


**The Role of Corporate Governance in the Successful Transition to  
Risk-Free Rates (RFRs) by Banks in Kenya**

**By**

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## Abstract

The Global Financial Crisis (GFC) of 2007-08 unearthed a global scandal in the manipulation of benchmark rates like the London Interbank Offered Rate (LIBOR). For over five decades, Interbank Offered Rates (IBORs) served as references and benchmarks in the development and negotiation of financial instruments globally. However, on the tail of the GFC, it was discovered that panel banks had been manipulating their LIBOR submissions to appear more creditworthy and maximise profits on LIBOR-based contracts. This prompted a debate on reform which led to the termination of the mandatory publication of LIBOR from December 2021 and its end in October 2024. In its place, risk-free rates (RFRs) were proposed and adopted as an alternative. The transition from LIBOR to RFRs has been a significant undertaking which was limited in terms of time. There were several concerns over how to ensure a successful transition and whether RFRs are the most suitable replacement. In Kenya, the weight of ensuring a successful transition from LIBOR to RFRs was placed on Board Directors and Senior Management in the financial sector. However, other than a CBK-issued guideline on the expectations of the transition, there were no regulatory undertakings to guide the process. This pegged the transition to RFRs in Kenya on the existing legal and regulatory frameworks. Anchored on the stakeholder theory and the public interest theory, this doctrinal legal research set out to explore the corporate governance landscape in Kenya's financial sector. It was guided by best practices borrowed from the US and the UK to determine whether the elements of corporate governance found within the existing Kenyan framework were sufficient to guarantee a successful transition from LIBOR to RFRs. The study finds that, while financial institutions made commendable efforts to mitigate risk, the Kenyan corporate governance framework is limited with respect to government supervision. Supervisory authorities have continuously taken a laissez-faire approach to oversight and this was no different with the transition. A more proactive and collaborative strategy, as adopted in the US and the UK, anchored in public interest and leveraging technology to facilitate automation would strengthen corporate governance supervisory and enforcement efforts in the country.

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## List of Legal Instruments

### Kenya

Constitution of Kenya (COK)

Banking Act, CAP 488

Capital Markets Act, CAP 485A

CBK Prudential Guidelines for Institutions Licensed Under the Banking Act, 2013.

Central Bank of Kenya Act, CAP 491

Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015.

Companies Act, CAP 486

Interpretation and General Provisions Act CAP 2

Kenya Deposit Insurance Act, CAP 487C

Statutory Instruments Act CAP 2A

### United Kingdom

Bank of England Act 1998

Banking Act 2009

Companies Act 2006

Critical Benchmarks (References and Administrators' Liability) Act 2021

Financial Services Act of 2012 (FSA 2012)

Financial Services and Markets Act 2000

Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Text with EEA relevance) (*UK BMR*)

### United States

Adjustable Interest Rate (LIBOR) Act, 2022

Consolidated Appropriations Act, 2022

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 2010

NASDAQ, 5600. Corporate Governance Requirements

NYSE, 303A.00 Corporate Governance Standards

Regulations Implementing the Adjustable Interest Rate (LIBOR) Act, 2023.

Sarbanes Oxley Act (SOX), 2002

Securities Act, 1933

Securities Exchange Act, 1934



## List of Cases

*Bermingham & Anor (Palombo) v R* [2020] EWCA Crim 1662

*Chase Bank Limited v Zafrullah Khan & 19 Others* [2018] eKLR HCCC No 159 of 2017

*Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021)  
KECMT

*Norman v Theodore Goddard* [1991] BCC 14

*R (Serious Fraud Office) v Tom Hayes & Carlo Palombo* [2024] EWCA Crim 304

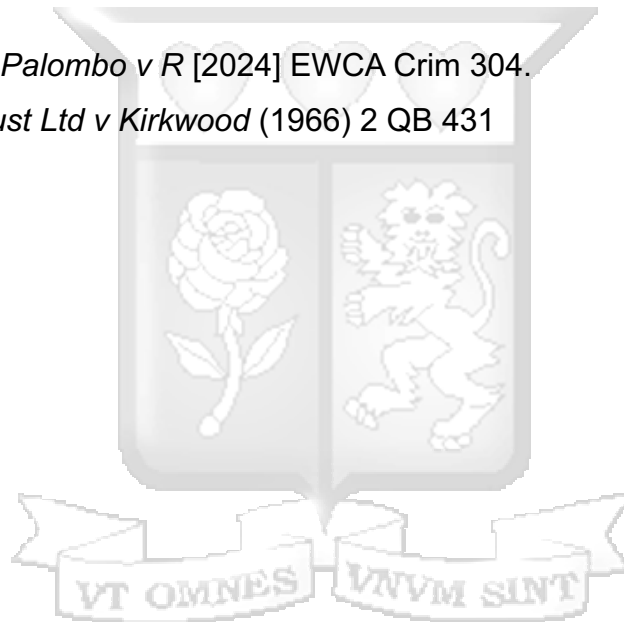
*R v Tom Alexander William Hayes* [2015] EWCA 1944

*Re Barings plc (No5)* [1999] 1 BCLC 433

*Richardson and David Limited vs Kenya Deposit Insurance Corporation & Another*  
[2015] eKLR

*Tom Hayes & Carlo Palombo v R* [2024] EWCA Crim 304.

*United Dominion Trust Ltd v Kirkwood* (1966) 2 QB 431



## List of Abbreviations

<b>ARRC</b>	-	Alternative Reference Rates Committee
<b>BBA</b>	-	British Bankers Association
<b>BCBS</b>	-	Basel Committee of Banking Supervision
<b>BMR</b>	-	Benchmarks Regulation
<b>CBK</b>	-	Central Bank of Kenya
<b>CFPB</b>	-	Consumer Financial Protection Bureau
<b>CMA</b>	-	Capital Markets Authority
<b>EONIA</b>	-	Euro Overnight Index Average
<b>ESTR/ESTER</b>	-	Euro Short-Term Rate
<b>EURIBOR</b>	-	Euro Interbank Offered rate
<b>FCA</b>	-	Financial Control Authority
<b>FDIC</b>	-	Federal Deposit Insurance Corporation
<b>FSB</b>	-	Financial Stability Board
<b>FSOC</b>	-	Financial Stability Oversight Council
<b>IBOR</b>	-	Interbank Offered Rate
<b>IOSCO</b>	-	International Organisation of Securities Commissions
<b>LIBOR</b>	-	London Interbank Offered Rate
<b>NYSE</b>	-	New York Stock Exchange
<b>OECD</b>	-	Organisation for Economic Co-operation and Development
<b>OSSG</b>	-	Official Sector Steering Group
<b>PRA</b>	-	Prudential Regulation Authority
<b>RFRs</b>	-	Risk-Free Rates
<b>SARON</b>	-	Swiss Average Rate Overnight
<b>SEC</b>	-	Securities Exchange Commission (US)
<b>SOFR</b>	-	Secured Overnight Financing Rate
<b>SONIA</b>	-	Sterling Overnight Index Average
<b>TONA</b>	-	Tokyo Overnight Average Rate

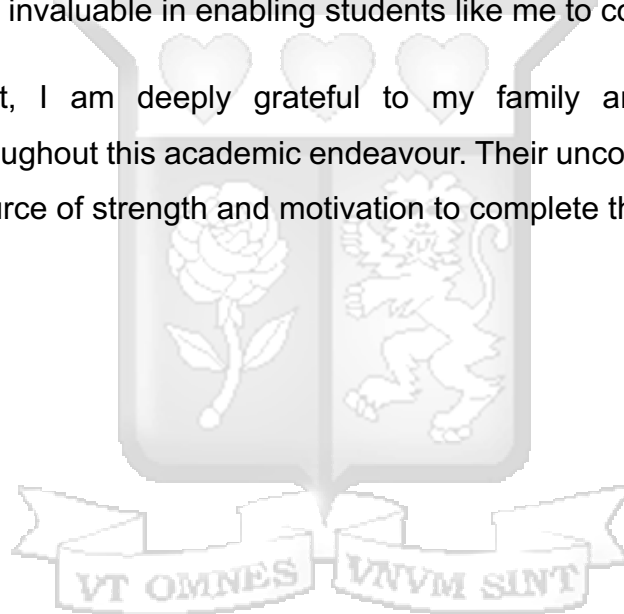
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## Dedication

To *Mr & Mrs Mulinge*, my beloved parents. For their love, support and understanding.



## Chapter 1 : Introduction

### LIBOR: Origin, Scandal, Transition and Corporate Governance Concerns

#### 1.1 Introduction

The economic health and financial stability of a country are pegged on the proper functioning of its financial sector.<sup>1</sup> This cannot exist without good and effective corporate governance systems.<sup>2</sup> In the management of an institution, the acknowledged key players in good corporate governance are the board of directors and senior management.<sup>3</sup> The board holds oversight over the institution's management and facilitates the process of decision making which drives the functions of the organisation.<sup>4</sup> The 2008 Global Financial Crisis (GFC) and the subsequent London Interbank Offered Rate (LIBOR) scandal have forced financial regulators to re-evaluate industry ethics and operations.<sup>5</sup> This was further complicated by the cessation of LIBOR in December 2021 and its progressive replacement with Risk-Free Rates (RFRs).<sup>6</sup> A smooth transition from LIBOR to RFRs is essential for the economic health and financial stability of the country and will go a long way in supporting its ambition to become a regional financial hub.<sup>7</sup>

The transition from LIBOR to RFRs is not merely the replacement of one rate with another. There are notable and significant differences between the two which establish cause for concern. For example, market experts championed the need to develop new infrastructure to support the adoption and application of RFRs and it is likely that

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<sup>1</sup> Basel Committee on Banking Supervision (BCBS), *Guidelines: Corporate Governance Principles for Banks*, 2015, 3.

<sup>2</sup> BCBS, *Guidelines: Corporate Governance Principles for Banks*, 3.

<sup>3</sup> Minciullo M, *Corporate Governance and Sustainability: The Role of the Board of Directors*, Springer International Publishing, Cham, 2019, 1.

<sup>4</sup> Minciullo M, *Corporate Governance and Sustainability*, 1.

<sup>5</sup> Huan X, Previts GJ and Parbonetti A, 'Understanding the LIBOR Scandal: The Historical, the Ethical, and the Technological' 24 (3) *Journal of Banking Regulation*, 2023, 2.

<sup>6</sup> Financial Conduct Authority, 'Announcements on the End of LIBOR' Financial Conduct Authority, 4 March 2021 — <<https://www.fca.org.uk/news/press-releases/announcements-end-libor>> on 10 March 2022.

<sup>7</sup> Olingo A, 'Cautious Optimism Meets Kenya's Bid for Continental Financial Hub' *The East African*, 2 August 2021 — <<https://www.theeastafrican.co.ke/tea/business/kenya-bid-for-continental-financial-hub-3495000>> on 4 March 2022; Napier M, 'Developing Nairobi as a Financial Hub will Open the Region to Climate Finance', *Nairobi International Financial Centre*, 30 July 2021 — <<https://nifc.ke/pressrelease/developing-nairobi-as-a-financial-hub-with-open-the-region-to-climate-finance/>> on 10 March 2022.

this infrastructure would be developed over time and not at the onset of the transition.<sup>8</sup> The transition to RFR transactions or the exit from LIBOR transactions also required sufficient liquidity.<sup>9</sup> Furthermore, the most notable difference is that RFRs are established on existing data; they are backwards-looking overnight rates.<sup>10</sup> LIBOR has been a forward-looking benchmark established by the proposals of identified banks.<sup>11</sup>

This study seeks to assess the role of corporate governance in ensuring a stable financial sector. It focuses specifically on the role corporate governance played in the banking sector in Kenya to guarantee a successful transition from LIBOR to RFRs regardless of the outlined complexities.

## 1.2 Background to the Study

### 1.2.1 The Origins of LIBOR

LIBOR was the reference rate which eleven (11) to sixteen (16) panel banks polled a hypothetical rate they would borrow short-term wholesale funds within the interbank market.<sup>12</sup> The panel banks constituted the largest and most credit-worthy or financially sound banks in London.<sup>13</sup> In simple terms, the calculation was conducted by doing away with the top four (25%) submissions and the bottom four (25%) submissions and averaging the middle.<sup>14</sup>

Before its phase-out, LIBOR submissions were collected for several currencies including; the US Dollar, the Sterling Pound, the Euro, the Japanese Yen and the Swiss Franc.<sup>15</sup> For each of these currencies, the daily LIBOR rate was calculated and submitted for up to seven maturities ranging from overnight to twelve months.<sup>16</sup> The

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<sup>8</sup> O'Neal B and Maguire E, 'Drilling down: Navigating the LIBOR Transition,' KPMG, October 2020 — <<https://home.kpmg/xx/en/home/insights/2020/10/navigating-the-libor-transition.html>> on 6 January 2022.

<sup>9</sup> O'Neal B and Maguire E, 'Drilling down: Navigating the LIBOR Transition,'.

<sup>10</sup> Heaton M and Puri S, 'Replacement of LIBOR: Differences Between RFR and LIBOR' Lexology, 31 January 2020 — <<https://www.lexology.com/library/detail.aspx?g=7158644a-ee43-428f-b126-771db5f9bd53>> on 6 January 2022.

<sup>11</sup> Heaton M and Puri S, 'Replacement of LIBOR'.

<sup>12</sup> Hou D and Skeie DR, *LIBOR: Origins, Economics, Crisis, Scandal, and Reform*, 667 Federal Reserve Bank of New York Staff Reports, 2014, 1; Huan X, *et al*, 'Understanding the LIBOR Scandal', 8.

<sup>13</sup> Hou D and Skeie DR, *LIBOR*, 1.

<sup>14</sup> Huan X *et al*, 'Understanding the LIBOR Scandal', 9.

<sup>15</sup> Hou D and Skeie DR, *LIBOR*, 2.; Huan X *et al*, 'Understanding the LIBOR Scandal', 8.

<sup>16</sup> Hou D and Skeie DR, *LIBOR*, 2.; Huan X *et al*, 'Understanding the LIBOR Scandal', 8.

calculation and publication were done by Thomson Reuters on behalf of the BBA.<sup>17</sup> The confidence attached to LIBOR and its wide usage as both a reference and benchmark rate over five decades was largely influenced by the reputation attached to the panel banks.

Despite its evident significance in the financial sector, LIBOR has largely been a concept familiar to only key and frequent finance industry players and professionals. However, in 2008, amid the GFC, LIBOR moved “from the fine-print of interest-rate contracts to the headlines of newspapers”<sup>18</sup> in what has come to be known as the LIBOR scandal. Before the GFC period, the LIBOR rate was usually predictably close to other short-term interest rates.<sup>19</sup> However, between 2007 – 2009 the rate became increasingly volatile.<sup>20</sup> LIBOR was used as a performance measure or stress measure for the banking system and financial sector as a whole.<sup>21</sup> Its behaviour during the crisis served to further exacerbate the issue as interbank lenders began to limit funding while simultaneously demanding higher returns when they did issue funds. This only served to a perceived loss of creditworthiness due to banks' inability to access funds and led to further volatility of the LIBOR rate.

### **1.2.2 Corporate Governance issues in the LIBOR Scandal**

In 2012, it came to light, that the behaviour of the LIBOR rate during the GFC was a result of manipulation by some of the panel banks.<sup>22</sup> LIBOR came under criticism as the larger public was concerned that bankers and regulators had colluded against the general public for their benefit.<sup>23</sup> The manipulation of LIBOR by participating banks was largely for two reasons; by reporting their borrowing costs to calculate the daily rates, banks would be exposing their creditworthiness. Therefore, to present an image of financial health and stability in a period of uncertainty, banks reported manipulated borrowing costs. Secondly, banks which had significant LIBOR-based contracts were interested in maximising profits on these contracts by taking advantage of the

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<sup>17</sup> Hou D and Skeie DR, *LIBOR* 1.; Huan X *et al*, 'Understanding the LIBOR Scandal', 8.

<sup>18</sup> Duffie D and Stein JC, 'Reforming LIBOR and Other Financial Market Benchmarks' 29(2) *Journal of Economic Perspectives*, 2015, 191.

<sup>19</sup> Hou D and Skeie DR, *LIBOR*, 4.

<sup>20</sup> Hou D and Skeie DR, *LIBOR*, 4.; Huan X *et al*, 'Understanding the LIBOR Scandal' 11.

<sup>21</sup> Duffie D and Stein JC, 'Reforming LIBOR and Other Financial Market Benchmarks', 191.

<sup>22</sup> Persaud A, 'London Interbank Offered Rate: Notes on a Scandal' 47(30), *Economic & Political Weekly*, 2012,10.

<sup>23</sup> Persaud A, 'London Interbank Offered Rate: Notes on a Scandal', 10.

perceived volatility of the market during the GFC. In the aftermath of the scandal, many of the reporting banks were found to have misreported and acted in violation of requisite regulations of which they had to pay fines and settlements. In addition, senior officials and management in a number of these banks were forced to resign.

Once the scandal was discovered, government authorities launched investigations and brought cases against individuals and banks across various jurisdictions.<sup>24</sup> There have also been private party lawsuits against banks over LIBOR manipulation, however, none has been successfully concluded in the claimants' favour.<sup>25</sup> The self-interest-driven, short-terminist, self-preservationist culture that permeated the pre-scandal era is illustrated in these cases.<sup>26</sup> On the responsibility of individuals in the scandal, two significant cases informed this study: *R v Tom Hayes*<sup>27</sup>, and *Birmingham & Anor (Palombo) v R*<sup>28</sup>. These cases saw individuals prosecuted and convicted for manipulation of both LIBOR and EURIBOR respectively.<sup>29</sup> The records of proceedings unearthed the cultural rot in the financial industry at the time and the convicted parties have become poster children for the scandal.<sup>30</sup>

Tom Hayes was the first individual criminally tried on accusations of LIBOR manipulation.<sup>31</sup> He began as a trainee interest trader at the Royal Bank of Scotland (RBS) before moving to the UBS Tokyo office in 2006 and later to Citigroup in 2009 where he was dismissed in the second half of 2010.<sup>32</sup> In 2012 he was arrested and charged in connection to LIBOR manipulation and conspiracy to defraud by the British Serious Fraud Office (SFO).<sup>33</sup> It is important to note, that all the banks he was engaged

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<sup>24</sup> Lo G, 'LIBOR Litigation' Stanford Law School, 18 February 2020—<<https://guides.law.stanford.edu/c.php?g=979522&p=7083400>> on 21 February 2024.

<sup>25</sup> Lo G, 'LIBOR Litigation'.; Downes P and Saunderson E, 'Marme v RBS: The End for LIBOR Manipulation Claims?' July/August, *Journal of International Banking Law*, 2019, 443.

<sup>26</sup> Aldohni AK, 'Is Ethical Finance the Answer to the Ills of the UK Financial Market? A Post-Crisis Analysis' 151(1), *Journal of Business Ethics*, 2018 ,275.

<sup>27</sup> *R v Tom Hayes* [2015]; *R v Tom Alexander William Hayes* [2015] EWCA 1944

<sup>28</sup> *Birmingham & Anor (Palombo) v R* [2020] EWCA Crim 1662

<sup>29</sup> Castro B, 'Former Traders' Convictions Upheld by Court of Appeal' *The Law Society Gazette*, 27 March 2024—<<https://www.lawgazette.co.uk/news/former-traders-convictions-upheld-by-court-of-appeal/5119208.article>> on 1 June 2024.

<sup>30</sup> Li R, 'Hayes Poised for LIBOR Supreme Court Appeal' *CDR - Commercial Dispute Resolution*, 17 April 2024—<<https://www.cdr-news.com/categories/competition-and-business-crime/20498-hayes-poised-for-libor-supreme-court-appeal>> on 1 June 2024.

<sup>31</sup> Angeletti T, 'The Differential Management of Financial Illegalisms: Assigning Responsibilities in the Libor Scandal' 53(4) *Law & Society Review*, 2019, 1248.

<sup>32</sup> Angeletti T, 'The Differential Management of Financial Illegalisms', 1248.

<sup>33</sup> Angeletti T, 'The Differential Management of Financial Illegalisms', 1248.

at were also eventually cited for LIBOR manipulation and penalised.<sup>34</sup> The prosecution in *R v Hayes*<sup>35</sup> presented Tom Hayes as the orchestrator of the scandal.<sup>36</sup> However, in his defence, Hayes argued that his attempts at influencing the benchmark were known to his employers and it was customary practice in the banking sector.<sup>37</sup> The motivation for this, as presented by the prosecution in the case, was to earn more for his employers to hopefully get paid more.<sup>38</sup>

The LIBOR scandal was motivated by two factors. First, to maximise profits on LIBOR-referenced contracts and second, to secure the public image of the participating institutions as healthy and creditworthy.<sup>39</sup> It is no surprise therefore that employees, presumably prompted by senior management, were motivated to engage in LIBOR manipulation to promote the success of their employers and consequently their own.<sup>40</sup> Of all individual cases, Tom Hayes received the harshest sentence of 14 years, later reduced after appeal.<sup>41</sup> He served five and a half years of this sentence and continues to appeal his conviction to date.<sup>42</sup> Colin Bermingham and Carlo Palombo were both senior traders at Barclays Plc who were charged with conspiracy to defraud.<sup>43</sup> The charges against them were on the manipulation of EURIBOR at the height of the GFC.<sup>44</sup> They were both found guilty and sentenced to four and five years in prison respectively.<sup>45</sup> Barclays Plc was also cited and penalised for LIBOR manipulation.<sup>46</sup>

Notably, none of the executives or directors at any of the offending banks has ever been charged despite evidence of an ingrained cultural rot across financial institutions characterised by collusion and a predisposition to fraudulent behaviour as “everyone

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<sup>34</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’, 39.

<sup>35</sup> *R v Tom Hayes* [2015].

<sup>36</sup> *R v Hayes* [2015]; Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1248.

<sup>37</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1249.; *R (Serious Fraud Office) v Tom Hayes & Carlo Palombo* [2024] EWCA Crim 304.

<sup>38</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1251.

<sup>39</sup> Aldohni AK, ‘Is Ethical Finance the Answer to the Ills of the UK Financial Market?’ 267.

<sup>40</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1252-53.

<sup>41</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1258; *R v Hayes* South Crown Court, Sentencing Remarks of Justice Cooke, 3 August 2015 .

<sup>42</sup> Li R, ‘Hayes Poised for LIBOR Supreme Court Appeal’.

<sup>43</sup> Serious Fraud Office (SFO), ‘EURIBOR’ Serious Fraud Office, 17 May 2021— <<https://www.sfo.gov.uk/cases/euribor/>> on 1 June 2024.

<sup>44</sup> SFO, ‘EURIBOR’.

<sup>45</sup> *Bermingham & Anor (Palombo) v R* [2020] EWCA Crim 1662.

<sup>46</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 2, 39.

was doing it”.<sup>47</sup> Offending banks instead entered into Deferred Prosecution Agreements (DPA) or Non-Prosecution Agreements (NPA) with various regulatory authorities.<sup>48</sup> In these agreements, settlements were made which are to the tune of USD 10.4 Billion to date.<sup>49</sup> Banks fined by regulatory authorities included Barclays Plc, UBS, Citigroup, RBS, Deutsche Bank and Rabobank among others.<sup>50</sup> Ordinarily, DPAs or NPAs are characterised by a fine, corporate governance review expectations and introduction of independent experts on the board of offending institutions.<sup>51</sup> However, it is noted with concern that in the LIBOR case, internal corporate governance reforms and improved compliance mechanisms were scarcely mentioned in these agreements.<sup>52</sup>

The pre-scandal era was characterised by calls for deregulation in the finance industry.<sup>53</sup> This was to, allegedly, make industry players more competitive in the 1960s.<sup>54</sup> The LIBOR episode was a product of this season of financial liberalization and deregulation in the global financial market.<sup>55</sup> It is folly to think that transparency in self-regulation is a sufficient treatment for market misconduct. As Amitai Etzioni<sup>56</sup> rightfully put it, *“The real treatment is more regulation...In most cases the only effective way we can hope to get a handle on that which plagues our public life is if our representatives choose to either ban the problematic behaviour (e.g., smoking in public) or regulate it (e.g., ensuring Wall Street will not again take risks that will lead to taxpayer bailout) – which is to say that these problems cannot be solved by merely releasing information and leaving it to the public to take action.”*<sup>57</sup>

It is argued that a well-supervised financial market would have been more resilient to the GFC, the LIBOR scandal and the post-crisis shocks.<sup>58</sup> The financial crisis led to

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<sup>47</sup> Lokanan M and Sharma S, ‘A Fraud Triangle Analysis of the Libor Fraud’ 10(2) *Journal of Forensic & Investigative Accounting*, 2018, 199.

<sup>48</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1250 & 1253.

<sup>49</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’, 39.

<sup>50</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 39.

<sup>51</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1258.

<sup>52</sup> Angeletti T, ‘The Differential Management of Financial Illegalisms’, 1259.

<sup>53</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15.

<sup>54</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15

<sup>55</sup> Vasudev PM and Rodriguez Guerrero D, ‘Corporate Governance in Banks – A View through the LIBOR Lens’ 15(3/4), *Journal of Banking Regulation*, 2014, 334.

<sup>56</sup> Fields G, ‘Common Cause: Institutional Corruption’s Role in the Libor and the 4pm Fix Scandals’, 8(8), *Law and Financial Markets Review* 2014, 10.

<sup>57</sup> Fields G, ‘Common Cause’ 11.

<sup>58</sup> Duffie D, ‘Prone to Fail: The Pre-Crisis Financial System’ 33(1), *Journal of Economic Perspectives*, 2019, 81.

the increase of financial and banking regulations across jurisdictions to combat systemic risk.<sup>59</sup> This inevitably threw a wrench in the cogs of the move towards principle-based global regulatory structures in the industry.<sup>60</sup> Consequently, this study believes, this move influenced a shift in corporate governance mechanisms thus informing the current framework. Banking and financial regulations are intended by design to mitigate the risk-taking tendencies of banks to secure and stabilise the financial system and consequently the economy.<sup>61</sup> They inform the foundation on which internal corporate governance cultures and mechanisms are developed and strengthened. Regulators cannot abdicate this responsibility to market discipline and internal compliance mechanisms.<sup>62</sup>

The scandal dealt a significant blow to the reputation of the financial industry.<sup>63</sup> It prompted the discussion on benchmark reform leading eventually to the decision to cease LIBOR publication.<sup>64</sup> The scandal also prompted a pivotal shift to the public interest approach of regulation pushing for increased and more detailed supervision.<sup>65</sup> In hindsight, the push for deregulation appears self-serving post-crisis.<sup>66</sup> The lack of transparency, compromised risk management systems facilitating institutional corruption and weak oversight mechanisms which prioritised short-term profits over ethics are the corporate governance issues that led to the LIBOR scandal during this era of deregulation in the financial industry.

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<sup>59</sup> Brown-Hruska S, 'The Impact of Post-Crisis Regulatory Reforms on Cross-Border Financial Transactions', 112, *Proceedings of the Annual Meeting (American Society of International Law)*, 2018, 42.

<sup>60</sup> Brown-Hruska S, 'The Impact of Post-Crisis Regulatory Reforms on Cross-Border Financial Transactions', 41.

<sup>61</sup> Batten JA, Lončarski I and Szilagyi PG, 'Financial Market Manipulation, Whistleblowing, and the Common Good: Evidence from the LIBOR Scandal' 58(1), *Abacus*, 2022, 14.

<sup>62</sup> Batten JA, *et al*, 'Financial Market Manipulation, Whistleblowing, and the Common Good', 14.

<sup>63</sup> Batten JA, *et al*, 'Financial Market Manipulation, Whistleblowing, and the Common Good', 12; Fabrizi M, Huan X and Parbonetti A, 'When LIBOR Becomes LIEBOR: Reputational Penalties and Bank Contagion' 56 *Financial Review*, 2021, 157.

<sup>64</sup> Financial Stability Board (FSB), *Progress Report on LIBOR and Other Benchmarks Transition Issues: Reaching the Finishing Line of LIBOR Transition and Securing Robust Reference Rates for the Future*, 2022, 2-3.

