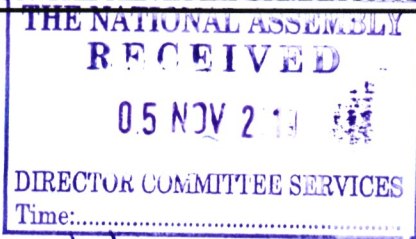


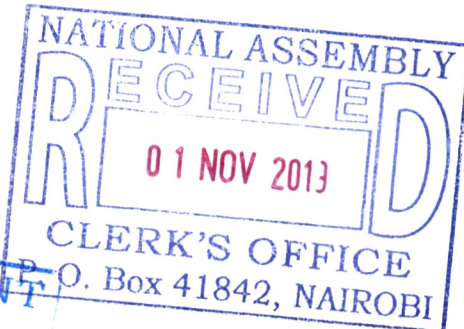
MEMORANDUM ON THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2019 (No. 20)



CODE-IP Trust
Box 75474-00200
City Square,
Nairobi.

31 October, 2019

Mr. Michael Sialai Rotich, EBS
The Clerk,
National Assembly of Kenya
Parliament Buildings
PO Box 41842-00100
NAIROBI, KENYA



Dear Mr. Sialai,

MEMORANDUM ON THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2019 (No. 20)

Reference is made to above media Notice inviting members of the public to submit representations on the Kenya Information and Communications Bill, 2019 (No. 20). We thank the Departmental Committee on Communication Information and Innovation for the invitation to provide input and appreciate being consulted on the law currently under House deliberations.

The Universal Service Fund established by the Kenya Information and Communication Act, 2009 was a welcome intervention to ensure high quality telecommunications services are available for all citizens throughout the country. As the nervous system is to the body, so is communication to the economic and social development of the nation and there importance of the Fund could not be emphasized enough. Commend the establishment of the Fund considering the role of government, here ensuring communication rights for all, unlike private companies primary profit motive. The Fund was therefore meant initiate and catalyse alternative-to-profit-driven telecommunications corporations motivation for universal coverage.

As of 2017-2018 the Fund had accumulated KShs 9.1 billion¹ and among its governance questions raised include;- why had so much money accumulated into the Fund without being directed to objectives of the fund? Had the Fund turned into a revolving door for the very private companies to draw back their contribution? Why no community-benefit telecommunication services models had been developed by the Authority? Why local content development had been excluded from benefiting from the fund, especially considering its youth self-employment jobs creation potential?

In our considered opinion, the internationalization of the Fund has been sub-optimal and lacking innovative new approaches to ensure universal services. We commend Parliament for revisiting the Fund with a view to re-railing its path to its original direction and purpose. And therefore hereby submit our Memorandum of Views for your consideration.

Respectfully submitted,

Alex Gakuru
Executive Director,
CODE-IP Trust

1 'Connecting Kenyans: Impact of Improved Network Coverage in Turkana and Marsabit Counties' The Chamwada Report broadcast recording available at <https://www.youtube.com/watch?v=NniZ1z9P28E> (viewed 31 October, 2019)

MEMORANDUM ON THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2019 (No. 20)

Clause	Title	Phrased	Proposal	Rationale
25A(1)(5)	Licensee may operate other businesses	The Commission , shall, within six months of the coming into force of this section and thereafter annually, report to Parliament on the extent to which this section has been implemented.	The Authority , shall, within six months of the coming into force of this section and thereafter annually, report to Parliament on the extent to which this section has been implemented.	Align institutional definition with that on Kenya Information and Communications Act, 2013
84J(2)(f)		Support capacity building and promote innovation in information and communications technology services.	Fund public capacity building and national innovation in information and communications technology services.	Avoid “ support ” and “ promote ” legal interpretations implementation challenges and specify funding to public preventing the Authority utilising funds internally.
Insert 84J(2)(g)		Proposed new	Fund local content development grants to competitive bid applicants	To promote quality local content, national identity and youth job creation, for example, local film making, music, arts and culture by local creative industries and potentially exported thereafter.
4		“The Commission shall in each financial year submit to the National Assembly a report indicating –”	“The Authority shall in each financial year submit to the national Assembly a report indicating –”	Align institutional definition with that on Kenya Information and Communications Act, 2013
4(b)		“The activities the Commission undertook to implement the objectives of the Fund; and”	“The activities the Authority undertook to implement the objectives of the Fund; and”	Align institutional definition with that on Kenya Information and Communications Act, 2013

