



REPUBLIC OF KENYA



**COUNTRY: KENYA**  
**PROJECT: KENYA DIGITAL ECONOMY ACCELERATION PROJECT (KDEAP)**  
**IMPLEMENTING AGENCY: Information and Communications Technology Authority (ICTA)**

**PROJECT ID: P170941; Credit Numbers 7289-KE and 7290-KE**

**TERMS OF REFERENCE FOR:**

## **Development of Regional Cross Border Data Transfer Regulations (Consulting Firm)**

**Contract No: KE-ICTA-392757-CS-QCBS**

**Transmission Date: 6<sup>th</sup> March 2024**

**Closing Date: 26<sup>th</sup> March 2024**

**Time: 10:00AM EAT**

**Client:**

The Chief Executive Officer,  
ICT Authority  
Telposta Towers 12<sup>th</sup> Floor, Kenyatta Ave  
PO Box 27150 - 00100 Nairobi Kenya  
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# DEVELOPMENT OF REGIONAL CROSS-BORDER DATA TRANSFER REGULATIONS (CONSULTING FIRM)

## 1.0 Background

The Government of the Republic of Kenya (GoK) has received financing in the amount equivalent to US\$390 Million equivalent from the World Bank towards the cost of the first phase of the Kenya Digital Economy Acceleration Project<sup>1</sup> and it intends to apply part of the proceeds to payments for goods, works, non-consulting services and consulting services to be procured under this project.

The project will include the following components.

**1.1 Component 1: Digital Infrastructure and Services-**The aim of this component is to increase access to high-speed internet for individuals, industry, and government—the ‘foundation of the foundations’ of a digital economy and strengthen Kenya’s role as regional digital leader—while leveraging investments from the private sector

**1.2 Component 2. Digital Government and Services-** This component will invest in the foundational digital services, platforms, architectures, and policies needed to transform the way the Government communicates and conducts its internal operations.

**1.3 Component 3. Digital Skills and Markets-** This component aims to equip young Kenyans with digital skills and strengthen their abilities to access and compete in domestic and regional markets through supporting skills development, to study mechanisms to improve access to affordable devices and through enhancing the enabling environment for e-commerce to support Kenya’s role as a regional digital hub.

**1.4 Component 4. Project Management-** This component will support project implementation, coordination, for the Project Implementation Unit (PIU) within ICTA and capacity building.

**1.5 Component 5: Contingent Emergency Response Components-**This component will be activated in the event of an emergency.

The Gok intends to apply a portion of the proceeds of the Credit to cover activities under sub-component 2.3e for *Technical Assistance to develop legal and regulatory framework, and implementation of a regional mechanism for cross-border data flows within the region and with the rest of the world, including through a bilateral mechanism with key digital trade partners*). The Office of the Data Protection Commissioner (ODPC) is established under Section 5 of the Data Protection Act, 2019 (“the Act”) to regulate the handling of personal data by the data controllers and processors. Under Section 8(i) of the Act, the ODPC is mandated to ‘*promote international co-operation in matters relating to data protection and ensure country’s compliance on data protection obligations under international conventions and agreements.*’

The Act further acknowledges cross-border data transfer by providing under Sections 48, 49 and 50 for conditions and safeguards for the transfer of personal data outside Kenya. Accordingly, the ODPC has been receiving numerous requests from data controllers and processors indicating their interest in transferring personal data outside Kenya. Equally, Kenya has increased its regional and

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<sup>1</sup> The Program Information Document for KDEAP, and other documentation, is available at: <https://projects.worldbank.org/en/projects-operations/project-detail/P170941>.

international activities and attracted several trade partners, among which there is constant movement of personal data.

However, the office lacks specific regulations to guide on how data controllers and processors can safely go about the cross-border transfer of personal information without violating the applicable national and international law. Under Section 71 of the Act, the Cabinet Secretary is permitted to make regulations so as to give effect to the Act and to make necessary prescriptions including in the area of cross-border. In light of this, the Cabinet Secretary has so far made three regulations to support the functions of the ODPC. Namely, the Data Protection (General) Regulations, 2021, the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 and the Data Protection (Compliance and Enforcement) Regulation, 2021. The intended regulation on regional cross-border transfer will significantly help in the realization of the ODPC's mandate in addition to the existing regulations.

The project of developing these regulations is intended to underpin the legally sanctioned procedure which includes policy analysis, stakeholder engagement and views, formulation of draft regulations, legislative drafting reviews, public participation, validation forums and parliamentary approval.

