THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2013

A Bill for

AN ACT of Parliament to amend the Kenya Information and Communications Act, 1998.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

Short title. 1. This Act may be cited as the Kenya Information and Communications (Amendment) Act, 2013.

Amendment of section 2. The Kenya Information and Communications Act, No. 2 of 1998, hereinafter referred to as the principal Act is amended in section 2—

(a) by inserting the following new definitions in their proper alphabetical sequence -

“cyber security” means the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber
environment and organisation user’s assets, which include connected computing devices, personnel, infrastructure, applications, services, telecommunication systems and the totality of transmitted and/or stores information in the cyber environment.

"former Commission" means the Communications Commission of Kenya immediately existing before the commencement of this Act;

"information and communication technology provider" means a provider engaged in providing technologies of collecting, storing, using or sending out information.

"market" means a product or group of products and a geographical area in which it is sold such that a hypothetical, profit maximising firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a ‘small but significant and non-transitory’ increase in price above prevailing or likely future levels;

"media" means broadcasting and other electronic media;

"media standards" means broadcasting and other
electronic media standards;

"significant market power" means a position of economic strength enjoyed by a licensee which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave independently of its competitors, customers and consumers.

(b) by deleting the words "and include those involving the use of computers or any telecommunication system" appearing in the definition of information and communication technologies.

(c) by deleting the definition of "Commission" and inserting in its proper alphabetical position, the following new definition of "Authority"—

"Authority" means the Communications Authority of Kenya established by section 3 of the principal Act;

(b) in the definition of "Minister" by deleting the word "Minister" and substituting therefor the words "Cabinet Secretary" in their proper alphabetical position, and consequently wherever else the word "Minister" appears in the Act;
3. The principal Act is amended by deleting the word “Commission” wherever it appears and substituting therefor the word “Authority”.

Amendment of section 2 of No. 2 of 1998.

4. Part II of the principal Act is amended by deleting the words “Communications Commission of Kenya” wherever they appear together and substituting therefor the words “the Communications Authority of Kenya”.

Repeal and replacement of section 5A of No. 2 of 1998.

5. The principal Act is amended by inserting the following new subsection (3) therefor after subsection (2)—

Independence of the Authority.

5A. (3) The Authority shall be independent and free of control by government, political or commercial interests in exercise of its powers and in the performance of its functions.

(2) In fulfilling its mandate, the Authority shall—

6. The principal Act is amended by deleting section 5B.

Repeal of section 5 of
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No. 2 of 1998.

Repeal and substitute section 6 of No. 2 of 1998 with the following new sections:

6. (1) There shall be a Board of Directors of the Authority which shall consist of—

(a) a chairperson, not being a public officer and possessing qualifications as set out in subsection (2), appointed by the President in accordance with section 6B;

(b) seven persons, not being public officers, possessing qualifications as set out in subsection (2), appointed by the Cabinet Secretary in accordance with section 6B;

(c) the Principal Secretary in the ministry for the time being responsible for communications;

(d) the Principal Secretary in the ministry for the time being responsible for finance; and
(c) the Director General who shall be appointed by the Board through a competitive recruitment process.

(2) To be qualified for appointment as a member of the Board under subsection (1)(a) and (b), a person shall—

(a) be a citizen of Kenya;

(b) be in possession of-

(i) a degree qualification from a university recognized in Kenya, in either law, telecommunications, computer science or information and communication technology, economics, broadcasting, postal regulation, commerce or any other relevant field; and

(ii) demonstrable experience in the relevant sector for a period of not less than ten years in the case of the chairperson and five years in the case of any other member; and

(c) satisfy the requirements of Chapter Six of the Constitution.

(3) Notwithstanding section 6 (2) (b), a person
shall be qualified for appointment as a member of the Board, if such person not being a degree holder, can demonstrate a distinguished career of not less than twenty years in the information, communication and technology sector.

Disqualifications for appointments

6A. A person shall not be eligible for appointment as a member of the Board under section 6 (a) and (b) if that person—

(i) has in the last six months immediately preceding the appointment had personal direct or indirect commercial interest in the sector regulated under this Act;

(ii) is an office-bearer or employee of any political party;

(iii) is an un-discharged bankrupt;

(iv) is suffering from mental incapacity as defined under the Mental Health Act;

(v) has at any time been convicted of an offence punishable by imprisonment for six months or more;

(vi) has at any time been convicted of an offence under this Act; or

(vii) has at any time, on account of abuse of office, resigned or been removed
from office.

