Approved for tabling.
SNA
26/10/23

PARLIAMENT OF KENYA LIBRARY

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - SECOND SESSION - 2023

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

.....

REPORT ON THE INQUIRY ON THE 100% BUYBACK OF TELKOM KENYA LIMITED BY THE GOVERNMENT OF KENYA

THE NATIONAL ASSEMBLY
PAPERS LAID
26 OCT 2023 Thursday
Hon. CPA Kuria Kimani (Finance and National Planning Committee)
Anne Shibuko

Publ

The Directorate of Departmental Com
Clerk's Chambers
Parliament Buildings
NAIROBI

)BER 2023

TABLE OF CONTENTS

ABBREVIATIONS ..... **Error! Bookmark not defined.**
CHAPTER ONE 5
1.0 PREFACE 8
1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEES 8
1.2 COMMITTEE MEMBERSHIP 9
1.3 COMMITTEE SECRETARIAT 11
CHAPTER TWO 12
2.0 BACKGROUND 12
2.1 RATIONALE FOR THE INQUIRY 13
2.2 TERMS OF REFERENCE (TOR) FOR THE INQUIRY 14
CHAPTER THREE 16
3.0 ORAL AND WRITTEN SUBMISSIONS FROM WITNESSES 16
3.1 SUBMISSION BY CPA MARGARET NYAKANG'O CBS, THE CONTROLLER OF BUDGET 16
3.2 SUBMISSION BY MR. KENNEDY OGETO CBS, FORMER SOLICITOR GENERAL 20
3.3 SUBMISSION BY HON. SHADRACK MOSE, THE SOLICITOR GENERAL 22
3.4 SUBMISSION BY MR. MUGO KIBATI, CEO OF TELKOM KENYA 26
3.5 SUBMISSION BY MR. EDDY NJOROGE, CHAIRPERSON TELKOM KENYA BOARD 39
3.6 SUBMISSION BY MR. EZRA CHILOBA, DG COMMUNICATION AUTHORITY (CA) 43
3.7 SUBMISSION BY MR. JOSEPH KOSKEY, CEO PRIVATIZATION COMMISSION 47
3.8 SUBMISSION BY DR. ADANO ROBA, AG DG COMPETITION AUTHORITY (CAK) 49
3.9 SUBMISSION BY AMB. UKUR YATANI, FORMER CABINET SECRETARY NATIONAL TREASURY AND ECONOMIC PLANNING 52
3.10 SUBMISSION BY ENG. STANLEY KAMAU FORMER DIRECTOR OF GENERAL PUBLIC INVESTMENT AND PORTFOLIO MANAGEMENT NATIONAL TREASURY 54
3.11 SUBMISSION BY FCPA BERNARD NDUNG'U MBS, DIRECTOR GENERAL ACCOUNTING SERVICES AND QUALITY ASSURANCE NATIONAL TREASURY 57
3.12 SUBMISSION BY PROF. NJUGUNA NDUNG'U CBS, CABINET SECRETARY NATIONAL TREASURY AND PLANNING 58
3.13 SUBMISSION BY PAUL CUNNINGHAM, DIRECTOR JAMHURI HOLDINGS LIMITED 61
3.14 SUBMISSION BY MR. JOE MUCHERU, FORMER CABINET SECRETARY IN THE MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS 69
3.15 SUBMISSION BY MR. JULIUS MUIA, FORMER PERMANENT SECRETARY OF NATIONAL TREASURY AND ECONOMIC PLANNING 72
3.16 SUBMISSION BY ANJARWALLA & KHANNA 74
3.17 SUBMISSION BY ADILI TRUSTEES 77
3.18 SUBMISSIONS BY DR JOSEPH KINYUA, EGH, THE IMMEDIATE FORMER HEAD OF PUBLIC SERVICE AND SECRETARY TO THE CABINET 78
3.19 SUBMISSION BY MR. JOHN NGUMI 82
3.20 EVIDENCE BY MR. BEN ROBERTS 83
4.0 ISSUES FOR DETERMINATION 87
5.0 COMMITTEE RECOMMENDATIONS 129

LIST OF ANNEXURES

Annexure 001	Adoption List
Annexure 002	Joint Committee Minutes
Annexure 003	Letters from the Clerk to various stakeholders
Annexure 004	Letter dated 28th July 2022 from the DG Accounting Services and Standards to OCOB
Annexure 005	Letter dated 25th July 2022 from former PS, National Treasury to CS NT
Annexure 006	Letter from CS, National Treasury to OCOB dated 28th July 2022
Annexure 007	Letter from OCOB to DG, Accounting Services NT dated 1st August 2022
Annexure 008	AG's Legal Opinion dated 12th March 2019
Annexure 009	Unprocedurally signed letter purporting to be from the former CS, NT (Par 40)
Annexure 010	Letter from AG to CS, NT dated 20th April 2016 (Par 57)
Annexure 011	Legal Clearance Letter dated 5th May 2016 (Par 57)
Annexure 012	Negotiation Letter dated 11th May 2016 from CS, NT (Par 58)
Annexure 013	Advisory Letter from the AG dated 16th May 2016 (Par 59)
Annexure 014	Letter from the Executive dated 8th June 2016 (Par 60)
Annexure 015	Letter from CS, NT to AG dated 30th March 2022 (Par 62)
Annexure 016	Letter from AG TO CS, NT dated 1st April 2022 (Par 63)
Annexure 017	Advisory Letter from AG to GOK dated 6th May 2022 (Par 64)
Annexure 018	Opinion Letter from CS, NT to AG dated 17th August 2022 (Par 64)
Annexure 019	Letter dated 30th August 2022 from the AG to CS,NT (Par 65)
Annexure 020	Letter dated 11th August 2022 from JHL to TKL Board (Par 74 a)
Annexure 021	Letter from CS, NT to TKL Board dated 19thAugust2022 (Par 74 b)
Annexure 022	Letter dated 24th January 2022 from JHL to TKL (Par 79 ii)

Annexure 023	Letter from Chairman, TKL to NT dated 29th August 2022 (Par 84)
Annexure 024	Letter dated 6th April 2022 from NT to CA (Par 159)
Annexure 025	Letter dated 4th October 2022 from TKL to CA (Par 160)
Annexure 026	Letter dated 7th October 2022 from CA to TKL (Par 161)
Annexure 027	Approval Letter dated 9th May 2022 from the Executive (Par 216)
Annexure 028	Letter dated 15th July 2021 from HIP/JHL to GOK (Par 243)
Annexure 029	Communication from Cabinet Office dated 9th May 2022 (Par 250)
Annexure 030	GOK acceptance letter dated 29th March 2022 (Par 287 ii)
Annexure 031	Share purchase agreement dated 31st May 2022 (Par 287 iii)
Annexure 032	Deed of Variation dated 29th July 2022. (Par 287 v)
Annexure 033	Letter dated 8th April 2022 from the Executive Officer to the PS, NTEP (Par 303)
Annexure 034	Letter dated 10th May 2022 from the AG to CS NT (Par 315)
Annexure 035	Letter dated 27th July 2022 from CS NT to the PS NTEP (Par 396)
Annexure 036	Memo dated 28th July 2022 from Head of Accounting NT (Par 398)
Annexure 037	Letter dated 2nd August 2022 from OCOB to PS, NT. (Par 399)
Annexure 038	Letter dated 6th April 2022 from the NT to the Solicitor General (Par 400 I)
Annexure 039	Memo dated 25th July 2022 from DG PIPM to PS NT (Par 400 II)
Annexure 040	Letter dated 30th September 2021 from CS, NT to JHL (Par 415)
Annexure 041	Letter dated 28th March 2022 from Head of Public Service to the CS NT (Par 416)
Annexure 042	Approval Letter dated 1st April 2022 from National Security

CHAIRPERSON'S FOREWORD

This report contains proceedings of the Departmental Committee on Finance and National Planning and that of Communication Information and Innovation ("Joint Committee") on an inquiry into the circumstance behind the disbursement of Ksh6.019 billion to Telkom Kenya under Article 223 of the Constitution.

In particular, the Joint Committee endeavored to ascertain how the disbursement was approved, effected, used and whether the necessary conditions for such disbursement as provided under Article 223, Sections 43(2) and 44 of the Public Finance Management Act 2012, Regulation 40 of the Public Finance Management (National Government) Regulations 2015, the legal status of TKL and general issues of concern to the people as contemplated under Article 95 of the Constitution.

Pursuant to its general power of inquiry, and in response to the concerns raised by the general public, the Committees resolved to inquire into the acquisition of TKL by the government under the following terms of reference-

i. Establish how the disbursement of KShs. 6.019 billion under Article 223 of the Constitution to Telkom Kenya was undertaken and whether the transaction met the conditions as provided in Article 223 of the Constitution, Section 44 of the Public Finance Management Act, 2012 and Regulation 40 of the attendant Public Finance Management (National Government) Regulations;
ii. Establish when Jamhuri Holding Limited (JHL) was incorporated in Kenya, its shareholding and any changes in its shareholding if any;
iii. iii) Find out when Helios Investment Partners (HIP) through Jamhuri Holding Limited (JHL) became a shareholder in Telkom Kenya and establish what was the value of the initial (60% controlling) shareholding at entry;
iv. Examine the acquisition of Telkom Kenya Shares from Helios Investment Partners by the Government of Kenya Including;
    (a) The process undertaken in the acquisition including the exercise of pre-emptive rights of shareholders;
    (b) the regulatory and statutory approval granted by the Communication Authority of Kenya (CA) and Competition Authority of Kenya (CAK) for the acquisition of Telkom shares;
    (c) ascertainment of the market share of Telkom Kenya in the telecommunications sector; and
    (d) the assessment of the impact of the acquisition on TKL operations, including its financial performance and ability to compete in the telecommunications industry.
v. Establish when Jamhuri Holding Limited (JHL)/Helios Investment Partners (HIP) signaled its exit from TKL and when the request was received by the Board of TKL before the same was transmitted to the National Treasury. Further, whether the Cabinet approved the exit of JHL from TKL and what was the role of the main regulators i.e. Communications Authority of Kenya and Competition Authority.

vi. Inquire whether JHL remitted the statutory fees and taxes to the Kenya Revenue Authority for the acquisition and exit from TKL Shareholding.

vii. Establish the shareholding structure of TKL in the past ten (10) years including the period after the alleged buyout and determine the extent to which it complies with the existing legal and regulatory frameworks.

viii. Establish the role of the following persons in the transactions under the inquiry:

a) The Hon (Amb) Ukur Yatani, EGH, the former Cabinet Secretary of the National Treasury;
b) Mr. Joseph Mucheru, EGH, the former Cabinet Secretary for the Ministry of Information, Communication, and Digital Economy;
c) Mr. Julius Monzi Muia the former Principal Secretary of the National Treasury;
d) Ms. Margaret Nyakang'o the Controller of Budget;
e) Eng. Stanley Kamau the Former Director General Public Investments and Portfolio Management of the National Treasury;
f) FCPA Bernard Ndungu the Director of General Accounting Services and Standards; and
g) Mr. Edward Njoroge Chairperson Board of TKL.
h) Mr. Mugo Kibati, CEO of TKL

ix. Investigate whether there was a conflict of interest or allegations of corruption in the acquisition process and whether due diligence was undertaken;

x. Recommend any necessary legal or regulatory changes regarding the legal status of TKL and the attendant regulatory framework in the telecommunications sector.

The Joint Committee wrote to key stakeholders inviting them to submit their views on the Telkom Kenya buyback by the government. The Committee further held meetings with the stakeholders to ascertain the issues raised in the TOR.

The Joint Committee made findings based on each term of reference and drew general observations. The Committee observed that the National Treasury commenced processing the exit of JHL from TKL upon the approval of the National Security Council on 1st April 2022 prior to the Cabinet Approval granted on 12th May 2022. Eng. Stanley Kamau former DG (PIPM) asserted that there was urgency to conclude the transaction. However, Mr. Paul Cunningham noted there was no urgency to conclude the matter. Further, the Committee observed that there were inconsistencies in the letter written by the former DG PIPM Eng. Stanley Kamau on behalf of Hon. (Amb) Ukur Yattani, EGH Former Cabinet Secretary National Treasury altered the mode of the settlement from three (3) Treasury Bond equivalent to USD 51,186,058 to a normal exchequer issue. The Committee noted that the 100% Buyback of TKL from JHL/HIP never received full approval from the Attorney General of Kenya.

In addressing the observations made the Joint Committee made recommendations to the acquisition and proposed the regulatory framework be revised to define the legal process for future acquisition of private entities.

The Joint Committee appreciates the assistance provided by the Office of the Speaker and of the Clerk of the National Assembly that enabled it to conduct its inquiry.I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations over the submissions made by different stakeholders on the acquisition of Telkom Kenya Limited.

Its now my pleasant duty and privilege, on behalf of the joint Committee pursuant to standing order No. 259 C (4) of the National Assembly to present this Report to the House .

Hon CPA Kuria Kimani, MP
Chairperson
Departmental Committee on Finance and National Planning

Hon. John Kiarie Waweru, MP
Chairperson
Departmental Committee on Communication Information Innovation

CHAPTER ONE

1.0 PREFACE

1.1 ESTABLISHMENT AND MANDATE OF THE COMMITTEES

1. The Departmental Committee on Finance and National Planning and Departmental Committee of Communication Information and Innovation are established under Standing Order 216 whose mandates pursuant to the Standing Order 216 (5) are as follows:
    i) ***To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;***
    ii) *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
    iii) *on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
    iv) *To study and review all legislation referred to it;*
    v) *To study, assess and analyze the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
    vi) *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
    vii) *To examine treaties, agreements and conventions;*
    viii) *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
    ix) *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
    x) *To examine any questions raised by Members on a matter within its mandate.*

2. Whereas, the Second Schedule to the National Assembly Standing Orders assigns the Departmental Committee on Finance and National Planning the mandate to consider matters in relation to ***public finance,*** *public audit policies, monetary policies, financial institutions,* ***economy, investment policies,*** *competition, banking, insurance, national statistics, population,* ***revenue policies including taxation,*** *national planning and development, digital finance, including digital currency. The* Departmental Committee on Communication, Information and Innovation is mandated to oversee **Communication, information,** media and broadcasting (except for broadcast of parliamentary proceedings), **information technology, communication technology,** including development and advancement of technology, data protection and privacy, cyberspace and cyber-security, artificial intelligence, block-chain technology, and other emerging technologies.

1.2 COMMITTEE MEMBERSHIP

3. The Departmental Committee on Finance and National Planning was constituted by the House on 27th October 2022 and comprises the following Members:

Chairperson
Hon. CPA Kuria Kimani, MP
Molo Constituency
UDA Party

Vice-Chairperson
Hon. (Amb.) Langat Benjamin Kipkirui, MP
Ainamoi Constituency
UDA Party

Members

Hon. Keynan, Wehliye Adan, MP
Eldas Constituency
Jubilee Party

Hon. Oyula, Joseph H. Maero, MP
Butula Constituency
ODM Party

Hon. Mboni, David Mwalika, MP
Kitui Rural Constituency
WDM Party

Hon. Okuome Adipo Andrew, MP
Karachuonyo Constituency
ODM Party

Hon. Kipkoros, Joseph Makilap, MP
Baringo North Constituency
UDA Party

Hon. CPA Rutto Julius Kipletting, MP
Kesses Constituency
UDA Party

Hon. Biego Paul Kibichiy, MP
Chesumei Constituency
UDA Party

Hon. Sunkuyia, George Risa, MP
Kajiado West Constituency
UDA Party

Hon. Joseph K. Munyoro, MP
Kigumo Constituency
UDA Party

Hon. Sheikh Umul K Kassim, MP
Mandera County
UDM Party

Hon. Ithinji Shadrack Mwiti, MP
South Imenti Constituency
Jubilee Party

Hon. Dr. Ariko John Namoit, MP
Turkana South Constituency
ODM Party

Hon. Machele M. Soud, MP
Mvita Constituency
ODM Party

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House on 27th October 2022 and comprises the following Members:

Chairperson
Hon. John Kiarie Waweru, MP
Dagoretti South Constituency
UDA Party

Vice Chairperson
Hon. Alfah Miruka Ondieki, MP
Bomachoge Chache Constituency
UDA Party

Hon. Shakeel Shabbir Ahmed, CBS, MP
Kisumu East Constituency
Independent Member

Hon. Erastus Kivasu Nzioka, MP
Mbooni Constituency
WDM-K Party

Hon. Joseph Kipkosgei Tonui, MP
Kuresoi South Constituency
UDA Party

Hon. Bensuda Joyce Atieno Osogo, MP
Homabay County
ODM Party

Hon. Bernard Kibor Kitur, MP
Nandi Hills Constituency
UDA Party

Hon. Geoffrey Wandeto Mwangi, MP
Tetu Constituency
UDA Party

Hon. Gideon Kipkoech Kimaiyo MP
Keiyo South Constituency
UDA Party

Hon. Florence Jematiah Sergon, MP
Baringo County
UDA Party

Hon. Irene Nyakerario Mayaka, MP
Nominated Member
ODM Party

Hon. Kakuta Maimai Hamisi, MP
Kajiado East Constituency
ODM Party

Hon. Khalif Ali Abdisirat MP
Nominated Member
UDA Party

Hon. Mumina Gollo Bonaya, MP
Isiolo County
Jubilee Party

Hon. Umulkher Harun Mohamed, MP
Nominated Member
ODM Party

1.3 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following staff:

Mr. Benjamin Magut
Principal Clerk Assistant /Head of Secretariat

Ms Nuri Nikatel
Clerk Assistant II

Mr.Nebert Ikai
Clerk Assistant I

Mr. Joshua Ondari
Clerk Assistant II

Mr. Salem Lorot
Legal Counsel I

Mr. Benson Kamande
Clerk Assistant III

Mr. George Ndenjeshe
Fiscal Analyst III

Ms. Joyce Wachera Gachoki
Hansard Officer III

Ms. Nelly W. Ondieki
Research Officer III

Ms. Shamsa A. Abdi
Research Officer III

Mr. Andrew Jumanne Shangirai
Principal Serjeant-At-Arms

Mr. Simon Odhiambo
Assistant Serjeant-At-Arms

Ms. Evelyn Orina
Clerk Assistant III

Mr. Thomas Ogwel
Fiscal Analyst I

Mr. Githinji Wanjohi
Research Officer III

Mr. Boaz Chebiego
Research Officer III

Ms. Winfred Kizia
Media Relations Officer

Mr. Manuel Leparachao
Sergeant At Arms

Mr. Kelvin Lengasi
Audio Officer

Mr. Jared Onyancha
Protocol Officer III

CHAPTER TWO

2.0 BACKGROUND

6. Pursuant to the National Treasury In-corporation Act (Cap 101), the Cabinet Secretary of the National Treasury on behalf of the Government exercises oversight and ownership through shareholding, equity participation, or state membership in all government investments. The Directorate of Government Investment and Public Enterprises (GIPE) in the National Treasury exercises the oversight and ownership functions in State corporations and other government entities on behalf of the Cabinet Secretary of the National Treasury.

7. Telkom Kenya was established in 1947 as the defunct Kenya Posts and Telecommunications Corporation (KPTC), which was responsible for postal and telecommunication services in the country. In 1999, the Kenyan government initiated a process of liberalizing the telecommunications sector, leading to the transformation of KPTC into Telkom Kenya Limited, Postal Corporation of Kenya (PCK) and Communication Authority of Kenya (CA). This change aimed to introduce competition and enhance efficiency in the industry.

8. In 2004, the government privatized a 51% stake in Telkom Kenya, with France Télécom (now known as Orange East Africa) becoming the majority shareholder. The partnership aimed to modernize the company and improve its services.

9. Over time the shareholding Telkom Kenya underwent various rebranding efforts. In 2013, Orange rebranded the company as "Orange Kenya," reflecting its ownership. However, in 2017, Helios Investment Partners through JHL acquired a majority 60% stake in the company, leading to another rebranding. The company was renamed "Telkom" as part of the repositioning strategy.

10. Telkom Kenya has been actively involved in expanding its services and infrastructure. It has invested in fiber optic cables, mobile network infrastructure, and broadband services. The company has also been a player in the mobile telecommunications market, providing voice, data, and mobile money services.

11. Telkom Kenya owns a 22.5% stake in The East African Marine System (TEAMS), a 5,000km undersea fiber optic cable through Fujairah, UAE. Telkom also hosts and operates this cable. Telkom also owns a 10% stake in the Lower Indian Ocean Network II (LIONII), a 2,700km undersea fiber optic cable through Mauritius. It also owns a stake in the Eastern Africa Submarine Cable System (EASSy) through shareholding in the West Indian Ocean Cable Company (WIOCC). Eassy is a 10,000km cable from Mtunzini, South Africa to Djibouti. Telkom is also the landing partner for the LIONII, EASSy, the Djibouti Africa Regional Express 1

(DARE 1) a 4,854km cable from Djibouti to Mombasa, and lately, Pakistan and East Africa Connecting Europe Cable (The PEACE Cable) a 15,000km cable from Marseilles, France through to Singapore and South Africa.

2.1 RATIONALE FOR THE INQUIRY

12. The Supplementary Estimates I for the 2022/23 Financial Year was submitted to the National Assembly on 31st January 2023 for consideration and approval pursuant to Article 223 of the Constitution, Sections 43(2) and 44 of the Public Finance Management Act 2012, Regulation 40 of the Public Finance Management (National Government) Regulations 2015 and Standing Order No. 243.

13. During the Scrutiny of the said Supplementary Estimates, the Departmental Committee on Finance and National Planning noted that pursuant to Article 223 (1) of the Constitution, Kshs.6.019 billion was withdrawn for disbursement to Telkom Kenya to facilitate the exit of Helios Investment Partners. However, owing to insufficient information provided in support of the transaction the Committee and House rejected the approval for the withdrawal.

14. In addition, TKL is a State Corporation under the State Department of Broadcasting and Telecommunication as per Executive Order I of 2023 and was invited by the Departmental Committee of Communication, Information and Innovation, for the scrutiny of Supplementary Estimates I for FY22/23. However, TKL did not appear stating that they were a private entity.

15. Article 223 of the Constitution provides as follows:

> (1) *Subject to clauses (2) to (4), the national government may spend money that has not been appropriated if –*
>
> *(a) the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or*
> *(b) money has been withdrawn from the Contingencies Fund.*
>
> *(2) The approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money, subject to clause (3).*
> *(3) If Parliament is not sitting during the time contemplated in clause (2), or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.*
> *(4) When the National Assembly has approved spending under clause (2), an appropriation Bill shall be introduced for the appropriation of the money spent.*

16. Consequently, the Departmental Committee on Finance and National Planning and that of Communication Information and Innovation ("Joint Committee") resolved to undertake an inquiry into the circumstance behind the disbursement of Kshs. 6.019 billion to Telkom Kenya under Article 223 of the Constitution. In particular, the Joint Committee endeavored to ascertain how the disbursement was approved, effected, used and whether the necessary conditions for such disbursement as provided under Article 223, Sections 43(2) and 44 of the Public Finance Management Act 2012, Regulation 40 of the Public Finance Management (National Government) Regulations 2015, the legal status of TKL and general issues of concern to the people as contemplated under Article 95 of the Constitution.

2.2 TERMS OF REFERENCE (TOR) FOR THE INQUIRY

17. In considering the matter in question, the Committee identified ten key issues for determination as follows:-

I. Establish how the disbursement of KShs. 6.019 billion under Article 223 of the Constitution to Telkom Kenya was undertaken and whether the transaction met the conditions as provided in Article 223 of the Constitution, Section 44 of the Public Finance Management Act, 2012 and Regulation 40 of the attendant Public Finance Management (National Government) Regulations;

II. Establish when Jamhuri Holding Limited (JHL) was incorporated in Kenya, its shareholding and any changes in its shareholding if any;

III. Find out when Helios Investment Partners (HIP) through Jamhuri Holding Limited (JHL) became a shareholder in Telkom Kenya and establish what was the value of initial **(60% controlling)** shareholding at entry;

IV. Examine the acquisition of Telkom Kenya shares from Helios Investment Partners by the Government of Kenya including;

(a) the process undertaken in the acquisition including the exercise of pre-emptive rights of shareholders;
(b) the regulatory and statutory approval granted by the Communication Authority of Kenya (CA) and Competition Authority of Kenya (CAK) for the acquisition of Telkom shares;
(c) ascertainment of the market share of Telkom Kenya in the telecommunications sector; and

(d) the assessment of the impact of the acquisition on TKL operations, including its financial performance and ability to compete in the telecommunications industry.

V. Establish when Jamhuri Holding Limited (JHL)/Helios Investment Partners (HIP) signaled its exit from TKL and when the request was received by the Board of TKL before the same was transmitted to the National Treasury. Further, whether the Cabinet approved the exit of JHL from TKL and what was the role of the main regulators i.e. Communications Authority of Kenya and Competition Authority.

VI. Inquire whether JHL remitted the statutory fees and taxes to the Kenya Revenue Authority for the acquisition and exit from TKL Shareholding.

VII. Establish the shareholding structure of TKL in the past ten (10) years including the period after the alleged buyout and determine the extent to which it complies with the existing legal and regulatory frameworks.

VIII. Establish the role of the following persons in the transactions under the inquiry:

a. The Hon (Amb) Ukur Yatani, EGH, the former Cabinet Secretary of the National Treasury;
b. Mr. Joseph Mucheru, EGH, the former Cabinet Secretary for the Ministry of Information, Communication, and Digital Economy;
c. Mr. Julius Monzi Muia the former Principal Secretary of the National Treasury;
d. Ms. Margaret Nyakang'o the Controller of Budget;
e. Eng. Stanley Kamau the Former Director of General Public Investments and Portfolio Management of the National Treasury;
f. FCPA Bernard Ndungu the Director of General Accounting Services and Standards; and
g. Mr. Edward Njoroge Chairperson Board of TKL and Mr. Mugo Kibati, CEO of TKL

IX. Investigate whether there was a conflict of interest or allegations of corruption in the acquisition process and whether due diligence was undertaken;

X. Recommend any necessary legal or regulatory changes regarding the legal status of TKL and the attendant regulatory framework in the telecommunications sector.

CHAPTER THREE

3.0 ORAL AND WRITTEN SUBMISSIONS FROM WITNESSES

3.1 SUBMISSION BY CPA MARGARET NYAKANG'O CBS, THE CONTROLLER OF BUDGET

18. CPA Margaret Nyakang'o serves as the Controller of Budget, a position she has held since her appointment on 4th December 2019. The Office of the Controller of Budget (OCOB) is one of two Independent Offices provided in the Constitution whose main mandate is to authorize any expenditure from the Consolidated Fund. The Joint Committee invited CPA Margaret as a person of interest for her role in approving the withdrawal under Article 228 (4) and (5) of the Constitution. CPA Margaret Nyakang'o appeared before the Joint Committee on 14th March 2023 and submitted as follows:

Article 223 of the Constitution and Supplementary Appropriation.

19. Subject to clauses (2) to (4) of Article 223 of the Constitution, the national government may spend money that has not been appropriated if:

    i. the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or

    ii. money has been withdrawn from the Contingencies Fund.

20. The approval of Parliament under Article 223 of the Constitution for any spending shall be sought within two months after the first withdrawal of the money, subject to clause (3).

21. If Parliament is not sitting during the time contemplated in clause (2) or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.

22. When the National Assembly has approved spending under clause (2), an Appropriation Bill shall be introduced for the appropriation of the money spent.

23. In any Financial year, the National government may not spend under the Article more than ten percent (10%) of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage.

Requisition Process for withdrawals under Article 223 of the Constitution

24. The process is initiated by the spending Ministry/State Department by writing to the Cabinet Secretary, the National Treasury requesting for additional/supplementary budget through Article 223. During this period, the OCOB is not informed or involved until the Cabinet Secretary, the National Treasury approves by sending a response letter to the Ministry/ State Department and a copy to OCOB and the Auditor General.

25. The Director General for Accounting Services Standards sends a request to OCOB for the approval and intention to make a withdrawal under Article 223 of the Constitution.

26. The OCOB considers the requisitions in line with the law and available revenue and when satisfied will approve the withdrawal of the funds. to the National Treasury on behalf of the requesting Ministry/State Department. Further, OCOB while granting the approvals, emphasizes the need for adherence with the provisions of Article 223 of the Constitution specifically requirements for Parliamentary Approval and regularization.

27. However, she submitted that feedback on the progress of Parliamentary Approval and regularization timelines of expenditure incurred under Article 223 is not shared with OCOB. In addition, details of procurement and payments by the responsible Ministry/State Department are also not shared with OCOB.

The withdrawal and disbursement of Kshs. 6.091 billion to TKL under Article 223 of the Constitution

28. The OCOB received a request from Mr. Benard Ndungu, the Director General Accounting Services and Standards through a letter dated 28th July 2022 (See Annex TI No. 4) to process exchequer release under Article 223 of the Constitution to TKL, to facilitate the exit of HIP LLP/JHL and same to be regularized in the Supplementary Estimates I FY 2022/23.

29. The requisition by Mr. Benard Ndungu was accompanied by a letter dated 25th July 2022 (See Annex TI No.5) from the former Principal Secretary, the National Treasury to the former Cabinet Secretary, the National Treasury regarding the exit of HIP/JHL from TKL. The letter indicated the desire by JHL to exercise their PUT OPTION. Further, the letter referred to a National Security Council meeting held on 1st April 2022, approving the exit of JHL from TKL through a share purchase agreement that involved the issuance of a 3-year Treasury Bond at a cost of USD51,186,058 or Kshs. 6.091 billion. Additionally, the letter requests the former Cabinet Secretary, the National Treasury for approval to pay USD51,186,058 under Article 223, in the form of a three (3) year Treasury Bond to be regularized under the Supplementary Budget of FY 2022/2023.

30. On 28th July 2022, OCOB received an Exchequer requisition to process Kshs. 6.091 billion under Article 223 while the letter of approval by CS National Treasury and the Share Purchase Agreement between GOK and JHL was received on 1st August 2022.

31. On 1st August 2022, OCOB received a letter dated 25th July 2022 (See Annex TI No. 6) from CS the National Treasury stating that GOK does not issue personalized Treasury Bonds to specific individuals or companies and that the payment of USD 51,186,058 should be made through normal exchequer.

32. On the same date on 1st August 2022, OCOB wrote a letter (See Annex TI No. 7) to the Director General Accounting Services National Treasury requesting a copy of the share purchase agreement and a copy of the approval from CS National Treasury to PS National Treasury for the payment of USD 51,186,098 or Kshs. 6.091 billion. This enabled the OCOB to satisfy itself on the probity of the transaction and therefore grant the approval.

33. Upon receipt of the letter of approval by CS National Treasury and the Share Purchase Agreement between GOK and JHL on 1st August 2022, the OCOB wrote to PS National Treasury on 2nd August 2022 noting the request and approving the withdrawal of funds. In addition, OCOB requested the National Treasury to seek Parliamentary Approval for the expenditure and ensure it is regularized under Supplementary Estimates I of FY 2022/2023 in line with provisions of Article 223 of the Constitution.

34. As per the approval of the OCOB, the total amount approved on this subject matter through Article 223 of the Constitution and approved by CS National Treasury was KShs. 6.091 billion at the then prevailing US Dollar exchange rate.

Regarding adherence to the provisions of Article 223 of the Constitution on disbursement of KShs. 6.091 billion to TKL

35. The request was made under Article 223 of the Constitution by the National Treasury and was in line with provisions of Article 223(1) (a) of the Constitution that is, where the amount appropriated for any purpose under the Appropriation Act is insufficient or a need arises for expenditure for a purpose for which no amount had been appropriated.

36. However, CPA Margaret Nyakang'o stated that feedback on the progress of Parliamentary Approval and regularization timelines of expenditures incurred under Article 223 of the Constitution are not shared with OCOB to assess compliance with clauses (2), (3) and (4) of Article 223 of the Constitution.

In response to the threshold of ten percent (10%) on Supplementary Estimates

37. The Attorney General's legal opinion Ref: AG/CONF/21/8/1 VOL.1 dated 12 March 2019 **(See Annex TI 8)** notes that under Article 223 (5) of the Constitution, the ten percent limit for supplementary Appropriation is of the entire approved budget.

Submissions on supplementary questions

38. Ms. Nyakang'o clarified that the processing of Article 223 of the Constitution is in three levels. The first approval is done by the CS National Treasury. The second approval for withdrawal is undertaken by the Controller of Budget. The third and last approval is the payment undertaken by the respective accounting officers. She further submitted that each of these three parties may not know what the other is doing. She reiterated that OCOB does not make payments at any time but only approves withdrawals from the Consolidated Fund to the spending account.

39. The Controller of Budget noted two gaps in Government procedure particularly on the withdrawal under Article 223 of the Constitution.

    i. The first anomaly is how requests originate from the MDAs without the knowledge of the OCOB and are approved by the National Treasury without knowledge of the OCOB and thereafter submitted to the OCOB for approval. To correct the anomaly, she proposed that any time a request is made from the MDA, it is copied to the OCOB so that the office is aware in good time before the withdrawal request is submitted to OCOB.

    ii. The second gap is the lack of a mechanism with the PFM Act that notifies the OCOB when the withdrawal under Article 223 of the Constitution is presented to Parliament as well as the resulting decision.

40. On the letter that was not procedurally signed purporting to be from former CS Ukur Yatani **(See Annex TI 9)**, she pointed out that she acted on it in good faith and was not aware if it was forged.

41. She reiterated that she was not under any duress while approving the withdrawal, that she acted prudently in the transaction, and she sought the necessary information required for withdrawal under Article 223 of the Constitution.

42. Ms. Nyakang'o informed the Joint Committee that she doesn't know the owners of HIP or JHL. However, she notes that the share purchase agreement presented to her was well executed by a law firm.

3.2 SUBMISSION BY MR. KENNEDY OGETO CBS, FORMER SOLICITOR GENERAL

43. Mr. Kennedy Ogeto CBS, the Former Solicitor General appeared on 14th March 2023. The Office of Solicitor-General is established under the Office of the Attorney-General Act, 2012 whose mandate is to assist the Attorney-General in the performance of the duties of the Attorney-General. Mr. Ogeto has served in the office for 5 years. The Joint Committee resolved to invite Mr. Ogeto to shed light on the ownership of HIP, JHL and TKL. It is worth noting that the term of the Solicitor General ended while the inquiry was still on. He submitted as follows:

Registration and ownership of Helios Investment Partners (Kenya) Limited CPR/2011/52674

44. The above entity was registered as a private company on 27th July 2011. The registered address of the company was indicated as LR NO. 1/870 3rd Floor, Kiganjo House, Rose Avenue, Nairobi, P.O Box 75079-00200, Nairobi. The nominal capital of the company is Kshs.100,000 divided into 100 shares of Kshs. 1,000.

45. At incorporation, the following were the shareholders and directors of the company:

Name	Nationality	Postal Address	Designation	Shares
HIP GP I Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
HIP GP II Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
Paul Gerard Cunningham	British	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Henry Awele Obi	Irish	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Robert Mwangi Ndungu	Kenyan	P.O. Box 14231-00100	Secretary	Nil
Total Shares				**100**

46. On 4th July 2013, the company filed a Form 203A notifying the Registrar that Robert Mwangi Ndung'u had resigned as the company's secretary and Mutual Registrars had been appointed in his place. Further, Shantilal Shah Khimji

appeared to be the person acting on behalf of the firm of Mutual Registrars as per the filed form.

47. The shareholding position of Helios Investment Partners (Kenya) as of 10th March 2023 was as follows:

Name	Nationality	Postal Address	Designation	Shares
HIP GP I Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
HIP GP II Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
Paul Gerard Cunningham	British	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Henry Awele Obi	Irish	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Shantilal Shah Khimji	Kenyan	P.O. Box 45669-00100 Nairobi	Secretary	Nil
Total Shares				**100**

Registration and ownership of Jamhuri Holding Limited (JHL)

48. The former Solicitor General noted that JHL was a shareholder of TKL. However, JHL was not registered in Kenya as per the records held by the Registrar of Companies. The address of the company was captured as Level 3, Alexander House 35 Cybercity Ebene, Mauritius.

Submission on Supplementary questions

49. The Former Solicitor General submitted that his office was not able to identify the shareholders of HIP GP I and HIP GP II as both entities are registered in the Cayman Islands. Further, they did not have information on JHL's shareholding.

50. With respect to the shareholding of TKL, the Former Solicitor General indicated that as per the Companies Registry, at the time of his submission, TKL's ownership structure was as follows:

Name	Designation	Shares
Government of Kenya (GOK)	Shareholder	37.91%

Jamhuri Holdings Ltd (JHL)	Shareholder	56.88%
Adili Trustees	Shareholder	5.21%
Total Shares		100

3.3 SUBMISSION BY HON. SHADRACK MOSE, THE SOLICITOR GENERAL

51. Mr. Shadrack Mose the Solicitor General appeared before the Committee on 5th April 2023. It is worth noting that the term of Hon. Shadrack Mose as Solicitor General started while the inquiry was on. He submitted as follows:

Regarding the particulars, registration and ownership of Jamhuri Holdings Limited (JHL) and Helios Investment Partners (HIP)

Jamhuri Holdings Limited (JHL)

52. An online search conducted on the Mauritius Corporate and Business Registration Department undertaken on the 3rd April 2023 established that, JHL was registered on the 27th of October 2015 as a private company. JHL is categorized as an authorized company, which means that it is a company whose business activities and control and management are outside of Mauritius. This company is considered a foreign company for tax purposes. Its registered office address is Level 3. Alexander House, 35 Cybercity Ebene, Mauritius.

53. The following are the office bearers:

	Position	Name	Address	Date of Appointment
1	Director	Cunningham Paul Gerard	Level 3, Alexander House 35 Cybercity Ebene Mauritius	27/10/2015
2	Director	Merrivale Limited	De Zippora Street 1st Foor #5 Dekk House 456 Providence Industrial Estate Seychelles	30/06/2021
3	Registered Agent	Intercontinental Trust Limited	35 Cybercity Ebene level 3 Alexander House Ebene Mauritius	27/10/2015
4	Secretary	Intercontinental Trust Limited	35 Cybercity Ebene level 3 Alexander	27/10/2015

			House Ebene Mauritius	

54. The Solicitor General indicated that the shareholder details were not available through the online search. However, he pointed out that through Mutual Legal Assistance between GOK and the Mauritian authorities, this information could be obtained.

Helios Investment Partners (HIP)

55. The status, structure and ownership of **Helios Investment Partners (HIP)** as of 3rd April 2023 was as follows:

Name	Nationality	Postal Add Address	Designation	Shares
HIP GP I Limited	Foreign Company	P.O Box 309gt, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
HIP GP II Limited	Foreign Company	P.O Box 309gt, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
Cunningham Paul Gerard	British	2nd Floor, 12 Charles II Street, St James' London, SW1Y4QU, UK	Director	Nil
Henry Awele Obi	Irish	2nd Floor, 12 Charles II Street, St James' London, SW1Y4QU, UK	Director	Nil
Shantilal Shah Khimji	Kenyan	P.O Box 45669-00100	Secretary	Nil
Total Shares				100

In respect to the role played by the State Law Office in the initial acquisition of TKL shareholding by JHL and subsequent offloading of the 10% shareholding to the GOK by JHL

56. On 2nd March 2016, the Cabinet Secretary of the National Treasury was made aware of the sale of the stake held by Orange East Africa (OrEA) in Telkom Kenya to HIP.

57. The Attorney General wrote a letter dated 20th April 2016 (See Annex TI 10) to the Cabinet Secretary National Treasury requesting the sale agreement between OrEA and HIP and all the documents used in negotiations. Subsequently, vide a letter dated 5th May 2016 (See Annex TI 11), the Cabinet Secretary of the National Treasury submitted the said letters and documents for legal clearance.

58. Additionally, through a letter dated 11th May 2016 (See Annex TI 12), the Cabinet Secretary National Treasury submitted additional documents that were relied on by the National Treasury in negotiations.

59. In its response and after reviewing the submitted documents, the Office of the Attorney General vide a letter dated the 16th May 2016 (See Annex TI 13), gave the following advisory. That:

    i. The Nairobi Center of International Arbitration rules be adopted instead of the London Court of International Arbitration rules, with the seat of arbitration being Nairobi instead of London.
    ii. In a letter dated 8th June 2016, the Executive Office of the President gave the go-ahead for this acquisition.

60. Following the advisory by the Attorney General, the Executive Office of the President through a letter dated 8th June 2016 **(See Annex TI 14)**, granted consent to the National Treasury regarding the acquisition.

How the State Law Office protected the strategic assets owned by TKL while undergoing acquisition in 2016 and the 100% buyback in 2022

61. The Solicitor General submitted that the Office of the Attorney General and Department of Justice protected the strategic assets owned by TKL by providing legal advice on all agreements that needed to be done before the transaction was completed.

62. In respect to the 100% buyback in 2022, the office of the Attorney General received a letter dated 30th March 2022 (See Annex TI 15) from the Cabinet Secretary, the National Treasury forwarding a Joint Memorandum on the exit of HIP from TKL. The main objective of the memorandum was to seek the National Security Council's approval for the proposed 100% buyback of TKL by GOK.

63. In response, the Attorney General through a letter dated 1st April 2022 (See Annex TI 16) informed the Cabinet Secretary of the National Treasury of his agreement by countersigning the memorandum. However, the Attorney General gave the following conditionalities. That:

    i. the National Treasury seeks approval of the Cabinet;
    ii. approval from the Board of Telkom Kenya was required among other conditions.

64. Further, the Attorney General through another letter on 6th May 2022 (See Annex TI 17) gave specific guidance to the GOK on how to proceed with the transaction. However, through a letter dated 17th August 2022 (See Annex TI 18) the Cabinet Secretary National Treasury wrote again to the Attorney General stating that the Attorney General's opinion was still required to complete the transaction.

65. In response to the Cabinet Secretary National Treasury's letter dated 17th August 2022 (See Annex TI 17), the Attorney General through the letter dated 30th August 2022 (See Annex TI 19), noted that the documents submitted in support of the request for legal opinion were not complete. In the letter, the Attorney General indicated that some of the submitted documents were not fully signed and dated by the respective parties. However, by the date of submission by the Solicitor General, the National Treasury has not responded to the Attorney General's request to submit fully executed documents. Consequently, the Attorney General's office had never issued the mandatory Legal opinion on the transaction.

66. It was the considered view of the Office of the Attorney General that the National Treasury was the initiator of the transaction. The assertion was supported by the CS National Treasury's letter dated 30th March 2022 (See Annex TI 15) to the Attorney General which stated, "attached please find a Joint memorandum to the National Security Council on the exit of Helios Investors/Jamhuri Holdings Limited in Telecom Kenya for your signature".

67. TKL Board ought to have been involved in the transaction and was never involved until the negotiation had been completed and the withdrawal executed.

Regarding the use of Article 223 of the Constitution

68. Subject to clauses (2) to (4), the National government may spend money that has not been appropriated if:

    i. the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or

ii. money has been withdrawn from the Contingencies Fund.

69. The approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money, subject to clause (3).

70. If Parliament is not sitting during the time contemplated in clause (2) or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.

71. In any Financial year, the National government may not spend under this Article more than ten percent (10%) of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage.

In relation to the apparent conflict of interest by Anjarwalla and Khanna law firm

72. The Solicitor General pointed out that the matter was not handled well. According to Hon Mose, it was clear that while Anjarwalla and Khanna were acting on behalf of JHL, it was also maintaining the Escrow Account in the transaction.

3.4 SUBMISSION BY MR. MUGO KIBATI, CEO OF TELKOM KENYA

73. Mr. Mugo Kibati the CEO of Telkom Kenya Board appeared before the Committee on two occasions, on 14th March 2023 and on 19th April 2023 and submitted as follows:

3.4.1 First appearance on 14th March 2023

74. That, Kshs. 6.091 billion withdrawn to facilitate the exit of HIP from TKL was never disbursed to TKL in part or as a whole. However, the TKL Board received two letters on diverse dates on different subject matters as follows:

    a) The first letter was from JHL dated 11th August 2022 **(See Annex TI 20)** and was received on 18th August 2022 signaling JKL's intention to exit TKL.

    b) The second letter was from former CS National Treasury (Ukur Yatani) dated 19th August 2022 **(See Annex TI 21)**.

How HIP through JHL became a shareholder in TKL

75. HIP through JHL became a shareholder in TKL following the acquisition of 70% of shares in Telkom held by OrEA in June 2016.

76. Upon JHL acquiring a 70% stake in TKL from OrEA, JHL transferred 10% shareholding to the GOK. The net effect was GOK's stake rising to 40% while JHL had a 60% shareholding.

77. The audited accounts of TKL as of 31st December 2015, indicated that shareholders' funds were in a deficit position.

Regulatory and statutory approval granted for the acquisition of Telkom Kenya

78. Mr. Mugo submitted that in 2016 TKL sought and received approvals from the Communications Authority of Kenya and the Competition Authority prior to the acquisition of TKL by JHL. However, TKL was not aware of any approval sought in the 100% buyback of Telkom Kenya by GOK.

The exit of JHL from TKL

79. The Board of TKL never received an express intention from JHL to exit TKL. However, the Board became aware of the intention through:

    i. A request by JHL in August 2021 for the management of TKL to support a due diligence exercise that would be conducted by potential investors. This culminated in a presentation by the management on 29th November 2021 to one of the potential investors;

    ii. In a letter dated 24th January 2022 **(See Annex TI 22)** JHL wrote to Telkom Kenya indicating their intention to terminate the Management Services Agreement.

80. The next indication of an intention of JHL to exit TKL was signaled to the Board of TKL through a letter dated 19th August 2022 **(See Annex TI 21)** from the National Treasury to the Chairman of the Board informing the Board of the 100% Buyback of TKL by the GOK.

Cabinet approval for the exit of JHL from TKL

81. Mr. Kibati stated that vide a letter dated 19th August 2022 **(See Annex TI 21)** to the Chairperson of TKL Board, the former Cabinet Secretary, the National Treasury indicated that all necessary GOK approvals including the Cabinet approval and the Attorney General's clearance to execute the 100% buyback had been granted. Similarly, the former Cabinet Secretary noted that the Communication Authority of Kenya (CA) and Competition Authority (CAK) had approved the acquisition.

Particulars of entities that were paid KSHS. 6.091 billion for the acquisition of TKL

82. Mr. Kibati pointed out that TKL neither received nor disbursed any funds relating to the exit of JHL and therefore, the Board was not aware of any details of the payments, accounts particulars and amounts paid.

Value of TKL shares at the acquisition and exit by JHL

83. Mr. Kibati stated that the Board and management of TKL were not privy to the discussions between the shareholders of the company regarding the value of the shares and therefore, he could not comment on it. However, as per a letter from the National Treasury dated 19th August 2022 **(See Annex TI 21),** the following was noted:

    i. GOK agreed to purchase 60% of the ordinary issued share capital from JHL at a nominal amount of USD 1.

    ii. JHL agreed to transfer by Deed of Novation all rights and obligations relating to all outstanding loans advanced by JHL to TKL amounting to USD. 51,186,057.

    iii. JHL agreed to transfer by deed of novation all rights and obligations relating to shareholding loans that JHL took over from OrEA amounting to USD 239,938, 692.

    iv. GOK made payment for the considerations of the purchase of shares and outstanding loans and accrued interest for loans advanced to TKL by JHL.

Submission on supplementary questions

84. Mr. Kibati clarified that in a letter written to the National Treasury on 29th August 2022 **(See Annex TI 23)** and in response to the former Cabinet Secretary National Treasury's letter dated 19th August 2022 **(See Annex TI 21)** TKL sought additional information regarding the 100% Buyback by the GOK. The letter was not responded to by the former Cabinet Secretary of the National Treasury until his term in office ended in October 2022. In his view, the response from the National Treasury would have been important in guiding the Board and company on how to restructure and officially communicate the changes to their critical stakeholders and partners of the company.

85. The 60% shareholding of TKL was held by JHL, while 40% was held by GOK. He further stated that other categories of preference shares were not included in the ordinary shares which have voting rights.

86. He indicated the transaction did not have any net impact on TKL's books. TKL was still carrying previous liabilities and was still indebted. Additionally, no assets had changed ownership that was previously in TKL's books.

87. TKL comprises three major businesses: mobile, enterprise and carrier network (undersea cables and landing stations). The enterprise and carrier businesses comprise 50% of TKL's revenues and are profitable, albeit the limited investment. On the other hand, the remainder 50% of TKL's business comprises mobile, which has been accruing losses.

88. In 2019 TKL pursued a merger transaction with Airtel Kenya with a view of merging the mobile business between the two companies. This was to bring synergies between the two companies and TKL would own 30% of this combined entity. TKL would have then remained behind with the smaller and more profitable enterprise and carrier business. The transaction was not allowed on account of National Security issues. However, Mr. Kibati indicated that National security entities in other countries work with private telecommunication companies such as Huawei, Microsoft, Lucent Technologies, and Lockheed Martin, and there are modalities and structures as to how this is done.

89. In August 2020, the largest asset in TKL's books, a property (worth over Kshs.15 billion) on Ngong Road was taken by GOK without consultation and a stadium was built by the Ministry of Sports. TKL engaged with GOK and had to sue when negotiations were not fruitful. However, the matter was still pending in court.

90. JHL was a subsidiary wholly owned by HIP and was an investment vehicle established for the sole purpose of the acquisition of TKL. Therefore, it was Mr. Mugo's view that the ultimate owner of the stake in TKL was HIP. Helios was a fund based in the United Kingdom, and he informed the Joint Committee to invite them for any clarifications.

91. On the advanced loan to TKL by JHL, the interest stopped accruing on the shareholder loans in December 2018 because of how negative TKL's balance sheet was at the time. The Management Services Agreement was also frozen at some point in time.

92. According to him, there was no PUT OPTION market trading in Kenya however, PUT OPTION was a relatively common market structure in international investor agreements. In an agreement between parties, it is put in place in case one shareholder feels that the other shareholder has been in breach of the agreement.

93. He submitted that it was in the view of TKL management that the 100% Buyback of TKL was not well thought out. In his view, the buyback would guarantee the death of TKL due to the legal environment in which it would be required to operate. Consequently, securing a new investor to take over the shares that were previously held by JHL would be the best bet. He further stated that the would-be shareholder should be able to bring back the Kshs. 6.091 billion and also commit to investing at least USD 400 million over the next three years to build

out the mobile network, fiber network, carrier and landing stations, data centers and even the core systems.

Second submission by Mr. Mugo Kibati CEO of TKL on 19th April 2023

94. While appearing for the second time on 19th April 2023, the CEO of Telkom Kenya Limited (TKL) Mr. Mugo Kibati through Mr. Allan Wainaina, Chief Financial Officer submitted as follows:

95. The ongoing inquiry has cast TKL in a speculative light. Employees, customers, partners, financial institutions, and potential investors are seeking clarification as to TKL's future. Approximately 2,000 employees and their families depend on TKL for their livelihoods. Additionally, hundreds of others serve their customers through an extended ecosystem of close to one thousand active channels in the retail trade. TKL hoped that the conclusion of the inquiry would settle these anxieties.

96. However, TKL has a solid and sustainable growth strategy going forward. The ability to attract the right private investor is based on the promise of this future-looking strategy, rather than the company's current performance and financial health. It is instructive that seeking a new investor will lead to the inflow of much-needed funds into TKL and the country in general.

The rejected proposed merger with Airtel

97. In February 2019, TKL and Airtel Networks Kenya Limited agreed to merge TKL's Mobile and Corporate Enterprise businesses into an entity that would have been known as Airtel-Telkom. The merger's objective was to create a second strong and competitive telecommunications player in the market.

98. Had the proposed merger gone through, TKL would have owned 30% of the merged entity. This shareholding would have been flipped into shareholding in Airtel Africa, an entity with a presence in fourteen (14) African markets and listed on the London Stock Exchange.

On expropriation of Telkom Kenya's property along Ngong Road, Nairobi

99. The 79-acre plot of land along Ngong Road, Nairobi, was expropriated by GOK to construct a sports complex. Despite numerous attempts to seek an audience with the then administration, TKL has not been compensated.TKL has been making use of its real estate portfolio to secure debt financing from local banks to enable it to operate. To that end, TKL informed the Joint Committee of their frustration as a company while trying to leverage its single largest real estate asset.

100. Consequently, the action undermined TKL's ability to continue capitalizing on their real estate as it raised doubts about the true ownership of other real estate assets in their portfolio, further distressing their financial position. TKL was left with no other recourse but to sue GOK in November 2021.

National security concerns

101. The story of TKL and the evolution of Kenya's national security are inextricably woven together. In this regard, national security agencies initiated conversations with TKL in late 2020 with a view to acquiring certain strategic infrastructure assets. At that time, a newly formed National Security Telecommunications Service (NSTS) needed foundational Telecommunications assets.

102. TKL was concerned about the potential impacts such a change would have on its local and international customers, as well as other stakeholders. Instead, TKL recommended a proactive framework for continuous engagement as this would extend the already existing mutual relationship. The discussion of this framework was never exhausted. Through this inquiry, it has come to TKL's attention that the acquisition of TKL and thus the exit of JHL was executed in the interest of National Security.

103. TKL is of the firm belief that the operations of a privately run telco and a public safety mandate can co-exist smoothly as it does today in Kenya and across the world. National security also existed and would have been addressed at the time of privatizing TKL 16 years ago.

104. It is global practice for Governments to engage private-sector actors to partner with a country's incumbent national operator in telecommunication services. The private sector takes up the larger part of the required investment needed to power the growth strategy of a dynamic telco. This not only provides relief to the taxpayer but also provides access to highly skilled talent, global expertise and technology partnerships on a global scale, as well as the agility and flexibility that come with best practices in the industry.

105. TKL remains committed to a strong national security posture and benefits from private sector-led investments. Research and development advance when the interests of private enterprises converge with the public good in all spheres of human endeavor.

Telkom Kenya's Future

106. It is TKL's strong view that it is in the best interest of Telkom Kenya, Kenya's national security interests, consumer choice, taxpayers and the country at large that TKL remains a private entity. Moreover, TKL's research into the process of reverting an already privatized company to the public has yielded no legal or

policy framework to oversee such a process. Indeed no precedent appears to exist.

107. TKL therefore urges the Joint Committee in its deliberations and subsequent recommendations to consider the ramifications of attempting to revert TKL into a publicly owned company. It is TKL's considered view that concluding the share transfer in a manner that retains TKL as a private company is the best outcome for their stakeholders.

108. It is TKL's view that an investor that has the capability and is willing to fund their growth strategy for the long-term be sourced by GOK. TKL submits that it will take about USD 400 million to transform the company into a sustainable company for the future.

109. TKL is on record having highlighted the state of the country's telecommunications industry as still needing regulatory interventions to operate fairly and efficiently. TKL would urge the Joint Committees to provide the needed oversight for the implementation of a robust policy framework and regulatory space that are conducive to investment in the sector.

110. TKL hopes that the entry of a new majority shareholder, in the context of a new national administration, will result in a tighter, strategic, value-adding engagement at the shareholder level.

Telkom Kenya's Financials in 2016

111. As at 31 December 2015, shareholders' equity was negative and total liabilities exceeded total assets by KSHS. 1.1 billion

112. The TKL Shareholder loans as at 31 December 2015 are as follows:

    i. Borrowings amounting to KSHS. 26.97 billion due to Orange Group are included under current liabilities

    ii. GOK did not have any outstanding shareholder loans

    iii. Non-current borrowings of KSHS. 251m were due to the Export Development Corporation (EDC)

113. As at 31 December 2015, borrowings amounting to KSHS. 38.6bn reported under non-current liabilities comprised:

	KSHS. bn
60% JHL share of Orange loan	19.9
40% GOK share of Orange loan	13.3
JHL's new loan disbursed to TKL	2.7

Export Development Corporation	0.3
Accrued Interest and forex losses	2.5
Total	38.6

Assets and Liabilities taken over by JHL

114. On 10 June 2016, when JHL acquired the 70% Orange EA shareholding in TKL, GOK did not have any outstanding shareholder loans. However, JHL took over the KShs. 33bn Orange EA loan asset, with the shareholders then agreeing to assign 40% (KShs. 13.3bn) to GOK in addition to JHL ceding 10% shareholding to increase GOK's shareholding from 30% to 40%.

115. The movements in shareholder loans and shareholding are summarized in the table below:

Shareholder Loan	Loan Asset	Loan Assigned	Loan Asset	Ratio
JHL	33,164	(13,266)	19,898	60%
GOK	-	13,266	13,266	40%
	33,164	-	33,164	100%

Shares Held Jun-16	Shares Before	Shareholding	Shares Ceded	Shares After	Shareholding
JHL	83,101,312	70%	(11,871,616)	71,229,696	60%
GOK	35,614,848	30%	11,871,616	47,486,464	40%
	118,716,160	100%	-	118,716,160	100%

116. TKL's major assets at the end of 2015 (before Helios entry) and 2021 (before Helios exit) are summarized as follows:

Investment Properties (those held as investments and not for use in the business)

KSHS in Millions	2015	2021	Notes
Ngong road property	1,520	4,892	2015 stated at cost, 2021 at valuation. Currently subject to an ongoing court matter

Extelcoms House	1,000	-	Disposed of in 2019
Gilgil Staff Houses	70	-	Disposed of in 2018
TOTAL	2,590	4,892	

Property, Plant, Equipment

KShs in Millions	2015	2021	Notes
Property in use in the business			
Nairobi Telephone House	382	886	2015 stated at cost, 2021 at valuation
Milimani Telephone House	66	489	2015 stated at cost, 2021 at valuation
Eldoret Telephone House	40	407	2015 stated at cost, 2021 at valuation
Mombasa Telephone House	157	346	2015 stated at cost, 2021 at valuation
Kisumu Telephone House	138	295	2015 stated at cost, 2021 at valuation
Nairobi Central Stores Pemba Depot	134	-	Disposed of in 2018
Other properties (>300 properties)	2,402	5,781	2015 stated at cost, 2021 at valuation
Total property	3,319	8,204	
Plant & equipment	16,007	8,613	At cost less depreciation. Reduction is mainly due to the sale of towers to ATC in 2018
TOTAL	19,326	16,817	

117. TKL's major liabilities at the end of 2015 (before Helios's entry in 2016) and 2021 (before Helios exit in 2022) are summarized as follows:

Liabilities

KShs in Millions	2015	2021	Notes
Trade Payables			
Communications Authority	1,566	3,192	

Safaricom	703	2,543	
ATC	-	826	
Long term IRUs	1,929	2,711	IRUs sold to WIOCC, ORANGE, ETISALAT, MTN and others
Other trade payables	11,638	8,585	Amounts due to suppliers and accrued expenses
Total trade payables	**15,835**	**17,857**	
Other third-party borrowings	1,758	1,251	Invoice financing arrangements
Other liabilities	1,053	972	Bank overdraft and retirement benefit obligations (2015 only)
Total liabilities before shareholder loans and lease liabilities (IFRS 16)	**18,646**	**20,080**	
Lease liabilities	-	28,622	Long-term obligations under leasing and rent contracts (IFRS 16) see note below*
Total liabilities before shareholder loans	**18,646**	**48,702**	
Shareholder loans	26,973	53,142	Additional loans advanced, interest and KShs devaluation
Total Liabilities	**45,619**	**101,844**	

***Note:** the long-term obligations under leasing and rent contracts mainly represent future lease payments to ATC running to September 2028. A corresponding asset is recognized under fixed assets. Both the assets and liabilities have been recognized in accordance with IFRS 16, which came into force on 1 January 2019.

JHL injection of USD 47.7m into TKL

118. TKL's funding needs were supposed to be funded by the shareholders on a 60:40 basis (in line with the respective shareholdings). However, GOK was not able to inject its share of funding. JHL injected into TKL both its own as well as GOK's portion. The following is the JHL loan that was disbursed and received by TKL on diverse dates between June 2016 and September 2017:

Date Disbursed	USD	KShs in Millions
16 June 2016	10,000,000	1,011

13 July 2016	5,940,000	602
19 July 2016	10,780,000	1,093
TOTAL (2016)	26,720,000	2,706
20 June 2017	10,000,000	1,038
15 August 2017	8,000,000	831
22 September 2017	1,500,000	155
22 September 2017	770,052	80
29 September 2017	729,948	75
TOTAL (2017)	21,000,000	2,179
TOTAL	**47,720,000**	**4,885**

119. TKL loan disbursements were utilized to fund capital expenditure and support operational expenses as summarized below:

Utilization of loan products	**KShs. In million**
Utilization of 2016 disbursements:	
Communication Authority fees	862
Capital expenditure (3G/4G & Digital business projects	804
Site rentals	280
Other monthly operational expenses	760
Total	**2,706**
Utilization of 2017 disbursements	
Communication Authority fees	36
Capital expenditure (3G/4G & Digital business projects	948
Site rentals	194
Other monthly operational expenses	1,001
Total	**2,179**
TOTAL	**4,885**

Terms of JHL shareholder loan

120. The key contract terms of the JHL shareholder loan were:

i. The funding total was limited to USD 50m.

ii. Purpose: loan amounts would be applied towards corporate purposes of TKL.

iii. Term: The repayment period of the loan amounts advanced was a maximum of 5 years.

iv. Disbursements: would be made from time to time, at the request of TKL.

v. JHL would disburse GOK's share of TKL's request if GOK did not honor its proportionate obligation.

121. The shareholder loans would:

i. be senior to the existing shareholder agreements, i.e. the Orange EA takeover loans.
ii. not be convertible into shares in TKL.
iii. interest would be at a rate that represented the market for funding a subordinated loan to the company at the time of disbursement.

122. Loan repayment:

i. Would be in equal annual installments over 5 years, starting from the first anniversary of the date of each loan disbursement.
ii. If TKL had any excess cash, it would pre-pay all or some of the outstanding amounts due on any outstanding loan amounts.
iii. Upon the occurrence of either: the expiry of the term; or an exit event; the outstanding portions of any loan amounts together with any accrued interest would become immediately due and payable to JHL.

Regarding loans advanced to TKL or guaranteed by GOK

123. Prior to 2015, GOK advanced TKL a total of KShs. 6.0 billion, which was subsequently capitalized in 2012.

124. In 2019, GOK supported TKL in securing a 4G spectrum license for KShs. 2.5 billion, with the actual cash funding arrangement being made between the Treasury and the Communication Authority. This amount is included in TKL's books as shareholder loans due to GOK.

125. These loans are summarized below:

Year	Kshs m	Purpose
2009	2,500	Working capital
2010	1,000	3G License – Treasury/CA arrangement

2011	-	
2012	2,500	Debt restructuring commitment
Capitalized	(6,000)	
2013	-	
2014	-	
2015	-	
2016	-	
2017	-	
2018	-	
2019	2,500	4G License – Treasury/CA arrangement
2020	-	
2021	-	
2022	-	
GOK Outstanding Loan	2,500	

126. GOK (through the National Treasury) has also committed to CA to cover spectrum fees for 2019/2020 and 2020/2021, amounting to KSHS. 2.1 billion.

127. In December 1999, GOK guaranteed a 33-year, USD 8.11 million loan from the Export Development Corporation (EDC) to the former Kenya Posts and Telecommunications Corporation (KPTC). TKL has repaid the greater part of this loan and as at 31 December 2022, only USSD 1 million was outstanding.

JHL loan guarantee and loans from financial institutions.

128. The JHL loan was neither secured nor guaranteed.

129. TKL has the following banking facilities with KCB and Standard Chartered Bank

Bank Facilities as at 31 March 2023

Facility	Financial Institution	Advanced Kshs. million
Overdraft	Kenya Commercial Bank (KCB)	1,000
Composite	Standard Chartered Bank	544
TOTAL Facilities		**1,544**

Payments and Outstanding liability to the Communication Authority (CA)

130. Since January 2019, TKL has paid CA a total of KS4.9 billion in annual spectrum license fees:

Payments made to CA

Year	Ksh in Million
2016	2,513
2017	109
2018	1,408
2019	884
2020	-
2021	-
2022	-
Total	4,913

131. As at 31 March 2023, TKL owed CA KSH4.2 billion, covering annual fees and service funds for the financial years 2019/2020 to 2022/2023. However, CA claims TKL owes the Authority KSH9.4 billion which TKL reconciles in the schedule below:

Payments made to CA

Year	Ksh m License	Ksh m USF	Purpose
FY 2019/2020	983	48	Annual spectrum and USF fees
FY 2020/2021	1,064	54	Annual spectrum and USF fees
FY 2021/2022	1,120	52	Annual spectrum and USF fees
FY 2022/2023	832	56	Annual spectrum and USF fees
Total	3,998	210	
Total License and Service Fees		4,208	

Amount claimed by CA

Balance as per CA Statement of Account	Ksh in Million	
31 Dec 2022	4,208	CA Statement of Account ties to TKL records
3G Spectrum license loan	1,300	GOK/Treasury committed to settling these amounts with CA
4G Spectrum license loan	3,250	
2G Spectrum license loan	660	
	5,210	
Total	9,418	

3.5 SUBMISSION BY MR. EDDY NJOROGE, CHAIRPERSON TELKOM KENYA BOARD

132. Mr. Eddy Njoroge the Chairman of Telkom Kenya Board appeared before the Committee on the 21st. March 2023 and submitted as follows:

133. That, the Ksh6.091 billion was not disbursed to Telkom Kenya Limited in part or whole. Mr. Eddy said he only knew of the amount after the effect and is pleased with this inquiry as it may reveal some of the matters that happened between our two shareholders.

134. That as the Chairman together with the Board, he was not privy to the negotiations between the shareholders. The facts of the transaction only came to light through two letters:

    a) A letter from Jamhuri Holdings Ltd. dated 11th August 2022 and received on 18th August 2022 **(See Annex TI 20)**

    b) A letter from the former Cabinet Secretary Amb Ukur Yatani dated 19th August 2022**(See Annex TI 21)**

How Helios Investment Partners (HIP) became a majority shareholder in Telkom Kenya and the value of the initial (60% controlling) shareholding.

135. Mr. Eddy Njoroge informed the Joint Committee that, France Telecom SA had been the majority shareholder of Telkom Kenya since 2007. At the time of its exit, Helios Investors III LP a USD 1.1b Private Equity Fund entered into a Share Purchase Agreement with Orange East Africa S.A. and through a subsidiary Jamhuri Holdings Ltd became a 70% shareholder in Telkom Kenya following the acquisition in June 2016. TKL was a party to a Shareholder Agreement signed on 10th June 2016. Helios also acquired all the shareholder's loans that had been advanced to the company by Orange East Africa/France Telekom SA amounting to an aggregate of USD 332.8m.

136. Upon JHL acquiring 70% from Orange, they transferred 10% to the Government of Kenya through the National Treasury resting the shareholding at 60% JHL and 40% The National Treasury. They also transferred 40% of the Shareholder Loans worth USD 133.1m to the GOK.

137. It is difficult for TKL to know what was ascribed to the value of the shares at the point of the entry of Helios. The only thing TKL could authoritatively state was that as per the audited accounts of Telkom Kenya Limited as at 31st December 2015, shareholders' funds were in a deficit position.

138. Mr. Njoroge points out that, at the exit point the value ascribed to the shares was USD 1 which was just a token rather than the value. However, the establishment of the value of 60% can only be authoritatively discussed by the shareholders.

How regulatory and statutory approval was granted.

139. In June 2016 when JHL acquired the shares from France Telkom SA, approvals were sought from all the regulatory authorities namely: the Communications Authority of Kenya (CA) and the Competition Authority (CAK). However, in 2022 TKL cannot confirm with certainty whether the CA and CAK granted the requisite approval save for the indication from the Former Cabinet Secretary's assertion in the letter dated 19th August 2022 **(See Annex TI 21)** addressed to the Chairperson of TKL Board

How JHL communicated its intention to exit from TKL and when the request was received by the Board of Telkom Kenya before the same was transmitted to the National Treasury.

140. There was no signal as such from JHL of their exit from TKL but being owned by a PE fund, TKL always knew that they would exit. The only readings which could have been read as signals were:

    i. The proposed merger with Airtel although it was not an exit but a value addition, it was nevertheless an indication of JHL's eventual exit.

    ii. Thereafter on 24th January 2022 **(See Annex TI 22),** JHL wrote to Telkom Kenya indicating their intention to terminate the Management Services Agreement.

    iii. The Board was not given a request by JHL of their intention to exit. Ordinarily, this would not come to the company but directly to the other shareholders.

    iv. TKL was only informed about the exit of JHL vide a letter dated 11th August (received on 18th August from Paul Cunningham a Director of JHL **(See Annex TI 20).** This was followed by a letter from the CS National Treasury dated 19th August 2022 **(See Annex TI 21)** from the National Treasury to the Chairman of the Board.

The exit of JHL from TKL and 100% Buyback of TKL was approved by the Cabinet and the role of the main Regulators in the acquisition.

141. The letter from the National Treasury dated 19th August 2022 (See Annex TI 21) enclosed the approval from the Communication Authority and the waiver from the Competition Authority of Kenya. It also stated that all necessary GOK approvals including the Cabinet and Attorney General's clearance to execute the legal documents. Understandably, the Cabinet approval was not attached. The AG's legal opinion was also missing.

142. The items and documents that the TKL Board requested through a letter dated 29th August 2022(See Annex TI 23) were the missing AG's Legal opinion among others. These documents were to enable the Board to proceed to conclude the transaction.

The particulars of entities paid KSH6.091 billion for the 100% Buyback of TKL.

143. TKL neither received nor disbursed any funds relating to the exit of JHL and was therefore not aware of any details of payees, account particulars and amounts paid.

On the Value of TKL shares at the acquisition by JHL vis a vie at the buyback, and whether JHL offloaded the majority shareholding to the GOK at a premium.

144. Mr Eddy indicated that the Board and Management of Telkom Kenya were not privy to the discussions between the shareholders that is JHL and GOK regarding the value of the shares. However, the letter from the CS National Treasury to him as the chairperson of the TKL Board dated 19th August 2022(**See Annex TI 21**) stated the following:

    i. GOK agreed to purchase 60% of the ordinary issued share capital from JHL at a nominal amount of USD. 1.

    ii. JHL agreed to transfer by Deed of Novation all rights and obligations relating to all outstanding new loans advanced by JHL to Telkom Kenya Limited amounting to USD. 51,186,057

    iii. JHL agreed to transfer by Deed of Novation all rights and obligations relating to the old shareholding loans that JHL took over from Orange East Africa SA amounting to USD. 239,938,692

    iv. GOK made payment for the consideration of the purchase of shares and outstanding loans and accrued interest for loans advanced to Telkom Kenya Limited by JHL.

On whether the share sale was at a premium

145. Mr Eddy indicated that TKL's understanding, the shares were not sold at a premium. The shares were acquired at a token of USD 1 and the shareholder's loans worth about USD 290 Million were bought for USD 51 Million. However, as per the audited accounts of TKL as at 31 December 2021, shareholders' funds were in a deficit position.

3.6 SUBMISSION BY MR. EZRA CHILOBA, DG COMMUNICATION AUTHORITY (CA)

146. Mr. Ezra Chiloba, the Director General Communication Authority (CA) appeared before the Committee on 21st March 2023 and submitted as follows:

TKL's performance compared to its competitors in the telecommunications industry

147. Based on the compliance returns received from operators, the performance of TKL compared to that of its competitors can be measured in terms of revenue as well as market share. For market share, CA looks at mobile SIM subscriptions, voice, and SMS traffic. Tables 1, 2, 3 and 4 show how different operators compare on the performance indicators.

Table 1: Market Share by Revenue (%)

Operator/Period	Dec-22	Dec-21	Dec-20	Dec-19	Dec-18
Safaricom PLC	86.1	86.4	88.5	88.3	88.8
Airtel Networks Kenya Ltd	9.4	8.5	6.8	7.4	6.6
Telkom Kenya Ltd	*3.6*	*4.1*	*4.2*	*3.8*	*4*
Finserve Africa Ltd	0.4	0.4	0.5	0.5	0.5
Jamii Telecommunications Ltd	0.6	0.6	-	-	-

Source CA Kenya

Table 2: Market Share by Mobile SIM Subscriptions (%)

Operator/Period	Dec-22	Dec-21	Dec-20	Dec-19	Dec-18
Safaricom PLC	65.7	65.9	63.6	64.8	63.3
Airtel Networks Kenya Ltd	26.8	25.2	27.2	25.9	23.4
Telkom Kenya Ltd	*4.7*	*6.4*	*6.2*	*3.1*	*9.0*
Finserve Africa Ltd	2.3	2.2	2.7	6.2	4.2
Jamii Telecommunications Ltd	0.5	0.4	0.3	0.0	0.0

Source CA Kenya

Table 3: Market Share by Voice Traffic (%)

Operator/Period	Dec-22	Dec-21	Dec-20	Dec-19	Dec-18
Safaricom PLC	65.9	70.4	69.2	67.1	64.3
Airtel Networks Kenya Ltd	32.2	27.6	28.5	29.2	30.7
Telkom Kenya Ltd	*1.7*	*1.9*	*2.2*	*3.4*	*4.8*
Finserve Africa Ltd	0.2	0.1	0.1	0.2	0.2

Jamii Telecommunications Ltd	0.0	0.0	0.0	0.0	0.0

Source CA Kenya

Table 4: Market Share by SMS Traffic (%)

Operator/Period	Dec-22	Dec-21	Dec-20	Dec-19	Dec-18
Safaricom PLC	89.2	89.4	92.2	94.1	94.1
Airtel Networks Kenya Ltd	10.4	9.9	7.2	5.2	5.2
Telkom Kenya Ltd	*0.3*	*0.6*	*0.6*	*0.7*	*0.7*
Finserve Africa Ltd	0.1	0.1	0.1	0.0	0.0
Jamii Telecommunications Ltd	0.0	0.0	0.0	0.0	0.0

Source CA Kenya

On the Regulatory or Legal requirements followed in the valuation process of TKL

148. The Authority does not have the mandate to determine the valuation of TKL. The Authority submitted that it believed that the mandate rests with the Privatization Commission.

On the impact on Telkom Kenya's performance following 100% Buyback by GOK

149. At this stage, the Authority is not able to establish the impact of TKL's performance in view of the acquisition under inquiry. The Authority believed that the issue of acquisition is very recent for the market to effectively adjust. But most importantly, the acquisition process is not complete.

On how the 100% acquisition of TKL has impacted the wider telecommunication sector

150. So far, the authority has not seen any movement in the sector in response to GOK's acquisition of TKL. CA submitted that changes in shareholding may not necessarily trigger a response from Telkom Kenya's competitors. However, an acquisition where the government is involved may trigger market distortion due to anxiety arising from long-term government intervention in favor of TKL. Therefore, CA advised that where such intervention is necessary, the same should be for the shortest time possible.

The legal or regulatory requirements for the acquisition of telecommunication companies in Kenya

151. The changes in shareholding in communication licensees in Kenya were governed by the ICT Sector Policy Guidelines of 2020 requirement on local equity ownership. The said guidelines required that at least 30 percent of shares in a communication company be allotted to local shareholders.

152. Regulation 9 of the Kenya Information and Communications (Licensing and Quality of Service) Regulations, 2010 and the relevant license conditions held by Telkom Kenya required that the Authority should be notified of any proposed change in ownership, control or proportion of shares held in a licensee, at least thirty (30) days before the change is implemented. Changes in shareholding that exceed 15 percent or acquisition of 5 percent of shares by an existing shareholder require prior written consent from the Authority. The main objective of this requirement was to ensure that communication licensees operating in Kenya do not repatriate their entire profits made from their operations in Kenya to their foreign countries of origin.

153. Based on this, where a licensee seeks to change shareholding, the focus of the Authority is to determine whether the proposed change is geared towards meeting the local equity participation requirement or not. Where such meets the local equity participation, the Authority is obligated in its role to approve the transaction, which approval is conditioned to be granted within not more than thirty (30) days after the request is made.

154. In the case of TKL, the request was made by the National Treasury to the Communication Authority (CA) vide a letter dated 6 April 2022 **(See Annex TI 24)**. This request involved a GOK buy-out of 60 percent of shares held by JHL in TKL. The transaction would result in the Government owning 100 percent of TKL. This transaction was approved on 13th April 2022 considering that it was meeting the local equity participation requirement. The approval was also subject to the following conditions:

    i. That the National Treasury provides a letter of comfort on the settlement of the TKL's outstanding debt on license fee of at least Ksh7,222,672,891;

    ii. That TKL provides assurance to the Authority that its customers are protected; and

    iii. That Telkom Kenya Limited furnishes to the Authority a copy of CR-12 after the acquisition.

