

**STAKEHOLDER COMMENTS TO THE PROPOSED KENYA INFORMATION AND COMMUNICATIONS (AMMENDMENT) BILL, 2013 AS AT JULY 13, 2013**

**1. INTRODUCTION**

Following the call for public consultations on the draft Kenya Information and Communications (Amendment) Bill, 2013 in the print media on 1<sup>st</sup> July 2013, inputs were received from a number of stakeholders through various fora.

Table 1. lists the sources of contributions received while Table 2. sets forth the list of contributions to the Bill that were received and analysed against the proposed Bill.

The column on the extreme right indicates the reaction by the Working Group to each proposal.

**Table 1. Contributors to the consultation exercise on the Draft Kenya Information and Communications (Amendment) Bill, 2013**

<b>Index</b>	<b>Name of Stakeholder</b>
1.	International Development Research Centre (IDRC)
2.	Kenya National Commission on Human Rights (KNCHR)
3.	Airtel Kenya
4.	Postal Corporation of Kenya (PCK)
5.	Eng. John. N. Kariuki (ICT Consultant)
6.	Thematic Group on Consumer Affairs (TG Consumer)
7.	Thematic Group on Universal Service Advisory Council (TG – USAC)
8.	Thematic Group on Governance (TG - Governance)
9.	Thematic Group on Broadcasts (TG – Broadcasts)
10.	Thematic Group on Competition (TG – Competition)
11.	Thematic Group on Postal and Courier (TG – P & C)
12.	Communications Commission of Kenya (CCK)

**Table 2. Contributions to the Bill and the Working Group’s response**

Area of Concern	Issues Arising	Contributor’s Name	Response
<b><i>Independence of the Commission</i></b>			
Policy directives from the Cabinet Secretary	Delete the proposal that the Cabinet Secretary may issue policy guidelines to the Authority in order to provide for total and complete independence from the State.	TG- Governance	Propose to retain this clause in order to provide a link between the Authority and the State since spectrum is a national public resource
	Define the term “Public Policy” - This term is ambiguous	Airtel	Propose to make no changes as the use of words is in keeping with the definition in academic text
Branding	Retain the name Communications Commission of Kenya. CCK is a well-established and respected brand with over 1,000,000 hits on the internet. What is driving the need to rename? Globally either of the words (Commission/ Authority) is used	TG -Governance	Propose to rename to Authority in keeping with best practice
<b><i>Governance</i></b>			

Area of Concern	Issues Arising	Contributor's Name	Response
Appointment of Board members	Reconsider the membership of the selection panel, which is largely drawn from state organizations	KNCHR	Propose to drop the selection panel
	List the key constitutional parameters that the selection committee has to comply with in the short listing, interviewing and selection process. These should include gender, regional and ethnic balance and equal opportunities for persons with disabilities	TG – Governance/ KNCHR	Propose to include Constitutional parameters
Qualifications & disqualifications for members	Provide adequate safeguards to bar the appointment of candidates with vested interests to the Board/USAC in order to ensure freedom from control by government, political or commercial interests	Airtel	Propose to make no changes. This is already provided for in the Bill – Sections 6A, 6B and 6D
	All members should possess a basic first degree. Regulatory issues are rather complex and just like other sectors require some basic scholarship	TG - Governance	Propose to retain the clause as provided for in the Bill
	Adopt the language in Article 251(b) of the Constitution with regard to misconduct as a ground of disqualification - provide safeguards to prevent abuse of this provision	TG - Governance	Propose to effect change in Section 6D
	Refine the language used to refer to mental disorder – mental disorder is not synonymous with mental incapacity	KNHCR	Propose to effect proposal in Section 6A
Removal Process	The Cabinet Secretary has sole discretion to remove Board members. Constitute a panel or a tribunal to consider removal of	John Kariuki	Propose to make no change as this function is to be exercised within an

Area of Concern	Issues Arising	Contributor's Name	Response
	Board members		administrative framework
<b><i>Universal Service Fund (USF)</i></b>			
	Expressly refer to postal and courier services in section 84J. The said section only makes reference to information and communication services yet postal and courier providers also contribute to USF	TG – P & C	Propose to make no changes  The definition of information and communication technologies, as provided for in the Act, includes postal and courier services
<b><i>Universal Service Advisory Council (USAC)</i></b>			
Governance structure of USAC	USAC should not be independent of the regulator (requires some level of joint coordination to ensure under/un-served areas are catered for in harmony rather than separately. USAC could however be quasi autonomous but with a clear reporting mechanism to the Board of the Commission	IDRC	Noted and agreed
Independence of	Enhance the independence of USAC from interference	TG- USAC	Propose that the Chair

