



KICTANet
The Power of Communities

MEMORANDUM ON

The Draft Kenya Information and Communication Act Amendment Bill, 2023

Submitted to:

Taskforce on the Review of the KICA, 1998
The Ministry of ICT, Innovation and Youth Affairs
Communications Authority of Kenya

By:

Kenya ICT Action Network (KICTANet)

8 May 2023

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8 May 2023,

The Chairperson,
Taskforce on the Review of the KICA, 1998
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Dear Sirs,

RE: Memorandum on Kenya Information and Communication Amendment Bill, 2023

Greetings from KICTANet.

KICTANet is a multistakeholder think tank for ICT policy and regulation. Its guiding philosophy encourages synergies for ICT policy-related activities and initiatives. KICTANet's overall mission is to promote an enabling environment in the ICT sector that is robust, open, accessible, and rights-based. Its strategic objectives during 2022 - 2024 are effective multistakeholder participation; promoting an enabling environment; building capacities and empowered communities; and institutional strengthening.

We submit this memorandum in response to the call for input on the Kenya Information and Communications Amendment Bill 2023. We have included herein a matrix presentation that captures our concerns, and highlights our proposals on relevant provisions of each of the Regulations for your review and consideration. We would be glad to provide further input and perspectives on the Regulations, as and when required.

We look forward to your response.

Regards,

Grace Githaiga

Kenya ICT Action Network (KICTANet)

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1. [Comments on the draft Kenya Information and Communication Amendment Bill 2023](#)

Clause	Provision	Issue/Concern	Proposal/ Recommendation	Justification for Proposal
7	23A. (1) The Authority shall formulate Guidelines on critical infrastructure assets.	It appears that perhaps a portion of this proposed amendment is missing, as it does not provide any guidance about what the Guidelines should cover, what actions (if any) might be mandated by the Guidelines, and what consultations and impact assessments should be undertaken in developing the Guidelines.	Delete provision or elaborate it in more detail.	<p>Elaborate the provision in more detail.</p> <p>The Ministry of ICT and Digital Economy should review and adopt the proposed draft Critical Infrastructure Bill, 2019. Such a bill would provide clarity and a legal framework for the management of critical information infrastructure.</p> <p>The government has already identified CII under Gazette Notice NO. 1043 of 31st January, 2022 under sections 9(1) and (2) of the Computer Misuse and Cybercrimes Act, 2018. However, there is limited guidance on aspects such as security standards, collaboration and information sharing, oversight and enforcement, and international cooperation.</p>

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9	Section 24 is amended in subsection (2) (b) by inserting the words “or express licence exemption”	Creation of express licence exemption that is novel to the regulatory regime	Delete the provision.	<p>There is need for due process and clarity of intention for the overhaul of existing regulatory processes to allow for express licence exemptions.</p> <p>The proposal or the Act in its entirety does not provide any criteria for the grant of exemptions to licensees under the Act. Granting express licence exemptions without due process, public consultation or any reasonable justification clouds the licensing process with opacity and introduces opportunities for corruption and favouritism in the licensing process.</p> <p>Secondly, such exemptions limit competition within the sector and could deny the state tax revenue in licence fees, and thus be contrary to the public interest especially in these difficult times when the state is looking for resources to finance the growth of the digital economy. Licences should be allocated fairly, transparently and in accordance with the law.</p>

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15	Amendment to section 27B of No. 2 of 1998. 15. Section 27B of the principal Act is amended— (a) by deleting subsection (1) and substituting therefor the following new subsection— Before a telecommunications operator sells a subscriber number or otherwise provides telecommunication services to a person, it shall obtain—	There is a lack of clarity on what the telecommunications operator should obtain prior to registering as a subscriber.	The section should provide clearly what the telecommunications body will need to obtain before offering telecommunications services to someone. Consideration should also be made to the provisions of the Data Protection Act, 2019 on the collection and processing of personal information.	Clarity and conciseness is important in achieving the objectives of the Bill. Consider implications of the Data Protection Act, 2019.
18	Amendment to section 35 of No. 2 of 1998 Section 35 of the principal Act is amended— in subsection (1) by inserting the words “possess, install” immediately after the word “shall”	Illegality of possession of equipment	Delete the word ‘possess’	Possession of radio equipment should not be illegal, as it may be for academic, scientific research or trade purposes. The Regulations could provide for the class of radio communication that does not require licences. The installation and establishment of a communications system without a licence should be the illegal act.

