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Legislative UPDATE

KEPSA KENYA PRIVATE SECTOR ALLIANCE

Dear Esteemed Member,

This Bulletin summarizes some of the key Bills, and Motions set for debate and consideration before Parliament in the week ending 5th April 2019.

THE NATIONAL ASSEMBLY

The following Bills came up for 1st reading and were ordered to be referred to the relevant Departmental Committees:

1. *The Narcotic Drugs and Psychotropic Substances (Control) (Amendment) Bill*
2. *The National Disaster Management Authority Bill*
3. *The Statutory Instruments (Amendment) Bill*
4. *The Employment (Amendment) Bill*

MOTIONS TABLED BEFORE THE NATIONAL ASSEMBLY

ADOPTION OF REPORT ON INQUIRY INTO LEGISLATIVE/ REGULATORY GAPS AFFECTING COMPETITION IN THE TELECOMMUNICATION SUB-SECTOR

The Report of Departmental Committee on Communication, Information and Innovation on the Inquiry into Legislative and Regulatory Gaps affecting Competition in the Telecommunications Sub-Sector, laid on the Table of House on Tuesday, 5th March, 2019 was tabled for adoption by the House.

The terms of reference of the committee were:

1. *To inquire into the nature, levels and extent of competition in the telecommunication sector under the existing legal framework with 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 SMS termination rates.*

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

    f) *Mobile money services and rates including transaction charges, transfer fees, loans and interest.*

    g) *Access to telecommunication infrastructure including cell towers, ducts, poles and fibre.*

    h) *Provision of content services.*

    i) *Mobile airtime and data rates including airtime loans and service fees.*

    j) *Proposals on the measures to address gaps that contribute to anticompetitive behaviour or restrict growth in the sector.*

2. *What the players in sector have done to ensure fair play in the sub-sector, and*

3. *Whether the Communication Authority (CA) has adequately protected competition in the sub-sector.*

1. The Communications Authority of Kenya (CA) to formulate and publish clear guidelines on the application, allocation and use of spectrum resources within six months. The guidelines should clearly indicate the process involved at each stage, the conditions applicable to the resource allocated and the circumstances under which spectrum is allowed. Spectrum is basically the resource that the telecommunication sub-sector is signed, and each pays about US$25 million over a period of 10 years and there is an annual licence of about a billion after that period. The guidelines should also indicate the procedure of 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.

2. In regard to market share of telecommunication service providers, the Committee recommended that the CA should review the market every two years to ascertain the levels of competition including dominance by any mobile operators and report to the National Assembly biannually on whether a dominant player exists within the sub-sector, including investment in infrastructure as a precondition for the issuance of licences in the sub-sector. Each applicant is required to demonstrate a clear investment plan as in the past, there have been investors who came in and stayed with licences and after a short while, they exited by selling the spectrum to other players. Importantly, the Committee also recommended that the Kenya Information and Communications Act should be amended to provide a clear definition of market share with reference to gross revenues related to declaration of a dominant telecommunication service provider.

3. On broadband services and rates, the Committee recommended the enactment of critical infrastructure legislation to provide appropriate framework for protection of key information infrastructure within six months. The legislation is to be introduced by the Committee and should contain provisions to the effect that all infrastructure built using the Universal Service Fund should be available for sharing by all telecommunications providers. Currently, fibre is not treated as a critical infrastructure. For instance, if the optic fibre cable network goes down, it means all the mobile money and communications will go down. There is also the issue of aligning the building code with regard to access for installation of fibre and permitting access to buildings by all ICT service providers. Currently, when providers are the first ones to go to buildings, they ensure that others do not go in.

4. That the CA uses the Universal Service Fund ("USF") to build new base station accessible to all network operations in the underserved counties of Isiolo, Garissa, Mandera, Marsabit, Samburu and Turkana. Such that as soon as one builds a tower, other operators can just plug in the active components in the towers and they do not have to rebuild. The USF are funds that have already been paid by the telecommunication operators and they are available for all those who are present and those who will be coming in.

5. That the CA and the Ministry, on matters relating to ICT, should formulate and publish regulations for provisions relating to critical infrastructure. The CA should also review the current licensing regime and report to the National Assembly on measures taken to ensure equity in issuance of licences.

6. In regard to SMS, the CA should consult the Mobile Network Operators (MNOs) and establish a glide path for reduction of mobile termination rates within two years and the Ministry responsible for ICT to publish regulations on fair competition, equality of treatment, tariffs and interconnection.