<sup>65</sup> Huan X *et al*, 'Understanding the LIBOR Scandal', 2-3.

<sup>66</sup> Batten JA, *et al*, 'Financial Market Manipulation, Whistleblowing, and the Common Good', 2.

### 1.2.3 The Transition to RFRs

As of 2018, it was reported that the global LIBOR exposure stood at about \$400 trillion in LIBOR-based financial contracts.<sup>67</sup> The dominant amounts were held in US LIBOR and EURIBOR-based financial products which accounted for about 80 per cent of the total global exposure.<sup>68</sup> In 2021, the Financial Conduct Authority (FCA) announced that after 31<sup>st</sup> December 2021, panel banks would no longer be expected to make submissions towards the computation of LIBOR and that publications for the USD LIBOR 2-month to 12-month maturity rates would cease in 2023.<sup>69</sup> During this time, various RFRs were proposed and adopted as replacements for LIBOR. These include the Secured Overnight Financing Rate (SOFR) to replace the USD LIBOR, the Sterling Overnight Index Average (SONIA) to replace the GBP LIBOR, the Euro Short-Term Rate (ESTR) to replace EURIBOR, Euro LIBOR and EONIA, the Swiss Average Rate Overnight (SARON) to replace CHF LIBOR and the Tokyo Overnight Average Rate (TONA) to replace the JPY LIBOR.<sup>70</sup>

It is evident that the application of LIBOR was highly indoctrinated into the financial sector. The transition is a large and complex regulatory change programme with a strict and limited transition timeline. “Transition” in the context of this study includes the full adoption and solidification of RFRs as reference and benchmark rates of similar status and repute as LIBORs. There were various risk concerns arising from both the change, the limited time frame for transition and the trillions of dollars at risk in form of LIBOR-based contracts. From a legal perspective, some of the identified risk concerns were<sup>71</sup> conduct risk that may arise in the renegotiation of contracts, challenges with fallback provisions, project management due to the bulk of multidisciplinary work required to guarantee the transition and the management of legacy contracts.<sup>72</sup> To

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<sup>67</sup> Schrimpf A and Sushko V, ‘Beyond LIBOR: A Primer on the New Reference Rates,’ March, *BIS Quarterly Review*, 2019, 29.

<sup>68</sup> Financial Stability Board, *Reforming Major Interest Rate Benchmarks*, 2014, 6.

<sup>69</sup> Financial Conduct Authority, ‘Announcements on the End of LIBOR’.

<sup>70</sup> Virji H, Merali A and Marshall P, ‘Facing the End of LIBOR: The Financial and Legal Implications’ 34 *Journal of International Banking and Financial Law*, 2019, 715.

<sup>71</sup> Volkert C and Wilbert D, ‘What Legal Teams Need to Know about the LIBOR Transition’ Legal Talk Network, 1 December 2021 — <<https://legaltalknetwork.com/podcasts/robert-half-legal-report/2021/01/what-legal-teams-need-to-know-about-the-libor-transition/>> on 27 May 2022.

<sup>72</sup> Jones-Fenleigh H, ‘LIBOR Discontinuation, Tough Legacy Contracts and the Legislative Solution - Where Are We Now?’, Norton Rose Fulbright, 2 January 2021 — <<https://www.nortonrosefulbright.com/en/inside-disputes/blog/libor-discontinuation-tough-legacy-contracts>> on 7 June 2022.

successfully navigate these and other risks, good corporate governance practices were required.

#### **1.2.4 Corporate Governance and the LIBOR Transition**

Corporate Governance, in simple terms, can be described as the structures used to manage and control companies or organisations.<sup>73</sup> As a concept, corporate governance has existed since the inception of the corporation. However, academic interest and contributions in recent years have grown significantly.<sup>74</sup> This is largely due to the consensus that corporate governance plays a significant role in establishing and sustaining economic health and financial stability. This consensus was cemented by the GFC and subsequent corporate scandals including the LIBOR scandal.<sup>75</sup> As trade and finance grew and morphed into an international playing field, the impact of this growth on corporate governance has increasingly become a focus of study. Researchers have reviewed and compared how various jurisdictions have established frameworks to ensure corporate governance issues are addressed.<sup>76</sup>

As the world moves away from LIBOR, international and local financial advisory and regulatory bodies have emphasised the key role of boards and senior management in the transition. In Kenya, the Central Bank of Kenya (CBK) issued a Guidance on LIBOR Transition in December 2021.<sup>77</sup> In this guidance, the responsibility of ensuring a smooth transition was placed on the boards of directors and senior management of financial institutions who are expected to develop strategies to guide their institutions in transitioning from LIBOR to alternative reference rates.<sup>78</sup> They are expected to establish proper frameworks with adequate budget and resource allocations to guide the process and also offer adequate oversight to ensure all possible risks are mitigated.<sup>79</sup> This focus on boards and senior management brings out the concept of corporate governance. The emphasis on the role of corporate leadership in the

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<sup>73</sup> Gericke RC, *Corporate Governance and Risk Management in Financial Institutions: An International Comparison Between Brazil and Germany*, Springer International Publishing, Cham, 2018, 5.

<sup>74</sup> Gericke RC, *Corporate Governance and Risk Management in Financial Institutions* 8.

<sup>75</sup> Vasudev PM and Guerrero DR, 'Corporate Governance in Banks – A View through the LIBOR Lens' 15(3-4) *Journal of Banking Regulation*, 2013, 326.

<sup>76</sup> Gericke RC, *Corporate Governance and Risk Management in Financial Institutions*, 6.

<sup>77</sup> Central Bank of Kenya (CBK), *Guidance on LIBOR Transition*, December 2021, 1-8.

<sup>78</sup> CBK, *Guidance on LIBOR Transition*, 3.

<sup>79</sup> CBK, *Guidance on LIBOR Transition*, 5.

transition to alternative reference systems calls to question how these leadership organs should operate to ensure the transition is successful.

Studies have been conducted to illuminate the significance of corporate governance in the financial sector both in Kenya and on the international platform. However, as the curtain falls on LIBOR, there is a need to assess, what role corporate governance plays and which elements or principles of this concept will be required to guarantee a smooth transition from the decades-old benchmark rate.

### **1.2.5 The Transition Period**

The LIBOR transition officially kicked off with a discussion on benchmark reform in 2014.<sup>80</sup> This was championed by the Financial Stability Board (FSB) who established the Official Sector Steering Group (OSSG), a working group comprised of regulators and central banks, tasked with coordinating benchmark reforms.<sup>81</sup> The initial task was to review and recommend methods of strengthening existing IBORs while exploring the possibility of near-risk-free rates as possible alternatives.<sup>82</sup> Reports from the OSSG led to the commencement of the transition from LIBOR to RFRs as it was determined that the integrity and robustness of LIBOR could no longer be confidently ensured.<sup>83</sup> Continued discourse saw the FCA announce the official cessation of mandatory LIBOR publication in 2021.<sup>84</sup>

As jurisdictions navigated this cessation, various synthetic LIBOR settings were published to provide a temporary bridge for institutions to smoothly transition their legacy contracts to suitable RFRs.<sup>85</sup> In September 2024, the last remaining synthetic LIBOR settings were published for the last time.<sup>86</sup> This saw the end of LIBOR publications. As such, the Bank of England in October 2024 announced the official end of LIBOR.<sup>87</sup> It however, encouraged market players to remain vigilant in the application

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<sup>80</sup> FSB, *Reforming Major Interest Rate Benchmarks*, 2014.

<sup>81</sup> Financial Stability Board (FSB), *Reforming Major Interest Rate Benchmarks: Progress Report on Implementation of July 2014 FSB Recommendations*, 2017, 1.

<sup>82</sup> FSB, *Reforming Major Interest Rate Benchmarks: Progress Report*, 1.

<sup>83</sup> FSB, *Reforming Major Interest Rate Benchmarks: Progress Report*, 1-2; FSB, *Progress Report on LIBOR and Other Benchmarks Transition Issues*, 1.

<sup>84</sup> Financial Conduct Authority, 'Announcements on the End of LIBOR'.

<sup>85</sup> Bank of England, 'The End of LIBOR' Bank of England, 1 October 2024 — <<https://www.bankofengland.co.uk/news/2024/october/the-end-of-libor>> on 19 October 2024.

<sup>86</sup> Bank of England, 'The End of LIBOR'.

<sup>87</sup> Bank of England, 'The End of LIBOR'.

of risk-free rates and avoid the use of USD credit-sensitive rates which emerged as possible LIBOR replacements during the transition<sup>88</sup> as these posed similar systemic risk issues as LIBOR.<sup>89</sup>

### **1.3 Statement of the Problem**

Until 2021 financial institutions in Kenya, like other countries, relied on LIBOR when borrowing from other institutions or extending credit to customers.<sup>90</sup> The cessation of LIBOR in December 2021 affected the exposure risk of key players in the Kenyan financial industry as it did globally.<sup>91</sup> The CBK tasked corporate leadership in financial institutions with the mandate of developing and implementing the requisite transitional strategies to facilitate the move from LIBOR to RFRs in Kenya.<sup>92</sup> The problem this paper aims to examine is whether the existing corporate governance practices and frameworks were effective in supporting the transition to RFRs and navigating potential legal risks. Ineffectiveness can manifest in outdated policies, inadequate transparency and disclosure measures, insufficient risk disclosure and risk management measures or inadequate monitoring and evaluation measures among other corporate governance concerns all of which are potential legal risks as the sector navigates the move to fully adopting and incorporating RFRs. In focusing on the LIBOR transition as a significant shift in the financial industry, the study is able to assess how the Kenyan framework responds to changes in a highly fluid but volatile industry so as to ensure stability and manage systemic risk.

### **1.4 Research Objectives**

The main objective of this study is to assess the role of corporate governance in ensuring a smooth transition from LIBOR to RFRs in Kenya.

To achieve this, the study is guided by the following specific objectives:

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<sup>88</sup> FSB, *Progress Report on LIBOR and Other Benchmarks Transition Issues*, 6.

<sup>89</sup> Bank of England, 'The End of LIBOR'.

<sup>90</sup> NCBA Group, *2021 Integrated Annual Report*, 2021, 186.; Standard Chartered Bank Kenya, *Annual Report 2021*, 2021,109.; KCB Group Plc, *2021 Integrated Report & Financial Statements*, 2021, 230.; Equity Group Plc, *2021 Integrated Report & Financial Statements*, 2021, 148,236-237.

<sup>91</sup> NCBA Group, *2021 Integrated Annual Report*; Standard Chartered Bank Kenya, 'Annual Report 2021'; KCB Group Plc, *2021 Integrated Report & Financial Statements*; Equity Group Plc, *2021 Integrated Report & Financial Statements*.

<sup>92</sup> CBK, *Guidance on LIBOR Transition*, 3.

- i. To identify the elements of a good corporate governance framework that would be essential to navigating the transition risk from LIBOR to RFRs.
- ii. To evaluate the legal, regulatory and institutional frameworks of corporate governance in the Kenyan banking sector to determine their efficacy in the transition from LIBOR to RFRs.
- iii. To analyse the corporate governance safeguards implemented in the UK and US and recommend best practices that Kenya can adopt to strengthen its own transition framework.

### **1.5 Research Questions**

To meet its research objectives, the study seeks to answer the following questions:

- i. What are the elements of a good corporate governance framework that would be essential in navigating the LIBOR to RFRs transition-related risks?
- ii. What are the legal, regulatory and institutional frameworks of corporate governance in Kenya employed to facilitate the LIBOR to RFRs transition?
- iii. Based on the lessons from LIBOR, what safeguards, have the UK and the US implemented in their corporate governance frameworks to navigate the LIBOR to RFRs transition?

### **1.6 Significance of Study**

Undoubtedly, poor corporate governance played a role in facilitating the GFC and the LIBOR scandal. As evinced in the literature review, scholars have continued to reiterate the need for good corporate governance frameworks in financial institutions to ensure financial stability and avoid a repetition of past mistakes. As the curtain falls on LIBOR, it is essential to ensure the transition is successful as the reputation and stability of the financial sector is at risk. This is especially true in Kenya today as the country hopes to establish itself as the regional financial hub.<sup>93</sup> Drawing lessons from LIBOR, this research is essential in identifying the elements of good corporate governance that Kenya should adopt and ensure are cemented in its legal and policy frameworks. The research benefits policymakers and legal reformers in the industry by providing evidence-based insight into stakeholder-championed and public-interest-

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<sup>93</sup> Olingo A, 'Cautious Optimism Meets Kenya's Bid for Continental Financial Hub'; Napier M, 'Developing Nairobi as a Financial Hub will Open the Region to Climate Finance'.

driven corporate governance enforcement strategies. It also challenges regulatory authorities like the CBK to appraise and reform their supervisory and enforcement strategies on corporate governance issues in the industry.

## 1.7 Hypothesis

The study hypothesizes that the corporate governance practices ingrained in the legal and institutional frameworks governing the Kenyan banking sector fall short of the necessary safeguards required to ensure a successful LIBOR to RFRs transition.

## 1.8 Theoretical Framework

This study is informed by two theories; the stakeholder theory of corporate governance and the public interest theory of regulation.

### 1.8.1 The Stakeholder Theory

The Stakeholder Theory was first proposed and developed in 1984 by Edward Freeman in his book 'Strategic Management: The Stakeholder Approach'.<sup>94</sup> This theory takes into account other participants in an organisation's structures such as employees, creditors, clients or customers, regulators and the general public.<sup>95</sup> It envisions corporate governance in the context of the relationships between the organisation and any other persons or groups that may be affected by its activities.<sup>96</sup> The theory pushes for stakeholder value where the organisation in carrying out its activities as a social entity pursues all stakeholder interests.<sup>97</sup> This theory is a direct critic of the shareholder primacy approach and attempts to cure the moral deficiency of the shareholder theory.<sup>98</sup> It argues that shareholder primacy is tunnel-visioned in its approach to decision-making and company performance.<sup>99</sup> While the stakeholder

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<sup>94</sup> Freeman RE, Harrison JS, Wicks AC, Parmar B, de Colle S, *Stakeholder Theory: The State of the Art*, Cambridge University Press, Cambridge, 2010, i.

<sup>95</sup> Maxfield S, Wang L and Magaldi de Sousa M, 'The Effectiveness of Bank Governance Reforms in the Wake of the Financial Crisis: A Stakeholder Approach' 150 (2), *Journal of Business Ethics*, 2018, 489.

<sup>96</sup> Tricker B, *The Evolution of Corporate Governance*, Cambridge University Press, Cambridge, 2020, 48.

<sup>97</sup> Mastrodascio M, *Corporate Governance Models: A Critical Assessment*, Routledge, Oxon, 2021, 13-14.

<sup>98</sup> Rissy YYW, 'The Stakeholder Model: Its Relevance, Concept, and Application in the Indonesian Banking Sector' 22 (3), *Journal of Banking Regulation*, 2021, 219.

<sup>99</sup> Lanoszka A, *Corporate Governance and Economic Development: Identifying Critical Institutional Reforms*, Routledge, Oxon, 2022, 6.

school of thought was initially met with criticism, it has gained more appreciation as the world grows more socially and environmentally conscious.<sup>100</sup>

The theory has been criticised as one that lacks an identifiable corporate objective and instead directs managers to serve the interests of many “masters”.<sup>101</sup> Regardless, its significance to this study is that the area of corporate governance concerned is not in the maximisation or protection of shareholder value but rather in the protection of the interests of other stakeholders, particularly clients and regulators and by extension the general public concerning the effect of the general economy. In the wake of the financial crises, shareholder-focused and agency-based approaches faced criticism and there was a push for a focus on the place of stakeholders in corporate governance and the lapses that plagued the finance sector.<sup>102</sup> Successful regulatory reform requires that those involved also pay mind to stakeholders. Where the industry players fail to focus on these interests to promote the required change, stakeholders such as regulators, policymakers, clients and others must act collectively to push for the change.<sup>103</sup>

The financial services sector is a for-profit-driven industry; therefore, it would be foolhardy to attempt to side line sustainable competitive advantage and wealth creation. The push for the shift from LIBOR to RFRs was not a concern solely for shareholder interests but for other stakeholders. It can therefore be argued as a move founded on stakeholder theory principles. This study however posits that for the transition to be successful, and lasting and to secure the deterrence of future acts or omissions that contributed to the LIBOR scandal, it is essential to ensure that the transition not only protects stakeholders’ interests but also facilitates future wealth creation and sustained competition in the industry. Without this, there is no incentive for good corporate governance practices in the sector regarding benchmark and reference use.

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<sup>100</sup> Tricker B, *The Evolution of Corporate Governance*, 49.

<sup>101</sup> Aduda J, Chogii R and Magutu PO, ‘An Empirical Test of Competing Corporate Governance Theories on the Performance of Firms Listed at the Nairobi Securities Exchange’ 9 (13), *European Scientific Journal*, 2013, 107-137.

<sup>102</sup> Maxfield S *et al*, ‘The Effectiveness of Bank Governance Reforms in the Wake of the Financial Crisis’, 485.

<sup>103</sup> Benedict C, ‘The LIBOR Scandal and Reform Agenda: Can We Trust These Rates Again?’, *Seven Pillars Institute*, 24 January 2014 <<https://sevenpillarsinstitute.org/libor-scandal-reform-agendacan-trust-rates/>> on 13 May 2022.

### 1.8.2 Public Interest Theory

As previously mentioned, the transition from LIBOR to RFRs signifies major regulatory reform from a system that has operated for about five decades, hence well ingrained in the finance sector's systems. In the study of regulation, various theories come into play.<sup>104</sup> Of particular focus concerning banking regulation and the LIBOR scandal are the private and public interest theories.<sup>105</sup> The origins of the public interest view can be traced back to the work of Cecil Pigou in 1932.<sup>106</sup> It opines that regulation is designed as an instrument to achieve public goals and the public good.<sup>107</sup> Regulation strikes a balance and cures the conflict between consumers and private entities.<sup>108</sup> The belief in this theory is that regulators play a key role in ensuring all needs are served as without regulation only the interests of the privileged would be considered.<sup>109</sup>

The private-interest view on the other hand arose as a criticism of the public-interest approach in the 1960s.<sup>110</sup> It assumes that the regulatory process is inefficient as regulators are influenced by their political interests as such creating a competitive process in which lobby groups can influence authorities for favourable regulation in exchange for political support.<sup>111</sup> This position can be traced back to George Stigler's "*Theory of Economic Regulation*"<sup>112</sup> where he defined regulatory capture. Stigler posited that "regulation is acquired by the industry and is designed to operate primarily for its benefit".<sup>113</sup> This view can be credited for the push towards deregulation in the

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<sup>104</sup> Levi-Faur D and Kariv-Teitelbaum Y, 'Regulation' in Berg-Schlosser D, Badie B and Morlino L (eds), *The SAGE Handbook of Political Science*, SAGE, 2020,1160.

<sup>105</sup> Huan X *et al*, 'Understanding the LIBOR Scandal' 2.

<sup>106</sup> Quach S, Thaichon P and Hewege C, 'Triadic Relationship between Customers, Service Providers and Government in a Highly Regulated Industry' 55 (102148) *Journal of Retailing and Consumer Services*, 2020, 1.

<sup>107</sup> Levi-Faur D and Kariv-Teitelbaum Y, 'Regulation' 1160.

<sup>108</sup> Gantzias G, 'Dynamics of Public Interest in Artificial Intelligence: "Business Intelligence Culture" and Global Regulation in the Digital Era' in Park SH, Gonzalez-Perez MA and Floriani DE (eds), *The Palgrave Handbook of Corporate Sustainability in the Digital Era*, Springer Nature, 2020, 265.

<sup>109</sup> Pratt M, Van Peursesem K and Garg M, *Auditing Theory and Practice*, Cengage AU, Victoria, 2023, 11.

<sup>110</sup> Levi-Faur D and Kariv-Teitelbaum Y, 'Regulation' 1160.

<sup>111</sup> Huan X *et al*, 'Understanding the LIBOR Scandal', 5.

<sup>112</sup> Stigler G, 'The Theory of Economic Regulation' 5 (2), *Bell Journal of Economics & Management Science*, 1974, 359-365; Huan X *et al*, 'Understanding the LIBOR Scandal', 5.

<sup>113</sup> Huan X *et al*, 'Understanding the LIBOR Scandal', 5.

financial sector that characterised the pre-GFC era and set the stage for the LIBOR scandal.

The criticism of the public interest approach to regulation in the 1960s-70s triggered deregulation efforts in the global financial markets.<sup>114</sup> In the US, between 1933 -1999 the Glass-Steagall Act ensured a separation of banking activities.<sup>115</sup> Commercial banks were prohibited from taking part in high-risk activities like underwriting or trading securities.<sup>116</sup> Investment banks on the other hand could not take part in banking business such as receiving or investing deposits.<sup>117</sup> However, market players argued that these prohibitions only served to make US banks less competitive.<sup>118</sup> This eventually led to the repeal of the Glass-Steagall Act and the enactment of legislation that was more market-friendly allowing banks to participate in high-risk activities.<sup>119</sup> In the UK, deregulation was driven by what is now referred to as the “Big Bang”.<sup>120</sup> The Financial Services Act, 1986 championed self-regulation and encouraged the risk appetite of retail banks.<sup>121</sup> It was during this season in UK financial regulation that the BBA, a private independent body, was charged with oversight of LIBOR publications.<sup>122</sup>

Bank activities have always driven the narrative on financial regulation, rules are re-written regularly post-crisis whereby each crisis is often preceded by a de-regulation period.<sup>123</sup> With LIBOR it was no different. The GFC and the LIBOR scandal among other revelations of misconduct in the banking and financial sector at the time illuminate an established and persistent culture skewed to promote rather than curtail institutional corruption.<sup>124</sup> The manipulation of LIBOR and the self-preservation attempts of senior management and board executives signal cultural rot in the market due to the casual business-as-usual attitude.<sup>125</sup> This study opines that deregulation

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<sup>114</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 4.

<sup>115</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15.

<sup>116</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15.

<sup>117</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15.

<sup>118</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15.

<sup>119</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 15.

<sup>120</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 17.

<sup>121</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 17.

<sup>122</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 17.

<sup>123</sup> Huan X *et al*, ‘Understanding the LIBOR Scandal’ 18.

<sup>124</sup> Miller S, ‘The Global Banking Sector: Corruption, Institutional Purpose, and Economic Justice’ 37(1), *Business and Professional Ethics Journal*, 2018, 13.

<sup>125</sup> Fabrizi M *et al*, ‘When LIBOR Becomes LIEBOR’, 159.

brought about by the private-interest approach allowed for the degradation of corporate governance structures as there were no checks and balances against conflicts of interest or unfair market practices. It is for this reason that the study relies on the public-interest approach which, though criticised as restrictive, evidently preserves market stability and reputation.

## **1.9 Literature Review**

### **1.9.1 Corporate governance and its role in risk mitigation**

Redondo and Bilbao<sup>126</sup> explore the concept of good corporate governance and how it is measured. Their study acknowledges that theoretically what constitutes good corporate governance has been viewed through a theoretical lens with the agency theory being the most mainstream methodology used to assess its quality.<sup>127</sup> Although the study by Redondo and Bilbao<sup>128</sup> highlights the important role of corporate governance and how it can be made more effective by adopting a behavioural approach vis-a-vis an agency theory approach, their evaluation is general. Gouiaa<sup>129</sup> provides a more specific evaluation of the role corporate governance plays in risk management. Whereas Redondo and Bilbao<sup>130</sup> assess from the perspective of theories of corporate governance, Gouiaa's study<sup>131</sup> analyses publicly listed companies to establish how attributes like board characteristics, structures and operating procedures influence the quality and efficiency of adopted risk management strategies on financial risks.

Although Gouiaa's specificity is appreciated with respect to this proposed study, a more tailored evaluation is required, particularly on risk management in the banking sector. Kafidipe, Uwalomwa, Dahunsi and Okeme<sup>132</sup> in their study on the financial

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<sup>126</sup> Redondo A and Bilbao P, 'The Substance of Good Corporate Governance: An Interpretive Analysis of Corporate Governance Quality and Its Metrics' 126 (3) *Rivista Internazionale di Scienze Sociali*, 2018, 283.

<sup>127</sup> Redondo A and Bilbao P, 'The Substance of Good Corporate Governance', 284.

<sup>128</sup> Redondo A and Bilbao P, 'The Substance of Good Corporate Governance', 283.

<sup>129</sup> Gouiaa R, 'Analysis of the Effect of Corporate Governance Attributes on Risk Management Practices' 8(1), *Risk Governance and Control: Financial Markets and Institutions*, 2018, 14.

<sup>130</sup> Redondo A and Bilbao P, 'The Substance of Good Corporate Governance', 283.

<sup>131</sup> Gouiaa R, 'Analysis of the Effect of Corporate Governance Attributes on Risk Management Practices' 14.

<sup>132</sup> Kafidipe A, Uwaloma U, Dahunsi O and Ojone FO, 'Corporate Governance, Risk Management and Financial Performance of Listed Deposit Money Bank in Nigeria' 8(1), *Cogent Business & Management*, 2021, 1.

performance of listed deposit money banks in Nigeria illuminate that sound corporate governance systems are essential for managing risk and in correlation boosting financial performance. Permatasari<sup>133</sup> provides a similar examination but with a focus on Indonesian banks. In their study, Permatasari introduces market risk, credit risk, liquidity risk and operation risk as the measures of risk management. Their study assesses how the implementation of corporate governance practices affects the four risk areas among banks with varying corporate governance ratings in Indonesia.<sup>134</sup> However, although this study is essential in illuminating how good corporate governance practices influence various risk areas thus influencing risk mitigation, it is limited to institutions with existing published corporate governance ratings.

Corporate governance within the context of banking is special in various aspects, some of these include, the intricacy and complexity of their activities and structures which are largely influenced by the non-transparency of their business activities, their significance in the economy, the unique level of trust required and the associated risks and their implications.<sup>135</sup> Hopt,<sup>136</sup> on the backdrop of the financial crisis and several scandals, explores the uniqueness of corporate governance in the banking sector and provides insight into the regulatory and other issues that arise in addressing the corporate governance of banks. Hopt believes that enforcement; internal and external, is essential to guaranteeing good corporate governance and mitigating risk in banks.<sup>137</sup>

### **1.9.2 Corporate governance and the LIBOR-EURIBOR scandal**

From a general perspective, research shows, as illuminated by Miller,<sup>138</sup> that financial scandals and crises such as the Global Financial Crisis are largely caused by unethical, corrupt and ill-considered practices. These characteristics are tied to poor corporate governance practices and monitoring controls. Financial benchmark rigging like LIBOR and EURIBOR, fraud and false accounting allegations, money laundering

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<sup>133</sup> Permatasari I, 'Does Corporate Governance Affect Bank Risk Management? Case Study of Indonesian Banks' 4(2), *International Trade, Politics and Development*, 2020, 127.

<sup>134</sup> Permatasari I, 'Does Corporate Governance Affect Bank Risk Management?', 127

<sup>135</sup> Hopt KJ, 'Corporate Governance of Banks and Financial Institutions: Economic Theory, Supervisory Practice, Evidence and Policy' 22 *European Business Organization Law Review*, 2021, 13.

<sup>136</sup> Hopt KJ, 'Corporate Governance of Banks and Financial Institutions' 13.

<sup>137</sup> Hopt KJ, 'Corporate Governance of Banks and Financial Institutions' 13.