## **2.0 Objectives of the Assignment**

2.1 The objectives of the assignment are:

- i. To analyse the policy position of Kenya and its regional and international neighbors on the regional and international cross-border transfer of personal data in Kenya.
- ii. To determine where there is need for a suitable regulation on regional and international cross-border transfer of personal data, and, if so, to propose inputs to such a text.
- iii. To facilitate and promote regional collaboration and co-operation on data protection, including with the Eastern Africa Community (EACD)<sup>2</sup>.
- iv. To facilitate international trade through safe and seamless movement of personal data, including trade in digital goods and services.

## **3.0 Scope of Services and Specific Tasks of the Assignment**

3.1 The scope of assignment relates to the development of the regulations on cross-border transfer of personal data to and from Kenya, but within the approved region. The services required covers the following:

- i. Defining the methodology and workplan for the development of the regulations.
- ii. Liaison with the steering committee as appointed by the Data Commissioner
- iii. Formulation of the draft regulation.
- iv. Stakeholder on the draft regulation.

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<sup>2</sup> The EAC has received a grant from the World Bank to facilitate regional digital integration among its member countries under the Eastern Africa Regional Digital Integration Program (EARDIP). The countries currently covered under the EARDIP program include Djibouti, Ethiopia, Somalia and South Sudan, as well as Kenya.

- v. Sensitization on the draft regulation
- vi. Finalization of the activity plan.

3.2 The specific tasks of the Assignment are:

- i. Conducting a gap analysis, desktop reviews and benchmarking
- ii. Conducting a detailed comparison of rules on cross-border data in EAC countries, including the mechanisms for data transfers (e.g. adequacy, SCCs, CBRs), their scope, and required procedures.
- iii. Conducting a detailed comparison of privacy safeguards in EAC countries
- iv. Identifying regulatory challenges that may hinder data interoperability between jurisdictions
- v. How do Kenyan firms currently share data with EAC countries in which no data privacy regulation is currently in force or operational?
- vi. Formulation and drafting of the regulation.
- vii. Delivery of necessary reports on milestones and statuses.
- viii. Preparation of relevant documents relating to stakeholder engagement.
- ix. Sensitizing the office and the public on the approved regulation.

**4.0 Duration, Location and the Budget of the Assignment**

The assignment shall be conducted within two phases for a period of **twelve (12) calendar months** for each phase from the date of contract commencement.

The location of the assignment will be Kenya, but may also cover Djibouti, Ethiopia, South Sudan and Somalia as well as the EAC (in Arusha, Tanzania).

**5.0 Reporting requirements and timelines for deliverables**

The consulting firm will prepare and submit the following reports:

S/No	Report	Description	Timeline for submission of reports from date of contract commencement	Number and format of reports presentation
1	Inception Report	The Consultancy firm will have the first meeting with the Data Commissioner and share a report on	2 Months	6 Hard copies and 2 digital copy

		workplan, methodology and the team among other inaugural items before commencing the assignment.		
2	Policy Analysis Report	The report shall analyse various policies and legal instruments to identify the policy positions and directions that Kenya and its East African neighbours have in cross-border transfer or sharing of personal data outside Kenya	6 Months	6 Hard copies and 2 digital copy
3	Project Status report	The consultancy firm will provide quarterly report on the status of the project	After 6, and 18 months	6 Hard copies and 2 digital copy
4	Public/Stakeholder Engagement report	The report will cover how the consultancy firm conducted the stakeholder engagements, public participation, validation forums as well as their feedback.	18 Months	6 Hard copies and 2 digital copy
5	Final Report and annexes	The consultancy firm will submit a final report on the project at the end of the contract detailing the scope, the deliverables and the status at the end of the contract period.	24 months	6 Hard copies and 2 digital copy

All draft and final reports (3 original hard copy and 3 hard copy and 2 digital copies) shall be submitted in the prescribed format to:

The Chief Executive Officer,

ICT Authority  
Telposta Towers 12th Floor, Kenyatta Ave  
PO Box 27150 – 00100  
Nairobi Kenya  
Tel: +254 20 2089061/ 2211960 Fax: +254 20 2211960  
Email: [procurement@ict.go.ke](mailto:procurement@ict.go.ke) , [info@icta.go.ke](mailto:info@icta.go.ke)  
Website: [www.icta.go.ke](http://www.icta.go.ke)

**Attention:**  
The Project Coordinator  
KDEAP

An additional four (4) hard copies and a digital copy of each required deliverable to the address below:

**The Data Commissioner**  
Office of the Data Protection Commissioner  
Britam Tower, Hospital Road, Upperhill  
PO Box 30920 - 00100  
**Nairobi Kenya**  
Tel: 0207801800  
Email: [procurement@odpc.go.ke](mailto:procurement@odpc.go.ke) with a copy to: [info@odpc.go.ke](mailto:info@odpc.go.ke)

## 6.0 Payment Schedule

The proposed payment schedules based on satisfactory performance of the contract which will be negotiated with the successful consultant will be as presented in Table 2 below.