**6B.** (1) The Cabinet Secretary shall-

(a) within seven days of the declaration of a vacancy in the Board invite applications for the position by advertising through the Gazette and two daily newspapers of national circulation; and

(b) within fourteen days after receipt of applications submitted under subsection (1) (a)

(i) consider the applications to determine their compliance with the provisions of the Constitution and this Act;

(ii) publish a notice of the applicants recommended for appointment;

(c) in the absence of any objection from the public, the Cabinet Secretary shall, within seven days of the end of the notice period in subsection 1 (b) (ii) —

(i) in the case of the chairperson forward the names to the President who shall appoint one among them; or

(ii) in the case of a member or members make the appointment.

**6C.** (1) The term of office of the members of
office and resignation. The Board appointed under section 6 (a) and (b) shall be three years.

(2) A member of the Board may be reappointed for one further term of three years, subject to procedures set out in section 6B of this Act.

(3) The Board shall be properly constituted notwithstanding a vacancy in its membership.

Removal from office. 6D. (1) A member of the Board (other than an ex officio member) may only be removed from office for—

(a) gross misconduct, whether in the performance of the member’s functions or otherwise;

(b) absence from three consecutive meetings of the Authority without permission of the Board, except for good cause shown;

or

(c) being disqualified as contemplated in 6A.

(2) A person desiring the removal of the chairperson or a member of the Board on any ground specified in subsection (1) may present a complaint under oath to the Cabinet Secretary setting out the alleged facts constituting that ground.

(3) The Cabinet Secretary shall, within seven days, consider the complaint and if satisfied that it discloses a ground under subsection (1)-
(a) forward the complaint together with his recommendations to the President in the case of a chairperson; and
(b) make a determination in the case of a member of the Board.

6E (1) The Authority shall establish a Broadcasting Standards Committee, which shall be responsible for developing standards for broadcasting content and regulating and monitoring compliance of those standards
(2) In addition to the Committee established under subsection (1), the Authority may-
(a) establish other committees as may be deemed necessary from time to time;
(b) co-opt into the membership of any committee established under this section, other persons whose knowledge and skills are necessary for the proper performance of the Authority; and
(c) invite any person to attend any of the meetings of the committees and to participate in their deliberations.
(3) A person co-opted or invited under this section shall have no right to vote at any meeting of such a committee.

Amendmen 8. Section 11 of the principal Act is amended by inserting the
t of section following new subsection immediately after subsection (2)—
11 of No. 2
of 1998.

(3) The Director-General shall be appointed for a
term of four years and may be eligible for
reappointment for one further term of four years.

Amendmen 9. Section 23 of the principal Act is amended—
t of section
23 of No. 2
of 1998.

(a) in subsection (1) by deleting the words
"telecommunication services and in
particular, emergency, public payphone
and directory information services"
appearing immediately after the word
such and substituting therefor the words
"basic communication products"
(b) and services";
(c) in subsection (2) by—

(i) deleting the word
"telecommunications' appearing in
paragraphs (a) and (b) and
substituting therefor the words
"basic products and services";

(ii) deleting the word
"telecommunications" appearing in
paragraph (c) and substituting
therefor the word
"communications";

(iii) deleting paragraph (d);

(iv) inserting a new paragraph
11
immediately after the last paragraph thereof as follows—

(e) “have regard to the values and principles of the Constitution”.

Amendment 11. The title to Part V of the principal Act is amended by inserting the words “AND COURIER” between the words “POSTAL” and “SERVICES”.

Amendment 12. Section 46D of the principal Act is amended in subsection (1) by—

(a) inserting new paragraphs after paragraph (c) as follows—

(d) is an office-holder of a political party;

(e) a public officer or a state officer.

(b) renumbering paragraph (e) as paragraph (f).

Amendment 13. Section 46H of the principal Act is amended in subsection (2) (c) by inserting the words “or listening to” immediately after the word “watching”.

Amendment 14. Section 46J of the principal Act is amended by deleting paragraph (c) and substituting therefor the following new paragraph (c) and substituting therefor the following new paragraph (f).
2 of 1998 paragraph—

(c) fails to utilize the assigned broadcasting frequencies within such period as the Authority shall stipulate in the licence.

Amendment of section 46S of No. 2 of 1998

16. Section 46S of the principal Act is amended by repealing section 46S.

Amendment to section 48 of No. 2 of 1998

17. Section 48 of the principal Act is amended in subsection (1) by deleting the word “shall” and substituting thereof the words “may”.

Amendment to section 50 of No. 2 of 1998

18. Section 50 of the principal Act is deleted and substituted therefore with the following new section—

The Authority may designate the Postal Corporation of Kenya to be the public postal licensee and by notice in the Gazette, assign to it, any of the powers, duties and functions of the Authority under this Part
Amendment
of section 83A of No. 2 of 1998.

19. Section 83A of the principal Act is amended in subsection (1) by inserting after the word shillings, the words “1% of the annual gross turnover of the offending licensee for every calendar quarter or part thereof in which the offence is continuing, whichever is higher”.

Amendment of heading to Part VIA of No. 2 of 1998.

