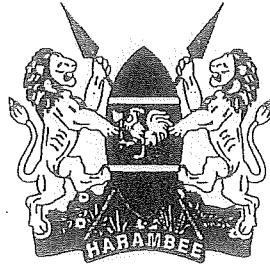


Approved for tabling

REPUBLIC OF KENYA

BN
SNA
5/3/19



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION
AND INNOVATION

REPORT ON THE INQUIRY INTO LEGISLATIVE AND REGULATORY GAPS
AFFECTING COMPETITION IN THE TELECOMMUNICATIONS SUB-SECTOR

DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

MARCH, 2019

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II—Correspondence by the Committee.

III—Advertisement inviting submission of Memoranda.

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LIST OF ABBREVIATIONS AND ACRONYMS

Airtel	Airtel Kenya Limited
AML	Anti-Money Laundering (AML)
BTS	Base Transceiver Station
CA	Communications Authority
CAK	Competition Authority of Kenya
CBK	Central Bank of Kenya
CCK	Communications Commission of Kenya
COFEK	Consumer Federation of Kenya
CSP	Content Service Provider
GSM	Global System for Mobile communications
ICANN	Internet Corporation for Assigned Names and Numbers
ICT	Information and Communications Technology
IEEE	Institute of Electrical and Electronics Engineers
ITU	International Telecommunications Union
JTL	Jamii Telecommunications Limited
KICA	Kenya Information and Communications Act, 1998
KPTC	Kenya Posts and Telecommunications Company
Liquid Telecom	Liquid Telecommunications (Kenya) Limited
LTE	Long-Term Evolution
LRAIC	Long-Run Average Incremental Cost
MNO	Mobile Network Operator
MTR	Mobile Termination Rates
MVNO	Mobile Virtual Network Operator
NFP	Network Facilities Provider

NOFBI	National Optic Fiber Backbone Infrastructure
QoS	Quality of service
Safaricom	Safaricom PLC
SMS	Short Message Service
STK	Sim Toolkit
TKL	Telkom Kenya Limited
KYC	Know-Your-Customer
USF	Universal Service Fund
USSD	Unstructured Supplementary Service Data

LIST OF STATUTES

Kenya Information and Communications Act, 1998.

Competition Act, 2010.

National Payments System Act, 2011.

LIST OF REGULATIONS

- Kenya Communications (Appeals) Rules, 1999;
- Kenya Communications Regulations, 2001;
- Kenya Information and Communications (Broadcasting) Regulations, 2009;
- Kenya Information and Communications (Dispute Resolution) Regulations, 2010;
- Kenya Information and Communications (Tariff) Regulations, 2010;
- Kenya Information and Communications (Compliance Monitoring, Inspections and Enforcement) Regulations, 2010;
- Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010;
- Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010;
- Kenya Information and Communications (Consumer Protection) Regulations, 2010;
- Kenya Information and Communications (Numbering) Regulations, 2010;
- Kenya Information and Communications (Postal and Courier Services) Regulations, 2010;
- Kenya Information and Communications (Importation, Type Approval and Distribution of Communications Equipment) Regulations, 2010;
- Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010;
- Kenya Information and Communications (Universal Access and Service) Regulations, 2010;
- Kenya Information and Communications (Licensing and Quality of Service) Regulations, 2010;
- Kenya Information and Communications (Electronic Certification and Domain Name Administration) Regulations, 2010
- Kenya Information and Communication (Transitional Provisions) Regulations, 2012
- Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations, 2013;

Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations, 2014;

Kenya Information and Communications (Registration of sim-cards) Regulations, 2015.

~~Money Remittance Regulations, 2013.~~

National Payments Systems Regulations 2014.

LIST OF CASES

Petition No. 45 of 2016 *Okiya Omtatah Okiiti v Communications Authority of Kenya & 21 others* [2017] eKLR.

CHAIRPERSON'S FOREWORD

The Departmental Committee on Communication, Information and Innovation is established and mandated under Standing Order No. 216 to—

(a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; and

.....

(g) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.....

Pursuant to its general power of inquiry, and in response to the concerns raised by the general public, the Committee resolved to inquire into legislative and regulatory gaps affecting competition in the telecommunications subsector with a view of proposing amendments to existing legislation and regulation to the House under the following terms of reference—

(1) To inquire into the nature, levels and extent of competition in the telecommunications sector under the existing legal framework, with a particular focus on—

(a) allocation and use of spectrum;

(b) the market share of telecommunication service providers;

(c) broadband services and rates;

(d) call and Short Message Service (SMS) termination rates;

(e) Unstructured Supplementary Service Data (USSD) and SIM application toolkit (STK) access and rates;

(f) mobile money services and rates, including transaction charges, transfer fees, loans and interest;

(g) access to telecommunications infrastructure, including cell towers, ducts, poles and fiber;

(h) provision of content services;

(i) mobile airtime and data rates, including airtime loans and service fees; and

- (j) proposals on the measures to address gaps that contribute to anti-competitive behaviour or restrict growth within the sector;*
- (2) What the players in the sector have done to ensure fair play in the sector; and*
- (3) Whether Communication Authority has adequately protected competition in the sub-sector.*

The Committee wrote to key stakeholders in the telecommunications subsector and placed an advert in the local dailies on 3rd September, 2018 inviting them to submit their views on legislative and regulatory gaps affecting the sector. Thereafter, the Committee held several meetings where it met with the stakeholders to consider the submissions received as incorporated in this report. A total of thirteen memoranda were received from members of the public and key stakeholders in the telecommunications sub-sector through the Office of the Clerk of the National Assembly. The Committee further held fourteen meetings with Communication Authority (CA), Telkom Kenya Limited (TKL), Jamii Telecommunications Limited (JTL), Airtel Kenya Limited (AKL), Central Bank of Kenya (CBK), Finserve Africa Limited, Safaricom PLC (Safaricom), Mobile Pay Limited, Wananchi Group, Liquid Telecom, Competition Authority of Kenya (CAK), Consumer Federation of Kenya and Safaricom Dealers Association.

Thereafter, the Committee proceeded for a report writing retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report.

The Committee appreciates the assistance proved 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 legislative and regulatory gaps affecting competition in the telecommunications subsector.

Pursuant to provisions of Standing Order 199 (6), and on behalf of the Departmental Committee on Communication, Information and Innovation, it is my pleasant privilege and honor to present to this House the Report of the Committee for adoption.

HON. WILLIAM KISANG, MP
CHAIRPERSON
COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

PREFACE

Committee Mandate

The Departmental Committee on Communications, Information and Innovation is established under Standing Order 216 whose mandate pursuant to the Standing Order 216(5) is as follows—

- (a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
- (b) Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
- (c) Study and review all legislation referred to it;
- (d) Study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) 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;
- (f) 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*);
- (fa) examine treaties, agreements and conventions;
- (g) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- (j) Examine any questions raised by Members on a matter within its mandate.

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of

parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.

Committee Membership

1. ~~The Hon. Kisang William Kipkemoi, M.P - Chairperson~~

2. The Hon. George Macharia Kariuki, M.P - Vice Chairperson

~~3. The Hon. Liza, Chelule Chepkorir, M.P.~~

4. The Hon. Alfah, O. Miruka, M.P.

5. The Hon. Annie Wanjiku Kibeh, M.P.

6. The Hon. Joshua Kimilu, Kivinda, M.P.

7. The Hon. Marwa Kitayama Maisori, M.P.

8. The Hon. Mwambu Mabongah, M.P.

9. The Hon. Maritim Sylvanus, M.P.

10. The Hon. Mwangaza Kawira, M.P.

11. The Hon. Jonah Mburu, M.P.

12. The Hon. Gertrude Mbeyu Mwanyanje, M.P.

13. The Hon. Wamuchomba Gathoni, M.P.

14. The Hon. (Eng) Mark Nyamita Ogola, M.P.

15. The Hon. John Kiarie Waweru, M.P.

16. The Hon. Erastus Nzioka Kivasu, M.P.

17. The Hon. Innocent Momanyi Obiri, M.P.

18. The Hon. Godfrey Osotsi Atieno, M.P.

19. The Hon. Anthony Tom Oluoch, M.P.

Committee Secretariat

1. Mr. Nicholas Emejen Deputy Director Committee Services (Lead Clerk)

2. Ms. Ella Kendi Clerk Assistant III

3. Mr. Ronald Walala Legal Counsel I

4. Ms. Lorna Okatch Research Officer III
5. Ms. Catherine Gati Fiscal Analyst III
6. Ms. Debra Mupusi Media Relations Officer.
7. Mr. Wilson Angatangoria Sergeant at arms

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

1. The telecommunications sub-sector in Kenya has grown exponentially since it was liberalized back in 1999. The sub-sector has undergone rapid dynamism to the extent that it has become a fundamental driver of the Kenya's economy. The liberalization increased the number of operators, competition and additional services to the consumers such as internet access through their mobile phones and reduced tariffs rates.
2. The mobile telecommunications sub-sector has over time witnessed entry and exit of various players. The first Mobile Network Operator (MNO) Kencell Kenya entered the Kenyan market in the year 2000 rebranding thereafter to Celtel Kenya in 2004, then to Zain in 2008 and Airtel in 2010. In 2007, Kenya Posts and Telecommunication Corporation began operating as an MNO and later rebranded to Orange Telkom in 2008 and later rebranded to Telkom in 2016. Essar Telecom Kenya began operations in 2008, and later exited the market in 2014. Safaricom was founded in 1997 as a division within Telkom Kenya and became a public limited company with the Government holding 60% shareholding in the year 2000.
3. The entry of new operators has seen the introduction of additional services such as Short Message Service (SMS), Unstructured Supplementary Service Data (USSD), mobile money transfers and data, mobile banking and short-term loans and this has led to increased levels of innovation and competition among the operators. However, some of the operators have seemed to entrench dominance in the telecommunication sub-sector and concerns have been raised on the alleged abuse of dominance in the telecommunication sub-sector.
4. Parliament enacted Kenya Information and Communications Act 1998 (KICA) which provides for the establishment of the Communications Commission of Kenya currently known as Communications Authority (CA). The Authority is responsible for facilitating the development of the information and communications sub-sectors including; broadcasting, cyber security, multimedia, telecommunications, electronic commerce, postal and courier services.

Role of CA in regulating competition in the telecommunication sub-sector

5. In regulating competition in the telecommunication sub-sector, CA is guided by the following sections in the KICA—

- (a) Section 23 (2) (b) which provides for effective competition among the operators.
- (b) Section 84Q, 84R, 84S and 84T which provide that the Authority shall ensure there is fair competition, identify any anti-competitive conduct in the market and carry out investigations in case of unfair competition; and
- (c) Section 84W which provides that CA may, by a notice in the Gazette declare an entity to be a dominant telecommunication service provider. In declaring an entity to be dominant, CA considers the market share of the entity being at least fifty percent of the relevant gross market segment; significant market power enjoyed by the telecommunications service provider; and any other consideration the Authority may determine.

Oversight role of the National Assembly and jurisdiction of the Committee to undertake inquiry

- 6. Article 95 of the Constitution mandates the National Assembly amongst others to oversight state organs and deliberate issues of concern to the people.
- 7. The Departmental Committee on Communication, Information and Innovation is established pursuant Standing Order 216 and mandated amongst others to, “investigate, inquire into and report on all matters relating to the mandate, management, activities and estimates of the assigned Ministries and departments”.

The Inquiry and terms of reference

8. The Committee, on its own motion pursuant to provisions of the National Assembly Standing Orders resolved to conduct an inquiry into legislative and regulatory gaps affecting competition in the telecommunication sub-sector in Kenya guided by the following terms of reference—

- (i) To inquire into the nature, levels and extent of competition in the telecommunications sub-sector under the existing legal framework, with a particular focus on—
 - (a) allocation and use of spectrum;
 - (b) the market share of telecommunication service providers;

- (c) broadband services and rates;
 - (d) call and Short Message Service (SMS) termination rates;
 - (e) Unstructured Supplementary Service Data (USSD) and SIM application toolkit (STK) access and rates;

 - (f) mobile money services and rates, including transaction charges, transfer fees, loans and interest;

 - (g) access to telecommunications infrastructure, including cell towers, ducts, poles and fiber;
 - (h) provision of content services;
 - (i) mobile airtime and data rates, including airtime loans and service fees; and
 - (j) proposals on the measures to address gaps that contribute to anti-competitive behaviour or restrict growth within the sub-sector.
- (ii) What the players in the sub-sector have done to ensure fair play in the sub-sector; and
 - (iii) Whether the Communication Authority has adequately protected competition in the sub-sector.

Applicable Legal Framework

9. The Constitution of Kenya, KICA and the Regulations made thereunder and the Competition Act, 2010 outline the legal provisions governing the telecommunications sub-sector in Kenya.
10. To implement the freedom of the media, the Constitution of Kenya places an obligation on Parliament to enact legislation to provide for the establishment of a body that is to be independent of control by the government, political interests or commercial interests, reflect all sections of the society and set media standards and regulate and monitor compliance with those standards.¹ The legislation contemplated by the Constitution is KICA which Parliament subsequently enacted to establish the Communications Authority (CA).

¹ Article 34(5) of the Constitution.