7. On Unstructured Supplementary Service Data (USSD) and SIM Application Toolkit (STK), the CA should develop and publish guidelines in the adoption of a unified Subscriber Identification Module (SIM) application toolkit with universal access across all mobile network operators' platforms within one year. Importantly, CA should also develop and publish regulations of the USSD by mobile network operators for non-telecommunication related services.

8. In regard to mobile money services rates including transaction charges, transfer fees, loans and interests, the Central Bank of Kenya (CBK) and the CA should formulate and publish regulations within six months on mobile money *applicable to commercial banks for standardisation. This will require mobile network operators engaged in mobile money services to obtain express consent of the 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.*

9. Within six months, the CBK and the CA should explore modalities of structuring and implementing agent interoperability through the use of a shared technology between mobile network operators engaged in mobile money services and requiring mobile network operators to deposit an agreed annual amount with the Kenya Deposit Insurance as a security for customer funds held in mobile wallets. The CBK and the CA should conduct an audit of the levels of compliance with anti-money laundering and Know Your Customer (KYC) obligations by mobile network operators engaged in mobile money services within six months. It was noted that some mobile operators still give out SIM cards without registering them.

10. The CA should conduct an audit of compliance by mobile network operators with SIM card registration within six months.

11. The CBK and the CA should audit all unregulated money lending fintech firms which leverage on mobile platforms and subject them to applicable money lending regulations within six months.

12. On access to telecommunication infrastructure, including cell towers, duct, poles and cyber, CA should formulate and publish regulations on mandatory infrastructure sharing subject to technical, environmental and commercial viability. Basically, the CA needs to sit down with telecommunication operators, see where they already have towers and whether they can be upgraded to accommodate the others. If the tower is owned by operator A, they should negotiate commercial terms with the other operators, use the Universal Service Fund to build new base transceiver stations accessible to all network operators.

13. The CA should formulate and publish regulations allowing the use of telecommunications infrastructure funded by Government agencies by all mobile network operators at a reasonable and uniform fee within six months in consultations with the agencies. In consultation with county governments, the Ministry responsible for roads should develop a licensing framework to harmonise all the charges applicable to the use of way-leaves for laying of fibre and ducts within one year. It was noted that currently, if one wants to lay a fibre optic cable in Nairobi, the rates charged are different from those charged at Kiambu, Elgeyo Marakwet or Thika. As such, the Committee indicated that they want the Ministry responsible for roads to standardise the rates so that technology becomes affordable.

14. That the money in the Universal Service Fund should be ring-fenced and utilised for the intended purpose which is supporting widespread access to information, communication and technology. As where the money is not ring-fenced, a need may crop up and the money is used.

15. With regard to the provision of content services, the CA should formulate an adequate mechanism for monitoring the provision of content services. This is meant to ensure that mobile network operators and content service providers offer customers only the services they have subscribed to as service providers should not be intrusive.

16. That the CA should formulate and publish regulations to manage premier rates service providers that will ensure customers can opt out of unwanted services without being charged. For instance, if there is a particular service that one subscribed to and after a month, a day or hours one is not willing to continue, one should be given an option to opt out of that service without being charged or getting restrictions.

17. The CA should formulate and publish regulations on the licensing of mobile network operators as content service providers and the obligations. The initial licences the providers are being given are not for content provision, but they are already doing that business. As such, they need to pay additional fee for that so that the Exchequer gets additional funds.

18. On national roaming, the CA should implement national roaming to all the Tier 1 mobile operators in the seven counties of Isiolo, Garissa, Marsabit, Samburu, Turkana and Wajir within one year, subject to long-run average incremental cost. Tier 1 operators are those who can offer their services across the country and Tier 2 are those that are restricted to particular regions. Tier 3 is restricted to a particular county. As such, because there is an issue with the seven counties, the CA should ensure that national roaming is done quickly.

19. The Committee also proposes the need to amend the Kenya Information and Communications Act, 1998 and the Competition Authority Act, 2010, to empower the CA with the sole mandate to determine competition matters arising in the telecommunication sub-sector within six months. Currently, the CA and the Competition Authority of Kenya should have an MoU because under the current law, the Competition Authority of Kenya is the sole authority that is mandated on competition matters, but CA is the technical organisation and the Competition Authority of Kenya does not have the technical expertise when it comes to the telecommunication sub-sector.

1. **THE PUBLIC PARTICIPATION BILL (SENATE BILLS NO. 4 OF 2018)**

The Bill was coming up for a Committee of the Whole but was deferred.

The Bill provides for a general framework for effective public participation; to give effect to the constitutional principles of democracy and participation of the people under Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) and (d), 184(1)(c), 196,201(a) and 232(1)(d) of the Constitution.

2. **THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILLS NO. 31 OF 2018)**

The Bill was coming up for a Second Reading but was deferred.

The purpose of the Bill is to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities.

3. **THE DECISION OF THE NATIONAL ASSEMBLY ON SENATE AMENDMENTS TO VARIOUS BILLS**

The House received the National Assembly's feedback on the Senate amendments to the following Bills:

1. *Physical Planning Bill (National Assembly Bill No. 34 of 2017);*
2. *Irrigation Bill (National Assembly Bill No. 46 of 2017); and*
3. *Land Value Index Laws (Amendment) Bill, (National Assembly Bill No. 3 of 2018).*

The National Assembly agreed to part of the Senate's amendments to the said Bills and rejected part of the said amendments. The Bills would therefore be referred to the Mediation Committee. The Speaker of the National Assembly had already appointed Members of the National Assembly to rep-resent the National Assembly in the Mediation Committee that will attempt to develop versions of the said Bills that both Houses will pass.

Where a Bill is referred to a mediation committee, the Speakers of both Houses appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass which the House then votes on. If both Houses approve the version of the Bill proposed by the mediation committee, the Speaker of the National Assembly shall refer the Bill *on a version of the Bill within 30 days, or if a version proposed by the committee is rejected by either House, the Bill is defeated.*

SENATE DEPARTMENTAL COMMITTEE ISSUES

1. DANGERS OF USING ROUNDUP HERBICIDE

The Chairperson of the Committee on Agriculture, Livestock and Fisheries was tasked to report to the House on:

1. *Whether he is aware that farmers in Kenya commonly use Roundup Herbicide in weeding their farms, yet it contains glyphosate, which is an active chemical ingredient which causes cancer.*

2. *To explain whether the Ministry, through the Pest Control Products Board, has done any research on the herbicide to caution farmers on the danger they are exposing themselves to with the continued use of the herbicide.*

3. *To state whether preventive measures have been set to enable farmers have protective gear, since the World Health Organisation (WHO), on their latest research, indicates that the cancer of the windpipe is the top killer in Kenya, yet Roundup Herbicide contains glyphosate, which is carcinogenic to human beings.*

4. *State what the Ministry of Agriculture, Livestock and Fisheries in collaboration with the Ministry of Health will do to ensure minimum or no cause of alarm or panic from the Kenyan farmers as a result of the use of this harmful herbicide that has been proven to cause cancer by other countries such as the United States of America (USA).*

JOINT SITTING OF THE NATIONAL ASSEMBLY AND THE SENATE

A Special Sitting of Parliament was convened as the Constitution of Kenya requires the President to address a Special Sitting of the Parliament of Kenya once every year and at any other time. Further, Article 132(1) (c) requires the President to, among others, once every year report, in an address to the Nation, all the measures taken and the progress achieved in the realisation of the national values set out in Article 10 of the Constitution. In addition, Article 247 of the Constitution requires the President, in his capacity as the Chairperson of the National Security Council (NSC), to report to Parliament annually on the State of the security of the Republic.

In his address the President noted that there is no turning back on the obligations that the Government has made on the Big Four Agenda, to environmental sustainability, to inter-generational equity and upholding a strong rules-based international system and that they remain true to the long-term strategy, the Kenya Vision 2030. The Medium-Term Plan of 2018-2021 is centred on the Big Four Agenda. During this period, the economy is expected to grow at an annual average rate of 6.6 per cent. Our focus is on socio-economic interventions in critical sectors, that we believe will enhance the quality of life for all Kenyans, in ways that are tangible and measurable.

In regard to manufacturing, the President renowned that his administration is prioritising local motor vehicle assembly and manufacturing of spare parts. This initiative has witnessed Peugeot and Volkswagen assembly lines set up in Kenya. Since their revival, the two companies have jointly assembled 627 motor vehicles; and by the end of 2019, they will have assembled at least 1,500 vehicles. This is a positive beginning for a sector that is expected to rapidly expand and make Kenya the regional motor vehicle assembly hub. This will create various opportunities for our people, particularly, for our youth.

The Universal Health Coverage (UHC) programme is expected to ensure a healthier nation as the basis for social economic development. In this regard, the President indicated that they have successfully rolled out the pilot phase of the programme in Isiolo, Machakos, Nyeri and Kisumu counties. The programme has witnessed enhanced access to essential health services with an average increase across the pilot counties of 39 per cent reported and that we are on course for the full roll-out of the UHC in the year 2019/2020 in the remaining 43 counties.

Hon. Members were informed that agriculture is the largest employer in the economy accounting for 60 per cent of total employment. In recognition of its central role, the President indicated that his administration earmarked the sector as a key pillar of the Big Four Agenda, as we seek to ensure food security and *being farmer-centric and are focused on reducing the cost of food, increasing agricultural value-addition and offering incentives for farming and 4,400 water pans under the Household Irrigation Water Projects were constructed to enhance food production at the household level. The pans will store six million cubic meters of water, placing an additional 6,000 acres under irrigation.*

In addressing the perennial challenges in the sugar and maize sub-sectors, the President noted that his administration commits to decisively act on the recommendations of the two sectoral taskforces that are slated to report their findings later this month. He noted that he expects that the teams will propose bold and transformative interventions to revive and substantially grow, in a sustainable way, the important sub-sectors. Additionally, the President stated that his administration has also prioritised reforms in the coffee sub-sector, and implemented numerous interventions emanating from the recommendations of the Coffee Task Force. These include the ambitious rehabilitation of 500 pulping stations in 31 coffee-growing counties.

Further, the President indicated that with a view to comprehensively resolve the problem of undue delays in the payment cycle, they have also set up a Kshs3 billion Cherry Advance Revolving Fund to be operational from 1st July, 2019. Consequently, all coffee farmers across the country will be able to access the Cherry Advance at a modest interest rate of 3 per cent.

The President also addressed himself to access to decent and affordable housing being a basic human right that his administration is determined and committed to honor. He noted that this was being fulfilled through the Affordable Housing Programme (AHP) and to realise this vision, the Affordable Housing Development Framework Guidelines (AHDFG) have been promulgated, providing the enabling policy and financing for the roll-out of the Programme. He noted that the life-changing Programme is being undertaken in partnership with county governments as well as the private sector.

Despite court cases and initial delays, over 175,000 Kenyans have already registered under the voluntary scheme known as "Boma Yangu." These Kenyans will, undoubtedly, be the first in line for the allocation of new housing.

Additionally, the Affordable Housing Programme is expected to create opportunities for the local industry. In this regard, the President noted that they have ring-fenced the supply of certain components such as doors, windows and cupboards for the exclusive delivery by Micro, Small and Medium Size Enterprises (SMEs). This will not only put money in the pockets of our local artisans, but also support the formalisation of this industry.

Moreover, the President stated that the delivery of the Big Four Agenda is on course and it is expected that the private sector will take advantage of the policies and incentives in place and turn the four priority areas into mighty engines of wealth and job creation. The realisation of the Big Four Agenda is dependent on critical enablers, including; energy, transport, education, water, Information, Communication and Technology (ICT).

In providing for reliable and cost-effective electricity that meets current and future demand, the President noted that they have put in place measures to accelerate the development of the entire power generation, electricity transmission and supply infrastructure. This will also support the realisation of universal access to electricity by the year 2022.

He reported that the installed capacity has increased from 1,768 megawatts in March of 2013, to the current 2,712 megawatts, with Lake Turkana Wind, Ngong Wind and Garissa Solar Power Plants joining the grid within the last year. He noted that in collaboration with development partners, they have made tremendous gains in scaling up connectivity over the last six years, with the number of electricity connections rising from 2.2 million in March of 2013, to 7.1 million as at March of 2019. The tangible impact on the lives and livelihoods of our people, associated with increased electricity connectivity cannot be gainsaid.

Further, the President pointed out that his administration recognises the role played by micro, small and medium enterprises in spurring the development of the country. The sector employs approximately 14.9 million Kenyans and contributes to an estimated 28 per cent of our Gross Domestic Product (GDP). To unlock the latent potential resident in this sector, the President noted that his administration has been working towards addressing the challenges of access to credit, training and skills development. In this regard, there will be a launch for Small Medium Enterprises (SMEs) Credit Guarantee Scheme in a few weeks aimed at deepening their access to credit without being subjected to complex application procedures and collateral requirements. He noted that the interventions are critical to production of competitive goods and services for the domestic, regional as well as global markets. In respect of the leather value chain, a Common Manufacturing Unit at Kariokor Market in Nairobi is nearing completion and once fully equipped, the centre will provide impetus to the local shoe making industry to professionalise and standardise manufacture of shoes.

Importantly, the President alerted the House that the national values are best realised through proactive reform measures in education. As such, it is in schools that we can best embed in our children, human dignity, equity, social justice, inclusivity and all the other values that we cherish and hold dear. He stated that it is for this reason that his administration introduced curriculum reforms designed to better align the education system with our national values. The reforms are expected to mould a people who embody innovation and excellence. The results will be a globally competitive human capital base, having the tools for success in a fast-paced and dynamic world. In fulfilment of the same, in 2018, the President noted that his administration adopted the policy on universal access to basic education. The policy seeks to ensure that all children enrol in primary school and complete their secondary education with 100 per cent transition rate. This measure will go a long way to ensuring that all Kenyans have access to equal opportunities and a chance to further their passions. He observed that their aggressive push of this agenda has this year yielded to the achievement of 100 per cent transition rate, the highest in the African Continent.

He also noted that in addressing the pressure on school facilities across the country, his administration has prioritised development of school infrastructure for the Fiscal Year 2019/2020. Importantly, he indicated that as part of the tertiary education reforms, his administration has implemented a rejuvenation of the vocational training institutions to build on the skills needed to contribute to nation building and in particular, the manufacturing pillar of the Big Four Age. He indicated that his administration has also set aside an unprecedented amount of resources towards supporting students joining technical and vocational training institutions.

Further, the president observed that the country is blessed with natural resources which, if properly managed, will transform, in a big way, our nation and the welfare of our people. However, we must appreciate that the resources are finite. In that context, it must be our solemn duty as the State to manage these resources sustainably for the fair and equitable benefit of both present and future generations. As such, the President noted that his administration has developed and will be presenting before the Parliament the ***Sovereign Wealth Fund Bill****. The Bill proposes creation of a Fund and provides a legal framework to guide investment of revenues from oil, gas minerals and other qualifying natural resources.*

The Fund, as proposed in the Bill, comprises of three parts, notably,

i. *A Stabilization Fund,*
ii. *Infrastructure Development Fund and*
iii. *A Future Generation Fund.*

The president further noted that it is important to underscore that other than the cost of services of those entrusted to manage the Fund, all monies in the Fund will be used to finance critical national development programmes in order to ensure sustainability. Sustainable development is a constitutional imperative and one of the national values and remains a core consideration within the Government, *across the board.*

As the host nation of the United Nations Environmental Programme (UNEP), the President note that Kenya remains a global leader in environmental conservation and sustainable development. He note that his Administration has spearheaded the implementation of various environmental initiatives including interventions for the sustainable exploitation of the blue economy, sustained the ban on environmentally harmful classes of plastics and polythene carrying and packaging materials, enhanced the protection and promotion of national forests in line with our commitment to achieve a minimum of 10 per cent forest cover by the year 2020, and interventions with regard to water and air quality. He noted that these interventions not only protect the environment but also create business and employment opportunities through the green economy and indeed, as a result of the interventions, Kenya is today a global leader in green energy with 85 per cent of our energy mix coming from renewable sources.

At the end of his speech, the President submitted to Parliament the following three Reports as required by the Constitution-

a) *Report on measures taken and progress achieved in the realisation of national values, 2019;*
b) *Report on progress made in fulfilling the international obligations of the Republic, 2018; and,*
c) *Report on the State of Security of Kenya, 2018.*

ADJOURNMENT OF THE NATIONAL ASSEMBLY

The House was adjourned until Tuesday, 23rd April 2019.

Your comments will be most appreciated – please send to kepsappd@kepsa.or.ke

Best regards,

Carole Kariuki, MBS, HSC l Chief Executive Officer
Kenya Private Sector Alliance | 5th Flr, Shelter Afrique Building, Mamlaka Rd,
P.O. Box 3556-00100 Nairobi, Kenya
Office: +254 20 2730371/2/2727936 | Fax: +254 20 2730374
Cell: +254 720 340949 | ceo@kepsa.or.ke
www.kepsa.or.ke | *The Voice of Private Sector in Kenya*

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