<sup>138</sup> Miller S, 'The Global Banking Sector' 13.

and tax evasion involvement of banks among others are all indicative of a banking culture, ingrained in governance structures, that caters to rather than combats corruption within banking institutions.<sup>139</sup>

Ehrenhard and Fiorito<sup>140</sup> studied 25 of the largest European banks and noted that of the 25 at least 15 had been involved in one or more scandals. Significantly noted is the fact that, although all the 25 banks, including the 15 involved in scandals, listed various values such as integrity, professionalism, fairness and transparency as their core corporate values, this did not deter them from engaging in unethical practices.<sup>141</sup> Short-term value creation such as profit-making and customer satisfaction often outweighed the aforementioned corporate values and corroded ethical banking practices.<sup>142</sup> Aldohni's<sup>143</sup> study in the UK financial market illuminates that the global financial crisis and scandals like LIBOR are a result of a contaminated business culture whose corporate values have been eroded and systemic malpractices normalised. This is largely driven by having profit as an ultimate objective as opposed to a by-product of business.<sup>144</sup>

By shifting the objective from profit generation to the creation of social, environmental and cultural values grounded on moderation, human dignity and the common good, financial institutions could reset the existing culture. This shift can only be established by a change in the existing corporate governance structures. Sound ethical banking is required to ensure the corporate governance pitfalls that facilitated LIBOR and other financial scandals are mitigated and eradicated. However, due to the voluntary nature of banking ethics, ethical and sound finance is based on the combined efforts of banks themselves, the market, the regulators and a functional and supportive legal framework. The long-applied corporate governance approach to regulatory rule enforcement which is considered a top-down approach has significantly failed in preventing and even detecting financial market abuse and manipulation as evidenced by the LIBOR scandal.<sup>145</sup> A bottom-up approach, premised on an interest in the

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<sup>139</sup> Miller S, 'The Global Banking Sector' 13.

<sup>140</sup> Ehrenhard ML and Fiorito TL, 'Corporate Values of the 25 Largest European Banks: Exploring the Ambiguous Link with Corporate Scandals' 18(e1700), *Journal of Public Affairs*, 2018, 1.

<sup>141</sup> Ehrenhard ML and Fiorito TL, 'Corporate Values of the 25 Largest European Banks' 1.

<sup>142</sup> Ehrenhard ML and Fiorito TL, 'Corporate Values of the 25 Largest European Banks' 1.

<sup>143</sup> Aldohni AK, 'Is Ethical Finance the Answer to the Ills of the UK Financial Market?', 265.

<sup>144</sup> Aldohni AK, 'Is Ethical Finance the Answer to the Ills of the UK Financial Market?', 265.

<sup>145</sup> Batten JA, *et al*, 'Financial Market Manipulation, Whistleblowing, and the Common Good', 1.

common good as opposed to merely profit generation may be more effective in the long-term.<sup>146</sup>

### **1.9.3 Corporate governance in the post-LIBOR application of RFRs**

Research shows that the transition from LIBOR to RFRs was a complex market-led collaborative effort of various players from the private sector to regulators.<sup>147</sup> There is a significant difference between LIBOR and the proposed RFRs which raises genuine transitory concerns. The structures and systems in place in banks and financial institutions across the world will determine the success of the transition.

#### *1.9.3.1 Application of RFRs in the US*

The Alternative Reference Rate Committee (ARRC) in 2017 announced the strategy to shift derivatives trading in USD LIBOR-referenced instruments to an alternative rate.<sup>148</sup> The proposed rate was the Broad Treasuries Financing or 'repo' Rate (BTFR) which has now been renamed SOFR.<sup>149</sup> From a corporate governance perspective, this rate is proposed over LIBOR as firstly it is under the control of the Federal Reserve Board (Fed).<sup>150</sup> Secondly, unlike LIBOR which was based on self-report rates, SOFR is informed by transactional-based interest rates and therefore less likely to be manipulated.<sup>151</sup>

The ARRC was convened to guide the transition away from USD LIBOR in the US. In exercise of its mandate, the body has published various reports<sup>152</sup> and guidelines to support this transition which also includes guides on fallback language<sup>153</sup>. In 2020 it published proposed legislation to guide the LIBOR transition, particularly on fallback language for legacy contracts.<sup>154</sup> Among the main legal and governance concerns in

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<sup>146</sup> Batten JA, *et al*, 'Financial Market Manipulation, Whistleblowing, and the Common Good', 1.

<sup>147</sup> Alternative Reference Rates Committee, 'Transition from LIBOR' Federal Reserve Bank of New York, February 2024—<<https://www.newyorkfed.org/arrc/sofr-transition>> on 19 October 2024.

<sup>148</sup> Tokic D, 'Replacing LIBOR: Is BTFR the Right Choice?' 29 (1), *Journal of Corporate Accounting & Finance*, 2018, 145.

<sup>149</sup> Tokic D, 'Replacing LIBOR' 145.

<sup>150</sup> Tokic D, 'Replacing LIBOR' 147.

<sup>151</sup> Tokic D, 'Replacing LIBOR' 147.

<sup>152</sup> Alternative Reference Rates Committee, *Interim Report and Consultation*, May 2016; Alternative Reference Rates Committee, *Second Report*, March 2018.

<sup>153</sup> Alternative Reference Rates Committee, *ARRC Recommendations Regarding More Robust Fallback Language for New Originations of Libor Syndicated Loans*, 30 June 2020.

<sup>154</sup> Alternative Reference Rates Committee, *Progress Report: The Transition from U.S Dollar LIBOR*, 17 December 2021.

the transition of LIBOR in the US is the transition of legacy contracts. These have created potential gaps, conflicts and flaws which may require legislative intervention to strengthen the existing legal and institutional frameworks which have been largely voluntary.<sup>155</sup> Additionally, there are conversations about the use of the new RFRs as crisis management tools in the event of another financial crisis.<sup>156</sup> However, there are concerns that, whereas LIBOR “overreacted” during the last financial crisis, SOFR could understate or under-price the risk.<sup>157</sup> This concerning characteristic breeds room for speculation, asset price bubbles and limits the incentive to guard against risk.<sup>158</sup>

### 1.9.3.2 Application of RFRs in the UK

As with the US LIBOR, the GBP LIBOR has also adopted a new overnight rate termed as Sterling Overnight Index Average (SONIA).<sup>159</sup> SONIA was established in 1997 and has from 2016 been published and administered by the Bank of England.<sup>160</sup> It was proposed as the replacement for sterling LIBOR in 2017 by the Working Group on Sterling Risk-Free Reference Rates.<sup>161</sup>

Like SOFR, industry experts and scholars have raised some concerns as regards the transition. In addition to the issue of fall-back provisions and legacy contracts, Virji, Merali and Marshall<sup>162</sup> are also concerned that the value of previously LIBOR-based contracts could change. SONIA rates are usually lower than LIBOR and as such, there is expected to be a difference in value on transition.<sup>163</sup> Although the FCA has expressly stated that the transition should not be an avenue to change continuing contracts to higher rates, the new pricing under SONIA is still a matter of individual negotiation between banks and their customers.<sup>164</sup> This poses a risk concern particularly because

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<sup>155</sup> McMurray LR and Saxton L, ‘USD LIBOR Succession Legislation at Home and Abroad’, 36 *Butterworths Journal of International Banking and Financial Law*, 2021, 559.

<sup>156</sup> Tokic D, ‘Replacing LIBOR’ 149.

<sup>157</sup> Tokic D, ‘Replacing LIBOR’ 149

<sup>158</sup> Tokic D, ‘Replacing LIBOR’ 149.

<sup>159</sup> Virji H *et al*, ‘Facing the End of LIBOR’, 715.

<sup>160</sup> Rennie T, Phelan D and Ashurst LLP, ‘LIBOR Discontinuation in the Loan Markets: Is Compounding SONIA the Answer?’ 34(9), *Journal of International Banking and Financial Law*, 2019, 596.

<sup>161</sup> Rennie T *et al*, ‘LIBOR Discontinuation in the Loan Markets’, 597.

<sup>162</sup> Virji H, *et al*, ‘Facing the End of LIBOR’, 715.

<sup>163</sup> Sinclair P, ‘Are Banks Obligated to Disclose Credit Adjustment Spreads to SONIA?’, 36 (5), *Journal of International Banking and Financial Law*, 2021, 329-330.

<sup>164</sup> Sinclair P, ‘Are Banks Obligated to Disclose Credit Adjustment Spreads to SONIA?’, 329.

the proposed calculation model to cater for the conversion difference is a Credit Adjustment Spread that banks are not obligated to disclose.<sup>165</sup>

Another concern is that there may be frustration and termination of LIBOR-based contracts where parties fail to successfully renegotiate legacy contracts from LIBOR.<sup>166</sup> Additionally, there will be a need for a reassessment of the efficacy of interest rate hedges as well as an evaluation and confirmation of the application of hedge accounting.<sup>167</sup> The significant disparities between LIBOR and SONIA as its replacement, and any other alternative reference rate replacement, creates risk management, accounting, legal<sup>168</sup> and governance issues which must be considered and mitigated within a minimal timeframe.<sup>169</sup> The task of replacing LIBOR and transitioning to SONIA has been placed on banks. Transitioning to SONIA will require them to not only amend existing financial documentation, for example for loans, but also restructure their internal systems to ensure a smooth transition to SONIA amidst the emerging risks and uncertainties.<sup>170</sup>

#### **1.9.4 Risks associated with the LIBOR transition**

Since the conversation on reform began in 2012, scholars have expressed that finding a suitable replacement for LIBOR would be difficult with some like Tabb and Grundfest terming it as a “fool’s errand”.<sup>171</sup> However, as illuminated in most of the reviewed literature above, legacy contracts pose the greatest risk concerning the transition,<sup>172</sup> particularly from a corporate governance point of view. Arising from these contracts and the overall transition, there are five core transitional risk areas this study has identified to evaluate: conduct risk, legal risk, regulatory risk, operational risk and systemic risk.

Conduct risk arises from the actions or inactions of individuals and organisations in the renegotiation of contracts and general project management to ensure all

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<sup>165</sup> Sinclair, ‘Are Banks Obligated to Disclose Credit Adjustment Spreads to SONIA?’, 330.

<sup>166</sup> Virji H *et al*, ‘Facing the End of LIBOR’, 715.

<sup>167</sup> Virji H *et al*, ‘Facing the End of LIBOR’, 715.; Moseley B, Malhotra M and Marshall G, ‘IBOR Transition: Are You Ready?’, May, *Tax Journal*, 2021, 15.

<sup>168</sup> Financial Markets Law Committee (FMLC), *LIBOR Transition: Issues of Legal Uncertainty*, October 2020, 6.

<sup>169</sup> Virji H *et al*, ‘Facing the End of LIBOR’, 715.

<sup>170</sup> Rennie T *et al*, ‘LIBOR Discontinuation in the Loan Markets’, 597.

<sup>171</sup> Tabb R and Grundfest J, ‘Alternatives to LIBOR’, 8(3), *Capital Markets Law Journal*, 2013, 229.

<sup>172</sup> McMurray LR and Saxton L, ‘USD LIBOR Succession Legislation at Home and Abroad’ 559.

transitional aspects are taken into consideration.<sup>173</sup> Legal risks, on the other hand, arise from contractual documentation, repapering, fallback language and contract frustrations arising therefrom.<sup>174</sup> Litigation risks may also arise from the adoption and application of “synthetic LIBOR” or other replacement rates through the transition that may trigger contract frustration.<sup>175</sup> The UK and US, prior to the kick-off of the transition, proposed regulation and regulatory amendments to address tough legacy contracts and facilitate the LIBOR transition.<sup>176</sup> The application of these regulations and the question on the role of the law in the transition also pose regulatory risks. Additionally, the development and implementation of LIBOR-based contracts relied on systems and technologies which have had to be adjusted or possibly overhauled to adopt the new reference rates posing operational risks for administrators.<sup>177</sup> Finally, as indicated, the transition is a major regulatory shift and if not properly administered poses systemic risk that will manifest in financial instability thus failing at the core objective of the transition.<sup>178</sup>

Evidently, there is a gap in literature on corporate governance practices and principles in the context of LIBOR or RFR management. The focus in literature lies in the general processes of institutional management. Additionally, the literature available in the Kenyan context does not satisfy the query about the adequacy and efficacy of the current framework. The study aims to evaluate whether the principles and practices of the current corporate framework are sufficient and further whether they were effective in transition management from LIBOR to RFRs. It will, hopefully, fill a gap in literature on principles and practices of corporate governance within the Kenyan and RFR context as well as in managing significant regulatory reform.

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<sup>173</sup> Volkert C and Wilbert D, ‘What Legal Teams Need to Know about the LIBOR Transition’.; Jones-Fenleigh H, Gray K and McDonnell R, ‘LIBOR Transition: Managing Customer Relations’ 36(3), *Journal of International Banking and Financial Law*, 2021, 181.

<sup>174</sup> Jones-Fenleigh *et al*, ‘LIBOR Transition’ 181-182.

<sup>175</sup> FMLC, *LIBOR Transition*, 6.; Neal A and Crowley S, ‘LIBOR Transition, Litigation Risk and the New Critical Benchmarks Bill’ Stephenson Harwood Legal, 11 November 2021— <[https://www.shlegal.com/docs/default-source/news-insights-documents/2022/finance-litigation-podcasts-series-2021---episode-4---libor-transition-risk-and-the-new-critical-benchmark-bill.pdf?sfvrsn=b5f9e65b\\_0](https://www.shlegal.com/docs/default-source/news-insights-documents/2022/finance-litigation-podcasts-series-2021---episode-4---libor-transition-risk-and-the-new-critical-benchmark-bill.pdf?sfvrsn=b5f9e65b_0)> on 2 February 2024.

<sup>176</sup> McKendrick J Qc, Stewart J and Bell C, ‘The UK’s Announcement of Plans for Synthetic LIBOR: Panacea or Pandora’s Box?’ 35(8), *Journal of International Banking and Financial Law*, 2020, 517.

<sup>177</sup> Hardy J, York I and Cuillerier I, ‘RFR Term Rates in a Post-LIBOR Landscape’ 36(7), *Journal of International Banking and Financial Law*, 2021, 473.

<sup>178</sup> Siboulet F, Kumar R, Douady R and Crepey S, ‘LIBOR Inside Out: Transition and Challenges’ 2019 (100), *Wilmott*, 2019, 12-29.

## 1.10 Research Methodology

This study is a doctrinal legal research that relied on primary and secondary sources of data.<sup>179</sup> It involved the collection and analysis of legal instruments, codes and case law as primary sources as well as refereed journal articles, books and other context-specific commentaries on laws or regulations as secondary sources.<sup>180</sup>

The study also looked into corporate governance frameworks and their application in the transition in the UK and the US. The purpose of this was to anchor them as best practice jurisdictions and identify lessons for Kenya to borrow. The choice of these two countries was based on the significant role they played globally in the transition which was largely influenced by their substantial LIBOR exposure.<sup>181</sup> While both the US and UK collaboratively championed the shift from the decades-old benchmark, they notably adopted significantly different approaches. The study hypothesises that these approaches are informed by the different corporate governance models adopted in both jurisdictions as highlighted in chapter two.

In the US, the transition was market led, under the direction of the ARRC supported by legislative actions to address gaps and resolve identified transition risks.<sup>182</sup> Additionally, for contracts without fallback clauses, the US imposed the mandatory adoption of SOFR via the LIBOR Act.<sup>183</sup> In the UK on the other hand, the approach was regulator-led under the direction of the FCA.<sup>184</sup> The FCA directly intervened to ensure the successful phasing out of LIBOR, requiring reports and engaging financial institutions.<sup>185</sup> It encouraged voluntary transition while allowing for synthetic LIBOR to

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<sup>179</sup> Lammasniemi L, *Law Dissertations: A Step-by-Step Guide*, 2<sup>nd</sup> ed, Routledge, 2022, 66.

<sup>180</sup> Lammasniemi L, *Law Dissertations: A Step-by-Step Guide*, 66.

<sup>181</sup> FSB, *Reforming Major Interest Rate Benchmarks*, 6; Held M, 'SOFR and the Transition from LIBOR', Federal Reserve Bank of New York, 26 February 2019—<https://www.newyorkfed.org/newsevents/speeches/2019/hel190226> on 21 November 2022.

<sup>182</sup> Alternative Reference Rates Committee, 'Transition from LIBOR' Federal Reserve Bank of New York'.

<sup>183</sup> Board of Governors of the Federal Reserve System, 'Press Release: Federal Reserve Board adopts final rule that implements Adjustable Interest Rate (LIBOR) Act by identifying benchmark rates based on SOFR (Secured overnight Financing rate) that will replace LIBOR in certain financial contracts after June 30, 2023' Board of Governors of the Federal Reserve System, 16 December 2022 - <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20221216a.htm> on 10 April 2025.

<sup>184</sup> Financial Conduct Authority, 'Announcements on the End of LIBOR'

<sup>185</sup> FCA, 'About LIBOR Transition', Financial Conduct Authority, 9 January 2023—<https://www.fca.org.uk/markets/libor-transition> on 19 February 2024.

apply for a limited period of time to support legacy contract transition.<sup>186</sup> While the US is an unusual comparator when assessing corporate governance in Kenya, the study acknowledges, in addition to the aforementioned reasons, as an assessment on the hard-law application to corporate governance within the context of major industry change.

### **1.11 Chapter Breakdown**

The study is categorised into five chapters. Chapter One is introductory. It provides a background to the study and the research problem. It also highlights the research objectives, questions and hypothesis as well as the methodology the research has adopted and a review of the supporting literature.

In Chapter Two, the researcher addresses the first research question to establish the elements of a good corporate governance framework. Anchoring corporate governance as a risk mitigation tool, the chapter evaluates generally established corporate governance models, principles and practices.

Chapter Three explores the Kenya corporate governance landscape. The aim is to evaluate the legal, regulatory and institutional frameworks of corporate governance in Kenya's financial sector. This evaluation brings out the adequacy of the laws and institutions that played a role in the transition from LIBOR to RFRs.

Chapter Four analyses how the UK and the US relied on lessons from the LIBOR scandal to navigate the transition to RFRs. It explores their legal, regulatory and institutional corporate governance frameworks and the role they played in navigating the transition-related risks to identify best practices.

Chapter Five provides a summary of the findings and conclusions from the previous chapters against the research questions and hypothesis. It draws from these conclusions to provide recommendations to improve industry practice in Kenya's financial sector.

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<sup>186</sup> Bank of England, 'The End of LIBOR'; McKendrick J Qc, *et al*, 'The UK's Announcement of Plans for Synthetic LIBOR', 517.

## Chapter 2 : The Role of Corporate Governance in Navigating the Transition from LIBOR to RFRs

### 2.1 Introduction

This chapter evaluates the principles of corporate governance as well as the models adopted by various jurisdictions in the context of financial regulatory change with a spotlight on the LIBOR transition. The aim is to provide a measure for evaluating Kenya's approach to corporate governance framework in the financial sector to assess its effectiveness during the transition from LIBOR to RFRs.

### 2.2 Corporate Governance in Risk Mitigation

Corporate governance is “the institutional authority and administration of a firm, encompassing the distribution of privileges and duties between different players such as a board of executives, directors, investors and other stakeholders. This involves the processes and laws that regulate making decisions within the firm”.<sup>187</sup> It is not an isolated function of bank administrators — employees, clients, vendors, banks, regulators and the public as a whole all play a role. It is a system and a concept that ensures effective communication between directors, management, shareholders and other stakeholders to guarantee integrity in the industry and secure the interests of all players.<sup>188</sup>

Financial institutions, like all other companies, are exposed to risk: financial, environmental or operational.<sup>189</sup> Risk management, generally, involves assessing, quantifying and monitoring the risk profile and consequently identifying and implementing risk mitigation measures.<sup>190</sup> Directors and senior management as key players in the corporate governance framework play a significant role in risk management. While directors establish risk management strategies, operational policies and appoint management, senior or executive managers are responsible for

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<sup>187</sup> Wali K, van Paridon K and Bnar Karim Darwish, 'Strengthening Banking Sector Governance: Challenges and Solutions', 9(95), *Future Business Journal*, 2023,1.

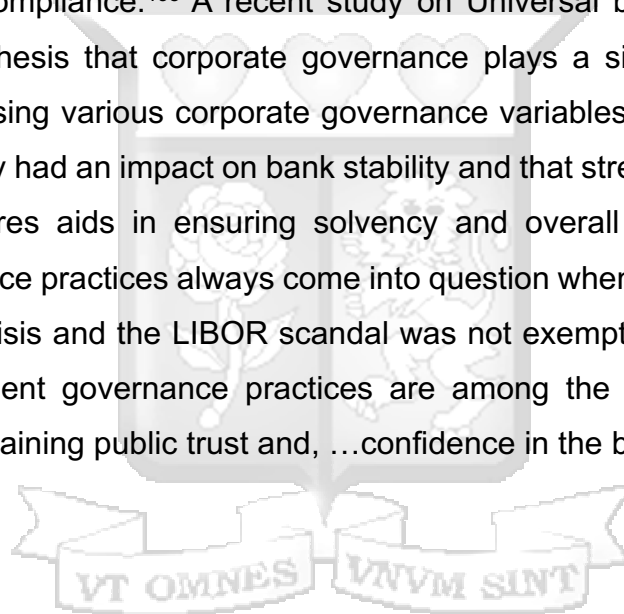
<sup>188</sup> Wali K *et al*, 'Strengthening Banking Sector Governance,' 1.

<sup>189</sup> van Greuning H and Bratanovic SB, *Analyzing Banking Risk: A Framework for Assessing Corporate Governance and Risk Management*, 4<sup>th</sup> ed, World Bank Group, 2020,3.

<sup>190</sup> van Greuning H and Bratanovic SB, *Analyzing Banking Risk*, 6.

the day-to-day operations and implementation of said strategies and should be guided by their expertise to act ethically and responsibly while performing these functions.<sup>191</sup>

As illuminated in the literature review, corporate governance plays a significant role in risk mitigation, particularly in the banking sector<sup>192</sup>. This is seen as the case in both Nigeria and Indonesia where scholars illustrated that incorporating good corporate governance systems not only assured stability for the evaluated organisations but also boosted their performance.<sup>193</sup> Using the resource-based view, Josephine and Joseph in their review of the Malaysian banking sector were also able to illustrate that corporate governance plays a significant role in bank performance and industry stability.<sup>194</sup> This is because it ensures the incorporation of regulatory monitoring mechanisms and compliance.<sup>195</sup> A recent study on Universal banks in Ghana also contributes to the thesis that corporate governance plays a significant role in risk mitigation.<sup>196</sup> Assessing various corporate governance variables, the study was able to establish that they had an impact on bank stability and that strengthening corporate governance structures aids in ensuring solvency and overall financial stability.<sup>197</sup> Corporate governance practices always come into question when the finance industry is plagued with a crisis and the LIBOR scandal was not exempt from this. Evidently, “effective, independent governance practices are among the key prerequisites to achieving and maintaining public trust and, ...confidence in the banking system”.<sup>198</sup>



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<sup>191</sup> van Greuning H and Bratanovic SB, *Analyzing Banking Risk*, 5.

<sup>192</sup> Kafidipe *et al*, 'Corporate Governance, Risk Management and Financial Performance of Listed Deposit Money Bank in Nigeria' 3.

<sup>193</sup> Kafidipe *et al*, 'Corporate Governance, Risk Management and Financial Performance of Listed Deposit Money Bank in Nigeria'7.; Permatasari I, 'Does Corporate Governance Affect Bank Risk Management?', 127.

<sup>194</sup> Josephine BJ and Joseph C, 'Corporate Governance Mechanisms and Bank Performance: Resource-Based View' 31 *Procedia Economics and Finance*, 2015, 117.

<sup>195</sup> Josephine BJ and Joseph C, 'Corporate Governance Mechanisms and Bank Performance' 122.

<sup>196</sup> Li K, Kong Y, Atuahene SA, Bentum-Micah G, and Agyapong MK, 'Corporate Governance and Banking Stability: The Case of Universal Banks in Ghana', VIII(I), *International Journal of Economics and Business Administration*, 2020, 325.

<sup>197</sup> Li K *et al*, 'Corporate Governance and Banking Stability: The Case of Universal Banks in Ghana' 325.

<sup>198</sup> van Greuning H and Bratanovic SB, *Analyzing Banking Risk*, 19.

## 2.3 Principles of Corporate Governance

Corporate governance, as a framework for directing and controlling companies, requires the intricate balance of a variety of stakeholder interests.<sup>199</sup> Across various jurisdictions, corporate governance principles are sourced from laws, regulations, ethical standards, guidelines published by regulatory authorities and industry best practices. However, despite this difference in sources and systems, the core principles of good corporate governance remain.<sup>200</sup>

In 1998, the OECD Business Sector Advisory Group on Corporate Governance chaired by Ira Millstein developed a report titled “Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets”.<sup>201</sup> This report, commonly referred to as the Millstein Report, outlined four essential principles of corporate governance that have informed the discourse to date. These four principles are transparency, accountability, responsibility and fairness.<sup>202</sup> As further illustrated below, transparency is concerned with disclosure, accountability with clarity, responsibility with professionalism and fairness with equal treatment of all stakeholders.<sup>203</sup>

The OECD adopted and revised the Millstein principles severally from 1999 to 2023.<sup>204</sup> The principles are a non-binding guide for policymakers to aid in evaluating and improving their corporate governance legal, regulatory and institutional framework.<sup>205</sup> Whereas the Millstein Report suggested four principles, the current OECD corporate governance principles are established into six core principles each with its sub-principles.<sup>206</sup> The six principles are: I. Ensuring the basis for an effective corporate governance framework; II. The rights and equitable treatment of shareholders and key ownership functions; III. Institutional investors, stock markets and other intermediaries;

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<sup>199</sup> James S, *The Art of Governance: Principles and Practices of Corporate Governance*, Independently Published, 2023, 24.

<sup>200</sup> James S, *The Art of Governance*, 24.

<sup>201</sup> Thomas Clarke, *International Corporate Governance*, 3rd ed, Taylor & Francis, 2024.

<sup>202</sup> Sankaran S, ‘Governance of Organizational Project Management’ in Müller R, Sankaran S and Drouin N (eds), *Research handbook on the governance of projects*, Edward Elgar Publishing, Cheltenham, 2023, 331.

<sup>203</sup> Müller R, Drouin N and Sankaran S, *Organizational Project Management: Theory and Implementation*, Edward Elgar Publishing, Cheltenham, 2019.

<sup>204</sup> Clarke T, *International Corporate Governance*.

<sup>205</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, OECD/LEGAL/0413, 2024, 3.

<sup>206</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3-4.

IV. Disclosure and transparency; V. The responsibilities of the board; and VI. Sustainability and resilience.<sup>207</sup>

The current OECD principles are a product of extensive review conducted between 2021-2023.<sup>208</sup> They are titled the *G20/OECD Principles of Corporate Governance* and are described as the international standard in corporate governance policy and framework development.<sup>209</sup> The Principles are essential as they provide guidance to assess and improve existing legal, regulatory and institutional corporate governance frameworks.<sup>210</sup> The overarching objective of these principles is “supporting market confidence and integrity, economic efficiency, sustainable growth and financial stability”.<sup>211</sup> It is important to note that the OECD principles inform the Financial Stability Board’s Key Standards for Sound Financial Systems as well as the World Bank Reports on the Observance of Standards and Codes (ROSC).<sup>212</sup> Well-designed, formal corporate governance structures firstly, promote transparency and accountability of company leadership.<sup>213</sup> Secondly, they contribute to the effective acknowledgement and protection of stakeholder interests and thirdly, facilitate the long-term success of the company which translates into economic growth and stability.<sup>214</sup>

The four Millstein principles are still reflected in the current publication of OECD principles. While this study assesses Kenya’s framework under the titling of the Millstein principles the focus is on the principles of transparency, accountability and responsibility. This study deems these three the most relevant for evaluating and establishing an effective corporate governance framework for the successful transition from LIBOR. In addition to these three general principles, the study also relies on current G20/OECD sub-principles specific to the corporate governance infrastructure. In this research, infrastructure refers to the legal, regulatory, institutional, supervisory and enforcement systems for corporate governance practices.

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<sup>207</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3-4.

<sup>208</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3.

<sup>209</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3.

<sup>210</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3.

<sup>211</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3.

<sup>212</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 4.

<sup>213</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3.

<sup>214</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3.