11. CA is required to, so far as is reasonably practicable, ensure telecommunication services are provided throughout Kenya in a manner that is reasonably necessary to satisfy the public demand.² Further, CA is required to—
- (a) protect the interests of all users of telecommunication services in Kenya with respect to the prices charged for and the quality and variety of such services;
 - (b) maintain and promote effective competition between persons engaged in commercial activities connected with telecommunication services in Kenya in order to ensure efficiency and economy in the provision of such services and to promote research and development in relation thereto;
 - (c) encourage private investment in the telecommunication sub-sector; and
 - (d) enable persons providing telecommunication services or producing telecommunication apparatus in Kenya to compete effectively in the provision of such services or apparatus outside Kenya; and have regard to the values and principles of the Constitution.
12. For the purpose of operationalizing KICA, the Cabinet Secretary responsible for matters relating to Information, Communication and Technology and CA are mandated to make general regulations relating to telecommunication services³. This general power is further clarified to include a mandate allowing the formulation of regulations prescribing—
- (a) the running of telecommunication systems;
 - (b) the privacy of telecommunications;
 - (c) the provision of telecommunication services including the manner in which such services are to be offered and performed;
 - (d) the issue of and payment for licences;
 - (e) the period that messages or papers related to a telecommunication service should be preserved;
 - (f) the issue, variation and withdrawal of approvals in respect of contractors for relevant operations in connection with any telecommunication system and the maintenance of registers of such contractors;

² section 23 KICA.

³ section 27 KICA.

- (g) the fees and other charges for any matter permitted or matters required to be done under KICA in relation to telecommunication services;
- (h) the form of any licence, notice, approval, certificate, authority or other written document required or permitted to be issued by or submitted to CA in relation to telecommunication services;
- (i) the registration of telecommunications subscribers; and
- (j) the registration of subscribers to telecommunications services.

13. KICA also outlines rules governing competition within the telecommunications subsector as well as the powers and responsibilities of the CA as the sector regulator. Section 84Q of KICA prohibits licensees from engaging “in activities, which have or are intended to or likely to have the effect of unfairly preventing, restricting or distorting competition where such act or omission is done in the course of, as a result of or in connection with any business activity relating to licensed services”.

14. CA is placed under an obligation to promote, develop and enforce fair competition and equality of treatment among licensees.⁴ In enforcing fair competition, CA is granted powers to investigate the abuse of a dominant position within the sub-sector or the entering into price fixing agreements by players within the sub-sector⁵. In addition, section 84W and 85A of KICA further mandate the Cabinet Secretary and CA to make particular regulations on competition within the sub-sector, including regulations on—

- (a) access, including rules of interconnection, by licensees and their subscribers to each other’s network;
- (b) the procedure for handling alleged breaches of fair competition;
- (c) investigation procedures;
- (d) access to information held by a licensee for purposes of facilitating investigations on alleged breaches of fair competition;
- (e) remedial actions for breach of competition regulations;
- (f) definition of market segments;
- (g) accounting separation; and
- (h) infrastructure sharing.

⁴ Section 84R KICA.

⁵ Section 84S KICA.

15. Significantly, CA is mandated to, after due process, declare a person or institution, by notice in the Gazette, to be a “dominant telecommunications service provider”. Such a decision is to be predicated on, among others, the market share of the subject being at least fifty percent of a relevant gross market segment or the subject enjoying significant market power.⁶
16. Pursuant to this extensive mandate, the Cabinet Secretary, in consultation with the CA has published the following Regulations—
- (a) Kenya Communications (Appeals) Rules, 1999;
 - (b) Kenya Communications Regulations, 2001;
 - (c) Kenya Information and Communications (Broadcasting) Regulations, 2009;
 - (d) Kenya Information and Communications (Dispute Resolution) Regulations, 2010;
 - (e) Kenya Information and Communications (Tariff) Regulations, 2010;
 - (f) Kenya Information and Communications (Compliance Monitoring, Inspections and Enforcement) Regulations, 2010;
 - (g) Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010;
 - (h) Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010;
 - (i) Kenya Information and Communications (Consumer Protection) Regulations, 2010;
 - (j) Kenya Information and Communications (Numbering) Regulations, 2010;
 - (k) Kenya Information and Communications (Postal and Courier Services) Regulations, 2010;
 - (l) Kenya Information and Communications (Importation, Type Approval and Distribution of Communications Equipment) Regulations, 2010;
 - (m) Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010;
 - (n) Kenya Information and Communications (Universal Access and Service) Regulations, 2010;
 - (o) Kenya Information and Communications (Licensing and Quality of Service) Regulations, 2010;

⁶ Section 84W(4) KICA.

(p) Kenya Information and Communications (Electronic Certification and Domain Name Administration) Regulations, 2010;

(q) Kenya Information and Communication (Transitional Provisions) Regulations, 2012;

(r) Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations, 2013;

(s) Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations, 2014; and

(t) Kenya Information and Communications (Registration of sim-cards) Regulations, 2015.

17. The Competition Act, 2010 was enacted by Parliament to promote and safeguard competition in the national economy, protect consumers from unfair and misleading market conduct, provide for the establishment, powers and functions of the Competition Authority of Kenya (CAK) and the Competition Tribunal. Under the Act, CAK is mandated to—

(a) promote and enforce compliance with the Act;

(b) receive and investigate complaints from legal or natural persons and consumer bodies;

(c) promote public knowledge, awareness and understanding of the obligations, rights and remedies under the Act and the duties, functions and activities of the Authority;

(d) promote the creation of consumer bodies and the establishment of good and proper standards and rules to be followed by such bodies in protecting competition and consumer welfare;

(e) recognize consumer bodies duly registered under the appropriate national laws as the proper bodies, in their areas of operation, to represent consumers before the Authority;

(f) make available to consumers information and guidelines relating to the obligations of persons under the Act and the rights and remedies available to consumers under the Act;

(g) carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers;

- (h) study government policies, procedures and programmes, legislation and proposals for legislation so as to assess their effects on competition and consumer welfare and publicize the results of such studies;
- (i) investigate impediments to competition, including entry into and exit from markets, in the economy as a whole or in particular sectors and publicize the results of such investigations;
- (j) investigate policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare and publicize the results of such studies;
- (k) participate in deliberations and proceedings of government, government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare;
- (l) make representations to government, government commissions, regulatory authorities and other bodies on matters relating to competition and consumer welfare;
- (m) liaise with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare; and
- (n) advise the Government on matters relating to competition and consumer welfare.⁷

Dominance and Significant Market Power

18. The Competition Act, 2010 prohibits persons from engaging in restrictive trade practices which it defines as “agreements which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya”.⁸ It outlines and prohibits what it terms as the “abuse of a dominant position” defining a dominant player as one who either “produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part of the country or provides or otherwise controls not less than *one-half of the services which are rendered in Kenya or any substantial part of the country*”.⁹ CAK is allowed to deem a player to be a dominant player if the player—

⁷ Section 9 Competition Act, 2010.

⁸ Section 21 Competition Act, 2010.

⁹ Section 23(1) Competition Act, 2010.

- (a) controls at least forty per cent but not more than fifty per cent of the market share and cannot show that it does not possess market power; or
- (b) controls less than forty per cent of the market share but possesses market power.¹⁰

19. Section 84W of KICA provides that CA may, by a notice in the *Gazette* declare an entity to be a dominant telecommunication service provider. In declaring an entity to be dominant, CA considers—

- (a) the market share of the entity being at least fifty per cent of the total revenue of the entire telecommunications market;
- (b) the level of control over the communications infrastructure;
- (c) the level of technological advancement of the telecommunications service provider; and
- (d) the scale of operations of the telecommunications service provider

20. Regulation 7(2) of the Fair Competition Regulations, 2010 sets out the criteria that should be used to identify an operator with Significant Market Power, i.e.—

- (a) current degree and development of market concentration or the market share of the licensee, determined by reference to revenues, numbers of subscribers or volumes of sales;
- (b) the degree to which a licensee's prices vary over time;
- (c) the ability of the licensee to maintain or erect barriers to entry to the market, including by means of control of essential facilities, access to superior technology, privileged access to resources or capital markets or superior buying or negotiating position, amongst others;
- (d) the ability of the licensee to earn supernormal profits;
- (e) the global technology and commercial trends affecting market power;
- (f) the licensee's power to make independent rate setting decisions;
- (g) the degree of product or service differentiation and sales promotion in the market;

¹⁰ Section 23(2) Competition Act, 2010.

(h) the ability to materially raise prices without suffering a commensurate loss in service demand to other licensees; and

(i) any other matters which the Communications Authority may consider relevant.

21. Abuse of dominance is construed to include imposition of unfair purchase or selling prices or unfair trading conditions; limitation or restriction of production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices; application of dissimilar conditions to equivalent transactions with other trading parties; imposing the acceptance of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of a contract as a precondition for the conclusion of the contract; and abuse of an intellectual property right.¹¹
22. CAK is further mandated to approve any proposed mergers which may affect the level of competition within a market, exempt particular agreements and undertakings from the application of the provisions of the Competition Act, continuously review the structure of production and distribution of goods and services to control the unwarranted concentration of economic power; prescribe product safety or information standards and initiate investigations into violation of the Act either of its own motion or in response to a complaint.
23. There exists an overlap in the mandate of the CA and CAK with regard to competition. Whereas the CA is mandated to ensure competition within the telecommunications sub-sector, CAK is given a broader economy-wide mandate to enforce competition under the Competition Act, 2010. As the independent body contemplated under Article 34(5) of the Constitution, the CA would be a more relevant enforcer of competition in the sub-sector, as a regulator with relevant expertise in the sub-sector. It would however be prudent for the CA to consult with the CAK on any interventions that may have implications extending beyond the sub-sector.
24. On this issue, CAK submitted that the Competition Act grants it primary jurisdiction in competition matters and obliges any sector regulator with concurrent jurisdiction to establish a working framework with CAK. It was their submission that this is what

¹¹ Section 24 Competition Act, 2010.

informed CA and CAK to enter into a Memorandum of Understanding (MoU) in May 2015.

1.1 METHOD OF WORK

25. In conducting the Inquiry, the Committee undertook a number of activities including requesting for written submissions, conducting research and analysis on various aspects of the inquiry, conducting meetings with various stakeholders and receiving oral submissions among others.

1.1.1 Meetings of the Committee

26. The Committee held its first meeting with regard to the Inquiry on 3rd July 2018 where it adopted a work plan, identified relevant stakeholders for engagement with the Committee and prepared a framework for meetings with the stakeholders identified. Thereafter the Committee proceeded for a working retreat to consider the submissions by the stakeholders and the public and to further draft, consider and approve its Report. The Report of the Committee contains a number of recommendations based on the Terms of Reference adopted by the Committee. The Minutes of the meetings of the Committee are annexed as **Annex I**.

1.1.2 Stakeholder Meetings and Public Participation

27. The Committee, through the Office of the Clerk of the National Assembly formally invited Jamii Telecommunications Limited (JTL); Liquid Telecommunications (Kenya) Limited (Liquid Telecom); Safaricom PLC(Safaricom); Airtel Kenya Limited (Airtel); Telkom Kenya Limited (TKL); Wananchi Group; CA, CAK, the Safaricom Dealers Association and the Consumer Federation of Kenya (COFEK) to appear and make submissions with regard to the terms of reference of the Inquiry. The letters are annexed as **Annex II**.

28. In addition, the Committee invited interested members of the public to make representations addressing the ToRs of the Inquiry vide an advert in the dailies of 3rd September, 2018. The advertisement is annexed as **Annex III**.

29. In response to the invitations and advertisement, the stakeholders duly appeared before the Committee and made both oral and written submissions. The Committee also received thirteen (13) other written submissions from Consumer Federation of Kenya;

Geonet Communications Limited; Safaricom Dealers Association; Mohammed Hersi; Jane Shisanya; Martin Kituku; Doris Nyambura; King'ori K. Choto; Wilbur Ahoya; Caroline Chengoli; and David Jesse. The written submissions are annexed as Annex IV.

The report is divided into chapters which cover the various aspects of the inquiry's terms of reference.

CHAPTER TWO

ALLOCATION AND USE OF SPECTRUM

2.0 Submissions Received

Stakeholders made submissions on allocation and use of spectrum as follows—

Communications Authority

- ~~30. The Director General, Communications Authority, Mr. Francis Wangusi, stated that in determining spectrum charges, the total of all spectrum charges levied is set to recover the total of the direct and indirect costs incurred in managing the frequency and contribute towards the Universal Service Fund (USF). For an operator to be issued with spectrum, the prerequisite is to acquire an infrastructure based license such as Network Facilities Provider (NFP) Tier 1, 2 and 3.~~
31. The Communications Authority indicated that the criterion for spectrum assignment is based on national or regional spectrum allocation as follows—
- (a) Tier 1 NFP is allocated for exclusive use nationally;
 - (b) Tier 2 NFP is allocated for exclusive use regionally; and
 - (c) Tier 3 NFP is allocated for exclusive use per County.
32. It was their submission that in 1998, Kenya Posts and Telecommunications Company (KPTC) was a monopoly and Safaricom was a unit within KPTC providing mobile services. KPTC was then split into the Communications Commission of Kenya (CCK) which is now CA, Telkom Kenya Limited and Postal Corporation, in 1999. CCK thereafter floated an international tender for the 2nd Mobile operator which Kencell won and was allocated 900MHz spectrum through a beauty contest competitive bid. In 2002, Safaricom was established as a limited company and was offered 900MHz spectrum priced equivalent to what Kencell was charged.
33. In 2016, CA allocated 3G frequencies to Airtel and Telkom on a pilot basis, with Safaricom, thereafter awarded an 800MHz spectrum license administratively. Airtel is currently negotiating the award of 800MHz administratively.

