



**KICTANET'S DRAFT REPORT ON THE INDEPENDENT COMMUNICATIONS
COMMISSION OF KENYA BILL 2010 DISCUSSION**

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The Kenya ICT Action Network (KICTANet) is a multi stakeholder network of members from civil society groups, private and public sectors, development partners and media. The network aims to act as a catalyst for reform in the ICT sector in support of the government's mission to enable Kenyans to gain maximum benefit from the opportunity offered by ICTs.

Introduction

The Ministry of Information and Communications have resolved to amend the Communications Commission of Kenya Act to bring the functions of the Commission more in line with the relevant constitutional provisions. The Act seeks to do away with the existing Communications Commission of Kenya and replace it with the Independent Communications Commission of Kenya. In line with the new constitutional provisions on stakeholder input into new statues, the Ministry of Information and Communications has put a copy of the Bill up for Discussion on the KICTANet mailing list so as to receive input from stakeholders in the ICT industry and various other sectors.

Over a 10 day period beginning 14th February 2011 and ending on 25th February 2011, the Bill was discussed on the KICTANet mailing list and input was received from various stakeholders in and outside the industry.

The Culmination of the issues raised and the suggestions posed to amendments of the Bill forms the basis of this report.

Analysis of the Bill

The analysis of the Bill has been done in a tabular form that sets out the specific section of the bill in the first column, the issues that were raised about that particular section and the recommended changes in the third column.

It is important to take note of the experience of Kenya Communications Act 1998 (KCA 98) and the subsequent amendment in 2009, the existing ICT policy document, the demands of new constitution and the directions of vision 2030. International trends are also imperative.

Both KCA 98 and the subsequent 2009 amendment reflected and emanated from a policy framework developed largely by government, the former Kenya Posts and Telecommunications Corporation (KPTC) and the national stakeholder groups respectively. This draft bill departs from the trend and certainly misses the collective wisdom and aspiration of the stakeholders which should provide for the purpose of the bill in the first place

The Bill establishes a regulatory tool which is in contrast with the existing Act whose preamble specifically refers to facilitating development of the telecommunications sector. It is feasible for the commission to do both by setting frameworks that promote nationwide and equitable growth. Growth is key and needs to appear in the preamble.

With evolution of such commissions internationally, the language and philosophy has changed over time from control philosophy to facilitation and sector leadership philosophy. The old style

regulators provided solutions, sought to protect the people or sector, restore order or maintain norms. This is not feasible today and going forward, we need sector leaders to scan the environment and the future and nudge the sector forward

Since KCA 98, the supply side has grown rapidly and although there is work to do, the greatest challenge going forward is setting standards for intervention on the demand side. The preamble needs to address this.

The operative language which is emphasized is "independence". This language was there in the KCA 98 and the subsequent 2009 amendment but certainly could not be achieved. The Bill sets a very high standard which will be difficult to realize. There are three dimensions of independence i.e. structural independence, financial independence and functionality. The Bill can provide structural independence but the rest are functions of the market and based on the effectiveness of the Commission.

SECTION	ISSUES OF CONCERN	RECOMMENDATIONS
<p>Preamble <i>“An Act of Parliament to provide for the establishment of the Independent Communications Commission of Kenya; to transfer the functions of the Communications Commission of Kenya to the Independent Communications of Kenya; to amend the Media act 2007, The Information and Communications Act, 1998 and to provide for matters connected therewith”</i></p>	<ul style="list-style-type: none"> • Why should the Bill amend the Media Bill of 2007, that is the function of the Media Bill of 2010 • There is no mention of the policy framework that informs the Bill • In Article 248, sub article (1) & (2) of the Constitution which establishes Commissions in this country, the ICCK name does not appear to be among those listed. Is this in contravention to constitutional provisions? • The independence of the ICCK cannot be vested in the name but the powers conferred to by the law • The Constitution refers to only one media regulatory body, so shall it be the ICCK or the Media Council? 	<ul style="list-style-type: none"> • This provision should be deleted from the preamble • There is need for a policy framework that informs the Bill • The likely unconstitutionality can be overcome by use of another name like “Communications Regulatory Authority of Kenya” • Remove the word ‘independent’ from the title of the Commission. • Promoting growth in the sector is key and needs to appear in the preamble.
<p>Title: Independent Communications Commission of Kenya</p>	<ul style="list-style-type: none"> • Article 34(5) of the Constitution envisions one body to regulate the media, so is that body the ICCK or the Media Council? 	<p>No consensus reached. Needs further discussion</p>
<p>Section 2(a) which says <i>"is independent of control by government, political or</i></p>	<ul style="list-style-type: none"> • This provision gives the impression that bodies such as the 	<p>No consensus reached, needs further discussion</p>