## **2.3.1 The Millstein Principles**

### **2.3.1.1 Transparency**

Transparency is a significant concept in corporate governance discourse; policymakers and academics alike believe it to be crucial in the establishment and sustainability of trust in capital markets.<sup>215</sup> It is a critical pillar in how businesses operate and the lack of transparency has been credited as a key contributor to accounting and corporate scandals across the globe.<sup>216</sup> The LIBOR scandal is in itself a testament to what can happen when financial Institutions fail to be transparent.<sup>217</sup> Studies also show that increased transparency and disclosure leads to improved auditing and compliance and additionally greater risk management thus positively affecting the performance of financial institutions.<sup>218</sup> As posited by the stewardship theory, directors serve as stewards of the corporation<sup>219</sup> and in this regard, they are required to act transparently as they undertake their functions.<sup>220</sup> With regard to the transition, financial institutions were required from the onset to be transparent and make proper disclosures in identifying, assessing as well as mitigating LIBOR exposure to both clients and regulators.

### **2.3.1.2 Accountability**

Accountability is an essential characteristic of corporate governance. The principle of accountability entails having the board of directors effectively oversee management's functions.<sup>221</sup> It also entails ensuring the board is accountable to the company's shareholders;<sup>222</sup> both the board and management are willing and accept responsibility for their actions regarding the organisation's activities and performance. Whereas, by narrow definition, accountability is seen only as a responsibility to shareholders,

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<sup>215</sup> Janning F, Khlif W and Ingle C, *The Illusion of Transparency in Corporate Governance: Does Transparency Help or Hinder True Ethical Conduct?* Palgrave Macmillan, Cham, 2020.

<sup>216</sup> Cahaya FR and Yoga G, 'Corporate Governance and Voluntary Disclosures: A Story about Corporate Transparency from Indonesia,' 13(3), *International Journal of Monetary Economics and Finance*, 2020, 269.

<sup>217</sup> Luberisse J, *From Calamity to Stability: Harnessing the Wisdom of Past Financial Crises to Build a Stable and Resilient Global Financial System*, Fortis Novum Mundum, 2023.

<sup>218</sup> Oino I, 'Do Disclosure and Transparency Affect Bank's Financial Performance' 19(6) *Corporate Governance*, 2019, 1344.

<sup>219</sup> Tricker B, *The Evolution of Corporate Governance*, 43.

<sup>220</sup> Oino I, 'Do Disclosure and Transparency Affect Bank's Financial Performance' 1354.

<sup>221</sup> Clarke T, *International Corporate Governance*.

<sup>222</sup> Clarke T, *International Corporate Governance*.

Solomon<sup>223</sup> argues that shareholder interests can only be fulfilled if the board and management consider the interests of all stakeholders and therefore accountability should be considered and applied in a broader sense.<sup>224</sup> In their definition, they perceive corporate governance as “...*the system of checks and balances, both internal and external to companies, which ensures that companies discharge their accountability to all their stakeholders.*”<sup>225</sup>

In the context of the LIBOR transition, accountability is essential as directors are required to ensure management undertakes the necessary measures towards a successful transition while also ensuring all relevant interests are protected. Accountability also requires that both directors and management are professionally competent to guide the transition; this calls for an informed allocation and management of resources to guarantee success.

### 2.3.1.3 Responsibility

Responsibility in corporate governance is characterised by an adherence to laws and regulations and an appreciation and acknowledgement of the rights of stakeholders as established therein.<sup>226</sup> This principle further expects that as they carry out their responsibilities to the company and its stakeholders, professionals act professionally; in a manner that meets the standards of their respective roles.<sup>227</sup> In the context of the LIBOR scandal and the subsequent transition, responsibility plays a key role as it is the foundation for ensuring compliance with laws, regulations and industry expectations, ethical conduct and also guaranteeing transparency and accountability to stakeholders. With the board and management given charge over the transition both in Kenya and the globe, it has been and continues to be their responsibility to ensure success as the world adopts RFRs as the new reference rates.

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<sup>223</sup> Solomon J, *Corporate Governance and Accountability*, 5<sup>th</sup> ed, John Wiley & Sons, West Sussex, 2020, 6.

<sup>224</sup> Solomon J, *Corporate Governance and Accountability*, 6.

<sup>225</sup> Solomon J, *Corporate Governance and Accountability*, 6.

<sup>226</sup> OECD, *OECD Principles of Corporate Governance 2004*, 2004.

<sup>227</sup> Sankaran S, 'Governance of Organizational Project Management' 331.

### **2.3.2 The G20/OECD Principles on Corporate Governance Infrastructure**

The OECD Principles provide that, effective corporate governance is required to facilitate contractual transactions in the market.<sup>228</sup> The guarantee for effective corporate governance is characterised by sound legal, regulatory and institutional frameworks.<sup>229</sup> This study's focus on corporate governance infrastructure is guided by Principles I, IV and V of the G20/OECD Principles as discussed hereinbelow. It relies on these principles to assess the efficiency of the Kenyan framework.

#### **2.3.2.1 Ensuring an Effective Corporate Governance Framework**

A corporate governance framework, according to the principles, may comprise of laws, regulations, listing rules, self-regulation systems, contractual commitments, voluntary commitments and business practices influenced by a country's culture and context.<sup>230</sup> According to Principle I.B, any legal or regulatory requirements that have bearing on corporate governance practices should be transparent, enforceable and in tune with the rule of law of their respective jurisdiction.<sup>231</sup> New laws should be clear and easy to implement and enforce while corporate governance codes or principles should complement the existing framework.<sup>232</sup>

Principle I.C. provides that "The division of responsibilities among different authorities and self-regulatory bodies should be clearly articulated and designed to serve the public interest".<sup>233</sup> This provision is made on the appreciation that corporate governance is influenced by various elements, laws and standards.<sup>234</sup> For example, a bank in Kenya's financial sector may be informed by company law, securities laws, labour laws, tax laws, accounting and auditing standards and even listing rules if it is a listed company among others. This means that various regulators play a role in monitoring and enforcing its governance. For the corporate governance framework to be effective, the roles and responsibilities of each of these bodies should be clearly defined in law.

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<sup>228</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 3-4.

<sup>229</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 9.

<sup>230</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 9.

<sup>231</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 10.

<sup>232</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 10.

<sup>233</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>234</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

In addition to having clearly defined responsibilities, Principle I.E advocates for these authorities to have adequate resources and independence to perform their supervisory and enforcement functions. It specifically states that. “Supervisory, regulatory and enforcement authorities should have the authority, autonomy, integrity, resources and capacity to fulfil their duties in a professional and objective manner. Moreover, their rulings should be timely, transparent and fully explained”<sup>235</sup> Resources in this case refers to both financial and human resources characterised by competent staff.

For listed companies, the Principles propose that stock market regulation support the corporate governance framework.<sup>236</sup> This provision is found under Principle I.D which appreciates the role of stock markets in the corporate governance system.<sup>237</sup> Quality listing and trading rules that establish and enforce corporate governance practices are essential.<sup>238</sup> Additionally, these stock market regulations and systems provide avenues for investors and stakeholders to provide feedback on an issuer’s governance through trading decisions.<sup>239</sup>

#### *2.3.2.2 Disclosure and Transparency*

The study has already established the significance of disclosure and transparency in corporate governance. The 2023 principles reiterate this by providing under Principle IV that, “The corporate governance framework should ensure that timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, sustainability, ownership, and governance of the company”.<sup>240</sup> Material information includes financial and operational reports, board membership and composition, risk factors and mitigation measures, governance structures and policies, debt contracts and non-compliance risks arising from these contracts.<sup>241</sup> All these are particularly important in the LIBOR to RFR transition discourse.

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<sup>235</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>236</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>237</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>238</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>239</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>240</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 24.

<sup>241</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 24-30.

### 2.3.2.3 Responsibilities of the Board

The fifth principle under the G20/OECD Principles provides for board responsibilities. It states that “The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board’s accountability to the company and the shareholders”.<sup>242</sup> In the context of the transition, this study appreciates the significance of this principle. Firstly, it established the fiduciary duties of directors to exercise care, good faith and diligence in the best interest of the company and its stakeholders.<sup>243</sup> Additionally, in exercising their function, high ethical standards are required of the board.<sup>244</sup> In some organisations, these standards may be informed by a code of ethics or the board charter. The board's key functions are also illuminated under this OECD principle.<sup>245</sup> They include establishment and review of risk management structures,<sup>246</sup> and risk oversight by ensuring accounting and reporting systems are secure and in place.<sup>247</sup> It also entails ensuring an independent external audit is undertaken and the institution complies with relevant laws and standards.<sup>248</sup> Further, board members must be accurately and adequately informed to exercise their function.<sup>249</sup> Importantly, this principle illuminates the significant role independent board members play especially in audit and risk committees to ensure the integrity of financial and other reports.<sup>250</sup> The next chapter illustrates the significance of this board function to the transition.

## 2.4 Corporate Governance Standards

The discourse on Corporate Governance in the banking industry is incomplete without highlighting the Corporate Governance Standards outlined by the Basel Accords. The Basel III accord is a set of reforms developed by the BCBS following the GFC to address the issues of low solvency levels identified as part of the contributors to the

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<sup>242</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 30.

<sup>243</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 34.

<sup>244</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 35.

<sup>245</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 32.

<sup>246</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 32.

<sup>247</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 34.

<sup>248</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 34.

<sup>249</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 38.

<sup>250</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 36-37.

crisis.<sup>251</sup> The Basel III accord is characterised by three pillars: Pillar 1, Pillar 2 and Pillar 3.<sup>252</sup>

Pillar 1 aims to strengthen the capital base of banks, enhance their risk coverage while introducing a leverage ratio.<sup>253</sup> The capital requirements established by this Pillar provide a minimum threshold for banks to maintain as well as buffers to this minimum.<sup>254</sup> The objective is to ensure banks are able to absorb unprecedented losses during times of stress or crisis in the market as well as ensure a steady flow of credit in the economy even during a downturn.<sup>255</sup>

Pillar 2, on the other hand, focuses on risk management and provides supervisory tools.<sup>256</sup> This pillar is principles-based and aimed at promoting sound supervisory practices in banks to ensure their internal processes are well structured manage risk appropriately.<sup>257</sup> The principles address both individual banks and supervisory bodies. For banks, proper internal supervisory tools are required such as board and executive oversight, internal controls, monitoring and reporting mechanisms among others.<sup>258</sup> For supervisory bodies, a hands-on approach involving on-site examinations, discussions with management and off-site reviews are suggested.<sup>259</sup> Additionally, supervisory bodies are required to have sufficient statutory powers so as to effectively execute their mandate.<sup>260</sup> Further, they should intervene at an early stage so as to ensure a bank's risk profile is well maintained and managed.<sup>261</sup>

Pillar 3 focuses on market discipline by establishing regulatory disclosure requirements.<sup>262</sup> These requirements promote transparency and confidence as they ensure market participants have access to information on a banks risk exposure and

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<sup>251</sup> Abad J and Pascual AG, 'Usability of Bank Capital Buffers: The Role of Market Expectations' International Monetary Fund (IMF), Working Paper No. WP/22/21, 2022, 4.

<sup>252</sup> Olson DL and Wu D, *Enterprise Risk Management Models: Focus on Sustainability*, 4<sup>th</sup> ed, Springer, Berlin, 2023, 77.

<sup>253</sup> Narayanaswamy R, *Financial Accounting: A Managerial Perspective*, 7<sup>th</sup> ed, PHI, Delhi, 2022, 546.

<sup>254</sup> Abad J and Pascual AG, 'Usability of Bank Capital Buffers', 4.

<sup>255</sup> Abad J and Pascual AG, 'Usability of Bank Capital Buffers', 4.

<sup>256</sup> Narayanaswamy R, *Financial Accounting*, 549.

<sup>257</sup> BIS, 'Pillar 2 framework – Executive Summary', 31 October 2019 <https://www.bis.org/fsi/fsisummaries/pillar2.htm> on 10 April 2025.

<sup>258</sup> BIS 'Pillar 2 framework'.

<sup>259</sup> BIS 'Pillar 2 framework'.

<sup>260</sup> BIS 'Pillar 2 framework'.

<sup>261</sup> BIS 'Pillar 2 framework'.

<sup>262</sup> Narayanaswamy R, *Financial Accounting*, 549.

capital adequacy.<sup>263</sup> Banks are expected to publish a readily available report in adherence to this pillar's requirements.<sup>264</sup> As aforementioned, the LIBOR transition was a major shift requiring adequate liquidity. The study believes that the Basel III standards, which were established to right the wrongs of the GFC, guaranteed a successful transition due to their commitment to risk mitigation and transparency.

In Kenya, the CBK has been progressively advancing the implementation of Basel III Standards by publishing guidelines that require banks to incorporate these standards.<sup>265</sup> These guidelines apply to all institutions licensed under the Banking Act CAP 488.<sup>266</sup>

## 2.5 Models of Corporate Governance

Although the underlying principles of corporate governance are similar, its models, also referred to as structures or systems vary across jurisdictions<sup>267</sup>. These variations can be influenced by culture or context; culture being the expectations, values or beliefs the people share<sup>268</sup> and context being ownership patterns, financing methods and control mechanisms.<sup>269</sup> As corporate governance evolved different countries and regions adopted different corporate structures and regulation approaches informed by what they believe was appropriate to them.<sup>270</sup> Fundamental questions were asked at the foundational stages of business formation which are still essential in the research on comparative corporate governance.<sup>271</sup> A comparative assessment of corporate governance aids us in establishing why different countries or regions adopt different systems and which systems work better in mitigating corporate governance issues.<sup>272</sup>

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<sup>263</sup> Basel Committee on Banking Supervision (BCBS), *DIS- Disclosure Requirements*, BIS, 2025, 3.

<sup>264</sup> BCBS, *DIS- Disclosure Requirements*, 3.

<sup>265</sup> Mulindi H, 'Cost-Benefit Analysis of Bank Regulation: Does Size Matter?' Kenya Bankers Association, Working Paper No. WPS/05/21, 2021, 4.

<sup>266</sup> Central Bank of Kenya (CBK), *Guidelines on the Liquidity Coverage Ratio, Net Stable Funding Ratio and Leverage Ratio*, 2025, 5.

<sup>267</sup> Mastrodascio M, *Corporate Governance Models*, 12.

<sup>268</sup> Tricker IR, *Corporate Governance: Principles, Policies, and Practices*, 4<sup>th</sup> ed, Oxford University Press, Oxford, 2019, 14.

<sup>269</sup> Tricker IR, *Corporate Governance*, 159

<sup>270</sup> Thomas Clarke, *Comparative Corporate Governance: A Research Overview*, 1<sup>st</sup> ed, Routledge, Oxon, 2023, 22.

<sup>271</sup> Clarke T, *Comparative Corporate Governance*, 22.

<sup>272</sup> Clarke T, *Comparative Corporate Governance*, 23.

A simplified distinction of these models is outsider vs insider systems. Outsider systems, also known as Anglo-Saxon systems, are market-oriented and focus on shareholder value;<sup>273</sup> they are characterised by dispersed ownership with a separation of control and ownership as well as disclosure-based regulation and a competitive profit-driven business strategy.<sup>274</sup> These systems can be found in the UK and US approach to corporate governance.<sup>275</sup> Insider systems on the other hand are stakeholder-influenced; founded on close relationships among various stakeholder groups and committed to value creation for all stakeholders.<sup>276</sup> They are characterised by concentrated ownership, majority interest representation on boards and stakeholder contribution to business strategy.<sup>277</sup> Insider systems can be found in European and Asian corporate governance models.<sup>278</sup> The different models illustrate the type of policies and practices that are adopted and the modes of implementation of these practices in the various jurisdictions.

A further distinction of corporate governance models is found in the board system; management and control can be undertaken either under a one-tier system or a two-tier system.<sup>279</sup> The one-tier system is monistic; shareholders appoint the board of directors as its administrative body.<sup>280</sup> The board is comprised of executive and non-executive directors. Non-executive directors, being “outsiders” to the business are charged with the essential role of risk management in controlling and monitoring the organisation through the compensation, nomination and audit committees.<sup>281</sup> The two-tier system, on the other hand, is characterised by two administrative bodies: the management board and the supervisory board.<sup>282</sup> The management board, consisting of executives, undertakes the day-to-day operations of the business while the supervisory board appoints the management and oversees its functions.<sup>283</sup>

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<sup>273</sup> Mastrodascio M, *Corporate Governance Models*, 65.

<sup>274</sup> Clarke T, *Comparative Corporate Governance*, 23.

<sup>275</sup> Clarke T, *Comparative Corporate Governance*, 26.

<sup>276</sup> Clarke T, *Comparative Corporate Governance*, 23-24.

<sup>277</sup> Clarke T, *Comparative Corporate Governance*, 24.

<sup>278</sup> Clarke T, *Comparative Corporate Governance*, 26.

<sup>279</sup> Mastrodascio M, *Corporate Governance Models*, 68.

<sup>280</sup> Mastrodascio M, *Corporate Governance Models*, 68.

<sup>281</sup> Mastrodascio M, *Corporate Governance Models*, 68.

<sup>282</sup> Mastrodascio M, *Corporate Governance Models*, 69.

<sup>283</sup> Mastrodascio M, *Corporate Governance Models*, 69.

Whereas the general principles of the different systems are the same in their respective regions, how they are implemented in individual jurisdictions may vary. For example, whereas, the US and UK both adopt the Anglo-Saxon outsider system, their regulatory approach is different. This study focuses on the regulatory models of corporate governance illustrated by the US and the UK. However, it is important to note that other models exist such as the European Continental model, the Japanese *keiretsu* model, the Asia family-based business model and the South Korean *chaebol* model among others which have made significant impact on corporate governance discourse.<sup>284</sup>

### **2.5.1 The “Comply or Else” Rules-Based Approach: The US Model of Corporate Governance**

The rules-based approach to corporate governance is mandatory; relying on state-sanctioned rules and regulations to ensure organisations meet the basic global standards of corporate governance.<sup>285</sup> It is at times referenced as “hard law” and deviates from the often-voluntary nature of corporate governance where policies and practices are incorporated in voluntary codes.<sup>286</sup> The US model of corporate governance serves as the best example of the rules-based approach. Following the 1929 Wall Street Crash, the US adopted a rule-based regulatory approach characterised by the enactment of various regulations that informed corporate governance practices.<sup>287</sup> Whereas the period following the enactment of these legislations saw a boost in trust in the US corporate governance systems and practices, corporate collapses on the NYSE in 2001 and the various scandals that significantly impacted the financial industry such as Enron and WorldCom led to the

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<sup>284</sup> Tricker IR, *Corporate Governance*, 14.

<sup>285</sup> Tricker IR, *Corporate Governance*, 14.

<sup>286</sup> Ekundayo VN and Sodipo B, ‘Approaches to the Application of Corporate Governance Regulations’ 4(1), *Society & Sustainability*, 2022, 98.

<sup>287</sup> Paterson J, ‘Corporate Governance and Corporate Social Responsibility’ in Bantekas I and Stein MA (eds), *The Cambridge Companion to Business and Human Rights Law*, 1<sup>st</sup> ed, Cambridge University Press, Cambridge, 2021,78-79.

birth of the Sarbanes Oxley Act (SOX) in 2002.<sup>288</sup> The Act outlines crimes and penalties for non-compliance by companies and their directors.<sup>289</sup>

A rules-based system can be advantageous. For example, in terms of an existence of clarity on the expectations of corporate governance due to having a standardised system. Additionally, having clear and heavy penalties can act as a deterrent to poor corporate governance practices. Further, due to having the rules clearly outlined it is easier for institutions to comply and establish corporate governance systems that align with industry and global standards. This creates an element of uniformity and stakeholder interests can arguably be better protected due to a stricter expectation for compliance and monitoring by regulatory bodies.<sup>290</sup> Despite its advantages, this approach is not without criticism.

The disclosure requirements brought about with the SOX 2002 have been criticised as being expensive and burdensome.<sup>291</sup> Additionally, proponents of the thesis that the market and not legislators are better placed to respond to and address corporate governance issues criticise the American approach. It has been argued that the SOX 2002 was a draconian action driven by political pressure on Congress to react to recent scandals during an election period. As such it was a political solution and not necessarily a solution influenced by stakeholder and market needs.<sup>292</sup> For this reason, the Act has been said to have had a detrimental effect on competitiveness in the market with a significant number of companies being delisted in the period following its enactment.<sup>293</sup>

The characteristics of the US rule-based system illuminate the corporate governance system under which the LIBOR transition in the US banking sector has been undertaken. The success, or failures, of the transition to RFRs in the US are attributable to this system.

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<sup>288</sup> Gelter M, 'Accounting and Convergence in Corporate Governance: Doctrinal or Economic Path Dependence?' in Afsharipour A and Gelter M (eds), *Comparative Corporate Governance*, Edward Elgar Publishing, 2021, 291; Ekundayo VN and Sodipo B, 'Approaches to the Application of Corporate Governance Regulations' 98.

<sup>289</sup> Tricker IR, *Corporate Governance*, 160.

<sup>290</sup> Ekundayo VN and Sodipo B, 'Approaches to the Application of Corporate Governance Regulations' 98.

<sup>291</sup> Tricker IR, *Corporate Governance*, 160.

<sup>292</sup> Paterson J, 'Corporate Governance and Corporate Social Responsibility', 79.

<sup>293</sup> Paterson J, 'Corporate Governance and Corporate Social Responsibility', 80.

### **2.5.2 The “Comply or Explain” Principle-Based Approach: The UK Model of Corporate Governance**

As with the rules-based approach, the UK’s principle-based approach is also a product of the government’s response to financial crises. In response to corporate governance scandals in the 1980s, the UK government commissioned the now famous Cadbury Committee to investigate and recommend corporate governance issues and best practices.<sup>294</sup> The recommendations of this committee birthed the ‘comply or explain’ approach to corporate governance, which is a principle-based model.<sup>295</sup> From the Committee’s recommendations, the responsibility for implementing the suggested *Code of Best Practice* was assigned to board directors with an emphasis on adaptability to specific organisational situations and substance over form.<sup>296</sup> With the understanding that compliance is a multi-faceted concern, the Committee urged investors to apply their influence in ensuring their companies conform to the Code.<sup>297</sup> The recommendation of the Cadbury Committee was that, listed companies, state in their reports and accounts whether they have complied with the Code and if not provide an explanation for non-compliance.<sup>298</sup>

The merits of the comply or explain, principle-based approach lie in its flexibility.<sup>299</sup> Unlike the rules-based approach where enactment or amendment takes a long time due to the legislative process, the UK’s approach presents a system that can easily adapt to market changes.<sup>300</sup> The UK system has been credited with being “mature, robust and adaptable” due to its flexible nature which allows it to constantly evolve to fit market demands.<sup>301</sup> Additionally, unlike the one-size-fits-all rules-based approach, the comply or explain system allows different companies to tailor governance to fit their unique circumstances.<sup>302</sup> As the system encourages all key stakeholders to participate

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<sup>294</sup> Ekundayo VN and Sodipo B, ‘Approaches to the Application of Corporate Governance Regulations’ 96.

<sup>295</sup> Ekundayo VN and Sodipo B, ‘Approaches to the Application of Corporate Governance Regulations’ 96.

<sup>296</sup> Roberts J, Sanderson P, Seidl D and Krivokapic A, ‘The UK Corporate Governance Code Principle of “Comply or Explain”: Understanding Code Compliance as “Subjection” 56(4), *Abacus*, 2020, 604.

<sup>297</sup> Roberts J *et al*, ‘The UK Corporate Governance Code Principle of “Comply or Explain” 604.

<sup>298</sup> Roberts J *et al*, ‘The UK Corporate Governance Code Principle of “Comply or Explain” 604.

<sup>299</sup> Lu W, ‘The Value of the “Comply or Explain” Principle’, Proceedings of the 2021 International Conference on Social Science: Public Administration, Law and International Relations, Organized by the International Science and Culture Center for Academic Contacts, Moscow, Russia, June 2021, 26.

<sup>300</sup> Lu W, ‘The Value of the “Comply or Explain” Principle’, 27.

<sup>301</sup> Lu W, ‘The Value of the “Comply or Explain” Principle’, 27.

<sup>302</sup> Lu W, ‘The Value of the “Comply or Explain” Principle’, 27.

in governance, it provides an enforcement avenue for shareholders which is believed to enhance accountability in a way that is better than the hard law approach.<sup>303</sup> This enforcement measure creates another unique aspect to the comply or explain approach. It combines voluntary and mandatory governance by requiring organisations to either “comply or explain” and thus promoting self-regulation.<sup>304</sup>

This approach, however, is not without fault. The first among these is that the flexibility of the approach and its stakeholder enforcement measures can only be enforced by active and aggressive investors interested and willing to evaluate an organisation's compliance and committed to changing their investments and behaviour accordingly.<sup>305</sup> Therefore, where the shareholder base is passive, this approach may be ineffective as its enforcement measures may not be applied. Additionally, research has shown that in a significant number of cases, where companies fail to comply, the explanations given have been vague or unsatisfactory.<sup>306</sup> In some cases, explanations are repeated regularly illustrating a lack of attempt at modification either to the explanation or towards compliance efforts.<sup>307</sup> Further, codes that may be considered controversial but proposed for ethical reasons are less likely to be adopted as compliance is driven on an economical as opposed to an ethical or political basis.<sup>308</sup> While the approach creates a system through which companies can adhere to a minimum corporate governance standard, this may be limiting as they may lack incentive to make further efforts of improvement to attain best practice.<sup>309</sup>

### **2.5.3 The “Apply and Explain” Approach: The South Africa Model of Corporate Governance**

South Africa, like most African countries, derives its corporate governance framework from the UK principle-based approach.<sup>310</sup> During the apartheid era, before 1994, the South African corporate governance framework was significantly below par.<sup>311</sup> This

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<sup>303</sup> Lu W, ‘The Value of the “Comply or Explain” Principle’, 28.

<sup>304</sup> Salisbury JA, ‘To Have or Have Not: The Limits of Comply-or-Explain Governance in an American Exchange’ 72(6), *Emory Law Journal*, 2023, 1511.

<sup>305</sup> Salisbury JA, ‘To Have or Have Not’ 1513.

<sup>306</sup> Salisbury JA, ‘To Have or Have Not’ 1515.

<sup>307</sup> Salisbury JA, ‘To Have or Have Not’ 1516.

<sup>308</sup> Salisbury JA, ‘To Have or Have Not’ 1516-17

<sup>309</sup> Ekundayo VN and Sodipo B, ‘Approaches to the Application of Corporate Governance Regulations’ 98.

<sup>310</sup> Ediagbonya V, *Corporate Governance in Africa*, Routledge, New York, 2025, 7.

<sup>311</sup> Ediagbonya V, *Corporate Governance in Africa*, 7

meant that, at the time of independence in 1994, the structures and systems governing capital markets lacked adequate protection and information dissemination systems to attract investors.<sup>312</sup> To reignite the economy and improve company control and management, the first corporate governance code, dubbed the King I, was published in 1994.<sup>313</sup> This King I applied the voluntary “comply or explain” approach and focused on the board of directors, board committees, stakeholders, auditors, ethics, compliance and corporate reporting.<sup>314</sup>

Criticisms of the King I such as, board independence, stakeholder concerns and several corporate failures led to the development and adoption of the King II in 2002.<sup>315</sup> In 2009, international developments like the GFC and a desire to focus on effective leadership, corporate citizenship and sustainability led to the publication of the King III.<sup>316</sup> The three codes were characterised by a voluntary, principles-based, non-legislated approach to corporate governance and compliance.<sup>317</sup> This was despite calls for a more regulatory-driven approach characterised by legislative reforms on corporate governance.<sup>318</sup> However, the King II shifted the approach from “comply or explain” to an “apply or explain” approach.<sup>319</sup>

In 2016, on the backdrop of a desire to mitigate ongoing political, socio-economic and environmental risks to the sustainable development agenda, South Africa adopted the King IV report.<sup>320</sup> The country recognised that financial measures no longer presented a complete assessment of company or economic performance and value creation. Long-term sustainability required inclusive capitalism which is informed by an appreciation of the integration between economic, social and environmental factors.<sup>321</sup> Under the King IV, the South African model views the company as a key part of the society, a corporate citizen thus conferring it responsibilities towards the society within which it operates.<sup>322</sup> Further to this is the acknowledgement of stakeholder

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<sup>312</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, Walter de Gruyter GmbH, Berlin, 2020, 12.