Area of Concern	Issues Arising	Contributor's Name	Response
USAC	from government, political and commercial interests. This can be achieved through competitive recruitment of the USAC members to minimize interference		and members of USAC be competitively appointed by the Cabinet Secretary
	De-link USAC from the Board	Airtel	Propose that the Cabinet Secretary appoints members.  Propose to retain the clause requiring USAC to report to the Board on a quarterly basis
Membership of USAC	Include a representative from the IT sector	John Kariuki	Propose to delete the Clause providing for industry representation in USAC
	Lack of youth representation in the membership of USAC	TG- USAC	Propose to make no changes. The consideration for membership already articulated are adequate; they do not bar the participation of the youth

Area of Concern	Issues Arising	Contributor's Name	Response
USAC's mandate	Clearly clarify the role of USAC vis-à-vis the CCK Board with regard to the management of the Fund	Airtel	Propose to have USAC advise the CCK Board on management of the Fund
<b><i>Consumer Matters</i></b>			
	<ul style="list-style-type: none"> <li>▪ There is need for enhanced consumer protection in order to comply with Article 46 of the Constitution</li> <li>▪ Amplify consumer interests as a foundation of public policy. This will ensure that the information provided is accurate, reliable and not of a misleading nature. In addition, this will enable the consumers make better and informed choices</li> </ul>	TG- Consumer	<p>Propose to make no changes. Consumer matters are extensively provided for in the Kenya Information and Communications (Consumer Protection) Regulations, 2010</p> <p>These regulations can also be amended from time to time to cater for emerging issues</p>
<b><i>Broadcasting Matters</i></b>			
Regulation of	This role should be under CCK (which has the legal mandate to regulate broadcasting content) and not the	IDRC	Propose to retain the

Area of Concern	Issues Arising	Contributor's Name	Response
broadcast content- Jurisdiction of CCK vis-à-vis the Media Council	<p>Media Council</p> <ul style="list-style-type: none"> <li>▪ There is need to harmonise the provisions of the Bill with those in the Media Bill in respect of regulation of broadcast content. The proposal is that the responsibility of regulating content should be shared between the two institutions</li> <li>▪ In the alternative, the two regulatory bodies may establish a joint Dispute Resolution Body to address content related matters</li> </ul>	TG-Broadcasts	<p>provision in the Bill</p> <p>Propose to retain the provision in the Bill</p>
Protection of Minors	<ul style="list-style-type: none"> <li>▪ This should be strengthened</li> <li>▪ Protection of minors is currently monitored by both the Media Council and the Authority and there is a proposal that the said function be performed by one body</li> <li>▪ The proposal is that CCK licences the operators while the Media Council solely regulates journalistic (professional standards) on minority protection</li> </ul>	TG- Broadcasts	<p>Noted.</p> <p>The Working Group is reaching out to other stakeholders in an effort to explore means of providing for shared jurisdiction</p>
Classification of broadcast services	Retain the different classification of broadcasting services	John Kariuki	Propose to reinstate the various classification of broadcast services in the

Area of Concern	Issues Arising	Contributor's Name	Response
			Act
Signal Distribution Services	<ul style="list-style-type: none"> <li>▪ Don't delete section 46O (2) and (3)</li> <li>▪ Signal distribution is a new bottleneck/non-competitive market that requires regulation in terms of tariffs, reference offers, account separation etc. The elaborations contained in the deleted parts are useful in guiding the licensing process</li> </ul>	John Kariuki	Propose to reinstate Section 46O (2) and (3)
<b>Competition</b>			
Anti-competitive conduct	Provide for other anti-competitive conduct which is beyond the scope of mergers and acquisitions	Airtel	The three aspects of competition law are anticompetitive-agreements, mergers and abuse of dominant position, all of which have been addressed in the Act
Regulations on competition issues	Provide for communication in a broader sense since competition is no longer restricted to specific market segments due to the converged environment	Airtel	The definitions of telecommunication services and telecommunication