20. The principal Act is amended by inserting the words “AND CYBER SECURITY” in the heading to Part IVA.

Amendment of section 83C of No. 2 of 1998.

21. Section 83C of the principal Act is amended—

(a) by inserting the words “and Cyber security” after the word transaction.

(b) by inserting a new paragraph immediately after paragraph (f) as follows—

(g) “promote and facilitate efficient management of critical internet resources.”

(h) “develop a framework for facilitating the investigation and prosecution of cybercrime offenees”.

(c) the Cabinet Secretary may in consultation with the Authority make regulations with respect to
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cyber security.

22. The principal Act is amended by deleting sections 83U and substituting therefor the following new section –

“The Cabinet Secretary may in consultation with the Authority make new regulations under this Part.”

23. The principal Act is amended by deleting sections 83V to 84I of No.2 of 1998, both sections inclusive.

24. Section 84K of the principal Act is amended—

(a) by deleting paragraph (c);

(b) in paragraph (d) by deleting the word “Commission” and substituting therefore the word “Fund”.

25. The principal Act is amended by deleting section 84L.

26. The principal Act is amended by deleting section 84M.
section
84M of
No.2 of
1998.

Repeal of 27. The principal Act is amended by deleting section 84N.
section
84N of
No.2 of
1998

Amendment 28. Section 84P of the principal Act is amended by deleting
paragraphs (b) and (c) and substituting therefore the following
new subsections
(b) operations of the fund;
(c) mechanisms for accessing the Fund

Amendment 29. The principal Act is amended by deleting section 84S (2)
(a) in paragraph (a) by deleting the words “which
unfairly excludes or limits competition between
such operators and any other party”;
(b) by deleting paragraph (c) and substituting
therefor the following new paragraph—
(c) the effectuation of any anti-
competitive conduct in the
communications sector;
Amendments

30. Section 84T (6) of the principal Act is amended—

(a) by substituting the words “is competing unfairly” wherever it appears with the words “has engaged in an anti-competitive conduct”.

(b) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) require the licensee to pay a fine not exceeding the equivalent of ten percent of the annual gross turnover of the preceding year of the licensee in Kenya, for each financial year that the breach persists.

(c) by inserting the word or after paragraph (c)

(d) by inserting a new paragraph immediately after paragraph (c) as follows—

(c) impose any other lawful remedial measure to redress this offence.

Amendments

31. Section 84W of the principal Act is amended—

(a) by deleting the word
84W of No.2 of 1998.

"telecommunication service" wherever it appears and substituting therefor the word "information and communication technologies"

(b) in the first subsection (2) by—

(i) deleting paragraph (g);

(c) by renumbering the subsections appropriately.

inserting the following new paragraphs immediately after the last paragraph thereof—account separation and regulatory audits;

(d) in subsection (5)

(i) in paragraph (a) appropriately; by deleting the expression "twenty five percent of the total revenue of the entire telecommunications market" and substituting therefor the expression "fifty percent of the total revenue of the relevant market segment".

(ii) by deleting paragraphs (b), (c) and (d);

(c) by inserting the following new paragraphs—

(b) significant market power enjoyed by the telecommunications service
provider; and
(c) any other consideration
the Authority may
determine.

32. Section 85 of the principal Act is amended -
(a) by repealing subsection (1) and substituting therefor the
following new subsection-

(1) Subject to subsection (3), an information and
communication technology provider may, with the
consent in writing of the owner or occupier of any
land, and subject to such terms and conditions as
may be agreed upon between the provider and the
owner or occupier, place or maintain under, over,
along, across, in or upon such land, any apparatus,
installed or used in accordance with a licence.

(b) by deleting the words “telecommunication operator”
wherever they appear together and substituting therefor the
words “information and communication technology provider”

33. Section 85A of the principal Act is amended by inserting the
following new subsection

(3) the Cabinet Secretary may in consultation with the
Authority make regulations with respect to infrastructure
sharing.

34. Section 90 of the principal Act is amended in subsection (4)
by deleting the words “subsection (3) and substituting therefor
the words “subsection (2).
of 1998.

Amendment of section 93 of No.2 of 1998.

35. Section 93 of the principal statute is deleted and substituted by the following new subsection:
access to information and restrictions on disclosure of information held by the Authority shall be implemented pursuant to legislation implanting Article 35 of the Constitution.

Amendment of section 102 of No.2 of 1998.

36. Section 102 of the principal Act is amended by—

(a) deleting subsection (1) (a) and substituting the following new subsection—

(1) (a) A chairperson who shall be a person competent to be appointed a Judge of the High Court or who is an Advocate of the High Court of not less than ten years.

(b) deleting subsection (2) and substituting the following new subsection—

(2) The chairman of the Tribunal shall be appointed by the Judicial Service Commission.