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27	<p>Section 27, amending section 46I of the Act inserting the following new paragraphs immediately after paragraph (j)—.</p> <p>(l) ensure content aired during watershed period is appropriately classified and suitable for the period;</p> <p>(m)ensure that programming on betting and gaming activities is duly authorized by Betting Control and Licensing Board</p>	<p>This poses a danger to the Freedom of Expression through imposition of intermediary liability for broadcasters</p>	<p>Delete (l) and (m)</p>	<p>The provision seeks to shift liability to companies and advertisers to broadcasters to ensure compliance by imposing intermediary liability provisions.</p> <p>The provision increases the cost of compliance and may make it difficult for broadcasters to operationally and sustainably comply with these new obligations in an already difficult business environment.</p>
27	<p>General Online Content (4) On provision of online content, all licensed broadcasters shall—</p> <p>(a) ensure that online content is safe, secure and does not contravene the provisions of any written law;</p>	<p>The proposed regulation of online content, that is already regulated</p> <p>Broad terminology</p>	<p>Delete Provision (4)</p> <p>Commission an evidence-based study to establish the nature and extent of harmful or problematic online content, which would then provide insights and recommendations.</p>	<p>1. The provision fails to define terms such as: ‘online content, ‘objectionable or prohibited content’, ‘cultural sensitivities’</p> <p>2. It is framed in a way too broad and open itself to subjective interpretation that would give wide discretion to the regulator when taking action against licensees.</p> <p>Licensees engaging in broadcast services are already regulated under various instruments:</p>

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	<p>(b) take into account trends and cultural sensitivities of the general public;</p> <p>(c) take corrective measures for objectionable or prohibited content;</p> <p>(d) ensure that prohibited content is removed immediately upon being directed by the Authority;</p> <p>(e) be responsible and accountable for the information published; and</p> <p>comply with any other regulatory requirements as may be directed.</p>			<ol style="list-style-type: none"> 1. Programming Code for Broadcasting Services in Kenya. These provide elaborate provisions on content regulation including hate speech, culture, child protection, complaints handling among other aspects. 2. Kenya Film Classification Board Co-regulation Framework for the broadcast and Over The Top (OTT) as well as the Video on Demand (VOD) services 3. Review KICTANet and ARTICLE 19 Joint Submission on the KFCB co-regulation Framework. We reiterate our position on this regulation to apply with respect to this provision.
28	<p>Amendment to section 46J of No. 2 of 1998.</p> <p>46J. If at any time the Authority determines that a Licensee — is in breach of the provisions of the Act or regulations made thereunder; is in breach of</p>	<p>Framing and phraseology of the section that appears to give the Authority unfettered and unchecked authority to arbitrarily revoke or suspend broadcaster licences.</p>	<p>Revise the provision to include due process safeguards for licensees.</p> <p>The following due process safeguards and guarantees should be required to be considered in the process of making decisions to terminate or suspend licences are made</p> <p>a. The provision should provide for adequate notice and hearing</p>	<p>Global best practice requires that due process considerations are entrenched in the law, to ensure adequate notice and hearing; right of appeal; burden of proof; proportionality; and transparency and accountability in the enforcement of such provisions.</p>