Area of Concern	Issues Arising	Contributor's Name	Response
			systems, as contained in the Act, accommodate all communication related matters
	Consider including other factors since revenue is not the only parameter for determination of SMP/ Dominance	TG- Competition	Propose to include a new paragraph (c) in section 84W(4) empowering the Authority to assess competition breaches on any other consideration as it may determine
	Retain the reference to telecommunication services as opposed to communication services since the latter term is ambiguous	John Kariuki	Propose to adjust draft to reflect this
	Streamline regulations regarding competition issues with emphasis on consumer interests	TG- Consumer	Noted. Will be examined in the development of consumer regulations
	Define the term account separation for clarity purposes	Airtel	The term "account separation" is already defined in the Kenya Information and

Area of Concern	Issues Arising	Contributor's Name	Response
			Communications (Fair Competition and Equality Of Treatment) Regulations, 2010
	Include "Regulatory Audits" in addition to Account Separation	CCK	Propose to effect this change in Section 84W
<b>Penalties</b>			
Accounts	Insert a requirement for audited accounts. This will ensure the veracity of submitted information	CCK	It was noted that the Regulator can ask for audited accounts administratively
Enhancement	<ul style="list-style-type: none"> <li>▪ Enhance penalties provided for in the following sections:- S. 24, S. 28, S. 29, S. 30, S. 31, S. 32, S. 33, S. 35, S. 45, S. 46C, S. 46N, S. 46Q for deterrence purposes</li> <li>▪ Enhance the penalty provided for in section 90 from KShs. 100,000 to KShs. 5M. The offence in this section is essentially similar to that in section 89; hence the need to harmonize</li> </ul>	CCK	Noted. Propose to provide for enhanced penalties in various parts of the Bill
Clause 18	Provide for a specific fine, e.g. KShs 1 Million, instead of	Airtel	Propose to retain

Area of Concern	Issues Arising	Contributor's Name	Response
83A	pegging it on the turnover		percentage fines for deterrent purposes
Clause 29 84T	The penalty should be assessed on the basis of the financials for the preceding years as opposed to all the years that the offence is continuing	Airtel	Propose to amend the provision in line with this suggestion
	Penalties should be raised for deterrence purposes but the actual penalties meted out should be commensurate to the offence and should be graduated for repeat and habitual offenders	TG – Consumers	Noted. The Working Group is endeavouring to craft proportionate penalties
	<ul style="list-style-type: none"> <li>▪ It's not clear, in practical terms, what the words "for every calendar quarter or part thereof in which the offence is continuing" mean</li> <li>▪ Segregating operators' revenues into quarters may be difficult. It is more practical to base the penalty on the operators' audited accounts for the previous year</li> </ul>	CCK	Propose to amend the section to reflect this proposal
<b><i>Postal and Courier</i></b>			
Exclusive right to provide certain	Do not abolish PCK's monopoly. This a new way to duplicate and/or open up parallel channels for providing postal services such as P.O. Boxes, Zip Codes, etc. And who knows what goods will be carried	John Kariuki	Propose to retain this provision in order to enhance competition in

Area of Concern	Issues Arising	Contributor's Name	Response
postal services	in the parallel postal systems?		the sector
	Retain the original clause since the public licensee has responsibilities which do not burden the other operators	PCK	Propose not to effect the proposed change in order to make the sector more competitive
	The 350 gramme monopoly to PCK should be moved from the Act to the regulations to enable periodical review and adjustment of the same where necessary	TG- P & C	Will be examined in the review of the postal and courier regulations.
Designation of public postal licensee	Section 50 of the main Act should be rephrased – the power to designate the public postal licensee should be donated to the Authority.  In addition replace the word “shall” appearing in section 50 with the word “may” in order to make the sector more competitive	TG- P & C	Propose to amend Section 50 in order to increase competition in the sector
Reference	Amend the provisions of the Act to include courier wherever postal is mentioned	TG- P & C	Propose to effect change in the draft
<b><i>Electronic Transactions</i></b>			
Cyber-security	Retain the original text; cybercrime is an offence and should not be included in the heading	John Kariuki	Propose to replace

Area of Concern	Issues Arising	Contributor's Name	Response
			cybercrime with cyber security
	Develop regulations to regulate cyber security and consider the issues of consumer rights	TG- Consumers Matters	Cyber Security is a dynamic issue and regulations will need to be revised regularly to address any issues that may arise
Developing a framework for prosecution of cybercrime offences	Investigation and prosecution of crimes is the work of law enforcement agencies and this role should not be assigned to the regulator.	John Kariuki	Propose to retain the proposal
Licencing Electronic Certification Services	Retain the original text of Section 83E(2)	Airtel	Propose to effect this proposal
<b><i>Definitions</i></b>			
Communication Services	Will online banking be part of this proposed new and therefore subject to regulation by the Commission/Authority?	Airtel	No Propose to retain the original definition of telecommunication

Area of Concern	Issues Arising	Contributor's Name	Response
			service
Proposals	Define the term Significant Market Power	T.G – Competition	Propose to define the term “Significant Market Power” in the Bill
	Include the definition of cyber security in the Act	CCK	Propose to define the term “cybercrime” in the Bill
	Define the following terms – Regulated Services Relevant Market	CCK	Propose to define the term “market” in line with the definition in the Competition Act
Amendment	Retain original definition of telecommunication service which is similar to the definition adopted by EAC/COMESA/ITU	John Kariuki	Propose to retain the original definition of telecommunication service
<b><i>Miscellaneous Provisions</i></b>			
Emergency Clause	under dictatorship, some of the provisions of censorship can be misused	IDRC	Propose to delete the clause vesting CCK with emergency powers

Area of Concern	Issues Arising	Contributor's Name	Response
Environment	The Constitution provides for the right to a clean environment. Therefore, please include provisions to support green ICTs (reduction in emissions) and management of eWaste etc. within the context of global best practice with respect to environmental protection and conservation	IDRC	Noted
Clarity of laws	Redraft the Bill so as to make it very specific. This will enhance clarity and ease of implementation	KNHCR	The Working Group has endeavoured to make the Bill as clear as possible and is continuously refining the same
Introduction of the term basic communication services	Do away with the new term and retain the wording of section 23 with necessary modifications if necessary	Airtel	Propose retain the original text of Section 23
Conformity to the Constitution	Revise the law to conform to Article 35 of the Constitution	TG - Consumers	Propose to effect this change
	Insert a reference to the Information and data protection laws in the Act	TG - Consumers	Noted
	Open a feedback mechanism which will enable participating stakeholders to analyse the extent of their contributions to the end product	TG - Consumers	Done

Area of Concern	Issues Arising	Contributor's Name	Response
Governance <i>(The Communications Appeals Tribunal)</i>	Retain paragraph 1 of the Second Schedule to the principal Act which provides the term of the members of the Tribunal	John Kariuki	Propose to delete paragraph 1 since the term for the members of the tribunal is already provided for in the Act
Prosecutorial powers <i>(New Proposal)</i>	CCK should be empowered to prosecute offences arising under the Act	CCK	Propose to include this provision in the Bill
New provisions	in view of recent developments in the broadcasting sector, consider expanding the scope of Broadcasting Services to cover multi-media services	CCK	Propose to make no changes. This proposal has been captured in the definition of media in the Bill which defines "media" as including broadcast and electronic media and excluding print and book publishing
Reference to the Act	Change reference to " <i>KICA, Cap 411A</i> " instead of " <i>KICA, Act No.2 of 1998</i> "	CCK	Propose to retain the reference to 1998 – this was informed by Section 13 of the <i>Interpretation and General Provisions Act, Cap 2</i>

\*We invite you to note that the Bill is still open for review and amendments until it is adopted by Parliament. Kindly note that an updated version of the Bill, which was published on 22nd July, 2013, is available for comment on the CIC website: [www.cickenya.org/index.php/legislation](http://www.cickenya.org/index.php/legislation). The Bill has also gone through the first reading in the National Assembly and is currently before the Committee on Energy, Information and Communication.

*This response has been signed and issued by the Prof. Patricia Kamari-Mbote, SC, Chairperson, Working Group on the Review of the ICT Regulatory Framework after consideration of comments received at the Stakeholder Consultation Forum held on July 9, 2013 at the KCB Leadership Training Centre, Karen.*

*Dated 13th July, 2013*

A rectangular box containing a handwritten signature in black ink. The signature reads "PGKamari" in a cursive, flowing script.