Safaricom PLC

34. The Chief Executive Officer, Mr. Bob Collymore, submitted that it was the first operator, together with Kencell Communications Limited (Kencell) to be issued with a Global

System for Mobile communications (GSM) licence. Both operators were allocated equal shares of spectrum. Subsequent entrants into the telecommunications sub-sector, Essar Limited (Essar) and Telkom Kenya Limited were similarly granted spectrum equivalent to that issued to Safaricom and Kencell. Safaricom took over Essar's spectrum allocation when it exited the market in 2014 with the approval of CA and CAK.

35. It was their submission that all Tier 1 operators have so far been allocated equivalent 4G spectrum resources. They noted that spectrum is a valuable and scarce resource and that the sector regulator ought to consider the efficient use of spectrum as a key factor in determining how to share it for the benefit of the public. On their part, they noted that they have so far rolled out in excess of 150,000 transmission links to support more than 29 million customers countrywide, unlike the approach taken by the other Tier 1 operator allocated the same spectrum resource.
36. Safaricom raised concerns with regard to spectrum usage noting that the fees charged by CA are overly high, whereas regulators in neighbouring countries do not charge usage fees after operators pay the initial license fees. It was their view that this high usage fees affects the costs of the services they provide. As per their submission, they have paid Kshs. 23,510,113,748 in spectrum usage fees to CA from 2010 to date.
37. Safaricom recommended that there be clarity with regard to allocation of spectrum resources and consistency in license terms to enable existing operators and investors to make long-term plans.

Competition Authority

38. The Director General, Competition Authority of Kenya, Mr. Francis Kariuki, submitted that spectrum is the single most important determinant of entry in the telecommunication sub-sector and therefore, its allocation process should be transparent and predictable. Currently, as a country we lack a market oriented process for spectrum assignment, and this could become a challenge in the current scenario where new available spectrum is assigned. It recommends two main policy options for spectrum allocation and assignment.
39. The first alternative follows a command and control approach. In this model, the regulator sets up detailed rules that effectively determine how, where and when the spectrum can be used and who has the right of access to the spectrum.

40. The second alternative may follow a market-oriented method. Spectrum is a profitable resource and, as such, is allocated and assigned through market forces. In this scenario, spectrum allocation and assignment is thus decided by the market; for example, through auctions or other competitive selection processes. Furthermore, this second alternative usually grants market players the right to trade the spectrum over the lifetime of the license. The digital switchover has freed up valuable spectrum and thus, having the appropriate assignment rules in place is key to safeguard future competition in the telecommunications sub-sector. These options will not only guarantee the Exchequer increased revenue but it will also ensure transparency and accountability in spectrum allocation which is very key to investors.

Jamii Telecommunications Limited

41. The Chief Executive Officer of Jamii Telecommunications Limited (JTL), Mr. Joshua Chepkwony Kipchumba, submitted that it currently holds a trial licence to roll out an LTE network in the 700MHz band awarded to it after having applied for and being denied a 1 x 5MHz allocation in the 800MHz band currently allocated to Safaricom, Airtel and Telkom. It was their view that the process of application and allocation of spectrum lacks clarity and necessary feedback on decisions made by CA. Additionally, JTL raised issue with the prohibitive cost of access to spectrum as viewed together with the other applicable costs and fees such as the revenue-based annual operating levy and Universal Service Fund (USF) levy, capital infrastructure deployment costs and county access fees, among others.
42. JTL recommended that there is need for a harmonized national spectrum policy clearly setting out fair, equitable and transparent procedures for the allocation, allotment and assignment of spectrum; licensing rules and operational procedures on the regulation of spectrum use; spectrum planning arrangements; a mechanism for spectrum farming to enable the systematic phase-out of ageing technologies to free up new spectrum space for re-allocation; a mechanism for monitoring the use of spectrum and providing feedback for planning, management control and decision-making; and a criteria for spectrum charges subjected to continuous review in line with international best practices.
43. It was their further view that there should similarly be put in place mechanisms to enable licensees to understand the procedure for surrender, alignment of the spectrum license

and the operating license, change of use of the spectrum, and the rights and obligations concerning spectrum use.

44. JTL further submitted that CA should foster ex-ante regulation to facilitate efficient entry in markets typically characterized by high entry barriers and to control for incumbent providers' first mover advantages, thus ensuring a transition toward competitive markets. Once the market is effectively competitive, ex ante regulation should be rolled-back, relying on ex post regulation to achieve the benefits of the process of competition. Additionally, they submitted that CA should conduct regular market reviews to ascertain whether a regulated market has become competitive, and, if the market is competitive, revoke or amend the ex-ante regulation in place.
45. Additionally, it was JTL's submission that to support local telecom companies, the spectrum fees payment to CA be spread within ten (10) years with conditions that a licensed operator must roll out between six hundred (600) to eight hundred (800) Base Transceiver Stations (BTSS) during the first three (3) years of operation.

Liquid Telecom

46. The General Manager (Legal and Regulatory) of Liquid Telecom, Ms. Judy Njeru submitted that currently, there is 60Mhz available on 700Mhz band as part of the digital dividend from the digital migration which was earmarked for allocation to Tier 2 operators only. 20Mhz of this band was allocated to JTL for a 4G trial without inviting other Tier 2 operators through an open tendering process. They stated that CA required all other Tier 2 operators to form a consortium in order for them to trial the 4G network on the remaining 40Mhz. It was their submission that this is uncompetitive, unfair and an opaque process of allocating spectrum.

Telkom Kenya Limited

47. The Chief Executive Officer of Telkom, Aldo Mareuse submitted that in 2000, both Safaricom and the then Kencell were awarded 10MHz spectrum in the 900MHz band to roll out 3G services while Telkom and Essar, owing to scarcity of resources, were awarded 7.5MHz of the said spectrum in 2007, 2.5MHz less than the other mobile network operators. On the exit of Essar in early 2015, Communications Authority (CA) approved the transfer of the scarce spectrum resources (900MHz and 1800MHz) to Safaricom without reallocating some of the freed-up spectrum to bring up Telkom

Kenya's spectrum share to par with the other operators. It was their submission that Safaricom's purchase of Essar frequencies lead to it being allocated additional spectrum resources well beyond the level required to maintain excellent quality of service (QoS) for all its subscribers. This, in their opinion, amounts to the amassing of prolific spectrum resources to the detriment of competition, with CA approval. They proposed that CA provides market oversight to discourage spectrum hoarding and that they be compensated for the shortfall in their allocation of the 900MHz spectrum.

48. Telkom further submitted that CA's practice of assessing spectrum fees on an operator's ability to pay has severely constrained smaller operators, since using its financial muscle, Safaricom has influenced the setting of exorbitant initial award fees. According to Telkom, forcing smaller operators to pay the same fee for the 4G spectrum as Safaricom is unfair as payment of the fee has left smaller operators in a perilous financial state, with little surplus to roll out or upgrade their network.
49. Telkom submitted that Safaricom has in the past bullied CA to nullify price reductions awarded to smaller operators despite award disparities and the fact that they had been allocated 3G resources much earlier and reaped the fruits of exclusive first entry.
50. On the cost of spectrum, Telkom submitted that both the initial license fees of USD 25 Million and usage fees of up to Kshs. 1 Billion per year are expensive to the detriment of smaller operators. They proposed that the charging structure for spectrum should be adjusted on a sliding scale to lessen the burden on smaller operators and consideration of staggered payment of the fee. It was also their submission that the license term for 4G spectrum should be revised to accord with best practice where licenses are granted for not less than fifteen years, with a renewal option of at least ten years. In their opinion, longer license periods encourage capital injection into infrastructure, as investors are confident of obtaining a return on their investment.

2.1 Committee Observations

51. From the submissions of the operators and the regulators, the Committee observed that—
 - (i) arbitrary fixing of license fees and requirement of upfront payment of the fees constitutes a significant barrier to entry into the market; and
 - (ii) MNOs view the current regime of allocation of spectrum as one that lacks transparency, uniformity and fairness.

2.2 Committee Recommendations

52. The Committee recommends that the Communications Authority—

- (i) formulates and publishes clear guidelines on the application, allocation and use of spectrum resources within six months. The guidelines should clearly indicate the processes involved at each stage, the conditions applicable to the resource allocated, circumstances under which spectrum farming is allowed, the procedures for monitoring and reporting on the usage of spectrum and the basis of charges for the allocation of spectrum for purposes of transparency and to prevent spectrum hoarding;
- (ii) reviews and audits the existing spectrum management processes including usage fees, related costs and licenses and report its findings to the National Assembly within six months; and
- (iii) formulates and publishes regulations on the application for, allocation, use and payment of spectrum fees, in installments, for local companies within six months.

CHAPTER THREE

MARKET SHARE OF TELECOMMUNICATION SERVICE PROVIDERS

53. The Committee analyzed the market share of the various MNOs as per the ~~Communications Authority (CA) fourth quarter sub-sector statistics report for the financial year 2017/2018 (April-June 2018) in the following categories—~~

- ~~(a) mobile subscription;~~
- (b) voice;
- (c) mobile data;
- (d) money transfer; and
- (e) subscriber base

Mobile subscription

54. According to the Communications Authority (CA) fourth quarter sector statistics report for the financial year 2017/2018 (April-June 2018) for the operators were as follows—

- (a) Safaricom 65.4%;
- (b) Airtel 21.4%;
- (c) TKL 8.8%
- (d) Finserve Africa Ltd 4.3%;
- (e) Mobile Pay Ltd 0.2%;
- (f) Sema at 0%

Mobile money services

55. As at 30th June 2018, the number of active mobile money transfer subscriptions and agents stood at 29.6 million and 206,940 respectively. Similarly, 727 million transactions valued at 1.9 trillion Kenya Shillings were made between 1st April 2018 and 30th June 2018.¹²

Service/ Indicator	Agents	Active subscriptions	No. of transactions	Value of transactions (KSHS)
M-pesa	159,726	23,946,174	581,944,422	1,503,293,228,098
Airtel	24,533	3,619,415	4,141,782	1,270,252,917
Equitel Money	-	1,959,009	140,438,370	413,423,114,000

¹² ca.go.ke/consumers/industry-research-statistics/statistics/

T-Kash	16,554	63,023	78,504	118,024,097
Mobile Pay	6,127	90,442	404,020	971,850,414

Voice Traffic

56. The CA Sector statistics report noted that—

- (a) Safaricom voice traffic market share dropped to 65.7 per cent from 66.5 per cent registered during the previous quarter. The operator recorded 34.6 billion minutes in 2017/18 from 35.6 billion minutes reported in 2017;
- (b) The volume of local mobile voice traffic originating from Airtel increased to 4.2 billion minutes from 3.6 billion minutes registered during the previous quarter. Subsequently, its voice market share rose to 30.2 per cent from 28.7 per cent;
- (c) the total mobile voice traffic originating from Telkom Kenya Limited declined by 7.9 per cent during the period under review to 535.5 million from 581.7 million minutes reported during the previous period;
- (d) the total local mobile voice traffic registered by Finserve Africa Limited grew to 38.9 million minutes during the period under review from 37.1 million minutes posted during the previous quarter;
- (e) during Financial Year 2017/18, Sema Mobile Services and Mobile Pay Limited recorded a total of 158,388 minutes and 117,535 minutes of local mobile voice traffic respectively.

Data/Internet Subscriptions

57. During the quarter under review, Safaricom's market stood at 69.5%. The market share for Airtel, Telkom, Finserve Africa Limited, Mobile Pay Limited and Sema Mobile Services stood at 22.5%; 7.6%; 0.5%; 0.2 and 0.0% respectively.¹³

3.1 Submissions Received

Stakeholders made submissions on on the market share of telecommunications service providers as follows—

Competition Authority of Kenya

58. CAK submitted that—

¹³ ca.go.ke/consumers/industry-research-statistics/statistics/

(a) in the voice market Safaricom has a market share of 67%, Airtel 29% and the rest of the operators have less than 10%. In addition, they noted that Safaricom's share has over the last six years declined by approximately 13% while Airtel's has expanded by approximately 16% over the last two years;

(b) in the mobile data/ internet market, Safaricom's market share reduced from 73% to 68% between October 2017 and March 2018 whereas Airtel's increased from 18.5% to 23.1% in the same period;

(c) in the retail mobile money market Safaricom, Finserve Africa Limited and Airtel have 83.08%, 16.36% and 0.56%, respectively; and

(d) with regard to subscription numbers between 2016 and 2018, Safaricom's share declined from 72.6 % to 66.7%.

59. CAK further noted that Safaricom has been progressively losing its market share over the period analyzed and therefore does not possess Significant Market Power (SMP) over any of the markets analyzed. It was therefore their submission that it would be premature to impose ex ante intervention in the analyzed markets.