The provisions set out in the Second Schedule shall have effect in relation to the membership, procedure and sittings of the Tribunal.

(b) inserting the following new subsection (5)
immediately after subsection (4)—

(5) The quorum for the conduct of the business of the Tribunal shall be three members.

37. The principal Act is amended by—
(a) in subsection (2) (b), by deleting the word “four” and substituting therefor the words “nine”
(b) by inserting the following new subsection (4) after subsection (3) —

(4) The Universal Service Advisory Council shall—

(a) advise the Authority and provide strategic policy guidance for the administration and implementation of the Universal Service Fund; and

(b) perform any other functions assigned to it by the Board and the Cabinet Secretary from time to time and as necessary for the implementation of these Regulations.
38. The principal Act is amended by inserting the following new sections immediately after section 103—

104. (1) The Authority shall pursuant to Article 157 (12) of the Constitution have the power to undertake prosecution of any offence under this Act.

(2) An officer duly authorised in writing by the Authority may conduct a prosecution for an offence under this Act.

Transition 105. The transition provisions set out in the Sixth Schedule to this Act shall have effect with respect to the Board, Universal Service Advisory Council, staff assets, rights, liabilities, obligations, agreements and other arrangements existing at the commencement of this Act.

39. The First Schedule to the Principal Act is amended by deleting subsection I(1);

First Schedule to No. 2 of 1998.

40. The Second Schedule to the principal Act is amended by deleting paragraph 1.

Second Schedule to No. 2 of
41. The Fourth Schedule to the principal Act is amended by-
   (a) deleting section 6.
   (b) inserting a new section 12

   12. The Council shall prepare and submit to the Board reports on its operations on a quarterly basis.

42. The Fifth Schedule to the principal Act is amended at
   (a) section 2 by substituting the words “prior to the commencement of this Act” and replacing with the words “or the former Commission under the Kenya Information and Communications Act, Cap 411A”
   (b) section 3 by substituting the words “at the date of commencement of this Act” and replacing with the words “under the Kenya Information and Communications Act, Cap 411A”
   (c) paragraph (3) (a) by substituting the words “six months” with the words “one year”
   (d) paragraph (3) (b) by substituting the words “six months” with the words “one year”
SIXTH SCHEDULE (s. 104)

TRANSITIONAL PROVISIONS

1. On the commencement of this Act, the members of the Board of Directors and the Universal Service Advisory Council of the former Commission shall continue in office for the remainder of their terms, and no appointments may be made until the number of such members of the Board of Directors or the Universal Service Advisory Council members falls to less than the number required by this Act for the Board of Directors of the Authority.

2. Any person who was an employee of the former Commission immediately before the commencement of this Act shall upon such commencement be deemed to be an employee of the Authority on the same terms and conditions of service.

3. All property, assets, rights, liabilities, obligations, agreements and other arrangements existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the former Commission, shall upon the commencement of this Act, be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Authority to the same extent as they were enforceable by or against the former Commission before the commencement of the Act.

4. Where the transfer of any property transferred to or vested in the Authority under subsection (1) is required by any written law to be registered, the Authority shall, within six months from the date of commencement of this Act and amendments thereto or within such other period as any relevant law may prescribe, apply to the appropriate
registering authority for the registration of the transfer and thereupon the registering authority shall, at no cost to the Authority or any person by way of registration fees, stamp or other duties—

(a) make such entries in the appropriate register as shall give effect to the transfer;

(b) where appropriate, issue to the Authority a certificate of title or other statutory evidence of ownership of the property or make such amendments on such certificates or in the appropriate register as may be necessary; and

(c) make any necessary endorsements on such deeds or other documents as may be presented to such registering authority relating to the title, right or obligation concerned.
MEMORANDUM OF OBJECTS AND REASONS

The Bill seeks to amend the Kenya Information and Communications Act in order to among other things, align it with the Constitution of Kenya, 2010. In this respect the Bill seeks to provide for a statutory framework governing the communications sector in order to conform to, and satisfy, the requirements of the Constitution of Kenya, 2010.

It is also proposed to make a raft of amendments to enable better regulation of the sector by providing for the handling of new regulatory challenges in the communications sector due to rapid technological changes. It is proposed to rename the Communications Commission of Kenya to Communications Authority of Kenya so as to better reflect the regulatory function of the current Commission.

The Bill seeks to provide a framework for dealing with issues relating to competition and consumer protection in the sector.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the .....................day of ........................., 2013.

Dr. Fred Matiang’i
Cabinet Secretary
This version of the Bill has been signed and issued by the Prof. Patricia Kameri-Mbote, SC, Chairperson, Working Group on the review of the ICT Regulatory Framework after consideration of comments received at the Stakeholder Consultation Forum held on July 9, 2013 at the KCB Leadership Training Center, Karen.

[Signature]

P. Kameri