<sup>313</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 12.

<sup>314</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 16.

<sup>315</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 17.

<sup>316</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 22.

<sup>317</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 24.

<sup>318</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 23.

<sup>319</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 24.

<sup>320</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 26.

<sup>321</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 26.

<sup>322</sup> IoDSA, *KING IV: Report on Corporate Governance for South Africa 2016*, 2016, 25.

engagement in company management and performance.<sup>323</sup> A company's management should be established with the objective of long-term sustainability and the satisfaction of stakeholder interests over and above short-term financial gains.<sup>324</sup>

This model is significant to the study as it emphasizes a stakeholder-centric, ethics-driven approach that visions beyond profitability but focuses on long-term sustainability. The stakeholder-centric nature of the South African approach provides a cure for the shareholder aspects of the US and UK models which are usually market-oriented making it more holistic which is one of the objectives of the King IV.<sup>325</sup> Further, it adopts the innovative "apply and explain" model which expects companies to comply with its established principles and also explain how they have been adopted to achieve the organisations targets.<sup>326</sup> An explanation is not deviation but rather elaboration on adopted practices.<sup>327</sup> While this approach is seen to be more optimistic and a softer approach to enforcement, it has been credited as being not entirely voluntary.<sup>328</sup> The requirement for disclosure through explanation promoted compliance as companies are answerable to investors and the public on failure to comply or deviation exposing them to reputational risk.<sup>329</sup>

The South African perspective is also important to the study as the South African Reserve Bank (SARB) championed benchmark reform in South Africa in line with international developments and reforms to LIBOR.<sup>330</sup> The also country participated in the OSSG in discussions on benchmark reform.<sup>331</sup>

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<sup>323</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 27.

<sup>324</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 27.

<sup>325</sup> Maroun W and Cerbone D, *Corporate Governance in South Africa*, 27.

<sup>326</sup> IoDSA, *KING IV: Report on Corporate Governance for South Africa 2016*, 25; *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>327</sup> Asplund A, 'Lost in Accountability. "Comply or Explain", "Apply or Explain" and "Apply and Explain" in a Test: The Barriers to Company Benefit?', University of Oslo, Faculty of Legal Studies Research Paper Series No 2020-24, 2020, 118.

<sup>328</sup> Ekundayo VN and Sodipo B, 'Approaches to the Application of Corporate Governance Regulations' 97.

<sup>329</sup> Ekundayo VN and Sodipo B, 'Approaches to the Application of Corporate Governance Regulations' 97.

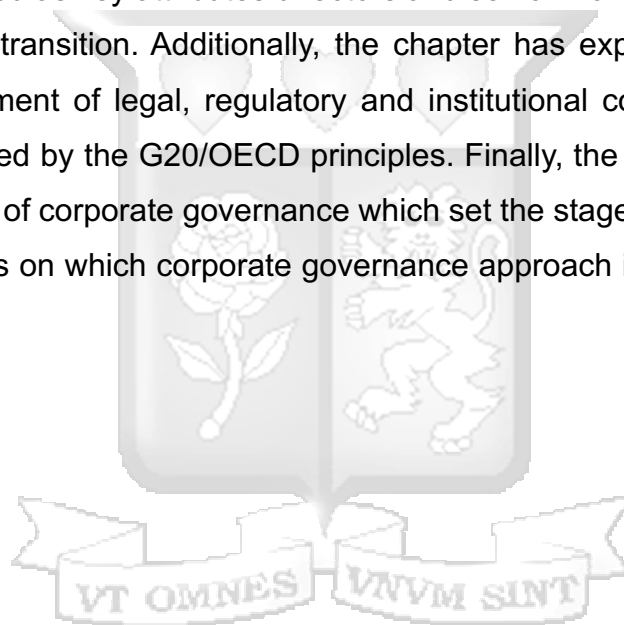
<sup>330</sup> FSB, *Reforming Major Interest Rate Benchmarks: Progress Report*, 15.

<sup>331</sup> FSB, *Reforming Major Interest Rate Benchmarks: Progress Report*, 15.

## 2.6 Conclusion

The discourse in this chapter serves to establish an understanding of corporate governance. It outlines the principles and models of corporate governance. As aforementioned, the objective of the chapter was to illuminate corporate governance as a risk mitigation tool and more specifically a risk mitigation tool in the LIBOR transition. In that light, the chapter has established the relevant corporate governance principles and models that are essential in evaluating the Kenyan framework discussed in the next chapter.

The principles of transparency, accountability and responsibility have been singled out as these are identified as key attributes directors and senior management required as they navigated the transition. Additionally, the chapter has explored principles that inform the development of legal, regulatory and institutional corporate governance frameworks as guided by the G20/OECD principles. Finally, the chapter has outlined the different models of corporate governance which set the stage for the evaluation in succeeding chapters on which corporate governance approach is most successful in risk mitigation.



## Chapter 3 : Legal, Regulatory and Institutional Frameworks of Corporate Governance in the Kenyan Banking Sector

### 3.1 Introduction

This chapter presents an analysis of the Kenyan corporate governance landscape; that is, the legal, regulatory and institutional frameworks in the finance sector. The analysis aims to identify strengths and gaps in Kenya's corporate governance framework in enabling a smooth transition from LIBOR to RFRs.

### 3.2 The Kenyan Approach to Corporate Governance

Kenya's corporate governance structure borrows heavily from the UK principle-based approach. Tracing back to the 1970s, Kenya, like other African countries began to appreciate the interdependence between corporate governance and organisational performance.<sup>332</sup> The lack of a proper corporate governance framework led to various corporate failures in Kenya in the 1990s, some involving financial institutions like the Continental Bank of Kenya and Capital Finance Ltd among others.<sup>333</sup> These failures facilitated the publication of the *Guidelines on Principles of Corporate Governance for Public Listed Companies* by the Capital Markets Authority in 2002.<sup>334</sup> These guidelines were in force up to 2015 and emulated the "comply or explain" approach where a company adopts the suggested practice or provides an explanation to its shareholders on non-compliance.<sup>335</sup> 2015 saw the revision of the principles by the Capital Markets Authority (CMA) and the introduction of the Code of Corporate Governance Practices for Issuers of Securities to the Public (the Code).<sup>336</sup> The Code 2015 drove a shift from the "comply or explain" to the "apply or explain" approach which is lauded for being more flexible, focusing on the minimum set of corporate governance standards to ensure best practice.<sup>337</sup>

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<sup>332</sup> Nyakeri BA, 'The Law on Corporate Governance and Shareholder Protection in Kenya: A Case for Reduction of Corporate Scandals within Private Companies' LLM Thesis, University of Nairobi, Nairobi, 2020, 31.

<sup>333</sup> Nyakeri BA, 'The Law on Corporate Governance and Shareholder Protection in Kenya', 32.

<sup>334</sup> Nyakeri BA, 'The Law on Corporate Governance and Shareholder Protection in Kenya', 33; Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 7(5), *International Journal of Business and Social Science*, 2016, 153.

<sup>335</sup> Obonyo MB, 'Engendering Good Corporate Governance in the Kenyan Banking Sector: An Examination of the Limits of Law', LLM Thesis, Strathmore University, Nairobi, 2019, 2.

<sup>336</sup> Obonyo MB, 'Engendering Good Corporate Governance in the Kenyan Banking Sector', 29.

<sup>337</sup> Nyakeri BA, 'The Law on Corporate Governance and Shareholder Protection in Kenya', 65.

Continued corporate scandals and failures, both in the public sector<sup>338</sup> and private sector raise questions on the effectiveness of the Kenyan model.<sup>339</sup> Research shows that Kenya continues to rank poorly on the corruption perceptions index.<sup>340</sup> Further, despite the implementation of the Code 2015, there are continued reports of corruption and weak corporate governance and accounting practices in the country.<sup>341</sup> It has been argued that this framework, within the Kenyan context does not give adequate incentive for compliance.<sup>342</sup> A criticism of the UK approach, which is reflective of the Kenyan case, is the risk of fostering a culture of superficial adherence to governance codes.<sup>343</sup> Where organisations fail to employ innovation to challenge their policies but instead merely adopt the prescribed structure. This undermines flexibility and the ability of an organisation to adapt and respond to changes in the market or industry ultimately hindering the development of corporate governance.<sup>344</sup>

While Kenya's corporate governance model is presented as a principle-based the *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT case posits that it can be inferred as a hybrid model. In this case, the appellants as directors of Real People Kenya Limited had issued Medium-Term Notes (MTN) in 2015 with the CMA's approval.<sup>345</sup> They raised Kshs 1.6 Billion from this issue. However, in 2020, the Authority conducted an inquiry into the company's affairs with regards to its obligations as an issuer of public securities and found it to be in violation of some provisions of the Code.<sup>346</sup> A Notice to Show Cause was issued citing these violations. The company however raised a preliminary objection arguing that provisions of the Code were voluntary and that the "comply or explain" principle and wording of the

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<sup>338</sup> Omondi FO and Njoroge J, 'Influence of Corporate Governance Practices on Financial Performance of Kenya Power and Lighting Company', 4(1), *Journal of International Social Science & Humanities*, 2023, 316.

<sup>339</sup> Kimani D, Ullah S, Kodwani D and Akhtar P, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective: Insights from Kenya' (2021) 78(102260) *Critical Perspectives on Accounting*, 2021, 2.

<sup>340</sup> Kimani D *et al*, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective' 4.

<sup>341</sup> Kimani D *et al*, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective' 4.

<sup>342</sup> Obonyo MB, 'Engendering Good Corporate Governance in the Kenyan Banking Sector' 11.

<sup>343</sup> Asplund A, 'Lost in Accountability', 141.

<sup>344</sup> Asplund A, 'Lost in Accountability', 141.

<sup>345</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>346</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

Code imply it is not mandatory and as such not enforceable.<sup>347</sup> The preliminary objection was dismissed and the company proceeded to appeal the ruling.

In its deliberations and findings on appeal, the Tribunal held that Kenya's approach to corporate governance is hybrid as it is characterised by rules established in legislature as well as "voluntary" principles.<sup>348</sup> The Tribunal further held that, despite the use of the term Code, the instrument is subsidiary legislature established under Section 11 (3) (v) of the CMA Act CAP 485A and as such is mandatory in nature.<sup>349</sup> It relied on Section 2 of the Statutory Instruments Act CAP 2A where a statutory instrument is defined as "*any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorised to be issued*".<sup>350</sup>

Additionally, the Tribunal held that Section 2 of the Interpretation and General Provisions Act CAP 2 recognises subsidiary legislation as written law. Further, the Code underwent the approval of the National Assembly Committee on Delegated Legislation. Based on this it is validly established a written law and not mere voluntary principles.<sup>351</sup> Although the Code 2015 expressly establishes itself as following the apply or explain approach to corporate governance regulation,<sup>352</sup> the deliberations of the tribunal in *Ambunya & 4 Ors v Capital Markets Authority*<sup>353</sup> indicate that its provisions are mandatory presenting an argument for a hybrid approach to corporate governance in Kenya.

### **3.3 The Legal and Regulatory Framework of Corporate Governance in Kenya**

Kenyan law acknowledges the significant role banks play as financial institutions within the public space. As stated by Justice Ogola in *Richardson and David Limited v Kenya*

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<sup>347</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>348</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>349</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>350</sup> Statutory Instruments Act CAP; *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>351</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

<sup>352</sup> Chapter 1, para. 1.1.1, *The Code*, 2015.

<sup>353</sup> *Dr Norman Ambunya & 4 Ors v Capital Markets Authority* (Appeal No 3 of 2021) KECMT.

*Deposit Insurance Corporation & Another*,<sup>354</sup> “A bank is a very important financial institution, and decisions concerning its operations should not appear to be made whimsically. Those decisions must be seen to be based on some policy principles which can be stated and dependent upon. This policy principle, when stated, will not only give assurance to the entity to be liquidated, its shareholders and depositors, but more important to the banking public”.<sup>355</sup> On this basis, the following are the laws and regulations governing corporate governance in Kenya’s banking and financial services sector.

### **3.3.1 The Constitutional Framework of Corporate Governance in Kenya**

As the supreme law of the land,<sup>356</sup> the Constitution of Kenya (COK) anchors all law, regulation, policy and authority. It therefore sets out the foundation for corporate governance in the country. Under Article 10, the COK outlines the national values and principles of governance among which are, “good governance, integrity, transparency and accountability”.<sup>357</sup> As highlighted in Chapter 2, transparency and accountability are among the core principles required to achieve good corporate governance practices. Their express deduction into the Constitution and their reflection as national values illuminates a national commitment to ingrain good corporate governance practices in the country’s culture both business and otherwise.<sup>358</sup> Consequently, the study can deduce that it is a constitutional obligation for finance institutions operating within the Kenyan jurisdiction to operate in a manner that upholds these basic principles.

Those serving in public offices are expected to espouse these values and other principles of leadership and integrity in the execution of their duties.<sup>359</sup> The same applies to public service institutions which are expected to uphold high standards of professionalism, integrity, transparency and accountability.<sup>360</sup> Further, it is important to note that, as the context of this study is the commitment of directors and senior management to ensure clients are well informed with the information required to

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<sup>354</sup> [2015] eKLR.

<sup>355</sup> [2015] eKLR.

<sup>356</sup> Article 2(1), *Constitution of Kenya*.

<sup>357</sup> Article 10 (2) (c), *Constitution of Kenya*.

<sup>358</sup> Article 10, *Constitution of Kenya*.

<sup>359</sup> Article 73, *Constitution of Kenya*.

<sup>360</sup> Article 232, *Constitution of Kenya*.

effectively renegotiate any of their LIBOR-based contracts, then the provisions of the Constitution on consumer rights may come into play.<sup>361</sup> It is on these collective values that the legal framework for good corporate governance practices in Kenya is founded.

Although, notably, the Constitutional provisions do not expressly extend to private banks and financial institutions,<sup>362</sup> this study opines they establish the spirit in which corporate governance practices in the sector are developed and implemented. Therefore, objectively this study deduces that the COK provides an effective foundation for the corporate governance elements required to facilitate the local LIBOR to RFR transition.

### **3.3.2 Statutes on Corporate Governance in Kenya's Banking & Finance Sector**

The Companies Act CAP 486 forms part of the Kenyan legal framework for corporate governance of financial institutions. The current, Act CAP 486, was enacted in an attempt to cure some of the shortcomings of its predecessor which have been attributed to the concerning bank failures and collapses of the 1980s.<sup>363</sup> According to the Act CAP 486, directors in exercising their functions have the power to bind a company.<sup>364</sup> As they do this, however, they are also expected to act within their powers<sup>365</sup> in a manner that promotes the success of the company.<sup>366</sup> Further, within the Act, various directors' duties such as the duties of care, skill, diligence<sup>367</sup> and accountability measures<sup>368</sup> as well as the rights of other stakeholders<sup>369</sup> in the corporate governance system are codified. This codification also illuminates legal consequences that would arise from a breach of duty.<sup>370</sup> In addition to codifying directors' duties, the Act also provides for shareholders control functions by establishing circumstances under which their approval must be sought.<sup>371</sup> This gives

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<sup>361</sup> Article 49, *Constitution of Kenya*.

<sup>362</sup> Kashindi EI, 'Strengthening Corporate Governance to Curb Corruption in Banks in Kenya: A Case Study of Dubai Bank and Imperial Bank', LLM Thesis, University of Nairobi, Nairobi, 2019, 31.

<sup>363</sup> Obonyo MB, 'Engendering Good Corporate Governance in the Kenyan Banking Sector' 29.

<sup>364</sup> Section 34, *Companies Act*, CAP 486.

<sup>365</sup> Section 142, *Companies Act*, CAP 486.

<sup>366</sup> Section 143, *Companies Act*, CAP 486.

<sup>367</sup> Section 145, *Companies Act*, CAP 486.

<sup>368</sup> Section 150, *Companies Act*, CAP 486.

<sup>369</sup> Sections 155-179, *Companies Act*, CAP 486.

<sup>370</sup> Section 148, *Companies Act*, CAP 486.

<sup>371</sup> Sections 155-179, *Companies Act*, CAP 486.

shareholders more power in decision-making creating a monitoring system for directors.

The Companies Act CAP 486 outlined above has bearing on banks as the Banking Act CAP 488 defines a bank as “a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank”.<sup>372</sup> “Banking business is further described as —

- a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;
- b) the accepting from members of the public of money on current account and payable on and acceptance of cheques;
- c) the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money; and
- d) such other business activity as the Central Bank may prescribe;<sup>373</sup>

This description of banking business appears to borrow from the findings of Lord Denning in *United Dominion Trust Ltd v Kirkwood* (1966)<sup>374</sup> where he described the characteristics of banks as follows —

“There are, therefore two characteristics usually found in banks today (i) They accept from, and collect cheques for, their customers and place them to their credit; (ii) They honour cheques drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them a third, namely (iii) They keep current accounts or something of that nature, in their books in which the credits and debits are entered”.<sup>375</sup>

Describing banks and financial institutions conducting banking business as “companies” places them under the ambit of the Companies Act CAP 486. Therefore,

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<sup>372</sup> Section 2, *Banking Act*, CAP 488.

<sup>373</sup> Section 2, *Banking Act*, CAP 488.

<sup>374</sup> *United Dominion Trust Ltd v Kirkwood* (1966) 2 QB 431

<sup>375</sup> *United Dominion Trust Ltd v Kirkwood* (1966) 2 QB 431; Adeyemo F, ‘Introduction to Banking Law’ in Austen-Baker R, Akintola K, Ahmed M and Adeyemo F (eds), *Principles of commercial law*, Edward Elgar Publishing, 2022, para. 2.2.

as one of the governance bodies tasked with the transition of LIBOR to RFRs, bank directors are expected to be cognizant of their capacity to bind these institutions by their decisions.<sup>376</sup> Any decisions taken towards the transition bear on the success of the institution and by extension the entire industry.

Directors and senior management are expected to exercise their duties of reasonable care, skill and diligence.<sup>377</sup> *Norman v Theodore Goddard*<sup>378</sup> establishes the threshold on the standard expected of directors in exercising the duty of care.<sup>379</sup> This reflects the legal position where a director is judged on their individual capacity and the expectations of a reasonable director carrying out similar functions.<sup>380</sup> In cases arising from financial crises, some executives and board directors have argued the lack of technical knowledge in an attempt to evade responsibility.<sup>381</sup> In *Re Barings plc (No5)*,<sup>382</sup> however, the court in its commentary stated that directors are obligated to acquire and maintain knowledge and understanding of the company's operations to effectively discharge their duties.<sup>383</sup> As such, directors and executives are expected to have appraised themselves on the transitional expectations and the adoption and cementing of RFRs as the new reference rates in a manner that guarantees both company and industrial stability.

As illustrated above, the Banking Act CAP 488 plays a significant role in the Kenyan corporate governance framework by, establishing the scope of the framework with regard to this study; it aids in identifying what qualifies as a bank and banking business.<sup>384</sup> Additionally, the focus of this study is the commitment of directors and senior management to corporate governance during the transition. The Banking Act

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<sup>376</sup> Section 34, *Companies Act*, CAP 486.

<sup>377</sup> Section 145, *Companies Act*, CAP 486.

<sup>378</sup> [1991] BCC 14

<sup>379</sup> Keay A, Loughrey J, McNulty T, Okanigbuan F and Stewart A, 'Business Judgment and Director Accountability: A Study of Case-Law over Time' 20(2) *Journal of Corporate Law Studies*, 2020, 371.

<sup>380</sup> Section 145, *Companies Act*, CAP 486.

<sup>381</sup> Davies H, 'Libor Verdict: A Rotten Egg for British Bankers?' World Economic Forum, 25 June 2013—<<https://www.weforum.org/agenda/2013/06/libor-verdict-a-rotten-egg-for-british-bankers/>> on 20 April 2024; Kay J, 'Ignorance Is No Defence for Misconduct Such as PPI and Libor' *Financial Times*, 8 December 2015—<<https://www.ft.com/content/c320fb96-9d96-11e5-8ce1-f6219b685d74>> on 19 April 2024; Scott M, 'British Panel Castigates Ex-UBS Officials at Hearing' *DealBook*, 10 January 2013—<<https://dealbook.nytimes.com/2013/01/10/former-ubs-executives-are-grilled-over-libor/>> on 19 April 2024.

<sup>382</sup> [1999] 1 BCLC 433

<sup>383</sup> *Re Barings plc (No5)* [1999] 1 BCLC 433; Keay A *et al*, 'Business Judgment and Director Accountability' 371.

<sup>384</sup> Section 2, *Banking Act*, CAP 488, s 2

plays a significant role in establishing the expectations of directors, CEOs and significant shareholders who should be certified as fit and proper and are subject to vetting by the Central Bank of Kenya.<sup>385</sup> The criteria for vetting are outlined under the First Schedule of the Act.<sup>386</sup> The Central Bank is expected to use this criteria to establish the professional and moral suitability of persons proposed to lead, manage or control institutions governed by the Act.<sup>387</sup> Professional suitability is evaluated against academic credentials and professional experience. Directors are therefore supposed to be well-versed with adequate knowledge, resources or know-how to make informed decisions for the institutions. It is not expected that directors themselves have the technical know-how to navigate the unique challenges of the sector such as the LIBOR transition. They are, however, required to be knowledgeable enough to properly and adequately acquire and deploy the resources required to ensure the transition is successful.

Further, the Banking Act under sections 28 and 29 also places certain disclosure expectations on banks. They are required to furnish either the Central Bank<sup>388</sup> or the Cabinet Secretary<sup>389</sup> with any information they may reasonably require in the exercise of their responsibilities. With regards to the LIBOR transition, the CBK was able to request and track information relating to LIBOR exposure among Kenya's banks as well as track their responses towards the transition.<sup>390</sup> While this provision outlines some of the expectations of disclosure and transparency on financial institutions, it also illuminates the role of the Central Bank as well as the compliance and enforcement mechanisms of the Kenyan banking corporate governance framework discussed in succeeding sections of this chapter.

The Capital Markets Act CAP 485A is another significant contributor to the legal corporate governance framework in Kenya. The Act establishes and empowers the CMA.<sup>391</sup> The CMA's role is discussed further as an institutional framework in the next section. However, it is credited for the release of the *Code of Corporate Governance Practices for the Issuers of Securities to the Public 2015* (the Code 2015). The Code

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<sup>385</sup> Sections 9A and 32A, *Banking Act*, CAP 488.

<sup>386</sup> First Schedule, *Banking Act*, CAP 488.

<sup>387</sup> First Schedule, Part A, (a), *Banking Act*, CAP 488.

<sup>388</sup> Section 28, *Banking Act*, CAP 488.

<sup>389</sup> Section 29, *Banking Act*, CAP 488.

<sup>390</sup> CBK, '*Guidance on LIBOR Transition*' 6.

<sup>391</sup> Section 5, *Capital Markets Act*, CAP 485A.

2015 forms a significant part of the framework discussed herein as it outlines corporate governance recommendations and requirements for listed companies. The Act CAP 485A also empowers the Cabinet Secretary to issue rules and regulations concerning the securities market in Kenya.<sup>392</sup> This provision is significant to the study as it sets the foundation for the formulation and publication of listing rules<sup>393</sup> which inform relevant disclosures that are essential for good corporate governance practice.

### **3.4 The Institutional Framework of Corporate Governance in Kenya**

#### **3.4.1 The Central Bank of Kenya (CBK)**

The CBK is established under the Central Bank of Kenya Act CAP 491.<sup>394</sup> Its main objective is the formulation and implementation of monetary policy to achieve and maintain stability.<sup>395</sup> It is also tasked with fostering liquidity, solvency and the proper functioning of the Kenyan financial system and economy.<sup>396</sup> It promotes stability; ensures payment transactions; manages foreign exchange policies; oversees foreign currency reserves; prints money and acts as the government's financial advisor and representative.<sup>397</sup> Under the Banking Act, the CBK is endowed with various powers, these include inspection of institutions,<sup>398</sup> vetting powers,<sup>399</sup> powers to intervene in management<sup>400</sup> and powers to establish regulations and penalise or fine institutions that offend the banking laws and regulations.<sup>401</sup>

Under section 33 (4) of the Banking Act, the Central Bank holds powers to advise and direct. The section states that —

“(4) The Central Bank may issue directions to institutions generally for the better carrying out of its functions under this Act and in particular, with respect to —

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<sup>392</sup> Section 12, *Capital Markets Act*, CAP 485A.

<sup>393</sup> Section 12, *Capital Markets Act*, CAP 485A.

<sup>394</sup> Section 3, *Central Bank of Kenya Act* CAP 491.

<sup>395</sup> Section 4 (1), *Central Bank of Kenya Act*, CAP 491.

<sup>396</sup> Section 4 (2), *Central Bank of Kenya Act*, CAP 491.

<sup>397</sup> CBK, 'CBK | Central Bank of Kenya' Central Bank of Kenya, 2024 — <https://www.centralbank.go.ke/> on 19 February 2024.

<sup>398</sup> Section 32, *Banking Act*, CAP 488.

<sup>399</sup> Section 32A, *Banking Act*, CAP 488.

<sup>400</sup> Section 34, *Banking Act*, CAP 488.

<sup>401</sup> Section 55, *Banking Act*, CAP 488.

- (a) the standards to be adhered to by an institution in the conduct of its business in Kenya or in any country where a branch or subsidiary of the institution is located; and
- (b) guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system.”

As aforementioned, the CBK was charged with oversight of the LIBOR transition in Kenya. Under the mandate provided in section 33 (4) above, the CBK issued the Guidance on LIBOR in December 2021.<sup>402</sup> This document was to guide banking sector players on matters of governance, monitoring, communication, risk management and system preparedness regarding the LIBOR transition.<sup>403</sup> This research finds that this guidance remains the only directive towards IBOR transition in Kenya to date (2024). This is despite concerns about the effect the transition may have on the financial industry.

Additionally, this research opines that the powers to vet directors and significant shareholders as well as the powers to intervene in management give the CBK oversight and control over corporate governance structures in the sector.<sup>404</sup> Further, where banks fail to adhere to sector requirements which may impede industry stability, the CBK can penalize or even prosecute them as seen in the Chase Bank<sup>405</sup> scandal. These supervisory and control measures are essential to ensuring the corporate governance framework is efficient and effective for significant practice and regulatory shift as has been brought on by the transition.<sup>406</sup>

According to this study, the legal framework empowers the CBK with the muscle to effectively oversee and manage an event as significant as the LIBOR transition. However, as seen with the management of previous financial scandals such as the Chase Bank collapse,<sup>407</sup> the CBK has been largely reactionary in exercising its mandate. In the next chapter, the study reviews international approaches to the transition. Similar bodies like the CBK participated in working groups and industry

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<sup>402</sup> CBK, *Guidance on LIBOR Transition*.

<sup>403</sup> Luusa D, *Banking Circular No 6 of 2021: Issuance of Guidance on Libor Transition*, 9 December 2021.

<sup>404</sup> Sections 32-34, *Banking Act*, CAP 488.

<sup>405</sup> *Chase Bank Limited vs Zafrullah Khan & 19 Others* [2018] eKLR HCCC No 159 of 2017.

<sup>406</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11.