60. In addition, CAK noted that—

(a) Safaricom may have maintained its market shares due to its innovation in products and services and consistent investment and the “network” or “club effect” of its tariffs, promotions and special offers.

(b) between October, 2017 and March, 2018, the market share of Safaricom in the mobile money market with regard to person-to-person transactions dropped from 82.59% to 0.46% while during the same period the market share of Finserve Africa Limited increased from 17.11% to 97.79%.

Safaricom PLC

61. Safaricom submitted that their market share has steadily grown over the last eighteen years and attributed the growth to deliberate strategic decisions, innovation and investment across the country. According to the Communications Authority sector statistics report for January-March 2018, they enjoyed a 67% subscriptions market share as compared to a 71.9% subscriptions market share over the same period a year back. They further noted that their voice traffic dropped from 82% to 66.5% over the period coupled with gains made by TKL in both subscriptions market share and voice traffic

over the same period. It was their view that this significant change in market share is attributable to the competitiveness of the market.

62. With regard to the fixed broadband market share, Safaricom relied on the CA Sector Statistics Report for the Period January-March 2018 which put them at 19.1%.
63. It was their further submission that competition should be investment led. They noted that their total capital expenditure on their network and expansion of services since 2014 to date amounts to Kshs. 166.5 Billion in contrast to the lack of comparable investment by the other operators in the market.
64. They noted that CA is mandated to impose investment conditions while issuing licenses but has so far unfairly targeted Safaricom by imposing higher investment conditions with regard to the construction of Base Transceiver Stations (BTS) in marginal and geographically difficult areas of the country. As per the operator roll-out commitment attached to the licenses issued for the period between 2016 and 2022, Safaricom is under an obligation to construct 592 BTSs while a competitor like Airtel was only obligated to construct 71 BTSs. It was their view that the disparity in such licensing conditions would lead to a determination that they are dominant in infrastructure.

Airtel Kenya Limited

65. Airtel submitted that the market shares of MNOs have not changed much despite symmetric Mobile Termination Rates and Mobile Number Portability being implemented in regulation. They further noted that despite the growth of mobile money, one operator possesses significant market power thereby denying the customers the right of choice. It was their further submission that the market share of smaller players have not reached a sustainable threshold which ideally would be at least 25%. They noted that in 2015, CA initiated a Telecommunications market study whose final report is yet to be published despite being disseminated for comments to the public in February, 2018. Additionally, they noted that the lack of competition in the market has seen the exit of Essar Telecom in 2014 and France Telecom in 2016/17.
66. Airtel further submitted that their market share as at March 2018 stood at 19.7% with that of Safaricom at 67%, well past the threshold for being declared a dominant player. In their opinion, the market share over the past ten years has not considerably changed, even with interventions by the regulator such as Market symmetric Mobile Termination Rates

and Mobile Number Portability. This, as per their submission, calls for more intervention by the regulator to enhance competition.

Jamii Telecom Limited

67. JTL submitted that CA should foster ex-ante regulations to facilitate efficient entry in markets typically characterized by high entry barriers to control incumbent providers' first mover advantages, thus ensuring a transition toward competitive markets. Once the market is effectively competitive, ex ante regulation should be rolled back, relying on ex post regulation to achieve the benefits of the process of competition. Additionally, they submitted that CA should conduct regular market reviews to ascertain whether a regulated market has become competitive, and, if so, revoke or amend the ex-ante regulations in place.

Liquid Telecom

68. Liquid Telecom submitted that their market share in the fixed broadband market stood at 2.9% as at 31st March 2018. It was their submission that this market share is based on subscriptions and under-estimates the size of its network and the level of investment Liquid Telecom has made which requires protection and compensation in law for competition to thrive.

Wananchi Group

69. Wananchi Group submitted that their market share stood at 34.4% as at 31st March 2018 in the Fixed Data/internet market.

Telkom Kenya Limited

70. Telkom Kenya Limited submitted that as at 31st March 2018, its market share stood at with 8.6% in terms of subscriber numbers. It was their submission that although Safaricom had a 67% market share in terms of subscriber numbers, it boasts an even larger market share of over 90% when analyzed based on revenues or traffic flows. They noted that Safaricom's economies of scale cannot be replicated by competition as the company is a private monopoly, enabling it to wield significant market power in the Kenyan ICT market. They therefore called for the declaration of Safaricom as a dominant player in order for CA to check its behavior in the market.

Mobile Pay Limited

71. Mobile Pay Limited submitted that as at 31st March 2018, the market share for all Mobile Virtual Network Operator (MVNOs) i. e. Mobile Pay Limited, Finserve Africa Limited and Zioncell stood at 4.7%.

Finserve Africa Limited

72. Finserve Africa Limited submitted that customer growth of its Equitel product has been steady for the past three years meaning that there is still room for growth and innovation in the sub-sector. They noted that Equitel's voice market had been reducing between January, 2017 and March, 2018 as the market is competitive and quite inelastic as the drivers are the promotions and the price undercutting. It was their view that the SMS market is competitive and quite difficult to make significant inroads into with current market practices and state. The growth of Equitel mobile banking traffic has been steady between January, 2017 to March, 2018. The financial services market is more elastic to competition.

3.2 Committee Observations

73. The Committee observed that—

- (i) As at June, 2018 Safaricom possesses a higher market share in mobile subscriptions, mobile money services, voice traffic and mobile data subscriptions well beyond the statutory threshold for being declared a dominant player;
- (ii) There has been an unexplained reluctance on the part of CA to declare any MNO as dominant within any segment of the telecommunications sub-sector pursuant to its mandate under KICA and relevant regulations; and
- (iii) "Market share" as relates to the declaration of a dominant telecommunications service provider is not clearly defined or provided for under KICA and the attendant regulations.

3.3 Committee Recommendations

74. The Committee recommends that—

- (i) the Communications Authority—
 - (a) reviews the market every two years to ascertain the levels of competition including dominance by MNOs;

(b) reports to the National Assembly **biennially** on whether a dominant player exists within the sub-sector;

(c) includes investment in infrastructure as a pre-condition for the issuance of licenses in the sub-sector with each applicant required to demonstrate a clear investment plan; and

(ii) KICA be amended to provide a clear definition of “Market share” with reference ~~to gross revenues as relates to the declaration of a dominant telecommunications~~ service provider.

CHAPTER FOUR

BROADBAND SERVICES AND RATES

75. As per Communications Authority Sector Statistics for April-June 2018, the number of broadband subscriptions rose by 3.0 percent to 20.5 million from 19.9 million recorded in the third quarter. This was attributed to the increased roll out of 4G network and expansion of last mile fiber network coupled with increased demand for broadband services especially in driving the academic community, entrepreneurship and video streaming.

4.0 Submissions Received

Stakeholders made submissions on broadband services and rates as follows—

Safaricom PLC

76. Safaricom submitted that it provides both mobile and fixed broadband services and that it has consistently upgraded its network over time to cover 86% of Kenyans on 3G network and 35% of Kenyans on 4G network.

77. Safaricom further submission that the broadband market is highly competitive and that they consistently review mobile data prices downwards to ensure that customers get more value for less especially in their different bundle propositions that are pegged comparative to prices prevalent in regional and global markets. Safaricom currently charges an average of Kshs. 0.3 per megabyte (MB) of data, which is one of the lowest in the region.

Jamii Telecommunications Limited

78. JTL submitted, with regard to rolling out of broadband services on the 700MHz frequency band, that they have been unable to meet the needs of their customers due inadequate supporting devices. They proposed that the government considers offering temporary subsidies or tax incentives to remedy the challenge. JTL also noted that counties charge high and disparate way-leave fees and maintenance charges which act to prohibit the faster deployment of infrastructure in the country. In their opinion, a harmonized framework for the charges would be more beneficial.

79. It was JTL's further submission that Kenya lacks a critical infrastructure protection law contrary to international best practice. This gap exposes the huge capital investments by

operators to the risk of disruption by other protected service providers like water and sewerage companies and road contractors. It was their proposal that Parliament enacts legislation to protect critical infrastructure.

80. JTL noted that presently, telecommunications providers are subjected to high rental costs when deploying their fiber optic in commercial buildings. They proposed that licensed service providers be granted mandatory free access to buildings in order to deploy their services.

81. It was JTL's further submission that there is need for the CA to investigate existing complaints of anti-competitive behavior by internet service providers who collude with caretaker's or property agents to deny building access to other service providers. It was their view that such behaviour contributes to higher charges for broadband services.

Liquid Telecom

82. Liquid Telecom submitted that operators offer broadband services tailored to customer needs, with insignificant price differences between the services. It was their submission that a significant variance exists with regard to installation costs. It was their further submission that this market is not currently susceptible to asymmetric ex-ante regulation. However, they suggested that CA should monitor the evolution of the broadband services market closely and, if necessary, undertake a market review before the standard three-year timeframe.

Telkom Kenya Limited

83. Telkom Kenya Limited submitted that the high cost of broadband services in Kenya is attributable to high spectrum costs. It noted that despite inherent challenges, it has brought down the cost of its broadband product to as little as Kshs. 99 for 2GB of data. They therefore proposed the lowering of spectrum fees and staggered payment of initial spectrum fees which would translate to lower charges to consumers.

4.1 Committee Observations

84. The Committee observed that—

- (i) there is inadequate telecommunication infrastructure in the country, especially in underserved counties such as Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana, and Wajir;

- (ii) there is a need for the enactment of a critical information infrastructure protection legislation;
- (iii) there is a need for regulations to operationalize the provisions relating to critical information infrastructure under the Computer Misuse and Cybercrimes Act, 2018; and
- (iv) there is a need to lower the cost of spectrum fees and stagger payment of initial spectrum fees which would in turn translate to lower charges to consumers.

4.2 Committee Recommendations

85. The Committee recommends—

- (i) that the Communications Authority uses USF to build new BTSs accessible to all network operators in the underserved counties of Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana, and Wajir;
- (ii) the enactment of a Critical Information Infrastructure legislation to provide an appropriate framework for the protection of key information infrastructure within six months. The legislation to be introduced by the Committee, should contain provisions—
 - (a) to the effect that all infrastructure built using the Universal Service Fund should be available for sharing by all telecommunications providers;
 - (b) aligning the building code with regard to access for installation of fiber; and
 - (c) permitting access to buildings by all ICT service providers.
- (iii) that the Communications Authority and the Ministry responsible for matters relating to ICT formulate and publish regulations for the provisions relating to critical infrastructure under the Computer Misuse and Cybercrimes Act, 2018 **within six months**; and
- (iv) that the Communications Authority reviews the current licensing regime **within six months** and report to the National Assembly on measures taken to ensure equity in the issuance of licences.

CHAPTER FIVE

5.0 CALL AND SHORT MESSAGE SERVICE (SMS) TERMINATION RATES

Submissions Received

Stakeholders made submissions on call and SMS termination rates as follows—

Safaricom PLC

86. Safaricom submitted that Mobile Termination Rates (MTRs) are not tools for management of competition as they are primarily a cost element of interconnection that should not be viewed as a revenue stream for an MNO as each MNO collects MTR charges on behalf of and remits them to the MNO required to facilitate seamless interconnection. It was their submission that in line with the practice world-over, other MNOs collect MTR charges on their behalf from their customers and they similarly reciprocate, noting that they have remitted Kshs. 7,423,171,000 in MTR charges to local MNOs from 2014 to date.
87. Safaricom further submitted that the adoption of Zero MTRs in a predominantly prepaid market would likely force operators to recover costs previously paid as MTRs by charging for incoming calls or raising the price of outgoing calls since in countries with Zero MTR, the cost is usually passed on to the consumer. In their view, such a move would unfairly disadvantage low income households and customers in rural areas who tend to receive calls thus denying them the right to communicate.
88. According to Safaricom, asymmetrical MTRs are applied to new entrants into the market for a limited duration of time and are thus unsuitable for the Kenyan telecommunications sub-sector where the other players have both been in the market for almost two decades. It was their view that adoption of asymmetrical and Zero MTRs discourages investment in network roll out for both smaller and larger operators.

Jamii Telecommunications Limited

89. JTL submitted that an operator with an extraordinarily huge subscriber base benefits the most from a uniform or symmetrical mobile termination rate because voice and SMS traffic on its network is higher than to competing networks. Noting that interconnection cost is a major cost component for network service providers, they proposed a review of the existing costs owing to the changing market structure of the cellular mobile segment and CA having made the last MTR review in 2014.

90. It was JTL's further submission that they have experienced unfair interconnection practices from other operators including delays and intentional degradation of quality of service on voice calls. They proposed stronger sanctions for such practices.

Airtel Kenya Limited

91. Airtel Limited in their submission called for the adoption of asymmetric MTRs or zero MTRs noting that such adoption does not negatively impact government earnings and goals, and the economy. It was their submission that, drawing from the comparative experience in other African and European jurisdictions, adoption of asymmetric MTRs spurs increases in mobile subscribers. Drawing from the experience in South Africa and Nigeria, it was their further submissions that asymmetric MTRs promote higher earnings for telecommunication companies, especially smaller operators.
92. Further, Airtel submitted that loyalty schemes like rebates, bonuses and loyalty programs create a lock in effect and are anti-competitive as they force the customer to continue using the services of a dominant firm in order to benefit from these programs. They proposed prohibition of this individually tailored loyalty schemes and that all tariffs, promotions and loyalty schemes by the dominant operator should be standardized and should not be based on individually set thresholds.