5		The Universal Fund shall be utilised by the Commission as follows –”	The Universal Service Fund shall be utilised by the Authority as follows –”	<ul style="list-style-type: none"> • Universal Service Fund established under Section 84J of the Act • Align institutional definition with that on Kenya Information and Communications Act, 2013
5(a)		“ six-percent of the Fund shall be used for ensuring the availability of telecommunication services to all consumers, including those in low income and rural areas”	“ sixty-percent of the Fund shall be used on provisioning of telecommunication services to all consumers, including those in low income and rural areas”	<ul style="list-style-type: none"> • sixty-percent (typographical error?) • Provisioning: Emphasise the <i>action of providing supplying telecommunication services</i> as opposed to more generic “<i>ensuring the availability</i>” – which could be interpreted to mean Authority staff spending 60% of the Fund travelling around the country with their mobile phones, internet devices, radios and television sets to map coverage then hold series of meetings services providers asking them when, if ever, they will cover the whole country
5(b)		“twenty percent of the Fund shall be used for increasing access to telecommunications and advanced services in schools, libraries and rural healthcare facilities”		<ul style="list-style-type: none"> • No comment,
5(c)		“ten percent of the Fund shall be used for ensuring increased nationwide access to advanced telecommunication services; and”	“ten per cent of the Fund shall be used for local content development grants, and;”	<ul style="list-style-type: none"> • Section 5(a) already provides for sixty percent of the Fund to increase access to telecommunications to all consumers, nationwide. • It would be a squander by Authority to promote obsolete, primitive, and

				<p>archaic telecommunication services rendering this 5(c) redundant.</p> <ul style="list-style-type: none"> • Create jobs to tens of thousands of local content developed youth and other self-employed local creative industries entrepreneurs. • Align institutional definition with that on Kenya Information and Communications Act, 2013 • Align institutional definition with that on Kenya Information and Communications Act, 2013 • Disaggregate offences committed by implementers from those Fund beneficiaries • a maximum fine of two million shillings and or imprisonment for a term not exceeding two years or both is no more than a slap on the wrist of dangerous criminals. • The Fund accumulates billions of Kenya shillings therefore increasing penalties for Fund abuse is an appropriate penalty • Requiring the full refund of ill-gotten gains is a just deterrent from Fund abuse
5(d)	<p>“ten percent of the Fund shall be used for furthering the other objectives of the Fund as the Commission may determine.”</p> <p>A person who fails to utilize or utilises the Universal Fund in a manner that does not promote the objectives of the Fund, commits an offence and shall be liable upon conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years of to both.</p>	<p>“ten percent of the Fund shall be used for furthering the other objectives of the Fund as the Authority may determine.”</p> <p>6 (a) A person who fails to utilize the Universal Service Fund commits an offence and shall be liable upon conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years or both.</p> <p>6 (b) A person benefiting from the Fund contrary to established objectives of the Universal Service Fund, commits an offence and shall be liable upon conviction to refund the full amount, a fine not exceeding twenty million shillings or an imprisonment for a term not exceeding four years or both.</p>		
6	<p>A person who fails to utilize or utilises the Universal Fund in a manner that does not promote the objectives of the Fund, commits an offence and shall be liable upon conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years of to both.</p>			

MEMORANDUM ON THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2019 (No. 20)

Dated: 31 October, 2019

Prepared by;

Content Development & Intellectual Property (CODE-IP) Trust
Box 75474-00200 City Square,
Nairobi.

Submitted to:

The Clerk,
National Assembly of Kenya
Parliament Buildings
P. O. Box 41842-00100
NAIROBI, KENYA

For the attention of:

Departmental Committee on Communication Information and Innovation,
The National Assembly, Twelve Parliament of Kenya,
Nairobi, Kenya

Signed by:

Alex Gakuru
Executive Directors
CODE-IP Trust

REPUBLIC OF KENYA



**THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – THIRD SESSION**

In the Matter of consideration by the National Assembly –

1. The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 20)
2. The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 61)

SUBMISSION OF MEMORANDA

Article 118(1) (b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Standing Order 127 requires the Departmental Committee to which a Bill is committed to facilitate public participation and take into account views and recommendations of the public when the Committee makes its report to the House.

The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 20) seeks to amend the Kenya Information and Communications Act Cap 411A to enable persons operating a telecommunication system or providing a telecommunication service to engage in any other business and provide for the separation of such other businesses from the telecommunication business.

The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bills No. 61) main objective is to amend the Kenya Information and Communications Act to provide for regulation of use of social media platforms.

The two Bills underwent First Reading as stipulated in the Standing Orders of the National Assembly and has been committed to the Departmental Committee on Communication, Information and Innovation for consideration and reporting to the House.

Pursuant to the provisions of Article 118(1) (b) of the Constitution of Kenya and Standing Order 127(3), the Committee invites the public to submit representations they may have on the said Bill.

The Committee will also be undertaking public hearings in the following counties.

	COUNTY	VENUE/TOWNS	DATE
1.	Kirinyaga	Baricho Sub County Hall	8 th November, 2019
2.	Nairobi	County Hall, Parliament Buildings	11 th November, 2019

The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to clerk@parliament.go.ke; to be received not later than Thursday, 31st November, 2019 at 5.00pm. The Bill may be accessed on the Parliamentary website – www.parliament.go.ke

**MICHAEL R. SIALA, EBS
CLERK OF THE NATIONAL ASSEMBLY**



Executive Summary

The Kenya Information and Communications (Amendment) Bill, 2019 (National Assembly Bill Number 20) should be adopted partially, some clauses amended, and some deleted, as shown in the matrix.

The new amendments to KICA proposed by Hon. Elisha Odhiambo, MP, published on March 15th, 2019, seeks to add a new section 34A on the compensation of telecommunications consumers for call drops; a new section 25A on splitting telecommunications businesses, and section 84J prescribing how the Universal Service Fund (USF) should be used.

Clause	Provision	Proposa l	Justification
25A. (1)	In addition to operating a telecommunication system or providing a telecommunication service as may be specified in the license granted under section 25, a person may engage in any other business provided that such a person shall -		
(a)	obtain the relevant licences from the respective regulators of any industry or sector ventured into;	Keep the section	There is already a framework in place for licenses in any industry, and if a telco gets into that business it would need to apply for that license anyway; for example, if the telco started selling medicines online, then it would need the relevant pharmaceutical license.

<p>(b)</p>	<p>legally split or separate the telecommunication business from such other business; and</p>	<p>This section should be deleted .</p>	<p>If the telecommunications company creates a separate company 100% owned (and controlled and managed) by itself, then what is the point of splitting it? It is just a department or subsidiary of the company. Dictating how a company runs its strategy will add bottlenecks, increase operational cost, and stifle it.</p> <p>Telecommunication companies have the unique capability to reach every single person in this country, they should be encouraged to do that rather than be hindered. Right now e-Health, e-Agriculture, etc are still really under-developed in this country. They need more support and stronger players to push in that space and expand the economy.</p> <p>Separating a business will not be enough because anti-competitive practices have to be checked even across different business entities owned by the same holding company.</p> <p>Successful companies should be supported to grow and compete at the global stage; not be targeted for being diligent, hardworking, and executing their strategy properly.</p>
-------------------	---	---	---

(c)	Provide separate accounts and reports in respect of all business carried out.	This section should be deleted.	As per the above reasons
(2)	A person who provides any service without the relevant licence under this section commits an offence	Delete this section	It is expected that any other related business needs an operating licence as per available regulations.
(3)	A person convicted of an offence under this section shall, on conviction be liable to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding two years, or both.	Delete this section	The offence being committed should be clear enough since we have recommended deleting of clause 25A. 1(b), 1 (c)
(4)	A person who, at the commencement date of this section, was operating a business that does not comply with the requirements of this section shall ensure that the business is compliant within six months of the coming into force of this section.	Delete this section	
(5)	The commission, shall, within six months of the coming into force of this section and thereafter annually, report to Parliament on the extent to which this section has been implemented.	Delete this section	

34A. (1)	A licensee is liable to credit a consumer who initiates a call that gets cut out after a connection by Kenya Shillings ten worth of airtime for each call drop within its network for a maximum of three call drops per day	<p>Ammend this section. Have the figure as a percentage of the cost of the call.</p> <p>Have a clause to protect other Telecommunications Service consumers. Telecommunication companies offer more than just phone calls. What happens to the other services (like internet access, satellite communication, mobile money services) when the Service Level Agreement has not been met?</p>	<p>There need to be a rationale for the penalty of Kenya Shillings 10 worth of airtime. It is not clear how that figure was arrived at.</p> <p>Currently, there is a <u>subsidiary clause</u> by the regulator where telecommunications companies are penalized a percentage of their profit for the poor quality of service. "The CA levies a fine equal to 0.1 percent of the gross annual revenue of a firm for failing to meet standards." This fund goes directly to CA, and not the affected end-users. This new provision is better because the refund is given to the consumers, rather than to CA.</p>
34A. (2)	A licensee shall not be liable to compensate a consumer, where a call gets cut out due to third party interference on the licensee's connection lines, inevitable accident or <i>force majeure</i> .	Keep this section	
84J (2)	The objective and purpose of the Fund shall be to -		

(a)	promote the availability of quality services at just, reasonable and affordable rates for all consumers;	This section should be deleted	The objective of the USF is very clear and the fund should be used to fulfill those objectives. CA has a whole department that can address quality control issues hence we don't need to legislate this in USF. The USF should not be used to address quality controls where CA can fund through its budget lines.
(b)	increase nationwide access to advanced telecommunications service;	Ammed this section	This section should be ammended to ensure there is proportionate allocation of the USF to expand coverage in underserved regions, and ensure that there is equitable distribution of resources across the country.
(c)	advance the availability of such services to all consumers, including those in low income, and rural areas;	Keep this section	
(d)	increase access to telecommunications and advanced services in schools, libraries and rural health care facilities;	Keep this section	

(e)	provide equitable and nondiscriminatory contributions from all providers of telecommunications services to the fund supporting universal service programs; and	Keep this section	
(f)	support capacity building and promote innovation in information and communications technology services	Keep this section	
(4)	The Commission shall in each financial year submit to the National Assembly a report indicating -	Keep this section	The amendment should be tailored towards demanding more transparency from the Authority, tightening reporting standards and returns to Parliament.
	(a) the total amount of money that was collected for the respective financial year;	Keep this section	
	(b) the activities the Commission undertook to implement the objectives of the Fund; and	Keep this section	There should be more transparency on outcomes of Universal Service Advisory Council board meetings and how the USF is spent; the CA's quarterly statistics are the perfect opportunity to share on the progress of how many places have been connected, and how many people have been using the network/services; without the need to wait for annual reports.

	(c) the extent to which the objective of the Fund were achieved	Keep this section	
(5)	The Universal Fund shall be utilized by the Commission as follows -	Keep this section	This clause is highly welcomed. The law must prescribe in the narrowest terms possible on what the USF should be used to achieve to avoid abuse of the fund. In the absence of transparency and uncertainty on how the USF needs to be apportioned, it leaves the utilization of the fund to the vagaries of people who may or may not have the interest of the country at heart.
	(a) six-percent of the Fund shall be used for ensuring the availability of telecommunication services to all consumers, including those in low income and rural areas;	Keep this section	
	(b) twenty percent of the Fund shall be used for increasing access to telecommunications and advanced services in schools, libraries and rural health care facilities.	Keep this section	

	(c) ten percent of the Fund shall be used for ensuring increased nationwide access to advanced telecommunications services; and	Keep this section	
	(d) ten percent of the Fund shall be used for the furthering the other objectives if the Fund as the Commission may determine.	This section should be deleted .	10% is a big percentage to be allocated as miscellaneous expenses. Instead of expanding the uses of the USF, we should first utilize the USF to meet the original objectives of increasing penetration levels. Let us dedicate USF to its original purpose until everyone is online.
(6)	A person who fails to utilize or utilizes the Universal Fund in a manner that does not promote the objectives of the Fund, commits an offence and shall be liable upon conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years or to both.	Keep this section	