<sup>407</sup> *Chase Bank Limited vs Zafrullah Khan & 19 Others* [2018] eKLR HCCC No 159 of 2017.

discussions to ensure a successful transition. Although individual bank reports and the Guidance reveal an expectation of regular updates to the CBK on the transition, the CBK has not communicated further action or progress reports on the management or success of the transition.<sup>408</sup>

### **3.4.2 The Capital Markets Authority (CMA)**

According to CAP 485A,<sup>409</sup> the CMA is established with the objective of “promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya”<sup>410</sup> to assure market integrity and investor confidence.<sup>411</sup> The establishment of this regulatory body stems from a realisation by the Kenyan Government in the 1980s on the need for reforms to establish an efficient and stable financial system that facilitates sustainable economic growth.<sup>412</sup> The Authority was established with the critical objective of facilitating capital resource mobilisation and allocation for long-term credit to support economic development as commercial banks were unable to meet this demand.<sup>413</sup>

As part of its mandate, the CMA supervises, licenses and monitors the activities of market intermediaries including the Central Depository and Settlement Corporation (CDSC) and the Stock Exchange.<sup>414</sup> The Act CAP 485A provides for the regulatory functions of the authority.<sup>415</sup> The CMA plays a significant role in this study as it is the authority behind the Code 2015<sup>416</sup> which, as abovementioned, is a key instrument in Kenya’s corporate governance framework. Therefore, publicly listed financial institutions fall under the scope of regulatory authority of this body.

As with the CBK, the CMA is legally empowered to adequately support the LIBOR transition. However, this study assumes that the CMA has adopted a spectator

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<sup>408</sup> CBK, ‘Guidance on LIBOR Transition’ 6; KCB Group Plc, *2021 Integrated Report & Financial Statements*, 95.

<sup>409</sup> Section 5, *Capital Markets Act, CAP 485A*.

<sup>410</sup> Section 11, *Capital Markets Act, CAP 485A*; Capital Markets Authority (CMA), *The Capital Markets Authority Handbook*, 2021, 1.

<sup>411</sup> CMA, ‘Capital Markets Authority’, 2024 — <<https://www.cma.or.ke/>> on 19 February 2024.

<sup>412</sup> CMA, *The Capital Markets Authority Handbook*, 1.

<sup>413</sup> CMA, *The Capital Markets Authority Handbook*, 1.

<sup>414</sup> CMA, ‘About Us – Capital Markets Authority’ Capital Markets Authority, 2024 — <<https://www.cma.or.ke/about-us/>> on 19 February 2024.

<sup>415</sup> Section 11, *Capital Markets Act, CAP 485A*.

<sup>416</sup> *Code of Corporate Governance Practices for Issuers of Securities to the Public*, 2015.

approach to the transition. There are no demonstrable actions or communications from the CMA on the transition to market players.

In 2022, the CMA penalised Chase Bank's former directors to the tune of KES 60 million for their role in the scandal.<sup>417</sup> It further disqualified the bank's former managing directors from holding any key director or executive position for an issuer on Kenya's capital market for ten years.<sup>418</sup> Further to this, the Authority ordered corporate governance training for one of the fined board members.<sup>419</sup> Among the penalised board members were four members of the Bank's audit and risk committee.<sup>420</sup> The authority in its investigations found that during the Bank's bond issuance in 2015, there were falsehoods in its financial statements and non-disclosure of material information.<sup>421</sup> Failure to audit the bank's IT system also facilitated channels for its directors and management to cover up details on the siphoning of monies from the bank to shell companies.<sup>422</sup>

Whereas the Authority appears to have the legal muscle to guarantee financial stability in the market, its actions in response to the Chase Bank scandal illuminate a reactionary approach. This approach, the study concludes, falls short of its supervisory obligations thus compromising the strength and efficiency of the overall corporate governance framework. Therefore, whereas there have been no reported challenges with the transition in Kenya, the laissez-faire approach previously adopted by this and other regulators is concerning.

### **3.4.3 The Kenya Deposit Insurance Corporation (KDIC)**

Another significant body of the Kenyan Corporate Governance Framework is the KDIC. This body is an institution established under the Kenya Deposit Insurance Act, CAP 487C with the mandate of safeguarding savings and bank deposits by

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<sup>417</sup> Muiruri K, 'CMA Dishes Ksh.60 Million Fines to Former Chase Bank Directors' Citizen Digital, 3 August 2022—<<https://www.citizen.digital/business/cma-dishes-ksh60-million-fines-to-former-chase-bank-directors-n303371>> on 19 April 2024.

<sup>418</sup> Ndege A, 'CMA Fines Ex-Chase Bank Bosses, Deloitte over Sh10bn Loan' Business Daily, 3 August 2022—<<https://www.businessdailyafrica.com/bd/markets/capital-markets/cma-fines-ex-chase-bank-bosses-auditor-o-sh10bn-loan-3901250>> on 19 April 2024.

<sup>419</sup> Ndege A, 'CMA Fines Ex-Chase Bank Bosses'.

<sup>420</sup> Ndege A, 'CMA Fines Ex-Chase Bank Bosses'.

<sup>421</sup> Muiruri K, 'CMA Dishes Ksh.60 Million Fines to Former Chase Bank Directors'.

<sup>422</sup> Ndege A, 'CMA Fines Ex-Chase Bank Bosses'.

establishing an insurance scheme for financial service providers.<sup>423</sup> The Corporation is also tasked with promoting the overall stability of the Kenyan financial system by providing incentives for sound risk management.<sup>424</sup> Under CAP 487C, the CBK can appoint the KDIC as a receiver of any financial institution where it is determined that the institution has violated legal, regulatory or supervisory obligations, is unsafe or unsound to conduct business or is unable to meet its financial obligations among other circumstances established under the Act.<sup>425</sup> This is in line with its mandate to solve bank problems and mitigate bank failure and overall systemic risk.<sup>426</sup>

Additionally, as recently seen in the Chase Bank case,<sup>427</sup> the KDIC may be appointed as a liquidator by the CBK where a financial institution a recommendation is made for liquidation or other criteria are met for liquidation as specified under the Act.<sup>428</sup> This body plays a significant role in the enforcement arm of the Kenyan corporate governance framework as it ensures corporate governance failures in financial institutions do not translate into systemic failure.

From a regulatory standpoint, the KDIC is well-equipped to manage and support the transition. However, as with the other bodies discussed hereinabove, the KDIC has not contributed to the transition discourse or demonstrably provided tools to inform or support stakeholders in the transition. As the next chapter illustrates, similar institutions in the US and UK played a proactive role in driving industry discussions and providing tools to inform both the public and other stakeholders on the transition, possible challenges and mitigation measures.

### **3.5 Corporate Governance Codes and Guidelines in Kenya's Financial Industry**

Prudential regulation is essential for risk mitigation, securing financial stability and promoting economic growth.<sup>429</sup> In Kenya, the *Prudential Guidelines for Institutions Licensed under the Banking Act, 2013* hold place in the corporate governance

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<sup>423</sup> KDIC, *Annual Report and Financial Statements for the Financial Year Ending June 30, 2021*, Kenya Deposit Insurance Corporation, 2021, 3.; Section 5, *Kenya Deposit Insurance Act*, CAP. 487C.

<sup>424</sup> Section 5(c), *Kenya Deposit Insurance Act*, CAP. 487C.

<sup>425</sup> Section 43, *Kenya Deposit Insurance Act*, CAP. 487C.

<sup>426</sup> KDIC, *Annual Report and Financial Statements 2021*, 3.

<sup>427</sup> *Chase Bank Limited vs Zafrullah Khan & 19 Others* [2018] eKLR; HCCC No 159 of 2017.

<sup>428</sup> Section 54, *Kenya Deposit Insurance Act*, CAP. 487C.

<sup>429</sup> Agénor P, Gambacorta L and Kharroubi E, 'The Effects of Prudential Regulation, Financial Development, and Financial Openness on Economic Growth' BIS Working Papers, Working Paper No 752, 2018, 4.

framework. The Prudential Guidelines are published by the Central Bank of Kenya (CBK) which also oversees their implementation.<sup>430</sup> Under these guidelines, the CBK provides a Guideline on Corporate Governance that applies to all institutions licensed under the Banking Act.<sup>431</sup> The guideline defines corporate governance<sup>432</sup> and the “Sound Principles of Corporate Governance”<sup>433</sup> as well as a Code of Conduct<sup>434</sup> affecting directors, CEOs and senior management of institutions governed by the Banking Act. The Guideline, whose requirements aim to align with international best practices, outlines the minimum standards expected of shareholders, directors, CEOs, management and employees in a banking institution to ensure sound banking practices.<sup>435</sup>

As highlighted above, the Code 2015, is published by the CMA.<sup>436</sup> It outlines the corporate governance expectations for listed companies in Kenya. The authority acknowledges that good corporate governance is essential to enhance the competitiveness and sustainability of a corporation and by extension the stability of the market.<sup>437</sup> The Code 2015 recommends a set of minimum standards for management, directors, CEOs and shareholders to uphold so as to conduct themselves ethically and perform their functions effectively.<sup>438</sup> These recommendations are categorised as Board Operations and Control,<sup>439</sup> Rights of Shareholders,<sup>440</sup> Stakeholder Relations,<sup>441</sup> Ethics and Social Responsibility,<sup>442</sup> Accountability, Risk Management and Internal Control<sup>443</sup> and Transparency and Disclosure.<sup>444</sup> Within the corporate governance framework, the board holds the greatest responsibility in establishing a corporate culture and systems that sustain good governance practices in the organisation.<sup>445</sup> The Code provides principles and

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<sup>430</sup> CBK Prudential Guidelines for Institutions Licensed Under the Banking Act, 2013.

<sup>431</sup> CBK/PG/02, Guideline on Corporate Governance, para 1.3.

<sup>432</sup> CBK/PG/02, Guideline on Corporate Governance, para 1.4.1.

<sup>433</sup> CBK/PG/02, Guideline on Corporate Governance, Part III.

<sup>434</sup> CBK/PG/02, Guideline on Corporate Governance, Part IV.

<sup>435</sup> CBK/PG/02, Guideline on Corporate Governance, para 2.1.

<sup>436</sup> *The Code*, 2015.

<sup>437</sup> CMA, *The Capital Markets Authority Handbook*, 57.

<sup>438</sup> CMA, *The Capital Markets Authority Handbook*, 57.

<sup>439</sup> Chapter 2, *The Code*, 2015.

<sup>440</sup> Chapter 3, *The Code*, 2015.

<sup>441</sup> Chapter 4, *The Code*, 2015.

<sup>442</sup> Chapter 5, *The Code*, 2015.

<sup>443</sup> Chapter 6, *The Code*, 2015.

<sup>444</sup> Chapter 7, *The Code*, 2015.

<sup>445</sup> CMA, *The Capital Markets Authority Handbook*, 58.

guidelines for the board in its establishment, responsibilities, composition, tools, evaluations and compliance obligations.<sup>446</sup>

Ruparelia and Njuguna explored the evolution of corporate governance in Kenya up to the 2002 promulgation of the 'Guidelines on Principles of Corporate Governance for Public Listed Companies' by the Capital Markets Authority.<sup>447</sup> Their research served to illuminate that most of the practices and principles in Kenya's corporate governance framework are borrowed from frameworks such as the OECD Principles of Corporate Governance and other works done in Malaysia, the United Kingdom and South Africa.<sup>448</sup>

Research shows that African countries like Kenya, generally tend to adopt the legal and institutional frameworks of other developed countries or jurisdictions.<sup>449</sup> However, most are plagued by weak institutional environments, for example, having powerful family or individual shareholders who make the voluntary checks and balances required by a principles-based system difficult to adopt and apply.<sup>450</sup> The Code, which borrows from international practice, is accused as being largely suggestive, most of its provisions fail to provide for enforcement mechanisms.<sup>451</sup> Despite these adoptions and emulations from developed countries, Kenya has continued to face significant scandals and failures in its banking and financial services industry.<sup>452</sup> With evidence illuminating the hybrid nature of Kenya's model, it would be paramount to consider strengthening supervisory and enforcement mechanisms to mitigate the risk of corporate failure.

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<sup>446</sup> CMA, *The Capital Markets Authority Handbook*, 58.

<sup>447</sup> Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 154-155.

<sup>448</sup> Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 159.

<sup>449</sup> Okike E, Adegbite E, Nakpodia F and Adegbite S, 'A Review of Internal and External Influences on Corporate Governance and Financial Accountability in Nigeria' 10(2), *International Journal of Business Governance and Ethics*, 2015, 165-166.; Ashiru F, Nakpodia F and Adegbite E, 'Principles of Corporate Governance and Effective Boards' in Franklin N Ngwu and others (eds), *Enhancing board effectiveness: Institutional, regulatory and functional perspectives for developing and emerging markets*, Taylor & Francis, 2021, 24-25.

<sup>450</sup> Ashiru F *et al*, 'Principles of Corporate Governance and Effective Boards' 25.

<sup>451</sup> Obonyo MB, 'Engendering Good Corporate Governance in the Kenyan Banking Sector', 8.

<sup>452</sup> Nyakeri BA, 'The Law on Corporate Governance and Shareholder Protection in Kenya', 4-5.; Kimani D *et al*, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective' 4.

### 3.6 Compliance and Enforcement Mechanisms in Kenya's Corporate Governance Framework

Guided by the legally established frameworks discussed above, companies within the Kenyan financial sector have also adopted internal structures to promote good corporate governance. Financial institutions like Diamond Trust Bank (DTB) Kenya,<sup>453</sup> HFC Group<sup>454</sup> and Equity Group Holdings<sup>455</sup> have established and published corporate governance policies and corporate governance frameworks respectively.

These policies and frameworks serve to create and promote a culture of ethical behaviour in the organization.<sup>456</sup> This is by outlining minimum conduct standards for directors and executive officers,<sup>457</sup> duties of the Board of Directors,<sup>458</sup> and strategies for ensuring compliance with legal requirements related to corporate governance.<sup>459</sup> While the style and language might defer, the spirit of these documents is the same. They decode the principles and regulatory requirements outlined herein above into policies that reflect and suit each organisation's culture and strategic objectives. These principles and expectations are not unique to the three highlighted financial institutions. A review of the board charters for KCB Group,<sup>460</sup> NCBA,<sup>461</sup> Standard Chartered Bank Kenya,<sup>462</sup> and the governance framework for Stanbic Group Kenya<sup>463</sup> reveals similarities in the commitments to corporate governance and adopted practices.

A review of board structures of various listed financial institutions reveals that most Kenyan institutions adopt a one-tier board system.<sup>464</sup> A key characteristic of this system is the reliance on non-executive directors as a control and monitoring

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<sup>453</sup> Diamond Trust Bank Kenya, *DTBK Corporate Governance Policy*, 2020.

<sup>454</sup> Housing Finance Group, *Corporate Governance Policy*, 2020.

<sup>455</sup> Equity Group, *The Group Corporate Governance Framework*, 2021.

<sup>456</sup> Equity Group, *The Group Corporate Governance Framework*, 8.

<sup>457</sup> Diamond Trust Bank Kenya, *DTBK Corporate Governance Policy*, 5.

<sup>458</sup> Equity Group, *The Group Corporate Governance Framework*, 19-20.

<sup>459</sup> Housing Finance Group, *Corporate Governance Policy*, 1-2.

<sup>460</sup> KCB Group, *KCB Group Plc Board Charter of Commitment*, 2019.

<sup>461</sup> NCBA, *NCBA Bank Kenya Plc: Board Charter*, 2023.

<sup>462</sup> Standard Chartered Bank, *Board Charter: Standard Chartered Bank Limited*, 2020.

<sup>463</sup> Stanbic Group Kenya, *Stanbic Group Kenya: Governance Framework*.

<sup>464</sup> KCB Group, 'Our Leaders' KCB Kenya, 2024—<<https://ke.kcbgroup.com/about-us/our-leaders>> on 19 April 2024; Equity Group, 'About Equity | Equity Group Holdings', Equity Group, 2024—<<https://equitygroup Holdings.com>> on 19 April 2024; Standard Chartered Bank Kenya, 'Board of Directors' Standard Chartered Bank Kenya, 2024—<<https://www.sc.com/ke/board-of-directors/>> on 19 April 2024.

mechanism.<sup>465</sup> This is done by establishing committees where these directors oversee the functions and decisions of the executive team.<sup>466</sup> Key among these committees is the audit committee.<sup>467</sup> Traditionally, audit committees have functioned to ensure the accuracy of financial statements however, over the years this role has grown to encompass monitoring compliance.<sup>468</sup> Studies have shown that audit committees in particular are a critical feature for boards in the finance sector.<sup>469</sup> These committees, with the relevant skilled and diverse membership, provide internal corporate governance mechanisms for mitigating operational risk and promoting institutional credibility.<sup>470</sup> Kenyan banks have adopted internal audit mechanisms within their structures which include an internal auditor as well as audit and risk committees.<sup>471</sup> Additionally, it is an expectation outlined in various reviewed board charters, on the appointment of independent non-executive directors to form part of the board.<sup>472</sup> These charters also illuminate the exclusive role of independent non-executive directors in audit committees. They expressly stipulate that alternate and executive directors shall not be members of audit committees commissioned by the respective Boards.<sup>473</sup>

During the transition, this study notes that Kenyan banks actively informed and trained stakeholders to ensure a smooth transition. They conducted risk identification analysis and implemented risk mitigation measures which included timely client communications, revision of LIBOR-linked contracts and training of key stakeholders

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<sup>465</sup> Mastrodascio M, *Corporate Governance Models*, 68.

<sup>466</sup> Mastrodascio M, *Corporate Governance Models*, 68.

<sup>467</sup> Mastrodascio M, *Corporate Governance Models*, 68.

<sup>468</sup> Colley JL, Doyle JL, Logan GW and Stettinius W, *Corporate Governance*, McGraw-Hill, New York, 2003, 48.

<sup>469</sup> Baiden JNE, 'Board Audit Committee Characteristics and Financial Performance of Selected Commercial Banks in Ghana' 10(1), *International Journal of Accounting and Financial Reporting*, 2020, 223; Gachau GN, Ngali R and Matanda J, 'Effects of Institutional Governance on Financial Performance of Commercial Banks in Kenya' 23(21), *Asian Journal of Economics, Business and Accounting*, 2023, 178.

<sup>470</sup> Erzurumlu Y and Avci G, 'Audit Committee Member Characteristics and Committee Effectiveness: Evidence from Turkish Banking Sector' 13(5), *International Journal of Monetary Economics and Finance*, 2020, 357.

<sup>471</sup> KCB Group, 'Our Leaders'.; Equity Group, 'About Equity | Equity Group Holdings'.; Standard Chartered Bank Kenya, 'Executive Committee', Standard Chartered Bank Kenya, 2024—<<https://www.sc.com/ke/management-committee/>> on 19 April 2024.

<sup>472</sup> Standard Chartered Bank, *Board Charter: Standard Chartered Bank Limited*, 3.; NCBA, *NCBA Bank Kenya Plc: Board Charter*, 11.; KCB Group, *KCB Group Plc Board Charter of Commitment*, 5.; Equity Group Holdings Plc, *Board Charter*, 2021, para. 2.2.

<sup>473</sup> NCBA, *NCBA Bank Kenya Plc: Board Charter*, 22.; KCB Group, *KCB Group Plc Board Charter of Commitment*, 13.; Equity Group Holdings Plc, *Board Charter*, para. 2.4.

in its LIBOR ecosystem.<sup>474</sup> Their Boards were updated on transition efforts undertaken under the established programmes.<sup>475</sup> This included internal audit reports made to the respective audit committees from the internal audit outfit.<sup>476</sup>

### 3.7 Conclusion

In the Kenyan financial and banking sector, various legislation and public institutions identified hereinabove contribute to the corporate governance framework. Anchored in the Constitution, the laws establish duties and responsibilities for these corporations and their leadership to safeguard the stability of the sector and the economy. The institutions discussed herein provide supervisory and enforcement mechanisms to support good corporate governance practices. They also provide safeguards in the event of institutional failures; this is essential in an industry that is plagued with failures occasioned by weak governance practices.

Individual banks contribute to the corporate governance framework through internal policies and frameworks that address board structure, composition and responsibilities. It has further illuminated the significance of the internal audit function and audit committees both generally and more specifically in the IBOR reform and transition to RFRs. The review of actions undertaken by some of Kenya's leading lenders provides insight into how Kenyan banks are managing the transition, its potential risks and their exposures. However, as illustrated by the Chase Bank case, the Kenyan corporate governance framework is evidently reactionary.

Whereas banks, guided by the principles of corporate governance enshrined in the legal framework have demonstrably undertaken proactive measures to navigate the transition, the institutions tasked with the mandate have been largely underwhelming in their approach. It remains to be seen whether this was by design; whereby the legal and institutional framework in Kenya adopted a hands-off approach to the transition.

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<sup>474</sup> Equity Group Plc, *2021 Integrated Report & Financial Statements*.

<sup>475</sup> NCBA Group, *2021 Integrated Annual Report*; Standard Chartered Bank Kenya, *'Annual Report 2021*'; KCB Group Plc, *2021 Integrated Report & Financial Statements*; Equity Group Plc, *2021 Integrated Report & Financial Statements*.

<sup>476</sup> Standard Chartered Bank Kenya, *'Annual Report 2021*.

## Chapter 4 : A Review of Corporate Governance Frameworks Facilitating the Transition to RFRs in the US and the UK

### 4.1 Introduction

This chapter dives into how the LIBOR scandal influenced global financial regulation reforms and transition approaches in the US and UK. It serves to illuminate the corporate governance frameworks employed in the transition by the target jurisdictions, highlighting, where applicable, the influences of the scandal on developments in these structures. The overarching objective is to provide a measure to assess the Kenyan approach and identify any possible safeguards Kenya can borrow to strengthen the corporate governance framework in its financial sector.

### 4.2 Transitional Risk Management in the Shift from IBORs to RFRs across Jurisdictions

This segment focuses on highlighting the risks associated with the transition from LIBOR to RFRs and the safeguards adopted in the US and the UK to mitigate them. It includes a review of the actions of some of the banks involved in the LIBOR scandal and their commitments to risk mitigation during the transition.

#### 4.2.1 Conduct Risks

According to the FSB, conduct risk is the risk of misconduct attributed to behaviour that falls short of expected standards which can be set either by legal, ethical, professional or internal guidelines.<sup>477</sup> In the financial space, it can arise from actions, inactions or behaviours of service providers which may include low-value products, poor advice, poor product design and dishonest practices.<sup>478</sup> With regards to the transition, the FCA published guidelines to ensure institutions committed to fair practices as they renegotiated contracts from LIBOR to RFRs.<sup>479</sup> The objective was to ensure that organisations do not use the term rates discontinuation to renegotiate contracts with rates or terms that would be unfair or higher than existing LIBOR-based

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<sup>477</sup> Maurer F, *Financial Risk Management: From Metrics to Human Conduct*, Wiley, 2024, 117.

<sup>478</sup> OECD, *Consumer Finance Risk Monitor*, OECD Publishing, Paris, 2024, 35.

<sup>479</sup> Jones-Fenlegh *et al*, 'LIBOR Transition' 181.; FCA, 'Conduct Risk during LIBOR Transition' Financial Conduct Authority, 9 January 2023—<<https://www.fca.org.uk/markets/libor/conduct-risk-during-libor-transition>> on 2 June 2024.

contracts.<sup>480</sup> The Authority also tasked institutions with making proper and clear disclosures and communications to customers who would be affected by the discontinuation of LIBOR and the transition to RFRs.<sup>481</sup>

Organisations were expected to put in place robust governance structures and systems to ensure conduct risks were identified and mitigated.<sup>482</sup> This is evinced by the actions of various banks that adopted these guidelines in their transition programmes.<sup>483</sup> Barclays Bank, for example, in its reports acknowledged conduct risk as a potential risk arising from the benchmark reforms and the LIBOR transition.<sup>484</sup> In its case, it described conduct risk arising from undertaking manipulative or misleading market activities, misusing information at clients' detriment, misadvising or not adequately advising clients, failed consistency in remediation of client concerns, lack of or unduly delayed information to clients regarding transitory activities where clients were exposed among others.<sup>485</sup> The Group's Risk Committee received regular updates on this and other risks related to the LIBOR transition which were being managed through its LIBOR Transition Programme.<sup>486</sup>

#### **4.2.2 Legal and Regulatory Risks**

Legal and Regulatory risks, also referred to as compliance risks, can be considered as sanctions, financial loss, or reputational damage incurred as a result of failing to comply with existing laws, regulations or industry standards and practice codes as defined by the BCBS.<sup>487</sup> In the case of the transition, they arise from uncertainty affecting contractual documentation in particular fallback language which led to risks of contract frustration as well as litigation risks.<sup>488</sup> To combat these and other legal

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<sup>480</sup> Jones-Fenleigh *et al*, 'LIBOR Transition' 181.

<sup>481</sup> Jones-Fenleigh *et al*, 'LIBOR Transition' 181.

<sup>482</sup> FCA, 'Conduct Risk during LIBOR Transition'.

<sup>483</sup> Barclays Plc, *Annual Report 2020*, 2020.; UBS Group, *Annual Report 2020*, 2020.; Deutsche Bank, *Annual Report 2020*, 2020.

<sup>484</sup> Barclays Plc, *Annual Report 2020*, 151.

<sup>485</sup> Barclays Plc, *Annual Report 2020*, 151.

<sup>486</sup> Barclays Plc, *Annual Report 2020*, 397-98; Barclays Plc, *Annual Report 2021- Part 1*, 2021.

<sup>487</sup> Basel Committee on Banking Supervision (BCBS), *Guidelines: Compliance and the Compliance Function in Banks*, 2005, 7; Dill A, *Bank Regulation, Risk Management, and Compliance: Theory, Practice, and Key Problem Areas*, Informa Law from Routledge, Oxon, 2020, 25.

<sup>488</sup> Jones-Fenleigh *et al*, 'LIBOR Transition' 182; FMLC, *LIBOR Transition*, 7.

uncertainties accompanying the transition, the UK and the US all enacted or amended legislative frameworks to support financial institutions in their jurisdictions.<sup>489</sup>

In the US, to minimise uncertainties and reduce economic risks associated with the LIBOR legacy contracts, the Adjustable Interest Rate (LIBOR) Act was enacted in 2022 as part of the Consolidated Appropriations Act, 2022.<sup>490</sup> The LIBOR Act would ensure uniformity by providing default rules to apply to LIBOR legacy contracts under the purview of US law tackling different categories of fallback provisions to mitigate potential risks.<sup>491</sup>

In the UK, the FCA was also granted additional powers to facilitate a smooth transition and manage legacy contracts.<sup>492</sup> In exercise of its mandate, the Authority also published a temporary Synthetic LIBOR to serve contracts where renegotiation or amendment of legacy contracts was nearly impossible.<sup>493</sup> These powers were strengthened by assenting the Critical Benchmarks (References and Administrators' Liability) Act 2021.<sup>494</sup> The act amended the UK Benchmarks Regulation (UK BMR) 2016<sup>495</sup> to provide resolutions to managing tough legacy contracts.<sup>496</sup> This amendment allowed for the application of Synthetic LIBOR thus reducing the risk of contracting parties to argue for breach of contract, frustration or material change. This served to reduce legal and regulatory risks for institutions with Libor-referenced contracts under

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<sup>489</sup> Huan X *et al*, 'Understanding the LIBOR Scandal', 23-25.

<sup>490</sup> Alternative Reference Rates Committee, 'ARRC Welcomes Passage of Federal LIBOR Transition Legislation in Omnibus Spending Package' New York Fed, 15 March 2022—<<https://www.newyorkfed.org/arrc/publications/legislation>> on 1 June 2024; Federal Reserve System, 'Regulations Implementing the Adjustable Interest Rate (LIBOR) Act' Federal Register, 26 January, 2023—<<https://www.federalregister.gov/documents/2023/01/26/2023-00213/regulations-implementing-the-adjustable-interest-rate-libor-act>> on 2 June 2024.

<sup>491</sup> Part 235, § 253.1, *Regulations Implementing the Adjustable Interest Rate (LIBOR) Act (Regulation ZZ)*, 2023.

<sup>492</sup> Huan X *et al*, 'Understanding the LIBOR Scandal', 24.

<sup>493</sup> FCA, 'Further Consultation and Announcements on the Wind-down of LIBOR' Financial Conduct Authority, 23 November 2022—<<https://www.fca.org.uk/news/news-stories/further-consultation-announcements-wind-down-libor>> on 2 June 2024.