Telkom Kenya Limited

93. Telkom submitted that it pays out over half of its revenues to Safaricom for interconnection charges. They noted that Asymmetric MTRs are introduced to promote competition in markets where an operator enjoys inordinately high market power. They further noted asymmetric MTRs have been introduced in the European Union, South Africa, Nigeria, and Mexico. It was their submission that implementation of asymmetric MTRs results to lower retail prices and higher mobile call volumes, increased government revenue in terms of taxes, more competitive smaller mobile operators; and stronger incentives for operators to invest, innovate and reduce costs. They proposed Zero MTRs for all operators to level the playing field and result in a reduction of consumer prices.
94. Telkom further submitted that since consumers prefer calling on their home network in order to enjoy preferential rates, the high disparities in Safaricom's on-net and off-net pricing create a strong club effect which calls for regulatory intervention.

Mobile Pay Limited

95. Mobile Pay Limited submitted that as an MVNO, they have applied to Safaricom for interconnection but the application was declined without reply. They called for the revision of all Mobile Termination Rates (MTR) from the current Kshs. 0.99 to Zero to enable operators to compete on a level playing field without having to send all their profits to the dominant operator on account of MTR.
96. Mobile Pay Limited further proposed the implementation of the regulations requiring the reservation by operators of 30% of their capacity for licensed MVNOs and allowing for interconnection without reservations. Additionally, they proposed that action be taken against players in the industry for historical violations with regard to competition as exemplified in other jurisdictions such as Turkey. According to them, the punishment should include fines based on duration of the rule-breaking, the seriousness of the offense and the operator's turnover, among other considerations.

Finserve Africa Limited

97. Finserve Africa Ltd observed that the SMS market is competitive and quite difficult to make significant inroads into with current market practices and state and that it charges Kshs.4 for voice on-net peak, voice on-net off peak, voice off-net peak, voice off-net off-peak, data and Kshs.1 for SMS on-net and SMS off-net.

Communications Authority

98. The Communications Authority (CA) stated that it is mandated to among other things manage competition in the ICT sector in Kenya. In the year 2016, the Authority contracted Analysys Mason to undertake a competition market study in the telecommunications sub-sector in Kenya
99. On Call and SMS termination on mobile networks, CA proposed that each mobile operator to continue providing termination services on its network to any other network operator on a non-discriminatory basis with rates set by the Authority based on long-run incremental costs (LRAIC). Each operator to prepare a Reference Access Offer detailing the commercial and technical terms that apply to call and SMS termination.

100. On Markets susceptible to Ex-Ante Regulation, CA findings on SMP on Call and SMS termination on mobile networks shows each mobile operator is dominant on its own network.

5.1 Committee Observations

101. The Committee observed that—

- (i) One MNO generates significantly higher revenue in MTR charges than what it collects and remits to other smaller MNOs;
- (ii) The current MTR regime is a barrier to entry into the market;
- (iii) There is need to review the current MTR regime to zero to eliminate the “club effect” associated with larger MNOs and encourage the smaller players in the market to develop more innovative services;
- (iv) MTR is determined and set by the Communication Authority based on LRAIC;
- (v) There has been unexplained delay on the part of CA in reviewing the MTR regime, the last review having been done in 2014;
- (vi) New KICA Regulations on fair competition, equality of treatment, tariffs and interconnection are yet to be published;

5.2 Committee Recommendations

102. The Committee recommends that—

- (i) the Communications Authority consults with MNOs and establishes a glidepath for the reduction of MTRs to zero **within two years**; and
- (ii) the Ministry responsible for ICT publishes KICA Regulations on fair competition, equality of treatment, tariffs and interconnection.

CHAPTER SIX

6.0 UNSTRUCTURED SUPPLEMENTARY SERVICE DATA (USSD) AND SIM APPLICATION TOOLKIT (STK) ACCESS AND RATES

6.1 Submissions received

Stakeholders made submissions on USSD and STK as follows—

Safaricom PLC

103. Safaricom submitted that USSD is a viable channel for rolling out content services as majority of Kenyans do not have access to smartphones. With affordability and accessibility of USSD services in mind, they noted that they provide all USSD services at a nominal rate of Kshs. 1/- per USSD session.

Jamii Telecommunications Limited

104. JTL submitted that USSD and STK is a maturing technology and which should be left to level out.

Telkom Kenya Limited

105. Telkom submitted that CAK had conducted an inquiry into Safaricom's USSD prices and found the prices to be unfairly high when compared to actual costs incurred in offering the service as well as usage fees as compared to countries with more competitive mobile markets where the per session fee is zero. They proposed that all licensed mobile operators be required to provide USSD access on request to all licensed content service providers on a non-discriminatory basis to improve to competition and promote digital inclusion.

Mobile Pay Limited

106. Mobile Pay Limited submitted that it currently charges Kshs. 5 per session for USSD.

Finserve Africa Limited

107. Finserve Africa Ltd submitted that its USSD and access to STK services are free.

Airtel Kenya Limited

108. Airtel submitted that on the self-help USSD menu 544 and the STK menu, it has free access to all the Airtel customers without any charges.

Communications Authority

109. CA submitted that the report on the market study had proposed that each mobile operator has an effective monopoly on USSD and STK access on its network.

6.2 Committee Observations

110. The Committee observed that—

- (i) USSD, STK and SIM access are key contributors to dominance in the event one provider blocks access to its SIMs to the exclusion of other players.
- (ii) There is need to regulate the use of USSD by MNOs for non-telecommunication related services.

6.3 Committee Recommendations

111. The Committee recommends that the Communications Authority—

- (i) develops and publishes guidelines on the adoption of a unified STK with universal access across the platforms of all MNOs **within one year**;
- (ii) conducts a study on USSD access fees **within one year** with a view to lower the fees;
and
- (iii) develops and publishes regulations on the use of USSD by MNOs for non-telecommunication related services.

CHAPTER SEVEN

7.0 MOBILE MONEY SERVICES AND RATES, INCLUDING TRANSACTION CHARGES, TRANSFER FEES, LOANS AND INTEREST

7.1 Submissions Received

Stakeholders made submissions on mobile money services and rates, including charges, transfer fees, loans and interest as follows—

Safaricom PLC

112. Safaricom submitted that mobile money is regulated by the Central Bank of Kenya (CBK) under the National Payments Systems Act 2011, the National Payments Systems Regulations 2013 and the Money Remittance Regulations, 2013. Under these rules, mobile money service providers may only implement tariffs once they are approved by CBK after consideration of justifications for the charges and a market comparison to prevent market abuse by operators holding a high market share.
113. Safaricom further submitted that their graduated transaction fees are based on transaction value for money transfers to enable compensation of all players within the mobile money ecosystem to ensure the sustainability of their service.
114. Safaricom noted that since 2014, all its M-Pesa agents are non-exclusive and may be recruited by other operators to run their mobile money services. Further, mobile money interoperability has been operationalized through an operator-led initiative under CBK supervision. This has enabled wallet-to-wallet interoperability thus allowing seamless transfer of money between Safaricom and Airtel customers. Plans are underway to include Telkom and other money transfer companies in wallet-to-wallet interoperability.
115. Safaricom strongly opposed agent-interoperability and sharing of mobile money float in a single wallet which is unprecedented in the payments industry as neither local banks nor other payment providers like Visa or Mastercard share a float. It was their view that such a proposal shows that other operators are unwilling to invest in an agency network and float-system. They submitted that other operators now want to access the M-Pesa float instead of investing in their own float system.
116. Additionally, it was their view that existing regulations require mobile money operators to maintain trust accounts in separate institutions, with attendant insurance obligations which renders the sharing of a float a problematic arrangement as it would present a

reconciliation nightmare with players unable to determine their respective shares of the float or liability for the loss of customer funds.

117. According to Safaricom, implementation of such a proposal would require establishment of an independent clearing agency to guarantee settlement of transactions after conducting a study to determine the portion of security deposit to be prefunded by each player to avoid the risk of unsettled transactions, agreement on a model for queuing and prioritization of transactions, and attendant service levels for processing of transactions.
118. Safaricom further noted that such an arrangement would negatively affect the time taken to process a mobile money transaction as compared to the existing standard thus negating the convenience of real-time processing that is the hallmark of mobile money transfers.
119. It was Safaricom's further view that float sharing will expose the mobile money industry to systemic risk as a shared platform is vulnerable and lacks redundancy and diversity in order to ensure business continuity. Additionally, varied standards of observance of Anti-Money Laundering (AML) and Know-Your-Customer (KYC) obligations by operators are bound to negatively affect the customer quality of experience.
120. Safaricom submitted that mobile money loans are products of partner banks that are only facilitated through their mobile money platform. They charge customers a flat rate of Kshs. 1 per USSD session to facilitate the transfer of the borrowed funds to the customer's mobile money wallet.

Jamii Telecommunications Limited

121. JTL submitted that there is need to have a wallet-to-wallet interoperability as the current process which hops across different platforms and does not terminate directly is expensive and inefficient.

Airtel Kenya Limited

122. Airtel submitted that Mobile Money is growing, however, one operator has significant market power thereby denying the customers the right of choice with regard to their mobile money transactions.
123. Airtel further submitted that they acknowledge the Central Bank of Kenya and Ministry of ICT for spearheading the implementation of wallet to wallet interoperability which was launched in May 2018 which has been instrumental in giving the customer choice in

seamlessly sending and receiving money. They requested Parliament to facilitate implementation of Agent interoperability which is the next step in ensuring full mobile interoperability.

124. Airtel observed that although platform Level (wallet to wallet) interoperability was achieved in the Kenya market in April 2018, it proposed the application of Agent interoperability which will effectively open up the agency network by allowing Agents to use one float to serve customers from all mobile money operators.
125. Airtel also submitted that Airtel Money is on average 40% discounted compared with Safaricom and 19% discounted compared with Telkom.
126. In addition, they called for the implementation of mobile money agent interoperability to enable agents to share a single float for all the telecommunication companies offering mobile money services. It was their submission that adoption of agent interoperability would reduce the distance that consumers move to trace mobile money agents thus minimize risk of theft. In addition, such a move would increase the overall earnings of mobile money agents.
127. Airtel submitted that CA should introduce a requirement that on-net/off-net prices for mobile voice and mobile money services are symmetric and usable both on-net and off-net a requirement that should also apply to any promotions, discounts or bonuses given to consumers by the large player. They proposed that the largest player should not be allowed to give discounts, bonuses or rebates which can only be enjoyed or earned for on-net calls only but the benefits should be enjoyed for off-net calls as well.

Telkom Kenya Limited

128. Telkom submitted that Safaricom's infrastructure is impossible to replicate as smaller operators lack the economies of scale it enjoys. It was their view that without regulation, a dominant firm may exclude, limit or delay a competitor's access to its infrastructure. They proposed the declaration of Safaricom as a dominant operator in order for them to facilitate access of their massive networks by other operators. In addition, they proposed that where an operator owns or controls any in-building wireless solution, they should be required to make it available to all other licensed NFPs on non-discriminatory and cost-oriented terms and regulations on the same.

Mobile Pay Limited

129. Mobile Pay Limited submitted that Safaricom currently commands 81% of all the mobile money subscribers in Kenya. They further submitted that they charge between Kshs. 10/- and Kshs. 100 on transfers to all networks and between Kshs. 10 and Kshs, 300 for withdrawals.
130. They noted that when they piloted their money transfer services, Safaricom immediately ordered their interconnection to be shut down without notice. It took the intervention of regulators to restore the interconnection. It was their further submission that Safaricom thereafter hiked the USSD short code charges from the normal Kshs. 5 to Kshs. 30 discriminatively.
131. Mobile Pay Limited further submitted that Safaricom discriminatively prevented their mobile money agents from offering the services of any other operator under threat of disconnection from the M-Pesa network. CA determined this to be in contravention of the law in 2014. It was their observation that despite recruiting their own agent network separate from Safaricom, their agents would thereafter remove the branding and become M-Pesa agents due to aggressive marketing tactics from Safaricom. Additionally, they noted that Safaricom used its advertising power to run its adverts immediately after theirs in order to confuse consumers with regard to their mobile money services.
132. Mobile Pay Limited also submitted that the current market cost of Mobile Loans in terms of total interest plus other charges range from 10% to 99% per annum, while savings attract an interest of between 6.65% and 7.35% per annum.

Safaricom Dealers Association

133. Safaricom Dealers Association submitted that imposing agent-interoperability would allow MNOs that have not invested in developing adequate agent networks to take advantage of those that have. They noted that in conjunction with Safaricom, they had invested in developing an agent network by mutual agreement where Safaricom incentivizes their operations. When they appeared before the Committee, they indicated that they would be open to consider agent interoperability if it was structured in a way that protects their investment in their agent network.

Finserve Africa Limited

134. Finserve Africa Limited submitted that it charges interest on loan amounts as set out in the Banking Act comprising the Central Bank rate plus a margin of 4%. Their rate is subject to change as stipulated by the law.
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Communications Authority

135. CA submitted that Safaricom's share of mobile money transactions by volume was (82%) in 3Q 2016 down from 91% in 1Q 2015 which was a result of the growth in the transaction volumes of Finserve Africa Limited.

