unwavering commitment to offer a Bold, Innovative and Dynamic service to our clients. We owe this achievement to each of our highly dedicated team members at Horizon Africa Capital Limited and all our clients who continue to support, trust in our quality advice and contribute to our shared growth



Asiri Africa is proud of our partner **Maureen Mujera** for being ranked on Chambers Global 2021.

"Maureen is exceptionally professional, dedicated and extremely versed in international property. She is sought out for her counsel on residential, mixed property use and transactional matters in the field of real estate."



O&M Law LLP

was recognized by the World Trademark Review as a leading expert in the application of Intellectual Property Law in Kenya



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