<sup>494</sup> HM Treasury, 'Extending the Transitional Period for Third Country Benchmarks under the UK Benchmarks Regulation', GOV.UK, 8 November 2023—<<https://www.gov.uk/government/publications/extending-the-transitional-period-for-third-country-benchmarks-in-the-uk/extending-the-transitional-period-for-third-country-benchmarks-under-the-uk-benchmarks-regulation>> on 5 June 2024.

<sup>495</sup> Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (Text with EEA relevance) (*UK BMR*).

<sup>496</sup> Howison A, Knight J and McAllister-Jones K, 'LIBOR transition and tough legacy Critical Benchmarks Act 2021 comes into force', Ashurst, 23 December 2021—<<https://www.ashurst.com/en/insights/libor-transition-and-tough-legacy-critical-benchmarks-act-2021-comes-into-force/>> on 5 June 2024.

English law.<sup>497</sup> These amendments guided the leadership of financial institutions on how to navigate potential risks illustrating the key role of hard law in facilitating corporate governance practices and compliance.

The expectation of financial institutions from a corporate governance point of view is to adhere to the protocols and directives issued on LIBOR transition and fallback language. Where none are applicable, it was expected that institutions would fairly renegotiate the terms of their contractual agreements to ensure a transition away from LIBOR.<sup>498</sup> However, the risks of contractual frustration<sup>499</sup> and litigation<sup>500</sup> are still possible and institutions such as Barclays,<sup>501</sup> UBS<sup>502</sup> and Deutsche Bank<sup>503</sup> have indicated to have effectively assessed and planned for them.

### **4.2.3 Operational Risks**

The BCBS defines operational risk as “the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events”.<sup>504</sup> In the context of LIBOR, it refers to changes in technology, documentation, systems and methodologies from IBORs to RFRs beyond the existing complexities of a globalised market.<sup>505</sup> Essentially, managing operational risk in banks is mandated to directors and senior managers.<sup>506</sup> They oversee how people and processes function to ensure they are at an optimum and compliant; the size and independence of an audit committee directly correlate to the minimisation of operational risks.<sup>507</sup> A robust and effective corporate governance framework is therefore essential to navigate operational risk.

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<sup>497</sup> Howison A *et al*, ‘LIBOR transition and tough legacy Critical Benchmarks Act 2021 comes into force’.; Explanatory Notes, *Critical Benchmarks (References And Administrators’ Liability) Act 2021*.

<sup>498</sup> Jones-Fenleigh *et al*, ‘LIBOR Transition’, 183.

<sup>499</sup> Jones-Fenleigh *et al*, ‘LIBOR Transition’, 183.

<sup>500</sup> Jones-Fenleigh *et al*, ‘LIBOR Transition’, 182.

<sup>501</sup> Barclays Plc, *Annual Report 2020*.

<sup>502</sup> UBS Group, *Annual Report 2020*.

<sup>503</sup> Deutsche Bank, *Annual Report 2020*.

<sup>504</sup> Basel Committee on Banking Supervision (BCBS), *Principles for the Sound Management of Operational Risk (Revised 2021)*, 2021, 2.

<sup>505</sup> Barclays Plc, *Annual Report 2020*, 151.

<sup>506</sup> Altaf K, Ayub H, Shabbir MS and Usman Muhammad, ‘Do Operational Risk and Corporate Governance Affect the Banking Industry of Pakistan?’, *7(2) Review of Economics and Political Science*, 2022, 111 & 116.

<sup>507</sup> Nguyen QK and Dang VC, ‘The Impact of Risk Governance Structure on Bank Risk Management Effectiveness: Evidence from ASEAN Countries’, *8(10), Heliyon* 2022, 2.

Barclays Plc acknowledged that the benchmark reforms and LIBOR transition to RFRs would impact its IT systems, operational controls and processes as well as trade reporting infrastructure.<sup>508</sup> It further acknowledged that it may have to incur additional costs to amend or develop documentation for existing or new transactions.<sup>509</sup> The bank's Group Risk Committee received updates on the operationalisation of its LIBOR Transition Programme established to manage and mitigate transition-related risks.<sup>510</sup> The programme had senior manager oversight coordinating global efforts.<sup>511</sup> Like Barclays, Deutsche Bank also acknowledged the likelihood of operational risk if it failed to identify and mediate processes dependent on IBORs.<sup>512</sup> In addition to its Operational Risk Management Framework, the bank also launched a group-wide IBOR & EU Benchmark Regulation Transition Programme in 2018 sponsored by its Chief Financial Officer (CFO) which provides regular reports to its IBOR Transition Steering Committee and its Board Risk Committee.<sup>513</sup>

#### **4.2.4 Systemic Risk**

At the onset, there were concerns that an improperly managed transition could trigger widespread global financial instability hence posing systemic risk.<sup>514</sup> Systemic risk, as guided by the BIS, FSB and the IMF, can be defined as *“the disruption to the flow of financial services that is (i) caused by an impairment of all or parts of the financial system; and (ii) has the potential to have serious negative consequences for the real economy”*.<sup>515</sup> As aforementioned in this study, the LIBOR was a widely used benchmark and reference rate, therefore the volume of transactions affected by its transition was concerning to regulators and industry players.<sup>516</sup> The BCBS, in its *Core Principles for Effective Banking Supervision*,<sup>517</sup> emphasises the significance of cooperation, collaboration and supervision in mitigating global systemic risk in the

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<sup>508</sup> Barclays Plc, *Annual Report 2020*, 151.

<sup>509</sup> Barclays Plc, *Annual Report 2020*, 151.

<sup>510</sup> Barclays Plc, *Annual Report 2020*, 367.

<sup>511</sup> Barclays Plc, *Annual Report 2020*, 367.

<sup>512</sup> Deutsche Bank, *Annual Report 2020*, 46.

<sup>513</sup> Deutsche Bank, *Annual Report 2020*, 265.

<sup>514</sup> Labonte M, *The LIBOR Transition*, Congressional Research Service, 21 March 2022, 1.

<sup>515</sup> Danielsson J, *The illusion of control: why financial crises happen, and what we can (can't) do about it*, Yale University Press, USA, 2022, 8.

<sup>516</sup> Hardy J et al, 'RFR Term Rates in a Post-LIBOR Landscape' 474.

<sup>517</sup> Basel Committee on Banking Supervision (BCBS), *Core Principles for Effective Banking Supervision*, July 2023.

financial sector.<sup>518</sup> Key players and relevant authorities, both locally and internationally, work together to identify, analyse and implement mitigation strategies for systemic risks.<sup>519</sup> However, for this to be successful, supervising authorities must have clearly defined roles and powers in this regard.<sup>520</sup> Studies have also shown that to improve financial stability and mitigate systemic risk, internal and external governance systems should be complementary.<sup>521</sup>

Mitigating the risks highlighted hereinabove was facilitated by the legal and institutional corporate governance structures employed in the US and the UK.

### **4.3 Legal and Institutional Corporate Governance Frameworks in the US and the UK**

#### **4.3.1 The United States**

##### **4.3.1.1 Legal and Regulatory Framework**

The US in its response to previous financial scandals took the hard law approach to corporate governance by enacting first the Sarbanes-Oxley Act of 2002 (SOX)<sup>522</sup> and later the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).<sup>523</sup> SOX played a significant role in imposing disclosure requirements and obligations on senior executives, limiting auditors' services to listed companies while enhancing their independence and ensuring the establishment and independence of audit committees.<sup>524</sup> It is credited for promoting higher standards of reporting and disclosure.<sup>525</sup> The Dodd-Frank, on the other hand, was passed with the objectives of investor protection, financial stability and bank regulation.<sup>526</sup> Clarke describes it as “the

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<sup>518</sup> BCBS, *Core Principles for Effective Banking Supervision*.

<sup>519</sup> BCBS, *Core Principles for Effective Banking Supervision*.

<sup>520</sup> BCBS, *Core Principles for Effective Banking Supervision*.

<sup>521</sup> Lee C, Wang Y and Zhang X, 'Corporate Governance and Systemic Risk: Evidence from Chinese-Listed Banks' 87 *International Review of Economics & Finance*, 2023, 180.

<sup>522</sup> Ortega S, 'Impact of Corporate Governance on Financial Reporting and Profitability of Banking', PhD Thesis, Walden University, Minnesota, 2021, 2; Anheier HK and Abels CM, 'Corporate Governance in Comparative Perspective' in Anheier HK and Baums T (eds), *Advances in Corporate Governance: Comparative Perspectives*, Oxford, Oxford University Press, 2020, 1.

<sup>523</sup> Anheier HK and Abels CM, 'Corporate Governance in Comparative Perspective', 1.

<sup>524</sup> Ilori O, Nwosu NT and Naiho HNN, 'Optimizing Sarbanes-Oxley (SOX) compliance: strategic approaches and best practices for financial integrity: A review', 22(03), *World Journal of Advanced Research and Reviews*, 2024, 226-27.

<sup>525</sup> Ilori O *et al*, 'Optimizing Sarbanes-Oxley (SOX) compliance' 226.

<sup>526</sup> Clarke T, *Corporate Governance: Cycles of Innovation, Crisis and Reform*, SAGE Publications, London, 2023, 86.

most comprehensive financial regulatory reform”<sup>527</sup> which aimed, at the time of its enactment, to reinforce the regulation and oversight of the US’s financial system and consequently mitigate risks of financial crisis.<sup>528</sup> The Dodd-Frank also established the Financial Stability Oversight Council (FSOC)<sup>529</sup> and the Consumer Financial Protection Bureau (CFPB)<sup>530</sup> which are discussed within the institutional framework.

The foundation of corporate governance regulation in the US is traced back to the 1929 stock market crash.<sup>531</sup> It was in the aftermath of this crisis that Congress enacted the Securities Act 1933 and the Securities Exchange Act 1934 which then established the Securities and Exchange Commission which will also be discussed in the next section.<sup>532</sup> The Act 1933 was the first federal law in the US on the regulation of the issuance of securities.<sup>533</sup> The objectives of these laws were to ensure investors were protected by guaranteeing access to reliable information for investment through disclosure requirements and ensuring honest and fair trading practices.<sup>534</sup> These disclosure obligations also apply to LIBOR-linked securities indicating the significance of these two Acts to the LIBOR transition.<sup>535</sup>

In addition to the corporate governance obligations outlined in the laws highlighted above, the New York Stock Exchange (NYSE) and the NASDAQ Stock Market also individually make rules for listed companies to comply with which include Corporate Governance Standards<sup>536</sup> that form part of the US regulatory framework. The NYSE and NASDAQ corporate governance standards outline requirements on various

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<sup>527</sup> Clarke T, *Corporate Governance*, 86.

<sup>528</sup> Clarke T, *Corporate Governance*, 86.

<sup>529</sup> US Department of the Treasury, ‘Financial Stability Oversight Council’, 2024—<<https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc>> on 16 February 2024.

<sup>530</sup> CFPB, ‘Building the CFPB’, Consumer Financial Protection Bureau, 2022—<<https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/>> on 16 February 2024.

<sup>531</sup> Lund DS and Pollman E, ‘The Corporate Governance Machine’ 121(8), *Columbia Law Review*, 2021 2569-70; US Securities Exchange Commission (SEC), *Agency Financial Report, Fiscal Year 2022*, 2022,6.

<sup>532</sup> US SEC, *Agency Financial Report*, 6.

<sup>533</sup> US SEC, *Agency Financial Report*, 6.

<sup>534</sup> US SEC, *Agency Financial Report*, 6.

<sup>535</sup> US SEC, ‘SEC Staff Statement on LIBOR Transition—Key Considerations for Market Participants’, U.S. Securities and Exchange Commission, 7 December 2021—<<https://www.sec.gov/news/statement/staff-statement-libor-transition-20211207>> on 16 February 2024.

<sup>536</sup> NYSE, 303A.00 *Corporate Governance Standards*; NASDAQ, 5600. *Corporate Governance Requirements*.

aspects including director independence, disclosure requirements, audit committee independence for risk mitigation and code of conduct requirements among others.<sup>537</sup> The effect with regards to these codes is on disclosure requirements on the LIBOR transition, for example, issuers of securities affected by the transition are required to ensure investors are well informed and updated on any changes affecting their investment as Citigroup Inc did.<sup>538</sup>

#### 4.3.1.2 Institutional Framework

The FSOC is tasked with identifying financial stability risks, promoting market discipline and responding to threats to the US financial system's stability.<sup>539</sup> It is not a regulatory authority but brings together member agencies who hold regulatory control over various aspects of the US financial system to assess, monitor and mitigate risks.<sup>540</sup> True to its mandate, since 2013, FSOC has identified LIBOR as a risk to financial stability in the US system.<sup>541</sup> In line with its constitution, the FSOC is composed of several voting and non-voting members most of whom are financial federal agencies.<sup>542</sup> Under the guidance of the FSOC several federal financial institutions, which serve as FSCO member agencies, were tasked with managing the progress towards a smooth LIBOR transition.<sup>543</sup> These included the Federal Reserve System (the Fed), the Board of Governors, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA),<sup>544</sup> and the Securities and Exchange Commission (SEC).<sup>545</sup>

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<sup>537</sup> NYSE, *303A.00 Corporate Governance Standards*; NASDAQ, *5600. Corporate Governance Requirements*.

<sup>538</sup> NASDAQ, 'Citi LIBOR Transition Update | Nasdaq' NASDAQ, 27 September, 2023—<<https://www.nasdaq.com/press-release/citi-libor-transition-update-2023-09-27>> on 17 February 2024.

<sup>539</sup> Financial Stability Oversight Council (FSOC), *Annual Report 2022*, 2022, 1.

<sup>540</sup> US Department of the Treasury, 'Financial Stability Oversight Council'.

<sup>541</sup> FSOC, *Annual Report 2022*, 10.

<sup>542</sup> FSOC, *Annual Report 2022*, 1.

<sup>543</sup> FDIC, 'Joint Statement on Managing the LIBOR Transition' Federal Deposit Insurance Corporation, 20 October 2021—<<https://www.fdic.gov/news/financial-institution-letters/2021/fil21070.html>> on 18 February 2024.

<sup>544</sup> FDIC, 'Joint Statement on Completing the LIBOR Transition' Federal Deposit Insurance Corporation, 26 April 2023—<<https://www.fdic.gov/news/financial-institution-letters/2023/fil23020.html>> on 18 February 2024.

<sup>545</sup> Gensler G, 'Remarks before the Financial Stability Oversight Council: LIBOR' U.S. Securities and Exchange Commission, 28 July 2023—<<https://www.sec.gov/news/speech/gensler-remarks-fsoc-libor-072823>> on 18 February 2024.

The CFPB is another institution established under the Dodd-Frank following the 2007-08 GFC. Before its establishment, regulation of consumer protection in the American financial space was spread out across seven bodies.<sup>546</sup> The aftermath of the crisis illuminated the failures in consumer protection as there was a lack of efficacy and consistency in oversight and enforcement in the market due to the fragmented approach of regulation and supervision.<sup>547</sup> The CFPB's establishment served to consolidate consumer protection efforts under one oversight authority.<sup>548</sup> Its mandate is to protect consumers of financial products from "unfair, deceptive, or abusive practices and take action against companies that break the law".<sup>549</sup> It educates consumers, monitors the markets for potential risks and provides a platform for receiving and addressing consumer complaints.<sup>550</sup> To enhance compliance among organisations and educate consumers regarding their rights, the Bureau published guidance on the transition and its actions as well as those of other bodies.<sup>551</sup> The guidance also included resources organisations can use to develop a LIBOR transition plan for mitigating compliance risk.<sup>552</sup>

The Fed, another feature of the US institutional framework, can be referred to as the central bank of the United States.<sup>553</sup> It is tasked with five functions: conducting the US's monetary policy, minimising systemic risk by promoting the financial system's stability, monitoring financial institutions to ensure they are safe and sound, ensuring payment and settlement systems are safe and efficient and promoting consumer protection and community development.<sup>554</sup> The Board of Governors of the Fed is one of its three entities which reports directly to Congress and oversees the Fed's mandate.<sup>555</sup> Together with the New York Fed, the Board and other FSOC member

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<sup>546</sup> CFPB, 'Building the CFPB'.

<sup>547</sup> CFPB, 'Building the CFPB'.

<sup>548</sup> CFPB, 'Building the CFPB'.

<sup>549</sup> CFPB, 'The CFPB', Consumer Financial Protection Bureau, 2024—  
<<https://www.consumerfinance.gov/about-us/the-bureau/>> on 5 June 2024.

<sup>550</sup> CFPB, 'The CFPB'.

<sup>551</sup> CFPB, 'LIBOR Transition FAQs', Consumer Financial Protection Bureau, 28 April 2023—  
<<https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/libor-index-transition/libor-transition-faqs/>> on 5 June 2024.

<sup>552</sup> CFPB, 'LIBOR Transition FAQs'.

<sup>553</sup> The Fed, *The Fed Explained: What the Central Bank Does*, 11<sup>th</sup> ed, Publications Fulfillment, Washington DC, 2021, 1.

<sup>554</sup> The Fed, *The Fed Explained*, 1.

<sup>555</sup> The Fed, *The Fed Explained*, 1.

agencies formed the Alternative Reference Rates Committee (ARRC)<sup>556</sup> which was tasked with ensuring the successful transition from USD LIBOR to SOFR, the new RFR.

The ARRC, which concluded its work in November 2023, was crucial to facilitating the transition from LIBOR, not only in the US but in other LIBOR currency jurisdictions.<sup>557</sup> Though initially convened in 2014, its significance to this study is on the Paced Transition Plan undertaken in the five years post its 2018 reconstitution culminating in its conclusion in 2023.<sup>558</sup> During this time, it facilitated the development of recommended fallback language for cash product contracts, the promotion of tools to support SOFR adoption, the enactment of federal legislation for contracts where LIBOR could not be replaced, the adoption of Term SOFR and its Scope of Use and eventually the cessation of USD LIBOR.<sup>559</sup> Its best practice recommendations continue to play a role in the use of reference rates and inform their adoption and application not only in the US but internationally.<sup>560</sup>

### **4.3.2 The United Kingdom**

#### **4.3.2.1 Legal and Regulatory Framework**

The UK has contributed significantly to the corporate governance conversation. A dive into the history of corporate governance regulation will most likely trace back to the Cadbury Report of 1992.<sup>561</sup> This report is arguably the first concrete guide to corporate governance in the UK. It provided various recommendations for listed companies that spoke to a separation of the Chair of Board and CEO roles, appointments of independent directors and the independent composition of the Board of Directors' audit committee.<sup>562</sup> The report was accompanied by a Code of Best Practice which,

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<sup>556</sup> New York Fed, 'Alternative Reference Rates Committee (ARRC)' Federal Reserve Bank of New York, 2024—<<https://www.newyorkfed.org/arrc/about>> on 18 February 2024.

<sup>557</sup> New York Fed, 'ARRC'.

<sup>558</sup> New York Fed, 'ARRC'.

<sup>559</sup> New York Fed, 'ARRC'.

<sup>560</sup> New York Fed, 'ARRC'.

<sup>561</sup> Buchetti B and Santoni A, *Corporate Governance in the Banking Sector: Theory, Supervision, ESG and Real Banking Failures*, Springer Nature, Switzerland, 2022, para 1.1.1.

<sup>562</sup> Buchetti B and Santoni A, *Corporate Governance in the Banking Sector*, para 1.1.1.

though not binding, had significant contributions to the development of corporate governance regulation in the UK today.<sup>563</sup>

Following the Cadbury Report were the Greenbury Report of 1995 and the Hampel Report of 1998.<sup>564</sup> The three reports and their recommendations culminated in the UK Combined Code of 1998.<sup>565</sup> The Code has been reviewed and revised severally<sup>566</sup> and today takes the form of the UK Corporate Governance Code, 2018.<sup>567</sup> The Code incorporates a set of principles of good governance which form the UK regulatory framework on corporate governance and inform listed companies on best practices.<sup>568</sup> It is important to note, however, that following consultations in 2022-2023, the Financial Reporting Council was tasked with strengthening the Code.<sup>569</sup> The objective was to, among other concerns, improve risk management controls, improve the effectiveness of the comply-or-explain approach and improve board responsibilities on corporate governance.<sup>570</sup> These consultations culminated in the UK Corporate Governance Code 2024 which, though published, will apply from January 2025.<sup>571</sup>

In addition to the Code, some legislations also play a key role in forming the corporate governance framework of the UK financial and banking services sector. The Financial Services Act of 2012 (FSA 2012) made some key amendments to the UK financial and banking services industry. These were amendments to the Financial Services and Markets Act 2000, the Banking Act 2009 and the Companies Act 2006.<sup>572</sup> Some of the key effects of the Act as outlined by HM Treasury were; making the Bank of England the oversight on financial stability and replacing the Financial Services Authority with the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) informed by the 2007-2008 financial crisis to ensure a more focused regulatory

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<sup>563</sup> Solomon J, *Corporate Governance and Accountability*, 45.

<sup>564</sup> Okike E, *Corporate Governance in Commonwealth Countries*, International Centre for Research in Accountability and Governance, United Kingdom, 2019, 343-44.

<sup>565</sup> Mallin CA, *Corporate Governance*, 6<sup>th</sup> ed, Oxford University Press, Oxford, 2019, 31.

<sup>566</sup> Okike E, *Corporate Governance in Commonwealth Countries*, 344-60.

<sup>567</sup> Buchetti B and Santoni A, *Corporate Governance in the Banking Sector*, para 1.1.1.

<sup>568</sup> FRC, 'Corporate Governance (Overview)' Financial Reporting Council, 6 October 2023—<https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/corporate-governance-overview/> on 17 February 2024.

<sup>569</sup> FRC, 'Corporate Governance (Overview)'.

<sup>570</sup> FRC, 'Corporate Governance (Overview).'; Financial Reporting Council, *Corporate Governance Code Consultation*, 2023, 3.

<sup>571</sup> FRC, *Corporate Governance Code Consultation*, 6.

<sup>572</sup> Introduction, *Financial Services Act*, 2012.

approach to financial service providers.<sup>573</sup> The Act also addressed criminal offences on market manipulation and provided for regulation of certain activities attributed to benchmarks like LIBOR and credit ratings.<sup>574</sup>

The Financial Services and Markets Act (FSMA) 2000, empowered by the amendments made by the FSA 2012, plays a significant role in giving authority to the institutional frameworks of corporate governance particularly the Financial Conduct Authority (FCA).<sup>575</sup> Notably, the FCA played a significant oversight and guidance role in the LIBOR transition in the UK.<sup>576</sup> It has the mandate to establish rules, standards and guidelines which form part of the corporate governance regulatory framework.<sup>577</sup>

The Companies Act 2006, though not directly related to the financial services sector, provides for the corporate governance obligations of directors. It tasks directors with promoting the company's success by paying mind to all stakeholders' needs.<sup>578</sup> This study proposes that this requirement adopts the stakeholder view by requiring directors to ensure company performance all while paying mind to stakeholder interests.

Other regulatory contributions to corporate governance can be derived from the Banking Act 2009 and the Bank of England Act 1998, which establishes the Bank of England that is tasked with the responsibility of financial stability.<sup>579</sup>

#### 4.3.2.2 Institutional Framework

Founded in 1694, initially as a private bank,<sup>580</sup> the Bank of England serves as the central bank of the United Kingdom.<sup>581</sup> The bank was nationalised in 1946 and granted

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<sup>573</sup> HM Treasury, *Financial Services Act 2012: Summary of Consultation Responses on Draft Secondary Legislation and Government Response*, 2013, 3.

<sup>574</sup> HM Treasury, *Financial Services Act 2012*, 3.

<sup>575</sup> Section 1A, *Financial Services and Markets Act*, 2000.

<sup>576</sup> FCA, 'About LIBOR Transition'.

<sup>577</sup> FCA, 'Benchmarks Regulation: Our Powers, Policy and Decision-Making' Financial Conduct Authority, 16 January 2023—<<https://www.fca.org.uk/markets/transition-libor/benchmarks-regulation-powers-policy-decision-making>> on 19 February 2024.

<sup>578</sup> Section 172, *Companies Act*, 2006.

<sup>579</sup> Introduction, *Bank of England Act*, 1998

<sup>580</sup> Smith C, *Bank of England: History, Role and Current Policy Debates*, House of Lords, 6 January 2020, 2.; Bank of England, 'What Does the Bank of England Do?' Bank of England, 2024—<<https://www.bankofengland.co.uk/about>> on 19 February 2024.

<sup>581</sup> Bank of England, *Annual Report and Accounts 1 March 2022-28 February 2023*, Bank of England, 2023, 24.; James H, *Making a Modern Central Bank: The Bank of England 1979-2003*, Cambridge University Press, Cambridge, 2020, 2.

operational independence in 1997-98 by the enactment of the Bank of England Act 1998.<sup>582</sup> Notably, the regulatory changes in the 1997-98 period transferred prudential supervision responsibilities from the Bank of England to the Financial Services Authority, however, this was reversed in 2012 by the Financial Services Act, 2012.<sup>583</sup> The functions of the Bank, as the central bank of the UK are the prudential regulation of other banks, issuance of bank notes, establishment of monetary policy, and maintenance of financial stability in the UK by ensuring industry players are safe and sound.<sup>584</sup> With primary responsibility for financial stability, the Bank of England plays a significant role in cementing the institutional framework for corporate governance in the UK. With the post 2007-08 crisis reforms, the amendments by the Financial Services Act 2012 also established the Prudential Regulatory Authority (PRA) as a subsidiary of the Bank of England and the Financial Conduct Authority (FCA).<sup>585</sup>

The Bank of England through the PRA, regulates financially significant firms, which includes banks, insurers and certain investment firms, to ensure their safety and soundness which contributes to overall financial stability.<sup>586</sup> According to the FSA 2012, the PRA is tasked with ensuring the business of those under its mandate is carried out in a manner that does not adversely affect the financial system's stability.<sup>587</sup> It is further tasked with minimising the adverse effects on the financial system that could be caused by the failure of a financial firm under its mandate.<sup>588</sup> This failure, as the Act 2012, describes, could be caused by a "disruption to the continuity of financial services".<sup>589</sup> Which, this paper posits, was a potential risk of the LIBOR transition. Together with the FCA, following communications with relevant institutions, the PRA published a set of key themes and good practices to inform the steps towards the LIBOR transition.<sup>590</sup> The Bank of England, the FCA, and the PRA have continued to

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<sup>582</sup> Smith C, *Bank of England*, 1.

<sup>583</sup> Kaprinis K, *The Institutional Structure of Macroprudential Policy in the UK*, Springer Nature, Switzerland, 2023, 82-86.

<sup>584</sup> Smith C, *Bank of England*, 2.

<sup>585</sup> Kaprinis K, *The Institutional Structure of Macroprudential Policy in the UK*, 86.

<sup>586</sup> Paul C and Montagu G, *Banking and Capital Markets Companion*, 6<sup>th</sup> ed, Bloomsbury Professional Limited, West Sussex, 2014, 88.; Part 2, Section 2B (2), *Financial Services Act*, 2012.

<sup>587</sup> Part 2, Section 2B (3) (a), *Financial Services Act*, 2012.

<sup>588</sup> Part 2, Section 2B (3) (b), *Financial Services Act*, 2012.

<sup>589</sup> Part 2, Section 2B (4), *Financial Services Act*, 2012.