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	<p>the conditions of a broadcasting licence; or fails to utilize the assigned broadcasting frequencies within such period as the stipulated in the licence, the Authority may— issue an order to such a Licensee to correct the deficiency; impose a penalty on such company pursuant to the Act; or suspend or revoke the License.</p>		<p>including an opportunity to respond to the allegations before any enforcement action is taken. The notice should outline The provision should require the regulator to identify the specific conditions breached, the evidence supporting the allegations, and the potential consequences of the breach.</p> <p>b. The provision should provide the licensee a right to appeal to a court for any enforcement action taken by the regulator.</p> <p>c. The regulator should be required to conduct the process in an open, fair, transparent manner.</p> <p>d. The provision should place the burden of proof on the regulator to demonstrate a breach of licence conditions.</p> <p>e. The provision should require the proportionality of any enforcement action taken by the regulator to be matched with the seriousness of the breach and the potential harm to consumers and the public interest. It should also take into account the licensee's past record of compliance, the impact of the breach on</p>	

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			<p>consumers, and any mitigating factors.</p> <p>f. The regulator should be required to be transparent about its enforcement actions and the reasons for its decisions. This includes providing written reasons for any enforcement action taken and making information about the enforcement process publicly available.</p>	
30	Amendment to section 46O of No. 2 of 1998.	Need to define common carrier	Adapt the international definition of common carrier, if so intended	Under international broadcasting and telecommunications regulations, the definition of common carrier varies and this needs to be clarified under the definitions section

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47.	<p>47.Section 84W of the principal Act is amended -</p> <p>(a) by inserting the following paragraph immediately after paragraph 2(g)—</p> <p>(h) to provide for salient aspects of Presumption of dominance and factors to be considered in determining significant market power;</p> <p>(b) by deleting subsection 3;</p> <p>(c) in section 7 by deleting subsection (4) and substituting therefor with the following subsection—</p> <p>(4) The Authority may, by notice in the Gazette, declare a person or institution to be a “dominant telecommunications service provider” for the purposes of this Act.</p>	<p>Enhancement of the role of the Communication Authority in regulating Competition in the telecommunications sector.</p> <p>Elimination of the role of the Competition Authority in Competition regulation</p> <p>Elimination of due process safeguards in the presumption of domination</p> <p>Introduction of new considerations in the determination of market dominance</p>	<p>Delete provisions</p> <p>Introduce a clause requiring the Communications Authority to enter into a memorandum of understanding with the Competition Authority on the regulation of competition in the Sector.</p>	<p>Competition in the country is regulated under the Competition Act, with the Competition Authority with a mandate under section 9 of the Act. Section 23 and 24 of the Act provide elaborately for the criteria for the determination of dominant position and what constitutes abuse of that position.</p> <p>There should be clarity on what the Regulator will consider before presuming a telecommunications operator dominant based on objective criteria and what the consequences of such a declaration is.</p> <p>There is also a general concern that the clause will frustrate growth in the sector by punishing success.</p> <p>Additionally, the role and functions of the Competition Authority in matters of competition across all industries cannot be gainsaid.</p>

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	<p>(d) by deleting section (5) and substituting therefor with the following new subsection –</p> <p>(5) In making a declaration under subsection (4), the Authority shall consider –</p> <p>(a) the market shares of the telecommunications service provider being at least fifty per cent of the total revenue of the entire telecommunications market;</p> <p>(b) significant market power enjoyed by the telecommunications service provider; and</p> <p>(c) any other consideration the Authority may determine.</p>			
	Delete Section 29 of KICA on ‘Improper use of system’	Section found unconstitutional	Complete deletion of the section	The provision of the law has been found unconstitutional by the Courts in Petition No. 149 of 2015 Geoffrey Andare v Attorney