**Table 2: Proposed payment schedule:**

S/No.	Report	Timeline for submission of report from date of contract commencement	Percentage payment of the contract amount
1	Inception Report	1 Month	10%
2	Policy Analysis Report,	4 Months	20%
3	Project Status Report	3 Months 9 Months	10% 10%
4	Public/Stakeholder Engagement Report	9 Months	20%
5	Final Report and annexes	12 Months	30%

## **7.0 Minimum requirements and experience for the Consultancy firm:**

The shortlisting criteria are as follows:

- a. Core business and years in business:** The firm shall be registered as a law firm or a consulting firm with core business in the legislative drafting or related field for a period of at least three (3) years.
- b. Relevant experience:** The firm shall demonstrate as having successfully executed and completed at least three assignments of similar nature, complexity and in a similar operating environment in the last three years. Details of similar assignments, with name and address of the client, scope, value (if not confidential), and period should be provided and submitted.
- c. Technical and managerial capability of the firm:** The firm shall demonstrate as having the requisite technical capacity and managerial capacity to undertake the assignment in the submitted the firm's profile(s).

## **8.0 Team composition and qualification and experience requirements and estimated time inputs, for the key expert**

The consultancy firm shall be required to undertake the assignment as a team comprising of a team leader and key experts. The details provided should include academic qualification and professional qualification of key experts, general experience, specific experience and, if applicable, registration/licensing from a recognized professional body.

### **(a) Team Leader/ Project Manager**

- i. A minimum of a Master's degree in law
- ii. A minimum of 10 years of professional experience in legislative drafting.
- iii. A minimum of two assignments of similar nature and complexity in a similar operating environment.
- iv. Fluency in written and spoken English.
- v. Ability to work also in Kiswahili and French is an advantage.

### **(b) Legislative Drafter**

- i. Advocate of the High Court of Kenya preferably with certification or training in legislative drafting
- ii. A minimum of 3 years of experience in legislative drafting.
- iii. Strong research and writing skills to conduct analysis and report on legal and policy issues.

- iv. Fluency in both written and spoken English and Kiswahili is essential.

**(c) Data Protection/Privacy Specialist**

- i. A minimum of 3 years of experience in data protection/privacy, experience in Africa is preferable.
- ii. A recognized certification in data protection/privacy in addition to a relevant bachelor degree.
- iii. Fluency in both written and spoken English and Kiswahili is essential.
- iv. Experience in East Africa countries will be added advantage.

**(d) Collaboration and Public Engagement specialist**

- i. A minimum of 5 years of experience in stakeholder/public engagement and sensitization, experience in Kenya is preferred.
- ii. A recognized certification in collaboration and public engagement in addition to a relevant bachelor degree.
- iii. Fluency in both written and spoken English and Kiswahili is essential.
- iv. Experience in East Africa countries will be added advantage.

**9.0 Estimated time inputs for key experts**

The number of key experts and the estimated time input for each key expert for the assignment are presented in Table 3.

**Table 3: Estimated Time Inputs for Key Experts**

S/No	Key and support Staff	No	Estimated Time Input (staff-months)
1.	Team Leader/Project Manager	1	12
2.	Legislative Drafter	1	12
3.	Data Protection/Privacy Specialist	1	12
4.	Collaboration and Public Engagement Specialist	1	12
<b>Total</b>		<b>4</b>	<b>48</b>

**10. Management and Accountability of the Assignment**

The Consulting firm will report to the Data Commissioner, Office of the Data Protection Commissioner as the Client and the principal contact for the consultancy.



## **11. Responsibilities of the Client**

The ODPC will ensure availability of meeting facilities and relevant laws and reports as may be necessary to the Consultancy firm. Additionally, the ODPC will:

- a) Provide all the support required by the Consultancy firm like facilitation in holding meetings, organizing and conduct of training programs, the provision of office facilities, document/record availability and any other requirements for timely completion.
- b) To ensure that there is compliance to the requirements as suggested in a timely manner are avoided.

## **12. Responsibilities of the Consulting Firm:**

- a) The Consulting firm will be responsible for their office accommodation, computers, logistics/transport, office equipment/stationery and furniture and all operational requirements.
- b) Carry out all the activities as specified in the terms of reference so as to enable the implement the regulation
- c) Depute trainer(s)/expert(s) to facilitate stakeholder engagement, validation forum and/or public participation activities.

Submit the progress report to the steering committee/Committee of the resource-persons of the Office on a weekly basis or as and when required.