155. The Authority subsequently sought a clarification on the status of government shareholding in TKL. TKL, vide the letter dated 4th October 2022 **(See Annex TI 25)** denied any changes in its shareholding. TKL further committed to inform

the Authority of any changes in its shareholding as they occur. As at the date of this submission, this had not been done and therefore the Authority was not aware yet if the changes approved on 13th April 2022 had occurred or not.

156. Furthermore, the Authority through a letter dated 7th October 2022 **(See Annex TI 26)** also sought to obtain TKL's latest CR-12 showing the latest shareholders thereof. This information had not been received to confirm the latest TKL shareholding, as at the date of this submission.

On the change of GOK policy from privatization to buyback of formerly state agencies.

157. The CA believes the National Treasury is best placed to advice on privatization and associated government policy directions.

Other matters relating to TKL

158. TKL's license was under threat due to non-renewal given the outstanding debt to the Authority estimated at Ksh9.40 billion as of the date of this submission.

159. TKL carries outstanding debt in relation to other service providers, for example, American Tower Company Limited and Safaricom PLC. This is likely going to compromise the quality of service and experience of Telkom Kenya customers.

Submission on supplementary questions

160. The CA provided conditional approval for the JHL exit. These conditions had not been met. TKL itself wrote to the Authority to confirm that there have been no changes that have taken place in its shareholding, so this was the current legal status.

161. On dominance, the issue has been in the public domain for the last 10 years. The Authority undertook a market study a couple of years ago to investigate the matter. The CA concluded that there was dominance in the ICT market. Some of the key recommendations were the revision of Mobile Termination Rates (MTR) and putting in place interventions toward infrastructure sharing. In 2022, the CA decided on mobile termination rates and dropped them from KShs. 0.99 to KShs. 0.12. This would mean that TKL would pay much less to Safaricom so that it could have some resources to reinvest in its business growth. However, there was a court case and the parties were able to re-negotiate the mobile termination rate of Ksh.0.58. This rate was going to be revised in August 2023. The CA's idea of balancing the market towards MTR was moving toward zero, a process they are looking to manage in the next four years. By August 2023, they will guide how infrastructure sharing is going to be managed.

162. Kenya Information Communications Act, Section 84W(4), states that "The Commission may, in consultation with the Competition Authority and after due process declare a person or institution, by notice in the Gazette, to be a "dominant telecommunications Service provider" for this Act". The declaration of dominance is domiciled by the CA.

163. When the CA looked at the market and the various aspects affecting that player's status, the CA made decisions on how to remedy the situation, looking into the policies and regulations at the time. CA believed the dominance declaration was not sufficient without developing strategies for what to do after the declaration.

164. CA submitted that it was important for the Joint Committee to appreciate that when the dominance law was put in place, the telecommunications market focus was on calls (voice), SMS and the attendant termination rates. However, with technological changes, there has been a movement towards data. With this, you have over-the-top services such as the ability to make online calls using data. The data space is a new market and there is stiff competition in this space. In CA's conversations with TKL, they have focused increasingly on data because they believe they are strategically placed to lead in this space. This was because they have submarine landing stations and they host 5 undersea fiber cables, so they can be the main distributors of data in the region. When it comes to understanding dominance in the dynamic telecommunications space, the law needs to be revisited.

165. The CA submitted that it would be impossible for TKL to be competitive in the telecommunications market if they are a government entity. This is because they will be constrained by the Public Finance Management Act, procurement and hiring requirements. A company cannot compete in this sector if it depends on a bureaucracy like the Government to operate.

3.7 SUBMISSION BY MR. JOSEPH KOSKEY, CEO PRIVATIZATION COMMISSION

166. Mr. Joseph Koskey, the Executive Director/CEO Privatization Commission appeared before the Committee on 21st March 2023 and submitted the following:

167. The Privatization Commission was established under Section 3 of the Privatization Act, 2005 and commenced operations in 2008. The Privatization of TKL happened in 2007 before the Commission commenced its operations and hence was not privy to the objective of the privatization then.

168. The Commission's mandate and functions are confined to the entities listed in the Privatization Programme as stipulated in Section 4 of the Privatization Act, 2005. The Commission, therefore lacks the legal capacity to manage

privatizations undertaken outside the Privatization Programme. The inaugural Privatization Programme approved by the Cabinet and gazetted in 2009 for implementation by the Commission comprises twenty-six (26) entities; TKL is not among them.

169. Privatization as defined by the Privatization Act "means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation but excludes sale of new shares to existing shareholders through a rights issue or any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity." From this definition, it talks about a transaction that results in a transfer of shares. Within the context of what the law stipulates, the law does not go to the extent of buyback. The Commission operates within the extent of the law.

170. Currently, the Privatization Act does not envisage a situation of buyback of a previously privatized public entity. Therefore the Joint Committee should consider advising the amending of the mandate of the Privatization Commission to include buyback situations.

171. Their position as a Commission was that the Government should not be involved in commercial activities unless the activities were strategic.

172. Section 17 of the Privatization Act, states that "(1) there shall be a privatization programme; (2) The privatization programme shall be formulated by the Commission and approved by the Cabinet; (3) The privatization programme shall be published in the Gazette; and, (4) The privatization programme may be amended and subsections (2) and (3) shall apply with respect to any such amendments." From this, once a list of entities is identified for privatization and gazetted, that is the confines to which the Commission operates.

173. In 2013, the then President formed a Taskforce to look at the rationalization of State Corporations. In July 2014, the Commission received a Cabinet communication to hold in abeyance all privatizations that they were undertaking then. When Mr. Joseph Koskey joined in November 2018, the directive was still in force. On 31st March 2019, the Commission got a waiver to continue with Privatization, however, some entities that were in the programme were removed. Three months later, on 29 June 2019, the term of the Board ended and was only reconstituted in March 2022. For 33 months they had a Privatization,k team but one without a Board to operate.

174. Currently, there is a privatization law review, and the CEO believes that it will soon be before the National Assembly. If there will be concurrence that the issue

of buyback should be included in the review, the Commission would welcome it. More importantly, the CEO suggested that, there needs to be a provision in law, that where privatization has been undertaken and the privatized company is not performing well, the private investor(s) be compelled to pursue the intended interest.

3.8 SUBMISSION BY DR. ADANO ROBA, AG DG COMPETITION AUTHORITY (CAK)

175. Dr. Adano Roba, the Ag. Director General Competition Authority of Kenya appeared before the Committee on 23rd March 2023 and submitted as follows:

176. The Authority was established by Section 7 of the Competition Act, No 12 of 2010 ("the Act"). It involved analyzing and thereafter, making a determination (approving or declining mergers/takeovers) in all sectors of the Kenyan economy.

177. The analysis of market structure aims to highlight the likely effects on competition and/or public interest resulting from merger transactions. It was important to highlight, ab initio, that Kenya's merger regime was suspensory. It means that any merger falling under the precincts of the Act is not enforceable without the approval of the Authority.

178. The law provided that a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. The terms merger and takeover were used interchangeably.

179. Further, the Act elucidated ways in which a merger may be achieved. They included:

    i. The purchase or lease of shares, acquisition of interest, or purchase of assets;

    ii. The acquisition of a controlling interest;

    iii. The acquisition of an undertaking under receivership by another undertaking;

    iv. Acquiring by whatever means, the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya;

    v. In the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently; and,

vi. Exchange of shares between or among undertakings which results in a substantial change in ownership.

180. The control may be procured through, inter alia:

i. Acquiring over 50% of the issued shares;

ii. Majority votes are cast at a general meeting; and,

iii. Acquisition of powers to veto key decisions.

181. Any parties that implement a merger without the approval of the Authority are liable to a penalty and the merger shall not have any legal effect and therefore will not be enforceable in law. In addition, the Authority may revoke a merger if it approves it without adequate information or through parties providing misleading information.

182. Any business intended to be carried on or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a trade association is required to notify the Authority if it intends to implement a merger.

183. To facilitate analysis of merger applications emanating from regulated sectors, the Authority pursuant to Section 5 of the Competition Act, has developed a Memorandum of Understanding (MoU) with sector regulators. Regarding mergers that may occur through the privatization process, the Privatization Commission would normally consult the Authority.

184. Regarding the Telecommunications sector, the Authority implements an MoU with the Communications Authority of Kenya. The framework has been very informative in our analysis of mergers in the sector.

The previous mergers and acquisitions in the Telecommunications Sector

185. With respect to TKL, the Authority considered the proposed acquisition of TKL's mobile operations, enterprise, and carrier business by Airtel (in 2019), in exchange for a 30% stake in Airtel consideration. The two parties were to merge their activities to form a new brand known as Airtel-TKL.

186. In 2016, the Authority also considered and approved the transaction involving JHL acquiring 70% shareholding in TKL.

The acquisition of TKL by the GOK

187. The National Treasury and Planning wrote to the Authority in April 2022 seeking an advisory opinion regarding the acquisition of 60% shareholding in TKL by the GOK from JHL, a subsidiary of Helios Investment Partners (HIP).

188. At the time, the shareholders of TKL were: JHL (60%) and GOK (40%) shareholding. The proposed acquisition would result in the Government owning 100% shareholding in Telkom Kenya. It was submitted that the main purpose of the acquisition was to safeguard the public interest.

189. The DG having reviewed the request according to the provisions of the Act, the Authority determined that the proposed transaction did not require prior authorization before implementation on the account that the Government was not 'an undertaking' as per the definition of the Act.

190. In making its determination, the Authority was guided by:

    a) Section 2 of the Act defines an "undertaking" as:

    "Any business intended to be carried on, or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service, and includes a trade association"; and,

    b) Section 41 of the Act states that:

    "For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking."

191. Based on the foregoing, it became clear that the GOK, which was making the acquisition directly, did not fit the meaning provided in the Act to be considered as an undertaking. Additionally, the acquisition was not being done through any of its agencies, corporations or companies that may fit the definition of an undertaking.

192. The proposed transaction therefore did not fall within the definition of a merger under Section 41 of the Act since GOK was not an undertaking within the meaning of Section 2 of the Act regarding the specific transaction.

193. Additionally, the Authority took cognizance of the fact that the proposed transaction involved the acquisition of 100% of TKL (which was akin to "nationalization") by the Government primarily to safeguard the public interest.

194. Further, the Authority advised that should the Government decide to cede its shareholding in any entity, in this case, TKL, to a private entity resulting in a change of control, either directly/indirectly and/or resulting in joint control,

the transaction should be notifiable to the Authority pursuant to the provisions of Section 41 of the Act.

195. The Authority's mandate did not include the determination of the fair market value of an interest in a business by any parties to a merger transaction process.

3.9 SUBMISSION BY AMB. UKUR YATANI, FORMER CABINET SECRETARY NATIONAL TREASURY AND ECONOMIC PLANNING

196. Amb. Ukur Yatani who is the former Cabinet Secretary of National Treasury and Economic Planning was the CS who approved the withdrawal of KShs. 6.019 billion to facilitate the exit of JHL from TKL. The Committee called him to give evidence to enable it to determine whether the decision to fully acquire Telkom Kenya by the Government of Kenya was lawful and the circumstances under which the KShs. 6.091 billion was disbursed. Amb. Ukur Yatani appeared before the Joint Committee on 22nd March 2022 and submitted a written response as follows:

197. TKL operates as a critical national cable that provides critical government services to the Office of the President, Statehouse, Ministry of Defense, ICT Authority, Ministry of Interior and Mombasa landing station. It also hosts several government telecommunication networks; IFMIS, DoD, e-citizen and NIS-restricted communication channels. These cyber systems and assets that are vital and incapacitation would have a devastating impact.

198. Telkom split from the Post Office and Telecommunication Authority (POSTA) and in 2005 70% of the shareholding was acquired by Orange SA. However, it failed to break even due to stiff competition from other network providers like Safaricom. As a result, Orange SA offloaded its shareholding to Helios Investment Partners (HIP) through JHL.

199. Due to several reasons, TKL continued to make losses prompting JHL to look for a partner. TKL settled on Airtel Kenya in a joint venture that would involve combining their networks. The venture was approved by JHL and Airtel Kenya partners, however, the Government of Kenya did not approve the merger due to National security concerns.

200. The National Security Council (NSC) advised the government to fully acquire Telkom. The government of Kenya acquired the remaining 60% of shares owned by Helios for a nominal USD 1 and compensated the loan principal amount of

$48milion which had accumulated to USD 51 million they had invested. The former Cabinet Secretary approved the amount for the exit of JHL.

201. The transaction was lawful as it was done in accordance with Article 223 of the Constitution. The former CS further alluded that the funds were not budgeted for because the Budget Cycle was completed earlier before June owing that it was an election period. He further indicated that the transaction complied with the PFM Act Section 17(4).

202. Pursuant to the Cabinet Secretary to the Treasury (incorporation) Act-Cap 101 the CS of Treasury oversees the ownership of government shares including shares in public and private companies whereby the CS of the National Treasury could transact business on behalf of the government.

203. TKL was owned by two shareholders; the GOK (40%) and JHL (60%) and being the Cabinet Secretary, the shares were in his name and he had the powers to own and dispose of them on behalf of the government.

204. Given the impact on the investments on the exit of JHL (Helios), the CS the National Treasury made a classified communication on 27th August 2021 advising the Executive Office of the President on the decision by JHL and sought concurrence to proceed with the proposed exit from TKL. He further claimed that JHL had threatened to move to court on the matter and therefore in a letter Ref; ZZ/331/02 dated 30th September 2021 he requested JHL to be patient while the government was consulting.

205. On 28th March, 2022 he received concurrence from the Executive Office of the President (under classified cover) to proceed with the process of exiting JHL.

206. He conveyed the GOK's decision to JHL accepting the proposal to exit TKL on 29th March 2022 and requested JHL to submit a proposal on the terms and conditions of the put option to facilitate further discussion.

207. The former CS further said that he sought approvals from relevant regulators including the Communication and Competition authorities of Kenya and the Attorney General to proceed with the exit of JHL and GOK to own 100% of Telkom Kenya.

208. As the shareholder, he signed the following documents as a part of the exit of JHL.

    i. Share Transfer form duly executed by JHL and CS/National Treasury

ii. Deed of Variation dated 29th July 2022 relating to the Share Purchase Agreement dated 31st May 2022 in respect of the sale & purchase of shares and shareholder loans.
iii. Share Purchase Agreement dated 31st May 2022 in relation to the sale and purchase of shares and shareholder loan at TKL.
iv. Deed of Novation in respect of the loan agreement relating to JHL-OREA shareholder loan dated 20th June 2016 (USD 239,938,692).
v. Deed of Novation relating to the additional JHL shareholder loans and interests (USD 51,186,057).
vi. Deed of Termination in respect of the Deed of Amendment and Restatement of Shareholder Agreement dated 10th June 2016 and additional Shareholders agreement dated 20th June 2016.
vii. Escrow Agreement in relation to the sale and purchase of shares and shareholders loans in TKL.

209. The former CS notes that he wrote to the Chairman TKL requesting him to convene a Board of Directors meeting to pass the necessary resolutions to facilitate the transfer of shares at the Company Registry (CR12) and the Novation of loans from JHL to GOK.

210. Under Article 223 of the Constitution and as the Cabinet Secretary of the National Treasury, he confirmed that he approved to pay KSH6.091 billion to JHL to facilitate their exit and forwarded the necessary documents to the National Assembly.

211. The former CS Treasury alluded that acquiring the 60% stake in TKL was a Strategic decision and not a commercial decision since the business was key and reflected the interest of the government to own and operate a national security commercial service. He further claimed that the Executive Office of the President via a letter Ref: CAB/GEN.3/1/1/VOL.XVIII/15 dated 9th May 2022 (See Annex TI 27) communicated the approval of the Cabinet. He further confirmed that TKL is fully owned by the GOK and National Treasury is in possession of the ownership documents.

3.10 SUBMISSION BY ENG. STANLEY KAMAU FORMER DIRECTOR OF GENERAL PUBLIC INVESTMENT AND PORTFOLIO MANAGEMENT NATIONAL TREASURY

212. Eng. Stanley Kamau is the immediate Director General in Public Investment and Portfolio Management at the National Treasury. This is a department in the National Treasury that invests in public and private corporations. The 100% Buyback of the TKL from JHL occurred when Eng Kamau was in office.

Therefore, the Committee resolved to invite him as a person of interest to give evidence to enable it to determine whether the decision to fully acquire Telkom Kenya by the Government of Kenya was lawful, the circumstance under which the Ksh6.091 billion was disbursed and his role in the transaction.

First Appearance on 23rd March 2022

213. He appeared before the Joint Committee on 23rd March 2022 and submitted a written response as follows:

214. Eng Kamau noted that, as the Director General, Public Investment and Portfolio Management (DG/PIPM) at the National Treasury, his role was mainly to advise the Accounting Officer (Principal Secretary) and the Cabinet Secretary/National Treasury on the ownership function of the National Treasury in respect of Government investments.

215. The GOK considered the options available through the National Security Council (NSC) and made a strategic decision based on the nature of assets owned by TKL. As the DG/PIPM National Treasury, he was directed to implement the decision of NSC and to provide the necessary budget to facilitate the exit of JHL from TKL. The Telkom buyback was a strategic decision and not a commercial decision, hence the reason why he was not consulted.

216. In respect to his role in the transaction, Eng Kamau pointed out that, given the impact on the investments on the exit of JHL (Helios), he as the DG/PIPM assisted the former Cabinet Secretary, the National Treasury in preparing a brief on 27th August 2021 advising the Executive Office of the President on the decision by JHL and sought concurrence to proceed with the proposed exit of Telkom. Additionally, he advised the former Cabinet Secretary, the National Treasury to implore JHL to be patient while the government was consulting on the matter.

217. Similarly, he claimed that he assisted the former Cabinet Secretary, the National Treasury in seeking approvals from relevant regulators including the Communication Authority of Kenya (CAK), Competition Authorities of Kenya (CA) and the Attorney General to proceed with the exit of JHL and ensure 100% Buyback of TKL by GOK.

218. Eng Kamau indicates that he reviewed the following documents related to the Exit of JHL from TKL;

    i. Share Transfer form duly executed by Jamhuri Holdings and CS/National Treasury

ii. Deed of Variation dated 29th July 2022 relating to the Share Purchase Agreement dated 31st May 2022 in respect of the sale & purchase of shares and shareholder loans.
iii. Share Purchase Agreement dated 31st May 2022 in relation to the sale and purchase of shares and shareholder loan at TKL.
iv. Deed of Novation in respect of the loan agreement relating to JHL-OREA shareholder loan dated 20th June 2016 (USD 239,938,692).
v. Deed of Novation relating to the additional JHL shareholder loans and interests (USD 51,186,057).
vi. Deed of Termination in respect of the Deed of Amendment and Restatement of Shareholder Agreement dated 10th June 2016 and additional Shareholders agreement dated 20th June 2016.
vii. Escrow Agreement in relation to the sale and purchase of shares and shareholders loans in TKL.

219. He further alluded to the fact that he assisted the former Cabinet Secretary, the National Treasury on 19th August 2022 in writing a letter to the Chairman TKL requesting him to convene a Board of Directors meeting to pass the necessary resolutions to facilitate the transfer of shares at the Company Registry (CR12) and Novation of loans from JHL to GOK.

Second Appearance on 20th April 2023

220. Eng. Stanley Kamau former Director General of Public Investment and Portfolio Management in the National Treasury appeared again before the Joint Committee on 20th April 2023 and submitted further as follows:

On his role in the negotiation of the 100% buyback of TKL from JHL

221. Eng Kamau insisted that, he did not participate in the negotiations for the buyback of the 72 million shares, however, he informed the Joint Committee that, he assisted the former Cabinet Secretary, the National Treasury to implement the decision of the National Security Council.

On his role in the signing of the letter dated 25th July 2022 addressed to the Principal Secretary Mr. Julius Muia that changed the mode of payment settlement from Treasury Bond to Normal exchequer.

222. He also mentioned that on August 19, 2022, he assisted the former Cabinet Secretary, the National Treasury, in writing a letter to the Chairman TKL requesting that a Board of Directors meeting be convened to pass the necessary resolutions to facilitate the transfer of shares at the Company Registry (CR12) and the Novation of loans from JHL to GOK.

The change to the mode of settling the payment (bonds to exchequer) was not communicated to the Cabinet.

223. Eng Kamau indicated that, consultations were done and according to the PFM Act Section 53, the use of bonds can be a means of raising funds not making payments. He further insisted that, the issuance of the bonds ought to be budgeted for. According to Eng Kamau, the shift from the issuance of bonds and to a normal exchequer issue was an administrative function that did not require Cabinet approval.

The initiator of the buyback of TKL

224. The National Treasury initiated the process, the process was started by JHL when it wrote a letter to the Cabinet Secretary who forwarded the same to the Cabinet for deliberations. JHL had the option of looking for an investor or exercising the PUT OPTION.

Advice he gave as the DG, Public Investment and Portfolio Management

225. The buyback of Telkom was not a commercial decision, but a strategic decision hence did not require his input since the reason for the acquisition was National security concerns and the National Security Council did not consult him.

Use of Article 223 of the Constitution and whether there was an urgency in the transaction

226. Eng Kamau stated that if there is an emergency, the government may utilize Article 223 to make payments, and the TKL transaction was not the only transaction settled through Article 223 regardless of the amount.

3.11 SUBMISSION BY FCPA BERNARD NDUNG'U MBS, DIRECTOR GENERAL ACCOUNTING SERVICES AND QUALITY ASSURANCE NATIONAL TREASURY

227. FCPA Bernard Ndung'u, MBS serves as a Director General Accounting Services and Quality Assurance at National Treasury. His office is charged with the role of issuing exchequer and transfer payments to MDAs among other roles. As the DG Accounting Services, FCPA Ndungu approved and facilitated the issuance of exchequer and payment to JHL. Therefore, the Joint Committee resolved to invite him as a person of interest to give evidence to enable the Joint Committee to decide whether the decision to fully acquire Telkom Kenya by the Government of Kenya was lawful and the circumstance under which the KSH6.091 Billion was disbursed.

228. FCPA Bernard Ndung'u, MBS appeared before the Joint Committees on 23rd March 2023 and Submitted as follows:

229. According to FCPA Ndungu, the substance of the transaction was best addressed by the Directorate of Public Investments and Portfolio Management (PIPM) which oversees evaluating public investments and making appropriate recommendations.

230. The budget was approved under Article 223 of the Constitution. The request was made by the Principal Secretary of the National Treasury as the Accounting Officer and approved by the Cabinet Secretary of National Treasury and Planning. This was a normal procedure applicable to other budget requests under Article 223 of the Constitution.

231. For items approved under Article 223 of the Constitution, the Directorate of Accounting Services and Quality Assurance was involved upon approval by the Cabinet Secretary National Treasury.

232. An Exchequer was submitted by the Head of Accounting unit/ National Treasury and forwarded to the Controller of Budget (CoB) who approved the request in accordance with Section 17(4) and (5) of the PFM Act 2012. Upon approval by the OCOB, the Head of the Accounting Unit/National Treasury released funds from Vote 1071 to the beneficiaries.

233. There was a Cabinet and the National Security Council approval of the buyback of TKL.

3.12 SUBMISSION BY PROF. NJUGUNA NDUNG'U CBS, CABINET SECRETARY NATIONAL TREASURY AND PLANNING

234. Prof. Njuguna Ndung'u CBS currently serves as the Cabinet Secretary National Treasury. As the current Cabinet Secretary, the Joint Committee invited him to give evidence to enable it to determine whether the decision to fully acquire Telkom Kenya by the Government of Kenya was lawful and the circumstances under which the KShs. 6.019 billion was disbursed.

235. Prof Njuguna Ndung'u CBS, in a written submission to the Joint Committee on 23rd March 2022 and submitted as follows:

On his role in the National Treasury in the buyback of Telkom Kenya ownership from Jamhuri Holding

236. He stated that he did not play any role in the buyback of Telkom ownership from Jamhuri Holding Limited (JHL) as he was appointed to the docket after the

payment was completed. However, the only aspect pending in the transaction was the TKL Board's approval for the transfer of the shares from JHL to TKL

On whether the withdrawal was lawful and whether it was done in the best interest of Kenyans

237. The withdrawal of 6.091 billion was to offset the capital injected by HIP/JHL who had notified the National Treasury of their intention to exit Telkom Kenya

238. Helios Investment Partners (HIP)/JHL notified GOK on 15th July 2021 (See Annex TI 28) of their decision to exit Telkom by exercising their PUT-OPTION which is their right to sell their stake in the company to GOK, as provided for in the Shareholder Agreements-citing frustrations, namely:

    i. Failure of GOK authorities to institute regulatory interventions necessary to remedy the structural imbalances in the telecommunications business environment that continue to make the sector less competitive, much to the disadvantage of the (rest of) the operators and consumers;

    ii. The decision of GOK not to approve the joint venture (JV) between Telkom and Airtel Kenya that would have involved the combination of the two companies with benefits that would have included reduced requirements for further injection of capital by the two shareholders; and,

    iii. The decision by Go's Ministry of Sports, Culture & Heritage to occupy and proceed to construct sporting facilities on the property LR. No. 7656 is situated along Ngong Road, of which Telkom is the legally registered owner.

On how Helios Investment Partners (HIP) became a majority shareholder in TKL and what was the value of the initial (60% controlling)

239. In June 2016, Helios Investment Partners (HIP) a London-based private equity firm focused on Africa acquired 70% of the shares in Telkom from OrEA through a special purpose vehicle named Jamhuri Holdings Limited (JHL). It was at this juncture that GOK increased its shareholding in TKL from 30% to 40%, for a nominal consideration.

240. As part of the transaction, JHL bought the Orange portion of shareholder loans at the time amounting to Euros 291,973,288.80 and transferred 40% of it (i.e.

Euros 116,789,315) to GOK for a nominal consideration and surrender of 10% shareholding to GOK.

241. Since the acquisition in 2016, JHL has advanced the company a total amount of USD 48 Million as additional shareholder's loans, bringing the total principal amounts of shareholder loans from Helios/Jamhuri to Telkom to Euros 175,183,973 and USD 48 Million.

On whether JHL notified the National Treasury of its planned exit from TKL and when the request was received by the Board of TKL.

242. HIP/JHL notified the National Treasury of its intention to exit vide a letter dated 15th July, 2021 **(See Annex TI 28)**.

On whether the Board of TKL considered and ratified the transaction for the transfer of ownership of TKL to GOK.

243. Prof Ndungu averred that the Joint Committee should request the TKL Board to submit to the Joint Committee minutes of their discussion on the 100% Buyback.

Cabinet approval for the 100% Buyback of TKL

244. Upon notice by Helios Investment Partners (HIP)/JHL to exit TKL, the former Cabinet Secretary/National Treasury and Planning briefed H.E. the President formally on 27th August 2021 and feedback obtained on 28th March 2022 to proceed with discussions with JHL on the PUT-OPTION in view of the Government's security communications services and assets under TKL.

245. The exit terms by JHL were approved by the National Security Council on 1st April 2022 and the Cabinet in May 2022 (communication from the Cabinet Office dated 9th May. 2022) (See Annex TI 29).

246. All the necessary documents including the Share Purchase Agreement, Novation of Loan Agreements and Share Transfer Forms were concluded with an amount of USD 51,186,058 paid to JHL.

The Particulars entity(s) paid the Ksh 6.091 billion for the exit of JHL and dates of remittance.

247. Prof Ndungu indicated that the entity paid was as follows :

Name:	Jamhuri Holding Limited
Account No:	MU451VES160100019528750000USD
Date of Payment:	10th August 2022

On whether the exit of Jamhuri Holding Limited (JHL) occasioned any transfer of liabilities to the Government of Kenya, if yes what were liabilities and what was its value?

248. Helios Investment Partners (HIP)/JHL agreed to exit under the following terms:

i. GOK acquires the Helios 60% shareholding in Telkom for a nominal USD 1;

ii. GOK to take over and reimburse the shareholder loan injected by Helios amounting to USD. 51 million (Principal USD 48 million and accrued interest USD 3 million;

iii. Helios/Jamhuri to forego the acquired shareholder loan which Helios took over from Orange Telkom that amounted to USD 239 million (Principal USD 199M and accrued interest of USD 40 million); and,

iv. Once Helios/Jamhuri exits Telkom Kenya, GOK will own it 100%.

3.13 SUBMISSION BY PAUL CUNNINGHAM, DIRECTOR JAMHURI HOLDINGS LIMITED

249. Paul Cunningham serves as a Director of Jamhuri Holdings Limited and has been acting on behalf of Jamhuri Holdings Limited in the transaction. The Committee invited him as a person of interest to deliberate on how the acquisition of Telkom Kenya Limited by the Government of Kenya was done. Paul Cunningham appeared before the Joint Committees on 4th April 2023 and submitted as follows:

On the status of registration, Helios Investment Partners (HIP) and Jamhuri Holdings Limited (JHL) a company registered/incorporated in Kenya.

250. Helios Investment Partners Kenya is a registered company in Kenya while Jamhuri Holdings Limited (JHL) is not registered in Kenya.

251. Helios Investment Partners was the largest African-focused private equity firm and was headquartered out of London, UK and regulated by the UK Financial Conduct Authority (FCA). By the time of submission, funds advised by Helios had invested in over 30 companies across 25 countries in Africa creating over 10,000 jobs.

252. JHL which was wholly owned by Helios Investment Partners (HIP) was a limited liability company incorporated in Mauritius and with registration number 134048C2/GBL. Its official address was Level 3 Alexander House, 35 Cybercity, Ebene, Mauritius.

253. The incorporation of Helios in the United Kingdom, and JHL in Mauritius was fully in line with Kenyan laws. This was also reflective of a standard structure commonly adopted by many other local and international investors in Kenya and across the world, particularly those that invest in multiple jurisdictions such as Helios, which invests in multiple African jurisdictions.

254. In the case of Helio's investment in TKL, JHL was set up as a Special Purpose Vehicle, whose sole purpose was to hold the firm's investment in Telkom Kenya and his role as a director was to ensure primarily the protection of its investors.

255. Within Helios Investment Partners (HIP) was a team of over 40 investment professionals, who were the ones that Source investment opportunities. They were responsible for any day-to-day interaction with that investment and equally would determine when the time was appropriate for the investor to celebrate the investment, which funds typically have 10 to 12 years of life. So when an investment was made, it was always the expectation that at some point they would be looking to exit.

256. In case of any issues pertaining to the investment, it gets presented to the Helios Investment Partners Investment Committee for approval. The same process should be followed from exiting the investment fund for any new material decisions.

257. In the case of exit, as a Director of JHL, he was not involved in any negotiations of the transaction either on the way in or on the way out, furthermore, he was not involved in any of the day-to-day management of the investments in Kenya though he ensured the document was presented and signed.

On acquisition of majority shareholding in TKL by Helios Investment Partners (HIP)/JHL.

258. JHL was the legal entity used by Helios in the TKL transaction and became a shareholder in TKL in June 2016 following a buyout of France Telkoms (Orange) Investment in TKL. Orange's decision to exit business was precipitated by the significant challenges the business and its holders were facing, some of which had led to the dilution of the shareholding of the Government of Kenya (GOK) in TKL from 49% at the time of investment by the orange down to 30% at the time of Orange exit.

259. Helios, through its wholly owned subsidiary JHL, took up the challenge of turning around TKL based on its abilities and encouragement by the GOK with a clear understanding that certain policy and regulatory interventions would be forthcoming to remedy the market's competitiveness and other structural (including potential market consolidation), Legal and regulatory Legal at

regulatory challenges prevalent in Kenya's telecoms sector. The commitment was affirmed by JHL having the option to exit its investment to GOK in certain circumstances the PUT OPTION

On what JHL acquired from Orange and transfer of shares and loans to GOK.

260. In June 2016, JHL acquired from Orange its 70% shareholding stake in TKL and shareholder loans that had been extended from Orange to Telkom Kenya amounting to USD 332,832,907. The transaction was between two private parties and did not involve the sale of any assets, rights or obligations or payments by GOK.

261. As an act of goodwill at the time of its entry into TKL, JHL ceded to GOK 10% of the shares and USD 133,133,163 of shareholder loans in TKL that it had acquired from Orange at no consideration or payment by GOK. Consequently, GOK's shareholding in TKL increased from 30% to 40% and GOK also acquired USD 199,699,744 of Shareholder loans in TKL.

On additional investments by JHL in TKL.

262. Since becoming a shareholder, JHL injected an additional sum of USD 47,720,000 of shareholder loans into TKL. The accrued interest on the loan up to 31st December 2020 when JHL decided to freeze any interest accruing amounted to USD 3,466,057. Hence the total amount of principal and accrued interest in July, 2022 was USD 51,186,000,057.

On valuation of TKL Shares at initial acquisition by JHL and the 100% Buyback by GOK.

263. No valuation of shares in TKL was conducted as the shares were acquired at a nominal value of USD 1 and transferred to GOK at USD 1, therefore, JHL did not offload its shareholding in TKL to GOK at any premium.

On whether JHL notified the National Treasury of its planned exit from TKL and when the request was received by the Board of TKL.

264. JHL informed GOK of its decision to exit TKL in July 2021 by exercising its PUT OPTION. The exit was prompted by the failure to attain shareholder alignment on the company's strategic direction, GOK's disapproval (as a shareholder) of a merger transaction with Airtel Kenya occasioning material loss of value to TKL and its shareholders and arbitrary expropriation of the company's prime assets. There was no legal requirement for JHL to inform the Board of TKL of JHL's

intention to exit from TKL before communicating the same to the National Treasury.

On transfer of Assets and Liabilities in 100% Buyback of TKL by GOK

265. The transaction did not involve a transfer of any physical assets and liabilities. However, it involved the transfer of Shares and Shareholder's loans

266. The purchase of shares was effected through a share purchase agreement dated 31st May 2022 as amended (the 2022 SPA). The transaction comprised the following;

    i. GOK acquiring 60% of TKL's shareholding from JHL at the consideration of USD 1

    ii. GOK, acquiring USD 239,938,692 of JHL shareholder loan acquired from Orange (Principal plus accrued interest to 31st December 2020) at a consideration of USD 1.

    iii. GOK acquired the additional JHL shareholder loan of USD 51,186,057 (principal plus accrued interest to 31st December 2020) at a consideration of USD 51,186,057.

267. The transaction between JHL and GOK was completed on 12th August 2022 following receipt of USD 51,186,057 by JHL from GOK and delivery of the fully signed transfer documents including fully signed share transfers from JHL to GOK.

268. Therefore, in summary, JHL obtained no more than the money it had invested directly into the business since it became a shareholder and GOK received all of JHL's shareholding and all the indebtedness owed by TKL to JHL.

Cabinet Approval for the 100% Buyback of TKL

269. All approvals required under Kenyan law were obtained in connection with the exit transaction. In particular, approvals were obtained from the following regulators in connection with the 2015 transaction, as required by law.

    i. The Communications Authority of Kenya (CA)

    ii. The Competition authority of Kenya (CAK)

    iii. The COMESA Competition Commission (CCC)

270. TKL was not listed on the Nairobi Stock Exchange, therefore no approval was required from the Capital Markets Authority, (CMA) as the CMA was mandated to regulate listed entities. JHL also sought and obtained confirmation of Cabinet

approval of JHL's exit from the former Cabinet Secretary National Treasury in furtherance of recording full transparency of the exit.

On whether JHL remitted their statutory fees taxes to the Kenya Revenue Authority for the acquisition and exit from TKL

271. There were no taxes payable under the law by JHL in connection with the exit transaction because;

    i. With respect to capital gains tax, JHL did not make any gain in connection with the exit transactions and therefore there were no capital gain taxes payable by JHL in connection with the exit. In particular;

    ii. JHL sold all its shares in TKL (i.e. 60% of TKL's shareholding) to GOK at a nominal consideration of USD 1 and therefore made no gain on the sale.

    iii. JHL transferred USD 239,938,692 of JHL's shareholder loan acquired from Orange (Principal plus accrued interest to 31st December 2020) at the nominal consideration of USD 1 and therefore made no gain on the transfer.

    iv. JHL transferred the additional shareholder loan advanced by JHL of USD 51,186,057 (principal plus accrued interest as at December 2020) at face value (i.e. at USD 51,186,057) and therefore JHL did not make again on the transfer

272. With respect to stamp duties, under Kenyan laws, stamp duties in connection with a transaction were payable by the buyer (in this case the GOK). GOK was however entitled to stamp duty exemption for such transfers.

On the process undertaken by JHL in the exercise of the PUT-OPTION in its exit from TKL.

273. JHL informed GOK in writing in July 2021 which was responded to on 29th March 2022 informing JHL of its decision to acquire JHL's stake. Following the above, a share purchase agreement dated 31st May 2022 as varied by subsequent deeds of variation (the 2022 SPA) together with the ancillary documents required to effect the transactions were entered into transaction Documents required.

274. The transaction between JHL and GOK was completed on 12th December 2022 and JHL delivered to GOK the original duly signed transfer documents reflecting the transfer of shares and shareholder loans under consideration.

The challenges encountered in efforts to turn around TKL

275. Despite significant efforts and progress made in turning around the business, achieved in collaboration with TKL's Board, Management and staff and supported by JHL investment, TKL did not attain a viable operating status and continued to incur losses. The policy and regulatory interventions envisaged remained largely unimplemented notwithstanding the publication in February 2018 of the recommendations of analysis conducted by Mason who had been commissioned to undertake a market study.

276. Consequently, the company engaged McKinsey & Co. (McKinsey), a leading firm of global Strategy Consultants to advise on viable strategic options for TKL to operate as a profitable entity as well as potential upsides and risks of a merger or joint venture with Airtel Kenya. Mckinsey's report highlighted amongst other matters that while Kenya presented a sizable and attractive telecommunication market, the scope for a viable operation by TKL was limited by the market structure and regulatory environment, which impeded competitiveness.

277. A combination of TKL and Airtel could present the key to establishing profitable exposure to an attractive and growing telecommunications market. The options for TKL were therefore limited to pursuing a merger or joint venture with Airtel or considering a shut-down of their mobile or overall business to stem the losses. Considering the consequences of a shutdown of TKL, TKL resolved to pursue the joint venture/merger transaction with Airtel Kenya.

278. The merger would, unless the strength of Airtel and TKL creates meaningful competition, reduce the requirement for a further injection of capital by GOK and JHL as shareholders of TKL and create value for all the stakeholders (including employees, suppliers, agents, customers, shareholders and creditors). Significant resources were consequently applied by the company and JHL culminating in a successful agreement to merge part of TKL's businesses with Airtel Kenya in 2019. Notably, GOK's representatives to the Board of TKL approved the proposed merger transaction.

279. Unfortunately, there were considerable delays in obtaining regulatory approvals for the merger transactions, in part attributable to protracted investigations launched by the EACC on TKL and its officials on various matters, which were all ultimately dropped with no adverse findings. Ultimately, the merger failed to proceed because GOK (in its capacity as a shareholder) declined to grant its approval for the transaction, occasioning lost value exceeding USD 200 million to TKL and its shareholders GOK and JHL, without providing any rational explanation to TKL or JHL.

280. Further to the frustration arising from the failure to consummate the merger transaction, the GOK proceeded to unlawfully appropriate a prime property of

TKL situated along Ngong Road, Nairobi, measuring approximately 79 acres and valued at over Ksh.10 billion, without TKL's consent and without any compensation being committed or paid to TKL for the property contrary to the requirements under Kenya's Constitution. There were also further attempts by GOK to strip TKL of other assets of strategic importance in gross violations of TKL and JHL rights. JHL consistently, but unsuccessfully sought to engage with the GOK on multiple occasions to address the matters to no avail.

On the evidence of monies paid out from proceeds of USD 51 million received by JHL.

281. He submitted that out of the USD 51 million JHL received as consideration for the exit from TKL. The monies were paid out for the following:

i) Management of Telkom Kenya Limited
ii) Escrow agent services
iii) Legal services and
iv) Transaction advisor

Date	Amount in USD	Payee	Details
11/08/2022	51,186,058.00		Gross proceeds received by Jamhuri Holdings Limited
Payment to the Helios Investment Partners (HIP) Fund			
19/09/2022	41,786,058.00	Helios Investment Partners III Subco I Ltd	This payment to the Helios Fund was subsequently distributed to its International institutional investors, including Global multi-lateral Finance organizations and leading Sovereign Wealth funds.
Payment to Legal and Transaction Advisors			
07/11/2022	422,991.46	ALN Kenya Anjarwalla & Khanna	This was a payment on account of legal fees for work done and fees to act as an escrow agent.

18/11/2022	1,000,000.00	Investment Bank	This was a payment of fees to an International Investment Bank, as transaction Advisor on JHL's exit from TKL, pursuant to agreed terms and conditions. This process commenced in early 2022. The name of the Bank entity could not be disclosed.
25/11/2022	3,071,163.00	John Ngumi	This was payment to Mr. John Ngumi for acting as an Advisor to JHL in connection with a sale of JHL's interests in TKL, pursuant to agreed terms and conditions.
c). payment to various employees and officers of Telkom Kenya			
18 - 25/11/2022	1,320,996.00	Various employees and officers of Telkom Kenya	The sum of payments made pursuant to a **Management Incentive scheme.**
20/11/2022	2,661,675.00	Adili Trustees Limited as trustees for the TKL Management Incentive Plan	This was a payment received for and on behalf of the TKL Management Incentive Plan, on account of which Adili Trustees Limited held redeemable (non-voting) shares in TKL. The plan was entered into and approved by the Board of TKL in 2018. These funds were subsequently paid out to the current and former staff of TKL who had vested rights in the Management Incentive Plan.
Total payments made	**50,262,883.46**		**This is the sum of all payments made**

31/12/2022	1,003,847.98		Balance held in the Bank as of 31st December 2022 (includes interest earned on the account) **(USD 80,862)**

282. On the correspondence on the PUT OPTION negotiations of the 60% shareholding price, reimbursement of the USD 51 million loan and copy of the share purchase agreement between the Government of Kenya and Jamhuri Holdings entered at the entry in 2016 and exit in 2022. the following documents were availed:

    i. A copy of the Put Option notice sent to GOK by JHL dated 15th July 2021 was availed **(See Annex TI 28)**

    ii. A copy of GOK's acceptance of the Put Option dated 29th March 2022 was available to the Committee **(See Annex TI 30)**

    iii. A copy of the share purchase agreement (SPA) between JHL and GOK dated 31st May 2022 in relation to the sale and purchase of shares and shareholder loans in TKL. **(See Annex 31)**

    iv. A copy of the deed of variation to the SPA dated 29th July 2022 **(See Annex 32)**

    v. A copy of the duly signed share purchase agreement dated 31st May 2022 with the longstop date of 29th July 2022 **(See Annex 31)**

On the nexus between Anjarwalla & Khanna (A&K) and Helios Investment Partners (HIP/Jamhuri Holdings Ltd (JHL).

283. Anjarwalla and Khanna LLP (A&K) started representing JHL in 2015 when JHL was formed and JHL was considering an investment in TKL. However, before that, Anjarwalla and Khanna LLP (A&K) had represented Helios in various other transactions.

3.14 SUBMISSION BY MR. JOE MUCHERU, FORMER CABINET SECRETARY IN THE MINISTRY OF ICT, INNOVATION AND YOUTH AFFAIRS

284. Mr. Joe Mucheru served as the Cabinet Secretary in the Ministry of ICT, Innovation and Youth Affairs in the immediate former administration between October 2013 to October 2022. TKL and the telecommunication sector fell within the mandate of the Cabinet Secretary. Therefore, the Joint Committee resolved to invite the former CS as a person of interest to give evidence on his role and the role played by the Ministry in the 100% buyback of TKL by the GOK.

Mr. Joe Mucheru appeared before the Joint Committee on 4th April 2023 and submitted as follows:

Acquisition of majority shareholding of TKL by Helios Investment Partners (HIP)/JHL

285. Mr Mucheru informed the Joint Committee that following his exit from the Cabinet he no longer had access to the required documents to provide the Joint Committee with accurate information. However, he said that the Investment Secretary at the National Treasury and the Office of the Attorney General were in a better position to provide relevant documents to address the matter for their role as the custodians of the actual records.

What prompted the GOK to buy back 100% shareholding from Jamhuri Holdings Ltd (JHL) / Helios Investment Partners (HIP) and the buyback terms

286. The former Cabinet Secretary pointed out that although he could not provide an authoritative response owing to his inability to access the relevant records, he was aware of the discussions surrounding a merger of the Airtel mobile business and TKL. JHL was willing to give up some shareholding to give the government a more strategic position (49%) in the merged entity as it was also going to participate in the Airtel Africa IPO/listing in London. Since the Ministry of ICT, Innovation, and Youth Affairs was only given an advisory role, he was unaware of any share transfers or other transactions that may have taken place after the National Security Advisory Committee (NSAC) rejected the merger plan.

Role of the Ministry and the former Cabinet Secretary for the Ministry of ICT, Innovation and Youth Affairs in the acquisition of TKL by Helios Investment Partners (HIP) in 2016.

287. Mr. Mucheru submitted that no part of the acquisition procedure involved him. It was agreed that JHL was purchasing shares from the Orange Company, which was leaving the Kenyan market, and that this was a shareholders' transaction for which the National Treasury/Investment Secretary was accountable on behalf of the Kenyan government.

288. The Ministry's role involved working with the Communications Authority of Kenya to provide regulatory approval. The Competition Authority's approval was also given in this instance. The newly formed Ministry of Information, Communication, and Digital Economy was in a better position to respond to the issues because they had access to the supporting documentation.

289. The former CS stated that he did not recall negotiating for the 10% shareholding with JHL since it was a National Treasury/Investment Secretary function. Any involvement was only at the advisory level to the government of Kenya. The documentation shows those involved in the execution of the transaction. He

further informed the Joint Committee that the Office of the Attorney General was in a better position to provide the actual status.

290. In relation to the role of the former CS in the 100% buyback of TKL, Mr. Mucheru said his role would have been only in the advisory capacity since he did not have the authority or responsibility in the share buyback. The Ministry of ICT, Innovation and Youth Affairs provided the regulatory approval of the transaction through the Communications Authority of Kenya, which gave conditional approval to the National Treasury upon their request.

291. With respect to any strategic reasons that justified the government's 100% buyback of TKL, the former Cabinet Secretary averred that the world was digitally driven, and communication infrastructure is a strategic national asset, especially for the security and sovereignty of a country. TKL is a valuable and important asset for Kenya, especially the strategic assets it holds including the national fiber backbone, spectrum for mobile and data communications, the shares in the TEAMS undersea fiber cable, the fiber landing station in Mombasa, ownership of the broad national right of way, amongst others. In addition to the above, Telkom Kenya provides critical government communications services to the Office of the President (OP), State House, and Government Data Centre (GDC). In view of the above, he advised the Joint Committee and all decision-makers that Telkom is too strategic an asset to be held in private hands.

Protection of the strategic assets owned by TKL during the acquisition in 2016 and 100% buyback in 2022.

292. Mr. Mucheru informed the Joint Committee that the Ministry did not have a role in the running of TKL. TKL was not a State Corporation and as such it was being run and managed by the directors and management under the supervision of the shareholders, which included the government representative, and the National Treasury. The Ministry provided a policy and regulatory framework to ensure an enabling environment for a competitive and robust ICT/ telecommunication sector.

293. TKL was a national investment under the Investment Secretary of the National Treasury and not a State Corporation under the Ministry of ICT, Innovation and Youth Affairs. JHL held a 60% ownership of TKL. He informed the Joint Committee that he wrote a letter to the former Head of the Public Service stating the error in Executive Order No 1 of 2017 placing TKL under the State Department of Broadcasting and Telecommunications. The role of the CS was to provide advice to the government and its agencies, create and implement sector policies that directly impacted Telkom Kenya as well as regulatory oversight via the Communications Authority of Kenya,

294. Mr. Mucheru further submitted that he was a member of the Cabinet of the 4th Administration but was not a member of the National Security Council (NSC) or member of the National Security Advisory Committee (NSAC) although he was occasionally invited to attend some of the sessions when matters touching on his Ministry were being discussed.

3.15 SUBMISSION BY MR. JULIUS MUIA, FORMER PERMANENT SECRETARY OF NATIONAL TREASURY AND ECONOMIC PLANNING

295. Mr. Julius Muia previously served as the Permanent Secretary to the National Treasury. As the Principal Secretary, Mr. Muia was the Accounting Officer at the State Department of the National Treasury. Therefore, is the one who requested the approval for withdrawal of KShs. 6.091 billion under Article 223 from the Cabinet Secretary, the National Treasury. Therefore, the Committee resolved to invite him as a person of interest to give evidence of his role in the 100% Buyback of TKL by the GOK. Mr. Julius Muia appeared before the Committee on 5TH April 2023 and submitted as follows:

Whether the withdrawal of Ksh.6.091 billion under Article 223 of the Constitution to facilitate the exit of JHL from TKL was lawful and done in the interest of Kenyans.

296. Mr. Muia submitted that there was full compliance in the withdrawal of funds under Article 223 of the Constitution of Kenya.

297. He received a letter dated 8th April 2022 (**See Annex 33**) from the Executive Office of the President communicating the National Security Council's decision to approve the exit of Helios/ JHL from TKL. Consequently, he marked the letter to the DG Directorate of Public Investments and Portfolio Management which oversees GOK's investments to make appropriate recommendations.

298. The Directorate of Public Investments and Portfolio Management reviewed letters forwarded to them and made recommendations to the Cabinet Secretary National Treasury and Planning to approve the payment of USD 51,186,058 to be paid to JHL under Article 223 of the Constitution and same regularized in the Supplementary budget 2022/23.

299. All steps in the approval of the withdrawal were followed to ensure that the law was adhered to in the approval of the payment.

300. The National Treasury reviews all the directives from the Office of the President and analyses such directives from a financial perspective to determine the amount of funding present. The National Treasury has the competence to check whether the numbers being referred to were reasonable. The National Treasury

agreed to this transaction following the timelines to ensure the transaction was completed within the stipulated time and was done in the interest of Kenyans.

The role played by the Former PS, the National Treasury in the 100% buyback of TKL.

301. He pointed out that there were quite a number of negotiations that went on between the National Treasury and the JHL, he had no idea how these negotiations were happening as this was handled by the former Cabinet Secretary as the shareholder in TKL and the Director General, Public Investment and Portfolio Management department,

302. The Directorate of Public Investment and Portfolio Management is the one that coordinates activities in the state enterprises which are owned by the government or where the government has a majority shareholding.

303. In addition, Mr. Muia indicated that his role was only limited to receiving written approval from the Executive Office of the President, forwarding the same to the Director General Public Investment and Portfolio Management Department and to the Cabinet Secretary National Treasury who approved the transaction. He later ensured the exchequer was availed, sorted approvals from the Controller of Budget and the funds paid to JHL under Article 223 of the Constitution.

304. Initially, the National Treasury relied on approval by the National Security Council dated 8th April 2022. Subsequently, the Cabinet approved the transaction in May 2022.

305. He also pointed out that he communicated to the Chairman of TKL to call a Board meeting and correct the shareholding to reflect the fact that the Government of Kenya owns 100% shareholding.

Whether the 100% buyback of TKL was a prudent decision by GOK

306. He indicated that it was a worthwhile investment. The National Treasury was implementing the directive to acquire 60% shareholding for the government in TKL and the $ 239 million loan was written off. The valuation of the transaction would be way above the Ksh6 billion

In respect to the sudden shift from the use of Treasury Bonds to settle the transaction to the use of normal exchequer.

307. The change was because the issuance of a bond is against the PFM Act 2012 and the Regulation Bureau of 2015 and those two preclude the use of bonds to make payment to a creditor. In the consultations with the public debt management office, they realized that the advisory and the direction from the Executive Office

of the President in terms of paying through a bond was not feasible. They wrote to the Cabinet secretary for him to provide another way of making the payment since the Cabinet Secretary is the holder of government shares in state-owned and state-linked enterprises and he's the one who approves any activity.

Regarding who may have initiated the Transaction and the perceived timing of the payment (Election Period)

308. Mr. Muia stated that, when he joined the National Treasury in 2019, there were consultations on the merger between TKL and Airtel Kenya. In 2021 JHL was informed of the decision by GOK to reject the proposed merger owing to National security concerns. It was on this basis that JHL decided to exit TKL. This therefore points out that, the National Treasury did not initiate the transaction.

309. The letter dated 10th May 2022 **(See Annex 34)** which was addressed to the Cabinet Secretary, the National Treasury and the Attorney General seems to suggest that the transaction was initiated in the Executive Office of the President following a decision of the National Security Council.

3.16 SUBMISSION BY ANJARWALLA & KHANNA

310. Anjarwalla and Khanna (A&K) is a leading law firm in East Africa, with its headquarters in Nairobi, Kenya. The firm provides a wide range of legal services to both local and international clients and has a strong reputation for its expertise and professionalism. Anjarwalla & Khanna appeared before the Committee on 19TH April 2023 and submitted as follows:

The role played by Anjarwalla & Khanna

311. JHL received legal advice on this transaction from Anjarwalla & Khanna. He informed the Joint Committee that the USD 51 million was paid directly to JHL, which is not an escrow account but a bank account like any other bank account that controls in their names, thus he never received or kept any of that money.

312. According to him, the real question was not whether the $51 million was in escrow, but rather whether it had passed through an escrow account before arriving in Mauritius. He asked the Joint Committee to get information from Jamhuri Holdings Limited or the Central Bank, who were both in a position to provide prompt guidance and proof of where the money went. He claimed that the money went from the Exchequer's account to Jamhuri Holding's account in Mauritius and there was swift advice available.

313. The Escrow account in place was for documents, share transfer forms, resignation letters from directors, and statutory declarations. It was never a case of money being held in escrow; instead, they were holding the paperwork to transfer them to the Kenyan government when the time came for completion. They were chosen as the trustees due to their trustworthiness and good reputation hence they were chosen to serve as agents.

314. He had known Mr. Cunningham for eight to ten years. He has met him numerous times, and each meeting has taken place in London, where he resides. He told the Joint Committee that they got together whenever he was in London. He is a familiar face to him who he has worked on numerous occasions, including the current transaction. He further told the Joint Committee that Mr. Cunningham is a well-known executive who has worked for several organizations. Before joining HIP, he was a global multinational leader with a distinguished business career. He claimed that he is not a mysterious character.

315. Anjarwalla & Khanna have been HIP's representatives for about 15 years. Only in 2015 or 2016 was Jamhuri as an entity established particularly for this transaction. Since they are a Kenyan law firm and not based in Mauritius, they were not the law firm that founded Jamhuri. In this instance, the law firm was not involved in the formation of Jamhuri; instead, they utilized independent lawyers or corporate agents.

316. They have extensive experience representing Helios in business deals, including their investment in Equity Bank and their purchase of Vivo Energy Kenya. He cleared their legal firm, stating that it was not involved in the establishment of Jamhuri Holding and that the record demonstrates that they were only recruited to represent rather than establish Jamhuri. They did so both when the investment was made and at the time of this submission. Since Jamhuri Holdings Ltd is a big entity based in Mauritius, they would have, dozens of lawyers that they use. He informed the committee that generally in Mauritius, companies are formed by corporate service providers, not law firms.

317. JHL through Mr. Gunningham may have signed the documents in the United Kingdom. The Joint committee was informed that the share transfer form was signed by Mr. Cunningham wherever he was likewise to the government of Kenya. He told the committee that he wasn't present when any of those documents were physically signed, and neither were any employees of his firm. Wherever they were, both parties signed them, which seemed to him to be common in these transactions.

318. They would employ one of the two methods, i.e., a physical courier like DHL, FedEx, or whoever with the courier, or an email-based execution version. Then,

following proper execution, they were instructed to print and return. He couldn't remember which approach was taken for the current situation. He maintained that it makes no difference what approach was taken as long as everyone signed the same agreement.

319. According to the records that were found during his investigation, HIP owns 100% of JHL and the business is based in Mauritius. This demonstrates that Helios owns 100% of JHL. On October 27, 2015, JHL submitted a registration application. The committee was informed that Jamhuri's resignation has been under consideration for some time. He reminded the committee of the problems with the Airtel merger and the illegal seizure of 79 acres of land on Ngong Road. He told the Joint Committee that Jamhuri and the government had reached a stage where Jamhuri was powerless to restore or sustain Telkom's expansion. Following these, Jamhuri Holding served what is now known as the PUT OPTION notification on July 15, 2021. They agreed on the 31st of May 2022, and the completion date of that agreement was the 29th of July 2022, which was by the deed of variation, extended to the 12th of August 2022.

320. He was aware that the deal would likely be finished after the election and before the outcome, especially once he had signed the deed of variation. The transaction, of which he was aware, was consummated on August 12, 2022. There have been allusions to the NSAC and the Cabinet but the National Treasury was in a better place to explain

321. He informed the Committee that the Government should ask itself questions like why it's difficult for a globally rated telecom player like Orange to make TKL work and why it is difficult for a globally rated private equity fund like Helios to make TKL work. Helios wanted to pull out because there was no way in which they could operate in a meaningful way with the government of Kenya to turn around telecom. He informed the Joint Committee that their company is not affiliated with John Ngumi in any way though they know each other. He informed the Joint Committee that he knows John Ngumi has a banker in Stanbic and previously at Citibank and so on in this case he has delt with him in many transactions. The payments that came back to them were two, one for their legal fees, some $442,000. This was for work done for two years, not just on the sale transaction. Secondly, the advocate's remuneration of Ksh135 million shillings. The other payment that came to them and its affiliate Adili Trustees from JHL was on account of the Management Incentive Plan. The money they received would have been paid out to either the current or former employees of TKL. In this case, the money was paid out in accordance with their obligations under a trust deed that was entered into in 2017 and 2018.

322. He asserted that he had undoubtedly worked for Helios on transactions and other topics unrelated to the current issue, even though he was unable to adjudicate the specifics of her clients. He said to the committee that when the TKL Board was considering potential trustees, they would choose someone they already knew and could trust. For this reason, Adili Trustee was chosen. In this instance, JHL and Adili Trustee had a conversation and reached an agreement on the terms. There is therefore no conflict of interest in any way. He finds this to be fairly typical.

3.17 SUBMISSION BY ADILI TRUSTEES

323. Adili Trustees Limited is the Adili Group entity established to provide security trustee services, nominal services, and other related services to banks, financial institutions, public and private companies. Adili Trustees appeared before the Committee on 19TH April 2023 and submitted as follows:

324. JHL created 5.5 % redeemable shares which was a different class of shares and had a par value of Ksh. 0.05 compared to the Ksh. 20 and the shares had no rights. They are not entitled to votes and dividends and can only be redeemed at exit. Do not participate in meetings, and the shares did not dilute GOK, however, they dilute JHL economically. TKL created these shares as an Incentive Plan for its staff as it was struggling to manage the senior staff.

325. The Incentive Plan had four players involved: Jamhuri Holdings Limited (JHL), TKL, Adili Trustees, and the Participants.

Role played by four entities in the Management Incentive Plan (MIP)

326. JHL's role was setting up the Management Incentive Plan (MIP), determining eligible employees, communicating to the Trustee on the occurrence of an Exit event and transferring funds to the trustee to enable payments to participants of the MIP

327. TKL's role was that of the employer, it approved the set-up of the MIP, redeemed the shares once payments to employees were completed and communicated the award of shares in the MIP to the participants and the Trustee.

328. Adili Trustee's role was to hold shares in a trust, communicate vesting to participants, maintain a register of Participants, make payments to participants on exit event based on the vested shares and had no discretion to determine eligible participants and acted on instructions.

329. The participants were senior management of Telkom who were 16 in total, however with the exit of one individual, the payout was done to 15 individuals.

Fee paid to Adili Trustee for the Management Incentive Plan

330. Adili Trustees were paid an annual fee of Ksh. 250,000 and Ksh. 800,000 which was the winding-up fee.

The Contractual agreement in the MIP, the number of individuals paid and when the payments were made.

331. The contractual agreement started in 2017 and the engagement of participants was in 2018. A total of sixteen (16) individuals were eligible for payments mainly from the senior management staff and not Board members. However, one staff left TKL and was categorized as a bad leaver hence losing the shares.

332. The payout was made to fifteen (15) staff, two (2) of whom are current staff and thirteen (13) left after the exit of JHL. Payments were made between December 2022 and January 2023.

GOK 's involvement in the Management Incentive Plan in TKL.

333. The GOK was not involved in the negotiations. However, it is noted that the Board of TKL had to approve the redeemable shares and the GOK being a shareholder had to approve hence it is expected the GOK was aware.

The nexus relationship between Adili Trustees and Anjarwalla and Khanna (A&K)

334. Adili Trustee is an affiliate of Anjarwalla and Khanna and the owners are the partners. This is quite common in any law firm where the legal services provided by the partnership are bound by the LSK rules, and the advisory services provided by another company.

3.18 SUBMISSIONS BY DR JOSEPH KINYUA, EGH, THE IMMEDIATE FORMER HEAD OF PUBLIC SERVICE AND SECRETARY TO THE CABINET

335. Dr. Joseph Kinyua is the immediate former Head of Public Service and Secretary to the Cabinet. As the Secretary to the Cabinet, Dr. Kinyua sat in Cabinet meetings, communicated Cabinet decisions, sat in the National Security Council (NSC) and supervised all Principal Secretaries and the Public Service as a whole. Therefore, the Joint Committee resolved to invite Dr Kinyua to give evidence on his role in the 100% Buyback of TKL by the GOK. Dr Joseph Kinyua, EGH

appeared before the Joint Committee on 20th April 2023 and submitted as follows:

On acquisition of majority shareholding of TKL by Helios Investment Partners (HIP) and subsequent offloading of 10 % shareholding to GOK.

336. Dr. Kinyua informed the Joint Committee that in 2007, the GOK decided to privatize Telkom Kenya Limited. It sold 51 % of its shares in TKL, to Orange East Africa Limited (OrEA), a subsidiary of France Telkom S.A. (FT). This policy was undertaken to turn around the performance of TKL and put it on a path of profitability.

337. Despite the privatization, TKL continued to perform poorly. It continued to fail to generate sufficient revenue to cover even its operating costs, let alone the repayment amounts of loans extended to it by shareholders. TKL was technically insolvent, thereby leaving the shareholders with one of two options, either to restructure its balance sheet or to voluntarily liquidate themselves.

338. The two shareholders, that is, GOK and Orange East Africa, decided in 2012 to restructure TKL's balance sheet which was carrying debts to the shareholders amounting to Ksh.50 billion comprising Ksh.44 billion owed to Orange East Africa and Ksh.6.9 billion owed to the GOK. As part of this restructuring, Orange East Africa wrote off Ksh.33.5 billion and converted the balance of Ksh.10.5 billion into equity. On its part, GOK converted the entire Ksh.6.9 billion debt into equity.

339. Following the restructuring of Telkom Kenya's balance sheet and with GOK's concurrence to be diluted, given that Orange East Africa had agreed to write off its loans to TKL, the shareholding structure changed to 70% for Orange East Africa and 30% for GOK.

340. Even after structuring the balance sheet, TKL continued to perform poorly. Therefore in 2014 Orange East Africa decided to exit the Kenya telecommunication market through the sale of its shares to another investor, an option which was provided for in the shareholders' agreement.

341. To progress its Exit Plan, Orange EA appointed an International Investment Bank, Lazard, to assist it in developing an appropriate exit strategy and identify a strong successor that will be able to foster TKL's turnaround strategy. The sale process took three years and culminated in Helios Investors III L.P. being identified as a suitable successor to Orange East Africa.

342. The exit of Orange EA and coming in of Helios through its subsidiary, JHL, was actualized in 2016 with government approval. Government approval of this

initiative was on condition that 10% of Orange East Africa shares in TKL would be transferred to GOK peppercorn price of Ksh. 1, a condition that both Orange EA and HIP/JHL agreed to. Following this transaction, the ownership of TKL was GOK 40%, and HIP/JHL 60%. This was how HIP/JHL became the majority shareholder in Telkom.

On what prompted the government of Kenya to buy back the 10%, shareholding from Jamhuri Holding Limited/Helios Investment Partners and the terms of the buyback

343. Dr. Kinyua submitted that the government accepted the sale transaction of Orange EA, to Helios on the condition that 10% of the shares held by Orange EA would be transferred to the government of Kenya at a peppercorn price of one shilling.

344. GOK was not buying the 10 % shareholding from JHL / Helios. It was an integral part of the sale transaction of Orange EA shares to JHL / Helios that 10% of the shareholding was to be transferred to GOK at Ksh 1.

Dr Kinyua's role in the acquisition process of TKL by JHL in 2016 and whether there was a Cabinet approval

345. In 2016, Dr. Kinyua served as the Chief of Staff, Head of the Public Service and the Acting Secretary to the Cabinet. As such, he stated that his role in the acquisition process of Telkom Kenya by Helios Investment and partners through JHL was limited to preparing minutes of the discussions by the Cabinet and preparing summaries and minutes arising from the Cabinet on that subject matter.

346. In addition, after the Cabinet considered the memorandum and pronounced itself on the request by both the Cabinet Secretary for the National Treasury and Planning and the Attorney General, the Head of Public Service in a letter dated, 8th June 2016 **(See Annex 14)** communicated the Cabinet decision for action by the National Treasury, Ministry of Information, Communication and Technology and the Attorney General's office. Dr. Kinyua confirmed that the Cabinet approved the transaction.

347. Even after HIP/JHL came in as a partner of GOK in TKL and as the majority shareholder, the company continued to perform poorly. It was against this backdrop that HIP/JHL notified the government of its decision to exit TKL by exercising its exit option. That is their right to sell their stake in the company to GOK as provided for in the shareholders' agreement.

348. Following HIP/JHL's decision to exit from TKL, the National Treasury's Cabinet Secretary and Attorney General prepared a joint memorandum to the National Security Council on the matter, seeking NSC's approval for HIP/JHL to exit and GOK to buy off HIP/JHL shares in Telkom Kenya limited. The NSC, during its second meeting held on 1st April 2022, considered the memorandum and approved the request therein.

349. The National Security Council (NSC) is established under Article 240 of the Constitution. The Council features the President as the Chairperson and the following as members of the council: The Deputy President, The Cabinet Secretary of Defense, The Cabinet Secretary for Interior and Coordination of National Government Administration, The Cabinet Secretary for Foreign and Diaspora Affairs, the Attorney General, the Chief of Defense Forces, the Director General of National Intelligence Service and the Inspector General of the National Police Service. Article 240 of the Constitution sets out the mandate of the National Security Council to include access and appraisal of the objectives, commitments and risks to the Republic in respect of actual and potential National Security capabilities.

350. The Secretary to the Cabinet is also designated as the Secretary to the NSC. Hence after NSC deliberations on the said memorandum, in his capacity as the acting Secretary to the Cabinet, he communicated NSC's decision on the matter to the Cabinet Secretary of the National Treasury and Planning and the Hon Attorney General advising them to take appropriate action.

351. Subsequently, on 10th May 2022, the Cabinet Secretary to the National Treasury and Planning and the Attorney General forwarded to the Cabinet office a memorandum on this matter to brief the Cabinet on the decision of the NSC on the matter.

352. Dr. Kinyua further submitted that the Cabinet convened on 12th May 2022 and ratified the decision of the National Security Council (NSC). He then transmitted the decision to the National Treasury and the Office of the Attorney General.

Strategic reasons for the government's 100% buyback of TKL

353. Dr. Kinyua informed the Joint Committee that as articulated by the Cabinet Secretary for the National Treasury and Planning, there were strategic reasons to justify the 100% buyback of TKL by the Government. He noted that TKL operates critical National Security assets and services including mobile telephone services, money transfer services, carrier business, Data Centre assets, National Fiber Optic Infrastructure (NOFBI) operation and maintenance, Fiber right of way and the Sub-Sea Assets, both landing and all undersea cables including TEAMS.

354. TKL provides critical government communication services to the Office of the President, the State House, the Government Data Centre (GDC), the Ministry of Defense, the Ministry of Interior and Coordination of National Government Administration, the National Police Service, Nyali and Mombasa landing stations, the Houses of Parliament and other sensitive public agencies.

355. TKL also maintains government hotlines and the government Core Communications Network (GCCN) that supports IFMIS as well as DOD and NIS-restricted communication channels, among others.

356. Dr. Kinyua informed the Joint Committee that the physical and cyber systems and Assets are so vital to the country that their incapacitation would have a serious impact not just on the economy but the country's security. This consideration made the government consider 100% buyback as the optimal option.

On how the GOK protected the strategic assets owned by Telkom Kenya while undergoing the 2016 acquisition and 100% buyback in 2022

357. Dr. Kinyua submitted that the government was at all times conscious of the need to protect the strategic assets owned by Telkom Kenya. In this context, the shareholders' agreement of 2007 was amended to include additional critical shareholder-reserved-matter, in the form of being able to veto the initial 5-Year Business Plan. With this provision, the government had a much bigger say than it had with Orange East Africa and significantly increased oversight and input at the onset of the relationship with Helios, including oversight, or sale of TKL assets. This provision meant that the government had full visibility of the plan and an opportunity to ensure that TKL assets were not stripped.

358. Dr. Kinyua further submitted that under the 100% buyback, the strategic assets owned by TKL would be fully protected. Being 100% owned by the government, TKL business would be governed by the State Corporations Act (Cap 446). He noted that under section 13 of the Act, a parastatal cannot dispose of its assets without the approval of the government.

3.19 SUBMISSION BY MR. JOHN NGUMI

Mr. John Ngumi appeared before the Committee on 19th April 2023 and submitted as follows:

Appointment of JHL Transaction Advisor

359. On 1st April 2022, Mr. John Ngumi was appointed by JHL as an advisor in his individual capacity through an advisor agreement. His appointment was in connection with JHL's decision to exit TKL. The appointment was consistent and in line with his long-standing advisory contract with Helios Investment Partners dating back to 2016. He stated that Helios Investment Partners are the advisors to the Funds that own JHL

360. Prior to executing the advisor agreement with JHL, Mr. Ngumi submitted to the Joint Committee that he had already provided strategic advice to HIP on their strategic options or critical developments that had called for a re-evaluation of JHL's investment options in relation to TKL. This intense conversation assisted HIP and JHL in arriving at their final, strategic decision. Entering into an advisor agreement with JHL formalized his prior and future engagements and also ensured that his fees and expenses would be borne by the right party, JHL, as the legal shareholder in TKL on behalf of HIP.

Mr. Ngumi's role in the HIP/JHL transaction

361. Mr. Ngumi informed the Joint Committee that his role was that of the advisor and not the transaction advisor. As an advisor, his roles entailed:

    i. Supporting JHL, its Partners, managers, directors and or officers in the sourcing of and engaging with counterparties that were potential acquirers of JHL's interests in TKL.

    ii. Advising on the structure of the transaction.

    iii. Working with any other advisors who may be appointed by JHL in the preparation and negotiation of translation documents with the preferred counterparties.

    iv. Supporting efforts to ensure successful closure and remittance of USD-denominated funds to JHL remittance.

362. Mr Ngumi received a total of USD 3,071,163 as an advisory fee from JHL which was paid to him on 25th November, 2022 in line with the terms of the agreement.

3.20 EVIDENCE BY MR. BEN ROBERTS

363. Mr. Ben Roberts is the Chief Technological Officer of Liquid Intelligent Technologies and Chairman of the ICT Board in the Kenya Private Sector Alliance

(KEPSA). Mr. Ben Robert was invited to the Joint Committee as an Expert witness and appeared before the Joint Committee on 20th April 2023 and submitted as follows:

364. In his current role and job at Liquid Intelligent Technologies, he has overseen the building of over 100,000km of fiber across Africa and a sizable number of them are in Kenya. They have a presence in 15 countries in Africa and they provide ICT infrastructure and services for many clients including Governments. Currently leads a team of over 1500 engineers across Africa who would be building, configuring, and managing data networks.

365. He also represents the industry in Kenya where he is the Chair of the ICT Board in the Kenya Private Sector Alliance (KEPSA). He does interact with different areas of Government in helping to guide policy direction from the industry voice. He submitted that he will be presenting from an industry and policy voice.

Whether TKL is the only Telco that carries sensitive or critical Government communication

366. Government data is always going to have different classifications of the sensitivity or critical nature of it.
367. Kenya is one of the first countries in Africa to have enacted strong data protection legislation (Kenya Data Protection Act) that has put in place the Office of the Data Protection Commissioner. All the data about citizens is covered by this act.

368. TKL is not the only telecommunications company that carries sensitive Government data because many Government agencies contract their ICT services from several different telecommunications providers. For instance, at Liquid Intelligent Technologies they offer services to County Governments, Ministries, Embassies (foreign and Kenyan diplomatic services), and many of the parastatals. Their customers choose Liquid Intelligent Technologies because they have a robust network with a reliable uptime.

369. He submitted that telecommunications providers do not know what data passes through the network. Telecommunications companies only offer telecommunication services and have no business in knowing what the data contents are. A good analogy would be, that when you are going somewhere,

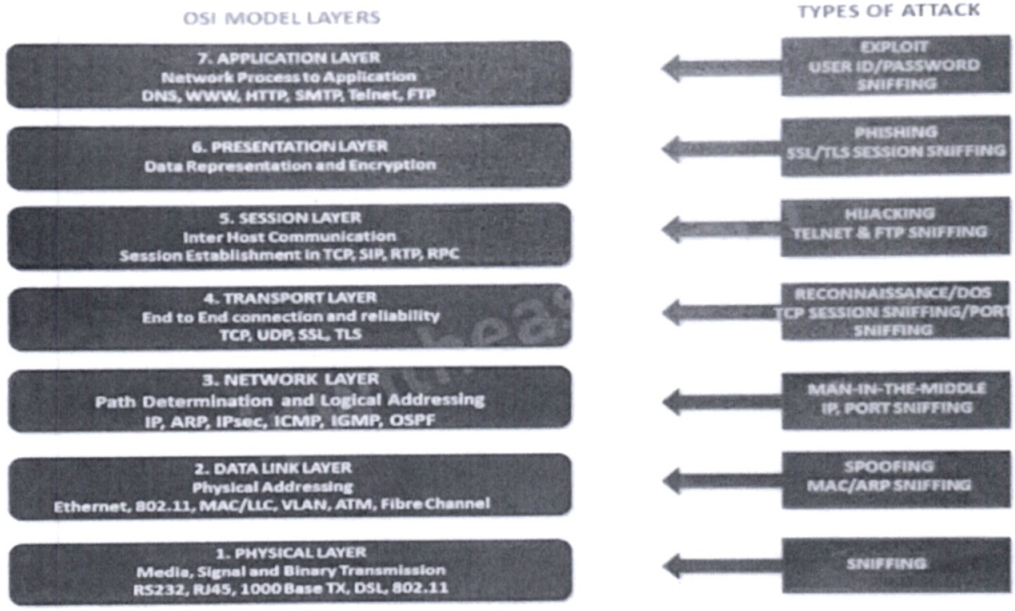
the driver knows that they are taking you to a particular place, but they have no business knowing what you are going to do at that place.

370. There is a CCTV system that is delivered by Safaricom to GOK, and he was convinced that it carries sensitive and critical data, so with this in mind, TKL is not the only telco carrying sensitive Government data.

371. Infrastructure sharing is common among telecos, and therefore there is no way, especially in Kenya where the industry is competitive and devolved, where you would buy a service from one teleco and have it go entirely over their infrastructure.

With respect to layers of security in a network

372. In data communications, there is the OSI (Open Systems Interconnection) model that computing systems use to communicate over a network.



373. The first layer is where the physical cables transmitting data would be found, these include copper and fiber cables through which data packets are transmitted. Above that, the. data link layer ensures that any errors encountered when transmitting the data packets are sorted out. The Network Layer, through Internet Protocol (IP), tells the network the address where to send the data next. The services offered by telecommunication services are mostly domiciled in these layers.

374. The user of the data is then responsible for how they manage layer 4 through to layer 6 of the communication.

375. At all the layers of communication, there are security risks that are attached to them (illustrated to the right of the diagram). The crudest way to access the data is through sniffing (layers 1 and 2), where a bad actor can cut physical media (cable), rewire and intercept the data passing through. Telcos try to protect the data by burying the cables in the ground, but there is nothing that can stop bad actors from digging a hole and sniffing the data. This means that it doesn't matter who owns the physical infrastructure.

376. However, with all these risks, protection is provided at all layers. In the physical layer, they provide physical protection (i.e. burying the cable or putting the cable high up on pylons), and they also use encoding and encryption for the data.

