Branch International Limited
Registration Number: CPR/2015/183658
Reliable Towers, Fourth Floor, Mogotio Rd, Westlands
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12 September 2018

Ministry of Information Technology and Communication
Teleposta Towers
P.O. Box 30025-00100
Nairobi
Kenya

For the attention of Mr. Jerome Ochieng,
Principal Secretary, ICT & Innovation

Taskforce on Development of the Policy &
Regulatory Framework for Privacy and Data Protection in Kenya
Communication Authority of Kenya
Email: pdp@information.go.ke and pdp@ca.go.ke
P.O. Box 14448 00800
Nairobi
Kenya

For the attention of Ms. Mercy Wanjau, Chairperson

Advance copy by e-mail

Dear Sirs

PROPOSED PRIVACY AND DATA PROTECTION POLICY-2018 & DATA PROTECTION BILL, 2018

Thank you for inviting feedback on the proposed Data Protection Bill, 2018 (the **Bill**).

Branch is a machine-learning provider of mobile financial services to emerging markets with the purpose of unlocking financial access to billions of underserved people around the world. The customer-centered service offers fast, fair and flexible lending without late fees, rollover fees, or restrictions on how the money is spent. Unlike traditional institutions, Branch gives people an opportunity to build credit despite limited banking history by assessing creditworthiness based on smartphone data. Branch's algorithms process thousands of data points to create personalized loan options in a matter of seconds.

Kenya is our first and to date most successful market and we have subsequently launched in Tanzania, Nigeria and Mexico. We will be launching in India soon. We are backed by the IFC, Andreesen Horowitz (an investor in Facebook) and several other well-known international investors.

We recognize the dangers in the current lacunae in the law in so far as data privacy and protection is concerned and welcome the efforts of the Government to address this. We wish to support these efforts by sharing our experience. Please find attached our comments on the Bill. We are available to meet with the Taskforce to discuss the submissions.

Please do not hesitate to contact the undersigned should you require clarification or further information.

Yours faithfully

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Section	Considerations
Section 31- Automated individual decision making	**Provision** The Bill in Section 31 provides a limitation that any automated processing of personal data intended to evaluate certain personal aspects relating to an individual shall not be based on sensitive categories of personal data. Sensitive categories of personal data include personal financial expenditures. This provision limits the use of automation to process information on personal expenditure which is critical for assessing and determining credit applications. **Concern** We are concerned that the blanket prohibition under Section 31(3) which limits the automated processing of sensitive personal data will create far reaching adverse effects for credit applicants who are at the bottom of the pyramid. The use of technology and specifically automated processing has made it possible to provide microcredit as a commercial enterprise. The cost and time implications of introducing a human credit approval process would make offering microloans untenable and it would roll back the gains which have been made in making credit accessible. **Proposal** **We propose that the limitation on the use of sensitive categories of personal data under Section 31(3) be deleted or alternatively, it be amended to allow the data subject to consent to the automated processing of sensitive personal data.**
Section 44- Rule on Data centers and servers	**Provision** The Section prohibits the cross border processing of sensitive personal data. Sensitive personal data includes data revealing a natural person's, location e.g. residential address, and personal financial expenditures among other classifications. **Concern**

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The world has embraced the use of cloud processing of data and cloud storage of data. The use of cloud has made data processing and storage cheaper and it has erased traditional boundaries drawn by geography as data is available real-time from anywhere in the world.

The proposal to limit cross-border processing of sensitive personal data would require data processors and data controllers to process personal data using servers and data centres located in Kenya. This is at odds with current global trends and the continued growth and widespread use of cloud processing and cloud storage.

Compliance with this provision would raise significant commercial hurdles for data processors and data controllers especially those who provide services to the lower end of the market.

The investment required to establish and run servers and data centres which are able to offer a reasonably priced service runs into the billions of dollars. This is a high barrier to entry which limits the likelihood that the required infrastructure can be easily set up.

From a commercial stand-point, Branch would only be able to use data centres and data servers which provide the required service at a price comparable to the current price offered by global competitors such as Amazon Web Services. Price is critical as it has a direct impact on Branch's ability to offer an affordable credit service.

This Section also raises a concern as it does not provide for the globally recognized exceptions which would allow a balance between protecting the privacy rights of data subject and facilitating commercial activities which the data subject freely engages in and consents to.

These globally recognized exceptions include:

(a) **Consent**: data subjects' consent is considered globally as a justification for cross-border data processing; and

(b) **Contracts**: performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

Proposal

We propose that this provision should be amended in line with global practice to allow cross-border processing of data (including sensitive personal data) with the consent of the data subject.

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	It should also be amended to include an obligation which requires any data controller or data processor engaged in cross-border transfer and processing of data to provide server access to the Data Commissioner upon request.
Section 46- Safeguards prior to cross boarder transfer.	**Provision** The Section gives the Data Commissioner the right to, prohibit, suspend or subject the transfer of data to another country to such conditions as may be determined. **Concern** The Data Commissioner has been given unfettered rights to prohibit, suspend or subject the transfer to such conditions as he may determine. This creates an opportunity for improper exercise of discretion which is further exacerbated by the lack of a mechanism in the Bill to challenge a determination by the Data Commissioner. **Proposal** **We propose that this Section should be amended to introduce a requirement for the Data Commissioner to issue a notice to remedy to any data controller or data processor before exercising his rights.**