<i>commercial interests"</i>	Media Ownersø Association have no stake in the Commissions activities	
Section 2(c) & (d) refer to set media standards and regulateø	<ul style="list-style-type: none"> • The Bill sets up a regulatory body that is contrary to the previous Act • Setting media standards is not a function of the Communications Commission of Kenya 	<ul style="list-style-type: none"> • The section should refer to facilitating developmentø of the sector rather than to regulation • Section 2(c) should be deleted
Section 2(d) which states that one of the objects is toí 'regulate communications in the public interest'	<ul style="list-style-type: none"> • What is included in the definition of communication? It will be to varied and will touch on content for both print and broadcast media 	<ul style="list-style-type: none"> • The definition of communications should be narrowed • Needs further discussion
Section 3(5) reads <i>'The Commission must function without political or commercial interference'</i>	<ul style="list-style-type: none"> • This leaves a loophole by limiting the scope of those who can interfere with independence to only 2 groups 	<ul style="list-style-type: none"> • This section should be amended to read <i>'The Commission must function without any interference from political, commercial or other partisan interests.ö</i>
Section 4 on the Functions of the Commission	<ul style="list-style-type: none"> • This section simply says that the ICCK will take over from the functions of the CCK; but what are those functions? • If ICCK will take over whatever CCK has been doing then how does one deal with the aspect of being öindependent of control by governmentö when in essence CCK votes at the ITU based on 	<ul style="list-style-type: none"> • The functions of the ICCK need to be particularized. • The functions of the ICCK should focus on implementation of policy rather than formulating policy

	<p>instructions from the Government of Kenya?</p> <ul style="list-style-type: none"> • The CCK has been working not only with the ITU but with other entities like ICANN and the IGF to FORMULATE policy while its role should have been limited to IMPLEMENTING policy. Will the new ICCK continue policy formulation function? 	
<p>Section 5(1) on the Appointment of Commissioners</p>	<ul style="list-style-type: none"> • Why should the President be charged with the mandate of appointing commissioners? • There is no mention of gender parity in the Bill as per constitutional requirements 	<ul style="list-style-type: none"> • The Cabinet Secretary should be then one to make appointments on recommendation of PSC • It is critical that the gender balance or the 30% is explicitly acknowledged in the Bill
<p>Section 5(3)(b) defines the fields from which qualifications and expertise qualifies one for appointment to the Commission</p>	<ul style="list-style-type: none"> • There is need for more diversity in the key experience areas required by the Commissioners 	<ul style="list-style-type: none"> • There should be an inclusion of Information Technology, policy and regulatory etc as one of the key experience fields /professions from which Commissioners may be selected • There is need for a balance among commissioners so that the public, private and NGO sectors are represented to avoid the ICCK catering only to corporate interests while ignoring the consumer

<p>Section 6(1)(e) which states <i>‘ or his or her family member has a direct or indirect financial interest in the sector’</i></p>	<ul style="list-style-type: none"> • This can be interpreted to mean that if an individual or his/her member of a family owns some shares in a company in the sector then he/her does not qualify to be a commissioner. This needs to be qualified further 	<ul style="list-style-type: none"> • This section should be amended to bar only individuals/owners of firms with controlling shares in any company in the sector.
<p>Section 6(1) (f)</p>	<ul style="list-style-type: none"> • This Section is too lengthy and is not clear 	<ul style="list-style-type: none"> • The Section needs to be amended and simplified • The reference to <i>‘subsection (f)’</i> at the end of the Section should be amended to refer to <i>‘subsection(e)’</i> • No consensus reached. Needs further discussion
<p>Section 7(1) on Duration of office of Chairperson</p>	<ul style="list-style-type: none"> • Why should the chair serve for a longer period than the other Commissioners? 	<ul style="list-style-type: none"> • The chair should serve for the same duration of time as other Commissioners
<p>Section 7(2) on Duration of office of Commissioners</p>	<ul style="list-style-type: none"> • A four year term is too long for the Commissioners 	<ul style="list-style-type: none"> • A three year term is advisable
<p>Section 7(5) states that <i>‘a Commissioner may at the end of his or her term of office be reappointed in terms of Section 5 for one additional term’</i></p>	<ul style="list-style-type: none"> • This section should be more clear on how many terms a Commissioner can run for • There is a likelihood of overlaps in the Commissioners terms 	<ul style="list-style-type: none"> • The terms of Commissioners should be limited to a maximum of two (2) and this must be specifically stated in the Bill • The appointments of Commissioners should be staggered to ensure at least 50% continuity in the Commission
<p>Section 7(6) on the employment of Commissioners</p>	<ul style="list-style-type: none"> • It is not clear whether Commissioners will be in full employment of the 	<ul style="list-style-type: none"> • There needs to be clarity on whether the Commissioners will be full time employees • The Commissioners need