377. The owners of sensitive data would put up encoding and encryption, specifically AES encryption that would be applied at level 7. With this in place, it is going to be almost impossible for anybody to intercept the data.

378. Unless it is an extremely small country, it is unlikely for governments to own and operate all the teleco infrastructure. Commercial support is necessary for feasibility. Governments around the world are divesting themselves away from the telecommunications business. Nevertheless, Governments make strategic investments in telecos, and this is mostly for commercial reasons to raise revenues for their people.

379. He further submitted that in the United States of America, the Government entirely uses services from commercial telecommunication companies, but they vet them and approve the ones that can provide services to the US Defense Forces. Once they have achieved the vetting, they will design their network, run tenders, and then contract the best company that meets their tendering needs.

CHAPTER FOUR

4.0 ISSUES FOR DETERMINATION

The following are the issues for determination by the Joint Committee as per the Terms of Reference (TOR)

4.1 **DETERMINE HOW THE DISBURSEMENT OF KSHS. 6.091 BILLION UNDER ARTICLE 223 OF THE CONSTITUTION TO TELKOM KENYA WAS UNDERTAKEN AND WHETHER THE TRANSACTION MET THE CONDITIONS AS PROVIDED IN ARTICLE 223 OF THE CONSTITUTION, SECTION 44 OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012 AND REGULATION 40 OF THE ATTENDANT PUBLIC FINANCE MANAGEMENT (NATIONAL GOVERNMENT) REGULATIONS;**

380. Subject to clauses (2) to (4) of Article 223 of the Constitution, the national government may spend money that has not been appropriated if:
    i. the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or
    ii. money has been withdrawn from the Contingencies Fund.

381. The approval of Parliament under Article 223 of the Constitution for any spending shall be sought within two months after the first withdrawal of the money, subject to clause (3).

382. If Parliament is not sitting during the time contemplated in clause (2) or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.

383. When the National Assembly has approved spending under clause (2), an Appropriation Bill shall be introduced for the appropriation of the money spent.

384. Upon the request by HIP/JHL to exit from TKL through a letter dated 15th July 2021 addressed to the Government of Kenya for the attention of Hon (Amb) Ukur Yattani, EGH **(Annex No 28)**, the former Cabinet Secretary, the National Treasury on 29th March 2023 wrote to JHL communicating GOK's decision to accept the JHL's exit through the exercise of PUT OPTION.

385. Prio communicating the GOK's decision to accept JHL's request to exit TKL, the former Cabinet Secretary, the National Treasury Hon (Amb) Ukur Yattani, EGH on 28th March, 2022 received concurrence from the Executive Office of the President to procced to process the exit of JHL from TKL **(The communication on the concurrence was never presented to the Joint Committee)**

386. On 30th March 2022 the former Cabinet Secretary National Treasury jointly with the former Attorney General prepared and submitted a memorandum to the National Security Council (NSC) **(Annex No 15)**, the memorandum sought the following:

i) Approval of the exit of HIP in TKL with GOK acquiring the 60% shareholding owned by HIP/JHL at USD 1
ii) Approval for GOK to take over and compensate HIP/JHL the loan injected by HIP amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million)
iii) Approval of a budget of Ksh 5.92 billion for FY 2022/23 for TKL to facilitate the implementation of the exit.
iv) Direct the Cabinet Secretary to the National Treasury and the Attorney General to take the necessary action.

387. During the NSC's second meeting held on 1st April 2022, the NSC considered the memorandum and approved JHL's request to exit TKL and the 100% buyback of TKL by GOK. Subsequently, the Head of Public Service and Secretary to the Cabinet **(HOPS)** Dr Joseph Kinyua vide a letter dated 1st April 2022 **(See Annex 16)** communicated the NSC's decision to approve the exit of HIP/JHL from TKL. In its approval, the National Security Council approved the issuance of a three (3) Treasury Bond worth USD 51,186,058 or its equivalent of Kes 6.019 billion under Article 223 of the Constitution as consideration for GOK's 100% buyback of TKL and the same be regularized in the Supplementary budget for FY 2022/23.

388. Arising from the approval of the Joint memorandum by the NSC, a joint Cabinet Memorandum by the Cabinet Secretary, the National Treasury and the Attorney General on the exit of JHL from TKL, as approved by the NSC, was prepared and submitted to the Cabinet office on 10th May 2022. The Cabinet ratified the NSC's decision during its sitting held on 12th May 2022. The Cabinet approved the issuance of a three (3) Treasury Bond worth USD 51,186,058 or its equivalent of Kes 6.019 billion under Article 223 of the Constitution as consideration to HIP/JHL to exit TKL and allow 100% buyback by GOK and the same to be regularized in the Supplementary budget for FY 2022/23. The Cabinet resolution was communicated through a letter dated 9th May 2022. **(See Annex 27).**

389. Eng Stanley Kamau the former Director General, the Directorate of Public Investments and Portfolio Management having reviewed letters dated 1st April 2022 and 9th May 2022 from the Executive Office of the President forwarded to him by the former Principal Secretary Mr. Julius Muia made recommendations dated 25th July, 2023 to the Cabinet Secretary National

Treasury and Planning to approve the payment of USD 51,186,058 through a 3 year Treasury Bond to be paid to JHL under Article 223 of the Constitution and same regularized in the Supplementary budget 2022/23.

390. Upon the recommendations from Eng Stantley Kamau the former DG Directorate of Public Investments and Portfolio Management for the use of Article 223 of the Constitution. The former Cabinet Secretary Amb Ukur Yattani, EGH approved the use of the Article 223 of the Constitution vide a letter addressed to former PS Julius Muia Ref RESTNT/ZZ/331/02 TY6 dated 27th July 2022 **(Annex No 35)**.

391. Eng Stanley Kamau, the former DG, Directorate of Public Investments and Portfolio Management vide a letter Ref TNT/ZZ 331/02 TY6 dated 25th July 2022 writes a letter to the former PS National Treasury Mr. Julius Muia referring him to letter Ref RESTNT/ZZ/331/02 TY6 dated 27th July, 2022 *(a date which is not feasible)* informing him that Government does not issue personalized Treasury Bonds to specific individuals or companies and that payment to JHL amounting to USD 51,186,058 should be made through normal exchequer. This is contrary to Approval by the Cabinet and approval by the Cabinet Secretary of the National Treasury.

392. In line with approval processes as provided in Article 223, Mr. Nemwel M Motanya, the Head of Accounting at the National Treasury prepared an exchequer requisition memo Ref NT/CA/50(30) dated 28th July, 2022 **(Annex No 36)** addressed to FCPA Bemard Ndungu, MBS DG, Accounting Services and Quality Assurance. Pursuant to Section 17(4) of the Public Finance Management Act 2012 FCPA Benard Ndungu through a letter Ref Article 223:FY2022-23/03 dated 28th July, 2022 submits the request to the Controller of Budget.

393. Prio granting the approval on 2nd August 2022 through a letter Ref COB/TNTP/006/VOL.III(60) **(Annnex No 37)** Dr. Margaret Nyakang'o, the Controler of Budget had on 1st August, 2022 **(Annnex No 7)** written to the former PS Julius Muia, requesting for copies of share purchase agreements among other documents. It is important that the approval granted for the use of Article 223 of the Constitution granted by Amb Ukur Yattani, EGH, the former CS, the National Treasury was for the issuance of three (3) Treasury Bond.

394. Having received the approval from the Controler of Budget on 2nd August 2022, the National Treasury General/Accounting Service and Quality Assurance directorate processed the request for withdrawal of the funds to the Controller of Budget, and approval was granted on 5th August 2022. It is imperative to note that the amount under Article 223 of the Constitution of Kshs 6,091,140,902

(USD 51,186,086 at an estimated rate of KShs 119/1 USD). However, the National Treasury remitted Kshs 6,196,584,181.45 (USD 51,186,058 at the actual CBK rate of 121.06/1 USD at the date of payment). The difference of Kshs 105,443,279.50 was a result of the exchange difference. The request for withdrawal of the additional amount was approved by the Controller of Budget on 25th August 2022.

The Joint Committee finds:

I. That, the National Treasury commenced processing of the exit of JHL from TKL upon initial approval of the National Security Council on 1st April 2022 prior to the Cabinet Approval granted on 12th May 2022. This is evident by a letter addressed to Mr. Kennedy Ogeto, the former Solicitor General Ref TNT/ZZ 331/02 dated 6th April 2022 (Annex No 38). Therefore, the 100% Buyback was initiated contrary to:

   i. Section 86 of the Public Finance Management Act 2012 provides that State Corporations may be established or dissolved only with prior approval of the Cabinet.
   ii. Section 87 of the Public Finance Management Act 2012 states that the National Government or National Government entity may not invest in a State corporation or government-linked company without the approval of the Cabinet.
   iii. Advise from the Office of the Attorney Generals through a letter dated 1st April 2022 (See Annex No 16) addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require Cabinet Approval.
   iv. Advise from the Office of the Attorney Generals through a letter dated 1st April 2022 *(See Annex No 16)* addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require the approval from TKL Board.

II. That, the initial consideration by the NSC on 1st April 2023, the APPROVAL by the Cabinet on 12th May, 2022, the memo from Eng Stantley Kamau, the former DG Directorate of Public Investment and Portfolio management addressed to PS Treasury dated 25th July, 2022 *(See Annex No)*, the request to the Hon (Amb) Ukur Yattani, EGH former CS National Treasury for approval for the use of Article 223 vide a letter Ref TNT/ZZ 331/02 TY5 dated 25th July, 2022 *(See Annex No 39)* and subsequent approval for the use of Article 223 of the Constitution by Hon (Amb) Ukur Yattani, EGH former CS National Treasury dated 27th July, 2022 *(See Annex No 35)* indicated the settlement for the transaction was to be undertaken through the issuance of three (3) year Treasury Bond

equivalent to USD 51,186,058 to HIP/JHL and not through an exchequer issue.

III. That, despite the assertion by Eng Stanley Kamau the former DG Directorate of Public Investment and Portfolio Management in his memo dated 25th July, 2022 *(See Annex No 39)* and subsequent assertions by Mr. Julius Muia, former Principal Secretary, the National Treasury in his letter Ref TNT/ZZ 331/02 TY6 dated 25th July, 2022 *(See Annex No 5 (1))* to Hon (Amb) Ukur Yattani, EGH former CS National Treasury that there was an urgency to conclude the transaction, Mr. Paul Cunningharm, Director of JHL while appearing before the Joint Committee on 4th April 2023 noted that there was no recorded urgency on the part of JHL to conclude the matter.

IV. That, the departure from the use of three (3) Treasury Bonds equivalent to USD 51,186,058 to HIP/JHL to settle transaction occurs through a letter Ref TNT/ZZ 331/02 TY6 dated 25th July, 2022 *(See Annex 5 (2))* written by Eng. Stanley Kamau, the former DG, the Directorate of Public Investments and Portfolio Management purportedly on behalf of Hon (Amb) Ukur Yattani, EGH former CS National Treasury addressed to Mr. Julius Muai, former PS National Treasury indicating that the Government does not issue personalized Treasury Bonds to specific individuals or companies and that payment to JHL amounting to USD 51,186,058 should be made through normal exchequer. This is contrary to Approval by the Cabinet and approval by the Cabinet Secretary of the National Treasury.

V. That, there are glaring inconstancies in the letter written by Eng. Stanley Kamau, the former DG, the Directorate of Public Investments and Portfolio Management allegedly on behalf of Hon (Amb) Ukur Yattani, EGH former CS National Treasury altered the mode of settlement from a three (3) Treasury Bond equivalent to USD 51,186,058 to HIP/JHL to a normal exchequer issue. *The letter Ref TNT/ZZ/331/02 TY6 is dated 25th July 2023 and refers to an approval granted in the future that is Ref RESTNT/ZZ/331/02 TY6 dated 27th July 2022.*

VI. Contrary to the assertion by Mr. Ukur Yatani, the former Cabinet Secretary, the National Treasury, Mr. Julius Muia, the former Principal Secretary the National Treasury and Mr. Stanley Kamau, the former Director General, Public Investment and Portfolio, the 100% Buyback of TKL from JHL/HIP never received full approval by the Attorney General

of Kenya. This is evident by the letter dated 30th August 2022 (Annex No 19) by the Office of Attorney seeking clarification from the AG on several issues including but limited to Approvals, Deed of Variation and Escrow Agreement.

4.2 DETERMINE WHEN JAMHURI HOLDING LIMITED (JHL) WAS INCORPORATED IN KENYA, ITS SHAREHOLDING AND ANY CHANGES IN ITS SHAREHOLDING IF ANY;

395. Helios Investment Partners is a private equity firm headquartered out of London, UK has portfolio investments in Kenya that include Vivo Energy, Qwetu Student Hostel and Zuku among others. The private equity firm has a presence in over 30 companies across 25 countries in Africa.

396. Jamhuri Holdings Limited (JHL) which is wholly owned by Helios Investment Partners (HIP) is a limited liability company incorporated in Mauritius and with registration number 134048C2/GBL. Its official address is Level 3 Alexander House, 35 Cybercity, Ebene, Mauritius. However, Helios Investment Partners Kenya is a registered company in Kenya.

397. An online search conducted on the Mauritius Corporate and Business Registration Department undertaken on the 3rd April 2023 established that JHL was registered on the 27th of October 2015 as a private company. JHL is categorized as an authorized company, which means that it is a company whose business activities and control and management are outside of Mauritius. This company is considered a foreign company for tax purposes.

398. The following are the office bearers:

	Position	Name	Address	Date of Appointment
1	Director	Cunningham Paul Gerard	Level 3, Alexander House 35 Cybercity Ebene Mauritius	27/10/2015
2	Director	Merrivale Limited	De Zippora Street 1st Foor #5 Dekk House 456 Providence Industrial Estate Seychelles	30/06/2021

3	Registered Agent	Intercontinental Trust Limited	35 Cybercity Ebene level 3 Alexander House Ebene Mauritius	27/10/2015
4	Secretary	Intercontinental Trust Limited	35 Cybercity Ebene level 3 Alexander House Ebene Mauritius	27/10/2015

399. The shareholder details were not available through the online search. However, through Mutual Legal Assistance between GOK and the Mauritian authorities, this information could be obtained.

The Joint Committee finds

I. **Jamhuri Holdings Limited (JHL) which is wholly owned by Helios Investment Partners (HIP) is a limited liability company incorporated in Mauritius and with registration number 134048C2/GBL and not registered in Kenya.**

II. **Helios Investment Partners (Kenya) Limited CPR/2011/52674 is an entity registered as a private company on 27th July 2011. The registered address of the company was indicated as LR NO. 1/870 3rd Floor, Kiganjo House, Rose Avenue, Nairobi, P.O Box 75079-00200, Nairobi. The nominal capital of the company is Ksh100,000 divided into 100 shares of Ksh1,000. However, there is no relationship with HIP (Kenya) Ltd in the ownership of TKL. The shareholding position of Helios Investment Partners (Kenya) as of 10 March 2023 was as follows:**

Name	Nationality	Postal Address	Designation	Shares
HIP GP I Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
HIP GP II Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
Paul Gerard Cunningham	British	2nd Floor, 12 Charles II Street, St.	Director	Nil

		James' London, SW1Y4QU, UK		
Henry Awele Obi	Irish	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Shantilal Shah Khimji	Kenyan	P.O. Box 45669-00100 Nairobi	Secretary	Nil
Total Shares				**100**

4.3 DETERMINE WHEN HELIOS INVESTMENT PARTNERS THROUGH JAMHURI HOLDING LIMITED (JHL) BECAME A SHAREHOLDER IN TELKOM KENYA AND ESTABLISH WHAT WAS THE VALUE OF INITIAL (60% CONTROLLING) SHAREHOLDING AT ENTRY

400. GOK and Orange East Africa being the two shareholders, decided in 2012 to restructure TKL's balance sheet which was carrying debts to the shareholders amounting to Ksh.50 billion comprising Ksh.44 billion owed to Orange East Africa and Ksh.6.9 billion owed to the GOK. As part of this restructuring, Orange East Africa wrote off Ksh.33.5 billion and converted the balance of Ksh.10.5 billion into equity. On its part, GOK converted the entire Ksh.6.9 billion debt into equity.

401. The restructuring of Telkom Kenya's balance sheet meant GOK's was diluted, given that Orange East Africa had agreed to write off its loans to TKL, the shareholding structure changed to 70% for Orange East Africa and 30% for GOK.

402. Even after structuring the balance sheet, TKL continued to perform poorly. Therefore in 2014 Orange East Africa decided to exit the Kenya telecommunication market through the sale of its shares to another investor, an option which was provided for in the shareholders' agreement.

403. To progress its Exit Plan, Orange EA appointed an International Investment Bank, Lazard, to assist it in developing an appropriate exit strategy and identify a strong successor that will be able to foster TKL's turnaround strategy. The sale process took three years and culminated in Helios Investors III L.P. being identified as a suitable successor to Orange East Africa.

404. The exit of Orange EA and the coming in of Helios HIP III through its subsidiary, JHL, was actualized in 2016 with government approval. Government approval of this initiative was on condition that 10% of Orange East Africa shares in TKL would be transferred to GOK Peppercorn price of Ksh. 1, a condition that both

Orange EA and HIP/JHL agreed to. Following this transaction, the ownership of TKL was GOK 40%, and Helios / JHL 60%. This was how HIP/JHL became the majority shareholder in Telkom.

405. GOK accepted the sale transaction of Orange EA, to Helios on the condition that 10% of the shares held by Orange EA would be transferred to the government of Kenya at a peppercorn price of one shilling.

406. GOK was not buying the 10 % shareholding from JHL / Helios HIP III. It was an integral part of the sale transaction of Orange EA shares to JHL / HIP III that 10% of the shareholding was to be transferred to GOK at Ksh 1.

407. In 2016 Helios Investment Partners (HIP) through its subsidiary, JHL acquired the 70% shareholding in TKL together with shareholder's loans that had been advanced to the company by Orange East Africa/France Telekom SA amounting to an aggregate of USD 332.8m.

The Joint Committee finds:

That, Helios Investment Partners (HIP) through its 100% owned subsidiary Jamhuri Holding Limited (JHL) acquired the 70% shareholding in TKL together with shareholder's loans that had been advanced to the company by Orange East Africa/France Telekom SA amounting to an aggregate of USD 332.8m. However, the GOK approval of this transaction was with the condition that 10% of Orange East Africa shares in TKL would be transferred to GOK with a Peppercorn price of Ksh. 1, a condition that both Orange EA and HIP/JHL agreed to. Following this transaction, the ownership of TKL was GOK 40%, and Helios / JHL 60%. This was how HIP/JHL became the majority shareholder in Telkom.

4.4 EXAMINE THE ACQUISITION OF TELKOM KENYA SHARES FROM HELIOS INVESTMENT PARTNERS/JAMHURI HOLDING LIMITED BY THE GOVERNMENT OF KENYA INCLUDING;

408. In a letter dated 15th July 2021(See Annex TI 28), Helios Investment Partners (HIP)/JHL notified GOK of their decision to exit Telkom by exercising their PUT-OPTION as their right to sell their stake in the company to GOK, as provided for in the Shareholder Agreements (SPA). The HIP/JHL cited the following frustrations, namely:
    i. Failure of GOK authorities to institute regulatory interventions necessary to remedy the structural imbalances in the telecommunications business

environment that continue to make the sector less competitive, much to the disadvantage of the (rest of) the operators and consumers;

ii. The decision of GOK not to approve the joint venture (JV) between Telkom and Airtel Kenya that would have involved the combination of the two companies with benefits that would have included reduced requirements for a further injection of capital by the two shareholders; and,

iii. The decision by GOK's Ministry of Sports, Culture & Heritage to occupy and proceed to construct sporting facilities on the property LR. No. 7656 situated along Ngong Road, of which Telkom is the legally registered owner.

409. Mr. Ukur Yatani the former Cabinet Secretary, the National Treasury wrote a letter on 27th August 2021 advising the Executive Office of the President on the decision by JHL and sought concurrence to proceed with the proposed exit from TKL. Additionally, a letter Ref; ZZ/331/02 dated 30th September 2021 **(See Annex 40)** was written by the former **CS** requesting JHL to be patient while the government was consulting.

410. In a letter dated **28th March, 2022 (See Annex 41)** from the former Head of Public Service, Hon (Amb) Ukur Yatani, the former Cabinet Secretary received concurrence from the Executive Office of the President to proceed with the process of exiting JHL. It is instructive to note that it took over eight (8) months for the Executive Office of the President to grant the concurrence.

411. Consequently, the GOK's decision to accept HIP/JHL's proposal to exit Telkom Kenya Limited (TKL) was conveyed via a letter dated 29th March 2022 **(See Annex 30)**. In the said letter HIP/JHL is requested to submit a proposal on the terms and conditions of the PUT OPTION to facilitate further discussion.

412. That, a Joint Memorandum (See Annex 15), dated 30th March 2022 was jointly prepared and signed by Mr. Ukur Yatani, EGH the former Cabinet Secretary, the National Treasury and Mr. Paul Kihara, the former Attorney General of Kenya and submitted to the National Security Council (NSC) proposing the exit of HIP/JHL from TKL. The draft Joint Memorandum was forwarded to Mr Paul Kihara, the former Attorney General vide a letter a letter dated 30th March 2022 (See Annex TI 15) and that sought the approval of the National Security Council for the proposed 100% buyback of TKL by GOK. *It is instructive to note that the National Treasury was yet to receive an offer on terms of exit by JHL as indicated in the letter to JHL dated 29th March 2022 (See Annex 30) conveying*

the acceptance by GOK for JHL exit and requesting for a proposal on terms of exit.

413. In the Joint Memorandum and the subsequent approval of 100% buyback of TKL by the National Security Council, the terms of the transaction were; -

    i. GOK acquiring 60% of TKL's shareholding from JHL at the consideration of USD 1

    ii. GOK, acquiring USD 239,938,692 of JHL shareholder loan acquired from Orange (Principal plus accrued interest to 31st December 2020) at a consideration of USD 1.

    iii. GOK acquired the additional JHL shareholder loan of USD 51,186,057 (principal plus accrued interest to 31st December 2020) at a consideration of USD 51,186,057 payable using three (3) a year Treasury Bond.

414. The Joint Committee was never furnished with any letter/document that indicated the proposal from HIP/JHL on terms of exit from TKL nor was the Committee provided with a counteroffer by GOK. In the absence of this information, the Joint Committee finds that the National Treasury came up with the terms of exit for HIP/JHL.

415. The mode of settlement for the 100% buyback of TKL from JHL/HIP as captured in the Joint Memorandum dated 30th March 2022 jointly signed by Mr. Ukur Yatani, EGH former Cabinet Secretary, the National Treasury and Mr. Paul Kihara, the former Attorney General was to be made through a three (3) year Treasury Bond. This is replicated in the approval from the National Security Council through a letter from the Executive Office of the President dated 1st April, 2022 (See Annex 42).

416. Contrary to the assertion by Mr. Ukur Yatani, the former Cabinet Secretary, the National Treasury, Mr. Julius Muia, the former Principal Secretary the National Treasury, Ms. Nyangako, the Controller of Budget and Mr. Stanley Kamau, the former Director General, Public Investment and Portfolio, the 100% Buyback of TKL from JHL/HIP never received full approval by the regulatory authorities specifically the Communication Authority of Kenya (CAK) gave conditional approval which was never met.

417. The Office of the Attorney General of Kenya never issued a complete legal opinion or express approval for the 100% buyback of TKL from JHL/HIP as required in such a substantive transaction. This is evident from the letter dated 30th August 2022 (see Annex 19) from the Office of Attorney General to Mr.

Ukur Yatani, EGH requesting more documents and information from the National Treasury, a letter that was never responded to until the finalization of the transaction.

418. There is no legal framework for the re-acquisition of formerly state-owned agencies by the GOK. The Privatization Act provides for the divesture of state-owned agencies and not vice versa

419. On 1st April 2022, the National Security Council considered and approved a Joint Memoranda co-signed by former Cabinet Secretary National Treasury Amb. Ukur Yatani and former Attorney General Hon. Justice (Rtd) Paul Kihara for the 100% acquisition of TKL.

420. On 12th May 2022, the Cabinet granted approvals sought by the National Security Council for the 100% acquisition of TKL by GOK.

421. On 6th April 2022, the Competition Authority informed the National Treasury that the proposed acquisition did not require prior authorization from the authority on account that the Government is not "an undertaking" as per the definition of section 2 of the Competition Act.

422. In a letter dated 6th April 2022, the National Treasury requested approval from the Communication Authority of Kenya (CA) for the 100% acquisition of TKL. In response on 13th April 2022, the CA granted approval subject to the following conditions:

    i. That, the National Treasury provides a letter of comfort on the settlement of Telkom Kenya Limited's outstanding debt of at least KShs. 7,222,672,891;

    ii. That, Telkom Kenya Limited provides assurance to the Authority that its customers are protected; and

    iii. That, Telkom Kenya Limited furnishes to the Authority a copy of CR-12 after the acquisition.

423. However, the National Treasury proceeded to complete the transaction without fulfilling the conditions of the Communication Authority of Kenya (CA) specifically condition (i) in Paragraph 422 above.

424. TKL was not part of the entities in the Privatization Programme and therefore, the transaction did not require approval by the Privatization Commission. The Commission's mandate and functions are confined to the entities listed in the

Privatization Programme as stipulated in Section 4 of the Privatization Act, 2005. Additionally, the Privatization Act 2005 does not provide for the process of reacquiring an entity that had been privatized by GOK.

425. It was not possible to establish the impact of TKL's performance in view of the acquisition under inquiry. The acquisition is very recent for the market to effectively adjust. But most importantly, the acquisition process is not complete.

426. The CA had not seen any movement in the sector in response to GOK's acquisition of TKL. Changes in shareholding may not necessarily trigger a response from TKL competitors. However, an acquisition where the government is involved may trigger market distortion due to anxiety arising from long-term government intervention in favor of TKL.

The Joint Committee finds:

I. **That, contrary to the assertion by Mr. Ukur Yatani, the former Cabinet Secretary, the National Treasury, Mr. Julius Muia, the former Principal Secretary the National Treasury and Eng Stantley Kamau, former Directtor General Public Investement and Portfolio Management the 100% Buyback of TKL from JHL/HIP never received full approval by the regulatory authorities specifically the Communication Authority of Kenya (CAK) gave conditional approval which was never met.**

II. **That, the reasons cited by the HIP/JKL for their decision to exit TKL by the exercise of their PUT-OPTION include the following frustrations, namely:**

   i. **Failure of GOK authorities to institute regulatory interventions necessary to remedy the structural imbalances in the telecommunications business environment that continue to make the sector less competitive, much to the disadvantage of the (rest of) the operators and consumers;**

   ii. **The decision of GOK not to approve the joint venture (JV) between Telkom and Airtel Kenya that would have involved the combination of the two companies with benefits that would have included reduced requirements for a further injection of capital by the two shareholders; and,**

   iii. **The decision by GOK's Ministry of Sports, Culture & Heritage to occupy and proceed to construct sporting facilities on the property**

LR. No. 7656 situated along Ngong Road, of which Telkom is the legally registered owner.

III. That, the National Treasury commenced processing of the exit of JHL from TKL upon initial approval of the National Security Council on 1st April, 2022 prior to the Cabinet Approval granted on 12th May, 2022. This is evident by among other letters addressed to Mr. Kennedy Ogeto, former Solicitor General Ref TNT/ZZ 331/02 dated 6th April, 2022, 2022. The transaction was initiated contrary to:

i. Section 86 of the Public Finance Management Act 2012 provides that State Corporations may be established or dissolved only with prior approval of the Cabinet.
ii. Section 87 of the Public Finance Management Act 2012 states that the National Government or National Government entity may not invest in a State corporation or government-linked company without the approval of the Cabinet.
iii. Advise from the Office of the Attorney General through a letter dated 1st April, 2022 (See Annex No 16) addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require Cabinet Approval.
iv. Advise from the Office of the Attorney General through a letter dated 1st April, 2022 *(See Annex No 16)* addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require the approval from TKL Board.

IV. That, the initial consideration by the NSC on 1st April, 2023, the APPROVAL by the Cabinet on 12th May, 2022, the memo from Eng Stanley Kamau, the former DG Directorate of Public Investment and Portfolio Management addressed to PS Treasury dated 25th July, 2022 *(See Annex No 5 (2))*, the request to the Hon (Amb) Ukur Yattani, EGH former CS National Treasury for approval for the use of Article 223 vide a letter Ref TNT/ZZ 331/02 TY5 dated 25th July, 2022 *(See Annex No 5 (2))* and subsequent approval for the use of Article 223 of the Constitution by Hon (Amb) Ukur Yattani, EGH former CS National Treasury dated 27th July, 2022 *See Annex No 35)* indicated the settlement for the transaction was to be undertaken through the issuance of three (3) Treasury Bond equivalent to USD 51,186,058 to HIP/JHL and not through an exchequer issue.

V. That, despite the assertion by Eng Stanley Kamau the former DG Directorate of Public Investment and Portfolio Management in his memo dated 25th July, 2022 *(See Annex No 5 (1))* and subsequent assertions by

Mr. Julius Muia, former Principal Secretary, the National Treasury in his letter Ref TNT/ZZ 331/02 TY5 dated 25th July, 2022 *(See Annex No 5 (2))* to Hon (Amb) Ukur Yattani, EGH former CS National Treasury that there was an urgency to conclude the transaction, Mr. Paul Cunningharm, Director of JHL while appearing before the Joint Committee on 4th April 2023 noted that there was no recorded urgency on the part of JHL to conclude the matter.

VI. That, the buyback of TKL by GOK was ill-thought, ill-timed and lacked the duty of care on the part of officials undertaking this transaction. For instance, a framework ought to have been put in place for transitioning a privately-operated company to a publicly-run entity without which this company, being akin to a living organism would have had to die first before it continues to live and serve the purpose for which it was intended. Flagrant violations were demonstrated clearly when the National Treasury sought the approval of the Board of TKL after making payments to JHL and when the National Treasury purported to complete the transaction before securing a comprehensive legal opinion from the Attorney General and fulfilling the conditions imposed by the Communications Authority. Moreover, the disbursement of the money under Article 233 of the Constitution was not necessary as there was no emergency in settling this transaction at the time. Indeed, this calls into question the real motive for hurriedly trying to complete this transaction under the circumstances of a major transition of the Government of The Republic of Kenya.

VII. That, the assertion that the buyback of TKL was motivated by security concerns lacks independent merit. It was established by industry experts far removed from the transaction that private and public interests can coexist. Private investment not only drives the growth and sustainability of companies but also brings along innovations and fit-for-purpose skills otherwise unavailable to government-run institutions. TKL has evidently served this role without question since it was privatized in 2007.

VIII. TKL was not a public entity and was not a part of the entities in the Privatization Programme and therefore, the transaction did not require approval by the Privatization Commission. Moreover, subsequent transactions would not require the services of the Privatiation Commission provided that the government remains a minority shareholder in the company.

IX. There is no legal framework for the re-acquisition of formerly state-owned agencies by the GOK.

X. There is a need to urgently implement policy and regulatory interventions to promote competition in the telecommunications market.

4.5 ESTABLISH WHEN JAMHURI HOLDING LIMITED (JHL)/HELIOS INVESTMENT PARTNERS (HIP) SIGNALED ITS EXIT FROM TKL AND WHEN THE REQUEST WAS RECEIVED BY THE BOARD OF TKL BEFORE THE SAME WAS TRANSMITTED TO THE NATIONAL TREASURY. FURTHER, WHETHER THE CABINET APPROVED THE EXIT OF JHL FROM TKL AND WHAT WAS THE ROLE OF THE MAIN REGULATORS I.E. COMMUNICATIONS AUTHORITY OF KENYA AND COMPETITION AUTHORITY OF KENYA.

427. In a letter dated 15th July 2021 **(See Annex TI 28),** Helios Investment Partners (HIP)/JHL notified GOK of their decision to exit Telkom by exercising their PUT-OPTION as their right to sell their stake in the company to GOK, as provided for in the Shareholder Agreements. The HIP/JHL cited the following frustrations, namely:

i. Failure of GOK authorities to institute regulatory interventions necessary to remedy the structural imbalances in the telecommunications business environment that continue to make the sector less competitive, much to the disadvantage of the (rest of) the operators and consumers;

ii. The decision of GOK not to approve the joint venture (JV) between Telkom and Airtel Kenya that would have involved the combination of the two companies with benefits that would have included reduced requirements for a further injection of capital by the two shareholders; and,

iii. The decision by GOK's Ministry of Sports, Culture & Heritage to occupy and proceed to construct sporting facilities on the property LR. No. 7656 situated along Ngong Road, of which Telkom is the legally registered owner

428. Mr. Ukur Yatani the former Cabinet Secretary, the National Treasury wrote a letter on 27th August 2021 advising the Executive Office of the President on the decision by JHL and sought concurrence to proceed with the proposed exit from TKL. Additionally, a letter Ref; ZZ/331/02 dated 30th September 2021(Annex 40) was written by the former CS requesting JHL to be patient while the government was consulting.

429. On 1st April 2022, the National Security Council considered and approved a Joint Memoranda co-signed by former Cabinet Secretary National Treasury Amb. Ukur Yatani and former Attorney General Hon. Justice (Rtd) Paul Kihara for the 100% acquisition of TKL.

430. On 12th May 2022, the Cabinet granted approvals sought by the National Security Council for the 100% acquisition of TKL by GOK long after the transaction had begun to see a letter addressed to Mr. Kennedy Ogeto, former Solicitor General Ref TNT/ZZ 331/02 dated 6th April, 2022 (Annex No38).

431. On 6th April 2022, the Competition Authority informed the National Treasury that the proposed acquisition did not require prior authorization from the authority on account that the Government is not "an undertaking" as per the definition of section 2 of the Competition Act.

432. In a letter dated 6th April 2022, the National Treasury requested approval from the Communication Authority of Kenya (CA) for the 100% acquisition of TKL. In response on 13th April 2022, the CA granted approval subject to the following conditions:

    i. That, the National Treasury provides a letter of comfort on the settlement of Telkom Kenya Limited's outstanding debt of at least KShs. 7,222,672,891;

    ii. That, TKL provides assurance to the Authority that its customers are protected; and

    iii. That TKL furnishes to the Authority a copy of CR-12 after the acquisition.

433. However, the National Treasury proceeded to complete the transaction without fulfilling the conditions of the Communication Authority of Kenya (CA) specifically condition (i) in Paragraph 422 above.

434. TKL was not part of the entities in the Privatization Programme and therefore, the transaction did not require approval by the Privatization Commission. The Commission's mandate and functions are confined to the entities listed in the Privatization Programme as stipulated in Section 4 of the Privatization Act, 2005. Additionally, the Privatization Act 2005 does not provide for the process of reacquiring an entity that had been privatized by GOK.

The Joint Committee finds:

I. Despite HIP/JHL having communicated their intention to exit TKL early enough on 15th July, 2021, GOK did not act on the request in time and opted to treat JHL's exit as an emergency that necessitated the use of Article 223 of the Constitution. Furthermore, with the knowledge of JHL exit GOK should have provided the funds through a supplementary Budget for FY 2022/23 as indicated in the various approvals by NSC, Cabinet, etc.

4.6 DETERMINE WHETHER JHL REMITTED THE STATUTORY FEES AND TAXES TO THE KENYA REVENUE AUTHORITY FOR THE ACQUISITION AND EXIT FROM TKL SHAREHOLDING.

435. There was no demonstratable gain in connection with the exit transactions and therefore there were no capital gain taxes payable by JHL in connection with the exit. In particular;

i) JHL sold all its shares in TKL (i.e. 60% of TKL's shareholding) to GOK at a nominal consideration of USD 1 and therefore made no gain on the sale.

ii) JHL transferred USD 239,938,692 of JHL's shareholder loan acquired from Orange (Principal plus accrued interest to 31st December 2020) at the nominal consideration of USD 1 and therefore made no gain on the transfer.

iii) JHL transferred the additional shareholder loan advanced by JHL of USD 51,186,057 (principal plus accrued interest to that was December 2020) at face value (i.e. at USD 51,186,057) and therefore JHL did not make again on the transfer again

The Joint Committee finds:

I. That, there was no demonstrable gain in connection with the exit transactions and therefore there were no capital gain taxes payable by JHL in connection with the exit. The 72 million shares were transferred to GOK for a Peppercone price of USD 1 while the other transfers included novation of Loans.

II. That, with respect to the transaction, Stamp duty was payable by the buyer (in this case the GOK). GOK was however entitled to stamp duty exemption for such transfers.

4.7 ESTABLISH THE SHAREHOLDING STRUCTURE OF TKL IN THE PAST TEN (10) YEARS INCLUDING THE PERIOD AFTER THE ALLEGED BUYOUT AND DETERMINE THE EXTENT TO WHICH IT COMPLIES WITH THE EXISTING LEGAL AND REGULATORY FRAMEWORKS.

436. The GOK privatized TKL in 2007 by offloading 51% of its shares in TKL, to Orange East Africa Limited (OrEA), a subsidiary of France Telkom S.A. (FT). This policy measure was undertaken to turn around the performance of TKL and put it on a path of profitability.

437. Despite the privatization, TKL continued to perform poorly. It continued to fail to generate sufficient revenue to cover even its operating costs, let alone, the repayment amounts of loans extended to it by shareholders. TKL was technically insolvent, thereby leaving the shareholders with one of two options, either to restructure its balance sheet or to voluntarily liquid themselves.

438. In 2012 GOK and Orange East Africa (OrEA) restructured TKL's balance sheet which at that time carried debts to the shareholders amounting to Ksh. 50 billion comprising KShs. 44 billion owed to Orange East Africa (OrEA) and Ksh. 6.9 billion owed to the GOK. As part of this restructuring, Orange East Africa wrote off KShs. 33.5 billion and converted the balance of KShs. 10.5 billion into equity. On its part, GOK converted the entire KShs. 6.9 billion debt into equity.

439. Arising from the restructuring of Telkom Kenya's balance sheet and with GOK's concurrence and given that Orange East Africa had agreed to write off its loans to TKL, the shareholding structure, changed to 70% for Orange East Africa (OrEA) and 30% for GOK.

440. The GOK approved the transfer of shares from Orange EA to HIP on the condition that 10% of Orange EA shares in TKL would be transferred to GOK peppercorn price of Kshs. 1, a condition that both Orange EA and HIP/Jamhuri Holding Limited agreed to. Following this transaction, the ownership of TKL was GOK 40%, and Helios / JHL 60%.

441. The transfer to GOK of the 10% of TKL shares owned by Orange EA meant the GOK taking up 40% of the Shareholder loan advanced to TKL by Orange EA/France Telekom SA amounting to USD 133.1m.

442. Since becoming a shareholder, JHL injected an additional sum of USD 47,720,000 of shareholder loans into TKL. The accrued interest on the loan up to 31st December 2020 when JHL decided to freeze any interest accruing

amounted to USD 3,466,057. Hence the total amount of principal and accrued interest as of July 2022 was USD 51,186,000,057.

443. In 2019 TKL entered into a merger negotiation with Airtel Kenya. The plan was to merge the mobile business with Airtel. The combined mobile business with Airtel would have created a bigger number two player in the market. This transaction was not allowed as the transaction was rejected by the second TKL shareholder (GOK) on account of National Security.

The Joint Committee finds

I. That, TKL was first privatized in 2007 when 51% of TKL shares were offloading 51% to Orange East Africa Limited (OrEA), a subsidiary of France Telkom S.A. (FT).

II. That, in 2012 GOK and Orange East Africa (OrEA) restructured TKL's balance sheet which at that time carried debts to the shareholders amounting to Kshs. 50 billion comprising KShs. 44 billion owed to Orange East Africa (OrEA) and Kshs. 6.9 billion owed to the GOK. As part of this restructuring, Orange East Africa wrote off KShs. 33.5 billion and converted the balance of KShs. 10.5 billion into equity. On its part, GOK converted the entire KShs. 6.9 billion debt into equity. Arising from the restructuring of Telkom Kenya's balance sheet and with GOK's concurrence and given that Orange East Africa had agreed to write off its loans to TKL, the shareholding structure, changed to 70% for Orange East Africa (OrEA) and 30% for GOK.

III. That, in 2016, Helios Investment Partners (HIP) through its 100% owned subsidiary, Jamhuri Holding Limited (JHL) acquired the 70% shareholding in TKL together with shareholder's loans that had been advanced to the company by Orange East Africa/France Telekom SA amounting to an aggregate of USD 332.8m. However, the GOK approval of this transaction was with the condition that 10% of Orange East Africa shares in TKL would be transferred to GOK with a Peppercorn price of Kshs. 1, a condition that both Orange EA and HIP/JHL agreed to. Following this transaction, the ownership of TKL was GOK 40%, and Helios / JHL 60%. This was how HIP/JHL became the majority shareholder in Telkom.

4.8 ESTABLISH THE ROLE OF THE FOLLOWING PERSONS IN THE TRANSACTIONS UNDER THE INQUIRY:

4.8.1 CPA Margaret Nyakang'o, Controller of Budget

444. On 2nd August 2022, CPA Margaret Nyakang'o approved the withdrawal of KShs. 6.091 billion as per Article 228 of the Constitution having certified herself of the probity of the transaction.

The Joint Committee finds

I. That, as the Controller of Budget, Dr. Margaret Nyakang'o, through a letter Ref COB/TNTP/006/VOL.III (60) dated 2nd August 2022 (Annex No 37.) approved the use of Article 223 of the Constitution to withdraw Kshs 6,091,140,702.00 to facilitate the exit of HIP/JHL.

II. That, as the Controller of Budget, Dr. Margaret Nyakang'o despite the glaring inconsistencies in the letter written by Eng Stanley Kamau, the former DG, Directorate of Public Investments and Portfolio Management allegedly on behalf of Hon (Amb) Ukur Yattani, EGH former CS National Treasury went ahead and granted the approval under Article 223 of the Constitution for the withdrawal of Kshs 6,091,140,702.00 to facilitate the exit of HIP/JHL from TKL

III. That, as the Controller of Budget, Dr. Margaret Nyakang'o did not undertake due diligence while approving the withdrawal of Kshs 6,091,140,702.00 under the use of Article 223 of the Constitution to facilitate the exit of HIP/JHL from TKL.

4.8.2 Hon (Amb). Ukur Yatani, EGH, the former Cabinet Secretary, the National Treasury

445. Under the Cabinet Secretary to the Treasury (incorporation) Act-Cap 101, the Cabinet Secretary of the National Treasury oversees ownership of government shares including shares in public and private companies whereby the Cabinet Secretary transacts business on behalf of the Government.

446. Upon the request by HIP/JHL to exit from TKL through a letter dated 15th July, 2021 addressed to the Government of Kenya for the attention of Hon (Amb) Ukur Yattani, EGH (Annex No 28.), the former Cabinet Secretary the National

Treasury on 29th March 2023 wrote to JHL communicating GOK's decision to accept the JHL's exit through the exercise of PUT OPTION.

447. Prior to communicating the GOK's decision to accept JHL's request to exit TKL, the former Cabinet Secretary of the National Treasury Hon (Amb) Ukur Yattani, EGH on 28th March 2022 received concurrence from the Executive Office of the President to proceed to process the exit of JHL from TKL **(The communication on the concurrence was never presented to the Joint Committee)**

448. On 30th March 2023 the former Cabinet Secretary National Treasury jointly with the former Attorney General prepared and submitted a memorandum to the National Security Council (NSC) **(Annex No 15)**, the memorandum sought the following:

    i) Approval of the exit of HIP in TKL with GOK acquiring the 60% shareholding owned by HIP/JHL at USD 1
    ii) Approval for GOK to take over and compensate HIP/JHL the loan injected by HIP amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million)
    iii) Approval of a budget of Kshs 5.92 billion for FY 2022/23 for TKL to facilitate the implementation of the exit.
    iv) Direct the Cabinet Secretary to the National Treasury and the Attorney General to take the necessary action.

449. During the NSC's second meeting held on 1st April 2022, the NSC considered the memorandum and approved JHL's request to exit TKL and the 100% buyback of TKL by GOK. In its approval, the National Security Council approved the issuance of a three (3) Treasury Bond worth USD 51,186,058 or its equivalent of Kes 6.019 billion under Article 223 of the Constitution as consideration for GOK's 100% buyback of TKL and the same be regularized in the Supplementary budget for FY 2022/23.

450. Arising from the approval of the Joint Memorandum by the NSC, a Joint Cabinet Memorandum by the Cabinet Secretary, the National Treasury and the Attorney General on the exit of JHL from TKL as approved by NSC was prepared and submitted to the Cabinet Office on the 10th May 2022. The Cabinet ratified the NSC's decision during its sitting held on 12th May 2022. The Cabinet approved the issuance of a three (3) Treasury Bond worth USD 51,186,058 or its equivalent of Kes 6.019 billion under Article 223 of the Constitution as consideration to HIP/JHL to exit TKL and allow 100% buyback by GOK and the same to be regularized in the Supplementary budget for FY 2022/23.

451. Eng Stanley Kamau the former Director General, Directorate of Public Investments and Portfolio Management, having reviewed letters dated 1st April, 2022 and 9th May 2022 from the Executive Office of the President forwarded to him by the former Principal Secretary Mr. Julius Muia made recommendations dated 25th July, 2023 to the Cabinet Secretary National Treasury and Planning to approve the payment of USD 51,186,058 through a 3 year Treasury Bond to be paid to JHL under Article 223 of the Constitution and same regularized in the Supplementary budget 2022/23.

452. Upon the recommendations from Eng Stantley Kamau the former DG Directorate of Public Investments and Portfolio Management for the use of Article 223 of the Constitution. The former Cabinet Secretary Hon (Amb) Ukur Yattani, EGH approved the use of Article 223 of the Constitution on 27th July, 2022**(Annex No 35)**.

453. Eng Stanley Kamau, the former DG, the Directorate of Public Investments and Portfolio Management vide a letter Ref TNT/ZZ 331/02 TY6 dated 25th July, 2022 writes a letter purportedly on behalf of Hon (Amb) Ukur Yattani, EGH to the former PS National Treasury Mr. Julius Muia referring him informing him that Government does not issue personalized Treasury Bonds to specific individuals or companies and that payment to JHL amounting to USD 51,186,058 should be made through normal exchequer. This is contrary to Approval by the Cabinet and approval by the Cabinet Secretary of the National Treasury while approving the use of Article 223 of the Constitution.

454. In line with approval processes as provided in Article 223, Mr. Nemwel M Motanya, the Head of Accounting at the National Treasury wrote an exchequer requisition memo Ref NT/CA/50(30) dated 28th July, 2022 **(Annex No 36.)** addressed to FCPA Bemard Ndungu, MBS DG, Accounting Services and Quality Assurance. Pursuant to Section 17(4) of the Public Finance Management Act 2012 FCPA Benard Ndungu through a letter Ref Article 223:FY2022-23/03 dated 28th July, 2022 submits the request to the Controller of Budget.

455. Prio granting the approval on 2nd August, 2022 through a letter Ref COB/TNTP/006/VOL.III (60) **(Annex No 37.)** Dr. Margaret Nyakang'o, the Controler of Budget had on 1st August, 2022 **(Annex No 7)** written to the former PS Julius Muia, requesting copies of share purchase agreements among other documents. It is important that the approval granted for the use of Article 223 of the Constitution granted by Amb Ukur Yattani, EGH, the former CS, the National Treasury was for the issuance of a three (3) year Treasury bond.

456. Having received the approval from the Controler of Budget on 2nd August, 2022. The National Treasury General/Accounting Service and Quality Assurance directorate processed the remittance on 10th August, 2022. It is imperative to note that the National Treasury remitted Kshs 6,196,584,181.45 as opposed to the initial approval under Article 223 of the Constitution of Kshs 6,091,140,902. The difference of Kshs 105,443,279.50 is the exchange rate difference.

The Joint Committee finds;

I. That, as the Cabinet Secretary of the National Treasury, the Hon (Amb) Ukur Yatani, EGH authorized the commencement of the transaction for the exit of JHL from TKL upon initial approval of the National Security Council on 1st April, 2022 and prior to the Cabinet Approval granted on 12th May, 2022. Therefore the transaction was initiated contrary to:

   i. Section 86 of the Public Finance Management Act 2012 that provides that State Corporations may be established or dissolved only with prior approval of the Cabinet.

   ii. Section 87 of the Public Finance Management Act 2012 that provides that, the National Government or National Government entity may not invest in a State corporation or government-linked company without the approval of the Cabinet.

   iii. Advice from the Office of the Attorney General through a letter dated 1st April, 2022 (See Annex No 16) addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require Cabinet Approval.

   iv. Advice from the Office of the Attorney General through a letter dated 1st April, 2022 *(See Annex No 16)* addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require the approval from TKL Board.

II. That, as the Cabinet Secretary of the National Treasury, the Hon (Amb) Ukur Yatani, EGH, in total contravention to the Cabinet resolution on the mode of settlement as dictated by the Cabinet on 12th May, 2022 approved and effected payments to HIP/JHL through a normal exchequer instead of issuance of three (3) Treasury Bond equivalent to USD 51,186,058.

III. That, as the Cabinet Secretary of the National Treasury, the Hon (Amb) Ukur Yatani, EGH having the full knowledge of the date HIP/JHL

communicated its intention to exit TKL i.e 15th July, 2022 and aware of the Budget Circle of the GOK and further aware of the Cabinet Resolution. The Hon (Amb) Ukur Yattani, EGH went ahead and approved the use of Article 223 to withdraw Kshs 6,091,140,702.00 to facilitate the exit of HIP/JHL from TKL in FY 2022 a day after the General Elections.

IV. That, as the Cabinet Secretary of the National Treasury, the Hon (Amb) Ukur Yatani, EGH, the Eng. Stanley Kamau, the former DG, Directorate of Public Investments and Portfolio Management to on his behalf significantly altered the mode of settlement from the use of three (3) Treasury Bond equivalent to USD 51,186,058 to HIP/JHL to settle the transaction to the use of normal exchequer contrary to the approval of the Cabinet and contrary to his approval in approving the use of Article 223 on 27th July, 2022.

V. That, as the Cabinet Secretary the National Treasury, the Hon (Amb) Ukur Yatani, EGH approved the use of Article 223 of the Constitution to withdraw Kshs 6,091,140,702.00 to facilitate the 100% Buyback of TKL from JHL/HIP much aware that the transaction had never received full approval by the Attorney General of Kenya and the Communication Authority of Kenya. *This was evident by the letter dated 30th August, 2022 (Annex No 19) by the Office of Attorney seeking clarification from the Cabinet Secretary the National Treasury on several issues including but limited to Approvals, Deed of Variation and Escrow Aggrements.*

4.8.3 Mr. Joe Mucheru, former Cabinet Secretary Ministry of ICT

457. Mr. Mucheru was the immediate former Cabinet Secretary for the Ministry of ICT, Innovation and Youth Affairs. The Ministry provided the regulatory approval of the acquisition of TKL through the Communications Authority of Kenya, which gave conditional approval to the National Treasury upon their request. Further, Mr. Mucheru was not involved in the negotiations for the acquisition of TKL.

The Joint Committee finds:

I. That, despite the fact that, Mr. Joe Mucheru said he was involved in the approval and implementation of the transaction, Executive Order No. 1 of 2021 placed TKL as agencies under the purview of the Ministry of ICT, Innovation and Youth Affairs and hence 100% buyback of the TKL could not have been undertaken without his consent.

II. **That, despite the assertion by Mr. Mucheru former Cabinet Secretary for the Ministry of ICT, Innovation and Youth Affairs that he wrote to the Head of Public Service (HOPS) seeking a correction of Executive Order No. 1 of 2021 to remove TKL from the list of State Corporation under the State Department of ICT, he did not provide any letter proving his assertion.**

4.8.4 Mr. Julius Monzi Muia, former Principal Secretary the National Treasury

458. That, on 8th April 2022, Mr.Julius Muia received a letter from the Executive Office of the President communicating the National Security Council's decision to approve the exit of JHL from TKL. He consequently marked the letter to Eng Stanley Kamau, Director General, Public Investments and Portfolio Management National Treasury to make appropriate recommendations.

459. The Director General Public Investments and Portfolio Management National Treasury reviewed and recommended the approval of the payment of USD51,186,058 through a 3-year Treasury Bond to be paid to JHL under Article 223 of the Constitution and the same regularized in the Supplementary Estimates I FY 22/23.

460. Upon the recommendations from Eng Stantley Kamau the former DG Directorate of Public Investments and Portfolio Management for the use of Article 223 of the Constitution. The former Cabinet Secretary Amb Ukur Yattani, EGH approved the use of the Article 223 of the Constitution vide a letter addressed to former PS Julius Muia Ref RESTNT/ZZ/331/02 TY6 dated 27th July 2022**(Annex No 35)**.

461. Eng Stanley Kamau, the former DG, Directorate of Public Investments and Portfolio Management vide a letter Ref TNT/ZZ 331/02 TY6 dated 25th July, 2022 writes a letter to the former PS National Treasury Mr. Julius Muia referring him to letter Ref RESTNT/ZZ/331/02 TY6 dated 27th July, 2022 *(a date which is not feasible)* informing him that Government does not issue personalized Treasury Bonds to specific individuals or companies and that payment to JHL amounting to USD 51,186,058 should be made through normal exchequer. This is contrary to Approval by the Cabinet and approval by the Cabinet Secretary of the National Treasury.

462. In line with approval processes as provided in Article 223, Mr. Nemwel M Motanya, the Head of Accounting, the National Treasury prepared an exchequer requisition memo Ref NT/CA/50(30) dated 28th July, 2022 **(Annex No 36)** addressed to FCPA Bemard Ndungu, MBS DG, Accounting Services and

Quality Assurance. Pursuant to Section 17(4) of the Public Finance Management Act 2012 FCPA Benard Ndungu through a letter Ref Article 223:FY2022-23/03 dated 28th July,2022 submits the request to the Controler of Budget.

463. Prio granting the approval on 2nd August,2022 through a letter Ref COB/TNTP/006/VOL.III(60) **(Annex No 7)** Dr. Margaret Nyakang'o, the Controler of Budget had on 1st August, 2022 **(Annex No 7)** written to the former PS Julius Muia, requesting copies of the Share purchase agreement among other documents, subsequently the former PS Julius Muia provided the documents. It is important that the approval granted by the Hon (Amb) Ukur Yattani, EGH, the former Cabinet Secretary of the National Treasury for the use of Article 223 of the Constitution provided for the issuance of a three (3) year Treasury Bond.

464. Mr. Muia wrote to the Chairperson TKL Board requesting the Board process that change of shareholding in TKL following the 100% buyback of TKL.

The Joint Committee finds

I. That, as the former Principal Secretary of the National Treasury, Mr. Julius Muia authorized the commencement of the transaction for the exit of JHL from TKL upon initial approval of the National Security Council on 1st April, 2022 and prior to the Cabinet Approval granted on 12th May, 2022. Therefore the transaction was initiated contrary to:

   i. Section 86 of the Public Finance Management Act 2012 that provides that State corporations may be established or dissolved only with prior approval of the Cabinet.

   ii. Section 87 of the Public Finance Management Act 2012 states that the National Government or National Government entity may not invest in a State corporation or government-linked company without the approval of the Cabinet.

   iii. Advice from the Office of the Attorney General through a letter dated 1st April, 2022 (See Annex No 16) addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require Cabinet Approval.

   iv. Advice from the Office of the Attorney General through a letter dated 1st April, 2022 *(See Annex No 16)* addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require the approval from TKL Board.

II. That, as the Principal Secretary of the National Treasury, Mr. Julius Muia in total contravention to the Cabinet resolution on the mode of settlement as dictated by the Cabinet on 12th May, 2022 approved and effected payments to HIP/JHL through a normal exchequer instead of issuance of three (3) Treasury Bond equivalent to USD 51,186,058.

III. That, as the Principal Secretary of the National Treasury, Mr. Julius Muia and having full knowledge of the date HIP/JHL communicated its intention to exit TKL i.e. 15th July,2022 and aware of the Budget Circle of the GOK and further aware of the Cabinet Resolution. Mr Julius Muia, the former Principal Secretary of the National Treasury did not provide prudent advice to the GOK that resulted in approval for the use of Article 223 to withdraw Kshs 6,091,140,702.00 to facilitate the exit of HIP/JHL from TKL in FY 2022 a day after the General Elections.

IV. That, as the Principal Secretary the National Treasury, Mr Julius Muia processed the withdrawal of Kshs 6,091,140,702.00 under Article 223 to facilitate the 100% Buyback of TKL from JHL/HIP much aware that the transaction had never received full approval by the Attorney General of Kenya and the Communication Authority of Kenya.

4.8.5 Eng. Stanley Kamau the Former Director of General Public Investments and Portfolio Management of the National Treasury

465. His role was to advise the Principal Secretary (Accounting officer) and Cabinet Secretary, the National Treasury on the ownership function of the National Treasury with respect to Government investments, and in this case TKL.

466. On 27th August 2021, he assisted the former Cabinet Secretary, the National Treasury the Hon (Amb) Ukur Yatani, EGH in preparing a brief informing the Executive Office of the President on the JHL exit decision, and sought concurrence on the exit. Eng. Kamau also assisted the former Cabinet Secretary in seeking regulatory approvals from the Communications Authority of Kenya and the Competition Authority of Kenya

467. That, on 8th April 2022, Mr.Julius Muia received a letter from the Executive Office of the President communicating the National Security Council's decision to approve the exit of JHL from TKL. He consequently marked the letter to Eng Stanley Kamau, Director General, Public Investments and Portfolio Management National Treasury to make appropriate recommendations.

468. The Director General Public Investments and Portfolio Management National Treasury reviewed and recommended the approval of the payment of USD51,186,058 through a 3-year Treasury Bond to be paid to JHL under Article 223 of the Constitution and the same regularized in the Supplementary Estimates I FY 22/23.

469. Upon the recommendations from Eng Stantley Kamau the former DG Directorate of Public Investments and Portfolio Management for the use of Article 223 of the Constitution. The former Cabinet Secretary Hon (Amb) Ukur Yattani, EGH approved the use of the Article 223 of the Constitution vide a letter addressed to former PS Julius Muia Ref RESTNT/ZZ/331/02 TY6 dated 27th July, 2022**(Annex No 35)**.

470. Eng Stanley Kamau, the former DG, Directorate of Public Investments and Portfolio Management vide a letter Ref TNT/ZZ 331/02 TY6 dated 25th July, 2022 writes a letter to the former PS National Treasury Mr. Julius Muia referring him to letter Ref RESTNT/ZZ/331/02 TY6 dated 27th July, 2022 *(a date which is not feasible)* informing him that Government does not issue personalized Treasury Bonds to specific individuals or companies and that payment to JHL amounting to USD 51,186,058 should be made through normal exchequer. This is contrary to Approval by the Cabinet and approval by the Cabinet Secretary the National Treasury.

The Joint Committee finds;

I. **That, as the Director General, Directorate of Public Investments and Portfolio Management, Eng Stanley Kamau participated and misled the Hon (Amb) Ukur Yatani, EGH, the former Cabinet Secretary, the National Treasury to commence the processing of the exit of JHL from TKL without the prior to the Cabinet Approval granted on 12th May, 2022. Therefore the transaction was initiated contrary to:**

   i. **Section 86 of the Public Finance Management Act 2012 that provides that State Corporations may be established or dissolved only with prior approval of the Cabinet.**

   ii. **Section 87 of the Public Finance Management Act 2012 provides that the National Government or National Government entity may not invest in a State corporation or government-linked company without the approval of the Cabinet.**

   iii. **Advice from the Office of the Attorney General through a letter dated 1st April, 2022 (See Annex No 16) addressed to Hon (Amb)**

Ukur Yatani, EGH requiring that the transaction would require Cabinet Approval.

iv. Advice from the Office of the Attorney General through a letter dated 1st April, 2022 *(See Annex No 16)* addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require the approval from TKL Board.

II. That, as the Director General, Directorate of Public Investments and Portfolio Management, Eng Stanley Kamau recommended to the Hon (Amb) Ukur Yatani, EGH, the former Cabinet Secretary, the National Treasury to commence the processing of the exit of JHL from TKL contrary to advise from the Attorney General. Therefore the transaction was initiated contrary to:

a) Advice from the Office of the Attorney General through a letter dated 1st April, 2022 (See Annex No 16) addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require Cabinet Approval.

b) Advice from the Office of the Attorney General through a letter dated 1st April, 2022 *(See Annex No 16)* addressed to Hon (Amb) Ukur Yatani, EGH requiring that the transaction would require the approval from TKL Board.

III. That, as the Director General, Directorate of Public Investments and Portfolio Management, Eng Stanley Kamau, purportedly writing on behalf of Hon (Amb) Ukur Yatani, the former Cabinet Secretary, the National Treasury in total contravention of Cabinet Approval significantly altered the mode of settlement from the use of three (3) Treasury Bond equivalent to USD 51,186,058 to HIP/JHL to the use of normal exchequer.

IV. Contrary to the assertion by Eng Stanley Kamau, Director General, Directorate of Public Investments and Portfolio Management that he did not participate in the negotiation for the exit of JHL. Several witnesses including the JHL transaction advisor confirmed having held meetings with Eng Kamau on the matter in question.

4.8.6 FCPA Bernard Ndung'u, Director General Accounting Services and Standards the National Treasury.

471. FCPA Bernard Ndung'u, as the Director General of Accounting Services and Quality Assurance at the National Treasury approved the issuance of exchequer for payment of KShs. 6,196,584,181. This was done after approval by the Cabinet Secretary of the National Treasury and the OCOB.

472. In line with approval processes as provided in Article 223, Mr. Nemwel M Motanya, the Head of Accounting, the National Treasury prepared an exchequer requisition memo Ref NT/CA/50(30) dated 28th July, 2022 **(Annex No 36)** addressed to FCPA Bemard Ndungu, MBS DG, Accounting Services and Quality Assurance. Pursuant to Section 17(4) of the Public Finance Management Act 2012 FCPA Benard Ndungu through a letter Ref Article 223:FY2022-23/03 dated 28th July, 2022 submits the request to the Controller of Budget.

The Joint Committee finds

I. That, as the Director General Accounting Services and Quality Assurance, FCPA Bemard Ndungu, MBS facilitated the issuance of the exchequer and payment of KShs. 6,196,584,181 (USD USD 51,186,058), based on the approval by the Cabinet Secretary of the National Treasury and the OCOB in line with the established procedure.

II. Having received the approval from the Controller of Budget on 2nd August, 2022, the National Treasury General/Accounting Service and Quality Assurance directorate processed the request for withdrawal of the funds to the Controller of Budget, and approval was granted on 5th August 2022. It is imperative to note that the amount under Article 223 of the Constitution of Kshs 6,091,140,902 (USD 51,186,086 at an estimated rate of KShs 119/1 USD). However, the National Treasury remitted Kshs 6,196,584,181.45 (USD 51,186,058 at the actual CBK rate of 121.06/1 USD at the date of payment). The difference of Kshs 105,443,279.50 was as a result of the exchange rate difference. The request for withdrawal of the additional amount was approved by the Controller of Budget on 25th August 2022.

4.8.7 Mr. Edward Njoroge, Chairperson of the Board of TKL

473. Mr. Edward Njoroge was nominated and appointed as a Board member by the HIP/JHL. He became chairperson of the Board courtesy of being a member of the Board nominated by JHL. Despite his assertion that he was an independent

Board Member, it was clear he was representing the majority shareholder in the Board.

474. Mr Njoroge submitted that KShs. 6.091 billion was not disbursed to TKL in part or whole. The Chairperson was not privy to the negotiations of the shareholders and the only indication which could have been read as exit signals were:

i. The proposed merger with Airtel although it was not an exit but a value addition, it was nevertheless an indication of JHL's eventual exit.

ii. Thereafter on 24th January 2022 **(See Annex TI 22)**, JHL wrote to Telkom Kenya indicating their intention to terminate the Management Services Agreement.

iii. The Board was not given a request by JHL of their intention to exit. Ordinarily, this would not come to the company but directly to the other shareholders.

iv. TKL was only informed about the exit of JHL vide a letter dated 11th August (received on 18th August from Paul Cunningham a Director of JHL **(See Annex TI 20)**. This was followed by a letter from the CS National Treasury dated 19th August 2022 **(See Annex TI 21)** from the National Treasury to the Chairman of the Board.

475. On 29th August 2022, while responding to the letter from Hon (Amb) Ukur Yattani, EGH former, Cabinet Secretary National Treasury, Mr. Edward Njoroge raised the following Board's concerns on the transaction.

i. Inability to transact as a Board due to a lack of quorum due retirement of two Board Members
ii. The Board will require assurance from the Attorney General on the transaction since the Board was never involved in the transaction
iii. The status of the TKL converting to a State Corporation and the significant challenge that will be posed to the operations of TKL
iv. How notification to the employees and stakeholders of TKL will be undertaken on the pending changes

476. That, at the exit point, the value ascribed to shares was USD1 which was a token rather than the value of shares. The shareholder's loans worth USD 290 million were bought for USD 51 million by the GOK. However, as per the audited accounts of TKL as at 31 December 2021, shareholders' funds were in a deficit position.

The Joint Committee finds

I. Despite the fact that Mr. Edward Njoroge, Chairperson of TKL wrote a letter dated 29th August 2022 (Annex No 23) to Hon (Amb) Ukur Yattani, EGH former Cabinet Secretary, the National Treasury in respect to several Board's concerns on the transaction. The Board did not receive any clarification from the former Cabinet Secretary of the National Treasury.

II. The transfer of shareholding from HIP/JHL to GOK will require to be done by the Board. However, to date, the process is yet to be undertaken.

4.8.8 Mr. Mugo Kibati, Chief Executive Officer TKL

477. As the Chief Executive Officer of TKL, Mr. Kibati confirmed that the Kshs 6.091billion withdrawn to facilitate the exit of JHL from TKL was never disbursed to TKL in part or whole and therefore, the Board was not aware of the payment, account particulars, and the amounts paid.

478. Mr Kibati confirmed that TKL received USD 47 million on diverse dates between 2016 and 2019 as a shareholder loan from JHL. He noted that as of December 2018, shareholder loans stopped accruing interest based on the negative nature of TKL's balance sheet.

479. He participated in the proposed merger between TKL and Airtel Kenya in 2019. However, the transaction was not allowed to proceed by GOK on account of National Security issues.

480. According to the CEO, the expropriation of one of the largest TKL properties on Ngong Road by GOK without the majority shareholder in the company exacerbated the already frosty relations between JHL and GOK. However, despite several interventions, the TKL did not receive any explanation on the expropriation leading to TKL proceeding with the Court.

481. Mr. Mugo was of the view that TKL should be retained as a private entity due to the complexities that it would face if converted into a state entity.

The Joint Committee finds

That, Mr Mugo Kibati, the CEO of the company, confirmed that indeed TKL had in the past received USD 47 million from JHL as a shareholder loan. However, TKL did not receive the KShs. 6.091 billion from GOK being reimbursement (principal plus interest) to JHL at the latter's exit.

4.8.9 Anjarwalla & Khanna (A&K)

482. Anjarwalla & Khanna (A&K) acted on behalf of JHL and HIP. Additionally, according to the Hon (Amb). Ukur Yatani, EGH, the former Cabinet Secretary National Treasury A&K also acted for GOK, an assertion that A&K denied.

483. Anjarwalla & Khanna (A&K) prepared the Share Purchase Agreement (SPA) in the 100% Buyback of TKL by the GOK

484. JHL maintained a Management Incentive Programme (MIP) for TKL. The programme was maintained by Adili Trustees, a wholly owned subsidiary of A&K. However, there was no clear evidence showing a conflict of interest on the part of A&K in the management of the MIP.

485. Anjarwalla & Khanna (A&K) were appointed as the Escrow Agents for the 100% Buyback of TKL from HIP/JHL despite acting on behalf of JHL and HIP. However, the National Treasury did not make payment for Escrow Agent fees. The full amount was borne by Anjarwalla & Khanna (A&K)

486. Anjarwalla and Khanna LLP (A&K) started representing JHL in 2015 when JHL was formed and JHL was considering an investment in TKL. However, before that, Anjarwalla and Khanna LLP (A&K) had represented Helios in various other transactions.

The Joint Committee finds

I. **That, despite the concerns raised on the appointment of Anjarwalla & Khanna (A&K) as the Escrow Agents for the 100% buyback of TKL by GOK owing to the fact A&K was acting on behalf of (HIP/JHL). There was no demonstrable evidence of conflict of interest on the part of Anjarwalla & Khanna (A&K)**

II. **Anjarwalla & Khanna (A&K) were appointed as the Escrow Agents for the 100% Buyback of TKL by HIP/JHL and GOK despite acting on behalf of JHL and HIP. However, the National Treasury did not make any payment for Escrow Agent fees. The full amount was borne by HIP/JHL.**

4.8.10 Mr John Ngumi

487. On 1st April 2022, Mr. John Ngumi was appointed by JHL as an advisor in his individual capacity through an advisor agreement. His appointment was in connection with JHL's decision to exit TKL. The appointment was consistent and in line with his long-standing advisory contract with Helios Investment Partners

dating back to 2016. He stated that Helios Investment Partners are the advisors to the Funds that own JHL

488. Mr. Ngumi's role was that of the advisor and not the Transaction advisor. As an advisor, his roles entailed:
   i. Supporting JHL, its Partners, managers, directors and or officers in the sourcing of and engaging with counterparties that were potential acquirers of JHL's interests in TKL.
   ii. Advising on the structure of the transaction.
   iii. Working with any other advisors who may be appointed by JHL in the preparation and negotiation of translation documents with the preferred counterparties.
   iv. Supporting efforts to ensure successful closure and remittance of USD-denominated funds to JHL remittance.

489. Mr Ngumi received a total of USD 3,071,163 as an advisory fee from JHL which was paid to him on 25th November 2022 in line with the terms of the agreement.

The Joint Committee finds

I. **That, Mr. Ngumi was appointed as an advisor to JHL and was never the Transaction Advisor.**

II. **That, Mr. John Ngumi, was formally appointed as Advisor by JHL on 1st April 2022, the day when the National Security Council approved the National Security Council (NSC) approved a Joint memorandum prepared and submitted by Hon (Amb) Ukur Yatani, EGH former Cabinet Secretary, the National Treasury and Rtd Justice John Kihara, the former Attorney General on the exit of JHL, complete with agreed terms. The Committee notes that prior to JHL formally engaging Mr. Ngumi, Helios Investment Partners HIP had had Mr. Ngumi as an advisor since 2016 specifically to provide strategic advisory services to HIP, including on Helios's and Jamhuri's continued involvement in TKL and subsequent decision to exit Telkom, including on the terms that were presented to the NSC**

4.8.11 Helios Investment Partners III/ Jamhuri Holdings Limited (JHL)

490. Helios Investment Partners was the largest African-focused private equity firm and was headquartered out of London, UK and regulated by the UK Financial Conduct Authority (FCA). By the time of submission, funds advised by Helios had invested in over 30 companies across 25 countries in Africa creating over 10,000 jobs.

491. JHL which was wholly owned by Helios Investment Partners (HIP) was a limited liability company incorporated in Mauritius and with registration number 134048C2/GBL. Its official address was Level 3 Alexander House, 35 Cybercity, Ebene, Mauritius.

492. The incorporation of Helios in the United Kingdom, and JHL in Mauritius was fully in line with Kenyan laws. This was also reflective of a standard structure commonly adopted by many other local and international investors in Kenya and across the world, particularly those that invest in multiple jurisdictions such as Helios, which invests in multiple African jurisdictions.

493. In the case of Helio's investment in TKL, JHL was set up as a Special Purpose Vehicle, whose sole purpose was to hold the firm's investment in Telkom Kenya and his role as a director was to ensure primarily the protection of its investors.

494. JHL was the legal entity used by Helios in the TKL transaction and became a shareholder in TKL in June 2016 following a buyout of France Telkoms (Orange) Investment in TKL. Orange's decision to exit business was precipitated by the significant challenges the business and its holders were facing, some of which had led to the dilution of the shareholding of the Government of Kenya (GOK) in TKL from 49% at the time of investment by the orange down to 30% at the time of Orange exit.

495. Helios, through its wholly owned subsidiary JHL, took up the challenge of turning around TKL based on its abilities and encouragement by the GOK with a clear understanding that certain policy and regulatory interventions would be forthcoming to remedy the market's competitiveness and other structural (including potential market consolidation), Legal and regulatory Legal at regulatory challenges prevalent in Kenya's telecoms sector. The commitment was affirmed by JHL having the option to exit its investment to GOK in certain circumstances the PUT OPTION

496. In June 2016, JHL acquired from Orange its 70% shareholding stake in TKL and shareholder loans that had been extended from Orange to Telkom Kenya amounting to USD 332,832,907. The transaction was between two private parties and did not involve the sale of any assets, rights or obligations or payments by GOK.

497. As an act of goodwill at the time of its entry into TKL, JHL ceded to GOK 10% of the shares and USD 133,133,163 of shareholder loans in TKL that it had acquired from Orange at no consideration or payment by GOK. Consequently,

GOK's shareholding in TKL increased from 30% to 40% and GOK also acquired USD 199,699,744 of Shareholder loans in TKL.

498. Since becoming a shareholder, JHL injected an additional sum of USD 47,720,000 of shareholder loans into TKL. The accrued interest on the loan up to 31st December 2020 when JHL decided to freeze any interest accruing amounted to USD 3,466,057. Hence the total amount of principal and accrued interest in July, 2022 was USD 51,186,000,057.

499. No valuation of shares in TKL was conducted as the shares were acquired at a nominal value of USD 1 and transferred to GOK at USD 1, therefore, JHL did not offload its shareholding in TKL to GOK at any premium.

500. JHL informed GOK of its decision to exit TKL in July 2021 by exercising its PUT OPTION. The exit was prompted by the failure to attain shareholder alignment on the company's strategic direction, GOK's disapproval (as a shareholder) of a merger transaction with Airtel Kenya occasioning material loss of value to TKL and its shareholders and arbitrary expropriation of the company's prime assets. There was no legal requirement for JHL to inform the Board of TKL of JHL's intention to exit from TKL before communicating the same to the National Treasury.

501. The transaction did not involve a transfer of any physical assets and liabilities. However, it involved the transfer of Shares and Shareholder's loans.

502. The purchase of shares was effected through a share purchase agreement dated 31st May 2022 as amended (the 2022 SPA). The transaction comprised the following;
    i. GOK acquiring 60% of TKL's shareholding from JHL at the consideration of USD 1
    ii. GOK, acquiring USD 239,938,692 of JHL shareholder loan acquired from Orange (Principal plus accrued interest to 31st December 2020) at a consideration of USD 1.
    iii. GOK acquired the additional JHL shareholder loan of USD 51,186,057 (principal plus accrued interest to 31st December 2020) at a consideration of USD 51,186,057.

503. The transaction between JHL and GOK was completed on 12th August 2022 following receipt of USD 51,186,057 by JHL from GOK and delivery of the fully signed transfer documents including fully signed share transfers from JHL to GOK.

504. There were no taxes payable under the law by JHL in connection with the exit transaction because;

i. With respect to capital gains tax, JHL did not make any gain in connection with the exit transactions and therefore there were no capital gain taxes payable by JHL in connection with the exit. In particular;

ii. JHL sold all its shares in TKL (i.e. 60% of TKL's shareholding) to GOK at a nominal consideration of USD 1 and therefore made no gain on the sale.

iii. JHL transferred USD 239,938,692 of JHL's shareholder loan acquired from Orange (Principal plus accrued interest to 31st December 2020) at the nominal consideration of USD 1 and therefore made no gain on the transfer.

iv. JHL transferred the additional shareholder loan advanced by JHL of USD 51,186,057 (principal plus accrued interest as of December 2020) at face value (i.e. at USD 51,186,057) and therefore JHL did not make amna gain on the transfer

505. With respect to stamp duties, under Kenyan laws, stamp duties in connection with a transaction were payable by the buyer (in this case the GOK). GOK was however entitled to stamp duty exemption for such transfers.