Central Bank of Kenya

136. CBK submitted that it regulates mobile payment service providers pursuant to the National Payment System Act, 2011 and the National Payment System Regulations, 2014. In the exercise of oversight powers CBK may authorize payment service providers, revoke their authorization, issue directives and institute audits.
137. CBK further indicated that its function on mobile money services includes conducting audits and inspection of payment service providers; assessing and approving trustees, significant shareholders, directors and senior managers in control of a payment service provider; and publishing of information useful to customers, including tariffs, quality of service and statistical information.
138. CBK noted that a payment service provider is required by law to notify its customers and CBK, of any material changes in its charges at least seven days before they take effect. CBK reviews the proposed charges against the prevailing market rates and determines the rationality of the charges.

7.2 Committee Observations

139. The Committee observed that—
- (i) the graduated mobile money transaction fees for all the operators have no reasonable basis as they use one platform for transactions with a single cost for each transaction;
 - (ii) wallet-to-wallet interoperability has been rolled out between Airtel, Safaricom and TKL;

- (iii) on wallet to wallet interoperability, the current process of money transfer across different platforms is expensive and inefficient;
- (iv) the interest rates on mobile money loans is arbitrary and needs to be regulated by CBK. Additionally, CBK has not adequately regulated the mobile money loans; and
- (v) there has been an increase in unregulated fintech firms and this has led to increase in predatory lending practices in the country;
- (vi) mobile money transfer services have been dominated by one MNO for years and there has been unexplained reluctance on the part of CA and CBK to pronounce themselves on the issue of such dominance;
- (vii) given the reliance of Kenyans on mobile money, dominance by one player in the mobile money transfer services market poses a grave risk to national security in the event of an outage of service;
- (viii) concerns have been raised on the protection of customer data collected in the provision of mobile money services;
- (ix) some MNOs involved in mobile money services are lax in observing requirements on AML, KYC and SIM-card registration; and
- (x) CA and CBK have been lax in enforcing the observance of AML and KYC requirements by MNOs and the process of SIM-card registration which poses a security risk to the country.

7.3 Committee recommendations

140. The Committee recommends that—

- (i) CBK and CA formulate and publish regulations **within six months** on mobile money transaction fees for all mobile money operators;
- (ii) **within six months** CA and CBK should explore modalities of structuring and implementing agent interoperability—
 - (a) through the use of a shared technology between MNOs engaged in mobile money services; and
 - (b) requiring MNOs to deposit an agreed annual amount with the Kenya Deposit Insurance Corporation as security for customer funds held in mobile money wallets;
- (iii) CA and CBK conduct an audit of the levels of compliance with AML and KYC obligations by MNOs engaged in mobile money services **within six months**;

- (iv) CA conducts an audit of compliance by MNOs with SIM-card registration requirements **within six months**;
- (v) CA and CBK formulate and publish regulations **within six months**—
- (a) on interest rates on mobile money. The interest rates should be those applicable to commercial banks for standardization;
 - (b) requiring MNOs engaged in mobile money services to obtain the express consent of their customers with regard to accessing the services and products offered and to clearly disclose to the customers all the charges applicable to the services and products; and
- (vi) CA and CBK audit all unregulated money lending fintech firms which leverage on mobile platforms and subject them to the applicable money lending regulations **within six months**.

CHAPTER EIGHT

8.0 ACCESS TO TELECOMMUNICATIONS INFRASTRUCTURE, INCLUDING CELL TOWERS, DUCTS, POLES AND FIBRE

8.1 Submissions Received

Stakeholders made submissions on access to telecommunications infrastructure as follows—

Competition Authority of Kenya

141. CAK submitted that the only incidence of dominance in the wholesale market, from its reading of CA reports, exists in the Tower market where Safaricom is listed as dominant in some counties. In this regard, CAK proposed that Safaricom be obliged to provide other Tier 1 operators access, on non-discriminatory basis, to its sites in those counties over the next five years, without extinguishing appetite for further investments by the current and future investors in the sub-sector. CAK further proposed that every licensee should be subjected to a minimum threshold investment requirement in the Towers market to ensure sustainability of the industry. They encouraged the regulator to compel any operator who divests its Towers to reinvest a minimum amount of money by leasing extra Towers.

Safaricom PLC

142. Safaricom submitted that supply and demand in the tower market is balanced with any party free to choose either to own or lease towers from more than one provider. They noted that they have heavily invested in constructing BTSs both strategically and in compliance with license conditions imposed by CA to cover most areas in the country including those that were previously unserved.
143. Safaricom noted that operators are currently sharing various infrastructure such as Base Station, Fiber Ducts and Fiber optic capacity and that they lease capacity from the National Optic Fiber Backbone Infrastructure (NOFBI) which is managed by Telkom Kenya.
144. Safaricom further submitted that with regard to their fiber infrastructure, they have made provision for other operators to access their ducts and that they are amenable to sharing their infrastructure through a framework that allows them to recoup their investment

through commercially agreed and time bound terms with clear investment requirements imposed on the hosted party.

145. It was Safaricom's view that there is need for a predictable and stable regulatory environment that promotes long term investment and innovation to ensure the sustainability of the telecommunications industry. Such an environment, coupled with investment in infrastructure by various industry players will, in their view, provide a wider communication coverage safety net against security threats and adequate redundancy options.

Jamii Telecommunications Limited

146. JTL submitted that the sharing of infrastructure at affordable costs should be encouraged owing to the capital-intensive nature of the telecommunications sub-sector. It was their view that the current lack of regulation with regard to infrastructure sharing leaves operators with a lower bargaining power at the mercy of dominant operators and state corporations.
147. They noted that they had faced challenges in accessing infrastructure including prohibitive costs of accessing the NOFBI and other nationally shared infrastructure such as Kenya Electricity Transmission Company Limited, Kenya Power, Kenya Pipeline Company and Kenya Railways; a lack of regulation on national roaming for mobile services, and prohibitive costs of sharing of towers. They proposed enactment of a national roaming regulation to assist entry of new operators for a limited period of not more than three (3) years based on the Long-Run Average Incremental Cost (LRAIC) model, regulations on accessing infrastructure funded by the public as well as a review of the current building code to allow free entry into buildings for the installation of telecoms infrastructure. They further proposed that use of USF resources should cover all allocated frequencies.

Liquid Telecom

148. Liquid submitted that the current roadworks across the country pose a significant challenge to the fiber optic infrastructure laid on public wayleaves. It was their submission that operators are not compensated for relocation, damage or rebuilding of fiber infrastructure. They proposed that the law be amended to cater for such compensation as part of the project costs for roadworks in the same manner as the Kenya

Power and Lighting Company is compensated. In addition, they proposed that the legislation recognizing ICT infrastructure as critical infrastructure be enacted to ensure its protection.

Wananchi Group

149. Wananchi Group submitted that some operators have gained exclusive right of entry into buildings for purposes of installing fiber services thus preventing consumers from accessing their preferred services and service providers. They proposed the development of regulations or guidelines for site access based on individual customer preference to remedy this challenge.
150. Wananchi Group further submitted that counties currently charge very high costs for the laying of fiber which cost is ultimately passed to the consumer. In addition, they decried the lack of proper urban planning and updating of records and proposed that counties develop a more sustainable model for way leaves costing. They further proposed that a compensation model be developed to ensure the indemnification or compensation of operators whose infrastructure is damaged or relocated during road works.

Mobile Pay Limited

151. Mobile Pay Limited submitted that Safaricom controls or has access to 4600 Cell Towers on which no access for sharing is provided to MVNOs. They noted that Airtel controls or has access to 1600 towers which are open to MVNOs for sharing while TKL's 1,500 towers are also open for sharing.
152. Mobile Pay Limited further submitted that with regard to ducts and fiber-optic, every provider seems to be digging their own trenches and laying their own fiber-optic cables. They proposed that all towers and BTSs should be sold out to independent operators as recommended by International Telecommunications Union (ITU) and the International Center for Assignment of Names and Numbers (ICANN) and Institute of Electrical and Electronics Engineers (IEEE), the three global overseers of global telecommunications policies and standards.

Airtel Kenya Limited

153. Airtel submitted that it had 93 self-owned sites, 1214 sites owned by Eaton, 191 on Safaricom sites, 33 on Telkom sites and others on multiple vendors i.e. Seal, KBC,

KPLC, etc.) Further, it submitted that it has 38 Kilometers of last mile fiber in the country whereas the rest of the fiber has been taken by fiber network providers like LTK, JTL, TKL and KPLC either as dark fiber or leased capacity.

Communications Authority

~~154. CA submitted that in their report on the study of the market competition it had been recommended that there should be regulated sites sharing which should be limited to seven most rural counties (Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana and Wajir) with review after five years. It was their further submission that the price for site sharing at these sites should be based on the long-run average incremental cost (LRAIC) of providing these sites, as set by the Authority.~~

8.2 Committee Observations

155. The Committee observed that—

- (i) infrastructure sharing should be encouraged owing to the capital-intensive nature of the telecommunications sub-sector. Sharing may lower the operational cost of the operators and encourage new entrants into the market;
- (ii) the price for infrastructure sharing should be based on the long-run average incremental cost (LRAIC) of providing these sites or any other method agreed upon by the providers in consultation with the regulator;
- (iv) there is need to harmonise charges applicable for the use of wayleaves;
- (v) licencing conditions relating to investment in infrastructure imposed by CA may have contributed to one player becoming dominant in the Towers market;
- (vi) given the reliance of Kenyans on ICT, broadband and mobile money services, dominance by one player in the provision of telecommunications infrastructure poses a grave risk to national security in the event of an outage of service; and
- (vii) USF funds have yet to be used by the USF Board for their intended purpose of supporting widespread access to ICT services and promoting capacity building and innovation in ICT services in the country.

8.3 Committee Recommendations

156. The Committee recommends that—

(a) the Communications Authority—

- (i) formulates and publishes regulations on mandatory infrastructure sharing subject to technical, environmental and commercial viability within six months.
- (ii) uses USF to build new BTSs accessible to all network operators in the market.
- (iii) formulates and publishes regulations allowing the use of telecommunication infrastructure funded by government agencies by all MNOs at a reasonable and uniform fee within six months in consultation with those agencies.
- (iv) in consultation with County Governments and the Ministry responsible for roads, develops a licensing framework to harmonize all the charges applicable to the use of wayleaves for the laying of fiber and ducts within one year.

(b) monies in the USF should be ring-fenced and utilized for their intended purpose of supporting widespread access to ICT services and promoting capacity building and innovation in ICT services in the country.

CHAPTER NINE

9.0 PROVISION OF CONTENT SERVICES

9.1 Submissions Received

Stakeholders made submissions on access to provision of content services as follows—

Safaricom PLC

157. Safaricom submitted that it is a licensed Content Service Providers (CSP) regulated by the CA in addition to hundreds of other CSPs who leverage on mobile network platforms to reach end-users. They noted that individual CSPs are responsible for ensuring that customers only receive services that they have subscribed to (or opted into) and are answerable to the CA for any violation of this requirement.
158. Safaricom further submitted that they have put in place adequate measures to assure the customers, including the independent confirmation of any premium subscription prior to charging for such subscription; and a mechanism for an avenue for customers to blacklist any code engaged in sending unsolicited messages.

Telkom Kenya limited

159. Telkom submitted that provision of content services is currently facilitated via short code services which are semi regulated by CA, with operators required to facilitate access to their networks to content service providers on commercial terms. They noted that as established by the CAK market enquiry, Safaricom has in the past abused its market dominance by setting prohibitive rates in accessing such services. They recommended that that the regulator curbs such behavior.

Communications Authority

160. The CA in their report on the market study submitted that all licensed NFPs that support third party content/ application service providers should be required to publish a reference access offer under the 2010 interconnection and provision of fixed links, access and facilities regulations.

9.2 Committee Observations

161. The Committee observed that—

- (i) mobile subscribers receive unsolicited messages from various service providers which come with a cost implication;
- (ii) some MNOs and CSPs set prohibitive rates for accessing content services facilitated via short code services;
- (iii) there is no clear licensing regime with regard to the operation of MNOs as content service providers and their obligations to the owners of the content.

9.3 Committee Recommendations

162. The Committee recommends that the Communications Authority—

- (i) formulates an adequate mechanism for the monitoring of the provision of content services within six months to ensure that MNOs and CSPs offer the customers only the services that they have subscribed to;
- (ii) formulates and publishes regulations to manage premium rates service providers that will ensure customers can opt-out of unwanted services without being charged within six months; and
- (iii) formulates and publishes regulations on the licensing of MNOs as CSPs and their obligations.

CHAPTER TEN

10. 0 MOBILE AIRTIME AND DATA RATES, INCLUDING AIRTIME LOANS AND SERVICE FEES

10.1 Submissions Received

Stakeholders made submissions on mobile airtime and data rates as follows---

Safaricom PLC

163. Safaricom submitted that it offers its customers both pre-paid and post-paid mobile airtime options, including a service to obtain an airtime advance. It was their submission that their airtime advance service does not constitute a “loan” as it charges an “access fee” instead of interest. They further submitted that their voice tariffs during both peak and off-peak hours are comparable to those applied by other local operators and constitute some of the lowest tariffs in the region.
164. With regard to data, Safaricom submitted that it offers various data propositions tailored to customers’ requirements, including daily, weekly, monthly, and quarterly bundles. In addition, they noted that they offer customized voice and data bundles also tailored to each customer’s needs in line with existing practice across other service industries. It was their view that provision of such personalized services should be encouraged for the benefit of consumers.