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				General & 2 others [2016] eKLR and is not in use by law enforcement authorities
	With regard to all regulations that apply to the Internet.	Because the Internet ecosystem within Kenya is very diverse (with bigger companies, small companies, non-profit organisations, and individuals, as well as the government) all contributing to its evolution, growth and success, it is important to undertaken robust public consultation on matter impacting the Internet.	<p>Internet-related regulations should only be issued after a process to gather input from experts and stakeholders in the private sector and civil society.</p> <p>Provide for a framework for public participation in ICT policy-making processes in Kenya. This is to ensure ICT policy making processes to be: open and Accessible, Diverse, Collaborative and Consensus Driven, Evidence Based, Transparent & Accountable</p>	<p>When CA is making significant decisions on the internet it should first hold strong public engagement with stakeholders to gather information (public participation)</p> <p>To ensure that the Internet in Kenya grows and evolves to benefit all parts of Kenya society, it is important for policies and regulations relating to the Internet to be based on broad consultations with stakeholders.</p> <p>Review KICTANet’s publication: Public participation: An Assessment of Recent ICT Policy Making Processes in Kenya, on the various thresholds and criteria for ensuring inclusive and multistakeholder ICT policy-making in Kenya.</p>

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	With regard to all regulations that apply to the Internet.	Because the Internet is different from prior communications networks, and is based on global cooperation and coordination for the smooth functioning of the Internet, many regulators elsewhere in the world make regulatory proposals that would have serious unintended consequences on Internet operations. To avoid harm to either the Internet within Kenya, or harms more broadly on the Internet, we urge that the legislation require that the Authority conduct – with public consultation – and “Internet Impact Assessment” to try to identify the likely impacts and consequences that may flow from a particular proposed regulation.	The authority should be required to do an internet impact assessment before adopting new regulation Provide a framework for conducting internet regulatory impact assessments	Internet-related regulations should only be issued after a public process to evaluate the impact on the Internet from a proposed regulation. To reduce unintended harms to the Internet, impact assessments should be undertaken. The Internet Society, a global non-profit organisation, provides a toolkit for undertaking Internet Impact Assessments that could be a useful guide. The impact assessment will guide the process and give tailored recommendations on the legislation.
	General	Penalties for breach of licence conditions	The Bill should include clear penalties for breach of licence conditions based on objective criteria	Penalties aid in the implementation and enforcement of the Act.
	General	Use of the word Commission	Amend to Authority where it appears	The Commission is now the Authority
	(i) “Develop a framework for facilitating and promoting national cyber readiness and resilience.	General	Elaborate the proposal and a specific legal framework for national cyber readiness and resilience.	The role of the Authority should be clearly articulated on cybersecurity and resilience. It only appears to be relevant to electronic transactions, yet cyber security and resilience are much broader that would require more thought.

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	<p>(3) The Authority may make Regulations under this section providing for penalties of up to one million shillings that shall be applicable to telecommunication equipment dealers, distributors, vendors, installers and any other relevant licence category.</p>	<p>Role of Communication Authority in law-making</p>	<p>Insert the words, “The Cabinet Secretary, in Consultation with” immediately before “The Authority.</p>	<p>The Authority is the Regulator and cannot as a matter of principle make regulations by itself, and still be responsible for the enforcement of the same laws.</p>
48	<p>Amendment of section 85 of No.2 of 1998. (4)The Authority in consultation with the National Treasury and on the recommendation of the Cabinet Secretary may waive spectrum fees where appropriate, to facilitate the provision of universal service in unserved and underserved areas of Kenya.</p>	<p>Waiver of spectrum fees</p>	<p>Delete provision</p>	<p>There is need for due process and clarity of intention to allow for express waiver of spectrum fees, and considerations for the same.</p> <p>The proposal does not provide any criteria for the grant of exemptions of spectrum fees. Granting waivers without due process, clear procedures, public consultation or any reasonable justification clouds the licensing process with opacity and introduces opportunities for corruption and favouritism in the granting of waivers. The current provision leaves such grants at</p>

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				<p>the discretion of the Authority and the Cabinet Secretary only.</p> <p>Also, such exemptions limit competition within the sector and could deny the state tax revenue in spectrum fees, and thus be contrary to the public interest especially in these difficult times when the state is looking for resources to finance the growth of the digital economy. Licences should be allocated fairly, transparently and in accordance with the law.</p>