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THIRTEENTH PARLIAMENT (THIRD SESSION)

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

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REPORT ON
THE CONSIDERATION OF KENYA INFORMATION AND COMMUNICATION (AMENDMENT) BILL, 2022 (NATIONAL ASSEMBLY Bill No. 52 of 2022)

PUBLISHED BY:

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DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
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LIST OF ABBREVIATIONS AND ACRONYMS

CA	Communications Authority of Kenya
CCK	Communication Commission of Kenya
ICT	Information, Communication Technology
KICA	Kenya Information and Communications Act
MP.	Member of Parliament
N.A	National Assembly
NP	Network Experience
QoS	Quality of Service
QoE	Quality of Experience
USF	Universal Service Fund

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CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Kenya Information and Communications (Amendment) Bill *(National Assembly Bill No. 52 of 2022)*. The Bill was published on 10th November 2022, read the First Time on 9th August 2023 and committed to the Departmental Committee on Communication, Information and Innovation for review and reporting to the House pursuant to Standing Order 127.

The Bill seeks to amend the Kenya Information and Communications Act Cap. 411A to enable persons operating telecommunication systems or providing telecommunication service to engage in any other business and provide for the separation of such other business from the telecommunication business. The Bill also seeks to amend the Act to make provision for quality of service to consumers making calls by compelling licensees in the telecommunication industry to invest in infrastructure that will guarantee the quality of service for consumers making calls. This seeks complement the provisions of Article 46 of the Constitution. The Bill further seeks to amend the Act in order to improve the management of the Universal Service Fund by the Communications Authority of Kenya by expanding the objectives of the Fund, prescribing the requirement for reporting to the Communications Authority on how the Fund is being utilized, enumerating the formula for distribution of monies from the Fund and prescribing offences.

Following the placement of adverts in the print media on 16th August 2023 requesting for comments and memoranda on the Bill from members of the public and relevant stakeholders pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee received memoranda from Ministry of Information, Communication and Digital Economy, Safaricom PLC and Communications Authority of Kenya. Upon receipt of the memoranda, the Committee held a total of five (5) meetings to consider the Bill and the submissions which are incorporated in this report. A total of five (5) memoranda were received from institutional stakeholders in the ICT sector. Thereafter, the Committee proceeded for a report writing retreat which provided the opportunity to consider the submissions of the stakeholders and to further draft, consider and approve its report.

On behalf of the Departmental Committee on Communication, Information and Innovation and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the KICA (Amendment) Bill, 2022 (N.A. Bill No. 52 of 2022). The Committee is grateful to Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank the Ministry of Information Communication and Digital Economy, the Communications Authority of Kenya and Safaricom PLC Ltd for submitting their comments on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the KICA (Amendment) Bill, 2022 (N.A. Bill No. 52 of 2022) and has the honour to report to the National Assembly with the recommendation that the Bill be should **not be proceeded** with.

Hon. John Kiarie, M.P.
Chairperson, Committee on communication, information and Innovation.

PART ONE

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Communication, Information and Innovation is one of the Departmental Committees of the National Assembly 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 analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
    - *vi. To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
    - *vii. 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);*
    - *viii. To examine treaties, agreements and conventions;*
    - *ix. To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
    - *x. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
    - *xi. To examine any questions raised by Members on a matter within its mandate.*
2. In accordance with the Second Schedule of the Standing Orders, the Committee 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.

3. In executing its mandate, the Committee oversees the State Department for ICT and the Digital Economy.

1.2 Committee Membership

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House on Thursday, 27^{th} 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. Flowrence 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

1.4 Committee Secretariat

5. The Committee is facilitated by the following staff secretariat:

Ms. Nuri Kitel Nataan
Clerk Assistant II

Mr. Sakana Saoli
Clerk Assistant III

Ms. Marlene Ayiro
Principal Legal Counsel

Mr. Thomas Ogwel
Fiscal Analyst I

Ms. Winfred Kizia
Media Relations Officer

Mr. Manuel Leparachao
Sergeant At Arms

Mr. Githinji Wanjohi
Research Officer III

Mr. Boaz Chebiego
Research Officer III

Ms. Pauline Njuguna
Hansard Reporter

Mr. Kelvin Lengasi
Audio Officer

PART TWO

2 BACKGROUND OF THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2022

2.1 SITUATIONAL ANALYSIS

6. The Kenya Information and Communications Act (KICA) Cap. 411A is a law that regulates the information and communications sector in Kenya, including broadcasting, multimedia, telecommunications, postal services and electronic commerce. The act was first enacted in 1998 as the Kenya Information Communications Act (KICA) to replace the Kenya Posts and Telecommunications Corporation Act of 1977. KICA was amended in 2009 as the Kenya Communications (Amendment) Act (KCAA) to address issues such as media freedom, content regulation, competition and consumer protection. The KCAA was further amended in 2013 as the Kenya Information and Communications (Amendment) Act (KICAA) to align the ICT sector with the new constitution of 2010, rename the Communications Commission of Kenya (CCK) to the Communications Authority of Kenya (CA), and give the CA additional mandate of managing the country's cyber security.

