



PRESS STATEMENT

PRESS STATEMENT BY MR. FRANCIS WANGUSI, DIRECTOR GENERAL, COMMUNICATIONS AUTHORITY OF KENYA ON THE PROPOSED MISCELLANEOUS AMENDMENTS TO THE KENYA INFORMATION AND COMMUNICATIONS ACT OF 1998

It has come to the attention of the Authority that there are proposed amendments to the Kenya Information and Communications Act, 1998 (KICA) as contained in the Statute Law (Miscellaneous Amendments) Bill, 2015.

The proposals seek to alter the definition of dominance under KICA and additionally to apply the criteria for determination of dominance as set out in section 4 and 23 of the Competition Act, 2014 - in total disregard of the thresholds provided in the sector specific legislation. These proposals undermine the efforts of the Authority, which is the independent sector regulator as envisaged under Article 33 and 34 of the Constitution of Kenya, 2010. The proposals further seek to remove the rule-making function from the Authority.

The amendments have come as a surprise to the Authority and it is even more concerning that Ministry of Information, Communications and Technology is equally not aware of the proposed amendments.

It is clear that the proposals are totally at variance with the ones were earlier submitted by the Ministry of Information, Communications and Technology for inclusion in the Bill.

Typically all such changes should be subjected to public and stakeholder consultations before they are forwarded to the Attorney General. It is quite disconcerting that neither the Ministry of Information, Communications and Technology, the Authority, nor any other industry stakeholders, were consulted on the proposed changes.

The Authority is persuaded that the definition of dominance as currently provided for in KICA is better suited for addressing ex-ante competition regulation and for correcting anti-competitive tendencies in the ICT sector. The definition provided for in the Competition Act, 2010 denies the sector regulator the tools to intervene in a timely manner in anti-competitive markets where abuses of dominance or anti-competitive concerns have not yet emerged. We are inclined to hold this view for reason that the definition of dominance in the Competition Act *inter alia*:

1. fails to take into account the relevant market segments that the communications market is comprised;
2. prescribes the threshold for ascertaining dominance at controlling a market share of 50% or above; and
3. fails to take into account the concept of significant market power

International best practice dictates that a telecommunications operator can have significant market power with a market share of as low as 25% and that in certain instances, this may necessitate regulatory intervention particularly in developing markets like ours.

The rationale behind the bestowment of the rule-making function to the Authority on matters pertaining to the regulation and licensing of the communications sector was to ensure full compliance with Article 34 of the Constitution which envisages an independent communications regulator that is free from government, political and commercial interests. In addition, such a provision would be in keeping with the recommendation from the Commission for the Implementation of the Constitution (CIC) that rule making functions be donated to the Authority as a means of enhancing the operational independence of the communications regulator. CIC made this recommendation to the taskforce during the review of KICA in 2013.

It is the view of the Authority that the enactment of the proposed amendments will not only interfere with Authority's regulatory independence but will also slow down the development and maturity of the communications industry in Kenya. The published proposals are therefore untenable and prejudicial to the ICT sector.

The Authority is not in agreement with the proposed amendments and strongly recommends that the amendments be done away with since they would greatly

hinder the enabling environment for policy, legal and regulatory constructs in the ICT sector.

However, as has been the custom and as mandated by national values and principles of public service, the Authority shall continue to engage earnestly with stakeholders, key among them being the Ministry of Information, Communications and Technology. The Authority remains committed to transforming the lives of Kenyans through ICTs and we will therefore maintain our focus to meet the targets we have set out in our plans.

The Communications Authority of Kenya is highly regarded in the region as a model regulator and it would therefore be in the interest of our country that we maintain the upward trajectory in order to uphold the respect other jurisdictions have for Kenya's ICT sector.

Issued on 29th October 2015, by:

A handwritten signature in black ink, appearing to read 'Francis W. Wangusi', with a large, stylized initial 'F' and a long horizontal stroke extending to the right.

**FRANCIS W. WANGUSI, MBS
DIRECTOR-GENERAL**