506. Out of the USD 51 million JHL received as consideration for the exit from TKL. The monies were paid out for the following:

i) Management of Telkom Kenya Limited
ii) Escrow agent services
iii) Legal services and
iv) Transaction advisor

Date	Amount in USD	Payee	Details
11/08/2022	51,186,058.00		Gross proceeds received by Jamhuri Holdings Limited
Payment to the Helios Investment Partners (HIP) Fund			

19/09/2022	41,786,058.00	Helios Investment Partners III Subco I Ltd	This payment to the Helios Fund was subsequently distributed to its International institutional investors, including Global multi-lateral Finance organizations and leading Sovereign Wealth funds.
Payment to Legal and Transaction Advisors			
07/11/2022	422,991.46	ALN Kenya Anjarwalla & Khanna	This was a payment on account of legal fees for work done and fees to act as an escrow agent.
18/11/2022	1,000,000.00	Investment Bank	This was a payment of fees to an International Investment Bank, as transaction Advisor on JHL's exit from TKL, pursuant to agreed terms and conditions. This process commenced in early 2022. The name of the Bank entity could not be disclosed.
25/11/2022	3,071,163.00	John Ngumi	This was payment to Mr. John Ngumi for acting as an Advisor to JHL in connection with a sale of JHL's interests in TKL, pursuant to agreed terms and conditions.
c). payment to various employees and officers of Telkom Kenya			
18 - 25/11/2022	1,320,996.00	Various employees and officers of Telkom Kenya	The sum of payments made pursuant to a **Management Incentive scheme.**

20/11/2022	2,661,675.00	Adili Trustees Limited as trustees for the TKL Management Incentive Plan	This was a payment received for and on behalf of the TKL Management Incentive Plan, on account of which Adili Trustees Limited held redeemable (non-voting) shares in TKL. The plan was entered into and approved by the Board of TKL in 2018. These funds were subsequently paid out to the current and former staff of TKL who had vested rights in the Management Incentive Plan.
Total payments made	**50,262,883.46**		**This is the sum of all payments made**
31/12/2022	1,003,847.98		Balance held in the Bank as of 31st December 2022 (includes interest earned on the account) **(USD 80,862)**

507. On the correspondence on the PUT OPTION negotiations of the 60% shareholding price, reimbursement of the USD 51 million loan and copy of the share purchase agreement between the Government of Kenya and Jamhuri Holdings entered at the entry in 2016 and exit in 2022. the following documents were availed:
    i. A copy of the Put Option notice sent to GOK by JHL dated 15th July 2021 was availed **(See Annex 28)**
    ii. A copy of GOK's acceptance of the Put Option dated 29th March 2022 was available to the Committee **(See Annex 30)**
    iii. A copy of the share purchase agreement (SPA) between JHL and GOK dated 31st May 2022 in relation to the sale and purchase of shares and shareholder loans in TKL. **(see Annex 31)**
    iv. A copy of the deed of variation to the SPA dated 29th July 2022 **(See Annex 32)**
    v. A copy of the duly signed share purchase agreement dated 31st May 2022 with the longstop date of 29th July 2022 **(See Annex 31)**

508. With respect to the shareholding of TKL, the Former Solicitor General indicated that as per the Companies Registry, at the time of his submission, TKL's ownership structure was as follows:

Name	Designation	Shares
Government of Kenya	Shareholder	37.91%
Jamhuri Holdings Ltd	Shareholder	56.88%
Adili Trustees	Shareholder	5.21%
Total Shares		100

509. Despite the payment of KShs. 6.091 billion to JHL for the 100% acquisition of TKL by GOK, the records in the Business Registration Service still indicated the shareholding as 60% JHL and 40% GOK.

The Joint Committee finds:

I. **Mr. John Ngumi acting as an Advisor to JHL and not a Transaction Advisor was paid USD 3,071,163.00**

II. **HIP/JHL maintained a Management Incentive Program (MIP) that allowed management staff at TKL to vest Shares as well as retain their services. At the exit of HIP/JHL, a total of USD 3,982,671.00 was paid out to staff at the Management level.**

III. **Despite the payment of KShs. 6.091 billion to JHL for the 100% acquisition of TKL by GOK, the records in the Business Registration Service still indicated the shareholding as 60% JHL and 40% GOK.**

IV. **Out of the USD 51 million JHL received as consideration for the exit from TKL.**

   i. **USD 41,786,058.00 was paid out to the Helios Fund**
   ii. **USD 422,991.46 was paid out to ALN Kenya Anjarwalla & Khanna for the Legal fees and fees for the escrow account.**
   iii. **USD 1,000,000.00 was paid out to an Investment Bank whose name was withheld by HIP/JHL**

4.9 OTHER ISSUES FOR DETERMINATION

The Joint Committee finds:

I. By dint of the payment made to JHL by GOK, TKL owes the Government of Kenya Kshs. 6.019 billion in the form of a shareholder loan.

II. There is no legal framework for the re-acquisition of formerly state-owned agencies by the GOK.

III. The national security entities in other countries work with private telcos in the discharge of their mandate, contrary to assertions that Kenya's national security would be jeopardized by TKL being privately controlled.

IV. That, the National Treasury is duty-bound to participate in the reconstitution of the Board of TKL to align the strategic focus of the company.

CHAPTER FIVE

5.0 COMMITTEE RECOMMENDATIONS

510. The Committee having received written and oral submissions and having arrived at its findings, therefore recommends the following:

ADMINISTRATIVE RECOMMENDATION

511. **THAT,** the HIP III/JHL transaction, being incomplete, be completed expeditiously in the following manner:

I. **THAT,** TKL **should be retained as a private entity** with the government as a minority shareholder to enhance the company's competitiveness, sustainability and efficacy in the market.

II. **THAT,** to support TKL's strategic positioning as a private entity, the National Treasury should promptly facilitate the selection of a suitable private investor who will make the necessary investments to transform the company into profitability on or before 29 December 2023.

III. **THAT,** through an amendment to the incomplete transaction, the National Treasury should ensure that GOK is reimbursed the Kshs. 6.019 billion paid to HIP/JHL at the onboarding of the new investor.

IV. **THAT,** the National Treasury through the exercise of its shareholder rights should ensure that it promptly receives the commitment of the new investor to protect the national strategic assets held by TKL.

V. **THAT,** the National Treasury and the new investor actively cooperate to strengthen the balance sheet of the company to accelerate its growth and viability.

VI. **THAT,** the National Treasury, in conjunction with the new investor, actively participates in the reconstitution of the Board of TKL to align it with the growth and sustainability aspirations of the company.

VII. **THAT,** the National Treasury facilitates urgent settlement of pending public sector bills owed to TKL to shore up the company's liquidity pending completion of the transaction, in any event no later than within the financial year 2023/2024.

VIII. **THAT,** the above recommendations be completed imminently, through the facilitation of the National Treasury, in order to safeguard the operations of the company.

512. **THAT,** the National Treasury, in consultation with the Ministry of Youth Affairs, Sports and the Arts, expeditiously moves to resolve the issue of expropriation of the company's property along Ngong Road (LR. No. 7656) by way of return of the property to TKL or compensation and in any event within a period not exceeding the next fiscal year of the Government of Kenya from the date of this report. The Committee recognizes that this property is Telkom Kenya's highest-value property asset, and its unlawful expropriation has denied the company access to its property and, in so doing injured the company by negatively affecting its operations.

513. **THAT,** owing to numerous inconsistencies in the letters authored by various parties with respect to the transaction, the Directorate of Criminal Investigation (DCI) conducts a forensic audit of all the paper trails and documents with respect to the transaction to ascertain the authenticity of various documents and records and whether they might have been authored and prepared after the fact.

514. **THAT,** Parliament explores Constitutional amendments to limit the application of Article 223 of the Constitution during electoral transitioning

POLICY RECOMMENDATION

515. **THAT,** the Ministry of Information, Communications and Digital Economy and the Communications Authority of Kenya review the regulatory and policy environment governing the telecommunications sector and implement policy initiatives to ensure fairness, foster competition, and promote market development to support a thriving telecommunications sector for the benefit of all Kenyans by 30 June 2024. This review should include, but is not limited to:

    I. The policy and/or regulations concerning spectrum frequency allocation ensure that no market player is allocated a majority of the frequency spectrum preventing distortion of competition through unjust allocations and spectrum hoarding.
    II. The policy and/or regulations concerning telecommunications infrastructure sharing to ensure that there are no underserved areas or communities in the Republic of Kenya; ensuring that all Kenyans have access to broadband coverage at an affordable cost.
    III. The policy and/or regulations concerning mobile termination rates to reduce the cost of calls for consumers.
    IV. The policy and/or regulations concerning SIM card registration to ensure compliance and conformity with a central reference database such as the Integrated Population Registration Database System (IPRS) or other suitable national registration databases.

V. The policy and/or regulations concerning mobile number portability to ensure that customers can port their mobile numbers to other networks to enhance customer choice.

VI. And any other policies and/or regulations that will facilitate market correction, spur innovation and competition, improve broadband coverage, improve quality of service, reduce the cost of calls and data, enhance consumer choice, and promote the overall development of the telecommunications sector in Kenya.

516. **THAT**, the National Assembly Departmental Committee on Finance and National Planning revises the regulatory framework with a view of defining a legal process for potential future nationalization/buyback of private entities.

517. **THAT,** within one hundred twenty (120) days of the House adopting this report, the Departmental Committee on Communication Information and Innovation conducts an inquiry into circumstances that have led to the underperformance of the TKL as a telecommunication operator despite huge capital support from the previous investors, whether there is the existence of dominant player in the telecommunication industry and how to ensure a level playing field in the industry.

FURTHER INVESTIGATION

518. **THAT,** the Ethics and Anticorruption Commission undertake a further investigation on all persons who facilitated the 100% buyback of Telkom Kenya Limited to ascertain whether they discharged their role on this matter in strict and full compliance with the Constitution of Kenya, the Public Finance Management Act 2012, Public Procurement and Disposal Act 2015, the Public Finance Management (National Government) Regulations 2015 and whether there was any conflict of interest on their part.

.....

DATE..... 26th October, 2023

Hon CPA Kuria Kimani, MP
Chairperson
Departmental Committee on Finance and National Planning

.....

DATE..... 26/10/2023

Hon. John Kiarie Waweru, MP
Chairperson
Departmental Committee on Communication Information Innovation

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 26 OCT 2023
TABLED BY: Hon CPA Kuria Kimani (Finance and National Planning Committee)
Anne Shibuko

THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION (2023)
COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION LIST

Date: 25th October 2023 **Venue: Committee Room 9**

AGENDA: Adoption of the Joint Committee Report on Inquiry into 100% Buyback of Telkom Kenya Ltd.

No.	NAME	SIGNATURE
1.	Hon. (CPA). Kuria Kimani, MP - Chairperson	
2.	Hon. (Amb). Benjamin Kipkirui Langat, MP – Vice Chairperson	
3.	Hon. Dr. Adan Keynan Wehliye, MP	
4.	**Hon. George Sunkuyia Risa, MP**	
5.	Hon. (CPA) Joseph Maero Oyula, MP	
6.	Hon. Andrew Adipo Okuome, MP	
7.	Hon. David Mwalika Mboni, MP	
8.	Hon. Joseph Makilap Kipkoros, MP	
9.	Hon. Joseph Kamau Munyoro, MP	
10.	Hon. (CPA) Julius Kipletting Rutto, MP	
11.	Hon. Paul Kibichiy Biego, MP	
12.	Hon. Umul Ker Sheikh Kassim, MP	
13.	Hon. Dr. Shadrack Mwiti Ithinji, MP	
14.	Hon. Dr. John Ariko Namoit, MP	
15.	Hon. Mohamed Soud Machele, MP	

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - SECOND SESSION – 2023

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

ATTENDANCE/ADOPTION SCHEDULE

Agenda: Consideration and adoption of the Joint Committee Report on the inquiry into 100% buyback of Telkom Kenya Ltd.

Date: 25th October 2023

No.	MEMBER	SIGNATURE
1.	Hon. John Kiarie Waweru, MP - **Chairperson**	
2.	Hon. Alfah Miruka Ondieki, MP – **Vice Chairperson**	
3.	Hon. Shakeel Shabbir Ahmed, CBS, MP	
4.	Hon. Erastus Kivasu Nzioka, MP	
5.	Hon. Joseph Kipkosgei Tonui, MP	
6.	Hon. Bensuda Joyce Atieno Osogo, MP	
7.	Hon. Bernard Kibor Kitur, MP	
8.	Hon. Geoffrey Wandeto, MP	
9.	Hon. Gideon Kimaiyo Kipkoech, MP	
10.	Hon. Flowrence Jematiah Sergon, MP	
11.	Hon. Irene Nyakerario Mayaka, MP	
12.	Hon. Kakuta Maimai Hamisi, MP	
13.	Hon. Khalif Ali Abdisirat, MP	
14.	Hon. Mumina Gollo Bonaya, MP	
15.	Hon. Umulkher Harun Mohamed, MP	

Attendance.

MINUTES OF THE 1ST SITTING OF DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON MONDAY, 13TH MARCH 2023 IN COMMITTEE ROOM ON 5TH FLOOR, CONTINENTAL HOUSE AT 2.30 P.M

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP - ***Chairperson***
2. Hon. Dr. Shadrack Mwiti Ithinji, MP
3. Hon. Joseph Munyoro, MP
4. Hon. Joseph Makilap Kipkoros, MP
5. Hon. Julius Kipletting Rutto, MP
6. Hon. Umul Ker Sheikh Kassim, MP
7. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
2. Hon. George Sunkuyia Risa, MP
3. Hon. Dr. Adan Keynan Wehliye, CBS, MP
4. Hon. CPA. Joseph Maero Oyula, MP
5. Hon. Andrew Adipo Okuome, MP
6. Hon. David Mwalika Mboni, MP
7. Hon. Dr. John Ariko Namoit, MP
8. Hon. Mohamed Soud Machele, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. Geoffrey Wandeto Mwangi, MP - **Co-*Chairing***
2. Hon. Irene Nyakerario Mayaka, MP
3. Hon. Bensuda Joyce Atieno Osogo, MP
4. Hon. Bernard Kibor Kitur, MP
5. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. John Kiarie Waweru, MP - **Chairperson**
2. Hon. Alfah Miruka Ondieki, MP - **Vice Chairperson**
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Erastus Kivasu Nzioka, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Kakuta Maimai Hamisi, MP

8. Hon. Khalif Ali Abdisirat, MP
9. Hon. Mumina Gollo Bonaya, MP
10. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1. Mr. Benjamin Magut	-	Senior Clerk Assistant
2. Mr. Joshua Ondari	-	Clerk Assistant II
3. Ms. Nuri Kitel	-	Clerk Assistant II
4. Ms. Everlyn Orina	-	Clerk Assistant III
5. Mr. Benson Kamande	-	Clerk Assistant III
6. Mr. Salem Lorot	-	Legal Counsel I
7. Mr. Chelanga L Maiyo	-	Research officer II
8. Ms Winnie Keziah	-	Media Relations Officer
9. Mr. Boaz Chibiego	-	Research Officer III
10. Mr. Githinji Wanjohi	-	Research Officer III
11. Mr. Simon Ouko	-	Serjeant at arms

MIN No. NA/JOINT/2023/001: PRELIMINARIES

The Co-chairperson called the meeting to order at 2.36 p.m. with a word of prayer followed by round of introductions.

MIN No. NA/JOINT/2023/002: AGENDA

The Agenda of the meeting was adopted having being proposed Hon. Geoffrey Wandeto, MP and seconded by Hon. Paul Kibichiy Biego, MP as follows-

1. Prayer
2. Adoption of the Agenda
3. Introductions
4. Substantive agenda

   Consideration of Terms of Reference in the inquiry into the Buyback and Legal Status of Telkom Kenya Ltd following its acquisition by the Government of Kenya
5. Any Other Business
6. Adjournment

MIN No. NA/JOINT/2023/003: REMARKS BY THE CO- CHAIRPERSON

The Co- chairperson welcomed the Members of both Committees to the meeting and thanked them for availing themselves for the pre-inquiry exercise.

MIN No. NA/JOINT/2023/004: **CONSIDERATION OF TERMS OF REFERENCE IN THE INQUIRY INTO THE BUYBACK AND LEGAL STATUS OF TELKOM KENYA LTD FOLLOWING ITS ACQUISITION BY THE GOVERNMENT OF KENYA**

The Committee was taken through the terms of reference developed by the both Committees and adopted it with amendments (copy attached).

MIN No. NA/JOINT/2023/005: **ADJOURNMENT**

The Co-chair adjourned the meeting at fifteen minutes past three o'clock.

Signed.....
Hon. CPA. Francis Kuria Kimani, MP
Chairperson

Date25/10/2023.....

Signed.....
Hon John Kiarie Waweru, MP
Chairperson

Date.....

MINUTES OF THE 2ND JOINT SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON MONDAY, 14TH MARCH 2023 IN PANARI HOTEL AT 10.30 A.M.

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP - ***Chairperson***
2. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
3. Hon. Dr. Adan Keynan Wehliye, CBS, MP
4. Hon. David Mwalika Mboni, MP
5. Hon. Dr. John Ariko Namoit, MP
6. Hon. CPA. Joseph Maero Oyula, MP
7. Hon. Joseph Munyoro, MP
8. Hon. Joseph Makilap Kipkoros, MP
9. Hon. Julius Kipletting Rutto, MP
10. Hon. Umul Ker Sheikh Kassim, MP
11. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. George Sunkuyia Risa, MP
2. Hon. Dr. Shadrack Mwiti Ithinji, MP
3. Hon. Andrew Adipo Okuome, MP
4. Hon. Mohamed Soud Machele, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. Geoffrey Wandeto Mwangi, MP - **Co-*Chairperson***
2. Hon. Irene Nyakerario Mayaka, MP
3. Hon. Bensuda Joyce Atieno Osogo, MP
4. Hon. Bernard Kibor Kitur, MP
5. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. John Kiarie Waweru, MP - **Chairperson**
2. Hon. Alfah Miruka Ondieki, MP - **Vice Chairperson**
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Erastus Kivasu Nzioka, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Kakuta Maimai Hamisi, MP

8. Hon. Khalif Ali Abdisirat, MP
9. Hon. Mumina Gollo Bonaya, MP
10. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	-	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	-	Clerk Assistant III
5.	Mr. Benson Kamande	-	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	-	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

WITNESSES

Office of the Controller of Budget

1.	Dr. Margaret Nyakang'o	-	Controller of budget
2.	Ms. Rhoda Rutto	-	Director, Legal Services
3.	Mr. Patrick Kamore		

Office of the Attorney General of Kenya

Mr. Kenndey Ogeto	-	Solicitor General

MIN No. NA/JOINT/2023/006: ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted having being proposed Hon. David Mwalika Mboni, MP and seconded by Hon. Irene Nyakerario Mayaka, MP as follows-

1. Prayer
2. Confirmation of the previous Minutes
3. Matters Arising
4. **Joint Inqiury into the acquisition of Telkom Kenya by the Government – Meeting with the Controller of Budget, Solicitor General of Kenya and the CEO, Telkom Kenya**
5. Any Other Business
6. Adjournment

MIN No. NA/JOINT/2023/007: PRELIMINARIES

The Co-chairperson called the meeting to order at 10.44 a.m. with a word of prayer from Hon. Joseph Makilap, MP followed round of introductions.

MIN No. NA/JOINT/2023/008: SUBMISSIONS BY THE CONTROLLER OF BUDGET

The CPA Margaret Nyakang'o, Controller of Budget appeared before the Committee accompanied by other Senior Officer and submitted as follows-

a) Article 223 of the Constitution provides that the national government may spend money that has not been appropriated if:
   i) the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or
   ii) money has been withdrawn from the Contingencies Fund.

b) The process is initiated by the spending Ministry/State Department by writing to the CS National Treasury requesting for additional/supplementary budget through Article 223. At this point CoB is not informed or involved until the CS National Treasury approves and sends a response letter to the Ministry/ State Department and a copy to CoB and the Auditor General;

c) The National Treasury sends a request to COB of the approval and intention to make withdrawal under Article 223 of the Constitution;

d) On 28th July 2022, Director General Accounting Services National Treasury sent request to CoB to process exchequer release under Article 223 of the Constitution to Telkom Kenya to facilitate exit of Helios Investors LLP/Jamhuri Holdings Ltd. The payment was to be regularized in the Supplementary Budget I FY 2022/23;

e) The exchequer requisition to process Kshs. 6.014 billion under Article 223 was sent before the approval by CS National Treasury. i.e., the request was received on 28th July 2022 while letter of approval by CS National Treasury and the Share purchase agreement between GoK and Jamhuri Holdings Limited were received on 1st August 2022 upon enquiry by CoB;

f) On 01st August 2022, on CoB request, the Director General Accounting Services National Treasury sends a soft copy of share purchase agreement, approval from CS National Treasury to PS National Treasury granting approval of USD 51,186,098.

g) On 2nd August 2022, the Controller of Budget wrote to PS National Treasury noting the request and granted approval for withdrawal of funds. In addition, she requested the National Treasury to seek parliamentary approval for the expenditure and ensure it was regularized under the supplementary budget I of FY 2022/2023 in line with provisions of Article 223;

h) The withdrawal of funds from the Contingencies Fund did not involve any approval by CoB;

i) On feedback on progress of Parliamentary Approval and regularization timelines of expenditures incurred under Article 223 were not shared with CoB to assess compliance with clauses (2), (3) and (4) of Article 223;

j) On Article 223 (5), ten per cent should be by the corresponding vote, however, the Attorney General's legal opinion Ref: AG/CONF/21/8/1 VOL.1 dated 12 March 2019 noted that under Article 223 (5) of the constitution of Kenya, the ten per cent limit for supplementary Appropriation was of the entire approved budget; and

k) She was not under any pressure to make the said payments.

Committee Observation

The Office of Controller of Budget is a constitutional office and that the office holder is protected hence need to follow the constitution when dispensing their roles.

MIN No. NA/JOINT/2023/009: SUBMISSIONS BY THE SOLICITOR GENERAL

The Mr. Kennedy Ogeto, Solicitor General appeared before the Committee accompanied by other Senior Officer and submitted as follows-

a) Helios investment partners (Kenya Ltd) CPR/2011/52674 was registered as a private company on 27th July 2011. The registered address of the company was indicated as LR NO. 1/870 3rd Floor, Kiganjo House, Rose Avenue, Nairobi, P.O Box 75079-00200, Nairobi. The nominal capital of the company is Kshs. 100,000 divided into 100 shares of Kshs. 1,000;

b) At incorporation, the following were the shareholders and directors of the company:

Name	Nationality	Postal Address	Designation	Shares
HIP GP I Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
HIP GP II Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
Paul Gerard Cunningham	British	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Henry Awele Obi	Irish	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Robert Mwangi Ndungu	Kenyan	P.O. Box 14231-00100	Secretary	Nil
Total Shares				100

c) On 4th July 2013, the company filed a Form 203A notifying the Registrar that Robert Mwangi Ndung'u had resigned as the company's secretary and Mutual Registrars had been appointed in his place. Shantilal Shah Khimji appeared to be the person acting on behalf of the firm of Mutual Registrars as per the filed form;

d) The position of the company as at 10th March 2023 was as follows:

Name	Nationality	Postal Address	Designation	Shares
HIP GP I Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
HIP GP II Limited	Foreign Company	P.O. Box 309GT, Ugland House, South Church Street, Grand Cayman, Cayman Islands	Shareholder	50
Paul Gerard Cunningham	British	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Henry Awele Obi	Irish	2nd Floor, 12 Charles II Street, St. James' London, SW1Y4QU, UK	Director	Nil
Shantilal Shah Khimji	Kenyan	P.O. Box 45669-00100 Nairobi	Secretary	Nil
Total Shares				100

e) On Jamhuri Holding Limited (JHL) was a shareholder of Telkom Kenya Limited. However, the same was not registered in Kenya as per the records held by the Registrar of Companies. The address of the company is however, captured as Level 3, Alexander House 35 Cybercity, Ebene, Mauritius.

MIN No. NA/JOINT/2023/010: ADJOURNMENT

The Co-chair adjourned the meeting at 1.30 pm. The Committee was to reconvene again at 3.00 pm the same day.

Signed.....
Hon. CPA. Francis Kuria Kimani, MP
Chairperson

Date..25/10/2023.....

Signed.....
Hon. John Kiarie, MP
Chairperson

Date.....

MINUTES OF THE 3RD SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD ON MONDAY, 14TH MARCH 2023 IN PANARI HOTEL AT 3.00 P.M.

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Kuria Kimani, MP -*Chairperson*
2. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP -*Vice-Chairperson*
3. Hon. Dr. Adan Keynan Wehliye, CBS, MP
4. Hon. David Mwalika Mboni, MP
5. Hon. Dr. John Ariko Namoit, MP
6. Hon. CPA. Joseph Maero Oyula, MP
7. Hon. Joseph Munyoro, MP
8. Hon. Joseph Makilap Kipkoros, MP
9. Hon. Julius Kipletting Rutto, MP
10. Hon. Umul Ker Sheikh Kassim, MP
11. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. George Sunkuyia Risa, MP
2. Hon. Dr. Shadrack Mwiti Ithinji, MP
3. Hon. Andrew Adipo Okuome, MP
4. Hon. Mohamed Soud Machele, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. Geoffrey Wandeto Mwangi, MP *Chairing*
2. Hon. Irene Nyakerario Mayaka, MP
3. Hon. Bensuda Joyce Atieno Osogo, MP
4. Hon. Bernard Kibor Kitur, MP
5. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. John Kiarie Waweru, MP - Chairperson
2. Hon. Alfah Miruka Ondieki, MP - Vice Chairperson
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Erastus Kivasu Nzioka, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Kakuta Maimai Hamisi, MP
8. Hon. Khalif Ali Abdisirat, MP

9. Hon. Mumina Gollo Bonaya, MP
10. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	–	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	–	Clerk Assistant III
5.	Mr. Benson Kamande	–	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	–	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

WITNESSES

TELKOM KENYA

Mr. Mugo Kibati - Chief Executive Officer

MIN No. NA/JOINT/2023/011: ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted having being proposed Hon. David Mwalika Mboni, MP and seconded by Hon. Irene Nyakerario Mayaka, MP as follows-

1. Prayer
2. Confirmation of the previous Minutes
3. Matters Arising
4. **Joint Inquiry into the acquisition of Telkom Kenya by the Government – Meeting with the Controller of Budget, Solicitor General of Kenya and the CEO, Telkom Kenya**
5. Any Other Business
6. Adjournment

MIN No. NA/JOINT/2023/012: PRELIMINARIES

The Co-chairperson called the meeting to order at 3.11 pm with a word of prayer followed by introductions.

MIN No. NA/JOINT/2023/013: SUBMISSIONS BY CHIEF EXECUTIVE OFFICER TELCOM KENYA

Mr. Mugo Kibati, the Chief Executive Officer of Telkom Kenya appeared before the committees and submitted as follows, THAT; -

a) Ksh. 6.014 billion was not dispatched to Telecom Kenya Limited in part or in whole. The following two letters were submitted to the Board on diverse dates:

   i) The first letter was from Jamhuri Holdings limited dated 11th August 2022 and was received on 18th August 2022.
   ii) The second letter was from CS National Treasury (Ukur Yatani) dated 19th August 2022

b) Helios investment partners (HIP) through JHL became a shareholder in Telecom Kenya following the acquisition of 70% of shares in Telecom, held by Orange in June 2016;

c) Upon the JHL acquiring 70%, from Orange, they transferred 10% to the government of Kenya through the national treasury resting the shareholding at 60% JHL and 40% the National Treasury;

d) The audited accounts of Telkom Kenya Limited as of 31st December 2015, shareholders' funds were in a deficit position;

e) The establishment of a value of 60% could only be authoritatively confirmed by the shareholders;

f) The approvals sought for the acquisition of Telkom Kenya shares back to JHL in June 2016 were from the communications authority of Kenya and the Competition Authority. Telkom Kenya was not a listed company; therefore, the Capital Market Authority approval was not required;

g) JHL signalled to the board and management their intention to exit from Telkom Kenya limited as follows-

   i) In August 2021, the management of Telkom Kenya was requested to support a due diligence exercise that would be conducted by potential Investors. This culminated in a presentation by the management on 29 November 2021 to one of the potential investors.

   ii) Thereafter on 24 January 2022 JHL wrote to Telkom Kenya Indicating their intention to terminate the Management Services Agreement.

h) the subsequent indication of an intention to exit by JHL from Telkom Kenya Limited was signalled to the Board of Telkom limited through a letter dated 19, August 2022, from the National Treasury to the chairman of the Board;

i) The letter from the National Treasury dated 19th August 2022 stated that all necessary, GOK approvals, including the Cabinet and Attorney general's clearance to execute the legal documents and approvals of the CA and CAK had been obtained;

j) Telkom Kenya limited neither received nor disbursed any funds relating to the exit of JHL and therefore not aware of any details of the payees, accounts particulars and amounts paid.

k) The board and management of Telkom Kenya were not privy to the discussions between the shareholders of the company regarding the value of the shares;

l) The letter from the national treasury dated 19th August 2022 Stated the following:

   i) GOK agreed to purchase 60% of the ordinary issued share capital from JHL at a nominal amount of USD 1.

   ii) JHL agreed to transfer by Deed of novation all rights and obligations relating to all outstanding loans advanced by JHL to Telkom Kenya limited amounting to USD. 51,186,057.

   iii) JHL agreed to transfer by deed of novation all rights and obligations relating to shareholding loans that JHL took over from Orange East Africa SA amounting to USD 239,938, 692.

   iv) GoK made payment for the considerations of the purchase of shares and outstanding loans and accrued interest for loans advanced to Telkom Kenya limited by JHL.

m) The audited accounts of Telkom Kenya limited as of 31st December 2021, shareholders' funds were in a deficit position.

MIN No. NA/JOINT/2023/014: ADJOURNMENT

The Co-chair adjourned the meeting at fifteen minutes past six o'clock.

Signed.....
Hon. CPA. Kuria Kimani, MP
Chairperson

Date25/10/2023.....

Signed.....
Hon John Kiarie Waweru, MP
Chairperson

Date.....

MINUTES OF THE 4TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON THURSDAY, 16TH MARCH 2023 IN NORFOLK HOTEL AT 11.00 A.M.

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Kuria Kimani, MP -*Chairperson*
2. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP -*Vice-Chairperson*
3. Hon. Dr. Adan Keynan Wehliye, CBS, MP
4. Hon. David Mwalika Mboni, MP
5. Hon. Dr. John Ariko Namoit, MP
6. Hon. CPA. Joseph Maero Oyula, MP
7. Hon. Joseph Munyoro, MP
8. Hon. Joseph Makilap Kipkoros, MP
9. Hon. Julius Kipletting Rutto, MP
10. Hon. Mohamed Soud Machele, MP
11. Hon. George Sunkuyia Risa, MP
12. Hon. Dr. Shadrack Mwiti Ithinji, MP

ABSENT WITH APOLOGIES

1. Hon. Andrew Adipo Okuome, MP
2. Hon. Umul Ker Sheikh Kassim, MP
3. Hon. Paul Kibichiy Biego, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. Geoffrey Wandeto, MP - Co-*Chairperson*
2. Hon. Irene Nyakerario Mayaka, MP
3. Hon. Bensuda Joyce Atieno Osogo, MP
4. Hon. Bernard Kibor Kitur, MP
5. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. John Kiarie Waweru, MP - *Chairperson*
2. Hon. Alfah Miruka Ondieki, MP - *Vice Chairperson*
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Erastus Kivasu Nzioka, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Kakuta Maimai Hamisi, MP
8. Hon. Khalif Ali Abdisirat, MP
9. Hon. Mumina Gollo Bonaya, MP

10. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	-	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	-	Clerk Assistant III
5.	Mr. Benson Kamande	-	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	-	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

MIN No. NA/JOINT/2023/015: PRELIMINARIES

The Co-chairperson called the meeting to order at 11.38 am. with a word of prayer from Hon. Geoffrey Wandeto Mwangi, MP.

MIN No. NA/JOINT/2023/016: COMMUNICATION FROM THE CO-CHAIR

He informed the Members that they were holding the fourth sitting on the public inquiry on the acquisition of Telkom Limited. He also informed the meeting that the Committee had met with the Controller of Budget, the Solicitor General, then CEO of Telkom Kenya Limited.

MIN No. NA/JOINT/2023/017: MEETING WITH CHAIRPERSON, TELCOM KENYA & SOLICITOR GENERAL

The co-chair informed the Committee that he had received communication though not yet official that he had received a telephone call from the Attorney General, the Hon. Justin Muturi, saying that there was a gazettement of a new Solicitor General in the name of the Hon. Shadrack Mose who, was yet to be sworn in. As a result then, they did not to have a substantive Solicitor General. He requested the meeting to be rescheduled to later date.

On the meeting with the Chairperson, Telkom Kenya Board, he informed the meeting that the Chair would be appearing on Tuesday, 21st March 2023.

MIN No. NA/JOINT/2023/018 ANY OTHER BUSINESS

The chairperson informed the Committee was scheduled to meet as follows;

Tuesday, 21st of March 2023

a) At 9:30 a.m., meeting with the Chairperson of the board of Telkom Kenya Limited.
b) At noon, meeting with the Communication Authority of Kenya.
c) At 2:30 p.m, meeting with the Competition Authority of Kenya.
d) At 4pm, meeting with the Privatization Commission.

Wednesday, 22nd of March 2023

The Committee would meet with the Attorney General, the former Cabinet Secretary for National Treasury and Mr. Julius Muia, the former Principal Secretary for the National Treasury.

Thursday, 23rd of March 2023.

The Committee would meet the Cabinet Secretary of ICT and Digital Economy, the Director General Accounting Services and Quality Assurance and Mr. Stanley Kamau, the Director General and the Public Investment Portfolio Management.

MIN No. NA/JOINT/2023/019: ADJOURNMENT

The Co-chair adjourned the meeting at thirty eight minutes past noon.

Signed.....
Hon. CPA. Francis Kuria Kimani, MP
Chairperson

Date.....25/10/2023.....

Signed.....
Hon John Kiarie Waweru, MP
Chairperson

Date.....

MINUTES OF THE 5TH JOINT SITTING OF THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON THURSDAY, 21ST MARCH 2023 IN BOMA INN HOTEL AT 11.00 A.M.

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP - ***Chairperson***
2. Hon. Dr. Adan Keynan Wehliye, CBS, MP
3. Hon. David Mwalika Mboni, MP
4. Hon. Dr. John Ariko Namoit, MP
5. Hon. CPA. Joseph Maero Oyula, MP
6. Hon. Joseph Munyoro, MP
7. Hon. Joseph Makilap Kipkoros, MP
8. Hon. Julius Kipletting Rutto, MP
9. Hon. George Sunkuyia Risa, MP
10. Hon. Dr. Shadrack Mwiti Ithinji, MP
11. Hon. Umul Ker Sheikh Kassim, MP
12. Hon. Paul Kibichiy Biego, MP
13. Hon. Mohamed Soud Machele, MP

ABSENT WITH APOLOGIES

1. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
2. Hon. Andrew Adipo Okuome, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. Geoffrey Wandeto, MP ***Chairperson***
2. Hon. Irene Nyakerario Mayaka, MP
3. Hon. Bensuda Joyce Atieno Osogo, MP
4. Hon. Bernard Kibor Kitur, MP
5. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. John Kiarie Waweru, MP - Chairperson
2. Hon. Alfah Miruka Ondieki, MP - Vice Chairperson
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Erastus Kivasu Nzioka, MP
5. Hon. Joseph Kipkosgei Tonui, MP

6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Kakuta Maimai Hamisi, MP
8. Hon. Khalif Ali Abdisirat, MP
9. Hon. Mumina Gollo Bonaya, MP
10. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	–	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	–	Clerk Assistant III
5.	Mr. Benson Kamande	–	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	–	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

WITNESSES

Telkom Kenya

1.	Mr. Edward Njoroge	Chairperson, Board of Directors, Telkom
2.	Mr. Allan Wainaina	Chief Finance Officer

MIN No. NA/JOINT/2023/020: PRELIMINARIES

The chairperson called the meeting to order at 11.00 a.m. with a word of prayer followed by introductions.

MIN No. NA/JOINT/2023/021: REMARKS BY THE CO- CHAIRPERSON

The chairperson welcomed the Members of both Committees to the meeting and thanked them for availing themselves for the continuing inquiry exercise into the Acquisition of Telkom Kenya by the Government of Kenya. The co-chair thereafter took the joint committee through the brief of previous week's activity.

MIN No. NA/JOINT/2023/022: SUBMISSIONS BY THE CHAIRMAN, BOARD OF DIRECTORS OF TELKOM KENYA

Mr. Edward Njoroge CBS, EBS appeared before the Committee accompanied by the Chief Finance officer and the company secretary of Telkom Kenya and submitted as follows under oath, that;-

a) As the CEO had clarified when he appeared before the Committee, the Kshs. 6.014 billion was not disbursed to Telkom Kenya Limited in part or in whole. They only knew of the amount after the effect and were pleased with the inquiry as it may reveal some of the matters that happened between the two shareholders;

b) He and the Board were not privy to the negotiations between the shareholders. The facts of the transaction only came to light through two letters:

   i) The first one from Jamhuri Holdings Ltd. dated 11th August 2022 and received on 18th August 2022

   ii) The second one from CS Ukur Yatani dated 19th August 2022

c) France Telecom SA had been the shareholders of Telkom Kenya since 2007 when it was privatised. When they wanted to exit, Helios Investors III LP a USD 1.1b Private Equity Fund entered into a Share Purchase Agreement with Orange East Africa S.A. and through a subsidiary Jamhuri Holdings Ltd became a 70% shareholder in Telkom Kenya following the acquisition in June 2016. As a company they were party to a Shareholder Agreement signed on 10th June 2016. Helios also acquired all the shareholders loans that had been advanced to the company by Orange East Africa/France Telekom SA amounting to an aggregate of USD 332.8m;

d) Upon JHL acquiring 70% from Orange, they transferred 10% to the Government of Kenya through the National Treasury resting the shareholding at 60% JHL and 40% The National Treasury. They also transferred 40% of the Shareholder Loans worth USD 133.1m to the GoK;

e) It was difficult for them to know what was ascribed to the value of the shares at the point of the entry of Helios. The only thing they authoritatively state was that as per the audited accounts of Telkom Kenya Limited as at 31st December 2015, shareholders' funds were in a deficit position;

f) At the exit point, the value ascribed to the shares was USD 1 which was just a token rather than the value;

g) The establishment of the value of the 60% could only be authoritatively discussed by the shareholders;

h) On June 2016 when JHL acquires the shares from France Telekom SA, approvals were sought from all the regulatory authorities namely: the Communications Authority of Kenya (CA) and the Competition Authority (CAK). Telkom Kenya is not a listed company therefore the Capital Markets Authority approval was not required;

i) There was no signal as such from JHL of their exit in the company but being owned by a PE fund, they always knew that they would exit. The only readings which could have been read as signals were:

   i) The proposed merger with Airtel. Although the merger was not an exit but a value addition, it was nevertheless an indication of their eventual exit.

   ii) Thereafter on 24th January 2022 JHL wrote to Telkom Kenya indicating their intention to terminate the Management Services Agreement.

iii) The Board was not given a request by JHL of their intention to exit. Ordinarily, this would not come to the company but directly to the other shareholder.

iv) They were only informed about the exit of JHL from Telkom Kenya Limited vide a letter dated 11th August (received on 18th August from Paul Cunningham a Director of JHL. This was followed by a letter from the CS National Treasury dated 19th August 2022 from the National Treasury to the Chairman of the Board. I responded to the CS vide my letter dated 29th August which is attached herewith together with the letter from JHL and from the CS national Treasury.

j) The letter from the National Treasury on the approval from Communication Authority and the waiver from Competition Authority of Kenya. It also stated that all necessary GoK approvals including the Cabinet and Attorney General's clearance to execute the legal documents. Understandably, the Cabinet approval was not attached. The AG's legal opinion was also missing. Upon realizing on missing documents on 29th August 2022 he wrote a letter requesting missing documents to enable the Board to proceed to conclude the transaction;

k) The Board and Management of Telkom Kenya was not privy to the discussions between the shareholders -JHL and GoK of the Company regarding the value of the shares. However the letter from the CS National Treasury to him dated 19th August 2022stated the following:

i) GoK agreed to purchase 60% of the ordinary issued share capital from JHL at a nominal amount of USD. 1.

ii) JHL agreed to transfer by Deed of Novation all rights and obligations relating to all outstanding new loans advanced by JHL to Telkom Kenya Limited amounting to USD. 51,186,057

iii) JHL agreed to transfer by Deed of Novation all rights and obligations relating to the old shareholding loans that JHL took over from Orange East Africa SA amounting to USD. 239,938,692

l) GoK made payment for the consideration of the purchase of shares and outstanding loans and accrued interest for loans advanced to Telkom Kenya Limited by JHL;

m) The shares were acquired at a token USD 1 and the shareholder's loans worth about USD 290 Million were bought for USD 51 Million;

n) He would exit as the chairman board of directors at Telkom Kenya from Telkom Kenya as soon as the transfer of the shares of Jamhuri Holdings Limited would be transferred fully. The resignation letter he did would at that moment be dated after the transfer of shares had been effected;

o) He was never coerced in any way by any government official to approve the transaction;

p) He was not furnished with any transaction details. That was not unusual as board was keen on the management and not the shareholders;

q) On the merger of Airtel and Telkom, the transaction was rejected by the government for unknown reasons. Telkom was still looking for another investor as Airtel moved on and not keen to go on with the proposed merger;

r) The Government was to do its due diligence on Jamhuri Holdings Limited. Therefore, Telkom Kenya never did any due diligence on the acquisition; and

s) He confirms that he received instructions from the current cabinet secretary to look for a new strategic partner.

MIN No. NA/JOINT/2023/023: ADJOURNMENT

The meeting was adjourned at two o'clock.

Signed.....
Hon. CPA. Francis Kuria Kimani, MP
Chairperson

Date.....25/10/2023.....

Signed.....
Hon John Kiarie Waweru, MP
Chairperson

Date.....

MINUTES OF THE 6TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON THURSDAY, 21ST MARCH 2023 AT BOMA INN HOTEL AT 3.00 P.M

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Kuria Kimani, MP - ***Chairperson***
2. Hon. Dr. Adan Keynan Wehliye, CBS, MP
3. Hon. David Mwalika Mboni, MP
4. Hon. Dr. John Ariko Namoit, MP
5. Hon. CPA. Joseph Maero Oyula, MP
6. Hon. Joseph Munyoro, MP
7. Hon. Joseph Makilap Kipkoros, MP
8. Hon. Julius Kipletting Rutto, MP
9. Hon. George Sunkuyia Risa, MP
10. Hon. Dr. Shadrack Mwiti Ithinji, MP
11. Hon. Umul Ker Sheikh Kassim, MP
12. Hon. Mohamed Soud Machele, MP
13. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
2. Hon. Andrew Adipo Okuome, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. John Kiarie Waweru, MP - **Chairperson**
2. Hon. Alfah Miruka Ondieki, MP - **Vice Chairperson**
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Erastus Kivasu Nzioka, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Kakuta Maimai Hamisi, MP
8. Hon. Geoffrey Wandeto Mwangi, MP
9. Hon. Irene Nyakerario Mayaka, MP
10. Hon. Bensuda Joyce Atieno Osogo, MP
11. Hon. Bernard Kibor Kitur, MP
12. Hon. Gideon Kimaiyo Kipkoech, MP

13. Hon. Mumina Gollo Bonaya, MP
14. Hon. Umulkher Harun Mohamed, MP

ABSENT WITH APOLOGY

Hon. Khalif Ali Abdisirat, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	–	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	–	Clerk Assistant III
5.	Mr. Benson Kamande	–	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	–	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

WITNESSES

Mr. Ezra Chiloba - Director General, Communication Authority of Kenya.

MIN No. NA/JOINT/2023/024: PRELIMINARIES

The chairperson called the meeting to order at 3.00 pm with a word of prayer followed by introductions.

MIN No. NA/JOINT/2023/025: SUBMISSIONS BY THE COMMUNICATION AUTHORITY OF KENYA

Mr. Ezra Chiloba, Director General of Communication Authority of Kenya appeared before the Committee and submitted as follows with regard to the six issues raised by the joint committee concerning the acquisition of Telkom Kenya Limited by the Government of Kenya that;-

a) Based on the compliance returns received from operators, the performance of Telkom Kenya Limited compared to that of its competitors can be measured In terms of revenue as well as market share. What is looked for in the, market share is the SIM subscription, voice and SMS traffic.

b) The authority did not have the mandate on the issue of valuation. In that respect, the authority was not involved in the valuation of Telkom Kenya Limited as that mandate lies with the Privatisation Commission.

c) The acquisition process was not complete and as such, the authority was not able to establish the impact of Telkom Kenya's performance in view of the acquisition under inquiry.

d) The authority had not seen any move in the telecommunications sector in Kenya in response to the government's acquisition of Telkom Kenya. The changes in shareholding may not necessarily trigger response of Telkom Kenya's competitors; however, an acquisition where government is involved may trigger market distortion due to anxiety arising from long term government intervention in favour of Telkom Kenya.

e) The changes of shareholding in communication licensees in Kenya is governed by ICT sector policy Guidelines of 2020 requirement on local equity ownership. The said guidelines required that at least 30% of shares in a communication company be allotted to local shareholders.

f) In the case of Telkom Kenya, the request was made by the National Treasury vide a letter dated 6th April 2022 on behalf of Telkom Kenya Limited. The request involved government buy-out of 60% of shares held by Helios/ Jamhuri Holdings in Telkom Kenya Limited. The transaction would result in the government owning 100% of Telkom Kenya's shares. The transaction was approved on 13th April 2022 considering that it was enhancing local equity participation requirement.

g) The authority sought a clarification on the status of government shareholding in Telkom Kenya Limited. Telkom Kenya Limited, vide a letter dated 4th October 2022 denied any changes in its shareholding. Telkom Kenya Limited further committed to inform the Authority of any changes in its shareholding as they occur. As at 21st March 2023, that had not been done and therefore the authority was not aware of any changes approved on 12th April 2022 occurred or not.

h) The authority vide a letter dated 7th October 2022 sought to obtain Telkom Kenya Limited's latest CR-12 showing the latest shareholders thereof. The information had not be received yet to confirm the latest Telkom Kenya Limited's shareholding as at 21st March 2023.

i) The communication Authority of Kenya believed that the National Treasury is best placed to advice on privatization and associated government policy directions.

MIN No. NA/JOINT/2023/026: SUBMISSIONS BY THE PRIVATIZATION COMMISION

The Chief Executive Officer of the Privatization Commission appeared before the Committee and submitted as follows;

a) The Privatization of Telkom Kenya happened in 2007 before the commission commenced its operations and hence was not privy to the objective of the privatization. The Privatization Commission was established and commenced operations in 2008.

b) The commission lacked the legal capacity to manage privatizations undertaken outside the Privatization programme. The inaugural Privatization programme approved by the Cabinet and gazetted in 2009 for implementation by the commission comprises of twenty-six entities in which Telkom Kenya is not among them.

c) It is the wish of the commission that government should not get involved in any commercial activities other than those of strategic nature like security.

d) The Commission main work was to-
   i) formulate, manage and implement the privatization programme;
   ii) make and implement specific proposals for privatization in accordance with the privatization programme;
   iii) carry out such other functions as are provided for under the Privatization Act No 2 of 2005 ; and
   iv) Carry out such other functions as the Commission considers advisable to advance the privatization programme.

e) The Privatization Commission was not aware of the letter by the current Cabinet Secretary to look for a potential investor to buy out Telkom Kenya.

MIN No. NA/JOINT/2023/027: ADJOURNMENT

The Co-chair adjourned the meeting at twenty five minutes past six o'clock.

Signed.....
Hon. CPA. Kuria Kimani, MP
Chairperson

Date..25/10/2023.....

Signed.....
Hon John Kiarie Waweru, MP
Chairperson

Date.....

MINUTES OF THE 7th SITTING OF DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON MONDAY, 21ST MARCH 2023 IN KIFARU CONFERENCE ROOM, BOMA HOTEL AT 9.30 AM

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP - ***Chairperson***
2. Hon. Dr. Shadrack Mwiti Ithinji, MP
3. Hon. Joseph Munyoro, MP
4. Hon. Joseph Makilap Kipkoros, MP
5. Hon. Julius Kipletting Rutto, MP
6. Hon. Umul Ker Sheikh Kassim, MP
7. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
2. Hon. George Sunkuyia Risa, MP
3. Hon. Dr. Adan Keynan Wehliye, CBS, MP
4. Hon. CPA. Joseph Maero Oyula, MP
5. Hon. Andrew Adipo Okuome, MP
6. Hon. David Mwalika Mboni, MP
7. Hon. Dr. John Ariko Namoit, MP
8. Hon. Mohamed Soud Machele, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. John Kiarie Waweru, MP - **Chairperson**
2. Hon. Alfah Miruka Ondieki, MP - **Vice Chairperson**
3. Hon. Erastus Kivasu Nzioka, MP
4. Hon. Joseph Kipkosgei Tonui, MP
5. Hon. Bernard Kibor Kitur, MP
6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Umulkher Harun Mohamed, MP
8. Hon. Gideon Kimaiyo Kipkoech,MP
9. Hon. Kakuta Maimai Hamisi, MP
10. Hon. Mumina Gollo Bonaya, MP
11. Hon. Bensuda Joyce Atieno Osogo, MP
12. Hon. Geoffrey Wandeto Mwangi, MP

ABSENT WITH APOLOGIES

1. Hon. Irene Nyakerario Mayaka, MP
2. Hon. Khalif Ali Abdisirat, MP
3. Hon. Shakeel Shabbir Ahmed, CBS, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	–	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	–	Clerk Assistant III
5.	Mr. Benson Kamande	–	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	–	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

MIN No. NA/JOINT/2023/028: PRELIMINARIES

The chairperson called the meeting to order at 10.00 a.m. with a word of prayer followed by introduction.

MIN No. NA/JOINT/2023/029: ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted having being proposed Hon. David Mwalika Mboni, MP and seconded by Hon. Erastus Kivasu Nzioka, MP as follows-

1. Prayer.
2. Adoption of the Agenda
3. Introductions
4. agenda
   a) **Inquiry into the Acquisition of Telkom Kenya by the Government of Kenya**
5. Any Other Business
6. Adjournment

MIN No. NA/JOINT/2023/030: SUBMISSION BY THE CHIEF EXECUTIVE OFFICER COMPETITION AUTHORITY OF KENYA (CAK)

Dr. Adano Roba, Ag Director General Competition Authority of Kenya appeared before the Committee and submitted as follows-

a) The Authority is established by Section 7 of the Competition Act, No 12 of 2010 ("the Act"). The Authority's key mandate, inter alia, is regulation of market structure. It

involved analyzing and thereafter, making a determination (approving or declining mergers/takeovers) in all sectors of the Kenyan economy.

b) The analysis of market structure aimed at highlighting the likely effects on competition and/or public interest resulting from mergers transactions. It is important to highlight, ab initio, that Kenya's merger regime is suspensory. This means that any merger falling under the precincts of the Act is not enforceable without the approval of the Authority.

c) The law provides that a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking. The terms merger and takeover are used interchangeably.

d) Further, the Act elucidates ways in which a merger may be achieved. These include:

   i) The purchase or lease of shares, acquisition of an interest, or purchase of assets;
   ii) The acquisition of a controlling interest;
   iii) The acquisition of an undertaking under receivership by another undertaking;
   iv) Acquiring by whatever means, the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
   v) In the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently; and,
   vi) Exchange of shares between or among undertakings which result in substantial change in ownership.

e) In this context, control may be procured through, inter alia:

   i) Acquiring over 50% of the issued shares;
   ii) Majority votes cast at a general meeting; and,
   iii) Acquisition of powers to veto key decisions.

f) Any parties that implement a merger without the approval of the Authority were liable to a penalty and the merger shall not have any legal effect and therefore would not be enforceable in law. In addition, the Authority may revoke a merger if it approved it without adequate information or through parties providing misleading information.

g) Any business intended to be carried on or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a trade association is required to notify the Authority if it intends to implement a merger.

h) To facilitate analysis of merger applications emanating from regulated sectors, the Authority pursuant to Section 5 of the Competition Act, has developed Memorandum of Understanding (MoUs) with sector regulators. Regarding mergers which may occur through privatization process, the Privatization Commission would normally consult the Authority.

i) Regarding the Telecommunications sector, the Authority implemented an MoU with the Communications Authority of Kenya. The framework has been very informative in our analysis of mergers in the sector.

j) With respect to Telkom Kenya, the Authority considered the proposed acquisition of Telkom's mobile operations, enterprise, and carrier business by Airtel (in 2019), in

exchange for a 30% stake in Airtel as consideration. The two parties were to merge their activities to form a new brand known as 'Airtel-Telkom' Limited.

k) In 2016, the Authority also considered and approved the transaction involving Jamhuri Holdings Limited acquiring 70% shareholding in Telkom Kenya Limited (TKL).

l) The National Treasury and Planning wrote to the Authority in April 2022 seeking an advisory opinion regarding the acquisition of 60% shareholding in Telkom Kenya by the Government of Kenya (GoK) from Jamhuri Holdings Limited (Jamhuri), a subsidiary of Helios Investment Partners.

m) At the time, the shareholders of Telkom Kenya were: Jamhuri (60%) and GoK (40%) shareholding. The proposed acquisition would result in the Government owning 100% shareholding in Telkom Kenya. It was submitted that the main purpose of the acquisition was to safeguard public interest.

n) Having reviewed the request, according to the provisions of the Act, the Authority determined that the proposed transaction DID NOT require prior authorization before implementation on the account that Government is not 'an undertaking' as per the definition of the Act.

o) In making its determination, the Authority was guided by:

   a) Section 2 of the Act which defines an "undertaking" as:

      "*Any business intended to be carried on, or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service, and includes a trade association*"; and,

   b) Section 41 of the Act which states that:

      "For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking."

p) Based on the foregoing, it became clear that the GoK, which was making the acquisition directly, does not fit the meaning provided for in the Act to be considered as an undertaking. Additionally, the acquisition was not being done through any of its agencies, corporations or companies that may fit the definition of an undertaking.

q) The proposed transaction therefore did not fall within the definition of a merger under Section 41 of the Act since GoK is not an undertaking within the meaning of Section 2 of the Act in regard to this specific transaction.

r) Additionally, the Authority took cognizance of the fact that the proposed transaction involved the acquisition of 100% of Telkom Kenya (which is akin to "nationalization") by the Government primarily to safeguard public interest.

s) Further, the Authority advised that the should the Government decide to cede its shareholding in any entity, in this case Telkom Kenya, to a private entity resulting in a change of control, either directly/indirectly and/or resulting in joint control, the transaction shall be notifiable to the Authority pursuant to the provisions of Section 41 of the Act.

t) The Authority wishes to inform the Joint Committee that its mandate does not include determination of fair market value of an interest in a business by any parties to a merger transaction process.

MIN No. NA/JOINT/2023/031: ADJOURNMENT

The meeting was adjourned at ten minutes to two o'clock. Next meeting to be held at three o'clock in the same day same venue.

Signed.....
Hon. CPA. Francis Kuria Kimani, MP
Chairperson

Date..25/10/2023.....

Signed.....
Hon. John Kiarie, MP
Chairperson

Date.....

MINUTES OF THE 8TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON MONDAY, 21ST MARCH 2023 IN KIFARU CONFERENCE ROOM, BOMA HOTEL AT 9.30 AM

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP - ***Chairperson***
2. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
3. Hon. Dr. Shadrack Mwiti Ithinji, MP
4. Hon. Joseph Kamau Munyoro, MP
5. Hon. Joseph Makilap Kipkoros, MP
6. Hon. Julius Kipletting Rutto, MP
7. Hon. Umul Ker Sheikh Kassim, MP
8. Hon. Paul Kibichiy Biego, MP
9. Hon. Dr. Adan Keynan Wehliye, CBS, MP
10. Hon. CPA. Joseph Maero Oyula, MP
11. Hon. David Mwalika Mboni, MP
12. Hon. Dr. John Ariko Namoit, MP

ABSENT WITH APOLOGIES

1. Hon. George Sunkuyia Risa, MP
2. Hon. Andrew Adipo Okuome, MP
3. Hon. Mohamed Soud Machele, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. John Kiarie Waweru, MP **Chairperson**
2. Hon. Alfah Miruka Ondieki, MP **Vice Chairperson**
3. Hon. Erastus Kivasu Nzioka, MP
4. Hon. Shakeel Shabbir Ahmed, CBS, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Bernard Kibor Kitur, MP
7. Hon. Flowrence Jematiah Sergon, MP
8. Hon. Gideon Kimaiyo Kipkoech,MP
9. Hon. Kakuta Maimai Hamisi, MP

ABSENT WITH APOLOGY

1. Hon. Irene Nyakerario Mayaka, MP
2. Hon. Khalif Ali Abdisirat, MP

3. Hon. Mumina Gollo Bonaya, MP
4. Hon. Bensuda Joyce Atieno Osogo, MP
5. Hon. Geoffrey Wandeto Mwangi, MP
6. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	–	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	–	Clerk Assistant III
5.	Mr. Benson Kamande	–	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	–	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

WITNESSES

Amb. Ukur Yattan

MIN No. NA/JOINT/2023/032: PRELIMINARIES

The chairperson called the meeting to order at 10.00 A.m. with a word of prayer followed by introductions.

MIN No. NA/JOINT/2023/033: ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted having being proposed Hon. David Mwalika Mboni, MP and seconded by Hon. Erastus Kivasu Nzioka, MP as follows-

1. Prayer.
2. Adoption of the Agenda
3. Introductions
4. agenda
   a) **Inquiry into the Acquisition of Telkom Kenya by the Government of Kenya Meeting:**
      i. **Directors of Jamhuri Holdings Limited/Helios Investment Partners**
      ii. **Former CS the National Treasury**
      iii. **Former PS, The National Treasury**
5. Any Other Business
6. Adjournment

MIN No. NA/JOINT/2023/032: **SUBMISSION BY AMB. UKUR YATTANI, THE FORMER CS NATIONAL TREASURY AND PLANNING**

Amb. Ukur Yattani appeared before the Committee and submitted as follows under oath-

a) Telkom Kenyan Limited operated as a critical national cable which provides critical government services to the Office of the President, Statehouse, Ministry of Defence, ICT authority, Ministry of Interior and Mombasa landing station. It also hosts a number of government telecommunication networks; IFMIS, DoD, E-citizen and NIS restricted communication channels. These cyber systems and assets that are vital and incapacitation would have a devastating impact.

b) Telkom split from POSTA and 70% of the shareholding was acquired by Orange. However, it failed to breakeven due to the stiff competition by other network providers like Safaricom. Orange late sold its shares to Helios which owns Jamhuri Holdings LTD (JHL).

c) Due to several reasons Telkom continued to make losses prompting JHL to look for a partner. Telkom settled on Airtel Kenya in a joint venture which would involve combining their networks. The venture was approved by Jamhuri Holdings Ltd (JHL) and Airtel Kenya partners; however, Government of Kenya did not approve the merger due to security reasons.

d) The National Security Council (NSC) advised the government to fully acquire Telkom. The government of Kenya acquired the remaining 60% of shares owned by Helios for a nominal USD 1 and compensated the loan principal amount of $48milion which had accumulated to $51million they had invested. The former Cabinet Secretary approved the amount for the exit of JHL.

e) The transaction was lawful as it was done in accordance with Article 223 of the constitution. The CS further alluded that the funds were not budgeted for because the Budget was read before June as this was the election period. Also, the transaction complied with the PFM Act section 17(4).

f) Under the Cabinet Secretary to the Treasury (incorporation) Act-Cap 101 the CS of Treasury was in charge of ownership of government shares including shares in public and private companies whereby he could transact business on behalf of the government.

g) Telkom Kenya was owned by two shareholders; Government of Kenya (40%) and Jamhuri Holdings Limited (60%) and being the Cabinet Secretary, the shares were on his name and he had the powers to own and dispose them on behalf of the government.

h) Given the impact on the investments on the exit of JHL (Helios), he made a classified communication on 27th August 2021 advising the Executive Office of the President on the decision by JHL and sought concurrence to proceed with the proposed exit of Telkom. Also, advised JHL in a letter Ref; ZZ/331/02 of 30th September 2021 to be patient while the government was consulting.

i) On 28th March, he received concurrence from the Executive Office of the President (under classified cover) to proceed with the process of exiting JHL.

j) He conveyed the government decision to JHL accepting the proposal to exit Telkom Kenya limited (TKL) on 29th March 2022 and requested JHL to submit a proposal on the terms and conditions of the put option to facilitate further discussion.

k) The former CS further sought approvals from relevant regulators including the Communication and Competition authorities of Kenya and the Attorney General to proceed with the exit of JHL and GOK to own 100% of Telkom Kenya.

l) As the shareholder, he signed the following documents as a part of exit of JHL.

   i) Share Transfer form duly executed by Jamhuri Holdings and CS/National Treasury
   ii) Deed of Variation dated 29th July 2022 relating to the Share Purchase Agreement dated 31st May 2022 in respect of sale & purchase of shares and shareholder loans.
   iii) Share Purchase Agreement dated 31st May 2022 in relation to the sale and purchase of shares and shareholder loan at TKL.
   iv) Deed of Novation in respect of the loan agreement relating to JHL-OREA shareholder loan dated 20th June 2016 (USD 239,938,692).
   v) Deed of Novation relating to the additional JHL shareholder loans and interests (USD 51,186,057).
   vi) Deed of Termination in respect of the Deed of Amendment and Restatement of Shareholder Agreement dated 10th June 2016 and additional Shareholders agreement dated 20th June 2016.
   vii) Escrow Agreement in relation to the sale and purchase of shares and shareholders loans in TKL.

m) He wrote to the Chairman TKL requesting him to convene a Board of directors meeting to pass the necessary resolutions to facilitate the transfer of shares at the Company Registry (CR12) and Novation of loans from JHL to GOK.

n) Under Article 223 of the constitution, he granted approval to pay Ksh. 6.09Billion to JHL to facilitate their exit and forwarded the necessary documents to National Assembly.

o) The former CS Treasury alluded that acquiring the 60% stake in Telkom was a Strategic decision and not a commercial decision since the business was key and reflected the interest of government to own and operate a national security commercial service. The executive office of the President via a letter Ref: CAB/GEN.3/1/1/VOL.XVIII/15 dated 9th May 2022 communicated to the cabinet on the approval of cabinet. He further confirmed that Telkom Kenya Limited is fully owned by the Government of Kenya and National Treasury is in possession of the ownership documents.

MIN No. NA/JOINT/2023/033: **SUBMISSION BY DR. JULIUS MUIA, THE FORMER PRINCIPAL SECRETARY NATIONAL TREASURY**

Dr. Julius Muia appeared before the Committee and the time being 9.00 p.m., the former Principal Secretary was requested by the committee to appear before it at a date that will be communicated by the secretariat.

MIN No. NA/JOINT/2023/034: **ADJOURNMENT**

The meeting was adjourned at quarter to nine o'clock.

Signed.....
Hon. CPA. Francis Kuria Kimani, MP
Chairperson

Date.....25/10/2023.....

Signed.....
Hon. John Kiarie, MP
Chairperson

Date.....

MINUTES OF THE 9TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON THURSDAY, 23RD MARCH 2023 IN KIFARU CONFERENCE ROOM, BOMA HOTEL AT 10.00 AM

COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Kuria Kimani, MP - ***Chairperson***
2. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
3. Hon. Dr. Shadrack Mwiti Ithinji, MP
4. Hon. Joseph Kamau Munyoro, MP
5. Hon. Joseph Makilap Kipkoros, MP
6. Hon. Julius Kipletting Rutto, MP
7. Hon. Umul Ker Sheikh Kassim, MP
8. Hon. Paul Kibichiy Biego, MP
9. Hon. Dr. Adan Keynan Wehliye, CBS, MP
10. Hon. CPA. Joseph Maero Oyula, MP
11. Hon. David Mwalika Mboni, MP
12. Hon. Dr. John Ariko Namoit, MP

ABSENT WITH APOLOGIES

1. Hon. George Sunkuyia Risa, MP
2. Hon. Andrew Adipo Okuome, MP
3. Hon. Mohamed Soud Machele, MP

COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. John Kiarie Waweru, MP **Chairperson**
2. Hon. Alfah Miruka Ondieki, MP **Vice Chairperson**
3. Hon. Erastus Kivasu Nzioka, MP
4. Hon. Shakeel Shabbir Ahmed, CBS, MP
5. Hon. Joseph Kipkosgei Tonui, MP
6. Hon. Bernard Kibor Kitur, MP
7. Hon. Flowrence Jematiah Sergon, MP
8. Hon. Gideon Kimaiyo Kipkoech,MP
9. Hon. Kakuta Maimai Hamisi, MP

ABSENT WITH APOLOGY

1. Hon. Irene Nyakerario Mayaka, MP
2. Hon. Khalif Ali Abdisirat, MP

3. Hon. Mumina Gollo Bonaya, MP
4. Hon. Bensuda Joyce Atieno Osogo, MP
5. Hon. Geoffrey Wandeto Mwangi, MP
6. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1.	Mr. Benjamin Magut	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	–	Clerk Assistant II
3.	Ms. Nuri Kitel	-	Clerk Assistant II
4.	Ms. Everlyn Orina	–	Clerk Assistant III
5.	Mr. Benson Kamande	–	Clerk Assistant III
6.	Mr. Salem Lorot	-	Legal Counsel I
7.	Mr. Chelanga L Maiyo	–	Research officer II
8.	Ms Winnie Keziah	-	Media Relations Officer
9.	Mr. Boaz Chibiego	-	Research Officer III
10.	Mr. Githinji Wanjohi	-	Research Officer III
11.	Mr. Simon Ouko	-	Serjeant at arms

WITNESSES

1. FCPA Benard Ndungu , MBS Director General Accounting Services and Quality Assurance
2. Eng. Stanley Kamau, Former Director General Public Investment Portfolio Management.

MIN No. NA/JOINT/2023/035: PRELIMINARIES

The chairperson called the meeting to order at 10.03 am. with a word of prayer.

MIN No. NA/JOINT/2023/036: - AGENDA

The Agenda of the meeting was adopted having being proposed Hon. David Mwalika Mboni, MP and seconded by Hon. Erastus Kivasu Nzioka, MP as follows-

1. Prayer.
2. Adoption of the Agenda
3. Introductions
4. agenda
   a) **Inquiry into the Acquisition of Telkom Kenya by the Government of Kenya Meeting:**
      i. **Mr Eliud Owalo , Cabinet Secretrary, Ministry of ICT and the Digital**
      ii. **FCPA Benard Ndungu , MBS Director General Accounting Services and Quality Assurance**
      iii. **Eng. Stanley Kamau, Former Director General Public Investment Portfolio Management.**
5. Any Other Business

6. Adjournment

MIN No. NA/JOINT/2023/037: REMARKS BY THE CHAIRPERSON

The Chairperson also informed the committee that Mr. Eliud Owalo sent an apology through the clerk of his unavailability to appear before the Committee.

MIN No. NA/JOINT/2023/038: SUBMISSION BY ENG. STANLEY KAMAU, FORMER DIRECTOR, GENERAL PUBLIC INVESTMENT PORTFOLIO MANAGEMENT

Eng. Stanley Kamau, former Director General Public Investment Portfolio Management appeared before the joint committee and informed the committee as follow that;

a) The government considered the options available through the National Security Council (NSC) and made a strategic decision based on the nature of assets owned by Telkom Kenya. AS the DG/PIPM National Treasury he was directed to implement the decision of NSC and to provide the necessary budget to facilitate the exit of Jamhuri Holdings in Telkom Kenya.

b) AS the Director General Public Investment and Portfolio Management (DG/PIPM) at the National Treasury, his role was to advise the Accounting Officer and the Cabinet Secretary/National Treasury on the ownership function of the National Treasury in respect of Government investments.

c) Given the impact on the investments on the exit of JHL (Helios), he (the DG/PIPM) assisted the CS/NT to prepare a brief on 27th August 2021 advising the Executive Office of the President on the decision by JHL and sought concurrence to proceed with the proposed exit of Telkom. Also, he advised the CS/NT to advise JHL to be patient while the government was consulting on the matter.

d) Assisted the CS National Treasury to seek approvals from relevant regulators including the Communication and Competition authorities of Kenya and the Attorney General to proceed with the exit of JHL and GOK to own 100% of Telkom Kenya.

e) He reviewed the following documents as part of the Exit from JHL;

   i) Share Transfer form duly executed by Jamhuri Holdings and CS/National Treasury
   ii) Deed of Variation dated 29th July 2022 relating to the Share Purchase Agreement dated 31st May 2022 in respect of sale & purchase of shares and shareholder loans.
   iii) Share Purchase Agreement dated 31st May 2022 in relation to the sale and purchase of shares and shareholder loan at TKL.
   iv) Deed of Novation in respect of the loan agreement relating to JHL-OREA shareholder loan dated 20th June 2016 (USD 239,938,692).
   v) Deed of Novation relating to the additional JHL shareholder loans and interests (USD 51,186,057).

vi) Deed of Termination in respect of the Deed of Amendment and Restatement of Shareholder Agreement dated 10th June 2016 and additional Shareholders agreement dated 20th June 2016.
vii) Escrow Agreement in relation to the sale and purchase of shares and shareholders loans in TKL.

f) He assisted the CS/ NT ON 19TH August 2022 to write a letter to the Chairman TKL requesting him to convene a Board of directors meeting to pass the necessary resolutions to facilitate the transfer of shares at the Company Registry (CR12) and Novation of loans from JHL to GOK.

MIN No. NA/JOINT/2023/039: **SUBMISSION BY FCPA BENARD NDUNGU , MBS DIRECTOR GENERAL ACCOUNTING SERVICES AND QUALITY ASSURANCE**

FCPA Benard Ndungu, the Director General Accounting Services and Quality Assurance National Treasury appeared before the Committee submitted as follows:

a) The substance of the transaction was best addressed by the Directorate of Public Investments and Portfolio Management (PIPM), who are in charge of evaluating public investments and making appropriate recommendations. The budget was approved under Article 223 of the Constitution. The request was made by the Principal Secretary National Treasury as the Accounting Officer and approved by the Cabinet Secretary National Treasury and Planning. This is a normal procedure applicable to other budget requests under Article 223 of the Constitution.

b) For items approved under Article 223 of the Constitution, the Directorate of Accounting Services and Quality Assurance is involved upon approval by the Cabinet Secretary National Treasury. An Exchequer was submitted by the Head of Accounting unit/ National Treasury and forwarded ti the Controller of Budget (CoB) who approved the request in accordance with Section 17(4) and (5) of the PFM Act 2012. Upon approval by the CoB, the Head of Accounting Unit/National Treasury released funds from Vote 1071 to the beneficiaries.

c) He did not play any role in the buy-back of Telkom ownership from Jamhuri Holding Limited (JHL).

d) The withdrawal of 6.091 billion was to offset the capital injected by Helios/Jamhuri Holding Partners who had notified the National Treasury their intention to exit Telkom Kenya.

e) Helios/Jamhuri notified GoK on 15th July 2021 of their decision to exit Telkom by exercising their put option-their right to sell their stake in the company to GoK, as provided for in the Shareholder Agreements-citing frustrations, namely:

i) Failure of GoK authorities to institute regulatory interventions necessary to remedy the structural imbalances in the telecommunications business environment that continue to make the sector less competitive, much to the disadvantage of the (rest of) the operators and consumers;

ii) The decision of GoK not to approve the joint venture (JV) between Telkom and Airtel Kenya that would have involved the combination of the two companies with benefits that would have included reduced requirement for further injection of capital by the two shareholders; and,

iii) The decision by Go's Ministry of Sports, Culture & Heritage to occupy and proceed to construct sporting facilities on the property LR. No. 7656 situated along Ngong Road, of which Telkom is the legally registered owner.

g) In June 2016, Helios Investors LP- a London-based private equity firm focused on Africa-acquired 70% of the shares in Telkom from OrEA through a special purpose vehicle named Jamhuri Holdings Limited (JHL). It was at this juncture that GoK increased its shareholding in Telkom from 30% to 40%, for a nominal consideration.

h) As part of the transaction, JHL bought the Orange portion of shareholder loans at the time amounting to Euros 291,973,288.80 and transferred 40% of it (i.e. Euros 116,789,315) to GoK for a nominal consideration.

i) Since the acquisition in 2016, JHL has advanced the company a total amount of USD 48 Million as additional shareholder loans, bringing the total principal amounts of shareholder loans from Helios/Jamhuri to Telkom to Euros 175,183,973 and USD 48 Million. There was a Cabinet and the National Security Council approval of the buyback of Telkom.

j) Helios/Jamhuri Holding Limited notified the National Treasury of its intention to exit vide letter dated 15 July, 2021 and further, tabled the same at the Annual General Meeting of 30% November, 2021.

k) The Board should be requested to table before the Committee minutes of their discussion of the above matter.

l) Upon notice by Helios to exit TKL, the Cabinet Secretary/National Treasury and Planning briefed H.E. the President formally on 27th August, 2021 and a feedback obtained on 28th March 2022 to proceed with discussions with JHL on the put option in view of the Government's security communications services and assets under TKL.

m) The exit terms by JHL were approved by National Security Council on 1st April 2022 and the Cabinet in May 2022 (communication from the Cabinet Office dated 9th May. 2022).

n) All the necessary documents including Share Purchase Agreement, Novation of Loan Agreements, Share Transfer Forms were concluded and an amount of USD 51, 186,058 paid to JHL.

o) Helios/Jamhuri agreed to exit under the following terms:

i) GoK acquires the Helios 60% shareholding in Telkom for a nominal USD 1;

ii) GoK to take over and to reimburse the shareholder loan injected by Helios amounting to USD. 51 million (Principal USD 48 million and accrued interest USD 3 million;

iii) Helios/Jamhuri to forego the acquired shareholder loan which Helios took over from Orange Telkom that amounted to USD 239 million (Principal USD 199M and accrued interest of USD 40 million); and,

iv) Once Helios/Jamhuri exits Telkom Kenya, GoK will own it 100%.

MIN No. NA/JOINT/2023/040: ADJOURNMENT

The meeting was adjourned forty five minutes past seven o'clock.

Signed.....
Hon. CPA. Kuria Kimani, MP
Chairperson

Date.....25/10/2023.....

Signed.....
Hon. John Kiarie, MP
Chairperson

Date.....

MINUTES OF THE 10th JOINT SITTING OF THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON THURSDAY, 20TH JULY 2023 IN SERENA HOTEL, MOMBASA AT 3.00 P.M

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP *-Chairperson*
2. Hon. David Mwalika Mboni, MP
3. Hon. Dr. John Ariko Namoit, MP
4. Hon. Joseph Makilap Kipkoros, MP
5. Hon. Julius Kipletting Rutto, MP
6. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP *-Vice-Chairperson*
2. Hon. George Sunkuyia Risa, MP
3. Hon. Umul Ker Sheikh Kassim, MP
4. Hon. Andrew Adipo Okuome, MP
5. Hon. Dr. Shadrack Mwiti Ithinji, MP
6. Hon. CPA. Joseph Maero Oyula, MP
7. Hon. Dr. Adan Keynan Wehliye, CBS, MP
8. Hon. Mohamed Soud Machele, MP
9. Hon. Joseph Munyoro, MP

INATTANDANCE

COMMITTEE SECRETARIAT

1. Mr. Benjamin Magut	Senior Clerk Assistant
2. Mr. Benson Kamande	Clerk Assistant III
3. Mr. Salem Lorot	Legal Counsel I
4. Mr. George Ndenjeshe	Fiscal Analyst
5. Mr. Simon Ouko	Sargent at arms
6. Ms. Joyce Wachera	Hansard Reporter

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. John Kiarie Waweru, MP *-Chairperson*
2. Hon. Alfah Miruka Ondieki, MP *- Vice Chairperson*
3. Hon. Geoffrey Wandeto Mwangi, MP
4. Hon. Irene Nyakerario Mayaka, MP

5. Hon. Flowrence Jematiah Sergon, MP
6. Hon. Shakeel Shabbir Ahmed, CBS, MP
7. Hon. Erastus Kivasu Nzioka, MP
8. Hon. Bensuda Joyce Atieno Osogo, MP
9. Hon. Bernard Kibor Kitur, MP
10. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. Joseph Kipkosgei Tonui, MP
2. Hon. Kakuta Maimai Hamisi, MP
3. Hon. Khalif Ali Abdisirat, MP
4. Hon. Mumina Gollo Bonaya, MP
5. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1. Ms. Everlyn Orina	Clerk Assistant III
2. Mr. Githinji Wanjohi	Research Officer III

MIN No. NA/JOINT/2023/ 040 : - PRELIMINARIES

The Co-chairperson called the meeting to order at 3.14 p.m.