7. KICA has been instrumental in facilitating the development of the ICT sector in Kenya, which has witnessed significant growth and innovation over the years. Some of the achievements of KICA include:

    i. Promoting competition and diversity in the ICT market, leading to lower prices, improved quality and increased access for consumers
    ii. Establishing a Universal Service Fund to support the provision of ICT services to underserved and marginalized areas
    iii. Enhancing consumer protection and empowerment through mechanisms such as complaints handling, quality of service monitoring, tariff regulation and SIM card registration
    iv. Supporting the development of local content and culture through broadcasting licensing, programme codes and access to public interest programmes
    v. Strengthening the independence and autonomy of the CA as the regulator of the ICT sector, as well as ensuring its accountability and transparency
    vi. Enhancing the security and resilience of the ICT infrastructure and systems, as well as combating cybercrime and safeguarding online rights.

2.2 COMPARATIVE ANALYSIS

2.2.1 South Africa

On Universal Service

8. The **Universal Service and Access Fund (USAF)** was established under the Electronic Communications Act (ECA) to fund projects and programmes that strive to achieve universal service and access to ICTs by all South African citizens.

9. In accordance with the ECA, this fund is utilised exclusively for payment of subsidies for:

    i. Assistance of needy persons towards the cost of the provision to or the use by them of broadcasting and electronic communications services,

ii. Financing the construction or extension of electronic communications networks in under-serviced areas,
iii. The procurement of broadcasting and electronic communications network services and access to electronic communications networks for schools and further education and training institutions,
iv. The establishment and operation of broadcasting services and the establishment and operation of, including training of and the payment of allowances to personnel of centres where access to electronic communications networks can be obtained.
v. Every holder of a license granted or deemed to have been granted in terms of the ECA is mandated to make prescribed contributions to the USAF

10. The South African Electronic Communications Act, 2005 provides for two types of licenses for electronic communications services and networks:
    i. Individual licenses for services or networks that need to use scarce resources, such as radio frequency spectrum or telephone numbers. These resources are limited and need to be allocated efficiently and fairly. Individual licenses are more specific and tailored to the needs and obligations of the licensee.
    ii. Class licenses for services or networks that do not need to use scarce resources, such as internet service providers or community broadcasters. These services or networks are more general and common, and do not need special allocation or regulation. Class licenses are more generic and flexible for the licensee.

On telecommunication companies engaging in other business

11. The South African Electronic Communications Act, 2005 regulates the licensing of electronic communications services and networks by the Independent Communication Authority of South Africa (ICASA).

12. The law also allows licensees to provide other services that are incidental to their licensed services, such as value-added services or content services. These services are not regulated by ICASA, but by other laws and authorities.

13. The South African Electronic Communications Act, 2005 empowers ICASA to prescribe quality of service standards and obligations for electronic communications services and networks 2. It also obliges electronic communications service licensees to provide consumers with information on the quality of service they offer and the procedures for lodging complaints.

2.2.2 Namibia

14. The Communications Act, 2009 was enacted by the Parliament of Namibia on 16th November 2009 and came into force on 18th May 2011. The Act promote the development of a competitive, efficient and accessible communications industry that serves the social, economic and cultural needs of Namibia and its people.

On telecommunication companies engaging in other business

15. The Nambian Communication Act allows telecommunication operators to engage in other businesses, subject to the approval of the Namibian Communications Commission (NCC). This is to promote competition and innovation in the telecommunications sector.

16. The Nambian Communication Act also provides a regulatory framework for telecommunication operators that engage in other businesses, to ensure there is no abuse of the market power.

On Quality of Service (call drops)

17. The NCA requires telecommunication operators to invest in infrastructure ensuring adequate coverage and quality of service for consumers. The NCA also sets quality of service standards that telecommunication operators must meet.

18. The NCA establishes a Universal Service Fund (USF) to provide financial assistance to telecommunications operators to help them expand their networks to underserved areas. The NCA also sets out the rules for managing and utilizing the USF.

2.2.3 Nigeria

19. The mandate of the Nigerian Communications Commission is established in the Nigerian Communications Act 2003, which was enacted on July 2003. The Act provides the NCC with the capacity to properly carry out its Regulatory functions and activities.

On telecommunication companies engaging in other business

20. The NCA allows telecommunication operators to engage in other businesses, but it also imposes certain restrictions. For example, the Act requires telecommunication operators to obtain the approval of the Nigerian Communications Commission (NCC) before they can engage in any other business.

21. The NCA also sets out several rules and regulations that telecommunication operators must follow when they engage in other businesses.

On Quality of Service (call drops)

22. The NCA requires telecommunication operators to invest in infrastructure to improve the quality of service for consumers. The Act sets out several Quality of Service (QoS) standards that telecommunication operators must meet. For example, the Act requires telecommunication operators to ensure that their networks are available 95% of the time.