Jamii Telecommunications Limited

165. JTL submitted that Mobile airtime and data rates be left to the control of market forces as their pricing is subject to too many variables.

Airtel Kenya Limited

166. Airtel proposed retail market remedies to level the playing field. They proposed that the regulator only approve tariffs that can be replicated by all the players in the market. They also called for the prohibition of individually tailored loyalty schemes, and prohibition of on-net and off-net discounts which lock-in subscribers to a dominant player’s network.
167. Airtel submitted that Airtel Money is on average 40% discounted as compared with Safaricom and 19% discounted as compared with Telkom and that their acquisition headline tariff was at K.shs. 2 which is the lowest in the country.

Telkom Kenya Limited

168. Telkom noted that mobile airtime and data rates have drastically reduced since its entry into the market in 2007. They proposed the implementation of zero MTRs and zero-rating on mobile communication services.
169. Telkom submitted that Safaricom should be prohibited from offering discriminatory tariffs and offers to their subscribers based on their spending as they unfairly lock the subscribers to the Safaricom network. In addition, they proposed that CA ensures that all offers and promotions ran by Safaricom are not below cost and can therefore be profitably replicated by its competitors.

Mobile Pay Limited

170. Mobile Pay Limited submitted that its current tariff for voice services is Kshs. 4 a minute.

10.2 Committee Observations

171. The Committee observed that there is need for the network operators to constantly invest in technological advancement and develop innovative products and services, including by partnering with strong financial institutions.

CHAPTER ELEVEN

OTHER RELATED SUBMISSIONS

11.0 Measures to address gaps that contribute to anti-Competitive behaviour or restrict growth within the sub-sector

172. The Competition Authority of Kenya proposed—

- (a) the lowering of switching costs among the networks to mitigate against the “network” or “club effect” as emphasized in its 2015 study report titled, “*Unlocking Growth Potential in Kenya: Dismantling Regulatory Obstacles to Competition*”. The regulator may additionally impose enhanced penalties for non-compliance by the sector players.
- (b) fast tracking and actualization of the current interoperability in the mobile money transfers;
- (c) the regulator either prescribes rules to effectively determine how, where and when the spectrum can be used and who has the right of access to the spectrum or allow spectrum allocation and assignment to be decided by the market through auctions or other competitive selection processes.
- (d) the regulator facilitates infrastructure sharing while motivating MNOs to invest in their own infrastructure. It was their further submission that any licensing regime should impose minimum investment obligations on a licensee within a certain period and cancellation of the license in the event of default.
- (e) that the USF be utilized to facilitate telecommunications service provision in the sparsely populated areas.

173. Liquid Telecom submitted that the following acts of sector players create the gaps which contribute to anti-competitive behavior and restrict sector growth—

- (a) anti-competitive cross-subsidization leading to lower revenues and margins predatory pricing to lock out competition;
- (b) use of information obtained from competitors to limit competitive pressures;
- (c) incumbent firms denying competitors technical information about essential facilities and other information necessary for the competitors to provide services; and
- (d) price fixing and rivals dividing markets amongst themselves.

174. The Consumer Federation of Kenya proposed that—

- (a) Safaricom be immediately declared a “Negotiated” dominant player;
- (b) an assurance be provided that declaration of dominance will not lead to rise in tariffs, withdrawal of pro-consumer promotions, innovations and competitiveness;
- (c) COFEK be recognized as a key stakeholder on the determination of dominance;
- (d) the current overlapping mandate between CA and CAK be resolved;
- (e) the actual steps, scope and number of studies to be conducted before and after declaration of dominance, and the role of consumer representatives be clearly defined;
- (f) a study be done or a taskforce formed to identify and mitigate any likely implications of the declaration of a dominant player on the consumer;
- (g) after declaration of dominance all MNOs be offered new licensing terms by CA;
- (h) a Competition Stakeholder Advisory Committee, chaired by CA and involving COFEK, meet bi-monthly to examine effects of dominance on the consumer and the market;
- (i) CA regularly reports to the National Assembly on the progress of declaration of dominance and its implications.

11.1 Retail price controls and discrimination

175. Safaricom submitted that any regulatory interventions in the market should be objectively aimed at regulating the industry and that the introduction of price controls would deter healthy competition in a market.

176. The Competition Authority of Kenya submitted that due to the dynamism of the Kenyan telecommunications sub-sector, any regulation must adopt a transparent, predictable, effective and modern regulatory regime on a multi-agency basis to sustain and deepen the current levels of development in the sub-sector. It was their submission that Competition law aims at preventing creation and exercise of market power that that may undermine effective competition and that, before proposing any ex-ante regulation, the following must be cumulatively prevalent in the market—

- (a) the relevant market must demonstrate high and non-transitory barriers to entry;

(b) the existing Market structures should not tend towards effective competition in a relevant time horizon; and the existing competition laws should be inadequate to address market failure.

177. Airtel Kenya Limited submitted that where a player in the mobile market has a far higher share of on-net traffic than the other operators and enjoys economies of scale in many other areas, it is in a position to offer tariffs, permanent loyalty schemes and promotions that the other operators cannot match without losing money. Airtel proposed that prior to launching a new tariff, loyalty scheme or promotion, the largest player should provide justification to the regulator that the proposals can be replicated by a reasonably efficient operator.

178. On prohibition of on-net/off-net discounts, Airtel submitted that the ‘clubbing’ effect that entails competition distortions can be viewed in the on-net/offnet differentiation of retail tariffs by the dominant operator with an on-net rate far lower than off-net rate. They proposed that the regulator should introduce a requirement that on-net/off-net prices for mobile voice and mobile money services are symmetric and usable both on-net and off-net. This requirement should also apply to any promotions, discounts or bonuses given to Consumers by the large player.

11.2 National Roaming

179. Safaricom submitted that instituting national roaming does not incentivize the need to invest by a hosted operator. According to Safaricom, national roaming is a measure applicable for new entrants and not for operators that have been in the market for many years as it rewards failure to invest. They recommended that the CA, through the USF, should implement measures to ensure communal network access for other operators in the areas where their coverage is limited.

180. The Communications Authority submitted that in their report on the market study done by Analysis Mason it was recommended that Safaricom should provide 2G, 3G and 4G national roaming to other Tier 1 mobile operators in the seven counties (Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana, and Wajir) which were selected on the basis of the relative number of base station sites for Safaricom and the other two operators.

181. Telkom Kenya Limited noted that it is economically inefficient for the second and third operators in Kenya to rollout to remote areas. They therefore proposed national roaming,

with Safaricom offering a QoS equivalent to that on its own network. In their view, the roaming should remain in place until certain objective milestones of competition are achieved and that the applicable charges should be set at the current regulated mobile termination rate (MTR) and data roaming charges ascertained via desktop benchmarking until an appropriate LRAIC-based rate is calculated. They proposed that the roaming model be reviewed at the expiry of five years.

Technology	Safaricom	Telkom	Airtel
2G	95%	88%	Similar to Telkom
3G	78%	65%	75%
4G	40%	10%	15%

Extent of national roll out by the three operators (Source: Submission by TKL)

Committee Observation

182. The Committee observed that with the current market shares most of the MNOs cannot profitably extend their current 2G or 3G geographic coverage and are likely to face financial difficulties in rolling out 4G infrastructure in the more rural parts of the country.

Committee Recommendation

183. The Committee recommends that CA pilot national roaming to other Tier 1 mobile operators in the seven counties of Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana, and Wajir within one-year subject to an LRAIC based cost.

11.3 What the players have done to ensure fair play in the sub-sector.

184. With regard to the measures it has taken to ensure competition in the sub-sector, CAK stated that—

- (a) it investigated complaints lodged by Airtel and MNOs against Safaricom relating to Safaricom's restrictive agreements with its Mobile Money transfer agents in 2013. CAK established that the agreements constituted an abuse of dominance as their clauses prohibited agents from transacting in competing products whereas there was no significant investment made by Safaricom into the agents'

businesses. CAK ordered Safaricom to expunge the restrictive clauses in the Agreements. It was their submission that this action may have led to the decline of the Safaricom's market share from 73% to 67%.

(b) it conducted a study which determined that some MNOs were engaging in abuse of dominance by imposing specifically excessive and discriminatory pricing of USSD services, a key support for mobile banking. CAK ordered that USSD prices for the purposes of mobile financial services on a wholesale basis be reduced in a graduating scale from Kshs. 10 in March, 2017 to Kshs. 1 per session in October, 2017;

(c) to remedy the lack of transparency in the provision of services in the mobile money market, CAK conducted an audit of the sub-sector and ordered that providers avail all applicable charges relating to mobile money services and products at the point of purchase or agreement and on the same interface or channel being used to acquire the product or execute the transaction.

185. Jamii Telecommunications Limited submitted that it has partnered on several fronts where viable in order to leverage on its platforms and provide customers with the best service e.g. through infrastructure sharing, and co-location where technically and commercially feasible.

11.4 Whether the Communication Authority has adequately protected competition in the sub-sector.

186. JTL submitted that CA has over the last two years fostered a healthy competitive environment in the sub-sector by—

- (a) opening up the 700MHz band to Tier 2 operators;
- (b) harmonizing mobile termination rates based on a glide path;
- (c) developing mobile number portability;
- (d) developing a code on infrastructure sharing; and
- (e) developing a guideline on features and technical specifications for mobile devices imported into Kenya.

187. However, JTL noted that there is still more for CA to do especially with regard to implementation in handling issues of competition as they possess the legal mandate as

echoed by the High Court ruling of Justice Odunga in Petition No. 45 of 2016 *Okiva Omtatah Okoiti v Communications Authority of Kenya & 21 others* [2017] eKLR.

11.5 Efficacy of competition regulation in Kenya's ICT sector

188. Telkom noted that the inherent challenges in the regulation of competition in the sector are as a result of concurrent jurisdiction exercised by the CA and the CAK which has hampered any efforts to combat dominance and other forms of unsavory conduct in the sector. They proposed that CA and CAK be compelled by law to operationalize a cooperation framework.
189. Telkom also submitted that even though both the CA and the CAK previously conducted market studies on the state of competition in Kenya's telecommunications markets, both have refrained from taking the requisite regulatory action. They referred to the 2010 Competitive Assessment and Contribution to the Gross Domestic Product of the Telecoms Sector in Kenya study by Price Waterhouse Coopers which established Safaricom's significant market power and recommended the introduction of wholesale remedies, including the introduction of symmetric cost-based MTRs over a three-year period. They also referred to a 2014 Ernst and Young report which established that the level of competition in the Kenyan market had decreased to the extent that it was impossible for the market to support four operators. They proposed a prompt declaration of Safaricom's dominance as market correction cannot happen in the absence of a declaration of dominance as well as the introduction of asymmetric remedies.
190. Telkom further submitted that regulating competition will prevent a dominant firm from predatory product innovation where it quickly imitates the smaller operators' innovations, aggressively takes them to the market, and reaps unjust benefits owing to their efficiencies in scale. They gave an example of a time when Zain was said to have signed an exclusive contract for distributing Blackberry handsets and Safaricom launched the service before tests for the same were completed.
191. Telkom submitted that the telecommunications market is currently controlled by a private monopoly. In their view, leaving such a monopoly unchecked will lead to the death of all other competitors and entrench it as the sole telecommunications service provider. According to Telkom this scenario poses a great risk to the economy and the security of the country, noting that, without urgent intervention,—

- (a) there is a real probability that Kenya could end up with a single operator in the provision of mobile services;
- (b) smaller players would exit the market or liquidate, negatively impacting the country's credit score and discourage the injection of foreign direct investment into the ICT sector;
- (c) Safaricom will have much weaker incentives to invest in emerging technologies and innovative services or offer quality services;
- (d) there will be loss of jobs in the industry as firms exit and the dominant firm scales down on investments and innovation;
- (e) end users will suffer substantial delays in getting the mobile broadband services they need to make Kenya globally competitive;
- (f) there will be less taxes from the sector to the exchequer;
- (g) Safaricom will have strong incentives, unconstrained by rivals, to raise end-user prices so as to maximize profits; and
- (h) the Kenyan economy, now heavily dependent on mobile communications and mobile money services, would be extremely vulnerable to the failure of one network provider.

192. Mobile Pay Limited called for the protection of CA as the regulator in competition matters as held by the Court in Petition No. 45 of 2016.

11.6 On the need for regulation

193. Airtel submitted that—

- (a) Uneven playing field conditions in telecom markets challenge the pace of investments in the industry, and impede progress towards expanding the economy and alleviation of poverty in the general population and that more players in the market creates demand for scarce resources such as spectrum, numbering and right of way.
- (b) Effective application of regulation largely contributes to a level playing field in a telecommunications market within which competitors can operate. This can be achieved through enforcement of interconnection, mobile money interoperability, local loop unbundling and application of safeguards against abuse of dominance or market power.