<sup>590</sup> Bank of England, 'Firms' Preparations for Transition from London InterBank Offered Rate (LIBOR) to Risk-Free Rates (RFRs): Key Themes, Good Practice, and next Steps', Bank of England, 5 June 2019—<<https://www.bankofengland.co.uk/prudential-regulation/publication/2019/firms-preparations-for-transition-from-libor-to-risk-free-rates>> on 19 February 2024.

monitor and guide the transition from LIBOR to RFRs in the UK and the adoption of RFRs thereafter to ensure uninterrupted continuity of quality financial services.<sup>591</sup>

The FCA holds the responsibility of regulating the market conduct of all financial services firms.<sup>592</sup> It also has prudential supervision of firms outside the jurisdiction of the PRA.<sup>593</sup> The FCA is a company limited by guarantee operating independently from the UK government but which is accountable to parliament.<sup>594</sup> It is tasked with ensuring UK financial markets operate properly by securing consumer protection, enhancing the integrity of the financial system and promoting fair and effective competition in the market.<sup>595</sup> In line with its mandate, the FCA has held the role of supervising the LIBOR transition in the UK from as far back as 2017.<sup>596</sup> In exercising its leadership role in the transition, the FCA's powers on benchmark regulation were expanded in 2021 which allowed them to make decisions on benchmark use.<sup>597</sup> These powers, brought about by the Financial Services Act 2021, addressed the risk on legacy contracts from lack of or inadequate fallback language that may be triggered by LIBOR cessation.<sup>598</sup>

On the recommendation of the FSB regarding the reform of major interest rates,<sup>599</sup> the Bank of England and the FCA convened the Working Group on Sterling Risk-Free Reference Rates (the Working Group).<sup>600</sup> The objective was to perform similar functions to the ARRC by working with industry players and regulators to ensure a smooth transition from LIBOR in the UK.<sup>601</sup> It provided support to firms on the transition by driving the discourse through roundtable talks.<sup>602</sup> It worked to identify potential barriers and make recommendations; for example, it was able to identify prudential

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<sup>591</sup> Bank of England, 'The End of LIBOR'.

<sup>592</sup> Kaprinis K, *The Institutional Structure of Macroprudential Policy in the UK*, 86; Paul C and Montagu G, *Banking and Capital Markets Companion*, 88.

<sup>593</sup> Kaprinis K, *The Institutional Structure of Macroprudential Policy in the UK*, 86.

<sup>594</sup> FCA, *Corporate governance of the Financial Conduct Authority*, 2024, 4.

<sup>595</sup> Part 2, Section 1B (3), *Financial Services Act*, 2012.; Paul C and Montagu G, *Banking and Capital Markets Companion*, 89.

<sup>596</sup> FCA, 'About LIBOR Transition'.

<sup>597</sup> FCA, 'Benchmarks Regulation'.

<sup>598</sup> Financial Conduct Authority, *Benchmarks Regulation and Amendments under the Financial Services Act 2021*, April 2021, para. 2.8.

<sup>599</sup> FSB, 'Reforming Major Interest Rate Benchmarks: Progress Report on Implementation of July 2014 FSB Recommendations'.

<sup>600</sup> FCA, 'Finalising LIBOR Transition – Achievements in Sterling Markets and What Remains to Be Done' Financial Conduct Authority, 9 February 2022—<<https://www.fca.org.uk/news/press-releases/finalising-libor-transition-achievements-sterling-markets>> on 19 February 2024.

<sup>601</sup> Bank of England, *Working Group on Sterling Risk-Free Reference Rates: Terms of Reference*, 2022, 2.

<sup>602</sup> Bank of England, *Working Group on Sterling Risk-Free Reference Rates*, 4.

regulatory issues for banking and insurance as well as conduct issues that may affect the financial sector during the transition.<sup>603</sup> This Working Group has played a significant role in the LIBOR transition in the UK and for that reason serves to form part of the corporate governance institutional framework for this study.

### **4.3.3 International Bodies Influencing the Global Transition to RFRs**

From the discourse above, there is evidence that the UK and US legal and institutional corporate governance frameworks are influenced by international standards established by various bodies. These include the FSB, IOSCO and the BCBS. These bodies have made significant contributions to banking and finance regulation which have informed the LIBOR transition.

The FSB as an international body is mandated to monitor and make recommendations on the global financial system to promote international financial stability.<sup>604</sup> In the aftermath of the scandal, the G20 tasked the FSB with undertaking a review of interest rate benchmarks intending to reform.<sup>605</sup> With this mandate, the FSB established an Official Sector Steering Group (OSSG) made up of industry regulators and central banks.<sup>606</sup> In 2014, the FSB published the first report on the progress towards benchmark reform. The report outlined two main recommendations; first to strengthen existing IBORs and second to identify alternative risk-free rates.<sup>607</sup> The OSSG has continued to deliberate on and publish the progress towards benchmark reform including the cessation of LIBOR and the identification and adoption of RFRs.<sup>608</sup>

IOSCO is an international body committed to developing, implementing and promoting the adherence to global standards in securities regulation to curb systemic risk.<sup>609</sup> As aforementioned, following the discovery of LIBOR manipulations in 2012, IOSCO published Principles for Financial Benchmarks which to date have provided

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<sup>603</sup> Morzaria T, 'Removal of Pan-European Regulatory Barriers to Transition Away from LIBOR and Other IBORs', Bank of England, 23 October 2019—<<https://www.bankofengland.co.uk/-/media/boe/files/markets/benchmarks/rfr/wgrfr-letter-to-european-commission.pdf>> on 19 February 2024.

<sup>604</sup> FSB, 'About the FSB' Financial Stability Board, 16 October 2020—<<https://www.fsb.org/about/>> on 1 June 2024.

<sup>605</sup> FSB, *Reforming Major Interest Rate Benchmarks*, 3.

<sup>606</sup> FSB, *Reforming Major Interest Rate Benchmarks*, 4.

<sup>607</sup> FSB, *Reforming Major Interest Rate Benchmarks*, 4.

<sup>608</sup> FSB, *Progress Report on LIBOR and Other Benchmarks Transition Issues*, 2.

<sup>609</sup> IOSCO, *Fact Sheet: International Organisation of Securities Commissions*, November 2022, 2.

benchmark administrators on the setting process and potential risks associated with benchmarks.<sup>610</sup> The principles ensure good governance structures for administrators, integrity and accountability in the benchmark design, methodology as well as documentation.<sup>611</sup> These principles have informed the identification and administration of RFRs post-scandal thus influencing the corporate governance structures and practices during the transition.<sup>612</sup>

The BCBS, as mentioned above, is an international body made up of banking regulators committed to the reduction of global systemic risk by encouraging multijurisdictional dialogue and cooperation in the industry.<sup>613</sup> It published the Guidelines on Corporate Governance Principles for Banks<sup>614</sup> a collection of thirteen (13) principles that provide a framework for banks and supervisory authorities to establish sound corporate governance systems.<sup>615</sup> It is on these principles and other recommendations that the LIBOR transition was undertaken.

#### 4.4 Conclusion

Deregulation in the pre-scandal era established a breeding ground for institutional corruption and the degradation of good corporate governance practices as the legal and institutional frameworks did not provide adequate safeguards against individual interests. As evinced in the review of the US and UK legal & institutional frameworks, steering groups were established across jurisdictions to facilitate collaboration and cooperation on LIBOR transition matters. Regulatory bodies were also empowered through legislative amendments to ensure successful supervision and management of the transition. Further to this, institutions were required to—and made—regular disclosures to regulators and stakeholders on their LIBOR transition progress.

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<sup>610</sup> BIS, 'Financial Benchmarks - Executive Summary' Bank for International Settlements, 24 June 2021—<[https://www.bis.org/fsi/fsisummaries/financial\\_benchmarks.htm](https://www.bis.org/fsi/fsisummaries/financial_benchmarks.htm)> on 1 June 2024.

<sup>611</sup> BIS, 'Financial Benchmarks - Executive Summary'; IOSCO, *2013 Principles for Financial Benchmarks*, July 2013.

<sup>612</sup> Financial Stability Board, *Interest Rate Benchmark Reform - Overnight Risk-Free Rates and Term Rates*, 2 June 2021, 3.

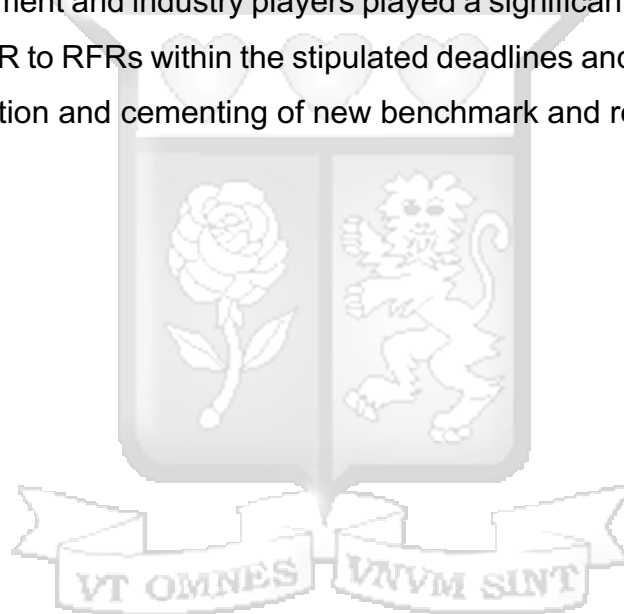
<sup>613</sup> Ellinger EP, Lomnicka E and Hare CVM, *Ellinger's Modern Banking Law*, 5<sup>th</sup> ed, Oxford University Press, Oxford, 2011, 77.

<sup>614</sup> BCBS, *Guidelines: Corporate Governance Principles for Banks.*; BIS, 'Corporate Governance Principles for Banks - Executive Summary' Bank for International Settlements, 27 April 2023 — <[https://www.bis.org/fsi/fsisummaries/corp\\_gov\\_principles.htm](https://www.bis.org/fsi/fsisummaries/corp_gov_principles.htm)> on 1 June 2024.

<sup>615</sup> BIS, 'Corporate Governance Principles for Banks'.

From this chapter, we can deduce that the successful mitigation of systemic risk arising from the LIBOR transition was dependent on a clear definition of roles and empowerment of supervisors coupled with cooperation and collaboration by industry players and regulators. This could only be attained by ensuring proper governance structures at both government and corporate levels. These structures facilitated collaboration via the free flow of information and expertise which can only be achieved through disclosure and transparency, a key principle of good corporate governance.

This chapter provides a measure for comparison against the Kenyan corporate governance landscape. It illuminates a more proactive approach to the transition, arguably informed by the lessons from the scandal. The collective transparent efforts between the government and industry players played a significant role in achieving the transition from LIBOR to RFRs within the stipulated deadlines and continue to oversee the successful adoption and cementing of new benchmark and reference rates.



## **Chapter 5 : Research Findings, Conclusions and Recommendations**

### **5.1 Introduction**

The objective of this chapter is to conclude on the research findings and make recommendations. This is on the backdrop of the hypothesis that the Kenyan corporate governance framework within its financial sector falls short of the requisite elements to facilitate a successful transition from LIBOR to RFRs.

### **5.2 Summary of Research Findings and Conclusions**

#### ***5.2.1 Findings and Conclusions on the Elements of Good Corporate Governance in Risk Mitigation***

The first research question was to identify the elements of good corporate governance to establish the role of corporate governance in risk mitigation. This question provides a foundation for the study to conclude the aspects of corporate governance that should be seen to have been employed to ensure a successful transition to RFRs. The study explored the principles and models of corporate governance under Chapter 2 to answer this question. This exploration establishes a correlation between corporate governance and financial stability in the banking sector.

From the research, we deduce that a good corporate governance framework must promote transparency, accountability, responsibility and fairness. This manifests in proper disclosure mechanisms, clarity in roles, responsibilities and communication, professionalism and equal treatment of stakeholders and their interests. Notably, these principles reflect a public interest model of regulation.

To navigate the LIBOR transition and its associated risks, an effective corporate governance framework must reflect these core elements. It should provide mechanisms for disclosure in identifying, assessing and mitigating LIBOR exposure. Additionally, relevant authorities and other self-regulatory bodies must have clearly defined roles and responsibilities enshrined in the law as well as the autonomy to perform their functions. The supervision and enforcement element of a corporate governance framework was identified as significant for an effective framework. All in all, the framework must be established in a manner that promotes and protects public

interest by ensuring compliance with laws, regulations, industry practice as well as relevant ethical standards.

These principles of corporate governance are applied by different jurisdictions using varying models. In the US for example, the study illuminates that the preferred approach is the rule-based model which codifies these elements into law anchored in the SOX 2002. It is notable, as highlighted in the research, that the US first caught wind of and raised issue on possible LIBOR manipulation.<sup>616</sup> The UK takes a different route, applying the principle-based model which outlines a set of principles and instead promotes self-regulation; a notable characteristic of the private interest regulatory approach which preceded the LIBOR scandal period.

This study finds that Kenya borrows heavily from the UK model as illuminated by its reliance on the Code 2015. Kenya has ranked poorly on the corruption perception index and its past is plagued with bank scandals attributable to corporate governance failures. The shortfalls of the UK model in preventing the LIBOR scandal and the failures of corporate governance attributable to Kenya's current model dent the credibility of the principle-based model in the application of corporate governance practices for the Kenyan financial sector.

In conclusion, an effective corporate governance framework must incorporate the elements identified above and highlighted in this study. However, a rule-based model incorporating these elements, as is the case with the US, might serve as a more effective approach. This conclusion is informed by the poor performance of the principle-based model in the LIBOR scandal and in preventing bank scandals attributed to corporate governance failures in Kenya.

### ***5.2.2 Findings and Conclusions on the Kenyan Landscape of Corporate Governance Employed to Navigate the LIBOR Transition***

The significance of banks in the health of the financial sector is not lost on the Kenyan corporate governance system. The elements of good corporate governance are anchored in the Constitution and reflected in its national values. This binds financial

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<sup>616</sup> Hou D and Skeie DR, *LIBOR*, 7; McBride J, 'Understanding the Libor Scandal' Council on Foreign Relations, 12 October 2016 — <<https://www.cfr.org/background/understanding-libor-scandal>> on 1 June 2024.

institutions, and the industry at large, to a constitutional obligation of good governance. While the Constitution does not expressly speak on banks or financial institutions, the study posits that it establishes the spirit of the Kenyan legal and regulatory landscape of corporate governance.

The study found that the significant statutes informing Kenya's legal landscape in the context of this study are the Companies Act CAP 486, the Banking Act CAP 488 and the Capital Markets Act CAP 485A. The Central Bank of Kenya Act CAP 491 and the Kenya Deposit Insurance Act CAP 487C also play a role in the framework as they establish some of the significant institutions that play a supervisory and enforcement role in the framework.

As highlighted in Chapter 2, an effective framework must ensure that the roles and responsibilities of regulatory bodies are clearly defined. Codifying them in law facilitates this clarity in responsibility and secures their independence from influence by other bodies. It guarantees authority, integrity and autonomy.

The chapter also highlighted institutions that are central to Kenya's financial corporate governance framework and were expected to play a key role in guiding the transition. These were found to be, the CBK, CMA and the KDIC. The CBK and the CMA have further contributed to the framework by publishing the Prudential Guidelines 2013 and the Code 2015. These outline principles of sound corporate governance for institutions licenced under the Banking Act as well as publicly listed companies.

Additionally, in assessing the annual reports of various financial institutions, that is Stanbic Group, NCBA, KCB, Standard Chartered Group, DTB, HFC Group and Equity Group, the study was able to illustrate how the legal and institutional framework was employed during the transition in Kenya. In line with the principle of accountability and responsibility, each of these institutions holds internal corporate governance structures that outline the roles and responsibilities of directors and senior management who were tasked to manage the transition at institutional level. The study found that most of these banks had empowered their risk and audit committees through regular updates on the LIBOR transition. This ensured they were able to identify risk and sanction appropriate risk mitigation strategies for senior management to adopt and execute.

Further to this, in line with the principle of transparency and disclosure, the reports revealed that banks made reports to the CBK on their LIBOR to RFR transition programmes and kept their shareholders and public informed on LIBOR exposure, potential risks and mitigation measures through their annual reports.

While the conduct of Kenyan banks paints a picture of an effective corporate governance framework, it is important to note that outside of the CBK directive of December 2021, the study found that none of the identified bodies have made further communication or taken demonstrable documented action towards facilitating the transition. In relying on the Chase Bank case, the study found that these institutions have historically adopted a reactive approach to their functions. The study puts it that the LIBOR transition required a more proactive collaborative approach as evinced by the findings in the fourth chapter.

### ***5.2.3 Findings and Conclusions on the Corporate Governance Safeguards Employed by the US and the UK in Navigating the LIBOR Transition***

To facilitate a comparative approach in assessing Kenya's framework, the study has explored the UK and the US LIBOR transition journey. This was informed by the following key study findings. Firstly, the two jurisdictions help significant global exposure in LIBOR-based contracts. Secondly, they contributed to and championed the discourse on transition efforts, targets and timelines through working groups. These working groups constituted regulatory bodies and other key players in the global financial industry. Thirdly, the findings and recommendations of their working groups, particularly on transition-related risks, informed the global navigation of the transition.

The study found that, in the US and the UK the scandal led to a shift in financial regulation to adopt more stringent and codified supervisory and enforcement measures. The objective being to protect the reputation of the financial industry and maintain financial stability. It is on these lessons that the US and UK navigated the transition to RFRs from LIBOR.

The study found that both the US and the UK have an extensive and elaborate corporate governance framework. In the US: the SOX 2002, the Dodd-Frank 2010, the Securities Act 1933 and the Securities Exchange Act 1934 establish the legal framework for corporate governance. In addition to this, the NYSE and NASDAQ

provide listing and trading rules for publicly listed companies which outline corporate governance expectations for their compliance.

The framework is institutionalised in the FSOC, the CFPB and the Fed. These institutions together with the FDIC, the OCC, the NCUA and the SEC came together to form the ARRC which oversaw the successful transition from USD LIBOR to SOFR. They collaborated and shared knowledge and resources to ensure industry players were well-informed and supported throughout the transition. The ARRC facilitated the identification of transition-related risks and their mitigation measures. Their findings were not only relevant to US-based companies but have informed the transition the world over.

In the UK, the Code is identified as the most significant legal instrument within the corporate governance framework. The FSA 2012, FSMA 2000, Companies Act 2006, the Banking Act 2009 and the Bank of England Act 1998 are also identified as significant contributors to the corporate governance framework applying to UK financial institutions. These laws have led to the establishment of the Bank of England, the PRA and the FCA which form the institutional framework. Additionally, like the US, the UK institutions formed a collaborative working group to facilitate the UK LIBOR transition. The Working Group identified and provided advice on various legal issues that directors and senior management must pay mind to for a successful transition.

The study also found that in addition to the local institutions in each jurisdiction, the UK and the US also relied on support, resources and collaborative discourse with the FSB, IOSCO and the BCBS throughout the transition. The FSB recommended the establishment of the UK working group and also formed the OSSG for industry regulators and central banks to assess the transition and make recommendations for success. IOSCO, post the scandal, published principles that benchmark administrators should rely on in establishing and administering benchmark rates. These principles inform governance practices which have influenced the identification and application of RFRs. Additionally, the BCBS Guidelines<sup>617</sup> played a key role in influencing corporate governance systems for banks and their supervisory authorities.

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<sup>617</sup> BCBS, *Guidelines: Corporate Governance Principles for Banks*; BIS, 'Corporate Governance Principles for Banks'.

The activities of the working groups established under the highlighted frameworks led to the identification of four classes of risk associated with the transition. These were conduct risks, legal and regulatory risks, operational risks and systemic risk. The ultimate goal of corporate governance structures is to mitigate systemic risk. They also made recommendations to strengthen legislature to mitigate some of these risks. As the study shows, the working groups' recommendations led to the enactment of the LIBOR Act in the US and the amendment of the UK BMR in the UK to strengthen relevant laws and provide for the transition of legacy contracts which posed significant legal risks for financial institutions.

Additionally, using the framework established above and informed by the collaborative efforts of industry players and the working groups, banks in the US and the UK were able to identify their risk exposure and develop mitigating strategies. This finding was established by a review of annual reports of Barclays Plc, Deutsche Bank and UBS Group. These banks were chosen based on, firstly their significant market power and secondly their mention in the LIBOR scandal as offending banks.<sup>618</sup> To successfully mitigate the identified risks, the institutions relied on internal corporate governance structures under the supervision of their respective risk and audit committees. They also made regular disclosures on their LIBOR exposure and transition progress to the relevant authorities.

In light of this, the study has identified the following safeguards from the US and UK LIBOR transition approach:

- a) Collaboration between regulators, bank leadership and relevant financial institutions to ensure a successful transition. This collaboration aided in the identification of potential risks and the development of relevant proposed strategies to mitigate them.
- b) Continuous monitoring and review of the transition, its emerging risks and the adoption of RFRs across financial industries.
- c) A shift from private interest to public interest regulatory approach to ensure financial institutions adopt corporate governance practices that balance profit-

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<sup>618</sup> Huan X *et al*, 'Understanding the LIBOR Scandal' 39.

making shareholder interests and stakeholder interests. This approach saw a call for increased supervision and enforcement mechanisms from regulators.<sup>619</sup>

- d) Strong internal supervisory and enforcement mechanisms also played a key role in navigating the transition in the US and UK. These manifested by ensuring the audit and risk teams, at Board and management level were well supported and informed to guide the transition.<sup>620</sup>
- e) The study found an appreciation for knowledge as a key resource in promoting good corporate governance practices. Internal corporate governance safeguards were knowledge driven with directors and senior management receiving regular training and reports on transition programmes in their institutions.<sup>621</sup>

### **5.3 Research Recommendations**

#### **5.3.1 Post Cessation Monitoring and Progress Reporting**

In regards to the transition to RFRs, the study has identified the significant role knowledge sharing and pooling through the working groups contributed to risk mitigation. The study recommends post-cessation monitoring and reporting by regulators and bank leadership on the progress of RFR adoption. This creates a knowledge resource for the industry on the success of bank institutions in managing their individual LIBOR exposure and transitioning relevant contracts, and contractual documents. Additionally, this provides information for formulating future strategies should a similar case of significant financial regulatory shift occur in the future.

#### **5.3.2 Collaborative Proactive Approach to Supervision and Enforcement**

The study found that, while Kenya has a well-documented legal and regulatory corporate governance framework, challenges lie in enforcement. As illustrated by the

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<sup>619</sup> Huan X *et al*, 'Understanding the LIBOR Scandal' 22.

<sup>620</sup> Barclays Plc, *Annual Report 2020*, 2020, 91.; Barclays Plc, *Annual Report 2022*, 513; Deutsche Bank, *Annual Report 2020*, 2020, 265; Deutsche Bank, *Annual Report 2021*, 2021, 221.; UBS Group, *Annual Report 2021*, 2021, 370.; UBS Group, *Annual Report 2022*, 2022, 337.

<sup>621</sup> Barclays Plc, *Annual Report 2020*, 91; Deutsche Bank, *Annual Report 2020*, 265; UBS Group, *Annual Report 2021*, 370.

Chase Bank scandal,<sup>622</sup> regulators appear to adopt a laissez-faire approach to their function and as such are merely reactive to corporate governance failures.

The study therefore recommends the adoption of a more collaborative and proactive approach by regulators towards supervision and enforcement of corporate governance practices in the industry. As the study highlights, effective corporate governance frameworks are characterised by the independence, autonomy and integrity of regulators to promote transparency, accountability and responsibility.<sup>623</sup> The Kenyan legal and regulatory framework reflects a desire for independent and autonomous supervision and enforcement.

To achieve this proactive approach the study recommends that regulators champion and undertake the following in alignment with their regulatory powers:

- a) Conduct regular conduct and competition reviews of financial institutions to ensure they balance wealth maximization with stakeholder interests by establishing and enforcing corporate governance practices.
- b) Conduct regular reviews and continuous accreditation of directors and executive management. Notably, the legal framework provides for the vetting of directors and significant shareholders. This study recommends an expansion of the vetting to include an accreditation model that is subject to review and renewal.
- c) Continuous collaborative training and capacity building between regulators and industry players. This recommendation stems from the notable impact of the US and UK working groups.
- d) The Kenyan framework, like the UK, is anchored on the principle-based model of corporate governance which is criticised for creating a box-ticking culture in corporate governance administration.<sup>624</sup> To cure this, the study recommends continuous intentional communication between regulators and industry players anchored on the principle of transparency and disclosure.

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<sup>622</sup> *Chase Bank Limited vs Zafrullah Khan & 19 Others* [2018] eKLR; HCCC No 159 of 2017

<sup>623</sup> OECD, *Recommendation of the Council on Principles of Corporate Governance*, 11-12.

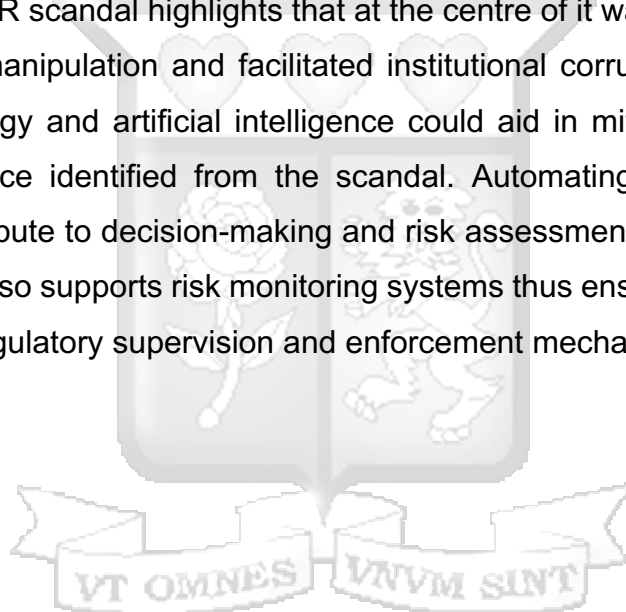
<sup>624</sup> Lu W, 'The Value of the "Comply or Explain" Principle', 29.

### **5.3.3 Public-Interest Driven Regulatory Model**

The study recommends the adoption of a public-interest-driven regulatory model, particularly in the financial sector. While flexibility boosts competitiveness, it should not be at the expense of ethical conduct and the risk of systemic failure. An application of the stakeholder resource-based model can facilitate a balance between stakeholder interests and the achievement of competitive advantage. In the adoption of a public interest model, global standards should inform the Kenyan approach as it seeks to be a regional financial hub.<sup>625</sup>

### **5.3.4 Leveraging Technology**

Reviewing the LIBOR scandal highlights that at the centre of it was human greed that promoted system manipulation and facilitated institutional corruption.<sup>626</sup> Leveraging blockchain technology and artificial intelligence could aid in mitigating some of the corporate governance identified from the scandal. Automating and decentralising functions that contribute to decision-making and risk assessment, reduces the risk of manipulation.<sup>627</sup> It also supports risk monitoring systems thus ensuring optimisation of both internal and regulatory supervision and enforcement mechanisms.<sup>628</sup>



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<sup>625</sup> Olingo A, 'Cautious Optimism Meets Kenya's Bid for Continental Financial Hub'.; Napier M, 'Developing Nairobi as a Financial Hub will Open the Region to Climate Finance'.

<sup>626</sup> Miller S, 'The Global Banking Sector'; Huan X *et al*, 'Understanding the LIBOR Scandal' 2.

<sup>627</sup> Jiang W and Li T, 'Corporate Governance Meets Data and Technology' European Corporate Governance Institute, Finance Working Paper No 979/2024, 2024, 62.

<sup>628</sup> Jiang W and Li T, 'Corporate Governance Meets Data and Technology', 62.

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# Appendices

## Appendix A: Similarity Report



**Gloria Mwikali**

**The Role of Corporate Governance in the Successful Transition to Risk-Free Rates %28RFRs%29 by Banks in Kenya.docx**

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## Appendix B: Ethical Clearance



13<sup>th</sup> May 2024

Ms Mulinge Gloria  
gloria.mwikali@strathmore.edu

Dear Ms Mulinge,

**RE: Beyond Libor: The Role of Corporate Governance in the Successful Transition to Risk-Free Rates (RFRs) by Banks in Kenya**

This is to inform you that SU-ISERC has reviewed and **approved** your above **SU-masters** research proposal. Your application reference number is **SU-ISERC2263/24**. The approval period is from **13<sup>th</sup> May 2024 to 12<sup>th</sup> May 2025**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used.
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification.
- iv. Any changes anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours.
- v. Clearance for the export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Ambrose Rachier".

**Mr Ambrose Rachier,**  
**Chairperson; SU-ISERC**