23. The NCA establishes a Universal Service Fund (USF) to provide financial assistance to telecommunications operators to help them expand their networks to underserved areas. The Act sets out several rules and regulations that govern the management and utilization of the USF.

2.2.4 India

On Quality of Service (call drops)

24. The Telecom Regulatory Authority of India (TRAI), the telecommunication regulatory body in India published the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015. This regulation was set to offer consumers one Rupee (INR 1) compensation for every call drop with a daily cap of 3 calls.

25. The regulation was challenged in court and the Supreme Court of India decided in 2016 to strike down penalties levied by the regulator on call drops. The Supreme Court said the following about the regulation, "We, therefore, hold that a strict penal liability laid down on the erroneous basis that the fault is entirely with the service provider is manifestly arbitrary and unreasonable.

26. Also, the payment of such penalty to a consumer who may himself be at fault, and which gives an unjustifiable windfall to such a consumer, is also manifestly arbitrary and unreasonable."

2.2.5 United States

27. The Telecommunications Act of 1996 (TCA) is the principal law governing the telecommunications sector in the United States. It has provisions allowing telecommunication operators to engage in other businesses, improving the quality of service for consumers making calls, and enhancing the management and utilization of the Universal Service Fund.

28. The TCA is a federal law that was enacted to promote competition and innovation in the telecommunications industry. The TCA has provisions for:

    i. Deregulating the telecommunications industry: The TCA repealed many of the restrictions that were imposed on the telecommunications industry by the 1934 Communications Act. This allowed telecommunications companies to compete more freely with each other.
    ii. Reducing the number of regulatory agencies: The TCA created the Federal Communications Commission (FCC) as the primary regulator of the telecommunications industry. This reduced the number of regulatory agencies that telecommunications companies had to deal with.
    iii. Promoting competition in the long-distance market: The TCA allowed long-distance companies to compete for the first time. This led to lower prices and better service for consumers.
    iv. Promoting competition in the local telecommunications market: The TCA required local telephone companies to open their networks to competition. This allowed other companies to offer long-distance, internet, and other services over the local telephone network.
    v. Protecting consumers: The TCA established the Universal Service Fund (USF) to ensure that all Americans have access to affordable telecommunications services. The USF is funded by a surcharge on all telecommunications bills.

On Universal Service Fund provisions

29. Section 254 of the Telecommunications Act of 1996 broadened the conventional objective of universal service by encompassing enhanced accessibility to telecommunications and cutting-edge services, such as high-speed Internet, for all consumers at fair, equitable, and economical rates.

30. Funding for the Universal Service Fund is derived from contributions made by telecommunications providers, which are determined through an assessment of their interstate and international end-user revenues. It is used to provide financial assistance to telecommunications operators to help them expand their networks to underserved areas.

31. The FCC has established four programs within the USF to implement the statute. The programs are:
    i. Connect America Fund for rural areas
    ii. Lifeline for low-income consumers including initiatives to expand phone service for residents of Tribal lands.
    iii. Schools and libraries (E-rate) - provides subsidies for Internet access and general telecommunications services to schools and libraries

iv. Rural health care - provides subsidies to health care providers for telehealth and telemedicine services.

PART THREE

3 OVERVIEW OF THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2022

3.1 Introduction of the Bill

32. Section 2 of the Kenya Information and Communication Act, 1998 (hereinafter referred to as the Act), defines both telecommunication systems and telecommunication services as—

"Telecommunication system" *means a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of—*

i. speech, music and other sounds;
ii. visual images;
iii. data;
iv. signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sound, visual images or data; or
v. signals serving for the activation or control of machinery or apparatus and includes any cable for the distribution of anything falling within (i) to (iv) above;

"Telecommunication service" *means any of the following—*

i. a service consisting of the conveyance by means of a telecommunication system of anything falling within subparagraphs (i) to (v) in the definition of "telecommunication system";
ii. a service consisting of the installation, maintenance, adjustment, repair, alteration, moving, removal or replacement of apparatus which is or is to be connected to a telecommunication system; or
iii. a directory information service, being a service consisting of the provision by means of a telecommunication system of directory information for the purposes of facilitating the use of a service falling within subparagraph (i) above and provided by means of that system;

33. Section 25 of the Act mandates the Communications Authority of Kenya to license a person to either operate a telecommunication system or provide telecommunication services. Further, section 83 of the Act requires the Communications Authority of Kenya to maintain registers for licenses issued under the Act. In line with this provision, the Communications Authority has published a telecommunications services registry in its website, which includes inter alia, Safaricom PLC, Airtel Networks Kenya Limited, Telkom Kenya Limited, Jamii Telecommunications Limited and Seacom Kenya Limited.

34. These telecommunication operators and services providers are licensed to either operate telecommunication systems or provide telecommunication services as described above. However, they also engage in other businesses which are not described as telecommunication services. These businesses include financial businesses such as mobile transfer services and mobile money lending services which are not regulated by the relevant regulators thereby leading to anti-competitive practices.