	Commission.	some safeguard against political and other unwarranted influence
Section 8(b) and (e) Removal of Commissioners from office	<ul style="list-style-type: none"> • There is no procedure/way specified for the removal of a Commissioner 	<ul style="list-style-type: none"> • A Commissioner should be removed from office by a 2/3 vote of other Commissioners
Section 10 on Remuneration	<ul style="list-style-type: none"> • What is reasonable in terms of allowances and remuneration? 	<ul style="list-style-type: none"> • The remuneration of Commissioners should be determined by the Cabinet Secretary and should also be pegged to remuneration given to Commissioners in other Commissions
Section 11(3) on Quorum for meetings	<ul style="list-style-type: none"> • There should be a specified minimum number of meetings per year • The numeric quorum for meetings must be specifically stated 	<ul style="list-style-type: none"> • The quorum for meetings should be at least five (5) Commissioners • Further discussion required
Section 12(1) (b)	<ul style="list-style-type: none"> • This section is impractical • A Commissioner has no control over what their family members do • It contradicts with Section 6(1)(e) and (f) 	<ul style="list-style-type: none"> • The Section should be deleted • Further discussion required
Section 14 on Staff to the Commission	<ul style="list-style-type: none"> • Section 14(2) could have a number of approaches by complying with existing law or also adopting an internal policy or both and needs to be clearer 	<ul style="list-style-type: none"> • Section 14(2)(a) could be amended to read: <i>-The Commission shall establish and adhere to an equal employment opportunity policy and/or shall comply with equal employment opportunity laws that prohibit among other practices, discrimination in the consideration of employment on the basis of colour, race, national or geographic origin, physical or mental</i>

		<p><i>handicap, gender, sex, ethnicity, religion, marital status, age for the purposes of employment</i></p> <ul style="list-style-type: none"> • Section 14(2) (b) could be amended to read: <i>'The Commission shall make reasonable accommodations for qualified staff members or employment candidates who may have a physical or mental handicap that would be a hindrance to job performance in the absence of these accommodations to allow them to carry out their respective employment duties.ø</i>
Appointment of the Director General	<ul style="list-style-type: none"> • The Bill is silent on how the Director will be appointed; this could lead to nepotism, favouritism in appointments • The Bill is also silent on the term of office of the Director General 	<ul style="list-style-type: none"> • The appointment of the Director General should be an open, transparent and competitive process • The term of office of the Director General should be restricted to two(2) terms of four(4) years each
Section 14(1) on Staff to the Commission	<ul style="list-style-type: none"> • How will the top management structure of the ICCK be organized? • Will there be a Board to oversee the management and work of the ICCK? • The roles of the Commissioners and the Director General are not clearly defined nor distinct from each other • The Commissioners 	<ul style="list-style-type: none"> • The Bill should be explicit that the Director General attends meetings of the ICCK as an ex-officio member whose role is to execute the decisions of the ICCK • The management structure of the ICCK needs to be clearly outlined • The roles of the Director General and the Commissioners must be specifically outlined and they must be distinct from

	<p>as full time employees will not be busy enough and will have the effect of undermining the power and authority of the Director-General</p> <ul style="list-style-type: none"> • By barring the Director-general from attending meetings of the Commission, makes it more necessary for the Commissioners to meddle in operational matters 	<p>one another so that the spheres of influence are clear</p> <ul style="list-style-type: none"> • The Commissioners should not be full time employees of the ICCK as their role is not management and there would not be enough work for them to do on a day to day basis
Section 16 on Annual Reports	<ul style="list-style-type: none"> • The Section only provides a bare minimum standard and the report only contains processes and activities which is very reactive 	<ul style="list-style-type: none"> • The ICCK should go beyond data and figures and make a statement of the status of the industry with a pointer on the direction of the ICT Sector in line with the national aspiration and global context • The report should include the financial health of the ICT sector as well as capture the activities of any of ICCK's subsidiary organs like the Communications Appeals Tribunal
Part IV: Transitional Provisions	<ul style="list-style-type: none"> • Section 18(1) and other sections referring to the 'effective date' when CCK will be dissolved should be clearer as to when this will be 	<ul style="list-style-type: none"> • The meaning of effective date in the definition section should be amended to read "<i>effective date</i>" means the date that this Act shall come into effect, which date shall be determined by the Cabinet Secretary by notice in the Gazette'