MIN No. NA/JOINT/2023/ CONSIDERATION OF DRAFT JOINT COMMITTEE REPORT ON 100% BUYBACK OF TELKOM KENYA.

The joint committee secretariat continued to take the committee through the report for the afternoon session as follows;-

a) Submissions by Eng. Stanley Kamau Former Director General Public Investment and Portfolio Management National Treasury presented by Ms. Joyce Wachera.
b) Submissions by FCPA Bernard Ndung'u MBS, Director General Accounting Services and Quality Assurance National Treasury presented by Mr. George Ndenjeshe.
c) Submissions by Paul Cunningham, Director Jamhuri Holdings Limited presented by Mr. Salem Lorot.
d) Submissions by Mr. Joe Mucheru, Former Cabinet Secretary ICT, Innovation and Youth Affairs presented by Ms. Everlyn Orina
e) Submissions by Mr. Julius Muia, Former Permanent Secretary National Treasury and Economic Planning presented by Mr. Benson Kamande.
f) Submissions by Adili Trustees presented by Mr. Salem Lorot.
g) Submissions by Dr Joseph Kinyua, EGH, The Immediate Former Head of Public Service and Secretary to the Cabinet presented by Mr. George Ndenjeshe.
h) Submissions by Mr. John Ngumi presented by Mr. George Ndenjeshe.
i) Submissions by Mr. Ben Roberts, Chief Technological Officer Liquid Intelligent Technologies, And Chairman of The ICT Board in the Kenya Private Sector Alliance presented by Mr. Githinji Wanjohi.

MIN No. NA/JOINT/2023/ 041 :- **ADJOURNMENT**

The Co-chair adjourned the meeting at 6.48 p.m. The next meeting will be held tomorrow.

Signed.....
Hon. CPA. Kuria Kimani, MP
Chairperson

Date.....

Signed.....
Hon. John Kiarie Waweru, MP,
Chairperson

Date.....

MINUTES OF THE 11th JOINT SITTING OF THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON THURSDAY, 20TH JULY 2023 IN SERENA HOTEL, MOMBASA AT 11.30 A.M

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP *-Chairperson*
2. Hon. David Mwalika Mboni, MP
3. Hon. Dr. John Ariko Namoit, MP
4. Hon. Joseph Makilap Kipkoros, MP
5. Hon. Julius Kipletting Rutto, MP
6. Hon. Paul Kibichiy Biego, MP

ABSENT WITH APOLOGIES

1. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP *-Vice-Chairperson*
2. Hon. George Sunkuyia Risa, MP
3. Hon. Umul Ker Sheikh Kassim, MP
4. Hon. Andrew Adipo Okuome, MP
5. Hon. Dr. Shadrack Mwiti Ithinji, MP
6. Hon. CPA. Joseph Maero Oyula, MP
7. Hon. Dr. Adan Keynan Wehliye, CBS, MP
8. Hon. Mohamed Soud Machele, MP
9. Hon. Joseph Munyoro, MP

INATTANDANCE

COMMITTEE SECRETARIAT

1. Mr. Benjamin Magut	Senior Clerk Assistant
2. Mr. Benson Kamande	Clerk Assistant III
3. Mr. Salem Lorot	Legal Counsel I
4. Mr. George Ndenjeshe	Fiscal Analyst
5. Mr. Simon Ouko	Sergent at arms
6. Ms. Joyce Wachera	Hansard Reporter

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. John Kiarie Waweru, MP *-Chairperson*
2. Hon. Alfah Miruka Ondieki, MP *- Vice Chairperson*
3. Hon. Geoffrey Wandeto Mwangi, MP
4. Hon. Irene Nyakerario Mayaka, MP

5. Hon. Flowrence Jematiah Sergon, MP
6. Hon. Shakeel Shabbir Ahmed, CBS, MP
7. Hon. Erastus Kivasu Nzioka, MP
8. Hon. Bensuda Joyce Atieno Osogo, MP
9. Hon. Bernard Kibor Kitur, MP
10. Hon. Gideon Kimaiyo Kipkoech, MP

ABSENT WITH APOLOGY

1. Hon. Joseph Kipkosgei Tonui, MP
2. Hon. Kakuta Maimai Hamisi, MP
3. Hon. Khalif Ali Abdisirat, MP
4. Hon. Mumina Gollo Bonaya, MP
5. Hon. Umulkher Harun Mohamed, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1. Ms. Nuri Kiteel Natan	-	Clerk Assistant III
2. Ms. Everlyn Orina	-	Clerk Assistant III
3. Mr. Boaz Chibiego	-	Research Officer III
4. Mr. Githinji Wanjohi	-	Research Officer III

MIN No. NA/JOINT/2023/ 042 : - PRELIMINARIES

The Co-chairperson called the meeting to order at 11.34 a.m. This was thereafter, followed with a word of prayer from Hon Paul Kibichy Biego, MP. He further welcomed members for the sitting and reminded them that they are holding the Sitting to consider the draft report on the Telcom inquiry on the Ksh6.040 billion that was supposed to be paid for acquisition of Telkom Kenya Limited. He read out the schedule as to how the witnesses appeared from 14th March 2023 to 20th April 2023.

The Chairperson thereafter called for self-introductions to those present in the meeting before inviting the Co-chairperson to make his remarks.

MIN No. NA/JOINT/2023/ 043 : - CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

The minutes of the previous sittings were confirmed as the true record of the proceedings having proposed by Hon. Joseph Makilap Kipkoros, MP and seconded by Hon. CPA Geoffrey Wandeto M, MP.

MIN No. NA/JOINT/2023/ 044 : COMMUNICATION FROM THE CO-CHAIR

The Co-chair briefed the committees' the genesis of the inquiry. He proceeded to appraise members that the Supplementary Estimates I for the 2022/23 Financial Year was submitted to the National Assembly on 31st January 2023 for consideration and approval. During the Scrutiny of the said Supplementary Estimates, the Departmental Committee on Finance and National Planning noted that Ksh.6.019 billion was withdrawn for disbursement to

Telkom Kenya to facilitate the exit of Helios Financial Partners which was a contravention of Article 223 (1) of the Constitution hence necessitating the inquiry.

MIN No. NA/JOINT/2023/: 044 CONSIDERATION OF DRAFT JOINT COMMITTEE REPORT ON 100% BUYBACK OF TELKOM KENYA.

The joint committee secretariat took the committee through the report as follows;-

i) Submissions by CPA Margaret Nyakang'o CBS, Controller Of Budget – Presented by Mr. Benjamin Magut.
ii) Submissions by Mr. Kennedy Ogeto CBS, Former Solicitor General- Presented by Mr. Benjamin Magut.
iii) Submissions by Hon. Shadrack Mose, The Solicitor General - Presented by Mr. Benjamin Magut.
iv) Submissions by Mr. Mugo Kibati, Chief Executive Officer of Telkom Kenya Limited -Presented by Mr. Benjamin Magut.
v) Submissions by Mr. Mugo Kibati, Chief Executive Officer of Telkom Kenya Limited Presented by Mr. Githinji Wanjohi
vi) Submissions by Mr. Eddy Njoroge, Chairperson Telkom Kenya Board- Presented by Mr. Salem Lorot.
vii) Submissions by Mr. Ezra Chiloba, Director General Communication Authority Presented by Mr. Salem Lorot.
viii) Submissions by Mr. Joseph Koskey, Chief Executive Officer, Privatization Commission presented by Ms. Everlyn Orina
ix) Submissions by Dr. Adano Roba, Ag. Director General, Competition Authority of Kenya by Mr. George Ndenjeshe.
x) Submissions by Amb. Ukur Yatani, Former Cabinet Secretary National Treasury and Economic Planning presented by Mr. George Ndenjeshe.

MIN No. NA/JOINT/2023/045 :- ADJOURNMENT

The Co-chair adjourned the meeting at 1.51 p.m. The next sitting will be held at 3.00 p.m.

Signed.....
Hon. CPA. Kuria Kimani, MP
Chairperson

Date..25/10/2023.....

Signed.....
Hon. John Kiarie Waweru, MP,
Chairperson

Date.....

MINUTES OF THE 12th JOINT SITTING OF THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING AND THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION HELD ON WEDNESDAY, 25TH OCTOBER 2023 IN COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDINGS AT 4.30 P.M.

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
PRESENT

1. Hon. CPA. Francis Kuria Kimani, MP - ***Chairperson***
2. Hon. Amb. Benjamin Kipkirui Langat, CBS, MP - ***Vice-Chairperson***
3. Hon. David Mwalika Mboni, MP
4. Hon. Joseph Makilap Kipkoros, MP
5. Hon. Julius Kipletting Rutto, MP
6. Hon. Mohamed Soud Machele, MP
7. Hon. George Sunkuyia Risa, MP
8. Hon. CPA. Joseph Maero Oyula, MP

ABSENT WITH APOLOGIES

1. Hon. Umul Ker Sheikh Kassim, MP
2. Hon. Andrew Adipo Okuome, MP
3. Hon. Dr. Shadrack Mwiti Ithinji, MP
4. Hon. Dr. Adan Keynan Wehliye, CBS, MP
5. Hon. Joseph Munyoro, MP
6. Hon. Dr. John Ariko Namoit, MP
7. Hon. Paul Kibichiy Biego, MP

INATTANDANCE

COMMITTEE SECRETARIAT

1. Mr. Benjamin Magut	-	Senior Clerk Assistant
2. Mr. Nebert Ikai	-	Clerk Assistant I
3. Mr. Benson Kamande	-	Clerk Assistant III
4. Mr. Salem Lorot	-	Legal Counsel I
5. Mr. George Ndenjeshe	-	Fiscal Analyst
6. Mr. Simon Ouko	-	Sergent at arms
7. Ms. Joyce Wachera	-	Hansard Reporter

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION, AND INNOVATION

PRESENT

1. Hon. Shakeel Shabbir Ahmed, CBS, MP
2. Hon. Erastus Kivasu Nzioka, MP
3. Hon. Gideon Kimaiyo Kipkoech, MP
4. Hon. Geoffrey M. Wandeto, MP
5. Hon. Irene Nyakerario Mayaka, MP

6. Hon. Flowrence Jematiah Sergon, MP
7. Hon. Bernard Kibor Kitur, MP

ABSENT WITH APOLOGY

1. Hon. John Kiarie Waweru, MP - ***Chairperson***
2. Hon. Alfah Miruka Ondieki, MP - ***Vice Chairperson***
3. Hon. Joseph Kipkosgei Tonui, MP
4. Hon. Kakuta Maimai Hamisi, MP
5. Hon. Khalif Ali Abdisirat, MP
6. Hon. Mumina Gollo Bonaya, MP
7. Hon. Umulkher Harun Mohamed, MP
8. Hon. Bensuda Joyce Atieno Osogo, MP

IN ATTENDANCE

COMMITTEE SECRETARIAT

1. Ms. Everlyn Orina - Clerk Assistant III
2. Mr. Boaz Chibiego - Research Officer III
3. Mr. Kelvin Lengasi - Audio Officer

MIN No. NA/JOINT/2023/ 046 PRELIMINARIES

The Co-chairperson called the meeting to order at 4.44 p.m. A word of prayer said by Hon. Irene Mayaka, MP, this was later followed by self-introductions by the Committee Members.

MIN No. NA/JOINT/2023/ 047 ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Hon. Gideon Kimaiyo Kipkoech, MP and seconded by Hon. Mohamed Soud Machele, MP.

MIN No. NA/JOINT/2023/048 CONSIDERATION THE JOINT COMMITTEE REPORT ON 100% BUYBACK OF TELKOM KENYA.

After lengthy deliberations, the joint committee resolved to adopt the report on the inquiry on the acquisition of Telkom Kenya by the Government of Kenya, having been proposed by Hon. Erastus Kivasu Nzioka, MP and Seconded by Hon. Joseph Makilap Kipkoros, MP.

MIN No. NA/JOINT/2023/049 COMMITTEE RECOMMENDATIONS

1. The Committee having received written and oral submissions and having arrived at its findings, therefore recommends the following:

ADMINISTRATIVE RECOMMENDATION

2. **THAT**, the HIP III/JHL transaction, being incomplete, be completed expeditiously in the following manner:

    I. **THAT,** TKL **should be retained as a private entity** with the government as a minority shareholder to enhance the company's competitiveness, sustainability and efficacy in the market.

POLICY RECOMMENDATION

6. **THAT**, the Ministry of Information, Communications and Digital Economy and the Communications Authority of Kenya review the regulatory and policy environment governing the telecommunications sector and implement policy initiatives to ensure fairness, foster competition, and promote market development to support a thriving telecommunications sector for the benefit of all Kenyans by 30 June 2024. This review should include, but is not limited to:

    I. The policy and/or regulations concerning spectrum frequency allocation ensure that no market player is allocated a majority of the frequency spectrum preventing distortion of competition through unjust allocations and spectrum hoarding.
    II. The policy and/or regulations concerning telecommunications infrastructure sharing to ensure that there are no underserved areas or communities in the Republic of Kenya; ensuring that all Kenyans have access to broadband coverage at an affordable cost.
    III. The policy and/or regulations concerning mobile termination rates to reduce the cost of calls for consumers.
    IV. The policy and/or regulations concerning SIM card registration to ensure compliance and conformity with a central reference database such as the Integrated Population Registration Database System (IPRS) or other suitable national registration databases.
    V. The policy and/or regulations concerning mobile number portability to ensure that customers can port their mobile numbers to other networks to enhance customer choice.
    VI. And any other policies and/or regulations that will facilitate market correction, spur innovation and competition, improve broadband coverage, improve quality of service, reduce the cost of calls and data, enhance consumer choice, and promote the overall development of the telecommunications sector in Kenya.

7. **THAT**, the National Assembly Departmental Committee on Finance and National Planning revises the regulatory framework with a view of defining a legal process for potential future nationalization/buyback of private entities.

8. **THAT,** within one hundred twenty (120) days of the House adopting this report, the Departmental Committee on Communication Information and Innovation conducts an inquiry into circumstances that have led to the underperformance of the TKL as a telecommunication operator despite huge capital support from the previous investors, whether there is the existence of dominant player in the telecommunication industry and how to ensure a level playing field in the industry.

FURTHER INVESTIGATION

9. **THAT,** the Ethics and Anticorruption Commission undertake a further investigation on **Hon (Amb) Ukur Yattani, EGH, the former Cabinet Secretary the National Treasury**, **Mr. Julius Muia, the former Principal Secretary, the National Treasury** and **Eng.**

II. **THAT**, to support TKL's strategic positioning as a private entity, the National Treasury should promptly facilitate the selection of a suitable private investor who will make the necessary investments to transform the company into profitability on or before 29 December 2023.

III. **THAT**, through an amendment to the incomplete transaction, the National Treasury should ensure that GOK is reimbursed the Kshs. 6.019 billion paid to HIP/JHL at the onboarding of the new investor.

IV. **THAT**, the National Treasury through the exercise of its shareholder rights should ensure that it promptly receives the commitment of the new investor to protect the national strategic assets held by TKL.

V. **THAT**, the National Treasury and the new investor actively cooperate to strengthen the balance sheet of the company to accelerate its growth and viability.

VI. **THAT**, the National Treasury, in conjunction with the new investor, actively participates in the reconstitution of the Board of TKL to align it with the growth and sustainability aspirations of the company.

VII. **THAT**, the National Treasury facilitates urgent settlement of pending public sector bills owed to TKL to shore up the company's liquidity pending completion of the transaction, in any event no later than within the financial year 2023/2024.

VIII. **THAT,** the above recommendations be completed imminently, through the facilitation of the National Treasury, in order to safeguard the operations of the company.

3. **THAT,** the National Treasury, in consultation with the Ministry of Youth Affairs, Sports and the Arts, expeditiously moves to resolve the issue of expropriation of the company's property along Ngong Road (LR. No. 7656) by way of return of the property to TKL or compensation and in any event within a period not exceeding the next fiscal year of the Government of Kenya from the date of this report. The Committee recognizes that this property is Telkom Kenya's highest-value property asset, and its unlawful expropriation has denied the company access to its property and, in so doing injured the company by negatively affecting its operations.

4. **THAT**, owing to numerous inconsistencies in the letters authored by various parties with respect to the transaction, the Directorate of Criminal Investigation (DCI) conducts a forensic audit of all the paper trails and documents with respect to the transaction to ascertain the authenticity of various documents and records and whether they might have been authored and prepared after the fact.

5. **THAT,** Parliament explores Constitutional amendments to limit the application of Article 223 of the Constitution during electoral transitioning

Stanley Kamau, the former Director General, Public Investments and Portfolio Management to ascertain whether they discharged their role on this matter in strict and full compliance with the Constitution of Kenya, the Public Finance Management Act 2012, Public Procurement and Disposal Act 2015, the Public Finance Management (National Government) Regulations 2015 and whether there was any conflict of interest on their part.

MIN No. NA/JOINT/2023/050 ADJOURNMENT

The Co-chair adjourned the meeting at 5.53 p.m. The next meeting will be held on notice

Signed.....
Hon. CPA. Kuria Kimani, MP
Chairperson

Date.....25/10/2023.....

Signed.....
Hon. John Kiarie Waweru, MP,
Chairperson

Date.....

iii) A signed and dated Deed of Novation *relating to the Additional JHL Shareholder Loans* between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and The Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

iv) A signed and dated Deed of Novation in respect of the Loan Agreement *relating to the JHL-OREA Shareholder Loan dated the 10th June, 2016,* between Telkom Kenya Limited and Jamhuri Holdings Limited(JHL) and the Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

v) A signed and dated Deed of Termination *in respect of The Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June 2016 and The Additional Shareholders Agreement* dated 10th June, 2016 between Telkom Kenya Limited and Jamhuri Holdings Limited(JHL) and Helios Investors III LP and The Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

vi) Share Transfer Form between Jamhuri Holdings Limited and The Cabinet Secretary National Treasury;

vii) The Deed of Amendment and Restatement of Shareholders Agreement between GoK, JHL, Helios Investors III L.P. and the Company dated 10th June,2016;

viii) The Additional Shareholders Agreement in relation to the Company entered into between GoK, JHL, Helios Investors III L.P. and the Company dated the 10th June, 2016.

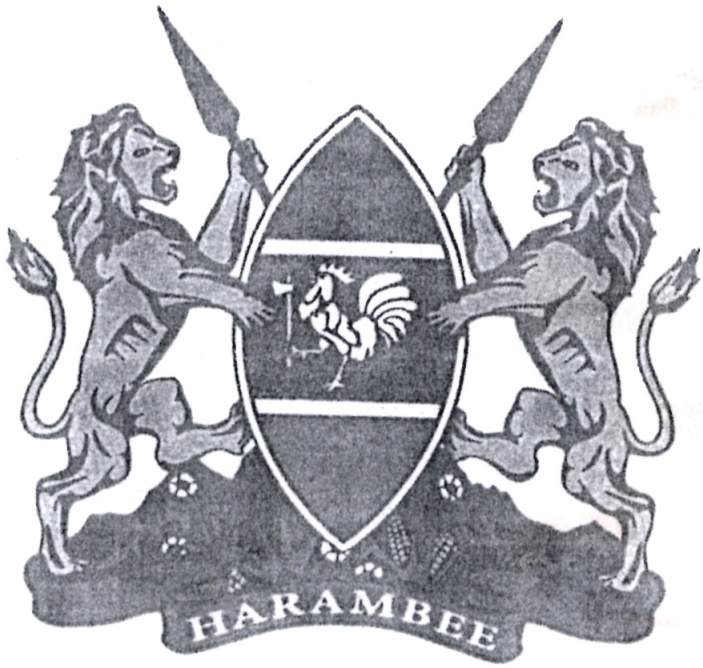
The National Treasury should take into consideration the comments made hereinabove and provide this Office with the requested approvals and documents to enable us issue a Legal Opinion in respect to the matter.

Kindly be advised accordingly.

P. Kihara Kariuki
ATTORNEY GENERAL

Copy to: **Dr. Julius M. Muia, Ph.D, CBS**
Principal Secretary
The National Treasury
The National Treasury and Planning
NAIROBI

Mr. Kennedy Ogeto CBS
SOLICITOR GENERAL



Annexure 20

Letter dated 11th August 2022 from JHL to TKL Board

A020

Jamhuri Holdings Limited
C/o Intercontinental Trust Ltd, Level 3, Alexander House
35, Cybercity, 72201 Ebene, Mauritius

To:
Edward Njoroge
Chairman, The Board of Directors
Telkom Kenya Limited
Telkom Plaza, Ralph Bunche Road
P.O. Box 30301-00100
Nairobi, Kenya

Received on 18th August 2022

11 August 2022

Dear Mr Njoroge,

Re: Resignation as a Director of Telkom Kenya Limited

We refer to the above matter.

Pursuant to a Share Purchase Agreement dated 31 May 2022 (the **SPA**), Jamhuri Holdings Limited (**JHL**) agreed to sell and The Cabinet Secretary To The National Treasury of Kenya on Behalf of The Government of Kenya (**GoK**) agreed to purchase seventy one million two hundred and twenty nine thousand six hundred and ninety six (71,229,696) ordinary shares of Kenya shillings twenty (KES 20) each, being sixty per cent (60%) of the ordinary issued share capital of Telkom Kenya Limited (the **Company**) (the **Transaction**).

In addition, as part of the Transaction, JHL has agreed to transfer to GoK, all the rights and obligations relating to the following loans advanced by JHL to the Company in accordance with the terms and conditions set out in the SPA:

(i) the loan in the principal amount of United States Dollars one hundred and ninety-nine million, six hundred and ninety nine thousand seven hundred and forty four (USD 199,699,744) together with all interest accrued thereon (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars forty million two hundred and thirty eight thousand nine hundred and forty eight (USD 40,238,948) and the total outstanding amount as at 31st December, 2021 was United States Dollars two hundred and thirty nine million nine hundred and thirty eighty thousand six hundred and ninety two (USD 239,938,692) (the **JHL-OrEA Shareholder Loan**); and

(ii) the additional loan amount in the total principal amount of United States Dollars forty seven million seven hundred and twenty thousand (USD 47,720,000) together with all interest accrued thereon as at the Final Completion Date (as defined in the SPA) (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars three million four hundred and sixty six thousand and fifty seven (USD 3,466,057) and accordingly, that the total outstanding amount as at 31st December, 2021 was United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057) (the **Additional JHL Shareholder Loans**).

Pursuant to the SPA, the directors nominated for appointment by JHL to the board of the Company (the **Board**) are required to resign with effect from the completion date of the Transaction. JHL and GoK are

Jamhuri Holdings Limited
C/o Intercontinental Trust Ltd, Level 3, Alexander House
35, Cybercity, 72201 Ebene, Mauritius

now ready to proceed to completion of the Transaction. We therefore request that you tender your resignation as a JHL appointed director and Chairman of the Board with effect from the completion date of the Transaction. Enclosed herewith is the form of resignation letter and statutory declaration. Please execute the documents (but do not date them) and return them to the undersigned.

Yours sincerely,

Paul Cunningham
For and on behalf of **Jamhuri Holdings Limited**

Annexure 21

Letter from CS,NT to TKL board dated 19th August 2022

A021

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

When replying please quote

REF: TNT/ZZ 331/02 "TY⁶" **Date: 19th August, 2022**

Mr. Eddy Njoroge
Chairman
Telkom Kenya Limited
NAIROBI

Dear Eddy,

RE: TELKOM KENYA – EXIT OF JAMHURI HOLDINGS LIMITED

I wish to inform you that Jamhuri Holdings Limited (JHL) notified Government of Kenya (GoK) in August 2021 of their decision to exit Telkom by exercising their put option **as provided in the Shareholders Agreement.**

The GoK and JHL have held discussions on this matter and have agreed as follows:-

1. GoK has agreed to purchase Seventy-One Million Two Hundred and Twenty Nine Thousand Six Hundred and Ninety Six (Kshs.71,229,696/-) Ordinary Shares of Kenya Shillings Twenty (Kshs.20/-) each, in aggregate comprising of sixty per cent (60%) of the ordinary issued share capital of Telkom Kenya Limited at a nominal price of USD 1.
2. JHL has agreed to transfer by Deed of Novation all rights and obligations relating to outstanding loans advanced by JHL to Telkom Kenya in the total principal amounting to USD 47,720,000 together with interest accrued thereon amounting to USD 3,466,057 totaling USD 51,186,057.
3. JHL has agreed to transfer by Deed of Novation all rights and obligations relating to shareholder loans that JHL took over from Orange East Africa, SA, amounting to USD 199,699,744 together with accrued interest amounting to USD 40,238,948 totaling USD 239,938,692.

It is confirmed that all Agreements relating to the above agreements have been executed after both shareholders have fulfilled their obligations including: -

(i) GoK having made payment for the consideration of the purchase of shares and outstanding loans and accrued interest for loans advanced to TKL by JHL;
(ii) Signing of Share Transfer Forms by both GoK and JHL;
(iii) Obtaining the necessary GoK approvals including the Cabinet and Attorney General's clearance to execute the legal documents; and
(iv) Obtaining the approvals of Communication Authority and Competition Authority of Kenya.

Legal opinion? Cabinet Approval?

The purpose of this letter therefore, is to request you to convene a Board of Directors meeting to pass the necessary resolutions to facilitate the completion of this transaction.

I have attached copies of the following documents: -

(i) Signed Share Transfer Form;
(ii) Share Purchase Agreement;
(iii) Deed of Termination in respect of Deed of Amendment and Restatement of Shareholders Agreement dated 20th June 2016 and Additional Shareholders Agreement dated 20th June 2015;
(iv) Novation Agreement of JHL _ Orange East Africa loan taken over by JHL;
(v) Novation Agreement for Additional Shareholder loans advance by JHL to TKL;
(vi) Competition Authority of Kenya approval; and
(vii) Communication Authority approval.

I would appreciate your urgent action on this matter.

Yours Sincerely.

Hon. (Amb.) Ukur Yatani, EGH
Cabinet Secretary/National Treasury and Planning

Copy to: **Jamhuri Holdings Limited**
Level 3, Alexander House
35 Cybercity, Ebene
MAURITIUS

Attn: Paul Cunningham

Annexure 22

Letter dated 24th January 2022 from JHL to TKL

A022

Helios Investors Genpar III LP
P.O. Box 309
South Church Street
Grand Cayman KY1-1104
Cayman Islands

STRICTLY PRIVATE AND CONFIDENTIAL

The Chief Executive Officer
Telkom Kenya
Telkom Plaza
Ralph Bunche Road
P.O. Box 30301-00100
Nairobi
Republic of Kenya

24 January 2022

Dear Sir,

TERMINATION OF MANAGEMENT SERVICES AGREEMENT

We refer to the Management Services Agreement dated 10 June 2016 (the **MSA**) entered into between Telkom Kenya Limited (the **Company**), Jamhuri Holdings Limited (**JHL**) and Helios Investors Genpar III L.P. (**Helios Genpar III**).

Pursuant to the MSA, Helios Genpar III agreed to provide the Management Services to the Company and the Company agreed to the provision of the Management Services on the terms and conditions set out in the MSA.

Following discussions between the Company's shareholders over several months in 2021 and as communicated by JHL at the Company's Annual General Meeting held on 28th November 2021, continuing the provision of the management services is no longer tenable.

Consequently, Helios Genpar III regrets to inform the Company that the MSA and the services provided will be terminated on 31st March 2022.

Helios Investors Genpar III LP
P.O. Box 309
South Church Street
Grand Cayman KY1-1104
Cayman Islands

This letter and the termination of the MSA is without prejudice to any of Helios Genpar III's and JHL's accrued rights up to the date of termination of the MSA. Further, JHL will continue to be engaged with the Company as a shareholder and through Board representation

Yours faithfully,

Ralph Woodford, Director, HIP GP III, Ltd.
For and on behalf of **Helios Investors Genpar III L.P**

For and on behalf of **Jamhuri Holdings Limited**

cc:

The Government of Kenya
Attention: Hon. (AMB) Ukur Yatani, EGH
The Cabinet Secretary
The National Treasury
Treasury Building, Harambee Avenue
P.O. Box 30007-00100
Nairobi, Kenya

The Principal Secretary
The National Treasury
Treasury Building, Harambee Avenue
P.O. Box 30007-00100
Nairobi, Kenya

The Chairman
Board of Directors of Telkom Kenya
Telkom Plaza
Ralph Bunche Road
Nairobi, Kenya

Anjarwalla & Khanna, LLP
P.O Box 200-00606
ALN House
Eldama Ravine Road
Westlands
Nairobi, Kenya

Annexure 23

Letter from Chairman, TKL to NT dated 29th August 2022

A023

Telkom
MOVING WITH YOU

29 August 2022

Hon, (Amb.) Ukur Yatani, EGH
Cabinet Secretary,
The National Treasury
P O Box 30007-00100
Nairobi
KENYA

Dear Sir,

RE: TELKOM KENYA LIMITED - EXIT OF JAMHURI HOLDINGS LIMITED

Thank you for your letter dated 19th August 2022 under the above title.

You state that Jamhuri Holdings Limited (**JHL**) has entered into an agreement with the Government of Kenya (**GoK**) for acquisition of all the shares they hold in Telkom Kenya Limited (**the Company**).

You confirm that the transaction has been executed as between the shareholders, the consideration paid, and request us to convene a meeting of the Board of Directors of the Company to pass the necessary resolutions to facilitate and complete the transaction.

Whereas there would be no issue with the request, I would nevertheless wish to point out the following matters.

a) The Board as currently constituted lacks quorum following the retirement of Mrs Dorcas Kombo and Mr Jinaro Kibet on 7th August, 2022;

b) I have further been advised under different title by the two directors appointed by JHL that they have already tendered their resignation and I have further been requested to execute a blank and undated letter of resignation effective from the completion date of the transaction.

c) I note from the letter by the Attorney General that he was waiting for the agreed form of the Attorney General's legal opinion for his consideration and issuance. It is evident from all the relevant transaction documents that this forms a fundamental condition precedent to the transaction. As Board members, we have not been involved at all in the transaction and in view of the fact that we could be held personally responsible for our actions, we would also seek this comfort from the Attorney General.

d) Upon acquisition of all the shares in the Company, the Company became a state corporation under the State Corporations Act. If the transaction is completed as you state, then it draws the complications under the provisions of the said Act which requires us to operate like a 100% Government owned parastatal under the various laws, statutes and guidelines. This proposition would introduce significant challenges to the immediate continued operation of the company.

Finally, the Company has an obligation to notify its employees, customers and other stakeholders of the transaction. Given that the members of the Board were not involved in the transaction, we would be seeking your guidance on how the transaction can be officially communicated and in particular, confirm the status of employment contracts as well as other ongoing operational contracts with critical stakeholders and partners of the company.

I look forward to hearing from you on the issues raised before we can hold the Board Meeting.

Yours faithfully,



EDDY NJOROGE

Board Chairman

CC

Paul Cunningham,
Jamhuri Holdings Limited,
Level 3, Alexander House,
35 Cybercity,
Ebene, Mauritius

DELIVERY NOTE

DATE	NAME	DESCRIPTION	No.	NAME OF PERSON RECEIVING	SIGNATURE
29/8/22	Hon Amb. Olku. Yatani EGH Cabinet Secretary The National Treasury	1 Le Hev IKL	001/22	Enock	F.mock 30/08/22
1.	Mr. Mugo KIBATI CEO TELKOM Kenya ielcom Plc.	1 LN IKL	002/22 002/22	Mumbi	30/8/22

Annexure 24

Letter dated 6th April 2022 from NT to CA

SECRET

A024

REPUBLIC OF KENYA

THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
Finance – Nairobi
FAX NO. 310833
Telephone: 2252299
When Replying Please Quote

THE NATIONAL TREASURY
P O BOX 30007 - 00100
NAIROBI

Ref: TNT/ZZ 331/02

Date: 6th April 2022

Mr. Ezra Chiloba
Director-General
Communications Authority of Kenya
CA Centre, Waiyaki Way
NAIROBI

Dear DG

RE: ACQUISITION OF 60% SHARES OF TELKOM (K) LTD BY GOVERNMENT OF KENYA

Telkom Kenya Limited is currently owned by Jamhuri Holdings Limited and Government of Kenya (GoK) at 60% and 40% Shareholding respectively.

The Government of Kenya has made a decision to acquire all the 60% shareholding of Jamhuri Holdings in Telkom in order to safeguard public interest. Consequentiy, the Government will own 100% of shareholding in Telkom after the proposed acquisition.

The purpose of this letter is to seek a waiver and or approval from the Communications Authority of Kenya.

Yours Sincerely

Eng. Stanley K. Kamau
Director General/Public Investment & Portfolio Management
For : CABINET SECRETARY/NATIONAL TREASURY & PLANNING

SECRET

COMMUNICATIONS AUTHORITY OF KENYA
RECEIVED
08 APR 2022
TIME: 11:20 am
OFFICE OF DIRECTOR GENERAL
P. O. Box 14448 - 00800, NAIROBI

Annexure 25

Letter dated 4th October 2022 from TKL to CA

A025

Telkom
MOVING WITH YOU

EU/TLSET
Pls draft a letter to TKL seeking update on actual Cabinet shareholding after 6/10/22

6/10/2022

Our Ref.: TKL/RA/CA (LIC)

4 October 2022

Ezra Chiloba,
Director General,
Communications Authority of Kenya,
CA Centre, Waiyaki Way,
P.O. Box 14448, 00800,
Westlands, Nairobi

for
DKCS/D/FSRA
FYNA
05/10/2022

DD/TREL
Please note, TKL communication for your action
for D/TPC&ET

Dear Sir,

RE: CHANGES IN THE SHAREHOLDING OF TELKOM KENYA

Reference is made to the above subject matter.

Further to reports published in today's dailies pertaining to a change of Telkom Kenya's shareholding, we write to update the Authority that there has been no change in the running of the business of Telkom Kenya. Furthermore, we undertake to timely inform the Authority of any changes as they occur.

Telkom Kenya remains committed to meeting its obligations to all its stakeholders.

Yours faithfully,

Mugo Kibati,
Chief Executive Officer

COMMUNICATIONS AUTHORITY OF KENYA
P. O. Box 14448 - 00800, NAIROBI
06 OCT 2022
RECEIVED
Ref. No.
OFFICE OF DIRECTOR
LICENCING COMPLIANCE & STANDARDS

COMMUNICATIONS AUTHORITY OF KENYA
RECEIVED
-5 OCT 2022
TIME: 4 pm
OFFICE OF DIRECTOR GENERAL
P. O. Box 14448 - 00800, NAIROBI

Annexure 26

Letter dated 7th October 2022 from CA to TKL

A 026

COMMUNICATIONS AUTHORITY OF KENYA

Ref: CA/LCS/1205/ASP/CSP/ICSS/NFP-T1/00001

7th October 2022

Mugo Kibati
Chief Executive Officer
Telkom Kenya Limited
Head Office, Plaza, Ralph Bunche Road
P.O. Box 30301
Nairobi-00100

Dear CEO,

RE: CHANGES IN THE SHAREHOLDING OF TELKOM KENYA

This has reference to your letter dated 4th October 2022 on the above subject matter.

We have noted the contents of your letter, and specifically, the indication that there are no changes in the running of Telkom Kenya business, as captioned in the dailies.

In this regard, please furnish the Authority with the current CR12, issued after the date of this letter, indicating the latest shareholding structure of Telkom Kenya Limited.

We will appreciate to receive the information on or before 14th October 2022.

Yours Sincerely,

CPA Joseph M. Kimanga
FOR: DIRECTOR GENERAL

Annexure 27

Approval Letter dated 9th May 2022 from the Executive (Par 216)

SECRET

CABINET SECRETARY
THE NATIONAL TREASURY & PLANNING
367 09 MAY 2022
RECEIVED
P.O. Box 30007 - 00100, NAIROBI

28

A027

EXECUTIVE OFFICE OF THE PRESIDENT
HEAD OF THE PUBLIC SERVICE

Telegraphic address
Telephone: +254-20-2227436
When replying please quote

STATE HOUSE
P.O. Box 40530-00100
Nairobi, Kenya

Ref. No. CAB/GEN.3/1/1/VOL.XVIII/15 and date 9th May, 2022 20.....

Dr. Julius M. Muia, PhD, CBS
Principal Secretary/National Treasury
National Treasury & Planning
NAIROBI

Mr. Torome Saitoti, CBS
Principal Secretary/Planning
National Treasury & Planning
NAIROBI

Mr. Kennedy N. Ogeto, CBS
Solicitor General
Office of the Attorney-General & Department of Justice
NAIROBI

(1) DR/PIB
(2) File

ACCOUNTANT GENERAL
NATIONAL TREASURY

Dear

EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

I refer to the Cabinet Memorandum **CAB (22)41** which was jointly submitted by the Cabinet Secretary for National Treasury and Planning and the Attorney General.

The Memorandum sought to brief Cabinet on the current status of Telkom Kenya Limited and seek Cabinet approval for the proposed exit of Helios Investors LLP/Jamhuri Holdings Limited in Telcom Kenya.

His Excellency the President has **considered** the Memorandum and:-

SECRET

(i) **Noted** the contents of the Memorandum.

(ii) **Concurred** with the request in the Memorandum subject to ratification by Cabinet.

(iii) **Directed** the Cabinet Secretary for National Treasury & Planning; and the Attorney-General to take appropriate action.

Please proceed and take appropriate action.

Yours

JOSEPH K. KINYUA, EGH
HEAD OF THE PUBLIC SERVICE

Copy to: **Hon. (Amb.) Ukur Yatani, EGH**
Cabinet Secretary
The National Treasury & Planning
NAIROBI

Hon. Justice (Rtd.) Paul Kihara Kariuki, EGH
Attorney-General
State Law Office & Department of Justice
NAIROBI

Annexure 28

Letter dated 15th July 2021 from HIP/JHL to GOK

A028

JAMHURI HOLDINGS

Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius

Strictly Confidential

15th July 2021

The Government of Kenya
Attention: Hon. (Amb) Ukur Yatani, EGH
The Cabinet Secretary
The National Treasury
Treasury Building, Harambee Avenue
P.O. Box 30007-00100
Nairobi, Kenya

Dear Sirs,

TELKOM KENYA LIMITED

We refer to the letter from the Chairman of the Board of Telkom Kenya Limited (TKL or the Company) of 16 April 2021, further to his letter of 20 January 2021 as well as to the Deed of Amendment and Restatement of the Shareholders Agreement (the **Amended SHA**) and the Additional Shareholders Agreement (the **Additional SHA**), entered into on 10 June 2016 (collectively, the **Shareholders Agreements**).

In accordance with the Shareholders Agreements, Jamhuri Holdings Limited (**JHL**) hereby notifies the GoK of its decision to exercise its put option.

JHL's exercise of the put option follows five years of its investment in TKL during which time substantial financial as well as other resources have been deployed to create value notwithstanding significant challenges, including the one highlighted in the Chairman's letter referred to above.

These matters have been brought to the attention of the GoK on numerous occasions and JHL has sought to engage with the GoK to address them over the years. The decision also follows the yet to be actioned alternative strategic plan following the disapproval of the Company's combination transaction by GoK, the chronology of which is summarized below for ease of reference.

TKL Combination Transaction

a) Since JHL became a shareholder in TKL, TKL re-branded its business, upgraded and optimized its network and rationalized the organization.

b) Despite TKL making significant progress with its overall business performance, the Company remained challenged in its pursuit of attaining long term financial viability and value creation in the prevailing market structure.

c) It was for that reason that the Board of Directors of TKL in 2018 engaged McKinsey & Company (**McKinsey**) as consultants to advise on viable strategic options for the Company. The conclusion from the review were:

i) For TKL to attain financial sustainability, regulatory interventions were required, and

ii) Without regulatory intervention, McKinsey forecasted a reduction in EBIDTA loss from KES 5.5 billion in 2018 to KES 1.7 billion in 2021 if an additional investment of KES 20 billion was made in the company.

d) The options open to TKL and evaluated by the Board of Directors of the Company, based on the McKinsey report were as follows:

i) **Option 1: Transforming the business** – This required investment of KES 20 billion and perfect execution of the McKinsey business plan which included requisite regulatory intervention.

ii) **Option 2: Shutting-down the business** - This would have required that TKL obtained additional funding from shareholders in the amount of KES 14 billion to settle its outstanding liabilities after having liquidated all its assets.

iii) **Option 3: Joint venture with Airtel Networks Kenya Limited (Airtel Kenya)** – In this scenario, TKL would have received an equity stake in the joint venture company, retained its real estate portfolio, derived business value in the new TKL and retained a significant number of TKL jobs.

e) Faced with the foregoing options, the Board of TKL resolved that the best option in the circumstances was to proceed with a joint venture with Airtel Kenya. The joint venture would harness the operational strengths of Airtel Kenya and TKL for purposes of creating meaningful competition and innovation in the telecommunication sector in Kenya. It would also have reduced the requirement for further injection of capital by both shareholders and also avoided the loss of c.1000 direct jobs and a multiple number of indirect jobs and supported livelihoods.

f) As a result, discussions were held in 2018 and early 2019 to combine TKL's telecommunications businesses in Kenya through a joint venture with Airtel Kenya to secure TKL's viability as a going concern (the TKL/Airtel Combination Transaction or Combination Transaction).

g) It was envisaged that the TKL/Airtel Combination Transaction would create value for all the stakeholders (including employees, suppliers, agents, distributors, customers, shareholders and creditors) and put TKL on a stable financial footing. The expected advantages of the TKL/Airtel Combination Transaction were numerous and have, as you well know, been canvassed in detail, in prior communications.

h) Whilst the Combination Transaction was deemed positive for the telecoms sector in Kenya and received the pre-requisite regulatory approvals, it could not be completed

following the decline by GoK (in its capacity as TKL's shareholder) to grant its approval.

JHL Investment

A value of up to USD 200m was foregone by TKL as a consequence of the declined approval of the Combination Transaction and more value would have accrued from the combined entity to date.

On the contrary, whilst the standalone TKL operation has continued to reduce its operating losses (EBITDA) to the c. KES 2b level, capital injection, market consolidation and a structural review of the sector still remain key enablers of an accelerated transformation for the company.

In addition to its equity stake, JHL's investment in TKL includes USD 291m in Shareholder Loans as at 31st December 2020.

Way Forward

We trust that GoK's 100% ownership of TKL or alternative equity partnership, together with required funding to the Company, will facilitate the continued turnaround, growth and success of the Company to support deepening of the public's access to and choice of telecommunications and related services providers, while delivering appropriate returns required to maintain long-term investment in the sector.

In the light of the exercise of the put option, JHL will also transition out of the Management Services Agreement (**MSA**) in accordance with Clause 9.2 of the MSA.

We look forward to discussing the next steps with you with a view to concluding JHL's formal exit from TKL and termination of the MSA by 30th September 2021.

Yours faithfully,

Paul Cunningham

Director

For and on behalf of Jamhuri Holdings Limited

Annexure 29

Communication from Cabinet Office dated 9th May 2022

CABINET SECRETARY
THE NATIONAL TREASURY & PLANNING
09 MAY 2022
RECEIVED
P.O. BOX 30007 - 00100, NAIROBI

SECRET

AN

RECEIVED
24

ICA 02

EXECUTIVE OFFICE OF THE PRESIDENT
HEAD OF THE PUBLIC SERVICE

Telegraphic Address
Telephone +254-20-2227436
When replying please quote

STATE HOUSE
P.O. Box 40530-00100
Nairobi, Kenya

Ref. No. and date **CAB/GEN.3/1/1/VOL.XVIII/15**

9th May, 2022

Dr. Julius M. Muia, PhD, CBS
Principal Secretary/National Treasury
National Treasury & Planning
NAIROBI

Mr. Torome Saitoti, CBS
Principal Secretary/Planning
National Treasury & Planning
NAIROBI

Mr. Kennedy N. Ogeto, CBS
Solicitor General
Office of the Attorney-General & Department of Justice
NAIROBI

Dear

EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

I refer to the Cabinet Memorandum **CAB (22)41** which was jointly submitted by the Cabinet Secretary for National Treasury and Planning and the Attorney General.

The Memorandum sought to brief Cabinet on the current status of Telkom Kenya Limited and seek Cabinet approval for the proposed exit of Helios Investors LLP/Jamhuri Holdings Limited in Telcom Kenya.

His Excellency the President has **considered** the Memorandum and:-

SECRET

Annex

12

(i) **Noted** the contents of the Memorandum.

(ii) **Concurred** with the request in the Memorandum subject to ratification by Cabinet.

(iii) **Directed** the Cabinet Secretary for National Treasury & Planning; and the Attorney-General to take appropriate action.

Please proceed and take appropriate action.

Yours

JOSEPH K. KINYUA, EGH
HEAD OF THE PUBLIC SERVICE

Copy to: **Hon. (Amb.) Ukur Yatani, EGH**
Cabinet Secretary
The National Treasury & Planning
NAIROBI

Hon. Justice (Rtd.) Paul Kihara Kariuki, EGH
Attorney-General
State Law Office & Department of Justice
NAIROBI

SECRET

Annexure 30

GOK acceptance letter dated 29th March 2022

A030

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299
When replying please quote

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

Ref: TNT/ZZ 331/02 TY6

Date: 29th March, 2022

Mr. Paul Cunningham
Director
Jamhuri Holdings

Dear Paul,

SUBJECT : TELKOM KENYA LIMITED

We acknowledge your letter dated 15th July 2021 in which Jamhuri Holdings Limited (JHL) expressed its decision to exit from Telkom Kenya Ltd by notifying the Government of Kenya that JHL will exercise its put option in accordance with the Shareholders Agreements. The delay in responding to this matter was occasioned by consultations within Government and is regrettable.

The Government of Kenya has reviewed the decision of Jamhuri Holdings Ltd and note as follows:

1. That Jamhuri holdings Ltd own 60% of Telkom Kenya Ltd while the Government of Kenya owns 40%.
2. That Jamhuri Holdings Ltd acquired a principal loan of USD 199 million when it took up Orange Telkom's stake. This loan has an accrued interest of USD 40 million bringing the total loan plus interest of USD 239 million.
3. That Jamhuri Holdings injected a new loan into Telkom Kenya Ltd amounting to USD 48 million, which has an accrued interest of USD USD 3 million with a total outstanding balance of USD 51 million.
4. The total debt outstanding to date is USD 290 million (principal – USD 247 million and accrued interest – USD 43 million)

The Government of Kenya wishes to express its gratitude to Helios for choosing Kenya as its investments destination and specifically the investments made in Telkom Kenya Ltd. The investments in Telkom Kenya have supported the company to continue its operations and create value despite poor business performance driven mainly by high interconnection charges and spectrum fees.

I now wish to inform you that the Government of Kenya has accepted your decision to exit Telkom Kenya Ltd and would be glad to receive your proposed terms and conditions of the put option to facilitate further engagement on the exit plan by Helios.

Further, we request that you prepare a draft Share Sale Agreement between GoK and Helios for the sale of 60% shareholding in Telkom Kenya Ltd for our review.

Yours sincerely,

Hon. (Amb). Ukur Yatani, EGH
CABINET SECRETARY/NATIONAL TREASURY & PLANNING

Annexure 31

Share purchase agreement dated 31st May 2022

'ICTLY CONFIDENTIAL

ANNEX 3

EXECUTION VERSION

A031

Dated 31 MAY 2022

The Cabinet Secretary the National Treasury on behalf of the Government of Kenya

(GoK)

and

Jamhuri Holdings Limited

(JHL)

Share Purchase Agreement

in relation to the sale and purchase of shares and shareholder loans in

Telkom Kenya Limited

(the **Company**)

A&K | ALN
ANJARWALLA & KHANNA

info@africalegalnetwork.com
www.africalegalnetwork.com

Table of Contents

Clause		Page
1	Interpretation	3
2	The Transaction	7
3	Conditions	7
4	Final Completion	9
5	Post – Completion Obligations	11
6	Representations and Warranties by the Parties	11
7	Dispute Resolution	12
8	Jurisdiction and Governing Law	13
9	Waiver of immunity	13
10	Notices	13
11	Whole Agreement and Remedies	14
12	Confidentiality	15
13	General	16

This Agreement is made as of 31 MAY 2022 (the Agreement)

BETWEEN

(1) THE CABINET SECRETARY TO THE NATIONAL TREASURY OF KENYA ON BEHALF OF THE GOVERNMENT OF KENYA whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (GoK); and

(2) JAMHURI HOLDINGS LIMITED, a limited liability company incorporated in accordance with the laws of Mauritius and with Registration Number 134048C2/GBL, whose official office is Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius (JHL/ the Seller),

(each a **Party** and together the **Parties**).

RECITALS

(A) Pursuant to a share purchase agreement dated 6 November 2015 between Orange East Africa S.A., Orange Participations S.A. and JHL, OrEA agreed to sell and JHL agreed to purchase eighty three million one hundred and one thousand three hundred and twelve (83,101,312) ordinary shares in the Company (as hereinafter defined) constituting seventy per cent (70%) of the ordinary issued share capital of the Company together with OrEA's shareholder loan to the Company at the time amounting to United States Dollars three hundred and thirty two million eight hundred and thirty two thousand nine hundred and six point seven five (USD 332,832,906.75) (the **OrEA Shareholder Loan**) (such acquisition collectively the **JHL-OrEA Transaction**).

(B) On completion of the JHL- OrEA Transaction, JHL agreed to transfer ten per cent (10%) of the Company's shares owned by JHL to GoK, thereby increasing GoK's shareholding to forty per cent (40%) of the ordinary issued share capital of the Company and JHL retained sixty per cent (60%) of the ordinary issued share capital of the Company. Further, JHL transferred forty per cent (40%) of the OrEA Shareholder Loan to GoK (such portion referred to as the **GoK- OrEA Shareholder Loan**) and retained the balance of the OrEA Shareholder Loan (such balance hereinafter defined as the **JHL- OrEA Shareholder Loan**).

(C) Subsequently, the Seller has provided additional funding to the Company by way of the Additional JHL Shareholder Loans (as hereinafter defined).

(D) On completion of the JHL-OrEA Transaction, the remaining seventy one million two hundred and twenty nine thousand six hundred and ninety six shares (71,229,696) ordinary shares of Kenya shillings twenty (KES 20) each being sixty per cent (60%) of the ordinary issued share capital of the Company were legally and beneficially owned by JHL (the **Sale Shares**).

(E) JHL has agreed to sell and GoK has agreed to purchase the Sale Shares and JHL has agreed to transfer all the rights and obligations relating to the JHL Shareholder Loans (as hereinafter defined) to GoK subject to the terms and conditions of this Agreement.

IT IS AGREED AS FOLLOWS

1 Interpretation

1.1 In this Agreement (including its recitals and the Schedules), unless the context otherwise requires, the following terms shall have the following meanings:

1.1.1 **Additional JHL Shareholder Loans** means the loans advanced by JHL to the Company in the total principal amount of United States Dollars forty seven million seven hundred

and twenty thousand (USD 47,720,000) together with all interest accrued thereon as at the Final Completion Date (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars three million four hundred and sixty six thousand and fifty seven (USD 3,466,057)) and accordingly that the total outstanding amount as at 31st December, 2021 was United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057);

1.1.2 **Additional JHL Shareholder Loans Consideration** means the sum of United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057);

1.1.3 **Business Day** means a day (other than a Saturday, Sunday or gazetted public holiday) on which commercial banks are open for general business in Mauritius and in Nairobi, Kenya;

1.1.4 **CBK** means the Central Bank of Kenya established pursuant to the Central Bank of Kenya Act (Cap 491, Laws of Kenya);

1.1.5 **Company** means Telkom Kenya Limited, a company incorporated in Kenya with company number C.3/2009 whose registered address is at Telkom Plaza, Ralph Bunche Road, P.O. Box 30301-00100, Nairobi, Kenya;

1.1.6 **Communications Authority** means Communications Authority of Kenya, established under the Kenya Information and Communications Act (Cap 411A of the laws of Kenya) (as amended from time to time);

1.1.7 **Competition Authority** means the Competition Authority of Kenya, established under the Competition Act, (No 12 of 2010, Laws of Kenya) (as amended from time to time);

1.1.8 **Conditions** means conditions to Final Completion set out in Clause 3.1;

1.1.9 **Escrow Agent** means Anjarwalla & Khanna LLP, of ALN House Eldama Ravine Close, Off Eldama Ravine Road, Westlands, P.O. Box 200-00606, Nairobi, Kenya;

1.1.10 **Escrow Agreement** means the deed in agreed form to be entered into between the Parties and the Escrow Agent on the Initial Completion Date setting out the terms on which the JHL Escrow Documents and the GoK Escrow Documents shall be held and released pursuant to this Agreement;

1.1.11 **Exchange Rate** means the sell rate published by the Central Bank of Kenya (CBK) as the exchange rate applicable for selling USD using KES as at five (5) Business Days or such date nearer to the Final Completion Date as the Parties may agree prior to the Final Completion Date;

1.1.12 **Existing Shareholders' Agreements** means the following agreements:

a) the Deed of Amendment and Restatement of Shareholders Agreement between GoK, JHL, Helios Investors III L.P. and the Company dated 10 June 2016; and

b) the Additional Shareholders Agreement in relation to the Company entered into between GoK, JHL, Helios Investors III L.P. and the Company dated 10 June 2016;

1.1.13 **Final Completion** means completion of the sale and purchase of the Sale Shares and the transfer of the JHL Shareholder Loans from JHL to GoK and the issuance of the GoK Treasury Bond to JHL in accordance with this Agreement;

1.1.14 **Final Completion Date** means the fifth (5th) Business Day from the date of the Final Completion Notice, or such other date as the Parties may agree to in writing provided that such date shall be no later than the Long Stop Date;

1.1.15 **Final Completion Notice** has the meaning set out in Clause 3.10;

1.1.16 **GoK Treasury Bond** has the meaning ascribed to it in Clause 4.5

1.1.17 **GoK Escrow Documents** has the meaning ascribed to it in Clause 4.3;

1.1.18 **Governmental Authority** means any regional, national, county, municipal and/or local authority or any governmental, administrative or regulatory body inside or outside Kenya having statutory competence to promulgate or to enforce rules and regulations having force of law with regard to the business undertaken by the Company or the transactions and matters referred to in this Agreement or other documents in connection with the Transaction (including without limitation the Communications Authority and the Competition Authority) and **Governmental Authorities** shall be construed accordingly;

1.1.19 **Initial Completion Date** means 31st May 2022 or such other date as may be mutually agreed between the Parties but no later than the Long Stop Date;

1.1.20 **JHL Escrow Documents** has the meaning ascribed to it in Clause 4.2;

1.1.21 **JHL Shareholder Loans** means together, the Additional JHL Shareholder Loans and the JHL-OrEA Shareholder Loans (and each a **JHL Shareholder Loan**);

1.1.22 **JHL-OrEA Shareholder Loan Consideration** means a peppercorn;

1.1.23 **JHL-OrEA Shareholder Loan** means the OrEA Shareholder Loan (as defined in the Recitals), less the GoK-OrEA Shareholder Loan (as defined in the Recitals), such loan (excluding the GoK-OrEA Shareholder Loan) being in the principal amount of United States Dollars one hundred and ninety-nine million, six hundred and ninety nine thousand seven hundred and forty four (USD 199,699,744) together with all interest accrued thereon (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars forty million two hundred and thirty eight thousand nine hundred and forty eight (USD 40,238,948)) and the total outstanding amount as at 31st December, 2021 was United States Dollars two hundred and thirty nine million nine hundred and thirty eighty thousand six hundred and ninety two (USD 239,938,692);

1.1.24 **KES** means Kenyan Shillings, the lawful currency of Kenya;

1.1.25 **Long Stop Date** means 29th July 2022 or such other date as may be agreed upon by the Parties in writing;

1.1.26 **PFMA** means the Public Finance Management Act (No. 18 of 2012, Laws of Kenya);

1.1.27 **Sale Shares** has the meaning ascribed to it in the Recitals;

1.1.28 **Sale Shares Consideration** means United States Dollars one (USD 1);

1.1.29 **Total Consideration** means together, the Sale Shares Consideration, the JHL-OrEA Shareholder Loan Consideration and the Additional JHL Shareholder Loans Consideration;

1.1.30 **Transaction** means the sale of the Sale Shares by JHL to GoK and the transfer of the JHL Shareholder Loans from JHL to GoK as envisaged under this Agreement; and

1.1.31 **USD** means United States Dollars.

1.2 Construction

1.2.1 References to **include** or **including** are to be construed without limitation.

1.2.2 The expression **person** means any legal or natural person, partnership, association, trust, company, joint venture, agency, governmental authority or other body, entity or organization (whether corporate or unincorporated) and that person's personal representatives, heirs or successors (as the case may be) or permitted assigns.

1.2.3 Any reference to **writing** or **written** means any method of reproducing words in a legible and non-transitory form (excluding, for the avoidance of doubt, email).

1.2.4 Any reference to in **"agreed form"** means in a form agreed by the relevant parties thereto and initialed for or on behalf of such parties;

1.2.5 The table of contents and headings are inserted for convenience only and do not affect the construction of this Agreement.

1.2.6 Unless the context otherwise requires, words in the singular include the plural and vice versa and a reference to any gender includes all other genders.

1.2.7 References to Clauses, Paragraphs and Schedules are to Clauses and paragraphs of, and Schedules to, this Agreement. The Schedules form part of this Agreement.

1.2.8 References to any statute or statutory provision include a reference to that statute or statutory provision as amended, consolidated or replaced from time to time (whether before or after the date of this Agreement) and include any subordinate legislation made under the relevant statute or statutory provision.

1.2.9 Unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

1.2.10 If a definition of a particular term or expression in this Agreement imposes substantive rights or obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.2.11 Each provision of this Agreement has been negotiated by the Parties and drafted for the benefit of the Parties and, accordingly, the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (the *contra proferentem* rule), shall not apply.

1.2.12 The rule known as the *ejusdem generis* rule shall not apply and accordingly general words introduced by the word other shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

1.2.13 Any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within the Party's power or control.

1.2.14 This Agreement shall be binding on and be for the benefit of the successors and personal representatives of the Parties.

2 The Transaction

2.1 Sale and purchase of Sale Shares

2.1.1 Subject to and in accordance with this Agreement, JHL hereby agrees to sell, and GoK hereby agrees to purchase, the Sale Shares on and with effect from Final Completion for the Sale Shares Consideration.

2.1.2 The Sale Shares are sold with all rights attaching to the Sale Shares on and from Final Completion, including the right to receive all dividends or distributions declared, paid or made on or after Final Completion.

2.2 Novation of JHL-OrEA Shareholder Loan

2.2.1 JHL hereby agrees to transfer all the rights and obligations relating to the JHL-OrEA Shareholder Loan to GoK by way of a deed of novation (in agreed form).

2.3 Novation of Additional JHL Shareholder Loans

2.3.1 JHL hereby agrees to transfer all the rights and obligations relating to the Additional JHL Shareholder Loans to GoK by way of a deed of novation (in agreed form) in consideration of the payment of the Additional JHL Shareholder Loans Consideration.

2.4 The Parties agree that the Sale Shares and the transfer of the JHL Shareholder Loans as envisaged under this Agreement shall be completed simultaneously as an indivisible transaction and neither Party shall be under any obligation to complete unless all the aforesaid transactions are completed simultaneously.

3 Conditions

3.1 Notwithstanding any provision of this Agreement, Final Completion shall be subject to and conditional upon satisfaction, or waiver by both Parties (to the extent capable of being waived), of the following conditions precedent (the **Conditions**) on or before the Long Stop Date:

3.1.1 GoK having notified the Communications Authority of the Transaction in a form acceptable to JHL and either receiving (in a form satisfactory to JHL) a letter of no objection or approval from the Communications Authority in respect of the Transaction on unconditional terms;

3.1.2 GoK having received (in a form satisfactory to JHL) approval for the Transaction from the Competition Authority and providing JHL with a copy of such written confirmation;

3.1.3 the Attorney-General of Kenya having issued an opinion in the agreed form;

3.1.4 GoK having procured (in a form satisfactory to JHL) that all legal and procedural requirements for the entry into of this Agreement and all agreements and documents ancillary hereto and the issuance of the GoK Treasury Bond are obtained and/or complied with, to the satisfaction of JHL (including without limitation, procuring that all approvals required from the Cabinet Secretary for the National Treasury and Planning (the **Cabinet Secretary**), the approval of Cabinet and any other approvals required under the PFMA and under any other applicable laws are obtained) and providing evidence thereof to JHL;

3.1.5 no award, decision, injunction, judgment, order, ruling or verdict of any court or Governmental Authority having been issued or made prior to Final Completion, which has the effect of making unlawful or otherwise prohibiting the Transaction (or any part thereof) as contemplated in this Agreement.

3.2 GoK will be solely responsible for and shall use its best endeavours to fulfil or procure the fulfilment of the Condition set out in Clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4, before the Long Stop Date.

3.3 GoK and the Seller shall co-operate fully in all actions necessary to procure the satisfaction of the Conditions, to the extent reasonably practicable and without unreasonable delay, provide the other Party with such necessary information, assistance and administrative co-operation as is reasonably requested by the other Party in order to seek to satisfy the Conditions, keeping the other Party informed of the progress of such Conditions.

3.4 In addition, the Parties shall, in respect of each of the approvals or no objection (as the case may be) required from the Communications Authority, the Competition Authority and/or any other applicable Governmental Authority:

3.4.1 use their best endeavours to submit or procure the submission of all the relevant applications for approval or no objection (as the case may be) from the Communications Authority, the Competition Authority and any other applicable Governmental Authority as soon as reasonably practicable and in any event within twenty-one (21) days from the date of the Agreement and use their respective reasonable endeavours to procure that each such Condition is satisfied as soon as possible and, in any event, by no later than the Long Stop Date;

3.4.2 provide each other with all information reasonably necessary to make any notification or filing required by any relevant Governmental Authority (and it is hereby acknowledged that in relation to any information required from the Company in connection with any Governmental Authority approvals or no objection, it shall be the responsibility of GoK to procure such information);

3.4.3 communicate with the relevant Governmental Authority in relation to each such Condition after prior written consultation with the other Party (and taking into account any reasonable comments and requests of the other Party) and provide the other Party with copies of all such forms, applications, notifications, filings, submissions and other communication in the form submitted or sent and notify the other Party of any communication (whether written or oral) received from the relevant Governmental Authority in relation to any such Condition and keep the other Party promptly informed as to progress towards satisfaction of each such Condition;

3.4.4 where reasonably practicable, provide the other Party with drafts of all written communications (save to the extent such written communications are wholly administrative or procedural in nature) intended to be sent to any Governmental Authority in connection with any such Condition and give the other Party a reasonable opportunity to comment thereon and provide the other Party with final copies of all such communications; and

3.4.5 give the other Party reasonable notice of and the opportunity for it or any of its advisers to attend all meetings and material telephone calls with any Governmental Authority.

3.5 Each Party shall, to the extent reasonably practicable and without unreasonable delay, provide the other Party with such necessary information, assistance and administrative co-operation as is reasonably requested by the other Party in order to seek to satisfy the Governmental Authority approvals (including, for the avoidance of doubt, attendance at meetings with the other Party or Governmental Authority).

3.6 If at any time a Party becomes aware of a fact, matter or circumstance that might reasonably be expected to prevent a Governmental Authority approval being satisfied prior to or by the Long Stop Date, it shall promptly inform the other Party and keep the other Party apprised of the status of such matter.

3.7 The filing fees relating to the obtaining of the relevant regulatory approvals, as well as the cost of any remedies requested by the relevant Governmental Authorities (including any costs incurred by the Company, as the case may be), shall be borne by GoK.

3.8 Each Party undertakes to notify the other Party in writing of anything which will or may prevent any of the Conditions (as applicable) from being satisfied on or before the Long Stop Date immediately it comes to its attention.

3.9 Either JHL or GoK shall be entitled to waive, to the extent capable by law of waiver, any Condition in whole or in part on written notice to the other.

3.10 Each Party undertakes to notify the other Party as soon as possible on becoming aware that any of the Conditions has been satisfied or waived in accordance with Clause 3.9. The Seller shall within three (3) Business Days of such satisfaction or waiver (if capable of waiver) of the last to be satisfied or waived of the Conditions issue a written notice to GoK confirming that the Conditions have all been satisfied and/or waived (if capable of waiver) (the **Final Completion Notice**).

4 Final Completion

4.1 Final Completion shall take place at the registered office of the Company or in such other place as the Parties may mutually agree.

4.2 On the Initial Completion Date (subject to and upon compliance by GoK of its obligations under Clause 4.3) to the satisfaction of JHL, JHL shall deliver the following documents (in agreed form) to the Escrow Agent (together the **JHL Escrow Documents**) to be held and dealt with in accordance with the terms of the Escrow Agreement PROVIDED THAT the JHL Escrow Documents shall be left undated:

4.2.1 share transfer form(s) in respect of the Sale Shares in favour of GoK duly executed by JHL;

4.2.2 statutory declaration signed by JHL in relation to the transfer of the Sale Shares as is required to be filed with the Companies Registry;

4.2.3 deed of termination with respect to the Existing Shareholders' Agreements duly executed by JHL and Helios Investors III L.P;

4.2.4 deed of novation in respect of the JHL-OrEA Shareholder Loan duly executed by JHL;

4.2.5 deed of novation in respect of the Additional JHL Shareholder Loans duly executed by JHL; and

4.2.6 executed resignation letters and the corresponding statutory declarations in respect of the following directors nominated for appointment by JHL to the board of the Company effective from the Final Completion Date:

(i) Nitin Kaul; and

(ii) Dennis Aluanga.

4.3 On the Initial Completion Date, simultaneously with Clause 4.2, GoK shall:

4.3.1 execute and procure the execution thereof by the Company (as applicable) of the following documents and deliver the originals thereof to the Escrow Agent in a form satisfactory to JHL (together the **GoK Escrow Documents**) to be held and dealt with in accordance with the terms of the Escrow Agreement **PROVIDED THAT** GoK Escrow Documents shall be left undated:

(a) share transfer form(s) in respect of the Sale Shares;

(b) the deed of termination of the Existing Shareholders' Agreements;

(c) deed of novation in respect of the JHL-OrEA Shareholder Loan;

(d) deed of novation in respect of the Additional JHL Shareholder Loan; and

(e) a resolution passed at a duly convened and held meeting of the board of directors of the Company in the agreed form approving the registration of the transfer of Sale Shares and the JHL Shareholder Loans subject to the occurrence of Final Completion and the matters envisaged under this Agreement.

4.4 In addition, on the Initial Completion Date:

4.4.1 the Parties shall sign and procure the signing of the Escrow Agreement; and

4.4.2 the Parties shall procure that the Escrow Agent signs the Escrow Agreement and shall hold the JHL Escrow Documents and the GoK Escrow Documents on the terms of the Escrow Agreement.

4.5 On the Final Completion Date GoK shall settle the Total Consideration in respect of the Sale Shares and in respect of the Additional JHL Shareholder Loans by issuing a three (3) year GOK treasury bond with a coupon rate that takes market factors into account (which coupon is payable half-yearly) and tradeable in whole or in any part thereof, in the Kenya Shillings equivalent of the Total Consideration (the **GoK Treasury Bond**) which shall be computed as follows:

Aggregate Value of GoK Treasury Bond in KES	=	Total Consideration i.e. USD 51,186,058	X	Exchange Rate

4.6 Time shall be of essence in connection with the issuance of the GoK Treasury Bond and compliance of with all other obligations of GoK as envisaged under this Agreement.

4.7 On the Final Completion Date, the Parties agree that immediately upon the issuance of the GoK Treasury Bond to JHL or its nominees to the satisfaction of JHL, JHL shall notify the Escrow Agent and the Parties shall procure that the Escrow Agent releases the JHL Escrow Documents and the GoK Escrow Documents for further action by the relevant Parties (as relevant) and the JHL Escrow Documents and the GoK Escrow Documents shall be dated and take effect as of the Initial Completion Date.

4.8 If the Conditions are not fulfilled (or waived to the extent capable of lawful waiver) and/or the GoK Treasury Bond is not issued to the Seller by the Final Completion Date, then this Agreement (other than Clauses 1 and Clauses 7 to 13 inclusive) shall automatically terminate and the Escrow Agent shall be required to release the JHL Escrow Documents and the GoK Escrow Documents to JHL for destruction.

5 Post – Completion Obligations

5.1 Within thirty (30) days from the Final Completion Date, GoK shall procure the stamping of the share transfer forms in respect of the Sale Shares and the transfer of the JHL-OrEA Shareholder Loan, and the transfer of the Additional JHL Shareholder Loans and the deed of termination of the Existing Shareholders Agreement with the requisite stamp duty (or waiver of stamp duty) and procure the registration of the share transfer forms in respect of the Sale Shares and the changes in the board of directors of the Company are duly completed at the Registrar of Companies in Kenya and that the books of the Company are duly updated to reflect the changes, and provide evidence of the same (together with certified copies thereof) to JHL.

6 Representations and Warranties by the Parties

6.1 Each Party represents and warrants to the other Party, such warranties being given as of the date of this Agreement and each day during the interim period up to and including the Final Completion Date, that:

6.1.1 such Party is properly incorporated, validly existing and in good standing in its jurisdiction of incorporation;

6.1.2 such Party has the requisite power, capacity and authority to enter into and perform this Agreement and any documents referred to in this Agreement, to perform its obligations hereunder and thereunder, and to complete the transactions contemplated hereby and thereby;

6.1.3 all actions required to be taken by such Party to authorize the execution and delivery of this Agreement and the documents referred to in this Agreement, and the performance of such Party's obligations hereunder and thereunder have properly been taken;

6.1.4 this Agreement constitutes (including documents which are to be delivered at Initial Completion and at Final Completion) will, when executed, constitute binding and enforceable obligations of such Party in accordance with their respective terms. The execution and delivery of, and the performance by such Party of its obligations under this Agreement and the documents referred to in this Agreement will not:

(a) violate any provision of the constitutional documents of such Party;

(b) result in a breach of, or constitute a default under, any instrument to which such party is a party or by which such Party is bound;

(c) violate any law applicable to, or binding upon or enforceable against such Party or result in a breach of any order, judgment or decree of any court or Governmental Authority to which such Party is bound; and

(d) other than as provided in clause 3 require consent, waiver, approval or notification to any person or Governmental Authority.

6.2 JHL further represents and warrants to GoK, such warranties being given as of the date of this Agreement and each day during the interim period up to and including the Final Completion Date, that:

6.2.1 JHL is the legal and beneficial owner of the Sale Shares, free from any encumbrances;

6.2.2 All the Sale Shares are fully paid up;

6.2.3 So far as JHL is aware, no order has been made, petition presented or resolution passed for the winding-up of JHL, no notice of appointment of or notice of intention to appoint an administrator has been made or issued in relation to JHL and no administration order or administration application has been made in relation to JHL and JHL is not involved in any insolvency proceedings;

6.2.4 The JHL-OrEA Shareholder Loan was acquired from Orange Telkom; and

6.2.5 The Additional JHL Shareholder Loans were disbursed to the Company by or on behalf of JHL.

6.3 GoK further represents and warrants to JHL, such warranties being given as of the date of this Agreement and each day during the interim period up to and including the Final Completion Date and thereafter that:

6.3.1 the GoK Treasury Bond shall be validly and lawfully issued to JHL or its nominees;

6.3.2 as at the Final Completion Date GoK shall have procured that all legal and procedural requirements for issuance of the GoK Treasury Bond have been complied with to the satisfaction of JHL at its discretion (including without limitation, procuring that all approvals required from the Cabinet Secretary for the National Treasury and Planning (the Cabinet Secretary), the approval of Cabinet and any other approvals required under the PFMA and under any other applicable laws) and provide evidence thereof to JHL;

6.3.3 GoK shall have procured the fulfilment of the Conditions set out in Clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4 in compliance with all legal and procedural requirements and GoK hereby undertakes to indemnify the Seller on a full indemnity basis against any risks and losses and in addition any penalties, fines and/or any other sanctions that may be imposed by the Competition Authority, the Communications Authority or any other Governmental Authority or any judicial or arbitral authority in connection with the manner in which the Conditions set out in Clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4 have been fulfilled and/or in respect of any failure to procure any approvals or consents required under any law in Kenya in connection with the Transaction and the matters envisaged under this Agreement; and

6.3.4 as at the Final Completion Date, no further requirements or approvals shall be required in order to make the GoK Treasury Bond valid and binding and no further approvals of consents shall be required from any regulators or governmental bodies in Kenya.

7 Dispute Resolution

7.1 The Parties shall use their respective good faith efforts to resolve any dispute, controversy or claim of any nature whatsoever arising out of or in relation to or in connection with this Agreement. To this end, the Parties shall each promptly appoint representatives of appropriate standing who shall meet and attempt to resolve any dispute between them. In the event that an amicable settlement has not been reached within twenty (20) Business Days of (a) the

Parties representatives meeting as aforesaid, or (b) the dispute, controversy or claim of any nature whatsoever arising, the following provisions of this Clause 7 shall apply.

7.2 Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules (the **Rules**), which Rules are deemed to be incorporated by reference into this clause.

7.3 The seat, or legal place of arbitration shall be in London in the United Kingdom.

7.4 The venue of the arbitration shall be in London in the United Kingdom.

7.5 The language to be used in the arbitral proceedings shall be English.

7.6 The number of arbitrators shall be three (3).

8 Jurisdiction and Governing Law

This Agreement and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with the laws of Kenya.

9 Waiver of immunity

9.1 To the extent permitted by the laws of Kenya, GoK irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or in connection with this Agreement, including without limitation immunity from:

9.1.1 the jurisdiction of any court or tribunal;

9.1.2 service of process;

9.1.3 injunctive or other interim relief, or any order for specific performance or recovery of land; and

9.1.4 any process for execution of any award or judgement against its property.

10 Notices

10.1 **Addresses**

10.1.1 Any notice, claim, demand or other communication in connection with this Agreement or with any arbitration under this Agreement (each a "**Notice**") shall be sufficiently given to the recipient at its address set out in Clause 10.2 or any other address notified to the sender by the recipient for the purposes of this Agreement and marked "IMPORTANT LEGAL NOTICE".

10.1.2 Any Notice or other communication shall be in writing, in English and delivered by hand or sent by messenger, courier or pre-paid airmail post. Any Notice shall be deemed to have been received at the time of delivery if delivered by hand, on the third (3rd) Business Day following such despatch, if sent by messenger, courier or seven (7) Business Days from the time of posting, if sent by post.

10.2 **(a) GoK:**

Attention: The Cabinet Secretary
The National Treasury
Treasury Building
Harambee Avenue

P.O. Box 30007-00100
NAIROBI, KENYA

(b) JHL:

Attention: Paul Cunningham
Jamhuri Holdings Limited and/or Helios Investors III L.P.
Level 3, Alexander House
35 Cybercity
Ebene, Mauritius

With a copy to:

Attention: Karim Anjarwalla
Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200-00606
Nairobi, Kenya

10.3 **Costs**

10.3.1 Each Party shall bear its own costs incurred by it in connection with the preparation, negotiation and entry into this Agreement and the documents to be entered into pursuant to it.

10.3.2 GoK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of the Transaction, including without limitation, the sale of the Sale Shares (and the corresponding share transfer forms), the transfer of the JHL OrEA Shareholder Loan, the transfer of the Additional JHL Shareholder Loans and deed of termination of the Existing Shareholders Agreement.

11 **Whole Agreement and Remedies**

11.1 **Whole Agreement**

This Agreement contains the whole agreement between the Parties relating to the subject matter of this Agreement at the date hereof to the exclusion of any terms implied by law which may be excluded by contract and supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Agreement.

11.2 **No inducement**

Each of the Parties acknowledges that it has not been induced to enter into this Agreement by any representation, warranty or undertaking not expressly incorporated into it.

11.3 **Remedies**

So far as permitted by law and subject to the express provisions of this Agreement and except in the case of fraud, each Party agrees and acknowledges that its only right and remedy in relation to any representation, warranty or undertaking made or given in connection with this Agreement shall be for breach of the terms of this Agreement to the exclusion of all other rights and remedies (including those in tort or arising under statute).

11.4 Legal Advice

Each Party to this Agreement confirms it has received independent legal advice relating to all the matters provided for in this Agreement, including the provisions of this Clause, and agrees, having considered the terms of this Clause and the Agreement as a whole, that the provisions of this Clause are fair and reasonable.

12 Confidentiality

12.1 Confidential Information

The Parties shall use all reasonable endeavours to keep confidential and to ensure that their respective Affiliates and their respective officers, employees, agents and professional and other advisers keep confidential any information (the **Confidential Information**) and the fact that this Agreement has been entered into and the terms of this Agreement.

12.2 Restrictions

12.2.1 No Party may use for its own business purposes or disclose to any third party any Confidential Information without the consent of the other Parties.

12.2.2 This Clause does not apply to:

(a) information which is or becomes publicly available (otherwise than as a result of a breach of this Clause);

(b) information which is independently developed by the relevant Party or acquired from a third party, to the extent that it is acquired with the right to disclose it;

(c) information which was lawfully in the possession of the relevant Party free of any restriction on disclosure;

(d) information which following disclosure under this Clause, becomes available to the relevant Party from a source other than another party which is not bound by any obligation of confidentiality in relation to such information;

(e) the disclosure by a Party of Confidential Information to its directors or employees who need to know that confidential information for purposes relating to this Agreement but those directors and employees shall not use that Confidential Information for any other purpose;

(f) the disclosure of information to the extent required to be disclosed by law or any court of competent jurisdiction, any governmental official or regulatory authority or any binding judgement, order or requirement of any other competent authority;

(g) the disclosure of information to any tax authority to the extent reasonably required for the purposes of the tax affairs of the Party concerned or any member of its group;

(h) the disclosure to a Party's professional advisers of information reasonably required to be disclosed for purposes relating to this Agreement; and/or

(i) the disclosure to any prospective purchaser(s) of shareholder loans or any shares in the Company.

12.2.3 Each Party shall inform every officer, employee or agent or any professional or other adviser advising it in relation to matters relating to this Agreement, or to whom it

provides Confidential Information, that such information is confidential and shall instruct them:

(a) to keep it confidential; and

(b) not to disclose it to any third party (other than to those persons to whom it has already been or may be disclosed in accordance with the terms of this Clause).

12.3 **Damages not an adequate remedy**

Without prejudice to any other rights or remedies which a Party may have, the Parties acknowledge and agree that damages would not be an adequate remedy for any breach of this Clause 12 and the remedies of injunction, specific performance and other equitable relief are appropriate for any threatened or actual breach of any such provision and no proof of special damages shall be necessary for the enforcement of the rights under this Clause 12.

12.4 **Survival**

12.4.1 The disclosing Party shall remain responsible for any breach of this Clause 12 by the person to whom that Confidential Information is disclosed.

12.4.2 The provisions of this Clause 12 shall survive the termination of this Agreement for whatever cause for a period of three (3) years.

13 **General**

13.1 **Survival of Rights, Duties and Obligations**

Termination of this Agreement for any cause shall not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

13.2 **No Partnership**

Nothing in this Agreement shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party for any purpose.

13.3 **Release**

Any liability to any Party under this Agreement may in whole or in part be released, compounded or compromised or time or indulgence given by that Party in its absolute discretion as regards any Party under such liability without in any way prejudicing or affecting its rights against any other Party under the same or a like liability, whether joint and several or otherwise.

13.4 **Waiver**

No failure of any Party to exercise, and no delay by it in exercising, any right, power or remedy in connection with this Agreement (each a **Right**) shall operate as a waiver of that Right, nor shall any single or partial exercise of any Right preclude any other or further exercise of that Right or the exercise of any other Right. The Rights provided in this Agreement are cumulative and not exclusive of any other Rights (whether provided by law or otherwise). Any express waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

13.5 **Variation**

No variation of this Agreement shall be effective unless in writing and signed by or on behalf of each of the Parties.

13.6 **Assignment**

This Agreement is personal to the Parties and the rights and obligations of the Parties may not be assigned or otherwise transferred.

13.7 **Time of the Essence**

Time shall be of the essence of this Agreement, both as regards any dates, times and periods mentioned and as regards any dates, times and periods which may be substituted for them in accordance with this Agreement or by agreement in writing between the Parties.

13.8 **Further Assurance**

At any time after the date of this Agreement the Parties shall and shall use all reasonable endeavours to procure that any necessary third party shall, at the cost of the relevant Party execute such documents and do such acts and things as that Party may reasonably require for the purpose of giving to that party the full benefit of all the provisions of this Agreement.

13.9 **Invalidity**

If any provision in this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under the law of any jurisdiction, the legality, validity or enforceability of such provision or part under the law of any other jurisdiction and the legality, validity and enforceability of the remainder of this Agreement shall not be affected.

13.10 **Counterparts**

This Agreement may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into this Agreement by executing any such counterpart.

[Remainder of Page Left Intentionally Blank]

IN WITNESS this Agreement has been duly executed by or on behalf of the Parties.

SIGNED by Paul Cunningham

for and on behalf of **JAMHURI HOLDINGS LIMITED**

in the presence of:

[sign here]

Signature of witness

Name of witness: Cassie Meade

Designation: Executive Assistant

SIGNED by

The Cabinet Secretary, the National Treasury

for and on behalf of the Government of Kenya

in the presence of:



[sign here]

Signature of witness

Name of witness Eng Stanley Kanuti

Designation: DG/PIPM

Annexure 32

Deed of Variation dated 29th July 2022

A 032

Deed of Variation

THIS DEED (the "**Deed**") is made on _____ 2016:

BY AND BETWEEN:

1) **THE CABINET SECRETARY TO THE TREASURY ON BEHALF OF THE GOVERNMENT OF KENYA**, whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (the "**Government**");

2) **ORANGE EAST AFRICA S.A.**, Registration Number 479 292 856 (Paris Trade and Companies Registry), whose registered office is at 78, rue Olivier de Serres – 75015 Paris, France ("**OrEA**");

3) **ORANGE S.A.** (formerly France Telecom S.A.), Registration Number 380 129 866 (Paris Trade and Companies Registry), whose registered office is at 78, rue Olivier de Serres – 75015 Paris, France, (the "**Lead Investor**"); and

4) **TELKOM KENYA LIMITED**, Registration Number C.3/2009, whose registered office is at PO Box 30301-00100, Nairobi, Kenyatta Avenue (the "**Company**"),

together the "**Parties**" and each a "**Party**".

WHEREAS

A. Reference is made to the shareholders' agreement entered into between OrEA, the Government, the Company and the Lead Investor dated 21st December 2007, in relation to the Company (the "**Shareholders' Agreement**").

B. Capitalized terms used in this Deed shall, unless otherwise defined herein, have the meanings ascribed to them in the Shareholders' Agreement.

C. Whereas OrEA has granted a first shareholders' loan to the Company, pursuant to an intragroup credit facility agreement entered into between OrEA and the Company on 27 December 2012, as amended from time to time (the "**First OrEA Loan**") and has granted a second shareholders' loan to the Company pursuant to an intragroup credit facility agreement entered into between OrEA and the Company on 9th November 2015, as amended from time to time (the "**Second OrEA Loan**") which loans amount to a total of Euros [***Amount to be finalized at Completion***] (EUR [ ]) as at [ ] (the "**OrEA Loans**").

D. On 6th November 2015, OrEA, Orange Participations S.A and Jamhuri Holdings Limited, a Mauritius company registered under number 134048C2/GBL, whose address is level 3, Alexander House, 35 Cybercity, Ebene, Mauritius ("**Jamhuri**") entered into a purchase agreement, pursuant to which OrEA agreed to (i) sell its entire shareholding in the Company (the "**Shares**") to Jamhuri, and (ii) to transfer to Jamhuri the Company's payments obligations OrEA Loans, through the endorsement of two promissory notes issued by the Company, as an overall and indivisible transaction (the "**Transaction**").

E. In consideration of the Government agreeing not to exercise its preemptive right in respect of the OrEA Loans under Clause 13.5 (*Loans, borrowings, guarantees and indemnities*) of the Shareholders' Agreement Jamhuri shall transfer to the Government ten per cent (10%) of the share capital of the Company at a purchase price of Kenya Shillings one (Kshs 1/=) and Jamhuri shall assign to the Government an amount comprising forty per cent (40%) of the OrEA Loans at a purchase price of Kenya Shillings one (Kshs 1/=) (the "**JHL-Government Transaction**").

F. Jamhuri has demonstrated to the Parties that it materially complies with the substantive provisions of the pre-qualification criteria set out in the RFP and Government has accepted Jamhuri as a purchaser of the Shares.

G. Under clause 10.4 of the Shareholders Agreement, OrEA may only transfer its shares in the Company to a person who meets the pre-qualification criteria of a purchaser as set out in the Request for Proposals dated 14th September 2007 issued by the Government in respect of the privatization of the Company.

H. In order to enable the Transaction to be completed it is necessary for the Parties to agree to certain variations of the terms of the Shareholders Agreement as permitted under Clause 27.6 (*Variation*) thereof.

NOW THIS DEED witnesseth as follows:

1. **Pre-Qualification Criteria**

1.1 The Parties hereby agree to amend Clause 10.4 of the Shareholders' Agreement (*Transfers by Purchaser after fifth anniversary*) as follows:

"After the fifth anniversary of this Agreement or the Listing of the Company, the Purchaser may transfer its Shares in the Company, or the Lead Investor may transfer its shares in the Purchaser, to any person who materially meets the substantive provisions of the pre-qualification criteria of a purchaser as set out in the RFP."

1.2 The Parties hereby agree to cause an Extraordinary Shareholders' Meeting of the Company to amend article 29 of the Articles as follows:

"After the fifth anniversary of the Shareholders' Agreement or the Listing of the Company, OrEA may transfer its shares in the Company, to any person who materially meets the substantive provisions of the criteria to be a Permitted Transferee, provided that such transferee shall be obliged, as a pre-condition of such transferee becoming a Member, to be bound by these Articles and the Shareholders Agreement and covenant with the Company that it will not transfer its shares in the Company to any party who is not a Permitted Transferee."

2. **Transfer of the OrEA Loans**

2.1 The Government agrees that it will not exercise its pre-emptive right to the OrEA Loans pursuant to Clause 13.5 of the Shareholders' Agreement (*Loans, borrowings, guarantees and indemnities*) for the consideration stated in Recital E of this Deed but subject to completion of the Transaction and the JHL-Government Transaction, and, accordingly, hereby agrees to the transfer by OrEA to Jamhuri of the OrEA Loans.

2.2 On completion of the Transaction and the JHL-Government Transaction, OrEA shall deliver to the Government and the Company deeds of termination of the two credit facility agreements referred to in Recital C above.

3. This Deed shall be governed by and construed in accordance with Kenyan law and the provisions of Clauses 22 and 24 of the Shareholders' Agreement shall apply *mutatis mutandis*.

EXECUTED as a deed the day and year first above written.

For and on behalf of **THE CABINET SECRETARY TO THE TREASURY ON BEHALF OF THE GOVERNMENT OF KENYA**

_____

Date: 2016
Name:
Authority:

For and on behalf of **ORANGE EAST AFRICA S.A.**

_____

Date: 2016
Name:
Authority:

For and on behalf of **ORANGE S.A.**

_____

Date: 2016
Name:
Authority:

Sealed with the Common Seal of
Telkom Kenya Limited
in the presence of :

.....
Director:

.....
Director/Secretary:

Annexure 33

Letter dated 8th April 2022 from the Executive Officer to the PS, NTEP

APPENDIX IV

A033 (26)

PRINCIPAL SECRETARY
THE NATIONAL TREASURY
348 08 APR 2022
RECEIVED
P. O. Box 30007 - 00100, NAIROBI

RECEIVED
08 APR 2022
Principal Secretary
National Treasury

PS TREASURY OFFICE
Take Necessary Action ✓
Please See Me
Please Review and Advice
Note
To Keep in View
Noted & Appreciated
Please Let's Discuss

EXECUTIVE OFFICE OF THE PRESIDENT
HEAD OF THE PUBLIC SERVICE

Telegraphic Address
Telephone: +254-20-2227436
When replying please quote

STATE HOUSE
P.O. Box 40530-00100
Nairobi, Kenya

Ref. No. .....CAB/NSC/14/2.VOL.1/(20)
and date

Fee

.....1st April, 2022....., 20.....

Dr. Julius M. Muia, PhD, CBS
Principal Secretary/National Treasury
National Treasury & Planning
NAIROBI

Da PPM

Mr. Torome Saitoti, CBS
Principal Secretary/Planning
National Treasury & Planning
NAIROBI

ACCOUNTANT GENERAL
NATIONAL TREASURY

628

Mr. Kennedy N. Ogeto, CBS
Solicitor General
Office of the Attorney-General & Department of Justice
NAIROBI

Dear Dr. Muia

EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

I refer to the **Second (Special)** National Security Council Meeting held on Friday, **1st April, 2022,** during which the Cabinet Secretary for National Treasury & Planning presented a Cabinet Memorandum **NSC(22)14**, jointly submitted by the Attorney-General.

The objective of the Memorandum was to apprise the Council on the current status of Telkom Kenya Limited; brief the Council on the proposed acquisition of Jamhuri Holdings Limited in Telkom Kenya Limited; and seek approval of the proposed acquisition of shares in order to have the Government own 100% shares in Telkom Kenya Limited.

The Telkom Kenya Limited was established as telecommunications operator in 1999. It was previously part of the Kenya Posts and Telecommunications Corporations which was the sole provider of postal and telecommunications services. It operates critical national security assets and services including mobile telephone services, money transfer services, courier businesses, real estate, data centre assets, National Fibre Optic Infrastructure (NOFBI) operation and maintenance, management of critical Government of Kenya services, Fibre Right of Way, Subsea Assets (both landing stations and all undersea cables including) TEAMS.

Telkom is currently in a dire state of financial and operational performance owing to continuing and accumulated operational losses which amounted to Ksh.105 billion as at 31st December, 2021. The company has huge accumulated liabilities related to critical services provided by business partners (third parties) which have threatened to discontinue the services owing to delays in payments.

I wish to inform you that the Council **considered** the Memorandum and:-

(i) **Noted** the contents of the Memorandum.

(ii) **Approved** the exit of Helios/Jamhuri in Telkom Kenya with the Government acquiring the 60% shareholding owned by Helios/Jamhuri at USD 1.

(iii) **Approved** the Government to take over and compensate Helios/Jamhuri the loan injected by Helios amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million).

(iv) Approved a budget of Kshs.5.92 billion for the FY 2022/23 for Telkom to facilitate the implementation of the exit plan by Helios/Jamhuri.

(v) **Directed** the Cabinet Secretary for National Treasury & Planning; and the Attorney-General to take appropriate action.

Annexure 34

Letter dated 10th May 2022 from the AG to CS NT

ANNEX 15

A 039

CABINET SECRETARY
THE NATIONAL TREASURY & PLANNING
06 MAY 2022
RECEIVED
P.O. Box 30007 - 00100, NAIROBI

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/CONF/2/C/62 VOL. VII
Your Ref: TNT/ZZ 331/02

6th May, 2022

MOST URGENT

Hon. (Amb.) Ukur Kanacho Yatani, EGH
Cabinet Secretary
The National Treasury & Planning
NAIROBI

RE: EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LTD IN TELKOM KENYA LIMITED

This has reference to the above-captioned subject matter and to your letter indicated to be dated the 6th April, 2022, under Ref. No. TNT/ZZ 331/02, which was delivered to our Office on the 27th April, 2022. By the said letter, the National Treasury and Planning submitted to us the following draft documents, which had been presented to the National Treasury and Planning by Jamhuri Holdings Limited vide a letter indicated to be dated the 19th April, 2022, for our review and legal clearance:

(a) Deed of Termination in Respect of the Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and the Additional Shareholders Agreement Dated the 10th June, 2016;

(b) Deed of Novation in Respect of the Loan Agreement Relating to the JHL-OREA Shareholder Loan Dated the 10th June, 2016;

(c) Escrow Agreement in Relation to the Sale and Purchase of Shares and Shareholder Loans in Telkom Kenya Limited;

(d) Share Purchase Agreement in Relation to the Sale and Purchase of Shares and Shareholder Loans in Telkom Kenya Limited;

(e) Deed of Novation Relating to the Additional JHL Shareholder Loans

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/0711944555/0732529995
E-MAIL: info.ag@awoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILE SELLASIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: kgal@justice.go.ke, WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified

We make further reference to the letter dated the 27th April, 2022, under Ref. No. CAB/NSC/14/2. VOL. 1(20), which we received on the 27th April, 2022. By the said letter, the Head of the Public Service informed this Office, among others, of the decision by the National Security Council to approve:

(a) the exit of Helios/Jamhuri Limited from Telkom, with the Government acquiring the 60% shareholding owned by Helios/Jamhuri at USD 1;

(b) the Government's takeover and compensation of Helios/Jamhuri for the loan injected into Telkom by Helios amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million);

(c) a budget of Kshs. 5.92 billion for the FY 2022/23 for Telkom to facilitate the implementation of the exit plan by Helios/Jamhuri Limited.

We also acknowledge receipt of the Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and the Additional Shareholders Agreement dated the 10th June, 2016. We have reviewed the documents and wish to make our comments as hereinbelow:

A. General Comments

1. As noted in our letter dated the 1st April, 2022, under Ref. No. AG/CONF/2/C/62 Vol. VIII (copy enclosed), the proposed transaction will have the effect of converting Telkom Kenya Limited (TKL) into a state corporation. Consequently, the approval by the Cabinet will be required for the transaction, in line with the requirements of Sections 86 and 87 of the Public Finance Management Act, 2012. All the requisite internal approvals within TKL should also be obtained.

2. We note that the dispute resolution clauses in all the draft agreements provide that arbitration shall be administered by the Mediation and Arbitration Centre of Mauritius under its arbitration rules in force. We recommend that in line with prevailing Government policy, such arbitration be administered by the Nairobi Centre for International Arbitration, under its arbitration rules.

3. We note that the various draft agreements (excluding the draft Escrow Agreement), provide that GoK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of the Deed. The National Treasury and Planning should note the obligations in the clause and confirm that they are suitable and that GoK will be in a position to satisfy the same. The National Treasury and Planning should also

ensure that it has adequate budget to meet the costs in relation to the Escrow Agreement and any other such costs, and that the same are reflective of value for money.

4. In addition to the foregoing, since the GoK will bear half of the fees payable to the Escrow Agent, the National Treasury and Planning should ensure that the selection of the said agent was done in accordance with the law.

5. All the draft agreements contain a provision to the effect that time is of the essence, both as regards dates, times and periods mentioned therein, and as regards any dates, times and periods which may be substituted for them. The National Treasury and Planning should take note of the said provisions and ensure that the dates, times and periods as shall be agreed are convenient and that the GoK will be in a position to meet the obligations thereunder.

6. As advised in our referenced letter, our comments herein are provided on the understanding that the figures and percentages, including of the parties' respective shareholding and of the amounts involved, are accurately captured. In addition to the foregoing, we wish to comments as follows on the two under-listed agreements:

(a) Deed of Termination in Respect of the Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and the Additional Shareholders Agreement Dated the 10th June, 2016

7. We note that the purpose of this Deed is to terminate the following agreements:

   (i) The Deed of Amendment and Restatement of Shareholders Agreement Between the Buyer, Jamhuri Holdings Limited (JHL), Helios Investors III L.P and the TKL (the Company) dated the 10th June, 2016; and

   (ii) The Additional Shareholders Agreement in relation to the Company entered into Between the Buyer, JHL, Helios Investors III L.P and the TKL dated the 10th June, 2016.

8. We advise that the following clause be inserted as clause B in the recitals section titled "WHEREAS", to ensure completeness of the information thereunder:

   "*On completion of the JHL-OrEA Transaction, JHL agreed to transfer ten percent (10%) of the Company's shares owned by JHL to GoK, thereby increasing GoK's shareholding to forty percent (40%) of the ordinary issued*

share capital of the Company. Further, JHL transferred forty percent (40%) of the OrEA Shareholder Loan to GoK and retained the balance."

9. We also advise that clause 1.1.1 which defines "Agreements" as "Existing Shareholders' Agreements" and clause 1.1.5 which defines "Existing Shareholders' Agreements" should be merged since they define the same substantive concept. In our view, it would suffice to replace the current definition of "Agreement" by listing the agreements under the definition of "Existing Shareholders' Agreements" as the definition of the term "Agreement."

(b) Share Purchase Agreement in Relation to the Sale and Purchase of Shares and Shareholder Loans in Telkom Kenya Limited

10. Clause 3.1.2 lists as conditions precedent that should be met on or before the Long Stop Date (the 29th July, 2022 or as may be agreed by the parties), that GoK would have received a letter of no-objection or approval from the Communications Authority of Kenya and the Competition Authority in respect of the transaction; in addition to the Attorney General's opinion in the agreed form. We advise the National Treasury and Planning to take note of the conditions concerning the procurement of approvals from the Communications Authority of Kenya and the Competition Authority and to ensure that the said conditions will be met, given that clause 6.3.3 stipulates that GoK shall indemnify JHL against any risks, penalties or sanctions that may be imposed by the Communication Authority of Kenya and the Competition Authority in connection with the said conditions.

11. We should also be most grateful if you would please provide to us, expeditiously, the agreed form of the Attorney General's legal opinion to ensure that we consider and issue the same as may be appropriate, in good time.

The various agreements may be signed once the foregoing comments have been addressed as advised. Please note to send us duly executed copies of the agreements for our information and records.

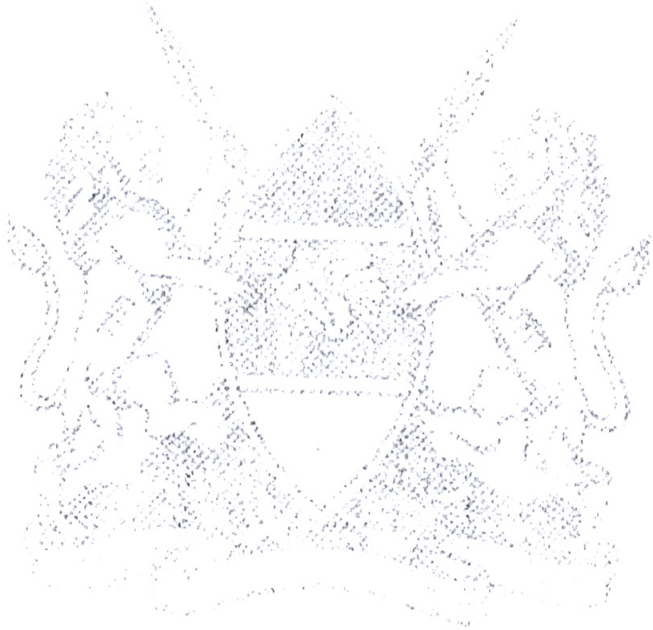
We trust that what we have stated hereinabove will be of assistance and that you may be pleased to be guided accordingly. We remain at your disposal to provide such further guidance as may be necessary.

P. Kihara Kariuki
ATTORNEY GENERAL

Copy to:

Mr. Kennedy Ogeto CBS
SOLICITOR GENERAL

Dr. Julius Muia, CBS
Principal Secretary/National Treasury
The National Treasury and Planning
NAIROBI



Annexure 35

Letter dated 27th July 2022 from CS NT to the PS NTEP

4035

RECEIVED
457

SENIOR CHIEF FINANCE OFFICER
THE NATIONAL TREASURY AND PLANNING
29 JUL 2022
RECEIVED
P. O. Box 30007 - NAIROBI

5

DG PSM
cc: DG BEA
cc: DF PSMO

REPUBLIC OF KENYA

THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE-NAIROBI
Fax No.: 310833
Telephone: 2252299

THE NATIONAL TREASURY
P.O. Box 30007-00100
NAIROBI
KENYA

When replying please quote
Ref: RESTNT/ZZ/331/02 TY⁶

3 SCFO
TASA.
29/7/22

Date: 27th July, 2022

Dr. Julius Muia, Phd, CBS
Principal Secretary
The National Treasury
P.O Box 300074 - 00100
NAIROBI

2 H/Accounting Unit.
Pse take further action.
SC 28/7/22
cc DG/ASEQ

Dear PS,

EXIT OF HELIOS INVESTORS LLP/JAMHURI LTD IN TELKOM KENYA LIMITED

Reference is made to your letter Ref. No. TNT/ZZ 331/02 TY⁶ dated 25th July, 2022 on the above subject matter.

The National Treasury has reviewed your request for additional funds amounting to **USD.51,186,058** under Article 223 of the Constitution of Kenya, 2010 to be paid to Jamhuri Holdings Limited in form of a three(3) years Treasury Bond and the same be regularised in the Supplementary Budget of FY 2022/23.

In view of this request, the National Treasury has granted approval under Article 223 of the Constitution of Kenya, 2010. This is to enable the Government of Kenya to take over and reimburse the shareholder loan injected and accrued interest amounting to **USD.51,186,058.**

Article 223 of the Constitution requires that the approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money. Consequently, in order to facilitate the CS/TNT&P to submit the same report to Parliament for approval, below is a format for submission for your necessary action.

Table 1: Template for Reporting Actual Expenditure under Article 223 of the Constitution

Description		Approved Additional Expenditure	Actual Expenditure at ……	Justification/Supporting Documentation
Vote Code & Vote Title	Total			
	Programme			
	Sub-Programme			
	Activity/Project			

NB: Provide analysis of the implications for the planned outputs and outcomes of the affected programmes

You are advised to ensure that all expenditures are incurred in line with the provisions of the Public Finance Management Act, 2012, the Public Procurement and Asset Disposal Act 2015 and the attendant Regulations.

Please take necessary action accordingly.

Yours Sincerely,

HON. AMB. UKUR YATANI, EGH
CABINET SECRETARY/NATIONAL TREASURY & PLANNING

Copy to: **CPA Nancy K. Gathungu, CBS**
Auditor General
Anniversary Towers
NAIROBI

CPA Dr. Margaret Nyakang'o, CBS
Controller of Budget
BIMA House
NAIROBI

Annexure 36

Memo dated 28th July 2022 from Head of Accounting NT

A036

ANNEX 2C





THE NATIONAL TREASURY & PLANNING

ACCOUNTS DIVISION

INTERNAL MEMO

File No.:NT/CA/50(30) **Date**:28th July, 2022

TO : Director General, AS&QA

SUBJECT : EXCHEQUER REQUISITION (Article 223)

Reference is made to a letter from the Cabinet Secretary/NT&P Ref.RESTNAT/ZZ/331/02 TY dated 27th July, 2022, approving release of USD51,186,058 (**Kshs.6,091,140,702/=**) to Telkom Kenya to facilitate exit of Helios Investors LLP Jamhuri Ltd (**copy attached**).

This is to request for Development Exchequer funding to pay for the under-listed payment voucher:-

1. Development (PAs) - **Kshs.6,091,140,702/=** (copy attached).

Nemwel M. Motanya
Head of Accounting Unit

Encls.

oreign Exchange Rates | CBK

Date	Currency	Mean	Buy	Sell
28/07/2022	STG POUND	143.0547	142.9153	143.1941
28/07/2022	JPY (100)	86.8787	86.8024	86.9550
28/07/2022	AE DIRHAM	32.3325	32.3039	32.3610
28/07/2022	HONGKONG DOLLAR	15.1289	15.1162	15.1416
28/07/2022	SINGAPORE DOLLAR	85.6383	85.5507	85.7258
28/07/2022	KES / USHS	32.6671	32.5933	32.7409
28/07/2022	NOR KRONER	12.1261	12.1142	12.1380
28/07/2022	KES / TSHS	19.6365	19.5778	19.6951
28/07/2022	US DOLLAR	118.7588	118.6588	118.8588
28/07/2022	EURO	120.5879	120.4682	120.7076
[illegible]7/2022	KES / RWF	8.6698	8.5614	8.7781
28/07/2022	KES / BIF	17.3464	16.9950	17.6978
28/07/2022	SW KRONER	11.5503	11.5395	11.5611
28/07/2022	CHINESE YUAN	17.5909	17.5754	17.6064
28/07/2022	S FRANC	123.5270	123.3973	123.6567
28/07/2022	SA RAND	7.0494	7.0425	7.0564
28/07/2022	DAN KRONER	16.2155	16.2007	16.2302
28/07/2022	SAUDI RIYAL	31.6184	31.5901	31.6467
28/07/2022	IND RUPEE	1.4864	1.4846	1.4882
28/07/2022	CAN $	92.4265	92.3343	92.5187
28/07/2022	AUSTRALIAN $	82.5433	82.4679	82.6188
[illegible]7/2022	STG POUND	142.6912	142.5471	142.8353
27/07/2022	EURO	120.7962	120.6747	120.9176
27/07/2022	AUSTRALIAN $	82.3426	82.2613	82.4238
27/07/2022	SA RAND	7.0333	7.0242	7.0423

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE-NAIROBI
Fax No.: 310833
Telephone: 2252299

THE NATIONAL TREASURY
P.O. Box 30007-00100
NAIROBI
KENYA

When replying please quote
Ref: RESTNT/ZZ/331/02 TY[6]

Date: 27th July, 2022

DRP - please capture under Art 223
1/8/22

Dr. Julius Muia, Phd, CBS
Principal Secretary
The National Treasury
P.O Box 300074 - 00100
NAIROBI

OFFICE OF THE CONTROLLER OF BUDGET
RECEIVED
01 AUG 2022
405
P.O. Box 35616 - 00100, NAIROBI

Dear

EXIT OF HELIOS INVESTORS LLP/JAMHURI LTD IN TELKOM KENYA LIMITED

Reference is made to your letter Ref. No. TNT/ZZ 331/02 TY[6] dated 25th July, 2022 on the above subject matter.

The National Treasury has reviewed your request for additional funds amounting to **USD.51,186,058** under Article 223 of the Constitution of Kenya, 2010 to be paid to Jamhuri Holdings Limited in form of a three(3) years Treasury Bond and the same be regularised in the Supplementary Budget of FY 2022/23.

In view of this request, the National Treasury has granted approval under Article 223 of the Constitution of Kenya, 2010. This is to enable the Government of Kenya to take over and reimburse the shareholder loan injected and accrued interest amounting to **USD.51,186,058.**

Article 223 of the Constitution requires that the approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money. Consequently, in order to facilitate the CS/TNT&P to submit the same report to Parliament for approval, below is a format for submission for your necessary action.

Table 1: Template for Reporting Actual Expenditure under Article 223 of the Constitution

Description		Approved Additional Expenditure	Actual Expenditure at ……..	Justification/Supporting Documentation
Vote Code & Vote Title	Total			
	Programme			
	Sub-Programme			
	Activity/Project			

NB: Provide analysis of the implications for the planned outputs and outcomes of the affected programmes



Annexure 37

Letter dated 2nd August 2022 from OCOB to PS, NT.

A037

9

ACCOUNTANT GENERAL
NATIONAL TREASURY

OFFICE OF THE CONTROLLER OF BUDGET

RECEIVED
Accountant General Department
Treasury Management Section
03 AUG 2022
PS TREASURY OFFICE
THE NATIONAL TREASURY
P. O. Box 30007 NAIROBI.

OCOB

PRINCIPAL SECRETARY
THE NATIONAL TREASURY
03 AUG 2022
RECEIVED
P. O. Box 30007 – 00100, NAIROBI

RECEIVED
02 AUG 2022

Tel: 020 221 1068, 0738466721, 0709910000
Email: cob@cob.go.ke/info@cob.go.ke
Website: www.cob.go.ke

Please Review and Advice
Hamilton Avenue
Tel: 35616-00100
Nairobi Kenya
To Keep in View
Noted & Appreciated
Please Let's Discuss

Ref: COB/TNTP/006/VOL.III(60)

2nd August, 2022

Dr. Julius Muia, CBS
Principal Secretary
National Treasury & Planning
NAIROBI

Dear Dr Muia,

THE NATIONAL TREASURY
RECEIVED
03 AUG 2022
837
DIRECTOR GENERAL ACCOUNTING SERVICES

RE: REQUEST TO PROCESS EXCHEQUER RELEASE UNDER ARTICLE 223 OF THE CONSTITUTION TO NATIONAL TREASURY (VOTE D1071)

Reference is made to your letter Ref. No. Article 223: FY2022-2023/03 dated 28th July, 2022 on the above subject matter.

We have noted the National Treasury's request for grant of credit on the Exchequer Account of **Ksh.6,091,140,702.00 say (Kenya Shillings Six Billion Ninety-One Million One Hundred Forty Thousand Seven Hundred Two Only)** to facilitate the exit of Helios Investors LLP/Jamhuri Limited which will be regularized in the Supplementary Budget Estimates I FY 2022/2023.

In view of the above and in accordance with Article 223 of the Constitution of Kenya, 2010, I hereby grant approval for withdrawal of the funds.

Please seek Parliamentary approval for this expenditure as required by Article 223(2) and (3) of the Constitution of Kenya, 2010.

Yours Sincerely,

Dr. Margret Nyakang'o CBS
CONTROLLER OF BUDGET

Annexure 38

Letter dated 6th April 2022 from the NT to the Solicitor General

A038

SOLICITOR GENERAL'S OFFICE
27 APR 2022
RECEIVED
TIME:.....SIGN:.....

REPUBLIC OF KENYA

THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
Finance – Nairobi
FAX NO. 310833
Telephone: 2252299
When Replying Please Quote

THE NATIONAL TREASURY
P.O BOX 30007 - 00100
NAIROBI

ANNEX 14

Ref: TNT/ZZ 331/02

Date: 6th April 2022

Mr. Kennedy Ogeto
The Solicitor General
State Law Office
NAIROBI

VERY URGENT

Mr Wabwire
Please review
28/4/2022

Dear SG

RE: EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LTD IN TELKOM KENYA LIMITED

Further to a letter from Head of Public Service Ref. CAB/NSC/14/2.Vol/(20) dated 1st April, 2022 on the above subject matter, please find the following documents for your review and legal clearance.

1) Share Purchase Agreement between Government and Jamhuri Holdings Ltd;
2) Deed of Termination in respect of the Deed of Amendment and Restatement of the Shareholders Agreement and the Additional Shareholders Agreement;
3) Deed of Novation relating to the Additional JHL Shareholder Loans
4) Deed of Novation in respect of the Loan Agreement relating to JHL-OREA Shareholder Loan; and
5) Escrow Agreement in relation to the Sale and purchase of shares and shareholder loans in Telkom Kenya Limited.

Yours Sincerely

Eng. Stanley K. Kamau
Director General/Public Investment & Portfolio Management
For: PRINCIPAL SECRETARY/NATIONAL TREASURY

Ms. Jeannette Mwadal
Please Deal
27 APR 2022
Solicitor General

Actioned. File away

JAMHURI HOLDINGS

Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius

Strictly Confidential

19th April 2022

The Government of Kenya
Attention: Hon. (Amb) Ukur Yatani, EGH
The Cabinet Secretary
The National Treasury
Treasury Building, Harambee Avenue
P.O. Box 30007-00100
Nairobi,
KENYA

Dear Sirs,

TELKOM KENYA LIMITED

Further to our letter of 4th April and the follow up discussions held on the subject matter, please find attached the updated draft of the Share Purchase Agreement (SPA) together with the following ancillary documents for your consideration;

1) Deed of Termination of the Shareholders Agreement
2) Deed of Novation of the Additional JHL Shareholder Loan
3) Deed of Novation of the JHL – OREA Shareholder Loan
4) Escrow Agreement

We look forward to your feedback and progressing the next steps of the Transaction.

Yours sincerely,

Paul Cunningham

Director

For and on behalf of

Jamhuri Holdings Limited

A&K DRAFT: 19th APRIL 2022 – STRICTLY CONFIDENTIAL

Dated _____ 2022

TELKOM KENYA LIMITED
(the **Company**)
and

JAMHURI HOLDINGS LIMITED
(JHL)
and

HELIOS INVESTORS III LP

and
THE CABINET SECRETARY THE NATIONAL TREASURY ON BEHALF OF THE GOVERNMENT OF KENYA(GOK)

DEED OF TERMINATION

in respect of

The Deed of Amendment and Restatement of Shareholders Agreement dated 10 June 2016
-and-
The Additional Shareholders Agreement dated 10 June 2016

A&K | ALN
ANJARWALLA & KHANNA

info@africalegalnetwork.com
www.africalegalnetwork.com

This Deed is made as of the day of , 2022

BETWEEN:

1. **TELKOM KENYA LIMITED** (Company Number C.3/2009), a company incorporated under the laws of the Republic of whose registered address is at L.R. No. 209/5535, Telkom Plaza, Ralph Bunche Road, P.O. Box 30301-00100, Nairobi, Kenya (the **Company**);
2. **JAMHURI HOLDINGS LIMITED**, a limited liability company incorporated in accordance with the laws of Mauritius and with Registration Number 134048C2/GBL, whose official office is Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius (the **JHL**);
3. **HELIOS INVESTORS III LP,** whose registered office is at P.O Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the **Lead Investor**); and
4. **THE CABINET SECRETARY TO THE NATIONAL TREASURY OF KENYA ON BEHALF OF THE GOVERNMENT OF KENYA** whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (**GOK**),

(each a **Party** and together the **Parties**).

WHEREAS:

(A) Pursuant to a share purchase agreement dated 6 November 2015 between Orange East Africa S.A., Orange Participations S.A. and JHL, OrEA agreed to sell and the JHL agreed to purchase eighty three million one hundred and one thousand three hundred and twelve (83,101,312) ordinary shares in the Company constituting seventy per cent (70%) of the ordinary issued share capital of the Company together with OrEA's shareholder loan to the Company at the time amounting to United States Dollars three hundred and thirty two million eight hundred and thirty two thousand nine hundred and six point seven five (USD 332,832,906.75) (such acquisition collectively the **JHL-OrEA Transaction**).

(B) The Parties entered into the Agreements (as hereinafter defined) with effect from completion of the JHL-OrEA Transaction.

(C) Pursuant to a Share Purchase Agreement entered into by the Parties dated on or about the date of this Deed (the **SPA**), JHL has agreed to sell and GOK has agreed to purchase JHL's shareholding in the Company and to acquire the loans advanced by JHL to the Company.

(D) It is a term of the SPA that the Parties terminate the Agreements, and the Parties wish to terminate the Agreements on the terms and conditions of this Deed.

IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATIONS

1.1 In this Deed (including its recitals) unless the context otherwise requires the following terms shall have the following meanings:

1.1.1 **Agreements** means the Existing Shareholders' Agreements;

1.1.9 If a definition of a particular term or expression in this Deed imposes substantive rights or obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.1.10 Each provision of this Deed has been negotiated by the Parties and drafted for the benefit of the Parties and, accordingly, the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Deed (the *contra proferentem* rule), shall not apply.

1.1.11 The rule known as the *ejusdem generis* rule shall not apply and accordingly general words introduced by the word other shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

1.1.12 Any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within the Party's power or control.

1.1.13 This Deed shall be binding on and be for the benefit of the successors and personal representatives of the Parties.

2. Termination of the Agreements

2.1 In consideration of the mutual covenants contained herein and in further consideration of United States Dollars one (USD 1/-) paid each Party to each of the other Parties (receipt and adequacy whereof is hereby acknowledged by each Party), the Parties hereby irrevocably agree that with effect from the Completion Date, the Agreements shall be terminated, without further action being required of any such Party.

2.2 The Parties further irrevocably and unconditionally agree and acknowledge that upon termination of the Agreements pursuant to clause 2.1:

2.2.1 each Party shall be irrevocably released and discharged from any and all past, present and future liabilities and obligations under the Agreements with effect from the Completion Date and no Party shall have any further rights, remedies, obligations or liabilities under the Agreements with effect from the Completion Date;

2.2.2 no Party to the Agreements shall have any claim in respect of any fees, costs, expenses or other payments of any kind, either incurred or to be incurred under the Agreements, nor any claim or right of action of any kind whatsoever arising out of the Agreements with effect from the Completion Date; and

2.2.3 accordingly, the respective rights of each of the Parties to the Agreements shall stand waived with effect from the Completion Date and each of the Parties respective obligations arising out of the Agreements shall stand discharged with effect from the Completion Date without further action being required of any of the Parties.

2.3 Each of the Parties confirms that upon termination of the Agreements pursuant to clause 2.1, they will not have any claim against each other under or in connection with the Agreements arising before the date of this Deed.

1.1.2 **Business Day** means a day (other than a Saturday, Sunday or gazetted public holiday) on which commercial banks are open for general banking business in Port Louis, Mauritius and Nairobi, Kenya;

1.1.3 **Completion Date** means the date of completion of the sale of 60% of JHL's shares in the Company to GOK on the terms and conditions of the SPA;

1.1.4 **Deed** means this Deed of Termination as the same may be amended from time to time;

1.1.5 **Existing Shareholders' Agreements** means the following agreements:

a) the Deed of Amendment and Restatement of Shareholders Agreement between the Buyer, JHL, Helios Investors III L.P. and the Company dated 10 June 2016; and

b) the Additional Shareholders Agreement in relation to the Company entered into between the Buyer, JHL, Helios Investors III L.P. and the Company dated 10 June 2016.

1.2 In this Deed (including the recitals) unless the context otherwise requires:

1.1.1 References to **include** or **including** are to be construed without limitation.

1.1.2 The expression **person** means any legal or natural person, partnership, association, trust, company, joint venture, agency, governmental authority or other body, entity or organization (whether corporate or unincorporated) and that person's personal representatives, heirs or successors (as the case may be) or permitted assigns.

1.1.3 Any reference to **writing** or **written** means any method of reproducing words in a legible and non-transitory form (excluding, for the avoidance of doubt, email).

1.1.4 The table of contents and headings are inserted for convenience only and do not affect the construction of this Deed.

1.1.5 Unless the context otherwise requires, words in the singular include the plural and vice versa and a reference to any gender includes all other genders.

1.1.6 References to Clauses and Paragraphs are to Clauses and paragraphs of this Deed.

1.1.7 References to any statute or statutory provision include a reference to that statute or statutory provision as amended, consolidated or replaced from time to time (whether before or after the date of this Deed) and include any subordinate legislation made under the relevant statute or statutory provision.

1.1.8 Unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

3. Further Assurance

3.1 Each Party shall do, or procure the doing of, all acts and things and execute or procure the execution of all documents as may reasonably be required to give full effect to this Deed.

4. Jurisdiction and Governing Law

4.1 This Deed and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with the laws of Kenya.

5. Dispute Resolution

5.1 The Parties shall use their respective good faith efforts to resolve any dispute, controversy or claim of any nature whatsoever arising out of or in relation to or in connection with this Deed. To this end, the Parties shall each promptly appoint representatives of appropriate standing who shall meet and attempt to resolve any dispute between them. In the event that an amicable settlement has not been reached within twenty (20) Business Days of (a) the Parties representatives meeting as aforesaid, or (b) the dispute, controversy or claim of any nature whatsoever arising, the following provisions of this Clause 5 shall apply.

5.2 Any dispute, controversy, difference or claim arising out of or relating to the present contract shall be referred to and finally resolved by arbitration administered by the Mediation and Arbitration Centre of Mauritius (MARC) under the MARC Arbitration Rules in force when the Request for Arbitration is submitted.

5.3 The seat of arbitration shall be Mauritius.

5.4 The law of this arbitration clause shall be Kenyan law.

5.5 The number of arbitrators shall be three. The arbitration proceedings shall be conducted in the English language.

6. Waiver of immunity

6.1 To the extent permitted by the laws of Kenya, GOK irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or in connection with this Deed, including without limitation immunity from:

6.1.1 the jurisdiction of any court or tribunal;

6.1.2 service of process;

6.1.3 injunctive or other interim relief, or any order for specific performance or recovery of land; and

6.1.4 any process for execution of any award or judgement against its property.

7. Notices

7.1 Addresses

7.1.1 Any notice, claim, demand or other communication in connection with this Deed or with any arbitration under this Deed (each a **Notice**) shall be sufficiently given to the recipient

at its address set out in Clause 7.2 or any other address notified to the sender by the recipient for the purposes of this Deed and marked "IMPORTANT LEGAL NOTICE".

7.1.2 Any Notice or other communication shall be in writing, in English and delivered by hand or sent by messenger, courier or pre-paid airmail post. Any Notice shall be deemed to have been received at the time of delivery if delivered by hand, on the third (3rd) Business Day following such despatch, if sent by messenger, courier or seven (7) Business Days from the time of posting, if sent by post.

7.2 GOK:

Attention: The Cabinet Secretary
The National Treasury
Treasury Building
Harambee Avenue
P.O. Box 30007-00100
NAIROBI, KENYA

JHL and/or the Lead Investor:

Attention: Paul Cunningham
Jamhuri Holdings Limited and/or Helios Investors III L.P.
Level 3, Alexander House
35 Cybercity
Ebene, Mauritius

With a copy to:

Attention: Karim Anjarwalla

Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200 -00606
Nairobi, Kenya

THE COMPANY:

Attention: [insert]
L.R. No. 209/5535, Telkom Plaza
Ralph Bunche Road
P.O. Box 30301-00100
Nairobi, Kenya

7.3 Costs

7.3.1 Each Party shall bear its own costs incurred by it in connection with the preparation, negotiation and entry into this Deed and the documents to be entered into pursuant to it.

7.3.2 GOK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of this Deed.

8. Whole Agreement and Remedies

8.1 Whole Agreement

This Deed contains the whole agreement between the Parties relating to the subject matter of this Deed at the date hereof to the exclusion of any terms implied by law which may be excluded by contract and supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Deed.

8.2 No inducement

Each of the Parties acknowledges that it has not been induced to enter into this Deed by any representation, warranty or undertaking not expressly incorporated into it.

8.3 Remedies

So far as permitted by law and subject to the express provisions of this Deed and except in the case of fraud, each Party agrees and acknowledges that its only right and remedy in relation to any representation, warranty or undertaking made or given in connection with this Deed shall be for breach of the terms of this Deed to the exclusion of all other rights and remedies (including those in tort or arising under statute).

8.4 Legal Advice

Each Party to this Deed confirms it has received independent legal advice relating to all the matters provided for in this Deed, including the provisions of this Clause, and agrees, having considered the terms of this Clause and the Deed as a whole, that the provisions of this Clause are fair and reasonable.

9. Confidentiality

9.1 Confidential Information

The Parties shall use all reasonable endeavours to keep confidential and to ensure that their respective Affiliates and their respective officers, employees, agents and professional and other advisers keep confidential any information (the **Confidential Information**) and the fact that this Deed has been entered into and the terms of this Deed.

9.2 Restrictions

9.2.1. No Party may use for its own business purposes or disclose to any third party any Confidential Information without the consent of the other Parties.

9.2.2. This Clause does not apply to:

a) information which is or becomes publicly available (otherwise than as a result of a breach of this Clause);

b) information which is independently developed by the relevant Party or acquired from a third party, to the extent that it is acquired with the right to disclose it;

c) information which was lawfully in the possession of the relevant Party free of any restriction on disclosure;

d) information which following disclosure under this Clause, becomes available to the relevant Party from a source other than another party which is not bound by any obligation of confidentiality in relation to such information;

e) the disclosure by a Party of Confidential Information to its directors or employees who need to know that confidential information for purposes relating to this Deed but those directors and employees shall not use that Confidential Information for any other purpose;

f) the disclosure of information to the extent required to be disclosed by law or any court of competent jurisdiction, any governmental official or regulatory authority or any binding judgement, order or requirement of any other competent authority;

g) the disclosure of information to any tax authority to the extent reasonably required for the purposes of the tax affairs of the Party concerned or any member of its group;

h) the disclosure to a Party's professional advisers of information reasonably required to be disclosed for purposes relating to this Deed; and/or

i) the disclosure to any prospective purchaser(s) of shareholder loans or any shares in the Company.

9.2.3. Each Party shall inform every officer, employee or agent or any professional or other adviser advising it in relation to matters relating to this Deed, or to whom it provides Confidential Information, that such information is confidential and shall instruct them:

a) to keep it confidential; and

b) not to disclose it to any third party (other than to those persons to whom it has already been or may be disclosed in accordance with the terms of this Clause).

9.3 Damages not an adequate remedy

Without prejudice to any other rights or remedies which a Party may have, the Parties acknowledge and agree that damages would not be an adequate remedy for any breach of this Clause 9 and the remedies of injunction, specific performance and other equitable relief are appropriate for any threatened or actual breach of any such provision and no proof of special damages shall be necessary for the enforcement of the rights under this Clause 9.

9.4 Survival

9.4.1. The disclosing Party shall remain responsible for any breach of this Clause 9 by the person to whom that Confidential Information is disclosed.

9.4.2. The provisions of this Clause 9 shall survive the termination of this Deed for whatever cause for a period of three (3) years.

10. General

10.1. Survival of Rights, Duties and Obligations

Termination of this Deed for any cause shall not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

10.2. No Partnership

Nothing in this Deed shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party for any purpose.

10.3. Release

Any liability to any Party under this Deed may in whole or in part be released, compounded or compromised or time or indulgence given by that Party in its absolute discretion as regards any Party under such liability without in any way prejudicing or affecting its rights against any other Party under the same or a like liability, whether joint and several or otherwise.

10.4. Waiver

No failure of any Party to exercise, and no delay by it in exercising, any right, power or remedy in connection with this Deed (each a **Right**) shall operate as a waiver of that Right, nor shall any single or partial exercise of any Right preclude any other or further exercise of that Right or the exercise of any other Right. The Rights provided in this Deed are cumulative and not exclusive of any other Rights (whether provided by law or otherwise). Any express waiver of any breach of this Deed shall not be deemed to be a waiver of any subsequent breach.

10.5. Variation

No variation of this Deed shall be effective unless in writing and signed by or on behalf of each of the Parties.

10.6. Assignment

This Deed is personal to the Parties and the rights and obligations of the Parties may not be assigned or otherwise transferred.

10.7. Time of the Essence

Time shall be of the essence of this Deed, both as regards any dates, times and periods mentioned and as regards any dates, times and periods which may be substituted for them in accordance with this Deed or by agreement in writing between the Parties.

10.8. Further Assurance

At any time after the date of this Deed the Parties shall and shall use all reasonable endeavours to procure that any necessary third party shall, at the cost of the relevant Party execute such documents and do such acts and things as that Party may reasonably require for the purpose of giving to that party the full benefit of all the provisions of this Deed.

10.9. Invalidity

If any provision in this Deed shall be held to be illegal, invalid or unenforceable, in whole or in part, under the law of any jurisdiction, the legality, validity or enforceability of such provision or part under the law of any other jurisdiction and the legality, validity and enforceability of the remainder of this Deed shall not be affected.

10.10. **Counterparts**

This Deed may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into this Deed by executing any such counterpart.

[Remainder of Page Left Intentionally Blank]

IN WITNESS this Deed has been duly executed as a Deed by or on behalf of the Parties.

SIGNED and delivered as a Deed by
Paul Cunningham
for and on behalf of **JAMHURI HOLDINGS LIMITED**
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED and delivered as a Deed by
Paul Cunningham
for and on behalf of **HELIOS INVESTORS III LP**
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED and Delivered as a Deed by

The Cabinet Secretary, the National Treasury

for and on behalf of the Government of Kenya

in the presence of:

Signature of witness

Name of witness: _____

Designation: _____

{sign here}

SIGNED and Delivered as a Deed

By_____

for and on behalf of Telkom Kenya Limited

In the presence of :

_____

Director/Secretary:

_____

Director:

A&K DRAFT:19th APRIL 2022 – STRICTLY CONFIDENTIAL

Dated _____ 2022

TELKOM KENYA LIMITED
(the **Company**)

and

JAMHURI HOLDINGS LIMITED
(JHL)

and

THE CABINET SECRETARY THE NATIONAL TREASURY ON BEHALF OF THE GOVERNMENT OF KENYA
(GOK)

DEED OF NOVATION
in respect of the
LOAN AGREEMENT **RELATING TO THE JHL- OREA SHAREHOLDER LOAN**
DATED 10 JUNE, 2016

A&K | ALN
ANJARWALLA & KHANNA

info@africalegalnetwork.com
www.africalegalnetwork.com

This Deed is made as of the day of , 2022

BETWEEN:

1. **TELKOM KENYA LIMITED** (Company Number C.3/2009), a company incorporated under the laws of the Republic of whose registered address is at L.R. No. 209/5535, Telkom Plaza, Ralph Bunche Road, P.O. Box 30301-00100, Nairobi, Kenya (the **Company**);
2. **JAMHURI HOLDINGS LIMITED**, a limited liability company incorporated in accordance with the laws of Mauritius and with Registration Number 134048C2/GBL, whose official office is Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius (the **JHL**); and
3. **THE CABINET SECRETARY TO THE NATIONAL TREASURY OF KENYA ON BEHALF OF THE GOVERNMENT OF KENYA** whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (**GOK**),

(each a **Party** and together the **Parties**).

WHEREAS:

(A) Pursuant to a share purchase agreement dated 6 November 2015 between Orange East Africa S.A., Orange Participations S.A. and JHL, OrEA agreed to sell and the JHL agreed to purchase eighty three million one hundred and one thousand three hundred and twelve (83,101,312) ordinary shares in the Company constituting seventy per cent (70%) of the ordinary issued share capital of the Company together with OrEA's shareholder loan to the Company at the time amounting to United States Dollars three hundred and thirty two million eight hundred and thirty two thousand nine hundred and six point seven five (USD 332,832,906.75) (the **OrEA Shareholder Loan**) (such acquisition collectively the **JHL-OrEA Transaction**).

(B) On completion of the JHL- OrEA Transaction, JHL agreed to transfer ten per cent (10%) of the Company's shares owned by JHL to GOK, thereby increasing GOK's shareholding to forty per cent (40%) of the ordinary issued share capital of the Company. Further, JHL transferred forty per cent (40%) of the OrEA Shareholder Loan to GOK (such portion referred to as the **GOK- OrEA Shareholder Loan)** and retained the balance (such balance hereinafter defined as the **JHL- OrEA Shareholder Loan**).

(C) JHL and the Company entered into the Purchaser Shareholder Loan Agreement dated 10th June 2016 (the **Loan Agreement**) with respect to the JHL- OrEA Shareholder Loan.

(D) Pursuant to a Share Purchase Agreement entered into by the Parties dated on or about the date of this Deed (the **SPA**), JHL has agreed to sell and GOK has agreed to purchase JHL's 60% shareholding in the Company (the **Sale Shares**) and JHL has agreed to transfer, subject to Final Completion, all the rights and obligations relating to the JHL- OrEA Shareholder Loan to GOK.

(E) The Company at the request of JHL and GOK hereby agrees to the rights and obligations of JHL under and pursuant to the Loan Agreement being extinguished subject to Final Completion and GOK agreeing to take over all the rights and obligations of JHL under and pursuant to the Loan Agreement on and subject to the terms and conditions of this Deed.

IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATIONS

1.1 In this Deed (including its recitals) unless the context otherwise requires the following terms shall have the following meanings:

1.1.1 **Deed** means this Deed of Novation as the same may be amended from time to time;

1.1.2 **JHL-OrEA Shareholder Loan Consideration** means a peppercorn;

1.1.3 **JHL-OrEA Shareholder Loan** means the OrEA Shareholder Loan (as defined in Recital (A)), less the GoK-OrEA Shareholder Loan (as defined in Recital (B)), such loan (excluding the GoK-OrEA Shareholder Loan) being in the principal amount of United States Dollars one hundred and ninety-nine million, six hundred and ninety nine thousand seven hundred and forty four (USD 199,699,744) together with all interest accrued thereon (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars forty million two hundred and thirty eight thousand nine hundred and forty eight (USD 40,238,948)) and the total outstanding amount as at 31st December, 2021 was United States Dollars two hundred and thirty nine million nine hundred and thirty eighty thousand six hundred and ninety two (USD 239,938,692); and

1.1.4 **Loan Agreement** has the meaning given to it in Recital (C).

1.1.5 **SPA** has the meaning ascribed to it in the Recital (D).

1.2 In this Deed (including the recitals) unless the context otherwise requires:

1.1.1 References to **include** or **including** are to be construed without limitation.

1.1.2 The expression **person** means any legal or natural person, partnership, association, trust, company, joint venture, agency, governmental authority or other body, entity or organization (whether corporate or unincorporated) and that person's personal representatives, heirs or successors (as the case may be) or permitted assigns.

1.1.3 Any reference to **writing** or **written** means any method of reproducing words in a legible and non-transitory form (excluding, for the avoidance of doubt, email).

1.1.4 The table of contents and headings are inserted for convenience only and do not affect the construction of this Deed.

1.1.5 Unless the context otherwise requires, words in the singular include the plural and vice versa and a reference to any gender includes all other genders.

1.1.6 References to Clauses and Paragraphs are to Clauses and paragraphs of this Deed.

1.1.7 References to any statute or statutory provision include a reference to that statute or statutory provision as amended, consolidated or replaced from time to time

(whether before or after the date of this Deed) and include any subordinate legislation made under the relevant statute or statutory provision.

1.1.8 Unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

1.1.9 If a definition of a particular term or expression in this Deed imposes substantive rights or obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.1.10 Each provision of this Deed has been negotiated by the Parties and drafted for the benefit of the Parties and, accordingly, the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Deed (the *contra proferentem* rule), shall not apply.

1.1.11 The rule known as the *ejusdem generis* rule shall not apply and accordingly general words introduced by the word other shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

1.1.12 Any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within the Party's power or control.

1.1.13 This Deed shall be binding on and be for the benefit of the successors and personal representatives of the Parties.

1.1.14 Words and expressions defined in the SPA shall have the meaning ascribed to them in the SPA when used in this Deed unless defined in this Deed or unless the context otherwise requires.

2. Novation

2.1 The Parties hereby agree that:

2.1.1 In consideration of the mutual covenants contained herein and in further consideration of the JHL-OrEA Shareholder Loan Consideration, JHL, as legal and beneficial owner, hereby assigns absolutely unto GOK the JHL-OrEA Shareholder Loan together with all the rights, title and interest of JHL in respect thereof unto GOK absolutely subject to Final Completion and with effect from the Final Completion Date.

2.1.2 It is hereby agreed by the Parties that GOK shall, with effect from the Final Completion Date, have the full benefit of the JHL-OrEA Shareholder Loan together with all the rights powers and remedies referred to or arising in respect thereof and under any applicable law.

2.1.3 All the rights and obligations under the Loan Agreement shall be extinguished as of the Final Completion Date; and

2.1.4 In substitution for the extinguished rights and obligations referred to in sub-clause 2.1.1, the Company and GOK hereby agree to create, as of the Final Completion Date, new rights and obligations between themselves identical (as to quality and quantum (except as otherwise stated herein)) to the said extinguished rights and obligations.

2.2 GOK unconditionally covenants and agrees with the Company to assume all of JHL's rights, obligations and responsibilities as JHL's under the Loan Agreement and undertakes to comply, as of the Final Completion Date, with all the provisions and terms of the Loan Agreement as if all references to JHL therein were to GOK.

2.3 The Company hereby acknowledges and consents to the absolute assignment of the JHL-OrEA Shareholder Loan by JHL to GOK together with the full benefit thereof for the repayment thereof and all the rights, title and interest of JHL in respect thereof unto GOK absolutely and the Company hereby acknowledges and confirms that as from the Final Completion Date, the Company owes and is indebted to GOK in the amount of the JHL-OrEA Shareholder Loan.

3. Release

3.1 The Parties agree that from the Final Completion Date, JHL shall no longer have any rights or obligations in relation to the JHL-OrEA Shareholder Loan other than those expressly granted in this Deed.

4. Further Assurance

4.1 Each Party shall do, or procure the doing of, all acts and things and execute or procure the execution of all documents as may reasonably be required to give full effect to this Deed.

5. Jurisdiction and Governing Law

5.1 This Deed and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with the laws of Kenya.

6. Dispute Resolution

6.1 The Parties shall use their respective good faith efforts to resolve any dispute, controversy or claim of any nature whatsoever arising out of or in relation to or in connection with this Deed. To this end, the Parties shall each promptly appoint representatives of appropriate standing who shall meet and attempt to resolve any dispute between them. In the event that an amicable settlement has not been reached within twenty (20) Business Days of (a) the Parties representatives meeting as aforesaid, or (b) the dispute, controversy or claim of any nature whatsoever arising, the following provisions of this Clause 6 shall apply.

6.2 Any dispute, controversy, difference or claim arising out of or relating to the present contract shall be referred to and finally resolved by arbitration administered by the Mediation and Arbitration Centre of Mauritius (MARC) under the MARC Arbitration Rules in force when the Request for Arbitration is submitted.

6.3 The seat of arbitration shall be Mauritius.

6.4 The venue of the arbitration shall be in Mauritius.

6.5 The law of this arbitration clause shall be Kenyan law.

6.6 The number of arbitrators shall be three. The arbitration proceedings shall be conducted in the English language.

7. Waiver of immunity

7.1 To the extent permitted by the laws of Kenya, GOK irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or in connection with this Deed, including without limitation immunity from:

7.1.1 the jurisdiction of any court or tribunal;

7.1.2 service of process;

7.1.3 injunctive or other interim relief, or any order for specific performance or recovery of land; and

7.1.4 any process for execution of any award or judgement against its property.

8. Notices

8.1 Addresses

8.1.1 Any notice, claim, demand or other communication in connection with this Deed or with any arbitration under this Deed (each a **Notice**) shall be sufficiently given to the recipient at its address set out in Clause 8.2 or any other address notified to the sender by the recipient for the purposes of this Deed and marked "IMPORTANT LEGAL NOTICE".

8.1.2 Any Notice or other communication shall be in writing, in English and delivered by hand or sent by messenger, courier or pre-paid airmail post. Any Notice shall be deemed to have been received at the time of delivery if delivered by hand, on the third (3rd) Business Day following such despatch, if sent by messenger, courier or seven (7) Business Days from the time of posting, if sent by post.

8.2 GOK:

Attention: The Cabinet Secretary
The National Treasury
Treasury Building
Harambee Avenue
P.O. Box 30007-00100
NAIROBI, KENYA

JHL:

Attention: Paul Cunningham
Jamhuri Holdings Limited and/or Helios Investors III L.P.
Level 3, Alexander House
35 Cybercity
Ebene, Mauritius

With a copy to:

Attention: Karim Anjarwalla

Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200 -00606
Nairobi, Kenya

TKL

[TO BE INSERTED]

8.3 Costs

8.3.1 Each Party shall bear its own costs incurred by it in connection with the preparation, negotiation and entry into this Deed and the documents to be entered into pursuant to it.

8.3.2 GOK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of this Deed and the transfer of the JHL-OrEA Shareholder Loan.

9. Whole Agreement and Remedies

9.1 Whole Agreement

This Deed contains the whole agreement between the Parties relating to the subject matter of this Deed at the date hereof to the exclusion of any terms implied by law which may be excluded by contract and supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Deed.

9.2 No inducement

Each of the Parties acknowledges that it has not been induced to enter into this Deed by any representation, warranty or undertaking not expressly incorporated into it.

9.3 Remedies

So far as permitted by law and subject to the express provisions of this Deed and except in the case of fraud, each Party agrees and acknowledges that its only right and remedy in relation to any representation, warranty or undertaking made or given in connection with this Deed shall be for breach of the terms of this Deed to the exclusion of all other rights and remedies (including those in tort or arising under statute).

9.4 Legal Advice

Each Party to this Deed confirms it has received independent legal advice relating to all the matters provided for in this Deed, including the provisions of this Clause, and agrees,

having considered the terms of this Clause and the Deed as a whole, that the provisions of this Clause are fair and reasonable.

10. **Confidentiality**

10.1. Confidential Information

The Parties shall use all reasonable endeavours to keep confidential and to ensure that their respective Affiliates and their respective officers, employees, agents and professional and other advisers keep confidential any information (the **Confidential Information**) and the fact that this Deed has been entered into and the terms of this Deed.

10.2. Restrictions

10.2.1. No Party may use for its own business purposes or disclose to any third party any Confidential Information without the consent of the other Parties.

10.2.2. This Clause does not apply to:

a) information which is or becomes publicly available (otherwise than as a result of a breach of this Clause);

b) information which is independently developed by the relevant Party or acquired from a third party, to the extent that it is acquired with the right to disclose it;

c) information which was lawfully in the possession of the relevant Party free of any restriction on disclosure;

d) information which following disclosure under this Clause, becomes available to the relevant Party from a source other than another party which is not bound by any obligation of confidentiality in relation to such information;

e) the disclosure by a Party of Confidential Information to its directors or employees who need to know that confidential information for purposes relating to this Deed but those directors and employees shall not use that Confidential Information for any other purpose;

f) the disclosure of information to the extent required to be disclosed by law or any court of competent jurisdiction, any governmental official or regulatory authority or any binding judgement, order or requirement of any other competent authority;

g) the disclosure of information to any tax authority to the extent reasonably required for the purposes of the tax affairs of the Party concerned or any member of its group;

h) the disclosure to a Party's professional advisers of information reasonably required to be disclosed for purposes relating to this Deed; and/or

i) the disclosure to any prospective purchaser(s) of shareholder loans or any shares in the Company.

10.2.3. Each Party shall inform every officer, employee or agent or any professional or other adviser advising it in relation to matters relating to this Deed, or to whom it provides Confidential Information, that such information is confidential and shall instruct them:

a) to keep it confidential; and

b) not to disclose it to any third party (other than to those persons to whom it has already been or may be disclosed in accordance with the terms of this Clause).

10.3. Damages not an adequate remedy

Without prejudice to any other rights or remedies which a Party may have, the Parties acknowledge and agree that damages would not be an adequate remedy for any breach of this Clause 10 and the remedies of injunction, specific performance and other equitable relief are appropriate for any threatened or actual breach of any such provision and no proof of special damages shall be necessary for the enforcement of the rights under this Clause 10.

10.4. Survival

10.4.1. The disclosing Party shall remain responsible for any breach of this Clause 10 by the person to whom that Confidential Information is disclosed.

10.4.2. The provisions of this Clause 10 shall survive the termination of this Deed for whatever cause for a period of three (3) years.

11. General

11.1. Survival of Rights, Duties and Obligations

Termination of this Deed for any cause shall not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

11.2. No Partnership

Nothing in this Deed shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party for any purpose.

11.3. Release

Any liability to any Party under this Deed may in whole or in part be released, compounded or compromised or time or indulgence given by that Party in its absolute discretion as regards any Party under such liability without in any way prejudicing or affecting its rights against any other Party under the same or a like liability, whether joint and several or otherwise.

11.4. Waiver

No failure of any Party to exercise, and no delay by it in exercising, any right, power or remedy in connection with this Deed (each a **Right**) shall operate as a waiver of that Right, nor shall any single or partial exercise of any Right preclude any other or further exercise of that Right or the exercise of any other Right. The Rights provided in this Deed are cumulative and not exclusive of any other Rights (whether provided by law or otherwise).

Any express waiver of any breach of this Deed shall not be deemed to be a waiver of any subsequent breach.

11.5. Variation

No variation of this Deed shall be effective unless in writing and signed by or on behalf of each of the Parties.

11.6. Assignment

This Deed is personal to the Parties and the rights and obligations of the Parties may not be assigned or otherwise transferred.

11.7. Time of the Essence

Time shall be of the essence of this Deed, both as regards any dates, times and periods mentioned and as regards any dates, times and periods which may be substituted for them in accordance with this Deed or by agreement in writing between the Parties.

11.8. Further Assurance

At any time after the date of this Deed the Parties shall and shall use all reasonable endeavours to procure that any necessary third party shall, at the cost of the relevant Party execute such documents and do such acts and things as that Party may reasonably require for the purpose of giving to that party the full benefit of all the provisions of this Deed.

11.9. Invalidity

If any provision in this Deed shall be held to be illegal, invalid or unenforceable, in whole or in part, under the law of any jurisdiction, the legality, validity or enforceability of such provision or part under the law of any other jurisdiction and the legality, validity and enforceability of the remainder of this Deed shall not be affected.

11.10. Counterparts

This Deed may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into this Deed by executing any such counterpart.

[Remainder of Page Left Intentionally Blank]

IN WITNESS this Deed has been duly executed as a Deed by or on behalf of the Parties.

SIGNED and delivered as a Deed by
Paul Cunningham
for and on behalf of **JAMHURI HOLDINGS LIMITED**
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED and Delivered as a Deed by
The Cabinet Secretary, the National Treasury
for and on behalf of the Government of Kenya
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED and Delivered as a Deed
By_____
for and on behalf of Telkom Kenya Limited
In the presence of :

_____
Director/Secretary:

_____
Director:

A&K DRAFT: 19TH APRIL 2022 – STRICTLY CONFIDENTIAL

Dated _____ 2022

The Cabinet Secretary the National Treasury on behalf of the Government of Kenya
(GoK)

and

Jamhuri Holdings Limited
(JHL)

and

Anjarwalla & Khanna LLP
(Escrow Agent)

Escrow Agreement

in relation to the sale and purchase of shares and shareholder loans in

Telkom Kenya Limited
(the **Company**)

A&K | ALN
ANJARWALLA & KHANNA

info@africalegalnetwork.com
www.africalegalnetwork.com

Table of Contents

Clause

		Page
1	Interpretation	3
2	Appointment of Escrow Agent	4
3	Representatives and Instructions	5
4	Escrow Documents	5
5	The Escrow Agent's Rights and Limitations on its liability and indemnification	7
6	Escrow Agent's remuneration, costs and expenses	8
7	Dispute Resolution	8
8	Jurisdiction and Governing Law	9
9	Waiver of immunity	9
10	Notices	9
11	Whole Agreement and Remedies	10
12	Confidentiality	11
13	General	12

This Escrow Agreement is made as of _____ 2022 (the Agreement)

BETWEEN

(1) **THE CABINET SECRETARY TO THE NATIONAL TREASURY OF KENYA ON BEHALF OF THE GOVERNMENT OF KENYA** whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (**GoK**); and

(2) **JAMHURI HOLDINGS LIMITED**, a limited liability company incorporated in accordance with the laws of Mauritius and with Registration Number 134048C2/GBL, whose official office is Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius (**JHL**/ the **Seller**); and

(3) **ANJARWALLA & KHANNA LLP**, a limited liability partnership whose address is ALN House, Eldama Ravine Close, Off Eldama Ravine Road, Westlands, P.O. Box 200-00606, Nairobi, Kenya (the **Escrow Agent**),

(each a **Party** and together the **Parties**).

RECITALS

(A) JHL and GoK have entered into a Share Purchase Agreement dated on or about the date of this Agreement (the **SPA**), pursuant to which JHL has agreed to sell and GoK has agreed to purchase JHL's shareholding in the Company (as hereinafter defined) and to acquire the loans advanced by JHL to the Company.

(B) Pursuant to the terms of the SPA, the Parties are entering into this Agreement to appoint the Escrow Agent for purposes of receiving the executed Escrow Documents (as hereinafter defined) and holding the Escrow Documents in escrow, which shall be released on the terms and subject to the conditions of this Agreement.

IT IS AGREED AS FOLLOWS

1 Interpretation

1.1 In this Agreement (including its recitals and the Schedules), unless the context otherwise requires, the following terms shall have the following meanings:

1.1.1 **Escrow Documents** means the GoK Escrow Documents and the JHL Escrow Documents;

1.1.2 **Escrow Fee** has the meaning ascribed to it in Clause 6.1;

1.1.3 **GoK Escrow Documents** has the meaning ascribed to it in Clause 4.1.2; and

1.1.4 **JHL Escrow Documents** has the meaning ascribed to it in Clause 4.1.1.

1.2 Construction

1.2.1 Words and expressions defined in the SPA shall have the same meaning when used in this Agreement.

1.2.2 References to **include** or **including** are to be construed without limitation.

1.2.3 The expression **person** means any legal or natural person, partnership, association, trust, company, joint venture, agency, governmental authority or other body, entity or organization (whether corporate or unincorporated) and that person's personal representatives, heirs or successors (as the case may be) or permitted assigns.

1.2.4 Any reference to **writing** or **written** means any method of reproducing words in a legible and non-transitory form (excluding, for the avoidance of doubt, email).

1.2.5 Any reference to in "**agreed form**" means in a form agreed by the relevant parties thereto and initialed for or on behalf of such parties;

1.2.6 The table of contents and headings are inserted for convenience only and do not affect the construction of this Agreement.

1.2.7 Unless the context otherwise requires, words in the singular include the plural and vice versa and a reference to any gender includes all other genders.

1.2.8 References to Clauses, Paragraphs and Schedules are to Clauses and paragraphs of, and Schedules to, this Agreement. The Schedules form part of this Agreement.

1.2.9 References to any statute or statutory provision include a reference to that statute or statutory provision as amended, consolidated or replaced from time to time (whether before or after the date of this Agreement) and include any subordinate legislation made under the relevant statute or statutory provision.

1.2.10 Unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

1.2.11 If a definition of a particular term or expression in this Agreement imposes substantive rights or obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.2.12 Each provision of this Agreement has been negotiated by the Parties and drafted for the benefit of the Parties and, accordingly, the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (the *contra proferentem* rule), shall not apply.

1.2.13 The rule known as the *ejusdem generis* rule shall not apply and accordingly general words introduced by the word other shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

1.2.14 Any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within the Party's power or control.

1.2.15 This Agreement shall be binding on and be for the benefit of the successors and personal representatives of the Parties.

2 Appointment of Escrow Agent

2.1 GoK and the Seller hereby appoint and instruct the Escrow Agent to act, and the Escrow Agent acknowledges that it has been appointed and will act, as escrow agent subject to the terms and conditions of this Agreement.

2.2 The Escrow Agent hereby agrees to act as escrow agent on the terms and subject to the conditions of this Agreement.

2.3 Costs and expenses of the Escrow Agent shall be borne equally by the GoK.

3 Representatives and Instructions

3.1 Representatives

3.1.1 The Seller hereby appoints _____ as their representative in respect of matters relating to this Agreement (the **Seller's Representative**).

3.1.2 GoK hereby appoints _____ as its representative in respect of matters relating to this Agreement (**GoK Representative**).

3.1.3 Neither the Seller nor GoK shall change its representative without giving prior written notice to all the other Parties, and the Escrow Agent shall not be obligated to act on instructions or communication sent to or by any person other than the Seller's Representative and the GoK Representative.

3.2 Instructions

3.2.1 For the purposes of procuring that instructions are given to the Escrow Agent in accordance with this Agreement, each of GoK and the Seller shall act only by their respective representatives appointed pursuant to Clause 3.1.

3.2.2 Each of the Seller and GoK shall procure that their respective representatives give such instructions to the Escrow Agent as may be required to give full effect to the provisions of this Agreement.

3.2.3 All instructions to the Escrow Agent shall be delivered by hand and with a copy by electronic mail to the address of the Escrow Agent detailed below on a Business Day:

Name	Anjarwalla & Khanna LLP
Address	ALN House, Eldama Ravine Close, Off Eldama Ravine Rd, Nairobi, Kenya
Attention	Karim Anjarwalla
Email	ksa@africalegalnetwork.com
Copy to	Anne Kiunuhe Email: ak@africalegalnetwork.com

4 Escrow Documents

4.1 On the Initial Completion Date:

4.1.1 JHL shall deliver the following documents (in agreed form) which shall be left undated, to the Escrow Agent (together the **JHL Escrow Documents**):

(a) share transfer forms in respect of the Sale Shares in favour of GoK duly executed by JHL;

(b) a statutory declaration signed by JHL in relation to the transfer of the Sale Shares as is required to be filed with the Companies Registry;

(c) a deed of termination with respect to the Existing Shareholders' Agreements duly executed by JHL and Helios Investors III L.P and the Company (as relevant), in duplicate;

(d) a deed of novation in respect of the JHL-OrEA Shareholder Loan duly executed by JHL, in triplicate;

(e) a deed of novation in respect of the Additional JHL Shareholder Loans duly executed by JHL, in triplicate;

(f) duly executed resignation letters and the corresponding statutory declarations in respect of the following directors nominated for appointment by JHL to the board of the Company effective from the Final Completion Date:

(i) Nitin Kaul; and

(ii) Dennis Aluanga.

4.1.2 GoK shall deliver the following documents (in agreed form) which shall be left undated, (together the **GoK Escrow Documents**):

(a) the share transfer forms in respect of the Sale Shares duly executed by GoK;

(b) the deed of termination referred to in clause 4.1.1(c) duly executed by GoK, in duplicate;

(c) the deed of novation referred to in 4.1.1(d) duly executed by GoK, in triplicate;

(d) the deed of novation referred to in 4.1.1(e), duly executed by GoK, in triplicate; and

(e) a resolution passed at a duly convened and held meeting of the board of directors of the Company in the agreed form approving the registration of the Sale Shares and the JHL Shareholder Loans subject to the occurrence of Final Completion and the matters envisaged in the SPA.

4.2 As from the date on which the Escrow Documents are delivered to the Escrow Agent in accordance with clause 4.1.1, the Escrow Agent shall hold the Escrow Documents in escrow on behalf of JHL and GoK, subject to the terms and conditions of this Agreement.