11.7 On whether imposing remedies on a dominant player punishes success

194. Airtel submitted that—

- (a) regulating dominant or significant market power players is not a new phenomenon for Kenya, but a global one implemented in Europe, South America and Africa. Regulating the dominant player does not bring negative impact on Government earnings and goals. In support of high termination rates, dominant mobile operators have argued that lowering termination rates will lead to increases in access and usage prices, leading to fewer people being able to afford communication services and resultant lower profits will limit operators' capacity to invest.
- (b) Lowering termination rates with a temporary asymmetric regime towards the cost of an efficient operator leads to increased competition, lower retail prices and higher mobile subscribers and more profit.
- (c) Regulations made by the Independent Communications Authority of South Africa required the dominant operators, MTN and Vodacom, to reduce their peak cellphone call termination charges to 89c from R1.25 in 2010, 73c a minute by March 2011, to 56c a minute by March 2012 and to 40c by 2013. However, despite the loss of earnings from interconnection, MTN and Vodacom overall revenue and operating profits have continued to grow.
- (d) the Nigerian Communications Commission issued a mobile termination determination in December 2009 prescribing converged termination rates for fixed and mobile networks (like in Namibia) and allowing for asymmetric mobile termination rates for small operators until December 2012. Nigeria's subscriber numbers did not decrease and retail prices of MTN Nigeria did not increase as predicted by a Waterbed effect. The subscriber bases expanded by 24% after the termination rate cut of December 2009, which is a considerably higher increase compared to 15% growth between 2008 and 2009. MTN Nigeria gained 4.2 million new subscribers.
- (e) The current status of the telecommunications market has been perpetuated by the inherent advantage bestowed upon the player with significant market power

through structural market conditions that favor the large operator and fail to encourage competition.

(f) These unfair structural conditions can be remedied with the enforcement of key competition and telecommunication laws and regulations which already exist in the Kenyan legislation. It is however necessary that a declaration of dominance (under the said laws) of the player holding the significant market power be effected first before application of the remedies. This is in line with global regulatory practice that ensures the Regulator's attempt to enforce proposed remedies is not derailed by any party with interest in maintaining the *status quo*.

(g) Further, the introduction of the recommended market remedies would help create vigorous competition that will lead to affordable offering, right of choice and innovation of services in the mobile telecom markets to expand the customer base and consumption. Imposition of regulatory remedies are standard practices internationally by ICT regulators in Europe, South America and Africa and are not seen nor classified as punishing success but as tools to correct any market anomalies and sustain a competitive landscape for the ultimate benefit of consumers.

11.8 On Corporate Social Responsibility (CSR) activities

195. Airtel submitted that it undertakes various CSR activities which include—

(a) the Airtel free Internet program where communities and students in Kenya are currently able to broaden their learning through twenty-four hours free access to educational material and other learning information that is available online so that they can do more to be successful in life. So far over 300 public and private schools, hospitals, police stations and not forgetting organizations like Albinism Society of Kenya, have benefited from this initiative.

(b) participation in the Beyond Zero Campaign by donating one of the mobile clinics and participating in the Half Marathons in support of the First lady, Her Excellency Margaret Kenyatta.

196. Safaricom submitted that—

- (a) They have partnered with more than 1,200 organizations to find sustainable solutions and transform lives positively. Through their Foundations (Safaricom and M-PESA Foundations), they have reached to more than four million Kenyans.
- (b) They promote access to health through free medical camps held in different towns across the country, including Makueni, Kiambu, Taita Taveta, Kilifi Murang'a, Nakuru, Kakamega, and Uasin Gishu Counties and that to date, they have held 120 medical camps in about 100 constituencies and reached more than 300,000 people.
- (c) In line with the Sustainable Development Goal 4 on quality education, they have established the M-PESA Foundation Academy in 2016 and have provided fully paid four-year scholarships for four gifted and economically challenged students in each county every year and aim to nurture a generation of thinkers, doers and leaders.
- (d) They have improved the Early Childhood Development (ECD) learning environment in 54 schools (one per constituency) by providing holistic responses via new ECD classrooms, furniture, learning equipment, new ablution blocks, water harvesting equipment; and in some instances, enhancements to the school feeding programme through the establishment of a greenhouse in the school.
- (e) They have rolled out the *Eneza* platform that uses SMS and USSD technology to provide primary and secondary school students with affordable learning content developed by teachers for revision purposes. The platform has almost two million active students countrywide who have access to unlimited lessons and assessments at a small fee of Kshs.10 per week.
- (f) In partnership with the World Food Programme (WFP), they had leveraged on M-PESA to help refugees in Kakuma and Dadaab refugee camps to access food, through a product known as "*Bamba Chakula*". M-PESA has enabled digitization of food delivery for over 100,000 households at the camps and this has reduced the cost of distributing relief aid, created employment and business opportunities for people in refugee camps.

11.9 OTHER ISSUES ARISING DURING THE INQUIRY

197. A number of submissions were made falling outside the foregoing categories. Safaricom Dealers Association and Mohammed Hersi submitted that any decision on dominance should not be used to punish innovative and successful companies and that there should be a deliberate move to protect indigenous local companies, such as Safaricom as is done in other jurisdictions.

198. Additionally, Jane Shisanya, Martin Kituku, Doris Nyambura, King'ori K. Choto, Wilbur Ahoya, Caroline Chengoli, and David Jesse noted the various ways in which the services and products offered by Safaricom had contributed to their lives and submitted against the use of the debate on dominance to prejudice its operations.

11.10 General Observations

199. The Committee observed that—

- (a) Notwithstanding the Committee communicating and publicizing its ToRs which were limited to addressing legislative and regulatory gaps affecting competition in the telecommunications subsector, the general debate surrounding its work and a number of submissions received misinterpreted the inquiry as one that focused on declaring an MNO as a dominant player. This posed a challenge since the Committee had to request some stakeholders to address their submissions to the inquiry's TORs.

Security

- (b) Monopolization in the telecommunication sub-sector poses a great risk to the economy and the security of the country and that without corrective measures smaller players would exit the market or liquidate, there will be loss of jobs in the industry as firms exit and that the Kenyan economy, which is heavily dependent on mobile communications and mobile money services, would be extremely vulnerable to the failure of one network provider in the absence of a credible alternative.

Overlap of Mandate

- (c) There exist challenges in the regulation of competition in the sub-sector due to concurrent jurisdiction exercised by the Communications Authority and the Competition Authority of Kenya.

Regulatory authority

- (d) There is need to strengthen legislation and regulations on various aspects in the telecommunications subsector.

CHAPTER TWELVE

12.0 COMMITTEE RECOMMENDATIONS

12.1 Allocation and use of spectrum;

1. The Committee recommends that the Communications Authority—

-
- (i) formulates and publishes clear guidelines on the application, allocation and use of spectrum resources **within six months**. The guidelines should clearly indicate the processes involved at each stage, the conditions applicable to the resource allocated, circumstances under which spectrum farming is allowed, the procedures for monitoring and reporting on the usage of spectrum and the basis of charges for the allocation of spectrum for purposes of transparency and to prevent spectrum hoarding;
 - (ii) reviews and audits the existing spectrum management processes including usage fees, related costs and licenses and reports its findings to the National Assembly **within six months**; and
 - (iii) formulates and publishes regulations on the application for, allocation, use and payment of spectrum fees, in installments, for local companies **within six months**.

12.2 The market share of telecommunication service providers;

2. The Committee recommends that—

- (i) the Communications Authority—
 - (a) reviews the market every **two years** to ascertain the levels of competition including dominance by mobile network operators;
 - (b) reports to the National Assembly **biennially** on whether a dominant player exists within the sub-sector;
 - (c) includes investment in infrastructure as a pre-condition for the issuance of licenses in the sub-sector with each applicant required to demonstrate a clear investment plan; and
- (ii) the Kenya Information and Communications Act, 1998 be amended to provide a clear definition of “Market share” with reference to gross revenues as relates to the declaration of a dominant telecommunications service provider.

12.3 Broadband services and rates;

3. The Committee recommends the enactment of a Critical Information Infrastructure legislation to provide an appropriate framework for the protection of key information infrastructure within six months. The legislation to be introduced by the Committee, should contain provisions—

- (i) to the effect that all infrastructure built using the Universal Service Fund should be available for sharing by all telecommunications providers;
- (ii) aligning the building code with regard to access for installation of fiber; and
- (iii) permitting access to buildings by all ICT service providers.

4. The Committee recommends that—

- (i) the Communications Authority uses Universal Service Fund to build new Base Transceiver Stations accessible to all network operators in the underserved counties of Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana, and Wajir;
- (ii) the Communications Authority and the Ministry responsible for matters relating to information and communications technology formulate and publish regulations for the provisions relating to critical infrastructure under the Computer Misuse and Cybercrimes Act, 2018 **within six months**; and
- (iii) the Communications Authority reviews the current licensing regime **within six months** and report to the National Assembly on measures taken to ensure equity in the issuance of licences.

12.4 Call and short message service (SMS) termination rates

5. The Committee recommends that—

- (i) the Communications Authority consults with mobile network operators and establishes a glidepath for the reduction of mobile termination rates to zero **within two years**; and
- (ii) the Ministry responsible for information and communications technology publishes Regulations on fair competition, equality of treatment, tariffs and interconnection.

12.5 Unstructured Supplementary Service Data (USSD) and SIM Application Toolkit (STK) access and rates

6. The Committee recommends that the Communications Authority—

(i) ~~develops and publishes guidelines on the adoption of a unified SIM application toolkit with universal access across the platforms of all mobile network operators~~
within one year;

(ii) conducts a study on unstructured supplementary data access fees **within one year** with a view to lower the fees; and

(iii) develops and publishes regulations on the use of unstructured supplementary data by mobile network operators for non-telecommunication related services.

12.6 Mobile money services and rates, including transaction charges, transfer fees, loans and interest

7. The Committee recommends that—

(i) the Central Bank of Kenya and the Communications Authority formulate and publish regulations **within six months** on mobile money transaction fees for all mobile money operators;

(ii) **within six months** the Central Bank of Kenya and the Communications Authority should explore modalities of structuring and implementing agent interoperability—

(a) through the use of a shared technology between mobile network operators engaged in mobile money services; and

(b) requiring mobile network operators to deposit an agreed annual amount with the Kenya Deposit Insurance Corporation as security for customer funds held in mobile money wallets;

(iii) the Central Bank of Kenya and the Communications Authority conduct an audit of the levels of compliance with Anti-Money Laundering and Know-Your-Customer obligations by mobile network operators engaged in mobile money services **within six months;**

(iv) The Communications Authority conducts an audit of compliance by mobile network operators with SIM-card registration requirements **within six months;**

(v) the Central Bank of Kenya and the Communications Authority formulate and publish regulations within six months—

(a) on interest rates on mobile money. The interest rates should be those applicable to commercial banks for standardization;

(b) requiring mobile network operators engaged in mobile money services to obtain the express consent of their customers with regard to accessing the services and products offered and to clearly disclose to the customers all the charges applicable to the services and products; and

(vi) the Central Bank of Kenya and the Communications Authority audit all unregulated money lending fintech firms which leverage on mobile platforms and subject them to the applicable money lending regulations within six months.

12.7 Access to telecommunications infrastructure, including cell towers, ducts, poles and fiber

8. The Committee recommends that the Communications Authority—

(i) formulates and publishes regulations on mandatory infrastructure sharing subject to technical environmental and commercial viability within six months.

(ii) uses Universal Service Fund to build new Base Transceiver Stations accessible to all network operators in the market.

(iii) formulates and publishes regulations allowing the use of telecommunication infrastructure funded by government agencies by all mobile network operators at a reasonable and uniform fee within six months in consultation with those agencies.

(iv) in consultation with County Governments and the Ministry responsible for roads, develops a licensing framework to harmonize all the charges applicable to the use of wayleaves for the laying of fiber and ducts within one year.

9. The Committee recommends that monies in the Universal Service Fund should be ring-fenced and utilized for their intended purpose of supporting widespread access to information and communications technology services and promoting capacity building and innovation in information and communications technology services in the country.

12.8 Provision of content services

10. The Committee recommends that the Communications Authority—

- (i) formulates an adequate mechanism for the monitoring of the provision of content services **within six months** to ensure that mobile network operators and content service providers offer the customers only the services that they have subscribed to;
-
- (ii) ~~formulates and publishes regulations to manage premium rates service providers that~~ will ensure customers can opt-out of unwanted services without being charged **within six months**; and
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- (iii) formulates and publishes regulations on the licensing of mobile network operators as content service providers and their obligations.

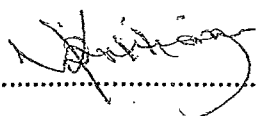
12.9 National Roaming

11. The Committee recommends that the Communications Authority implements national roaming to other Tier 1 mobile operators in the seven counties of Isiolo, Garissa, Mandera, Marsabit, Samburu, Turkana, and Wajir within one-year subject to Long-Run Average Incremental Cost.

12.10 Amendment of the law

12. The Committee recommends the amendment of Kenya Information and Communications Act, 1998 and the Competition Act, 2010 to empower CA with the sole mandate to determine competition matters arising in the telecommunications sub-sector **within six months**.

SIGNED.....



DATE:

02/03/2019

HON. WILLIAM KISANG, MP - CHAIRPERSON

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION