**An analysis of the key changes introduced by the ICT Policy (2020) in Kenya**

The Cabinet Secretary for Information, Communication, Technology, Innovation and Youth Affairs (the **CS**) published the National information Communication and Technology Policy Guidelines, 2020 (the **Policy**) on 7 August 2020. The Policy is aimed at realising the potential of the digital economy by creating an enabling environment of information, communication and technology (**ICT**) for all citizens and stakeholders, with a particular emphasis on promoting the use of and access to ICT services in Kenya.

**Equity Participation**

The Policy encourages Kenyans to participate in the ICT sector through equity participation. To this end, the Policy introduces a key change, making it a requirement for a company to have at least 30% substantive Kenyan ownership in order to be licensed by the Communication Authority (the **CA**) to provide ICT services in Kenya. Kenyan individuals and corporations may be shareholders, though in the latter case, the Policy stipulates that corporate shareholders without majority Kenyan ownership will not be considered Kenyan, and may therefore not be calculated to constitute part of the 30% Kenyan ownership requirement.

This provision will have a major impact on telecommunications licensees who were previously required to have 20% Kenyan ownership. It will however not affect broadcasters, who are already required to have 30% local ownership.

The CA and the Ministry of ICT is yet to issue notices or guidelines on the way forward in relation to implementation of the policy. The guidelines will be key for licensed telecommunications licensees already compliant with the 20% shareholding requirement, as they will inform decisions on continued operations in the country. The Policy gives all companies licensed by the CA 3 years to meet the local equity ownership threshold, and where there are appropriate justifications and upon application by the company, this requirement may be extended by a further year. In making this provision, the Policy has taken away the discretion of the Ministry in relation to periods of extension. Previously, extensions could be granted for periods of 2 to 3 years. What remains unclear is whether multiple extensions on reasonable grounds can still be granted, as was the case in the past.

**Promotion and Protection of Local Skills, Innovation and Data**

In a bid to promote and protect the local ICT industry in Kenya, the Policy introduces an ICT Co-Fund that will unlock capital, avail access to critical technical assistance and promote the adoption and utilisation of local ICT innovation and entrepreneurship. It is not clear how this Co-Fund will be funded and developed. Separately, pension funds are also encouraged to set aside 5% of their investment for the local ICT start-up ecosystem, in an effort to promote innovation.

The Policy also prioritizes Kenyan built solutions over foreign ICT solution in government ICT procurement. To this end, in every instance where there is a Kenyan solution that meets up to 70% of the stated requirements in a government tender, the Kenyan built solution will be accepted in preference to foreign solutions. Moreover, where no local businesses meet tender requirements, skill transfer to local firms and personnel will be a mandatory requirement.

From a policy perspective, this is a great move by the government to ensure that there is funding for the development of the broader ICT sector. This is especially so in light of the limitations on the uses to which the Universal Service Fund can be put and the general needs in the sector that have been pain points in the past. Questions around the structuring, governance and financing of the ICT Co-Fund still remain. The probability is that regulations or guidelines will be formulated in due course depending on the structures that the government wishes to adopt in order to address this.

**Mobile First**

The Policy will adopt a mobile first approach to ensure that every Kenyan has reasonable access to ICT, by focusing on mobile and wireless infrastructure. To this end, the government will provide network, storage and processing infrastructure frameworks and guidelines that will see Kenya successfully compete on a global scale.

The inclusion of this measure continues to cement Kenya's leading position in mobile penetration in Africa, which is reported as 91% compared to Africa's 80% as of 2019.[1] This penetration rate corresponds to Kenya's high rate of mobile internet connectivity score of 50.2 as at 2018, which was a marked 13.4 rise from 2014.[2]

**ICT Infrastructure**

The CS notes that the development and deployment of infrastructure is capital intensive. To this end, the CA is tasked to oversee and regulate infrastructure to be built with public funds. The infrastructure will be available for use by Kenyan private and commercial operators on fair and equitable terms. Moreover, the Policy indicates that a legal framework will be developed which provides for a fair use policy through which privately developed infrastructure may be licensed to another operator on fair commercial terms.

This is in line with the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations, 2010, which already allow licensees to lease or share infrastructure as well as share costs in establishing points of interconnection.

**Data and Data Centres**

The Policy includes compulsory availability of government services online, and the efficient and full delivery of such services at all times. Cognisant of the risks involved, the Policy indicates that that Kenyan data emanating from government services should remain in Kenya, and that any such Kenyan data should be stored safely and in a manner that protects the privacy of citizens. The Policy also requires regulations to be enacted to ensure that data is processed fairly and lawfully, in accordance with the right of citizens and the relevant data protection laws. These provisions are in line with the spirit of the Data Protection Act, which requires certain safeguards in place to transfer data outside Kenya and includes specific provisions to guard the privacy of data subjects.

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[1] Business Today, accessed here: https://businesstoday.co.ke/kenya-leads-africa-smartphone-usage/ on 24 August 2020.

[2] GSMA State of Mobile Internet Connectivity Report, 2019.

In particular, the Policy anticipates that there will be rules and guidelines enacted further to the Policy to guide equitable sharing and access to profile data in current and future national data sinks by all legitimate and licensed players (termed as data superpowers). It is imperative that these rules and guidelines are consistent with the principles of use, disclosure and storage of data under the Data Protection Act. Notably, however, the Policy reserves the government's right to retain a copy of personal data in its possession, even where 'deactivated', the meaning of which has not been provided in the Policy. Rules and regulations to this effect will be instrumental in determining the parameters of government use of this data.

The Policy also foresees the development of guidelines and standards for current and future data centres. The government is required to ensure the availability of basic infrastructure for approved data centres, including but not limited to reliable grid power and access to the national publicly owned data transport backbone. The government will also promote, encourage and license private sector investment in neutral data centres by companies incorporated for that purpose.

The establishment of data centres in Kenya requires careful legal due diligence to establish whether one has to be licensed or not. Typically, licensing has not been required where one is just providing the basic infrastructure for establishment of data centres such as the building and retrofitted space. There were however, indications from the regulators that there was a need to regulate such persons to protect and ensure seamless provision of services to the data centres. These provisions in the Policy palpably set the foundation for the enactment of such regulation.

**Broadcast Signal Distribution**

The CA will continue to license broadcast signal distribution services depending on the market growth and the availability of the required radio frequency spectrum resources to ensure that the use of broadcasting infrastructure is maximized and frequencies are utilized efficiently and equitably.[3] All licensed signal distributors will be required to provide services to licensees on an open access and non-discriminatory basis.

**Universal Access of ICT Services and Infrastructure**

The Policy mandates that ICT services and infrastructure be made available to the public. To this end, the government will ensure that the tools enable the environment through which people can access, use and enjoy the technology in their work and recreational activities; for example, by guaranteeing a legal framework and technical support for block chain, to securely record all transactions as well as regulatory and legal support for digital payments to enable safe financial transactions.

The Policy also caters for people with disabilities by mandating the government to ensure that persons with disabilities have full accessibility. Accordingly, the Policy obliges the government to take measures to ensure both public and private entities to provide information and services in accessible and usable formats for persons with disabilities.

The current Programming Code for Broadcasting Services in Kenya (2019) already requires broadcasters to include accessibility measures for persons living with disability, specifically requiring them to implement

[3] We wrote an article earlier in 2020 on the new guidelines on Frequency Spectrum Management, which can be accessed here: https://www.bowmanslaw.com/insights/intellectual-property/ca-sets-the-stage-for-efficient-spectrum-usage-in-kenya/.

closed captioning, subtitling, and sign language inserts during news and current affairs programs, emergency announcements and during programming of national interest such as national events. It will be important to observe whether the government will extend the accessibility measures introduced in the Policy to all broadcast content, whether via traditional media or online.

**Fiscal Measures**

The Policy encourages introduction of fiscal measures in order to create a favourable investment climate for the development of a globally competitive ICT sector. As such, the government is required to review the taxation regime, which is to be aligned with the requirements for affordable computing, broadband services, financial inclusion and online work.

With the current frenzy around taxation of digital services in Kenya, and major global market players being opposed to the imposition of such taxes at the global stage, it will be interesting to see whether the government will take advantage of this policy statement to reverse the digital services tax in the future due to stakeholder outcry.

In addition, the government will provide incentives for majority Kenyan ICT equipment manufacturers in a bid to ensure they remain competitive in the ICT sector. Other incentives to promote pocket friendly innovation as contemplated in the Policy include the designation of duty free ICT incubation centres in each county.

**Information Management**

The Policy appreciates the role of knowledge and technology in driving productivity and economic growth knowledge distribution as essential to the performance of the Kenyan economy. In light of this, the policy has introduced a number of measures geared to promote a thriving information economy and accelerate use of ICT in Kenya – such as use of social media in line with the constitutional freedom of expression.

The Policy has also prioritised the value and heritage of Kenyan culture by proposing certain measures to promote national and international investment in Kenyan content. The Policy requires the CA, Kenyan National Information Centre and other stakeholders to take measures to promote the '.ke' domain and Kenyan names that have historical, cultural or intellectual value on the internet. It further provides for the protection of the development of local content and establishing a market structure that attracts and protects investment in broadcasting content and services.

The emphasis on promoting Kenyan culture is alive to the current needs of the Kenyan creative economy, which has for long been deprioritized and often left with minimal to no investment. It further ultimately demonstrates an olive branch by the government in fulfilling its constitutional mandate in promoting arts and culture in Kenya.

**Protection of Children**

Whilst the policy seeks to promote the development of high quality easily accessible and relevant local digital content, it also intends to ensure that the government will create and enforce policies and legislation that protects children from inappropriate content and upholds national values.

The Computer Misuse and Cybercrimes Act has already addressed this to an extent, with the proposed amendments to the Films and Stage Plays Act anticipated to further address children's rights.

**Conclusion**

The Policy is likely to have sweeping effects across the ICT industry should the government fully implement it. We anticipate enactment of multiple regulations and/or amendment of existing laws in the future to address the issues raised in the Policy. Stakeholder involvement in the legislation process will play a major role in determining and guiding the form that regulation takes, and will help dictate whether enacted regulation cripples the sector by being averse to investor's interests.

*For any clarification, please do not hesitate to contact Rose Njeru, Angela Mukora and Sidharth Shah or any other member of the Intellectual Property and Technology team or your Relationship Partner at Bowmans Coulson Harney.*