4.3 The Escrow Agent shall not transfer or cause the transfer of, or release or allow the release of the Escrow Documents other than in accordance with Clause 4.4 or 4.6.

4.4 Upon receipt by the Escrow Agent of written notification from the Seller's Representative that the GoK Bonds have been duly issued in accordance with the terms of the SPA, the Escrow Agent shall release the Escrow Documents to each of JHL and GoK as follows:

4.4.1 to GoK, originals of the documents referred to in clauses 4.1.1(a), 4.1.1(b), 4.1.1(f) and a counterpart of the documents referred to in clauses 4.1.1(c) 4.1.1(d) and 4.1.1(e);

4.4.2 to the Sellers, copies of the documents referred to in clauses 4.1.1(a), 4.1.1(b), and 4.1.1(f), counterparts of the documents referred to in clauses 4.1.1(c), 4.1.1(d) and 4.1.1(e) and a counterpart of the document referred to in clauses 4.1.2(e).

4.5 The Escrow Agent shall not release the Escrow Documents except:

4.5.1 pursuant to an instruction in writing from the Seller's Representative, issued on the basis of clause 4.4 of this Agreement; or

4.5.2 as ordered by a court or any legal or regulatory authority of competent jurisdiction.

4.6 Should the Escrow Agent not receive written notification as envisaged in clause 4.4 by the Long Stop Date (time being of the essence) and unless otherwise notified in writing by the Seller's Representative, the Escrow Agent shall return all the Escrow Documents to the Sellers and this Agreement shall thereupon stand terminated.

5 The Escrow Agent's Rights and Limitations on its liability and indemnification

5.1 In consideration of the Escrow Agent holding the Escrow Documents in the manner set out in this Agreement, JHL and the GoK undertake on a joint and several basis to:

5.1.1 indemnify the Escrow Agent on a full indemnity basis and at all times keep the Escrow Agent fully and effectually indemnified from and against all liability whether in respect of any claims by JHL, GoK (or any of them) or any third party whatsoever, any taxes, costs or otherwise, as holder of the Escrow Documents or in connection with any release thereof; and

5.1.2 bear and pay all legal and other costs and expenses in connection with preparation and completion of this Agreement or incurred in the implementation thereof and all costs, taxes, stamp duties fees and other expenses payable or in respect of this Agreement and/or any release completed in anticipation thereof or in pursuance thereto.

5.2 The Escrow Agent shall not be required to exercise any judgment, opinion or view in relation to the applicability, suitability or appropriateness of any instructions received by it in terms of Clause 4.4 above but shall simply be required to respond to written directions and notifications as required by and in accordance with the terms of this Agreement.

5.3 The Parties agree that the Escrow Agent's duties under this Escrow Agreement shall be limited by and subject to the following provisions of this Clause 5.3. The Escrow Agent:

5.3.1 shall not be bound by any agreement between JHL and GoK (whether or not the Escrow Agent has any knowledge thereof) and the duties and responsibilities of the Escrow Agent shall be limited to those expressly set forth in this Agreement and no other duties shall apply to the Escrow Agent;

5.3.2 makes no representation as to the validity, value, authenticity or collectability of the Escrow Documents and/ or any document or instrument held by or delivered to it, howsoever given (in an email or otherwise);

5.3.3 shall not be required or be under any liability to take any legal action hereunder to request or require that any of the other Parties complies with any of its obligations arising hereunder or otherwise;

5.3.4 shall not be under any obligation to enquire as to, check or monitor or be in any way responsible for, the other Parties' compliance with any of their obligations under this Agreement or the SPA and shall be entitled to assume, without enquiry, that all such Parties are duly performing and observing all their respective obligations and duties;

5.3.5 shall not be regarded or treated for any purposes as having any notice or knowledge of any of the provisions of any arrangements relevant to the matters hereby

contemplated which are not expressly set out in this Agreement, shall be entitled to have regard only to the express terms of this Agreement as to the discharge of its duties and the exercise of any of its rights as Escrow Agent and shall have no responsibility to ensure that the terms of this Agreement are consistent with the terms of the SPA;

5.3.6 may refrain from doing anything which would or might be contrary to any law of any jurisdiction or any directive or regulation of any agency or any state or which would or might otherwise render it liable to any person or require it to expend or risk its own funds or otherwise incur any financial or other liability in the performance of any of its duties or in the exercise of any of its rights or powers if it shall believe that repayment of such funds or adequate indemnity against such risk or liability is not assured to it; provided that, the Escrow Agent shall promptly inform JHL and GoK in writing if it does so decide to refrain from acting and shall be entitled to take such steps as may be necessary to comply with any such law, directive or regulation;

5.3.7 shall be entitled at any time and from time to time to take any proceedings which it thinks fit to inter-plead or otherwise seek to place before any court of competent jurisdiction for such court to settle, any dispute or matter whatsoever arising hereunder or in relation to the escrow established hereunder;

5.3.8 shall, in any particular circumstance, promptly seek written clarification from the other Parties in the event that it is of the opinion that it is unclear how it is required to act hereunder and it may in its absolute discretion and without liability for any loss resulting therefrom refrain from taking any action pending receipt to its satisfaction of such written clarification or an order of a court of competent jurisdiction binding on the Escrow Agent;

5.3.9 shall in no event have any liability to any person for indirect loss, including (without limitation) loss of business, loss of profit or any type of consequential loss.

5.4 The provisions of this Clause 5 shall, to the extent relevant, continue to apply notwithstanding the termination in whole or in part of this Escrow Agreement.

6 Escrow Agent's remuneration, costs and expenses

6.1 In consideration of the Escrow Agent holding the Escrow Documents in the manner set out in this Agreement, the Escrow Agent shall charge a fee of USD [insert] (the **Escrow Fee**) for its services pursuant to this Agreement.

6.2 The Seller, on the one hand, and GoK, on the other hand, shall be liable to the Escrow Agent for fifty percent (50%) each of the payment of the Escrow Fee.

6.3 The Seller and GoK shall, in addition, together pay to the Escrow Agent (if so required) an amount equal to the amount of any value added tax charged in respect of the Escrow Fee and any amount payable to it under this Agreement.

7 Dispute Resolution

7.1 The Parties shall use their respective good faith efforts to resolve any dispute, controversy or claim of any nature whatsoever arising out of or in relation to or in connection with this Agreement. To this end, the Parties shall each promptly appoint representatives of appropriate standing who shall meet and attempt to resolve any dispute between them. In the event that an amicable settlement has not been reached within twenty (20) Business Days of (a) the

Parties representatives meeting as aforesaid, or (b) the dispute, controversy or claim of any nature whatsoever arising, the following provisions of this Clause 7 shall apply.

7.2 Any dispute, controversy, difference or claim arising out of or relating to the present contract shall be referred to and finally resolved by arbitration administered by the Mediation and Arbitration Centre of Mauritius (MARC) under the MARC Arbitration Rules in force when the Request for Arbitration is submitted.

7.3 The seat of arbitration shall be Mauritius.

7.4 The venue of the arbitration shall be in Mauritius.

7.5 The law of this arbitration clause shall be Kenyan law.

7.6 The number of arbitrators shall be three. The arbitration proceedings shall be conducted in the English language.

8 Jurisdiction and Governing Law

This Agreement and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with the laws of Kenya.

9 Waiver of immunity

9.1 To the extent permitted by the laws of Kenya, GoK irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or in connection with this Agreement, including without limitation immunity from:

9.1.1 the jurisdiction of any court or tribunal;

9.1.2 service of process;

9.1.3 injunctive or other interim relief, or any order for specific performance or recovery of land; and

9.1.4 any process for execution of any award or judgement against its property.

10 Notices

10.1 Addresses

10.1.1 Any notice, claim, demand or other communication in connection with this Agreement or with any arbitration under this Agreement (each a "**Notice**") shall be sufficiently given to the recipient at its address set out in Clause 10.2 or any other address notified to the sender by the recipient for the purposes of this Agreement and marked "IMPORTANT LEGAL NOTICE".

10.1.2 Any Notice or other communication shall be in writing, in English and delivered by hand or sent by messenger, courier or pre-paid airmail post. Any Notice shall be deemed to have been received at the time of delivery if delivered by hand, on the third (3rd) Business Day following such despatch, if sent by messenger, courier or seven (7) Business Days from the time of posting, if sent by post.

10.2 **GoK:**

Attention: The Cabinet Secretary
The National Treasury
Treasury Building

Harambee Avenue
P.O. Box 30007-00100
NAIROBI, KENYA

JHL:

Attention: Paul Cunningham
Jamhuri Holdings Limited and/or Helios Investors III L.P.
Level 3, Alexander House
35 Cybercity
Ebene, Mauritius

With a copy to:

Attention: Karim Anjarwalla

Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200 -00606
Nairobi, Kenya

The Escrow Agent:

Attention: Karim Anjarwalla & Anne Kiunuhe

Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200 -00606
Nairobi, Kenya

10.3 **Costs**

10.3.1 Each Party shall bear its own costs incurred by it in connection with the preparation, negotiation and entry into this Agreement and the documents to be entered into pursuant to it.

11 Whole Agreement and Remedies

11.1 **Whole Agreement**

This Agreement contains the whole agreement between the Parties relating to the subject matter of this Agreement at the date hereof to the exclusion of any terms implied by law which may be excluded by contract and supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Agreement.

11.2 **No inducement**

Each of the Parties acknowledges that it has not been induced to enter into this Agreement by any representation, warranty or undertaking not expressly incorporated into it.

11.3 **Remedies**

So far as permitted by law and subject to the express provisions of this Agreement and except in the case of fraud, each Party agrees and acknowledges that its only right and remedy in relation to any representation, warranty or undertaking made or given in connection with this Agreement shall be for breach of the terms of this Agreement to the exclusion of all other rights and remedies (including those in tort or arising under statute).

11.4 **Legal Advice**

Each Party to this Agreement confirms it has received independent legal advice relating to all the matters provided for in this Agreement, including the provisions of this Clause, and agrees, having considered the terms of this Clause and the Agreement as a whole, that the provisions of this Clause are fair and reasonable.

12 Confidentiality

12.1 Confidential Information

The Parties shall use all reasonable endeavours to keep confidential and to ensure that their respective Affiliates and their respective officers, employees, agents and professional and other advisers keep confidential any information (the **Confidential Information**) and the fact that this Agreement has been entered into and the terms of this Agreement.

12.2 Restrictions

12.2.1 No Party may use for its own business purposes or disclose to any third party any Confidential Information without the consent of the other Parties.

12.2.2 This Clause does not apply to:

(a) information which is or becomes publicly available (otherwise than as a result of a breach of this Clause);

(b) information which is independently developed by the relevant Party or acquired from a third party, to the extent that it is acquired with the right to disclose it;

(c) information which was lawfully in the possession of the relevant Party free of any restriction on disclosure;

(d) information which following disclosure under this Clause, becomes available to the relevant Party from a source other than another party which is not bound by any obligation of confidentiality in relation to such information;

(e) the disclosure by a Party of Confidential Information to its directors or employees who need to know that confidential information for purposes relating to this Agreement but those directors and employees shall not use that Confidential Information for any other purpose;

(f) the disclosure of information to the extent required to be disclosed by law or any court of competent jurisdiction, any governmental official or regulatory authority or any binding judgement, order or requirement of any other competent authority;

(g) the disclosure of information to any tax authority to the extent reasonably required for the purposes of the tax affairs of the Party concerned or any member of its group;

(h) the disclosure to a Party's professional advisers of information reasonably required to be disclosed for purposes relating to this Agreement; and/or

(i) the disclosure to any prospective purchaser(s) of shareholder loans or any shares in the Company.

12.2.3 Each Party shall inform every officer, employee or agent or any professional or other adviser advising it in relation to matters relating to this Agreement, or to whom it provides Confidential Information, that such information is confidential and shall instruct them:

(a) to keep it confidential; and

(b) not to disclose it to any third party (other than to those persons to whom it has already been or may be disclosed in accordance with the terms of this Clause).

12.3 **Damages not an adequate remedy**

Without prejudice to any other rights or remedies which a Party may have, the Parties acknowledge and agree that damages would not be an adequate remedy for any breach of this Clause 12 and the remedies of injunction, specific performance and other equitable relief are appropriate for any threatened or actual breach of any such provision and no proof of special damages shall be necessary for the enforcement of the rights under this Clause 12.

12.4 **Survival**

12.4.1 The disclosing Party shall remain responsible for any breach of this Clause 12 by the person to whom that Confidential Information is disclosed.

12.4.2 The provisions of this Clause 12 shall survive the termination of this Agreement for whatever cause for a period of three (3) years.

13 General

13.1 **Survival of Rights, Duties and Obligations**

Termination of this Agreement for any cause shall not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

13.2 **No Partnership**

Nothing in this Agreement shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party for any purpose.

13.3 **Release**

Any liability to any Party under this Agreement may in whole or in part be released, compounded or compromised or time or indulgence given by that Party in its absolute discretion as regards any Party under such liability without in any way prejudicing or affecting its rights against any other Party under the same or a like liability, whether joint and several or otherwise.

13.4 **Waiver**

No failure of any Party to exercise, and no delay by it in exercising, any right, power or remedy in connection with this Agreement (each a **Right**) shall operate as a waiver of that Right, nor shall any single or partial exercise of any Right preclude any other or further exercise of that Right or the exercise of any other Right. The Rights provided in this Agreement are cumulative and not exclusive of any other Rights (whether provided by law or otherwise). Any express waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

13.5 **Variation**

No variation of this Agreement shall be effective unless in writing and signed by or on behalf of each of the Parties.

13.6 **Assignment**

This Agreement is personal to the Parties and the rights and obligations of the Parties may not be assigned or otherwise transferred.

13.7 **Time of the Essence**

Time shall be of the essence of this Agreement, both as regards any dates, times and periods mentioned and as regards any dates, times and periods which may be substituted for them in accordance with this Agreement or by agreement in writing between the Parties.

13.8 **Further Assurance**

At any time after the date of this Agreement the Parties shall and shall use all reasonable endeavours to procure that any necessary third party shall, at the cost of the relevant Party execute such documents and do such acts and things as that Party may reasonably require for the purpose of giving to that party the full benefit of all the provisions of this Agreement.

13.9 **Invalidity**

If any provision in this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under the law of any jurisdiction, the legality, validity or enforceability of such provision or part under the law of any other jurisdiction and the legality, validity and enforceability of the remainder of this Agreement shall not be affected.

13.10 **Counterparts**

This Agreement may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into this Agreement by executing any such counterpart.

[Remainder of Page Left Intentionally Blank]

IN WITNESS this Agreement has been duly executed by or on behalf of the Parties.

SIGNED by Paul Cunningham
for and on behalf of **JAMHURI HOLDINGS LIMITED**
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED by
The Cabinet Secretary, the National Treasury
for and on behalf of the Government of Kenya
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED by

Karim Anjarwalla

for and on behalf of Anjarwalla & Khanna LLP

in the presence of:

Signature of witness

Name of witness: _____

Designation: _____

[sign here]

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
Finance – Nairobi
FAX NO. 310833
Telephone: 2252299
When Replying Please Quote

THE NATIONAL TREASURY
P O BOX 30007 - 00100
NAIROBI

Ref: TNT/ZZ 331/02

Date: 6th April 2022

Mr. Kennedy Ogeto
The Solicitor General
State Law Office
NAIROBI

Dear

RE: EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LTD IN TELKOM KENYA LIMITED

Further to a letter from Head of Public Service Ref. CAB/NSC/14/2.Vol/(20) dated 1st April, 2022 on the above subject matter, please find the following documents for your review and legal clearance.

1) Share Purchase Agreement between Government and Jamhuri Holdings Ltd;
2) Deed of Termination in respect of the Deed of Amendment and Restatement of the Shareholders Agreement and the Additional Shareholders Agreement;
3) Deed of Novation relating to the Additional JHL Shareholder Loans;
4) Deed of Novation in respect of the Loan Agreement relating to JHL-OREA Shareholder Loan; and
5) Escrow Agreement in relation to the Sale and purchase of shares and shareholder loans in Telkom Kenya Limited.

Yours

Eng. Stanley K. Kamau
Director General/Public Investment & Portfolio Management
For : PRINCIPAL SECRETARY/NATIONAL TREASURY

Kennedy Ogeto
SG

~~Re: Telkom Kenya Ltd~~
Re: Exit of Helios Investors LLP / Jamhuri Holdings Ltd in Telkom Kenya Limited

Further to ~~the~~ a letter from Head of Public Service Ref: CAB/NSC/14/2 VOL 1/(20) dated 1st April, 2022 on the above subject matter, please find the following documents for your review and legal clearance.

i) Share Purchase Agreement between GOK and Jamhuri Holdings Ltd.

2) Deed of Termination in respect of the Deed of Amendment and Restatement of the Shareholders Agreement and the Additional Shareholders Agreement

3) Deed of Novation relating to the Additional JHL Shareholder Loans

4) Deed of Novation in respect of the Loan Agreement relating to JHL - ORET Shareholder loan

5) Escrow Agreement in relation to the Sale and purchase of Shares and Shareholder loans in Telkom Kenya Limited.

Yours

Eng Stanley Kamau
for PS/NSC

A&K DRAFT: 26TH APRIL 2022 – STRICTLY CONFIDENTIAL

Dated _____ 2022

The Cabinet Secretary the National Treasury on behalf of the Government of Kenya

(GoK)

and

Jamhuri Holdings Limited

(JHL)

Share Purchase Agreement

in relation to the sale and purchase of shares and shareholder loans in

Telkom Kenya Limited

(the **Company**)

A&K | ALN
ANJARWALLA & KHANNA
info@africalegalnetwork.com
www.africalegalnetwork.com

Table of Contents

Clause		Page
1	Interpretation	3
2	The Transaction	7
3	Conditions	7
4	Final Completion	9
5	Post – Completion Obligations	11
6	Representations and Warranties by the Parties	11
7	Dispute Resolution	12
8	Jurisdiction and Governing Law	13
9	Waiver of immunity	13
10	Notices	13
11	Whole Agreement and Remedies	14
12	Confidentiality	15
13	General	16

This Agreement is made as of _____ 2022 (the Agreement)

BETWEEN

(1) **THE CABINET SECRETARY TO THE NATIONAL TREASURY OF KENYA ON BEHALF OF THE GOVERNMENT OF KENYA** whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (**GoK**); and

(2) **JAMHURI HOLDINGS LIMITED**, a limited liability company incorporated in accordance with the laws of Mauritius and with Registration Number 134048C2/GBL, whose official office is Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius (**JHL**/ the **Seller**),

(each a **Party** and together the **Parties**).

RECITALS

(A) Pursuant to a share purchase agreement dated 6 November 2015 between Orange East Africa S.A., Orange Participations S.A. and JHL, OrEA agreed to sell and JHL agreed to purchase eighty three million one hundred and one thousand three hundred and twelve (83,101,312) ordinary shares in the Company constituting seventy per cent (70%) of the ordinary issued share capital of the Company together with OrEA's shareholder loan to the Company at the time amounting to United States Dollars three hundred and thirty two million eight hundred and thirty two thousand nine hundred and six point seven five (USD 332,832,906.75) (the **OrEA Shareholder Loan**) (such acquisition collectively the **JHL-OrEA Transaction**).

(B) On completion of the JHL- OrEA Transaction, JHL agreed to transfer ten per cent (10%) of the Company's (as hereinafter defined) shares owned by JHL to GoK, thereby increasing GoK's shareholding to forty per cent (40%) of the ordinary issued share capital of the Company. Further, JHL transferred forty per cent (40%) of the OrEA Shareholder Loan to GoK (such portion referred to as the **GoK- OrEA Shareholder Loan)** and retained the balance (such balance hereinafter defined as the **JHL- OrEA Shareholder Loan**).

(C) Subsequently, the Seller has provided additional funding to the Company by way of the Additional JHL Shareholder Loans (as hereinafter defined).

(D) On completion of the JHL-OrEA Transaction, the remaining seventy one million two hundred and twenty nine thousand six hundred and ninety six shares (71,229,696) ordinary shares of Kenya shillings twenty (KES 20) each being sixty per cent (60%) of the ordinary issued share capital of the Company were legally and beneficially owned by JHL (the **Sale Shares**).

(E) JHL has agreed to sell and GoK has agreed to purchase the Sale Shares and JHL has agreed to transfer all the rights and obligations relating to the JHL Shareholder Loans (as hereinafter defined) to GoK subject to the terms and conditions of this Agreement.

IT IS AGREED AS FOLLOWS

1 **Interpretation**

1.1 In this Agreement (including its recitals and the Schedules), unless the context otherwise requires, the following terms shall have the following meanings:

1.1.1 **Additional JHL Shareholder Loans** means the loans advanced by JHL to the Company in the total principal amount of United States Dollars forty seven million seven hundred and twenty thousand (USD 47,720,000) together with all interest accrued thereon as at the Final Completion Date (it being acknowledged that as at 31st December, 2021

the accrued interest was United States Dollars three million four hundred and sixty six thousand and fifty seven (USD 3,466,057)) and accordingly that the total outstanding amount as at 31st December, 2021 was United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057);

1.1.2 **Additional JHL Shareholder Loans Consideration** means the sum of United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057);

1.1.3 **Business Day** means a day (other than a Saturday, Sunday or gazetted public holiday) on which commercial banks are open for general business in Mauritius and in Nairobi, Kenya;

1.1.4 **CBK** means the Central Bank of Kenya established pursuant to the Central Bank of Kenya Act (Cap 491, Laws of Kenya);

1.1.5 **Company** means Telkom Kenya Limited, a company incorporated in Kenya with company number C.3/2009 whose registered address is at Telkom Plaza, Ralph Bunche Road, P.O. Box 30301-00100, Nairobi, Kenya;

1.1.6 **Communications Authority** means Communications Authority of Kenya, established under the Kenya Information and Communications Act (Cap 411A of the laws of Kenya) (as amended from time to time);

1.1.7 **Competition Authority** means the Competition Authority of Kenya, established under the Competition Act, (No 12 of 2010, Laws of Kenya) (as amended from time to time);

1.1.8 **Conditions** means conditions to Final Completion set out in Clause 3.1;

1.1.9 **Escrow Agent** means Anjarwalla & Khanna LLP, of ALN House, Eldama Ravine Close, Off Eldama Ravine Road, Westlands, P.O. Box 200-00606, Nairobi, Kenya;

1.1.10 **Escrow Agreement** means the deed in agreed form to be entered into between the Parties and the Escrow Agent on the Initial Completion Date setting out the terms on which the JHL Escrow Documents and the GoK Escrow Documents shall be held and released pursuant to this Agreement;

1.1.11 **Exchange Rate** means the buy rate published by the Central Bank of Kenya (CBK) as the exchange rate applicable for buying USD using KES as at [five (5) Business Days or such date nearer to the Final Completion Date as the Parties may agree] prior to the Final Completion Date;

1.1.12 **Existing Shareholders' Agreements** means the following agreements:

a) the Deed of Amendment and Restatement of Shareholders Agreement between GoK, JHL, Helios Investors III L.P. and the Company dated 10 June 2016; and

b) the Additional Shareholders Agreement in relation to the Company entered into between GoK, JHL, Helios Investors III L.P. and the Company dated 10 June 2016;

1.1.13 **Final Completion** means completion of the sale and purchase of the Sale Shares and the transfer of the JHL Shareholder Loans from JHL to GoK and the issuance of the GoK Treasury Bond to JHL in accordance with this Agreement;

1.1.14 **Final Completion Date** means the fifth (5th) Business Day from the date of the Final Completion Notice, or such other date as the Parties may agree to in writing provided that such date shall be no later than the Long Stop Date;

1.1.15 **Final Completion Notice** has the meaning set out in Clause 3.10;

1.1.16 **GoK Treasury Bond** has the meaning ascribed to it in Clause 4.5;

1.1.17 **GoK Escrow Documents** has the meaning ascribed to it in Clause 4.3;

1.1.18 **Governmental Authority** means any regional, national, county, municipal and/or local authority or any governmental, administrative or regulatory body inside or outside Kenya having statutory competence to promulgate or to enforce rules and regulations having force of law with regard to the business undertaken by the Company or the transactions and matters referred to in this Agreement or other documents in connection with the Transaction (including without limitation the Communications Authority and the Competition Authority) and **Governmental Authorities** shall be construed accordingly;

1.1.19 **Initial Completion Date** means [....., 2022];

1.1.20 **JHL Escrow Documents** has the meaning ascribed to it in Clause 4.2;

1.1.21 **JHL Shareholder Loans** means together, the Additional JHL Shareholder Loans and the JHL-OrEA Shareholder Loans (and each a **JHL Shareholder Loan**);

1.1.22 **JHL-OrEA Shareholder Loan Consideration** means a peppercorn;

1.1.23 **JHL-OrEA Shareholder Loan** means the OrEA Shareholder Loan (as defined in the Recitals), less the GoK-OrEA Shareholder Loan (as defined in the Recitals), such loan (excluding the GoK-OrEA Shareholder Loan) being in the principal amount of United States Dollars one hundred and ninety-nine million, six hundred and ninety nine thousand seven hundred and forty four (USD 199,699,744) together with all interest accrued thereon (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars forty million two hundred and thirty eight thousand nine hundred and forty eight (USD 40,238,948)) and the total outstanding amount as at 31st December, 2021 was United States Dollars two hundred and thirty nine million nine hundred and thirty eighty thousand six hundred and ninety two (USD 239,938,692);

1.1.24 **KES** means Kenyan Shillings, the lawful currency of Kenya;

1.1.25 **Long Stop Date** means 29th July 2022 or such other date as may be agreed upon by the Parties in writing;

1.1.26 **PFMA** means the Public Finance Management Act (No. 18 of 2012, Laws of Kenya);

1.1.27 **Sale Shares** has the meaning ascribed to it in the Recitals;

1.1.28 **Sales Shares Consideration** means United States Dollars one (USD 1);

1.1.29 **Total Consideration** means together, the Sale Shares Consideration, the JHL-OrEA Shareholder Loan Consideration and the Additional JHL Shareholder Loans Consideration;

1.1.30 **Transaction** means the sale of the Sale Shares by JHL to GoK and the transfer of the JHL Shareholder Loans from JHL to GoK as envisaged under this Agreement; and

1.1.31 **USD** means United States Dollars.

1.2 Construction

1.2.1 References to **include** or **including** are to be construed without limitation.

1.2.2 The expression **person** means any legal or natural person, partnership, association, trust, company, joint venture, agency, governmental authority or other body, entity or organization (whether corporate or unincorporated) and that person's personal representatives, heirs or successors (as the case may be) or permitted assigns.

1.2.3 Any reference to **writing** or **written** means any method of reproducing words in a legible and non-transitory form (excluding, for the avoidance of doubt, email).

1.2.4 Any reference to in "**agreed form**" means in a form agreed by the relevant parties thereto and initialed for or on behalf of such parties;

1.2.5 The table of contents and headings are inserted for convenience only and do not affect the construction of this Agreement.

1.2.6 Unless the context otherwise requires, words in the singular include the plural and vice versa and a reference to any gender includes all other genders.

1.2.7 References to Clauses, Paragraphs and Schedules are to Clauses and paragraphs of, and Schedules to, this Agreement. The Schedules form part of this Agreement.

1.2.8 References to any statute or statutory provision include a reference to that statute or statutory provision as amended, consolidated or replaced from time to time (whether before or after the date of this Agreement) and include any subordinate legislation made under the relevant statute or statutory provision.

1.2.9 Unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

1.2.10 If a definition of a particular term or expression in this Agreement imposes substantive rights or obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.2.11 Each provision of this Agreement has been negotiated by the Parties and drafted for the benefit of the Parties and, accordingly, the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Agreement (the *contra proferentem* rule), shall not apply.

1.2.12 The rule known as the *ejusdem generis* rule shall not apply and accordingly general words introduced by the word other shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

1.2.13 Any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within the Party's power or control.

1.2.14 This Agreement shall be binding on and be for the benefit of the successors and personal representatives of the Parties.

2 The Transaction

2.1 Sale and purchase of Sale Shares

2.1.1 Subject to and in accordance with this Agreement, JHL hereby agrees to sell, and GoK hereby agrees to purchase, the Sale Shares on and with effect from Final Completion for the Sales Shares Consideration.

2.1.2 The Sale Shares are sold with all rights attaching to the Sale Shares on and from Final Completion, including the right to receive all dividends or distributions declared, paid or made on or after Final Completion.

2.2 Novation of JHL-OrEA Shareholder Loan

2.2.1 JHL hereby agrees to transfer all the rights and obligations relating to the JHL-OrEA Shareholder Loan to GoK by way of a deed of novation (in agreed form).

2.3 Novation of Additional JHL Shareholder Loans

2.3.1 JHL hereby agrees to transfer all the rights and obligations relating to the Additional JHL Shareholder Loans to GoK by way of a deed of novation (in agreed form) in consideration of the payment of the Additional JHL Shareholder Loans Consideration.

2.4 The Parties agree that the Sale Shares and the transfer of the JHL Shareholder Loans as envisaged under this Agreement shall be completed simultaneously as an indivisible transaction and neither Party shall be under any obligation to complete unless all the aforesaid transactions are completed simultaneously.

3 Conditions

3.1 Notwithstanding any provision of this Agreement, Final Completion shall be subject to and conditional upon satisfaction, or waiver by both Parties (to the extent capable of lawful waiver), of the following conditions precedent (the **Conditions**) on or before the Long Stop Date:

3.1.1 GoK having notified the Communications Authority of the Transaction in a form acceptable to JHL and either receiving (in a form satisfactory to JHL) a letter of no objection or approval from the Communications Authority in respect of the Transaction on unconditional terms;

3.1.2 GoK having received (in a form satisfactory to JHL) approval for the Transaction from the Competition Authority and providing JHL with a copy of such written confirmation;

3.1.3 the Attorney-General of Kenya having issued an opinion in the agreed form;

3.1.4 GoK having procured (in a form satisfactory to JHL) that all legal and procedural requirements for the entry into of this Agreement and all agreements and documents ancillary hereto and the issuance of the GoK Treasury Bond are obtained and/or complied with, to the satisfaction of JHL (including without limitation, procuring that all approvals required from the Cabinet Secretary for the National Treasury and Planning (the **Cabinet Secretary**), the approval of Cabinet and any other approvals required under the PFMA and under any other applicable laws are obtained) and providing evidence thereof to JHL;

3.1.5 no award, decision, injunction, judgment, order, ruling or verdict of any court or Governmental Authority having been issued or made prior to Final Completion, which has the effect of making unlawful or otherwise prohibiting the Transaction (or any part thereof) as contemplated in this Agreement.

3.2 GoK will be solely responsible for and shall use its best endeavours to fulfil or procure the fulfilment of the Condition set out in Clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4, before the Long Stop Date.

3.3 GoK and the Seller shall co-operate fully in all actions necessary to procure the satisfaction of the Conditions, to the extent reasonably practicable and without unreasonable delay, provide the other Party with such necessary information, assistance and administrative co-operation as is reasonably requested by the other Party in order to seek to satisfy the Conditions, keeping the other Party informed of the progress of such Conditions.

3.4 In addition, the Parties shall, in respect of each of the approvals or no objection (as the case may be) required from the Communications Authority, the Competition Authority and/or any other applicable Governmental Authority:

3.4.1 use their best endeavours to submit or procure the submission of all the relevant applications for approval or no objection (as the case may be) from the Communications Authority, the Competition Authority and any other applicable Governmental Authority as soon as reasonably practicable and in any event within twenty-one (21) days from the date of the Agreement and use their respective reasonable endeavours to procure that each such Condition is satisfied as soon as possible and, in any event, by no later than the Long Stop Date;

3.4.2 provide each other with all information reasonably necessary to make any notification or filing required by any relevant Governmental Authority (and it is hereby acknowledged that in relation to any information required from the Company in connection with any Governmental Authority approvals or no objection, it shall be the responsibility of GoK to procure such information);

3.4.3 communicate with the relevant Governmental Authority in relation to each such Condition after prior written consultation with the other Party (and taking into account any reasonable comments and requests of the other Party) and provide the other Party with copies of all such forms, applications, notifications, filings, submissions and other communication in the form submitted or sent and notify the other Party of any communication (whether written or oral) received from the relevant Governmental Authority in relation to any such Condition and keep the other Party promptly informed as to progress towards satisfaction of each such Condition;

3.4.4 where reasonably practicable, provide the other Party with drafts of all written communications (save to the extent such written communications are wholly administrative or procedural in nature) intended to be sent to any Governmental Authority in connection with any such Condition and give the other Party a reasonable opportunity to comment thereon and provide the other Party with final copies of all such communications; and

3.4.5 give the other Party reasonable notice of and the opportunity for it or any of its advisers to attend all meetings and material telephone calls with any Governmental Authority.

3.5 Each Party shall, to the extent reasonably practicable and without unreasonable delay, provide the other Party with such necessary information, assistance and administrative co-operation as is reasonably requested by the other Party in order to seek to satisfy the Governmental Authority approvals (including, for the avoidance of doubt, attendance at meetings with the other Party or Governmental Authority).

3.6 If at any time a Party becomes aware of a fact, matter or circumstance that might reasonably be expected to prevent a Governmental Authority approval being satisfied prior to or by the Long Stop Date, it shall promptly inform the other Party and keep the other Party apprised of the status of such matter.

3.7 The filing fees relating to the obtaining of the relevant regulatory approvals, as well as the cost of any remedies requested by the relevant Governmental Authorities (including any costs incurred by the Company, as the case may be), shall be borne by GoK.

3.8 Each Party undertakes to notify the other Party in writing of anything which will or may prevent any of the Conditions (as applicable) from being satisfied on or before the Long Stop Date immediately it comes to its attention.

3.9 Either JHL or GoK shall be entitled to waive, to the extent capable by law of waiver, any Condition in whole or in part on written notice to the other.

3.10 Each Party undertakes to notify the other Party as soon as possible on becoming aware that any of the Conditions has been satisfied or waived in accordance with Clause 3.9. The Seller shall within three (3) Business Days of such satisfaction or waiver (if capable of waiver) of the last to be satisfied or waived of the Conditions issue a written notice to GoK confirming that the Conditions have all been satisfied and/or waived (if capable of waiver) (the **Final Completion Notice**).

4 Final Completion

4.1 Final Completion shall take place at the registered office of the Company or in such other place as the Parties may mutually agree.

4.2 On the Initial Completion Date (subject to and upon compliance by GoK of its obligations under Clause 4.3) to the satisfaction of JHL, JHL shall deliver the following documents (in agreed form) to the Escrow Agent (together the **JHL Escrow Documents**) to be held and dealt with in accordance with the terms of the Escrow Agreement **PROVIDED THAT** the JHL Escrow Documents shall be left undated:

4.2.1 share transfer form(s) in respect of the Sale Shares in favour of GoK duly executed by JHL;

4.2.2 statutory declaration signed by JHL in relation to the transfer of the Sale Shares as is required to be filed with the Companies Registry;

4.2.3 deed of termination with respect to the Existing Shareholders' Agreements duly executed by JHL and Helios Investors III L.P;

4.2.4 deed of novation in respect of the JHL-OrEA Shareholder Loan duly executed by JHL;

4.2.5 deed of novation in respect of the Additional JHL Shareholder Loans duly executed by JHL;

4.2.6 executed resignation letters and the corresponding statutory declarations in respect of the following directors nominated for appointment by JHL to the board of the Company effective from the Final Completion Date:

(i) Nitin Kaul; and

(ii) Dennis Aluanga.

4.3 On the Initial Completion Date, simultaneously with Clause 4.2, GoK shall:

4.3.1 execute and procure the execution thereof by the Company (as applicable) of the following documents and deliver the originals thereof to the Escrow Agent in a form satisfactory to JHL (together the **GoK Escrow Documents**) to be held and dealt with in accordance with the terms of the Escrow Agreement **PROVIDED THAT** GoK Escrow Documents shall be left undated:

(a) share transfer form(s) in respect of the Sale Shares;

(b) the deed of termination of the Existing Shareholders' Agreements;

(c) deed of novation in respect of the JHL-OrEA Shareholder Loan;

(d) deed of novation in respect of the Additional JHL Shareholder Loan;

(e) a resolution passed at a duly convened and held meeting of the board of directors of the Company in the agreed form approving the registration of the transfer of Sale Shares and the JHL Shareholder Loans subject to the occurrence of Final Completion and the matters envisaged under this Agreement.

4.4 In addition, on the Initial Completion Date:

4.4.1 the Parties shall sign and procure the signing of the Escrow Agreement;

4.4.2 the Parties shall procure that the Escrow Agent signs the Escrow Agreement and shall hold the JHL Escrow Documents and the GoK Escrow Documents on the terms of the Escrow Agreement.

4.5 On the Final Completion Date GoK shall settle the Total Consideration in respect of the Sale Shares and in respect of the Additional JHL Shareholder Loans by issuing a three (3) year GOK treasury bond with a coupon rate that take market factors into account (which coupon is payable half-yearly) in the Kenya Shillings equivalent of the Total Consideration (the **GoK Treasury Bond**) which shall be computed as follows:

Aggregate Value of GoK Treasury Bond in KES	=	Total Consideration i.e. USD 51,186,057 X Exchange Rate

4.6 Time shall be of essence in connection with the issuance of the GoK Treasury Bond and compliance of with all other obligations of GoK as envisaged under this Agreement.

4.7 On the Final Completion Date, the Parties agree that immediately upon the issuance of the GoK Treasury Bond to JHL or its nominees to the satisfaction of JHL, JHL shall notify the Escrow Agent and the Parties shall procure that the Escrow Agent releases the JHL Escrow Documents and the GoK Escrow Documents for further action by the relevant Parties (as relevant) and the JHL Escrow Documents and the GoK Escrow Documents shall be dated and take effect as of the Initial Completion Date.

4.8 If the Conditions are not fulfilled (or waived to the extent capable of lawful waiver) and/or the GoK Treasury Bond is not issued to the Seller by the Final Completion Date, then this Agreement (other than Clauses 1 and Clauses 7 to 13 inclusive) shall automatically terminate and the Escrow Agent shall be required to release the JHL Escrow Documents and the GoK Escrow Documents to JHL for destruction.

5 Post – Completion Obligations

5.1 Within thirty (30) days from the Final Completion Date, GoK shall procure the stamping of the share transfer forms in respect of the Sale Shares and the transfer of the JHL-OrEA Shareholder Loan, and the transfer of the Additional JHL Shareholder Loans and the deed of termination of the Existing Shareholders Agreement with the requisite stamp duty (or waiver of stamp duty) and procure the registration of the share transfer forms in respect of the Sale Shares and the changes in the board of directors of the Company are duly completed at the Registrar of Companies in Kenya and that the books of the Company are duly updated to reflect the changes, and provide evidence of the same (together with certified copies thereof) to JHL.

6 Representations and Warranties by the Parties

6.1 Each Party represents and warrants to the other Party, such warranties being given as of the date of this Agreement and each day during the interim period up to and including the Final Completion Date, that:

6.1.1 such Party is properly incorporated, validly existing and in good standing in its jurisdiction of incorporation;

6.1.2 such Party has the requisite power, capacity and authority to enter into and perform this Agreement and any documents referred to in this Agreement, to perform its obligations hereunder and thereunder, and to complete the transactions contemplated hereby and thereby;

6.1.3 all actions required to be taken by such Party to authorize the execution and delivery of this Agreement and the documents referred to in this Agreement, and the performance of such Party's obligations hereunder and thereunder have properly been taken;

6.1.4 this Agreement constitutes (including documents which are to be delivered at Initial Completion and at Final Completion) will, when executed, constitute binding and enforceable obligations of such Party in accordance with their respective terms. The execution and delivery of, and the performance by such Party of its obligations under this Agreement and the documents referred to in this Agreement will not:

(a) violate any provision of the constitutional documents of such Party;

(b) result in a breach of, or constitute a default under, any instrument to which such party is a party or by which such Party is bound;

(c) violate any law applicable to, or binding upon or enforceable against such Party or result in a breach of any order, judgment or decree of any court or Governmental Authority to which such Party is bound; and

(d) other than as provided in clause 3 require consent, waiver, approval or notification to any person or Governmental Authority.

6.2 JHL further represents and warrants to GoK, such warranties being given as of the date of this Agreement and each day during the interim period up to and including the Final Completion Date, that:

6.2.1 JHL is the legal and beneficial owner of the Sale Shares, free from any encumbrances;

6.2.2 All the Sale Shares are fully paid up;

6.2.3 So far as JHL is aware, no order has been made, petition presented or resolution passed for the winding-up of JHL, no notice of appointment of or notice of intention to appoint an administrator has been made or issued in relation to JHL and no administration order or administration application has been made in relation to JHL and JHL is not involved in any insolvency proceedings;

6.2.4 The JHL-OrEA Shareholder Loan was acquired from Orange Telkom; and

6.2.5 The Additional JHL Shareholder Loans were disbursed to the Company by or on behalf of JHL.

6.3 GoK further represents and warrants to JHL, such warranties being given as of the date of this Agreement and each day during the interim period up to and including the Final Completion Date and thereafter that:

6.3.1 the GoK Treasury Bond shall be validly and lawfully issued to JHL or its nominees;

6.3.2 as at the Final Completion Date GoK shall have procured that all legal and procedural requirements for issuance of the GoK Treasury Bond have been complied with to the satisfaction of JHL at its discretion (including without limitation, procuring that all approvals required from the Cabinet Secretary for the National Treasury and Planning (the **Cabinet Secretary**), the approval of Cabinet and any other approvals required under the PFMA and under any other applicable laws) and provide evidence thereof to JHL;

6.3.3 GoK shall have procured the fulfilment of the Conditions set out in Clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4 in compliance with all legal and procedural requirements and GoK hereby undertakes to indemnify the Seller on a full indemnity basis against any risks and losses and in addition any penalties, fines and/or any other sanctions that may be imposed by the Competition Authority, the Communications Authority or any other Governmental Authority or any judicial or arbitral authority in connection with the manner in which the Conditions set out in Clauses 3.1.1, 3.1.2, 3.1.3 and 3.1.4 have been fulfilled and/or in respect of any failure to procure any approvals or consents required under any law in Kenya in connection with the Transaction and the matters envisaged under this Agreement;

6.3.4 as at the Final Completion Date, no further requirements or approvals shall be required in order to make the GoK Treasury Bond valid and binding and no further approvals of consents shall be required from any regulators or governmental bodies in Kenya.

7 Dispute Resolution

7.1 The Parties shall use their respective good faith efforts to resolve any dispute, controversy or claim of any nature whatsoever arising out of or in relation to or in connection with this Agreement. To this end, the Parties shall each promptly appoint representatives of appropriate standing who shall meet and attempt to resolve any dispute between them. In the event that an amicable settlement has not been reached within twenty (20) Business Days of (a) the

Parties representatives meeting as aforesaid, or (b) the dispute, controversy or claim of any nature whatsoever arising, the following provisions of this Clause 7 shall apply.

7.2 Any dispute, controversy, difference or claim arising out of or relating to the present contract shall be referred to and finally resolved by arbitration administered by the Mediation and Arbitration Centre of Mauritius (MARC) under the MARC Arbitration Rules in force when the Request for Arbitration is submitted.

7.3 The seat of arbitration shall be Mauritius.

7.4 The venue of the arbitration shall be in Mauritius.

7.5 The law of this arbitration clause shall be Kenyan law.

7.6 The number of arbitrators shall be three. The arbitration proceedings shall be conducted in the English language.

8 Jurisdiction and Governing Law

This Agreement and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with the laws of Kenya.

9 Waiver of immunity

9.1 To the extent permitted by the laws of Kenya, GoK irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or in connection with this Agreement, including without limitation immunity from:

9.1.1 the jurisdiction of any court or tribunal;

9.1.2 service of process;

9.1.3 injunctive or other interim relief, or any order for specific performance or recovery of land; and

9.1.4 any process for execution of any award or judgement against its property.

10 Notices

10.1 **Addresses**

10.1.1 Any notice, claim, demand or other communication in connection with this Agreement or with any arbitration under this Agreement (each a "**Notice**") shall be sufficiently given to the recipient at its address set out in Clause 10.2 or any other address notified to the sender by the recipient for the purposes of this Agreement and marked "IMPORTANT LEGAL NOTICE".

10.1.2 Any Notice or other communication shall be in writing, in English and delivered by hand or sent by messenger, courier or pre-paid airmail post. Any Notice shall be deemed to have been received at the time of delivery if delivered by hand, on the third (3rd) Business Day following such despatch, if sent by messenger, courier or seven (7) Business Days from the time of posting, if sent by post.

10.2 **GoK:**

Attention: The Cabinet Secretary
The National Treasury
Treasury Building

Harambee Avenue
P.O. Box 30007-00100
NAIROBI, KENYA

JHL:

Attention: Paul Cunningham
Jamhuri Holdings Limited and/or Helios Investors III L.P.
Level 3, Alexander House
35 Cybercity
Ebene, Mauritius

With a copy to:

Attention: Karim Anjarwalla

Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200 -00606
Nairobi, Kenya

10.3 **Costs**

10.3.1 Each Party shall bear its own costs incurred by it in connection with the preparation, negotiation and entry into this Agreement and the documents to be entered into pursuant to it.

10.3.2 GoK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of the Transaction, including without limitation, the sale of the Sale Shares (and the corresponding share transfer forms), the transfer of the JHL-OrEA Shareholder Loan, the transfer of the Additional JHL Shareholder Loans and deed of termination of the Existing Shareholders Agreement.

11 Whole Agreement and Remedies

11.1 Whole Agreement

This Agreement contains the whole agreement between the Parties relating to the subject matter of this Agreement at the date hereof to the exclusion of any terms implied by law which may be excluded by contract and supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Agreement.

11.2 No inducement

Each of the Parties acknowledges that it has not been induced to enter into this Agreement by any representation, warranty or undertaking not expressly incorporated into it.

11.3 Remedies

So far as permitted by law and subject to the express provisions of this Agreement and except in the case of fraud, each Party agrees and acknowledges that its only right and remedy in relation to any representation, warranty or undertaking made or given in connection with this

Agreement shall be for breach of the terms of this Agreement to the exclusion of all other rights and remedies (including those in tort or arising under statute).

11.4 **Legal Advice**

Each Party to this Agreement confirms it has received independent legal advice relating to all the matters provided for in this Agreement, including the provisions of this Clause, and agrees, having considered the terms of this Clause and the Agreement as a whole, that the provisions of this Clause are fair and reasonable.

12 Confidentiality

12.1 **Confidential Information**

The Parties shall use all reasonable endeavours to keep confidential and to ensure that their respective Affiliates and their respective officers, employees, agents and professional and other advisers keep confidential any information (**the Confidential Information**) and the fact that this Agreement has been entered into and the terms of this Agreement.

12.2 **Restrictions**

12.2.1 No Party may use for its own business purposes or disclose to any third party any Confidential Information without the consent of the other Parties.

12.2.2 This Clause does not apply to:

(a) information which is or becomes publicly available (otherwise than as a result of a breach of this Clause);

(b) information which is independently developed by the relevant Party or acquired from a third party, to the extent that it is acquired with the right to disclose it;

(c) information which was lawfully in the possession of the relevant Party free of any restriction on disclosure;

(d) information which following disclosure under this Clause, becomes available to the relevant Party from a source other than another party which is not bound by any obligation of confidentiality in relation to such information;

(e) the disclosure by a Party of Confidential Information to its directors or employees who need to know that confidential information for purposes relating to this Agreement but those directors and employees shall not use that Confidential Information for any other purpose;

(f) the disclosure of information to the extent required to be disclosed by law or any court of competent jurisdiction, any governmental official or regulatory authority or any binding judgement, order or requirement of any other competent authority;

(g) the disclosure of information to any tax authority to the extent reasonably required for the purposes of the tax affairs of the Party concerned or any member of its group;

(h) the disclosure to a Party's professional advisers of information reasonably required to be disclosed for purposes relating to this Agreement; and/or

(i) the disclosure to any prospective purchaser(s) of shareholder loans or any shares in the Company.

12.2.3 Each Party shall inform every officer, employee or agent or any professional or other adviser advising it in relation to matters relating to this Agreement, or to whom it provides Confidential Information, that such information is confidential and shall instruct them:

(a) to keep it confidential; and

(b) not to disclose it to any third party (other than to those persons to whom it has already been or may be disclosed in accordance with the terms of this Clause).

12.3 **Damages not an adequate remedy**

Without prejudice to any other rights or remedies which a Party may have, the Parties acknowledge and agree that damages would not be an adequate remedy for any breach of this Clause 12 and the remedies of injunction, specific performance and other equitable relief are appropriate for any threatened or actual breach of any such provision and no proof of special damages shall be necessary for the enforcement of the rights under this Clause 12.

12.4 **Survival**

12.4.1 The disclosing Party shall remain responsible for any breach of this Clause 12 by the person to whom that Confidential Information is disclosed.

12.4.2 The provisions of this Clause 12 shall survive the termination of this Agreement for whatever cause for a period of three (3) years.

13 General

13.1 **Survival of Rights, Duties and Obligations**

Termination of this Agreement for any cause shall not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

13.2 **No Partnership**

Nothing in this Agreement shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party for any purpose.

13.3 **Release**

Any liability to any Party under this Agreement may in whole or in part be released, compounded or compromised or time or indulgence given by that Party in its absolute discretion as regards any Party under such liability without in any way prejudicing or affecting its rights against any other Party under the same or a like liability, whether joint and several or otherwise.

13.4 **Waiver**

No failure of any Party to exercise, and no delay by it in exercising, any right, power or remedy in connection with this Agreement (each a **Right**) shall operate as a waiver of that Right, nor shall any single or partial exercise of any Right preclude any other or further exercise of that Right or the exercise of any other Right. The Rights provided in this Agreement are cumulative and not exclusive of any other Rights (whether provided by law or otherwise). Any express waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

13.5 Variation

No variation of this Agreement shall be effective unless in writing and signed by or on behalf of each of the Parties.

13.6 Assignment

This Agreement is personal to the Parties and the rights and obligations of the Parties may not be assigned or otherwise transferred.

13.7 Time of the Essence

Time shall be of the essence of this Agreement, both as regards any dates, times and periods mentioned and as regards any dates, times and periods which may be substituted for them in accordance with this Agreement or by agreement in writing between the Parties.

13.8 Further Assurance

At any time after the date of this Agreement the Parties shall and shall use all reasonable endeavours to procure that any necessary third party shall, at the cost of the relevant Party execute such documents and do such acts and things as that Party may reasonably require for the purpose of giving to that party the full benefit of all the provisions of this Agreement.

13.9 Invalidity

If any provision in this Agreement shall be held to be illegal, invalid or unenforceable, in whole or in part, under the law of any jurisdiction, the legality, validity or enforceability of such provision or part under the law of any other jurisdiction and the legality, validity and enforceability of the remainder of this Agreement shall not be affected.

13.10 Counterparts

This Agreement may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into this Agreement by executing any such counterpart.

[Remainder of Page Left Intentionally Blank]

IN WITNESS this Agreement has been duly executed by or on behalf of the Parties.

SIGNED by Paul Cunningham
for and on behalf of **JAMHURI HOLDINGS LIMITED**
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED by
The Cabinet Secretary, the National Treasury
for and on behalf of the Government of Kenya
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

Dated 2022

TELKOM KENYA LIMITED
(the **Company**)

and

JAMHURI HOLDINGS LIMITED
(JHL)

and

THE CABINET SECRETARY THE NATIONAL TREASURY ON BEHALF OF THE GOVERNMENT OF KENYA
(GOK)

DEED OF NOVATION
relating to the
ADDITIONAL JHL SHAREHOLDER LOANS

A&K | ALN
ANJARWALLA & KHANNA

info@africalegalnetwork.com
www.africalegalnetwork.com

This Deed is made as of the day of , 2022

BETWEEN:

1. **TELKOM KENYA LIMITED** (Company Number C.3/2009), a company incorporated under the laws of the Republic of whose registered address is at L.R. No. 209/5535, Telkom Plaza, Ralph Bunche Road, P.O. Box 30301-00100, Nairobi, Kenya (the **Company**);

2. **JAMHURI HOLDINGS LIMITED**, a limited liability company incorporated in accordance with the laws of Mauritius and with Registration Number 134048C2/GBL, whose official office is Level 3, Alexander House, 35 Cybercity, Ebene, Mauritius (the **JHL**); and

3. **THE CABINET SECRETARY TO THE NATIONAL TREASURY OF KENYA ON BEHALF OF THE GOVERNMENT OF KENYA** whose address is Treasury Building, Harambee Avenue, P.O. Box 30007-00100, Nairobi, Kenya (**GOK**),

(each a **Party** and together the **Parties**).

WHEREAS:

(A) Pursuant to a share purchase agreement dated 6 November 2015 between Orange East Africa S.A., Orange Participations S.A. and JHL, OrEA agreed to sell and the JHL agreed to purchase eighty three million one hundred and one thousand three hundred and twelve (83,101,312) ordinary shares in the Company constituting seventy per cent (70%) of the ordinary issued share capital of the Company together with OrEA's shareholder loan to the Company at the time amounting to United States Dollars three hundred and thirty two million eight hundred and thirty two thousand nine hundred and six point seven five (USD 332,832,906.75) (the **OrEA Shareholder Loan**) (such acquisition collectively the **JHL-OrEA Transaction**).

(B) On completion of the JHL- OrEA Transaction, JHL agreed to transfer ten per cent (10%) of the Company's shares owned by JHL to GOK, thereby increasing GOK's shareholding to forty per cent (40%) of the ordinary issued share capital of the Company. Further, JHL transferred forty per cent (40%) of the OrEA Shareholder Loan to GOK (such portion referred to as the **GOK- OrEA Shareholder Loan)** and retained the balance (such balance hereinafter defined as the **JHL- OrEA Shareholder Loan**).

(C) Subsequently, the JHL provided additional funding to the Company by way of the Additional JHL Shareholder Loans (as hereinafter defined).

(D) Pursuant to a Share Purchase Agreement entered into by the Parties dated on or about the date of this Deed (the **SPA**), JHL has agreed to sell and GOK has agreed to purchase JHL's 60% shareholding in the Company (the **Sale Shares**) and JHL has agreed to transfer, subject to Final Completion, all the rights and obligations relating to Additional JHL Shareholder Loans to GOK.

(E) The Company at the request of JHL and GOK hereby agrees to the rights and obligations of JHL in relation to the Additional JHL Shareholder Loans being extinguished subject to Final Completion and GOK agreeing to take over all the rights and obligations of JHL in relation to the Additional JHL Shareholder Loans on and subject to the terms and conditions of this Deed.

IT IS HEREBY AGREED as follows:

1 DEFINITIONS AND INTERPRETATIONS

1.1 In this Deed (including its recitals) unless the context otherwise requires the following terms shall have the following meanings:

1.1.1 **Additional JHL Shareholder Loans** means the loans advanced by JHL to the Company in the total principal amount of United States Dollars forty seven million seven hundred and twenty thousand (USD 47,720,000) together with all interest accrued thereon as at the Final Completion Date (it being acknowledged that as at 31st December, 2021 the accrued interest was United States Dollars three million four hundred and sixty six thousand and fifty seven (USD 3,466,057)) and accordingly that the total outstanding amount as at 31st December, 2021 was United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057);

1.1.2 **Additional JHL Shareholder Loans Consideration** means the sum of United States Dollars fifty one million one hundred and eighty six thousand and fifty seven (USD 51,186,057);

1.1.3 **Deed** means this Deed of Novation as the same may be amended from time to time;

1.1.4 **GoK Bonds** has the meaning ascribed in the SPA; and

1.1.5 **SPA** has the meaning ascribed to it in the Recital (D).

1.2 In this Deed (including the recitals) unless the context otherwise requires:

1.2.1 References to **include** or **including** are to be construed without limitation.

1.2.2 The **expression person** means any legal or natural person, partnership, association, trust, company, joint venture, agency, governmental authority or other body, entity or organization (whether corporate or unincorporated) and that person's personal representatives, heirs or successors (as the case may be) or permitted assigns.

1.2.3 Any reference to **writing** or **written** means any method of reproducing words in a legible **and** non-transitory form (excluding, for the avoidance of doubt, email).

1.2.4 The table of contents and headings are inserted for convenience only and do not affect the **construction** of this Deed.

1.2.5 Unless the context otherwise requires, words in the singular include the plural and vice versa and a reference to any gender includes all other genders.

1.2.6 References to Clauses and Paragraphs are to Clauses and paragraphs of this Deed.

1.2.7 References to any statute or statutory provision include a reference to that statute or statutory provision as amended, consolidated or replaced from time to time (whether before or after the date of this Deed) and include any subordinate legislation made under the relevant statute or statutory provision.

1.2.8 Unless otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a Business Day, the next succeeding Business Day.

1.2.9 If a definition of a particular term or expression in this Deed imposes substantive rights or obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.2.10 Each provision of this Deed has been negotiated by the Parties and drafted for the benefit of the Parties and, accordingly, the rule of construction that the contract shall be interpreted against or to the disadvantage of the Party responsible for the drafting or preparation of the Deed (the *contra proferentem* rule), shall not apply.

1.2.11 The rule known as the *ejusdem generis* rule shall not apply and accordingly general words introduced by the word other shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things and general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

1.2.12 Any covenant by a Party not to do an act or thing shall be deemed to include an obligation not to permit or suffer such act or thing to be done by another person so far as this is within the Party's power or control.

1.2.13 This Deed shall be binding on and be for the benefit of the successors and personal representatives of the Parties.

1.2.14 Words and expressions defined in the SPA shall have the meaning ascribed to them in the SPA when used in this Deed unless defined in this Deed or unless the context otherwise requires.

2 Novation

2.1 The Parties hereby agree that:

2.1.1 In consideration of the mutual covenants contained herein and in further consideration of the Additional JHL Shareholder Loans Consideration (which the parties hereby acknowledge shall be settled by the issuance of the GoK Treasury Bonds), JHL, as legal and beneficial owner, hereby assigns absolutely unto GOK the Additional JHL Shareholder Loans together with all the rights, title and interest of JHL in respect thereof unto GOK absolutely subject to Final Completion and with effect from the Final Completion Date.

2.1.2 It is hereby agreed by the Parties that GOK shall, with effect from the Final Completion Date, have the full benefit of the Additional JHL Shareholder Loans together with all the rights powers and remedies referred to or arising in respect thereof and under any applicable law.

2.1.3 In substitution for the extinguished rights and obligations referred to in sub-clause 2.1.1, the Company and GOK hereby agree to create, as of the Final Completion Date, new rights and obligations between themselves identical (as to quality and quantum (except as otherwise stated herein)) to the said extinguished rights and obligations.

2.2 GOK unconditionally covenants and agrees with the Company to assume all of JHL's rights, obligations and responsibilities as JHL's in relation to the Additional JHL Shareholder Loans.

2.3 The Company hereby acknowledges and consents to the absolute assignment of the Additional JHL Shareholder Loans by JHL to GOK together with the full benefit thereof for the repayment thereof and all the rights, title and interest of JHL in respect thereof unto GOK absolutely and the Company hereby acknowledges and confirms that as from the Final Completion Date, the Company owes and is indebted to GOK in the amount of the Additional JHL Shareholder Loans.

3 Release

3.1 The Parties agree that from the Completion Date, JHL shall no longer have any rights or obligations in relation to the Additional JHL Shareholder Loans other than those expressly granted in this Deed.

4 Further Assurance

4.1 Each Party shall do, or procure the doing of, all acts and things and execute or procure the execution of all documents as may reasonably be required to give full effect to this Deed.

5 Jurisdiction and Governing Law

5.1 This Deed and the documents to be entered into pursuant to it, save as expressly referred to therein, shall be governed by and construed in accordance with the laws of Kenya.

6 Dispute Resolution

6.1 The Parties shall use their respective good faith efforts to resolve any dispute, controversy or claim of any nature whatsoever arising out of or in relation to or in connection with this Deed. To this end, the Parties shall each promptly appoint representatives of appropriate standing who shall meet and attempt to resolve any dispute between them. In the event that an amicable settlement has not been reached within twenty (20) Business Days of (a) the Parties representatives meeting as aforesaid, or (b) the dispute, controversy or claim of any nature whatsoever arising, the following provisions of this Clause 6 shall apply.

6.2 Any dispute, controversy, difference or claim arising out of or relating to the present contract shall be referred to and finally resolved by arbitration administered by the Mediation and Arbitration Centre of Mauritius (MARC) under the MARC Arbitration Rules in force when the Request for Arbitration is submitted.

6.3 The seat of arbitration shall be Mauritius.

6.4 The venue of the arbitration shall be in Mauritius.

6.5 The law of this arbitration clause shall be Kenyan law.

6.6 The number of arbitrators shall be three. The arbitration proceedings shall be conducted in the English language.

7 Waiver of immunity

7.1 To the extent permitted by the laws of Kenya, GOK irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or in connection with this Deed, including without limitation immunity from:

7.1.1 the jurisdiction of any court or tribunal;

7.1.2 service of process;

7.1.3 injunctive or other interim relief, or any order for specific performance or recovery of land; and

7.1.4 any process for execution of any award or judgement against its property.

8 Notices

8.1 Addresses

8.1.1 Any notice, claim, demand or other communication in connection with this Deed or with any arbitration under this Deed (each a **Notice**) shall be sufficiently given to the recipient at its address set out in Clause 8.2 or any other address notified to the sender by the recipient for the purposes of this Deed and marked "IMPORTANT LEGAL NOTICE".

8.1.2 Any Notice or other communication shall be in writing, in English and delivered by hand or sent by messenger, courier or pre-paid airmail post. Any Notice shall be deemed to have been received at the time of delivery if delivered by hand, on the third (3rd) Business Day following such despatch, if sent by messenger, courier or seven (7) Business Days from the time of posting, if sent by post.

8.2 **GOK:**

Attention: The Cabinet Secretary

The National Treasury
Treasury Building
Harambee Avenue
P.O. Box 30007-00100
NAIROBI, KENYA

8.3 **JHL:**

Attention: Paul Cunningham
Jamhuri Holdings Limited and/or Helios Investors III L.P.
Level 3, Alexander House
35 Cybercity
Ebene, Mauritius

With a copy to:

Attention: Karim Anjarwalla
Anjarwalla & Khanna LLP
ALN House
Eldama Ravine Close, Off Eldama Ravine Road
Westlands
PO Box 200 -00606
Nairobi, Kenya

TKL

[TO BE INSERTED]

8.4 **Costs**

8.4.1 Each Party shall bear its own costs incurred by it in connection with the preparation, negotiation and entry into this Deed and the documents to be entered into pursuant to it.

8.4.2 GOK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of this Deed and the transfer of the Additional JHL Shareholder Loans.

9 Whole Agreement and Remedies

9.1 **Whole Agreement**

This Deed contains the whole agreement between the Parties relating to the subject matter of this Deed at the date hereof to the exclusion of any terms implied by law which may be excluded by contract and supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Deed.

9.2 **No inducement**

Each of the Parties acknowledges that it has not been induced to enter into this Deed by any representation, warranty or undertaking not expressly incorporated into it.

9.3 **Remedies**

So far as permitted by law and subject to the express provisions of this Deed and except in the case of fraud, each Party agrees and acknowledges that its only right and remedy in relation to any representation, warranty or undertaking made or given in connection with this Deed shall be for breach of the terms of this Deed to the exclusion of all other rights and remedies (including those in tort or arising under statute).

9.4 **Legal Advice**

Each Party to this Deed confirms it has received independent legal advice relating to all the matters provided for in this Deed, including the provisions of this Clause, and agrees, having considered the terms of this Clause and the Deed as a whole, that the provisions of this Clause are fair and reasonable.

10 Confidentiality

10.1 **Confidential Information**

The Parties shall use all reasonable endeavours to keep confidential and to ensure that their respective Affiliates and their respective officers, employees, agents and professional and other advisers keep confidential any information (the **Confidential Information**) and the fact that this Deed has been entered into and the terms of this Deed.

10.2 **Restrictions**

10.2.1 No Party may use for its own business purposes or disclose to any third party any Confidential Information without the consent of the other Parties.

10.2.2 This Clause does not apply to:

(a) information which is or becomes publicly available (otherwise than as a result of a breach of this Clause);

(b) information which is independently developed by the relevant Party or acquired from a third party, to the extent that it is acquired with the right to disclose it;

(c) information which was lawfully in the possession of the relevant Party free of any restriction on disclosure;

(d) information which following disclosure under this Clause, becomes available to the relevant Party from a source other than another party which is not bound by any obligation of confidentiality in relation to such information;

(e) the disclosure by a Party of Confidential Information to its directors or employees who need to know that confidential information for purposes relating to this Deed but those directors and employees shall not use that Confidential Information for any other purpose;

(f) the disclosure of information to the extent required to be disclosed by law or any court of competent jurisdiction, any governmental official or regulatory authority or any binding judgement, order or requirement of any other competent authority;

(g) the disclosure of information to any tax authority to the extent reasonably required for the purposes of the tax affairs of the Party concerned or any member of its group;

(h) the disclosure to a Party's professional advisers of information reasonably required to be disclosed for purposes relating to this Deed; and/or

(i) the disclosure to any prospective purchaser(s) of shareholder loans or any shares in the Company.

10.2.3 Each Party shall inform every officer, employee or agent or any professional or other adviser advising it in relation to matters relating to this Deed, or to whom it provides Confidential Information, that such information is confidential and shall instruct them:

(a) to keep it confidential; and

(b) not to disclose it to any third party (other than to those persons to whom it has already been or may be disclosed in accordance with the terms of this Clause).

10.3 **Damages not an adequate remedy**

Without prejudice to any other rights or remedies which a Party may have, the Parties acknowledge and agree that damages would not be an adequate remedy for any breach of this Clause 10 and the remedies of injunction, specific performance and other equitable relief are appropriate for any threatened or actual breach of any such provision and no

proof of special damages shall be necessary for the enforcement of the rights under this Clause 10.

10.4 **Survival**

10.4.1 The disclosing Party shall remain responsible for any breach of this Clause 10 by the person to whom that Confidential Information is disclosed.

10.4.2 The provisions of this Clause 10 shall survive the termination of this Deed for whatever cause for a period of three (3) years.

11 General

11.1 **Survival of Rights, Duties and Obligations**

Termination of this Deed for any cause shall not release a Party from any liability which at the time of termination has already accrued to another Party or which thereafter may accrue in respect of any act or omission prior to such termination.

11.2 **No Partnership**

Nothing in this Deed shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party for any purpose.

11.3 **Release**

Any liability to any Party under this Deed may in whole or in part be released, compounded or compromised or time or indulgence given by that Party in its absolute discretion as regards any Party under such liability without in any way prejudicing or affecting its rights against any other Party under the same or a like liability, whether joint and several or otherwise.

11.4 **Waiver**

No failure of any Party to exercise, and no delay by it in exercising, any right, power or remedy in connection with this Deed (each a **Right**) shall operate as a waiver of that Right, nor shall any single or partial exercise of any Right preclude any other or further exercise of that Right or the exercise of any other Right. The Rights provided in this Deed are cumulative and not exclusive of any other Rights (whether provided by law or otherwise). Any express waiver of any breach of this Deed shall not be deemed to be a waiver of any subsequent breach.

11.5 **Variation**

No variation of this Deed shall be effective unless in writing and signed by or on behalf of each of the Parties.

11.6 **Assignment**

This Deed is personal to the Parties and the rights and obligations of the Parties may not be assigned or otherwise transferred.

11.7 **Time of the Essence**

Time shall be of the essence of this Deed, both as regards any dates, times and periods mentioned and as regards any dates, times and periods which may be substituted for them in accordance with this Deed or by agreement in writing between the Parties.

11.8 **Further Assurance**

At any time after the date of this Deed the Parties shall and shall use all reasonable endeavours to procure that any necessary third party shall, at the cost of the relevant Party execute such documents and do such acts and things as that Party may reasonably require for the purpose of giving to that party the full benefit of all the provisions of this Deed.

11.9 **Invalidity**

If any provision in this Deed shall be held to be illegal, invalid or unenforceable, in whole or in part, under the law of any jurisdiction, the legality, validity or enforceability of such provision or part under the law of any other jurisdiction and the legality, validity and enforceability of the remainder of this Deed shall not be affected.

11.10 **Counterparts**

This Deed may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Any Party may enter into this Deed by executing any such counterpart.

[Remainder of Page Left Intentionally Blank]

IN WITNESS this Deed has been duly executed as a Deed by or on behalf of the Parties.

SIGNED and delivered as a Deed by
Paul Cunningham
for and on behalf of **JAMHURI HOLDINGS LIMITED**
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED and Delivered as a Deed by
The Cabinet Secretary, the National Treasury
for and on behalf of the Government of Kenya
in the presence of:

[sign here]

Signature of witness
Name of witness: _ _ _ _ _ _ _ _ _ _ _ _
Designation: _ _ _ _ _ _ _ _ _ _ _ _

SIGNED and Delivered as a Deed
By_____
for and on behalf of Telkom Kenya Limited
In the presence of :

_____
Director/Secretary:

_____
Director:

Annexure 39

Memo dated 25th July 2022 from DG PIPM to PS NT

A039 APPENDIX I

(1)

105

VERY URGENT

THE NATIONAL TREASURY

ACCOUNTANT GENERAL
NATIONAL TREASURY

DIRECTORATE OF
PUBLIC INVESTMENT &
PORTFOLIO MANAGEMENT

INTERNAL MEMO

Ref. No. : TNT/ZZ 331/02 TY⁶ Date : 25th July 2022

To : Principal Secretary/National Treasury

From : DG/PIPM

Subject : EXIT OF HELIOS INVESTORS LLP/JAMHURI LTD IN TELKOM KENYA LIMITED

It is noted that Telkom Kenya Ltd was established as a Telecommunication Operator in 1999 and operates critical national security assets and services in the country. Telkom Kenya was privatized in 2007 where the Government sold 51% of its shares to France Telkom SA at a price of USD.390 million.

In 2016, Helios Investors LLP acquired 70% of shares in Telkom Kenya from France Telkom and through this transaction GOK increased its shareholding from 30% to 40% for a nominal consideration. GOK had initially been diluted from 49% to 30% shareholding for lack of participation in additional equity injection.

Helios/Jamhuri Holdings have made a decision to exit Telkom by exercising their PUT OPTION and the following has been agreed with GOK;

i. GOK acquires the Helios 60% shareholding in Telkom Kenya for nominal USD1.
ii. GOK to take over and reimburse Helios the Shareholder loan injected and accrued interest amounting to USD.51 million.
iii. The amount to be reimbursed to be made through a Government Bond
iv. Helios will forgo the acquired Shareholder loans from Orange Telkom (French Telkom) amounting to USD.239 million.
v. Once Helios/Jamhuri exits, GOK will own 100% of the Telkom Kenya

The National Security Council in its meeting held on 1st April, 2022 approved the proposal by Helios to exit Telkom Kenya under the above terms. Consequently, a Share Purchase Agreement was signed between GOK and Helios/Jamhuri Holdings.

The Transaction will be concluded by settling the total consideration in respect of the Sale of Shares by issuing a three (3) years GOK Treasury Bond equivalent to **USD.51,186,058**. The completion date of the Transation is 29th July, 2022 failure to which the signed agreements will be null and void.

In view of the urgency to conclude the above Transaction, the National Treasury requests that an amount equivalent to USD.51,186,058 be paid to Jamhuri Holdings Limited under Article 223 of the Constitution of Kenya in form of a Three (3) years Treasury Bond and the same be regularized in the Supplementary Budget of FY 2022/23.

The purpose of this Memo is to request you to sign the attached letter to the Cabinet Secretary/National Treasury & Planning.

Eng. Stanley Kamau

Annexure 42

Approval Letter dated 1st April 2022 from National Security Council

A042

APPENDIX IV

26

PRINCIPAL SECRETARY
THE NATIONAL TREASURY
08 APR 2022
RECEIVED
P. O. Box 30007 - 00100, NAIROBI

RECEIVED
08 APR
Principal Secretary
National Treasury

PS TREASURY OFFICE

Take Necessary Action	✓
Please See Me	
Please Review and Advice	
Note	
To Keep in View	
Noted & Appreciated	
Please Let's Discuss	

EXECUTIVE OFFICE OF THE PRESIDENT
HEAD OF THE PUBLIC SERVICE

STATE HOUSE
P.O. Box 40530–00100
Nairobi, Kenya

Telegraphic Address
Telephone: +254–20–2227436
When replying please quote

Ref. No. .....CAB/NSC/14/2.VOL.1/(20)
and date

Fee

....1st April, 2022....., 20.....

Dr. Julius M. Muia, PhD, CBS
Principal Secretary/National Treasury
National Treasury & Planning
NAIROBI

Dr. PSM

Mr. Torome Saitoti, CBS
Principal Secretary/Planning
National Treasury & Planning
NAIROBI

ACCOUNTANT GENERAL
NATIONAL TREASURY

628

Mr. Kennedy N. Ogeto, CBS
Solicitor General
Office of the Attorney-General & Department of Justice
NAIROBI

Dear Dr. Muia,

EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

I refer to the **Second (Special)** National Security Council Meeting held on Friday, **1st April, 2022,** during which the Cabinet Secretary for National Treasury & Planning presented a Cabinet Memorandum **NSC(22)14,** jointly submitted by the Attorney-General.

The objective of the Memorandum was to apprise the Council on the current status of Telkom Kenya Limited; brief the Council on the proposed acquisition of Jamhuri Holdings Limited in Telkom Kenya Limited; and seek approval of the proposed acquisition of shares in order to have the Government own 100% shares in Telkom Kenya Limited.

The Telkom Kenya Limited was established as telecommunications operator in 1999. It was previously part of the Kenya Posts and Telecommunications Corporations which was the sole provider of postal and telecommunications services. It operates critical national security assets and services including mobile telephone services, money transfer services, courier businesses, real estate, data centre assets, National Fibre Optic Infrastructure (NOFBI) operation and maintenance, management of critical Government of Kenya services, Fibre Right of Way, Subsea Assets (both landing stations and all undersea cables including) TEAMS.

Telkom is currently in a dire state of financial and operational performance owing to continuing and accumulated operational losses which amounted to Ksh.105 billion as at 31st December, 2021. The company has huge accumulated liabilities related to critical services provided by business partners (third parties) which have threatened to discontinue the services owing to delays in payments.

I wish to inform you that the Council **considered** the Memorandum and:-

(i) **Noted** the contents of the Memorandum.

(ii) **Approved** the exit of Helios/Jamhuri in Telkom Kenya with the Government acquiring the 60% shareholding owned by Helios/Jamhuri at USD 1.

(iii) **Approved** the Government to take over and compensate Helios/Jamhuri the loan injected by Helios amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million).

(iv) Approved a budget of Kshs.5.92 billion for the FY 2022/23 for Telkom to facilitate the implementation of the exit plan by Helios/Jamhuri.

(v) **Directed** the Cabinet Secretary for National Treasury & Planning; and the Attorney-General to take appropriate action.

Please proceed and take action as directed by NSC.

Yours Sincerely

JOSEPH K. KINYUA, EGH
HEAD OF THE PUBLIC SERVICE

Copy to: **Hon. (Amb.) Ukur Yatani, EGH**
Cabinet Secretary
The National Treasury & Planning
NAIROBI

Hon. Justice (Rtd.) Paul Kihara Kariuki, EGH
Attorney-General
State Law Office & Department of Justice
NAIROBI

NATIONAL ASSEMBLY
PAPERS LAID
DATE: 26 OCT 2023 DAY: Thursday
TABLED BY: Hon. CPA Kuria Kimani (Finance and National Planning Committee)
CLERK-AT-THE-TABLE: Anne Shibuko

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - SECOND SESSION - 2023

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

.....

REPORT ON THE INQUIRY ON THE 100% BUYBACK OF TELKOM KENYA LIMITED BY THE GOVERNMENT OF KENYA

VOLUME 2
ANNEXURE

Published by:

The Directorate of Departmental Committees
Clerk's Chambers
Parliament Buildings
NAIROBI

OCTOBER 2023

- Annexure 4 –

  Letter dated 28th July 2022 from the Director General Accounting Services and Standards to OCOB

A004

REPUBLIC OF KENYA

THE NATIONAL TREASURY

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 330426
Telephone: 252299
When replying please quote

ANNEX 2

The Treasury
P.O. Box 30007
NAIROBI

Ref. No. Article 223: FY2022-2023/03

28th July, 2022

OFFICE OF THE CONTROLLER OF BUDGET
RECEIVED
28 JUL 2022
370
P.O. Box 35616-00100, NAIROBI

The Controller of Budget
Office of The Controller of Budget
P. O. Box 35616- 00100
NAIROBI

RE: REQUEST TO PROCESS EXCHEQUER RELEASE UNDER ARTICLE 223 OF THE CONSTITUTION

The National Treasury **(Vote D1071)** has an Exchequer request of **Kshs 6,091,140,702.00 (Say Kenya Shillings Six Billion Ninety-One Million One Hundred Forty Thousand Seven Hundred Two Only)** under Article 223 of the Constitution to Telcom Kenya to facilitate exit of Helios Investors LLP/Jamhuri Limited. This will be regularized in the Supplementary Budget Estimates I FY 2022/2023 (see attached letter).

In view of this Treasury requests, you to grant a credit on the Exchequer Account of **Kshs 6,091,140,702.00 (Say Kenya Shillings Six Billion Ninety-One Million One Hundred Forty Thousand Seven Hundred Two Only)** in accordance with Article 223 of The Constitution of Kenya.

The reason for this application is that the amount appropriated for the The National Treasury (Vote D1071) under appropriation Act 2022 FY 2022/2023 does not include this provision. The same will be regularized in the Supplementary Budget Estimates I FY 2022/2023.

FCPA BERNARD NDUNGU, MBS
DIRECTOR GENERAL/ACCOUNTING SERVICES AND QUALITY ASSURANCE

Annexure 5 (1 & 2)-

Letter dated 25th July 2022 from former PS, National Treasury to CS National Treasury

A005

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299
When replying please quote
Ref: TNT/ZZ 331/02 TY⁶

ANNEX 2B

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

Date: 25th July 2022

Hon. (Amb) Ukur Yatani, EGH
Cabinet Secretary/National Treasury & Planning
The National Treasury
NAIROBI

Dear CS

Subject : EXIT OF HELIOS INVESTORS LLP/JAMHURI LTD IN TELKOM KENYA LIMITED

It is noted that Telkom Kenya Ltd was established as a Telecommunication Operator in 1999 and operates critical national security assets and services in the country. Telkom Kenya was privatized in 2007 where the Government sold 51% of its shares to France Telkom SA at a price of USD.390 million.

In 2016, Helios Investors LLP acquired 70% of shares in Telkom Kenya from France Telkom and through this transaction GOK increased its shareholding from 30% to 40% for a nominal consideration. GOK had initially been diluted from 49% to 30% shareholding for lack of participation in additional equity injection.

Helios/Jamhuri Holdings have made a decision to exit Telkom by exercising their PUT OPTION and the following has been agreed with GOK;

i. GOK acquires the Helios 60% shareholding in Telkom Kenya for nominal USD1.
ii. GOK to take over and reimburse Helios the Shareholder loan injected and accrued interest amounting to USD.51 million.
iii. The amount to be reimbursed to be made through a Government Bond
iv. Helios will forgo the acquired Shareholder loans from Orange Telkom (French Telkom) amounting to USD.239 million.
v. Once Helios/Jamhuri exits, GOK will own 100% of the Telkom Kenya

The National Security Council in its meeting held on 1st April, 2022 approved the proposal by Helios to exit Telkom Kenya under the above terms. Consequently, a Share Purchase Agreement was signed between GOK and Helios/Jamhuri Holdings.

The Transaction will be concluded by settling the total consideration in respect of the Sale of Shares by issuing a three (3) years GOK Treasury Bond equivalent to **USD.51,186,058**. The completion date of the Transaction is 29th July, 2022 failure to which the signed agreements will be null and void.

In view of the urgency to conclude the above Transaction, the National Treasury requests that an amount equivalent to USD.51,186,058 be paid to Jamhuri Holdings Limited under Article 223 of the Constitution of Kenya in form of a Three (3) years Treasury Bond and the same be regularized in the Supplementary Budget of FY 2022/23.

Yours

Julius Muia, PhD, CBS
PRINCIPAL SECRETARY/NATIONAL TREASURY

Annexure 6

Letter from CS, National Treasury to OCOB dated 28th July 2022

A006 (8)

Copy

REPUBLIC OF KENYA

THE NATIONAL TREASURY

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 330426
Telephone: 252299
When replying please quote

The Treasury
P.O. Box 30007
NAIROBI

Ref. No. Article 223: FY2022-2023/03

28th July, 2022

OFFICE OF THE CONTROLLER OF BUDGET
RECEIVED
28 JUL 2022
P.O. Box 35616-00100, NAIROBI

The Controller of Budget
Office of The Controller of Budget
P. O. Box 35616- 00100
NAIROBI

RE: REQUEST TO PROCESS EXCHEQUER RELEASE UNDER ARTICLE 223 OF THE CONSTITUTION

The National Treasury (Vote D1071) has an Exchequer request of **Kshs 6,091,140,702.00 (Say Kenya Shillings Six Billion Ninety-One Million One Hundred Forty Thousand Seven Hundred Two Only)** under Article 223 of the Constitution to Telcom Kenya to facilitate exit of Helios Investors LLP/Jamhuri Limited. This will be regularized in the Supplementary Budget Estimates I FY 2022/2023 (see attached letter).

In view of this Treasury requests, you to grant a credit on the Exchequer Account of **Kshs 6,091,140,702.00 (Say Kenya Shillings Six Billion Ninety-One Million One Hundred Forty Thousand Seven Hundred Two Only)** in accordance with Article 223 of The Constitution of Kenya.

The reason for this application is that the amount appropriated for the The National Treasury (Vote D1071) under appropriation Act 2022 FY 2022/2023 does not include this provision. The same will be regularized in the Supplementary Budget Estimates I FY 2022/2023.

FCPA BERNARD NDUNGU, MBS
DIRECTOR GENERAL/ACCOUNTING SERVICES AND QUALITY ASSURANCE

Annexure 7

Letter from OCOB to Director General, Accounting Services NT dated 1st August 2022

A009

ACCOUNTANT GENERAL
NATIONAL TREASURY

RECEIVED
Accountant General Department
Treasury Management Section
03 AUG 2022
P.O. Box 30007 - 00100 NAIROBI

OFFICE OF THE CONTROLLER OF BUDGET

OCOB

PRINCIPAL SECRETARY
THE NATIONAL TREASURY
RECEIVED
P. O. Box 30007 - 00100, NAIROBI

RECEIVED
02 AUG 2022

THE NATIONAL TREASURY
P. O. Box 30007 - NAIROBI.

Please Review and Advice
To Keep in View
Noted & Appreciated
Please Let's Discuss

THE NATIONAL TREASURY
RECEIVED
03 AUG 2022
837
ACCOUNTANT GENERAL ACCOUNTING SERVICES

Ref: COB/TNTP/006/VOL.III(60)

2nd August, 2022

Dr. Julius Muia, CBS
Principal Secretary
National Treasury & Planning
NAIROBI

Dear Dr Muia,

RE: REQUEST TO PROCESS EXCHEQUER RELEASE UNDER ARTICLE 223 OF THE CONSTITUTION TO NATIONAL TREASURY (VOTE D1071)

Reference is made to your letter Ref. No. Article 223: FY2022-2023/03 dated 28th July, 2022 on the above subject matter.

We have noted the National Treasury's request for grant of credit on the Exchequer Account of **Ksh.6,091,140,702.00 say (Kenya Shillings Six Billion Ninety-One Million One Hundred Forty Thousand Seven Hundred Two Only)** to facilitate the exit of Helios Investors LLP/Jamhuri Limited which will be regularized in the Supplementary Budget Estimates I FY 2022/2023.

In view of the above and in accordance with Article 223 of the Constitution of Kenya, 2010, I hereby grant approval for withdrawal of the funds.

Please seek Parliamentary approval for this expenditure as required by Article 223(2) and (3) of the Constitution of Kenya, 2010.

Yours sincerely,

Dr. Margret Nyakang'o CBS
CONTROLLER OF BUDGET

Annexure 8

AG's Legal Opinion dated 12th March 2019

ANNEX 5

A 008

PRINCIPAL SECRETARY
THE NATIONAL TREASURY
15 MAR 2019
RECEIVED
P. O. Box 30007 - 00100, NAIROBI

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/CONF/21/8/1 VOL. I
Your Ref: ES 1/014 (92)

12th March, 2019

Dr. Kamau Thugge, CBS
Principal Secretary
The National Treasury
Treasury Building
P.O. Box 30007-00100
NAIROBI.

Annex 21

RE: REQUEST FOR LEGAL OPINION

Introduction

1. Vide a letter dated 27th February, 2019 you sought for a legal opinion on the interpretation and application of Article 223 of the Constitution under the following specific questions:-

i. Whether the approval of the National Assembly is required before any spending takes place;
ii. If the National Assembly can annul approvals that have been granted by the Cabinet Secretary/National Treasury under Article 223 of the Constitution;
iii. How the Government should deal with such expenditures which have not been approved by the National Assembly; and
iv. The Constitution allows the Cabinet Secretary/National Treasury to make changes up to a maximum of 10%. Does this also apply to vote or the entire approved budget?

2. The request was stated to be premised on challenges being experienced by the National Treasury related to interpretation of Article 223 of the Constitution. In addition, when approving FY 2017/18 Supplementary Estimates No. 2, the National Assembly resolved that they have to pre-approve any expenditure exceeding Kshs. 1 billion granted under Article 223 of the Constitution.

DIRECTOR BUDGET
DEPARTMENT
18 MAR 2019
RECEIVED
TREASURY

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/0711 594555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUEP.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2240261/2240537
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified

Legal Analysis

3. In interpreting Article 223 of the Constitution, we are guided by the provisions of Article 259(1) of the Constitution which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance.

4. Therefore, in regard to the specific questions raised by the National Treasury, we advise as follows:-

i. Whether the approval of the National Assembly is required before any spending takes place

5. It is our considered opinion that the scheme of Article 223 of the Constitution is that approval of the National Assembly is not a condition precedent to a first withdrawal for spending under the provision.

6. Article 223 (2) and (3) of the Constitution addresses the procedure and timings for the approval for any spending of money that has not been appropriated.

Clause (2) provides;

"The approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money, subject to clause (3)."

Clause (3) provides;

"If Parliament is not sitting during the time contemplated in clause (2), or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits."

7. In interpreting the provisions of clause (2) and (3) of Article 223 of the Constitution, we are guided by the decision of the High Court in Bernard James Ndeda & 6 others v Magistrates and Judges Vetting Board & 2 others [2018] eKLR in which it was held that;

"Constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing.

In other words, the interpretation should not be "unduly strained" but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision."

8. In this case the provisions of clauses (2) and (3) of Article 223 of the Constitution are clear that Parliamentary approval may be issued *post facto*. The express wording of the clauses are clear. Clause (2) uses the words, *"....shall be sought within two months after the first withdrawal of the money"*, meaning approval may be post withdrawal in order to spend the money. Clause (2) further provides that Parliamentary approval upon first withdrawal must be sought within two months unless Parliament is not sitting or is sitting but adjourns before the approval has been sought, the approval must be sought within two weeks after it next sits.

ii. **If the National Assembly can annul approvals that have been granted by the Cabinet Secretary/National Treasury under Article 223 of the Constitution**

9. It is our considered opinion that the power of the National Assembly to annul approvals that have been granted by the Cabinet Secretary/National Treasury under Article 223 of the Constitution is constrained. It is trite law that discretion must be exercised judiciously and reasonably within the contours of the Constitution.

10. The power of Parliament to approve spending within the scheme of Article 223 of the Constitution is limited to consideration whether the spending was consistent with the circumstances contemplated under clause (1) & (5) and is also consistent with the Principles of Public Finance under Article 201 of the Constitution.

11. The values based approach to interpretation of the Constitution was underscored by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** wherein at para 54 it held that:

"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with

their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."

iii. How the Government should deal with such expenditures which have not been approved by the National Assembly

12. As observed herein, any spending that is properly made within two months from the first withdrawal and is within the circumstances contemplated under Article 223 (1) of the Constitution is legal and cannot be annulled by Parliament.

iv. The Constitution allows the Cabinet Secretary/National Treasury to make changes up to a maximum of 10%. Does this also apply to vote or the entire approved budget?

13. Article 223(5) of the Constitution sets the ceiling of 10% allowable expenditure of money that has not been appropriated unless, in special circumstances, Parliament has approved a higher percentage.

Clause (5) provides;

"In any particular financial year, the national government may not spend under this Article more than ten per cent of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage."

14. It's trite jurisprudence that Constitutional provisions must be construed purposively and in a contextual manner. The interpretation should not be "unduly strained" but should avoid "excessive peering at the language to be interpreted without sufficient attention to its context.

15. In this case, it is clear from the language of the provision that the ten per cent limit is of the entire approved budget. The sum appropriated by Parliament in a financial year is thrust out under Article 221(6) and (7) as follows;

Clause (6) provides;

"When the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced in the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill."

Clause (7) provides;

"The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution or an Act of Parliament."

Conclusion and Way forward

16. In consideration of the foregoing, we advise as follows:-

i. That the scheme of Article 223 of the Constitution is that approval of the National Assembly is not a condition precedent to a first withdrawal for spending under the provision;

ii. That the power of the National Assembly to annul approvals that have been granted by the Cabinet Secretary/National Treasury under Article 223 of the Constitution is constrained; and

iii. That under Article 223 (5) of the Constitution the ten per cent limit for Supplementary Appropriation is of the entire approved budget.

We respectfully suggest that you be guided accordingly.

KENNEDY OGETO EBS
SOLICITOR GENERAL

Copy to:

1. Hon. P. Kihara Kariuki
   ATTORNEY-GENERAL

Annexure 9

Unprocedurally signed letter purporting to be from the former CS, NT

A009 (4)

106

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299
When replying please quote

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

(1) DA AS.
cc: HAU
DG PIPM.

Ref: TNT/ZZ 331/02 TY6

Date: 25th July 2022

Dr. Julius Muia, PhD, CBS
Principal Secretary/National Treasury
The National Treasury
NAIROBI

Noted
Appreciated for
Actioning

Dear Julius

Subject : EXIT OF HELIOS INVESTORS LLP/JAMHURI LTD IN TELKOM KENYA LIMITED

29/7/2022

Please refer to my earlier letter Ref. No. RESTNT/ZZ/331/02 TY6 dated 27th July, 2022 on the above subject.

This is to clarify that in view of the fact that the Government does not issue personalized Treasury Bonds to specific individuals or companies, the payment to Jamhuri Holdings Limited amounting to USD.51,186,058 should be made through the normal exchequer.

Yours Sincerely

Pp Hon. (Amb) Ukur Yatani, EGH
CABINET SECRETARY/NATIONAL TREASURY & PLANNING

THE NATIONAL TREASURY
RECEIVED
29 JUL 2022
722
DG / PIPM

Copy to: CPA Nancy K. Gathungu, CBS
Auditor General
Anniversary Towers
NAIROBI

(2) File Telkom

CPA Dr. Margaret Nyakang'o, CBS
Controller of Budget
BIMA House
NAIROBI

Annexure 10

Letter from AG to CS, NT dated 20th April 2016

A010

ANNEX 2

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Your Ref: ZZ/MOF 331/02

20th April, 2016

Our Ref: AG/CONF/2/C/162 VOL V

Mr. Henry K. Rotich, E
The Cabinet Secretary
The National Treasury
NAIROBI

Dear

TELKOM KENYA LIMITED – EXIT BY ORANGE EAST AFRICA (FRANCE TELKOM)

Reference is made to the above matter and my letter dated 2nd March, 2016.

Kindly but urgently let me have sight of the sale agreement between Orange East Africa and Helios together with all other documents that are being relied on in the ongoing negotiations for my urgent review and legal input.

Yours

GITHU MUIGAI, E.G.H., S.C.
ATTORNEY-GENERAL

SHERIA HOUSE, HARAMBEE AVENUE
P.O Box 40112-00100, NAIROBI, KENYA.TEL:+254 20 2227461/2251355/0700072929/0732529995
EMAIL: info@ag.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILE SELASSIE AVENUE, P.O. Box 56057 – 00200, Nairobi – Kenya TEL: Nairobi 2224029/2240337
EMAIL: legal@justice.go.ke

ISO 9001: 2008 Certified

Annexure 11

Legal Clearance Letter dated 5th May 2016

A011

REPUBLIC OF KENYA

THE NATIONAL TREASURY

www.treasury.go.ke
FAX NO.310833
Telephone: 2252299
When replying please quote:

THE NATIONAL TREASURY
P.O. Box 30007-00100
NAIROBI

Ref: ZZ/MOF 331/02

Date: 05 May 2016

Prof Githu Muigai, EGH, SC
Attorney General
Office of the Attorney General & Department of Justice
Sheria House
NAIROBI

Dear A.G.,

RE: TELKOM KENYA LIMITED (TKL) – SALE OF SHARES BY ORANGE EAST AFRICA LIMITED (OrEA) to JAMHURI HOLDINGS LIMITED, A COMPANY OWNED 100% BY HELIOS FUND III (HELIOS III)

Forwarded herewith please find the following documents in respect of the above mentioned transaction for which we seek your legal clearance:-

1. Deed of Variation
2. Framework Agreement
3. Deed of Adherence
4. Share Purchase Agreement
5. Deed of Assignment
6. Government Loan Agreement
7. Deed of Amendment and Restatement of the Shareholders Agreement
8. Additional Shareholders Agreement

1 Background on the Proposed Transaction

1.1 As you are aware, TKL has been in an increasingly challenging operational and financial situation and OrEA has been seeking to exit the Kenyan market. To facilitate this process, OrEA appointed an international investment bank, Lazard, to assist it with evaluating the optimal exit strategy and identifying a strong successor to assist TKL in its turn-around. Orange and Lazard conducted a sale process in respect of Orange's shares in TKL for close to 36 months following which Helios was been identified as a suitable successor. It is noted that although a number of investors showed interest in this process including the Vietnamese telecommunications company, Viettel, none of these investors sustained their interest in the opportunity to invest in TKL.

1.2 Helios III, through its wholly-owned subsidiary Jamhuri Holdings Limited (Jamhuri), and Orange entered into a binding purchase agreement on 6th November 2015 regarding the sale of its shares in TKL to Helios. The Purchase Agreement is conditional upon a number of matters including receiving regulatory approvals as well as Helios and the Government entering into binding agreements.

2 Background on Helios

2.1 Helios III is one of three investment funds advised by Helios Investment Partners LLP (Helios) which make diverse investments across Africa including several successful investments in Kenya. The three funds that Helios advises have a total of more than USD $3 billion under management.

2.2 Over the last several years, the Helios funds' investments in relation to Kenyan businesses alone have exceeded USD $500 million. These include investments in Equity Group Holdings Limited, Wananchi (known through its "Zuku" brand), Vivo Energy Limited (known through the "Shell" brand), Africa Oil, Flamingo Holdings, Afsat Communications Limited (known through the "I-Way" brand), Paynet (through Helios' portfolio company Interswitch), and Acorn Group Holdings.

2.3 Furthermore, we have been assured that Helios and Helios' investment professionals have significant telecommunications experience. In addition to the investments in Wananchi and Afsat stated above, Helios has previously invested in Africatel, a mobile network operator (where Helios partnered with Portugal Telecom in 4 Sub-Saharan African jurisdictions) and has existing investments in Helios Towers (a pan-African telecommunications towers and infrastructure business). Helios

also has experience in turnaround and restructuring situations having acquired a mobile network operator in Nigeria, Multi-Links, from Telkom S.A. which it successfully restructured prior to exiting from the business.

2.4 Helios is a recognized investor in African markets, and has a strong combination of capital and industry expertise, a vast network of relationships across the globe, as well as a world class investment team.

2.5 In the same way that Orange had entered into a consulting contract with Sofrecom, Helios III/Jamhuri has engaged Detecon International GmbH (**Detecon**) to provide telecommunications consulting services to TKL under a technical services agreement. Detecon is an experienced telecommunications consulting firm that has provided operating, management and technical skills to well-known telecommunications operators globally, and throughout Africa. Such firms include Vodacom, Econet, Qtel, Du, Angola Telecom, and Telecom Namibia.

2.6 We have also been informed that Helios is in the process of recruiting a new world class management team to steward TKL, with key management team individuals possessing relevant experience from firms such as British Telecom, Orascom, Etisalat Nigeria, Celltel, Libancell, and Comium. This team will work alongside identified local talent to ultimately develop a deep pool of human capital to drive the turnaround and sustained success of TKL.

2.7 The proposed structure of the transaction is that Jamhuri will purchase Orange's interest in TKL. Helios III has USD $1.1 billion of committed capital of which approximately USD $200 million has been invested to date.

2.8 Helios being a Private Equity Fund is a different investor from a traditional telecoms investor. Some of the key features of a PE Fund is that it is a financial rather than a specific industry investor, it has a shorter time horizon and as such it requires a clear exit mechanism from any investment. Therefore, to facilitate the investment by Helios, some new commercial terms have been negotiated as detailed in this brief.

3 Pre-Qualification Criteria

3.1 Pursuant to clause 10.4 of the Government's Shareholders Agreement with Orange dated 21st December 2007 (as amended) (the **Existing Shareholders Agreement**), the sale of the shares in TKL by Orange to a new party is contractually conditional upon the purchaser meeting pre-qualification criteria set out in the RFP applied at the time of TKL's privatisation.

3.2 We consider that Helios III, the beneficial transferee of the shares currently held by OrEA under the proposed transaction, materially meets the substantive provisions of the prequalification criteria in the 2007 RFP.

3.3 In recognition of the fact that the provisions of clause 10.4 of the pre-qualification criteria are contractual rather than statutory and have, in any case, been materially met, the parties to the Existing Shareholder Agreement (OrEA & GOK) have agreed to facilitate the transaction through a deed of variation of the Existing Shareholders Agreement to allow for the transfer of the shares held by OrEA to a person who materially meets the substantive provisions of the prequalification criteria in the 2007 RFP.

4 Orange Loans and non-dilution

4.1 Pursuant to Clause 13.5 of the 2007 Shareholders Agreement, the Government has pre-emptive rights on a transfer of shareholder loans advanced by OrEA to TKL (the "**Orange Shareholder Loans**") but not on a transfer of the shares held by OrEA in TKL. Under the Proposed Transaction, the Government has agreed not to exercise its pre-emptive right to the Orange Shareholder Loans, in consideration of Helios III/Jamhuri agreeing to:

4.1.1 the transfer to the Government for KES 1/- of 10% of the shares in TKL to the Government such that the Government's shareholding in TKL will increase from 30% to 40%; and

4.1.2 the transfer to the Government for KES 1/- of 40% of the Orange Shareholder Loans that Jamhuri is acquiring from Orange.

4.2 In effect therefore, the Government, for a total of KES 2/=, will acquire approximately USD 90 million worth of shareholder loans in addition to the extra 10% of the share capital in TKL, in return for waiving its the pre-emption rights in respect of the Orange Shareholder Loans.

4.3 To ensure that TKL is able to access new funding for its operations, the Orange Shareholder Loans to be transferred to Jamhuri and to the Government will be subordinated to existing and future debt from lenders.

4.4 The key terms of the Orange Shareholder Loans, once transferred to Helios III/Jamhuri and GoK will be as follows:

(a) the maturity date of the loans will be 8 years from the date of completion of the Proposed Transaction (this period may be extended if mutually agreed). This period is in line with the investment horizon of Helios as a PE Fund;

(b) interest is only payable once there is 'excess cash' in the books of the company which has been defined in a particular way following expert advice received on this issue and which is clearly defined in the relevant Agreements;

(c) reducing the amount of interest payable on the loans to 4% above LIBOR if paid in cash or 6% above LIBOR if not paid in cash;

(d) unpaid interest will not be capitalized or compounded; and

(e) for the first year interest will be charged at a concessionary rate of 0.5%.

4.5 As the Orange Shareholder Loans to be transferred to Jamhuri and to the Government will be subordinated and only repayable from 'excess cash' in TKL, they will not affect repayments to existing or future lenders and are unlikely to affect future funding for TKL.

4.6 Some value for the shareholder loans may be realised from repayments that a transformed TKL may be able to make and also through the sale of the loans to third parties (but in the latter case only after three years from the date of the proposed transaction). The Government will have a 'tag-along' right to sell a pro-rata portion of its shareholder loan on the same terms as Helios III/Jamhuri in the event of any sale of the loans.

4.7 Taking into consideration (i) Helios' short term view on the investment in line with the nature of PE Funds, and (ii) GOK's longer term view of the business and, further, that GOK as a Government has an interest in jobs, competition, taxes and other benefits that will accrue from a reformed and sustainable TKL, the parties have agreed to the following repayment waterfall:-

4.7.1 when there is 'excess cash' in the company, cash interest will be paid first to both Jamhuri and Government on a pro-rata basis;

4.7.2 if the cash interest has been paid and there is still 'excess cash' the Jamhuri principal amount will be paid in full, followed by payment in full of the Government's principal amount; and

4.7.3 if there is still excess cash after Jamhuri and the Government's principal amounts have been paid, repayment of the accrued interest will be paid to Helios and Government on a pro-rata basis.

4.8 It is also important to note that under the proposed arrangements between the Government and Helios III/Jamhuri, the Government's stake cannot be diluted and further funding by Helios III/Jamhuri would have to be provided on a basis that is non-dilutive to Government.

5 Management

5.1 Helios has already engaged significant resources towards creating a business plan for TKL to assist in its recovery and will tap into its vast network to provide management services to the company including strategic and financial advice, access to a range of experts in telecommunications, access to financing and capital markets, assisting with recruitment of senior management, stream-lining procurement and operating processes, assisting with contemplated mergers and acquisitions and implementing global best practices around corporate governance. Given the operational complexity of TKL, Helios will also continue to utilise its resources as well as the time and expertise of its employees and advisors to provide management services to TKL. The management services will be provided out of both London and Nairobi.

5.2 Given the financial situation of TKL, we have negotiated a reduction on the management fees compared to that currently charged by OrEA of 1% down to 0.5% on the current revenue. If they are able to run the company in a way that it generates additional revenue, they will be paid an incremental management fees of 1%. Effectively, we have negotiated a performance based management fee with a base amount. This fee structure means that Helios will earn the current level of fees paid to OrEA only after the company's revenue is double the amount it is currently. The management services Agreement will be entered into between the company (TKL) and Helios.

6 Amendments to the 2007 Shareholders Agreement

6.1 Additional Shareholders Agreement (SHA)

6.1.1 As noted above, in view of Helios being a Private Equity Fund, it has been necessary to make some amendments to the Existing Shareholders Agreement to facilitate them to invest. However as it is not in our best interest to make permanent amendments to the Existing Shareholders Agreement in such a way that such amendments will apply to all future investors (including non-PE investors), we have set these amendments in a separate Additional Shareholders Agreement. This will provide the Government with the flexibility to revert to the Existing Shareholders Agreement with a new shareholder (Helios' successor) at the point of exit by Helios assuming that Government is still a shareholder then.

6.1.2 We have set out below the material amendments to the commercial position in the Existing Shareholders Agreement.

6.2 Non-Compete

6.2.1 Helios, as an African-focussed private equity fund, is in the business of investing across companies and sectors in the continent. To this end, they require less non-compete restrictions than traditional investors such as Orange. In addition Helios has a pre-existing investment in the Wananchi Group and Interswitch. These existing investments have been carved out of the non-compete provisions, together with:

(a) Any holding of an interest by Helios where the shareholding does not exceed 10% of the share capital of a competing entity or Helios does not control such entity;

(b) Any holding by Helios in any business provided that (i) such business constitutes less than 15% of the sales of TKL's group;

(c) any holding by Helios in any business provided that (i) such activity or business constitutes less than 10% of the sales of the competing business' group;

(d) any competing business which TKL's group has no controlling interest or management in (i.e. in which TKL is also just an investor).

6.2.2 Without these non-compete carve outs, Helios would be restricted from going about its ordinary business and would therefore find it difficult to invest in TKL.

6.2.3 It should however be noted that Jamhuri/Helios will be completely restricted from investing in any entity that carries out the business of mobile voice and cellular data and it cannot invest in the existing Tier I mobile operators in Kenya, namely Safaricom and Airtel.

6.3 Default by Helios

6.3.1 As a private equity fund with a fixed life, Helios has indicated to us that it is very difficult for it to assume contingent liabilities which means it is unable to accept the requirement to sell all its shares to Government at 'fair market value' in the case of an Event of Default as currently stipulated in the Existing Shareholders Agreement. The following adjustment has therefore been made:-.

(a) The current position as in the Existing Shareholders Agreement will apply to Helios for the first three years pursuant to which the Government may require Jamhuri to sell its shares to the Government in the event of default by Jamhuri.

(b) After three years, and in the event of default by Jamhuri, the Government may require Jamhuri to either sell its shares to the Government at a price which is 75% of 'fair market value' or sell its shares to a bona fide third party within a period of one year.

6.4 Guarantee by Helios Fund III

6.4.1 For the same reasons referred to above in relation to contingent liabilities, Helios was initially unwilling to provide the Lead Investor Guarantee required under the Existing Shareholders Agreement.

6.4.2 After much negotiations, however, Helios Fund III has been able to procure consent, on an exceptional basis for this in recognition of Government's position. As a concession, we have agreed to limit this guarantee so that it falls away in the event the Government has sold more than half its shares (in which case it will then be a small minority shareholder in TKL).

6.5 Business Plan

Government has been able to add an additional critical shareholder reserved matter to the Existing Shareholder Agreement in the form of being able to veto the initial 5 year business plan. This gives Government a much bigger say than it had with Orange and significantly increases oversight and input at the outset of the relationship with Helios including on sale of assets.

6.6 Guiding Rationale in the Negotiations:

6.6.1 It is acknowledged that some of the above amendments have required some degree of accommodation by the Government as is customary in any negotiation. This flexibility was necessary in recognition of the fact that Helios is a private equity fund and partly also for the reasons set out below:

(a) Orange has continued, through this transition period, to fund TKL and this was negotiated by Helios. This has been crucial in assisting TKL to meet its obligations during this transition period.

(b) Helios has also been able to procure from Orange a separate commitment to pay the shortfall on the outstanding licence fees due to the Communications Authority (after deducting amounts due by governmental entities). This will facilitate the issuance of necessary licences for TKL to run its business.

7.1 In order to appropriately capture all the obligations in respect of the waiver of certain rights in the Existing Shareholders Agreement and the transfers to the Government of shares and shareholder loan from Helios, the following documentation has been negotiated:

7.1.1 A Deed of Variation

This deed will be entered into between Orange and Government to vary the provisions clause 10.4 of the Existing Shareholders Agreement so as to facilitate the proposed transaction and make the consequential amendments to the company's Articles of Association.

7.1.2 A Framework Agreement

This agreement will be entered into between Helios III, Jamhuri and Government and will document all the steps in the transaction and set out all the documentation that is required. In addition, it specifies that all the transactions envisaged between the Government and Helios III/Jamhuri must be entered into otherwise none of them will be entered into. It also requires that the transaction between Orange and Helios/Jamhuri must have been entered into before the Government/Jamhuri transaction documents can be entered into.

7.1.3 A Deed of Adherence

This is a deed of adherence to the 2007 Shareholders Agreement and will be entered into by Jamhuri pursuant to Clause 13.6 of the Existing Shareholders Agreement, immediately upon Jamhuri becoming a shareholder in TKL.

7.1.4 A Share Purchase Agreement

This agreement will be entered into between Jamhuri and Government and is in respect of the transfer of 10% of the shareholding in TKL from Jamhuri to Government for KES 1/-.

7.1.5 A Deed of Assignment

This deed will be entered into between Jamhuri and Government and is in respect of the transfer of 40% of the shareholder loan in TKL from Jamhuri to Government for KES 1/-.

7.1.6 Jamhuri Loan Agreement

This loan agreement will be entered into between Jamhuri and TKL and will reflect the softer loan terms set out in 4 above.

7.1.7 Government Loan Agreement

This loan agreement is similar to the Jamhuri Loan Agreement (7.1.6 above) and will be entered into between Government and TKL on substantially similar terms to the Jamhuri Loan Agreement.

7.1.8 A Deed of Amendment and Restatement of the Shareholders Agreement

This deed will be entered into between Jamhuri, Helios III, the Government and TKL to make certain amendments to the Existing Shareholders Agreement as negotiated between the parties and also to delete references therein to OrEA and France Telecom. TKL's articles of association are being amended correspondingly.

7.1.9 The Additional Shareholders Agreement

This agreement will be entered into between Jamhuri, Helios III (as guarantor), the Government and TKL for the reasons detailed in paragraph 6.1.

7.2 In addition, the Purchase Agreement (between Orange and Jamhuri) and the Framework Agreement (between Government and Jamhuri) both envisage the Orange and Helios transaction and the Government and Helios transaction occurring consecutively on the same day and none shall occur without the other.

Against the above background we submit the following documents for your legal clearance.

(i) Deed of Variation

(ii) Framework Agreement

(iii) Deed of Adherence

(iv) Share Purchase Agreement

(v) Deed of Assignment

(vi) Government Loan Agreement

(vii) Deed of Amendment and Restatement of the Shareholders Agreement

(viii) Additional Shareholders Agreement

We look forward to receiving your legal clearance of these documents to enable us expeditiously seek Cabinet approval for this important transaction.

Yours

Henry Rotich, EGH

CABINET SECRETARY/NATIONAL TREASURY

cc. **Mr Joe Mucheru**
Cabinet Secretary
Ministry of Information, Communications & Technology
NAIROBI

Annexure 12

Negotiation Letter dated 11th May 2016 from CS,NT

A012

ANNEX 4

REPUBLIC OF KENYA
THE NATIONAL TREASURY

www.treasury.go.ke
FAX NO.310833
Telephone: 2252299
When replying please quote:
Ref: ZZ/MoF/331/01

THE NATIONAL TREASURY
P.O. Box 30007-00100
NAIROBI

11th May 2016

PROF. GITHU MUIGAI, EGH, SC
Attorney-General
Office of the Attorney General & Dept. of Justice
NAIROBI

Dear A.G.,

RE: TELKOM KENYA LIMITED – EXIT BY ORANGE EAST AFRICA (FRANCE TELECOM)

This is in reference to your letter, Ref. AG/CONF/2/C/162 VOL V dated 20th April 2016, on the subject above.

The documents, herewith attached, that we have relied on in the transaction negotiations are as follows:

i. Shareholders' Agreement dated 21st December 2007;
ii. Articles of Association of Telkom Kenya Limited (Adopted on 21st December 2007); and,
iii. Funding and Restructuring Agreement dated 21st December 2012 (in relation to Clause 6 of the said Agreement).

ISO 9001:2008
Certified.

ANNEX 4

In view of the fact that the Sale/Purchase Agreement between Helios and Orange East Africa (OrEA) is a third party document, we have requested Helios to make the document available for your purposes. To this end, they have advised that they will communicate the link and password directly to you. We confirm, however, that the transaction between OrEA and Helios, and the transaction between GoK and Helios are envisaged to occur consecutively on the same day and none shall occur without the other.

We thank you for your continued support.

Yours Sincerely,

HENRY K. ROTICH, EGH
CABINET SECRETARY/NATIONAL TREASURY

Annexure 13

Advisory Letter from the AG dated 16th May 2016

Confidential

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

URGENT

AOB

Your Ref: ZZ/MOF 331/02

16th May, 2016

Our Ref: AG/CONF/2/C/162 VOL V

ANNEX 5

Mr. Henry K. Rotich, EGH
The Cabinet Secretary
The National Treasury
NAIROBI

Dear Henry Rotich

TELKOM KENYA LIMITED (TKL) – SALE OF SHARES BY ORANGE EAST AFRICA LIMITED (OrEA) to JAMHURI HOLDINGS LIMITED, A COMPANY OWNED 100% BY HELIOS FUND III (HELIOS III)

I make reference to the above matter and your letter of 5th May, 2016 together with its enclosures whose contents we have duly noted and your letter of 11th May, 2016 in reply to my letter of 20th April, 2016 wish to address the letters as follows.

We have reviewed the above documents and noted that they in the form described in your letter, we have noted that the Arbitration clause in the following documents has adopted the seat of arbitration as London with the rules of the London Court of International Arbitration, and the said documents are:

I. Deed of Assignment of Shareholder Loan;

II. Deed of Amendment and Restatement of the Shareholders Agreement;

III. Framework Agreement; and

IV. Share Purchase Agreement.

In line with the recent practice adopted by this office and the nature of the transaction at hand, it is advisable that the Nairobi Centre of International Arbitration rules be adopted for use in this transaction with the seat of arbitration being in Nairobi.

The documents provide that the Governing Law shall be Kenyan Law, with non-exclusive jurisdiction of Kenyan Courts. There may be need to relook this clause as it potentially opens the door to have judicial proceedings in other courts outside the jurisdiction of Kenyan Courts. There needs to be a proper justification as to why any of the parties would seek to have judicial proceedings conducted by courts outside of Kenya while the subject matter of the proceeding is wholly in Kenya.

SHERIA HOUSE, HARAMBEE AVENUE
P.O Box 40112-00100, NAIROBI, KENYA.TEL:+254 20 2227461/2251355/0700072929/0732529995
EMAIL: info@ag.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILE SELASSIE AVENUE, P.O. Box 56057 – 00200, Nairobi – Kenya TEL: Nairobi 2224029/2240337
EMAIL: legal@justice.go.ke

ISO 9001: 2008 Certified

Confidential

Confidential

Further we have noted that Jamhuri Holdings Limited (Registered in Mauritius) is wholly owned by Helios Investor III L.P. (Registered in the Cyman Islands) and Advised by Helios Investment Partners. From the documents and previous meetings attended by officers from this office we have noted that the National Treasury has be negotiating with representatives of Helios Investment Partners who are the Advisors of Helios Investor III L.P., thus it is prudent for The National Treasury to establish who are the beneficial owners in Helios Investor III L.P. so as to be clear on the persons or entities The National Treasury is entering into partnership with in this transaction.

Once you have addressed the above issues you may proceed to seek Cabinet approval for the transaction.

Yours

GITHU MUIGAI, E.G.H., S.C.
ATTORNEY-GENERAL

Copy To: Mr. Joe Mucheru
Cabinet Secretary
Ministry of Information, Communication and Technology
NAIROBI

Confidential

Annexure 14

Letter from the Executive dated 8th June 2016

A014

ANNE

10

THE PRESIDENCY

EXECUTIVE OFFICE OF THE PRESIDENT

CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE

Telegraphic Address
Telephone: +254-20-2227436
When replying please quote

STATE HOUSE
P.O. Box 40530-00100
NAIROBI, KENYA

SECRET

Ref. No. **OP/CAB.58/4A** and date

8th June, 2016

Dr. Kamau Thugge, CBS
Principal Secretary
National Treasury
NAIROBI

Mr. Sammy A.S. Itemere
Principal Secretary/Broadcasting & Telecommunication
Ministry of Information, Communication & Technology (ICT)
NAIROBI

Eng. Victor Kyalo
Principal Secretary/Information, Communication, Technology & Innovation
Ministry of Information, Communication & Technology (ICT)
NAIROBI

Mr. Njee Muturi, CBS
Solicitor General
State Law Office
NAIROBI

Dear

THE SALE OF SHARES BY ORANGE EAST AFRICAN LIMITED (OrEA) TO JAMHURI HOLDINGS LIMITED, A COMPANY OWNED 100% BY HELIOS FUND III (HELIOS III)

I refer to the **Fifth Cabinet Meeting 2016,** held on **8th June, 2016,** during which Cabinet Memorandum **CAB(16)34**, jointly submitted by the Cabinet Secretary for the National Treasury; and Cabinet Secretary for

SECRET

Information, Communication & Technology was presented and discussed.

I wish to inform you that Cabinet **considered** the Cabinet Memorandum and;

(i) **Noted** the proposed exit of the Kenya Telecommunications market by Orange East Africa, a subsidiary of France Telecom.

(ii) **Noted** that Helios Fund III, a fund advised by Helios LLP, will be purchasing OrEA's shares through its wholly owned SPV, Jamhuri Holdings Limited.

(iii) **Noted** that, under the negotiated position, the Government has agreed not to exercise its pre-emptive right to the Orange Shareholder Loans, in consideration of Helios agreeing to:

(1) The transfer of 10% of the shares in TKL to the Government for KES 1/-, such that the Government's shareholding in TKL will increase from 30% to 40%; and
(2) The transfer of 40% of the Orange Shareholder Loans it (Helios) is acquiring from Orange to the Government for KES 1/-.

(iv) **Approved** the transaction as negotiated.

(v) **Directed** the Cabinet Secretary for the National Treasury; the Cabinet Secretary for Information, Communications & Technology; and the Attorney General to take appropriate action.

Please proceed and take action as directed by Cabinet.

Yours

JOSEPH K. KINYUA, EGH
CHIEF OF STAFF & HEAD OF PUBLIC SERVICE

Copy to: **Mr. Henry K. Rotich, EGH**
Cabinet Secretary
The National Treasury
NAIROBI

Mr. Joseph Mucheru
Cabinet Secretary
Ministry of Information, Communication & Technology (ICT)
NAIROBI

SECRET

Hon. (Prof.) Githu Muigai, EGH
Attorney General
NAIROBI

SECRET

Annexure 15

Letter from CS,NT to AG dated 30th March 2022

ANNEX 11

OFFICE OF THE ATTORNEY GENERAL & DEPARTMENT OF JUSTICE
SOLICITOR GENERAL'S OFFICE
31 MAR 2022
RECEIVED
SIGN

OFFICE OF THE ATTORNEY GENERAL & DEPARTMENT OF JUSTICE
RECEIVED
31 MAR 2022
ATTORNEY GENERAL'S CHAMBERS
P.O. Box 40112, 00100 NAIROBI

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299
When replying please quote

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

Ref: ZZ/MOF/32/01

Date: 30 March 2022

Hon. Justice (Rtd) Paul K. Kariuki, EGH
Attorney General
Office of the Attorney-General
& Department of Justice
State Law Office
NAIROBI

MOST URGENT

The SG
Please prepa
the response on
the lines discus

Dear Justice,

Subject: JOINT MEMORANDUM TO THE NATIONAL SECURITY COUNCIL BY THE CABINET SECRETARY TO THE NATIONAL TREASURY AND PLANNING AND THE ATTORNEY GENERAL ON EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

Reference is made to the above subject matter.

Attached, please find a Joint Memorandum to the National Security Council on the exit of Helios Investors LLP/Jamhuri Holdings Limited in Telkom Kenya Limited for your signature.

Yours sincerely,

Hon. (Amb) Ukur Yatani, EGH
CABINET SECRETARY/THE NATIONAL TREASURY & PLANNING

Annexures 11-21 Of the AG's letter dated 5th April 2023 to the departmental Committee On finance.

SECRET

Ms. Jeannette Mwangi
Please Deal
31 MAR 2022
ATTORNEY GENERAL

XNNEX II

SECRET

JOINT MEMORANDUM TO THE NATIONAL SECURITY COUNCIL BY THE CABINET SECRETARY TO THE NATIONAL TREASURY AND PLANNING AND THE ATTORNEY GENERAL ON EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

I. OBJECTIVE

1) The objective of this Memorandum is to;
   i.) apprise the NSC on the current status of Telkom Kenya Limited (TKL);
   ii.) brief the NSC on the proposed acquisition of Jamhuri Holdings Limited (JHL) in TKL; and
   iii.) seek NSC approval to the proposed acquisition of shares in order to have GoK own 100% shares in TKL

II. BACKGROUND

2) Telkom Kenya was previously part of the Kenya Posts and Telecommunications Corporations (KPTC) which was the sole provider of postal and telecommunication services. It was established as telecommunications operator in 1999.

3) Telkom operates critical national security assets and services including mobile telephone services, money transfer services, carrier businesses, real estate, data centre assets, National Fibre Optic Infrastructure (NOFBI) operation and maintenance, management of critical GoK services, Fibre Right of Way, Subsea Assets (both landing stations and all undersea cables including TEAMS

4) In 2007 Telkom Kenya Limited (Telkom) was privatized when GoK, through a competitive process, sold 51% of its shares in the company to Orange East Africa Limited (OrEA) – a subsidiary of France Telecom S.A (FT) – at a price of US$ 390 million.

III. CURRENT STATUS OF TELKOM

10) Telkom is currently in a dire state of financial and operational performance owing to continuing and accumulated operational losses which amounted to Ksh 105 billion as at 31st December 2021. The company made a loss of Ksh 7.2 billion in 2021. The company has huge accumulated liabilities related to critical services provided by business partners (third parties) which have threatened to discontinue the services owing to delays in payments.

11) As at 31st December 2021 the outstanding shareholder loans were as follows:

Shareholder (Amount in million)	**Principal**		**Accrued**		**Total**	
	USD	Ksh	USD	Ksh	USD	Ksh
Helios (old Loan)	199.7		40		239.7	
Helios (New Loan)	47.7		3		50.7	
Total	**247.4**		**43**		**290.4**	
GoK (Old)	133.1		23		156.1	
GoK (New 4 G)	0	2,500	-			2,500
Total	**133**	**2,500**	**23**			**2,500**

12) Telkom has in many instances made cash-injection calls to the two shareholders. In particular, Telkom is currently seeking USD.25 million (approximately **Ksh.2.5 billion**) to enable the company pay its frequency licenses to the GoK. This amount has already been factored in the Supplementary Budget for FY 2021/22. Although the funds will eventually revert back to GoK in form of licenses, the amount will be treated as a shareholder loan to TKL.

13) It is highlighted at this juncture that Telkom sought and obtained shareholder approval to dispose of non-core real estate assets of amounts up to Ksh.3.5 billion to enable the company fund its operations and to meet some of its commitments to creditors. GoK approval for this request was given in February 2020.

iii.) Helios/Jamhuri will forego the acquired shareholder loan which Helios took over from Orange Telkom that amounts to USD 239 million (principal USD 199 m and accrued interest of USD 40million).

iv.) Once Helios/Jamhuri exits Telkom Kenya, GoK will own it 100%. A restructuring of the company will therefore be necessary including capital structure, reviewing the continued operation of various businesses, land use plan and cooperation with the national government.

16) This offer is considered a good deal for the Government considering that the total shareholder loan outstanding to JHL as at 31st December 2022 was Ksh 33 Billion and the value of shares.

V. FINANCIAL IMPLICATION OF EXIT OF HELIOS/JAMHURI

17) The exit of Helios in Telkom Kenya will require a GoK allocation of Kshs.5.92 billion to pay Helios Investors LLP for the payment of 60% shareholding at a nominal value of USD 1.0 and reimbursement of USD 51 million for the principal loan and accrued interest on the loan injected by JHL.

VI. BUDGETARY IMPLICATIONS

18) A budget of KShs.5.92 billion in FY2022/23 will be required to facilitate issuance of a bond and or payment to Helios.

VII. REQUEST TO THE NSC

19) The NSC is requested to note the contents of this Memorandum and to consider and:

i.) Approve the exit of Helios/Jamhuri in Telkom Kenya with Gok acquiring the 60% shareholding owned by Helios/Jamhuri at USD 1

ii.) Approve GoK to take over and compensate Helios/Jamhuri the loan injected by Helios amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million)

SECRET

iii.) Approve a budget of KShs.5.92 billion for the FY 2022/23 for Telkom to facilitate the implementation of the exit plan by Helios/Jamhuri.

iv.) Direct the Cabinet Secretary to the National Treasury and Planning and the Attorney General to take necessary action.

SIGNED:

.....

HON (AMB.) UKUR YATANI, EGH
CABINET SECRETARY, NATIONAL TREASURY & PLANNING

DATE: 31st March, 2022.

.....

HON. JUSTICE (RTD) PAUL K. KIHARA KARIUKI, EGH
ATTORNEY GENERAL

DATE: First April 2022

SECRET

SECRET

JOINT MEMORANDUM TO THE NATIONAL SECURITY COUNCIL BY THE CABINET SECRETARY TO THE NATIONAL TREASURY AND PLANNING AND THE ATTORNEY GENERAL ON EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

I. OBJECTIVE

1) The objective of this Memorandum is to;
   i.) apprise the NSC on the current status of Telkom Kenya Limited (TKL);
   ii.) brief the NSC on the proposed acquisition of Jamhuri Holdings Limited (JHL) in TKL; and
   iii.) seek NSC approval to the proposed acquisition of shares in order to have GoK own 100% shares in TKL

II. BACKGROUND

2) Telkom Kenya was previously part of the Kenya Posts and Telecommunications Corporations (KPTC) which was the sole provider of postal and telecommunication services. It was established as telecommunications operator in 1999.

3) Telkom operates critical national security assets and services including mobile telephone services, money transfer services, carrier businesses, real estate, data centre assets, National Fibre Optic Infrastructure (NOFBI) operation and maintenance, management of critical GoK services, Fibre Right of Way, Subsea Assets (both landing stations and all undersea cables including TEAMS

4) In 2007 Telkom Kenya Limited (Telkom) was privatized when GoK, through a competitive process, sold 51% of its shares in the company to Orange East Africa Limited (OrEA) – a subsidiary of France Telecom S.A (FT) – at a price of US$ 390 million.

5) In spite of significant investment made by the shareholders (mainly OrEA) since privatization, the company was not able to achieve sufficient revenues to meet its operating costs including recovery of the capital investment. It, therefore, continued to post losses.

6) As a result of not being able to participate fully in a restructuring which followed, involving debt write-offs and injection of equity capital, GoK suffered a dilution resulting in a shareholding structure of 70% (OrEA) and GoK (30%).

7) In June 2016, Helios Investors LP – a London-based private equity firm focused on Africa – acquired 70% of the shares in Telkom) from OrEA through a special purpose vehicle named Jamhuri Holdings Limited (JHL). It was at this juncture that GoK increased its shareholding in Telkom from 30% to 40%, for a nominal consideration.

8) As part of the transaction, JHL bought the Orange portion of shareholder loans at the time amounting to **Euros 291,973,288.80** and transferred 40% of it (i.e **Euros 116,789,315**) to GoK for a nominal consideration. Since the acquisition in 2016, JHL has advanced the company a total amount of **USD 48 million** as additional shareholder loans, bringing the total principal amounts of shareholder loans from Helios/Jamhuri to Telkom to **Euros 175,183,973** and **USD 48 million**.

9) Helios is the largest Africa-focused private investment firm, managing over US$3.5 billion. The firm is a significant international investor in Kenya and has invested over US$400 million to date. In addition to Telkom, other investments include Acorn Group (developers of student (Qwetu) and young professionals housing (Palma), Vivo Energy (operating the Shell retail brand in Africa), Africa Oil (exploration partners with Tullow in Lake Turkana), Wananchi Group. (Zuku Brand) and Equity Bank (now exited). The investors in the firm include GIC, IFC, CDC, Temasek and other leading global investors for whom the Helios investments in Kenya are high profile and very significant.

III. CURRENT STATUS OF TELKOM

10) Telkom is currently in a dire state of financial and operational performance owing to continuing and accumulated operational losses which amounted to Ksh 105 billion as at 31st December 2021. The company made a loss of Ksh 7.2 billion in 2021. The company has huge accumulated liabilities related to critical services provided by business partners (third parties) which have threatened to discontinue the services owing to delays in payments.

11) As at 31st December 2021 the outstanding shareholder loans were as follows:

Shareholder (Amount in million)	**Principal**		**Accrued**		**Total**	
	USD	Ksh	USD	Ksh	USD	Ksh
Helios (old Loan)	199.7		40		239.7	
Helios (New Loan)	47.7		3		50.7	
Total	**247.4**		**43**		**290.4**	
GoK (Old)	133.1		23		156.1	
GoK (New 4 G)	0	2,500	-			2,500
Total	**133**	**2,500**	**23**			**2,500**

12) Telkom has in many instances made cash-injection calls to the two shareholders. In particular, Telkom is currently seeking USD.25 million (approximately **Ksh.2.5 billion**) to enable the company pay its frequency licenses to the GoK. This amount has already been factored in the Supplementary Budget for FY 2021/22. Although the funds will eventually revert back to GoK in form of licenses, the amount will be treated as a shareholder loan to TKL.

13) It is highlighted at this juncture that Telkom sought and obtained shareholder approval to dispose of non-core real estate assets of amounts up to Ksh.3.5 billion to enable the company fund its operations and to meet some of its commitments to creditors. GoK approval for this request was given in February 2020.

SECRET

IV. PROPOSED EXIT BY HELIOS INVESTORS LLP (JAMHURI HOLDINGS LTD)

14) Helios/Jamhuri have now notified GoK of their decision to exit Telkom by exercising their **put option** – their right to sell their stake in the company to GoK, as provided for in the Shareholder Agreements – citing frustrations, namely:

i.) Failure of GoK authorities to institute regulatory interventions necessary to remedy the structural imbalances in the telecommunications business environment that continue to make the sector less competitive, much to the disadvantage of the (rest of) the operators and consumers;

ii.) the decision of GoK to not approve the joint venture (JV) between Telkom and Airtel Kenya that would have involved the combination of the two companies' telecommunications businesses for better synergies needed for meaningful competition and innovation, with benefits that would have included reduced requirement for further injection of capital by the two shareholders; and,

iii.) the decision by GoK's Ministry of Sports, Culture & Heritage to occupy and proceed to construct sporting facilities on the property LR. No. 7656 situated along Ngong Road, of which Telkom is the legally registered owner.

15) In view of the outstanding shareholder loans and considering that Helios continue to invest in other businesses in the country, Helios/Jamhuri has given the following terms and conditions for their put option

i.) GoK acquires the Helios 60% shareholding in Telkom for a nominal USD 1

ii.) GoK to take over and to reimburse the shareholder loan injected by Helios amounting to USD.51 million (principal USD 48 million and accrued interest USD. 3 million). The payment of USD 51 million will be made through a shortterm bond, which will be tradable, interest bearing and payable at the counters of Central Bank of Kenya.

SECRET

iii.) Helios/Jamhuri will forego the acquired shareholder loan which Helios took over from Orange Telkom that amounts to USD 239 million (principal USD 199 m and accrued interest of USD 40million).

iv.) Once Helios/Jamhuri exits Telkom Kenya, GoK will own it 100%. A restructuring of the company will therefore be necessary including capital structure, reviewing the continued operation of various businesses, land use plan and cooperation with the national government.

16) This offer is considered a good deal for the Government considering that the total shareholder loan outstanding to JHL as at 31st December 2022 was Ksh 33 Billion and the value of shares.

V. FINANCIAL IMPLICATION OF EXIT OF HELIOS/JAMHURI

17) The exit of Helios in Telkom Kenya will require a GoK allocation of Kshs.5.92 billion to pay Helios Investors LLP for the payment of 60% shareholding at a nominal value of USD 1.0 and reimbursement of USD 51 million for the principal loan and accrued interest on the loan injected by JHL.

VI. BUDGETARY IMPLICATIONS

18) A budget of KShs.5.92 billion in FY2022/23 will be required to facilitate issuance of a bond and or payment to Helios.

VII. REQUEST TO THE NSC

19) The NSC is requested to note the contents of this Memorandum and to consider and:

i.) Approve the exit of Helios/Jamhuri in Telkom Kenya with Gok acquiring the 60% shareholding owned by Helios/Jamhuri at USD 1

ii.) Approve GoK to take over and compensate Helios/Jamhuri the loan injected by Helios amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million)

iii.) Approve a budget of KShs.5.92 billion for the FY 2022/23 for Telkom to facilitate the implementation of the exit plan by Helios/Jamhuri.

iv.) Direct the Cabinet Secretary to the National Treasury and Planning and the Attorney General to take necessary action.

SIGNED:

.....

HON (AMB.) UKUR YATANI, EGH
CABINET SECRETARY, NATIONAL TREASURY & PLANNING

DATE: 31st March, 2022.

.....

HON. JUSTICE (RTD) PAUL K. KIHARA KARIUKI, EGH
ATTORNEY GENERAL

DATE: First April 2022

SECRET

Annexure 16 - Letter from AG TO CS, NT dated 1st April 2022

ANNEX 12

A016

64

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/CONF/2/C/62 VOL VIII
Your Ref: ZZ/MOF/32/01

1st April, 2022

Hon. (Amb) Ukur Yatani, EGH
Cabinet Secretary
The National Treasury and Planning
Treasury Building, Harambee Avenue
P.O Box 30007-00100
NAIROBI

RE: JOINT MEMORANDUM TO THE NATIONAL SECURITY COUNCIL BY THE CABINET SECRETARY TO THE NATIONAL TREASURY AND PLANNING AND THE ATTORNEY GENERAL ON EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LIMITED IN TELKOM KENYA LIMITED

1. This has reference to the subject matter captioned hereinabove and your letter dated 30th March, 2022 forwarding the Joint Memorandum for the signature of the Honourable the Attorney General.

2. The objective of the Memorandum is to:

   (a) Apprise the National Security Council (NSC) of the current status of Telkom Kenya Limited (TKL);

   (b) Brief the NSC on the proposed acquisition of Jamhuri Holdings Limited (JHL) in TKL; and

   (c) Seek NSC's approval for the proposed acquisition of shares in order to have GoK own 100% shares in TKL.

OUR GUIDANCE

We have reviewed the subject Memorandum and comment as follows:

(a) Financial Aspect of the Transaction

3. Paragraph 8 of the Memorandum states that since 2016, JHL has advanced TKL a total of USD 48 million as shareholder loans. These loans are in addition to the earlier loan of Euros 175,183,973, which it took over from Orange Telkom.

4. Helios/JHL have notified the Government of Kenya (GoK) of their decision to exit Telkom by exercising their "put option." We note that GoK will be required to pay Helios Investors LLP Kshs. 5.92 billion for 60% shareholding at a nominal value of USD. 1 and also reimburse the shareholder loans of USD 48 million and accrued

ANNEX 12

interest of USD 3 million. Helios/JHL will, however, forego the acquired shareholder loan, which it took over from Orange Telkom.

5. In this regard, we advise that the Honourable the Attorney General has countersigned the enclosed Memorandum conditional upon the National Treasury and Planning satisfying itself of the guidance on requisite approvals as set out herein as well as the following:

   (i) That the particulars of the Memorandum regarding shareholding and shareholders' loan are correct;

   (ii) That the loan was indeed advanced to TKL and there is evidence to that effect;

   (iii) That the shareholders' agreement provided for the exit of Helios/JHL through the exercise of a "put option" and that the conditions for exercising the "put option" as captured in the Memorandum have been met;

   (iv) That the proposed share nominal value of USD 1. aligns with the predetermined price for exercising the "put option"; and

   (v) That upon government making the proposed payment, Helios/JHL's claim or stake in TKL will stand fully and finally extinguished.

(b) Approval by TKL Board

6. TKL is a body corporate distinct from GoK as a shareholder. Consequently, we advise that the proposed transaction herein must also be subject to the requisite internal approvals by TKL, including by the Board of Directors.

(c) Approval by Cabinet

7. We note that the proposed transaction will have the effect of converting TKL into a State Corporation. We advise that in line with sections 86 and 87 of the Public Finance Management Act, the prior approval of the Cabinet should be sought before the transaction is finalized.

(d) Revision of dates

8. Paragraph 16 refers to the total shareholder loan outstanding as at "31st December 2022". We believe the reference to the year 2022 is a typographical error and should be revised accordingly.

CONCLUSION

We trust that what we have stated hereinabove will be of assistance to you and that you will be pleased to be guided accordingly.

Kennedy Ogeto CBS
SOLICITOR GENERAL
FOR: ATTORNEY GENERAL

Encl.

Copy to:

Hon. P. Kihara Kariuki, EGH
ATTORNEY GENERAL

Dr. Julius Muia, PhD, CBS
Principal Secretary
The National Treasury & Planning
NAIROBI



Annexure 17

Advisory Letter from AG to GOK dated 6th May 2022

CABINET SECRETARY
THE NATIONAL TREASURY & PLANNING
6 MAY 2022
RECEIVED
P.O. Box 30007 - 00100, NAIROBI

A017

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/CONF/2/C/62 VOL. VII
Your Ref: TNT/ZZ 331/02

6th May, 2022

Hon. (Amb.) Ukur Kanacho Yatani, EGH
Cabinet Secretary
The National Treasury & Planning
NAIROBI

MOST URGENT

RE: EXIT OF HELIOS INVESTORS LLP/JAMHURI HOLDINGS LTD IN TELKOM KENYA LIMITED

This has reference to the above-captioned subject matter and to your letter indicated to be dated the 6th April, 2022, under Ref. No. TNT/ZZ 331/02, which was delivered to our Office on the 27th April, 2022. By the said letter, the National Treasury and Planning submitted to us the following draft documents, which had been presented to the National Treasury and Planning by Jamhuri Holdings Limited vide a letter indicated to be dated the 19th April, 2022, for our review and legal clearance:

(a) Deed of Termination in Respect of the Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and the Additional Shareholders Agreement Dated the 10th June, 2016;

(b) Deed of Novation in Respect of the Loan Agreement Relating to the JHL-OREA Shareholder Loan Dated the 10th June, 2016;

(c) Escrow Agreement in Relation to the Sale and Purchase of Shares and Shareholder Loans in Telkom Kenya Limited;

(d) Share Purchase Agreement in Relation to the Sale and Purchase of Shares and Shareholder Loans in Telkom Kenya Limited;

(e) Deed of Novation Relating to the Additional JHL Shareholder Loans.

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/071194555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUEP.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified

We make further reference to the letter dated the 27th April, 2022, under Ref. No. CAB/NSC/14/2. VOL. 1(20), which we received on the 27th April, 2022. By the said letter, the Head of the Public Service informed this Office, among others, of the decision by the National Security Council to approve:

(a) the exit of Helios/Jamhuri Limited from Telkom, with the Government acquiring the 60% shareholding owned by Helios/Jamhuri at USD 1;

(b) the Government's takeover and compensation of Helios/Jamhuri for the loan injected into Telkom by Helios amounting to USD 51 million (principal USD 48 million and accrued interest of USD 3 million);

(c) a budget of Kshs. 5.92 billion for the FY 2022/23 for Telkom to facilitate the implementation of the exit plan by Helios/Jamhuri Limited.

We also acknowledge receipt of the Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and the Additional Shareholders Agreement dated the 10th June, 2016. We have reviewed the documents and wish to make our comments as hereinbelow:

A. General Comments

1. As noted in our letter dated the 1st April, 2022, under Ref. No. AG/CONF/2/C/62 Vol. VIII (copy enclosed), the proposed transaction will have the effect of converting Telkom Kenya Limited (TKL) into a state corporation. Consequently, the approval by the Cabinet will be required for the transaction, in line with the requirements of Sections 86 and 87 of the Public Finance Management Act, 2012. All the requisite internal approvals within TKL should also be obtained.

2. We note that the dispute resolution clauses in all the draft agreements provide that arbitration shall be administered by the Mediation and Arbitration Centre of Mauritius under its arbitration rules in force. We recommend that in line with prevailing Government policy, such arbitration be administered by the Nairobi Centre for International Arbitration, under its arbitration rules.

3. We note that the various draft agreements (excluding the draft Escrow Agreement), provide that GoK shall be solely responsible for the payment of (or procuring the waiver of) any stamp duties, registration costs, taxes and any other fees or costs payable in respect of the Deed. The National Treasury and Planning should note the obligations in the clause and confirm that they are suitable and that GoK will be in a position to satisfy the same. The National Treasury and Planning should also

ensure that it has adequate budget to meet the costs in relation to the Escrow Agreement and any other such costs, and that the same are reflective of value for money.

4. In addition to the foregoing, since the GoK will bear half of the fees payable to the Escrow Agent, the National Treasury and Planning should ensure that the selection of the said agent was done in accordance with the law.

5. All the draft agreements contain a provision to the effect that time is of the essence, both as regards dates, times and periods mentioned therein, and as regards any dates, times and periods which may be substituted for them. The National Treasury and Planning should take note of the said provisions and ensure that the dates, times and periods as shall be agreed are convenient and that the GoK will be in a position to meet the obligations thereunder.

6. As advised in our referenced letter, our comments herein are provided on the understanding that the figures and percentages, including of the parties' respective shareholding and of the amounts involved, are accurately captured. In addition to the foregoing, we wish to comments as follows on the two under-listed agreements:

(a) Deed of Termination in Respect of the Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and the Additional Shareholders Agreement Dated the 10th June, 2016

7. We note that the purpose of this Deed is to terminate the following agreements:

   (i) The Deed of Amendment and Restatement of Shareholders Agreement Between the Buyer, Jamhuri Holdings Limited (JHL), Helios Investors III L.P and the TKL (the Company) dated the 10th June, 2016; and

   (ii) The Additional Shareholders Agreement in relation to the Company entered into Between the Buyer, JHL, Helios Investors III L.P and the TKL dated the 10th June, 2016.

8. We advise that the following clause be inserted as clause B in the recitals section titled "WHEREAS", to ensure completeness of the information thereunder:

   "On completion of the JHL-OrEA Transaction, JHL agreed to transfer ten percent (10%) of the Company's shares owned by JHL to GoK, thereby increasing GoK's shareholding to forty percent (40%) of the ordinary issued

share capital of the Company. Further, JHL transferred forty percent (40%) of the OrEA Shareholder Loan to GoK and retained the balance."

9. We also advise that clause 1.1.1 which defines "Agreements" as "Existing Shareholders' Agreements" and clause 1.1.5 which defines "Existing Shareholders' Agreements" should be merged since they define the same substantive concept. In our view, it would suffice to replace the current definition of "Agreement" by listing the agreements under the definition of "Existing Shareholders' Agreements" as the definition of the term "Agreement."

(b) Share Purchase Agreement in Relation to the Sale and Purchase of Shares and Shareholder Loans in Telkom Kenya Limited

10. Clause 3.1.2 lists as conditions precedent that should be met on or before the Long Stop Date (the 29th July, 2022 or as may be agreed by the parties), that GoK would have received a letter of no-objection or approval from the Communications Authority of Kenya and the Competition Authority in respect of the transaction; in addition to the Attorney General's opinion in the agreed form. We advise the National Treasury and Planning to take note of the conditions concerning the procurement of approvals from the Communications Authority of Kenya and the Competition Authority and to ensure that the said conditions will be met, given that clause 6.3.3 stipulates that GoK shall indemnify JHL against any risks, penalties or sanctions that may be imposed by the Communication Authority of Kenya and the Competition Authority in connection with the said conditions.

11. We should also be most grateful if you would please provide to us, expeditiously, the agreed form of the Attorney General's legal opinion to ensure that we consider and issue the same as may be appropriate, in good time.

The various agreements may be signed once the foregoing comments have been addressed as advised. Please note to send us duly executed copies of the agreements for our information and records.

We trust that what we have stated hereinabove will be of assistance and that you may be pleased to be guided accordingly. We remain at your disposal to provide such further guidance as may be necessary.

P. Kihara Kariuki
ATTORNEY GENERAL

Copy to: Mr. Kennedy Ogeto CBS
SOLICITOR GENERAL

Dr. Julius Muia, CBS
Principal Secretary/National Treasury
The National Treasury and Planning
NAIROBI

Annexure 18

Opinion Letter from CS, NT to AG dated 17th August 2022

cc Ms. Lilian Abishai

RECEIVED
23 AUG 2022
ATTORNEY GENERAL'S CHAMBERS
P.O. Box 40112, 00100 NAIROBI

URGENT

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299
When replying please quote

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

② Lilian Abishai, KSC.
Please review and handle appropriately.
24/8/2022

Ref: TNT/ZZ 331/02 'TY⁶' **Date: 17th August, 2022**

(1)

Ms. Jeannette Mwangi
Please Deal
23 AUG 2022
ATTORNEY GENERAL
Cc: The SG

Justice (Rtd) Paul Kihara Kariuki, EGH
Attorney General
Office of the Attorney General
& Department of Justice
NAIROBI

Dear Justice,

RE : TELKOM KENYA – EXIT OF HELIOS

I refer to your letter Ref No. AG/CONF/2/C/62 Vol. VII dated 6th May, 2022 vide which you cleared the various agreements for execution between the Government of Kenya and Jamhuri Holdings Limited (JHL) regarding the exit of Jamhuri Holdings in Telkom Kenya. The Share Purchase Agreement (SPA) and associated documents were setting out the terms upon which the JHL has agreed to sell and GoK has agreed to purchase Seventy One million Two hundred and Twenty Nine thousand Six hundred and Ninety Six (Kshs.71,229,696/-) Ordinary Shares of Kenya Shillings Twenty (Kshs. 20/-) each, in aggregate comprising of sixty per cent (60%) of the ordinary issued share capital of Telkom Kenya Limited at a nominal price of USD 1.

We confirm that these Agreements were executed on 31st May, 2022. However, due unavoidable delays, the Long Stop Date was extended from 31st July, 2022 to 12th August, 2022 through a Deed of Variation dated 29th July, 2022 which was forwarded to your office vide letter Ref No. TNT/ZZ 331/02'TY⁶' dated 11th August, 2022.

We further wish to confirm that the Escrow Documents have been released to the National Treasury and Planning as per the attached letter from Anjarwalla and Khanna Advocates dated 17th August, 2022.

Pursuant to Clause 3.1.3 of the SPA, one of the conditions to completion of the proposed transaction is the requirement for Attorney General of Kenya to issue an opinion in an agreed form. Although it is past the Long Stop Date, the Attorney General's opinion is still required to complete the transaction.

The purpose of this letter therefore is to request you to issue a legal opinion in the attached form.

Dear Ms. Jeannette Mwangi
I am directed by the Hon. the AG to forward this to you for your kind action.
Thank you
Lm

SECRET

We also attach copies of the following signed documents:-

1) Share Purchase Agreement;
2) Deed of Termination in respect of Deed of Amendment and Restatement of Shareholders Agreement dated 20th June, 2016 and Additional Shareholders Agreement dated 10th June 2015;
3) Novation Agreement of JHL – Orange East Africa loan;
4) Novation Agreement for Additional Shareholder Loans; and
5) Share Transfer form.

Yours faithfully,

Hon. (Amb) Ukur Yatani, EGH
Cabinet Secretary/National Treasury and Planning

Annexure 19

Letter dated 30th August 2022 from the AG to CS,NT

REPUBLIC OF KENYA

Annex 19
A019

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Your Ref: TNT/ZZ 331/02 'TY6'
Our Ref: AG/CONF//21/C/62 VOL. VII

30th August, 2022

Hon. (Amb) Ukur Yatani, EGH
Cabinet Secretary
The National Treasury and Planning
NAIROBI

MOST URGENT

RE: TELKOM KENYA – DEED OF VARIATION

TELKOM KENYA – EXIT HELIOS

We refer to your letter under Ref: TNT/ZZ/331/02 TY6 dated the 6th April, 2022, received on the 5th August, 2022; and the letter under Ref: TNT/ZZ 331/02 'TY 6' dated 17th August, 2022, received on the 23rd August 2022, forwarding the following documents for our legal clearance and issuance of the Legal Opinion of the Attorney General:

i) A draft Deed of Variation for the Agreement *relating to the Share Purchase Agreement dated the 31 May, 2022 in respect of the sale and purchase of shares and shareholder loans in Telkom Kenya Limited* between the Cabinet Secretary the National Treasury on behalf of the Government of Kenya (GoK) and Jamhuri Holding Limited (JHL);

ii) Share Purchase Agreement *in relation to the sale and purchase of shares and shareholders loans in Telkom Kenya Limited* between the Cabinet Secretary the National Treasury on behalf of the Government of Kenya and Jamhuri Holdings Limited (JHL) dated the 31st May, 2022;

iii) Deed of Termination *in respect of The Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and The Additional Shareholders Agreement dated the 10th June, 2016* between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and Helios Investors III LP and The Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/07119445555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUEP.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified

iv) Deed of Novation *relating to the Additional JHL Shareholder Loans* between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and The Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

v) Deed of Novation in respect of the Loan Agreement relating to the JHL-OREA Shareholder Loan dated 10th June, 2016, between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and the Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

vi) Share Transfer Form between Jamhuri Holdings Limited and The Cabinet Secretary National Treasury;

vii) Draft Legal Opinion of the Attorney General.

Having reviewed the aforementioned documents, the following is noted:

A. DOCUMENTS

1. We note that the following documents submitted are not complete as they are not fully signed and dated by all the parties and/or the attestation is not complete:

i) Deed of Termination in respect of The Deed of Amendment and Restatement of Shareholders Agreement dated the 10th June, 2016 and The Additional Shareholders Agreement dated the 10th June, 2016 between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and Helios Investors III LP and The Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

ii) Deed of Novation relating to the Additional JHL Shareholder Loans between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and The Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

iii) Deed of Novation in respect of the Loan Agreement relating to the JHL-OREA Shareholder Loan dated the 10th June, 2016, between Telkom Kenya Limited and Jamhuri Holdings Limited (JHL) and the Cabinet Secretary the National Treasury on behalf of the Government of Kenya;

iv) Share Transfer Form between Jamhuri Holdings Limited and the Cabinet Secretary National Treasury.

2. The National Treasury should provide us with the signed and dated documents by all the parties referred to in (i), (ii) and (iii) hereinabove and a fully attested to and dated Share Transfer Form.

B. SHARE PURCHASE AGREEMENT

3. We note that the Share Purchase Agreement was signed by the parties on the 31st May, 2022.

4. Through a letter dated the 6th May, 2022 under Ref. **AG/CONF/2/C/62 VOL. VII,** this Office provided legal advice on a draft Share Purchase Agreement for consideration by the National Treasury.

5. Having reviewed the signed Share Purchase Agreement, the following is noted:

Approvals

i) In our advisory letter dated the 6th May, 2022, we have noted that the proposed transaction will have the effect of converting Telkom Kenya Limited into a State Corporation. Consequently, the approval of Cabinet shall be required for the transaction in compliance with the statutory requirements under Sections 86 and 87 of the Public Finance Management Act, 2012 and Regulation 215 of the Public Finance Management (National Government) Regulations, 2015. The National Treasury is advised to provide this Office with the approval of Cabinet for the transaction for our information and records.

ii) In our advisory, we also noted that some of the approvals required as provided in clause 3.1.2 and 6.33 is the approval of the transaction by the Communication Authority of Kenya and the Competition Authority of Kenya. The National Treasury should confirm that the said approvals have been obtained and forward to this Office copies of the approvals for our review and records.

iii) Further, the National Treasury should forward to this Office the requisite approvals of the transaction from Telkom Kenya Limited, for our review and records.

Dispute Resolution

iv) We had advised that in line with the prevailing Government policy, dispute resolution should be administered by the Nairobi Centre for International Arbitration (NCIA) and not the Mediation and Arbitration Centre of Mauritius as was provided in the draft Agreement.

v) We note that clause 7 of the signed Agreement provides for settlement of disputes by the London Court of International Arbitration (LCIA) Rules and that the seat and venue of arbitration shall be London.

vi) The National Treasury should clarify the basis for selection of the London Court of International Arbitration and the seat and location as London.

vii) Further, the National Treasury should note the budgetary implication of the same.

C. DEED OF VARIATION

6. We note that the Deed of Variation primarily extends the Longstop date to the 12 August, 2022 and includes settlement of the transaction in cash.

7. Noting that cash payment has been introduced in the draft Deed of Variation, the National Treasury should ensure that it has the requisite budgetary resources to honor the obligation.

D. ESCROW AGREEMENT

8. In our advisory letter dated the 6th May, 2022, it was advised that since the Government of Kenya was to bear half of the fees of the Escrow Agent (Anjarwalla & Khanna LLP), the National Treasury should ensure that the selection of the said agent was done in accordance with the law. The National Treasury should confirm that the procurement law was adhered to in the selection of the Escrow Agent and forward to this Office the procurement documents for our review and records.

9. In the aforementioned letter, it was advised that the National Treasury should ensure that it has adequate budget to meet the costs in relation to the Escrow Agreement and ensure that the costs are reflective of value for money. The National Treasury should confirm that the costs are reflective of value for money and that it has budgetary allocation to meet the cost.

10. In addition, the National Treasury should forward a copy the signed Escrow Agreement for our records.

E. LEGAL OPINION OF THE ATTORNEY GENERAL

11. Having reviewed the draft format of the Legal Opinion of the Attorney General, the same is noted to be in order. However, to enable the Attorney General issue the Legal Opinion, the following documents should be provided to this Office:

    i) A signed and dated Deed of Variation between the Cabinet Secretary the National Treasury on behalf of the Government of Kenya (GoK) and Jamhuri Holding Limited(JHL);

    ii) The signed Escrow Agreement between JHL, GOK and Anjarwalla & Khanna LLP dated the 31st May, 2022;