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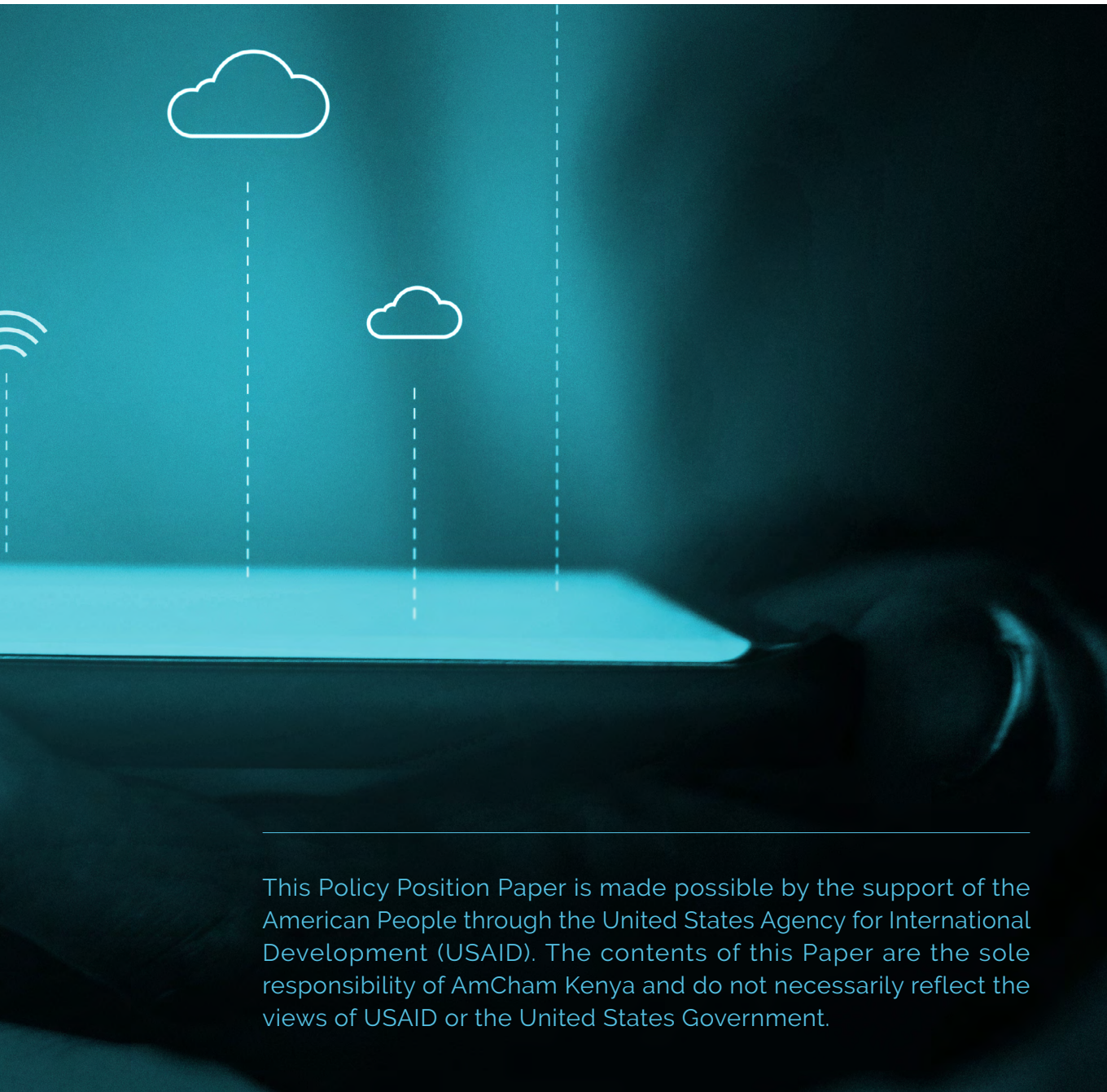


AMCHAM
KENYA

ICT Sector Constraints & Opportunities for Enhanced Growth

—
A policy paper





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Executive Summary

Executive Summary

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This policy position paper

presents an analysis of key policy hurdles and positions in the ICT Sector. These policy hurdles were identified in the preceding policy scoping reports that involved in-depth desktop research, including a literature review of documentation from public sources, which informs key statistics in the report.

An analysis of existing ICT policies was carried out, highlighting priorities and current gaps, as well as an analysis of the commercial landscape, which underscores the sector's opportunities and risks. The results of the scoping/analysis was presented to stakeholders for validation and review. The policy positions presented in this paper have been developed as a result of both the research and consultation with AmCham members.

02

Kenya's digital economy policy landscape

has played a key role in the growth of its ICT sector, which according to the Communication Authority's 2020 report, has enabled it to expand by over 28% in the past decade alone. Kenya is also a leader in the region, in terms of connectivity and infrastructure with an internet penetration of approximately 87%, and internet subscription of approximately 40.9 million.

03

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04

The country's ICT Sector's development

is informed by Kenya's Digital Economy strategy 2020, which is based on the 2019 Digital Economy Blueprint focusing on six key pillars i.e.: **digital government; digital business; infrastructure; innovation-driven entrepreneurship; and digital skills and values.** However, despite heavy investment in connectivity infrastructure and the digital economy, there are still significant barriers to access and growth in the sector, including insufficient venture capital for Kenyan-led enterprises, high taxation, malpractice within the public sector, and multi-pronged cybersecurity threats.

05

Key policy hurdles in the sector

include legislation such as the Information and Communication (Amendment) Bill, which if implemented its current form will have far reaching implications on the use of social media in the country, limiting sector growth, technology advancements and service provision; infringement on data privacy rights; regression of the ICT sector and hampering growth of the creative industry and local content creation. This would in the long term deter investors.

Similarly, the localisation and equity requirements outlined by the government pose challenges to foreign firms in the sector as they may incur significant costs as they restructure to meet the requirements. Other the other hand, these requirements present opportunities for local ownership and local involvement in higher level operations of foreign firms.



06

The Computer Misuse and Cybercrimes Act

is also cited as a policy hurdle due to its potential misuse by the government and its agencies. Civil society players have criticised the government and influential citizens for misusing aspects of the Act.

Many individuals have been threatened or charged with the 'publication of false information' provision, targeting content that is critical of the government, politicians, high-profile individuals, or content that exposes corruption. As international firms are keen on adhering to international laws on citizen's rights, this may result in further criticism of the government, and withdrawal of firms from the market.

07

The development of the Data Protection and Privacy Act and Regulations, 2021,

is of critical interest. Concerns have been expressed around the data localisation requirements and cross border sharing of data, especially considering data protection legislation globally continues to evolve. These aspects largely impact the operations of firms in several jurisdictions.

08

Other obstacles within the industry

include lack of public-private engagement and coordination which impacts policy implementation and affects business operations; an unfavourable investment climate that directly influences investors decisions to invest - directly affecting sector and economic growth; and the country's lack of alignment with international agreements which presents decreases the ease of doing business in the country.

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Background

Background

Kenya's digital economy policy landscape is broadly cited as a notable success story.

According to the Kenya National Economic Survey report of 2019, the value of the ICT sector expanded by 12.9% from

KES 345.6B

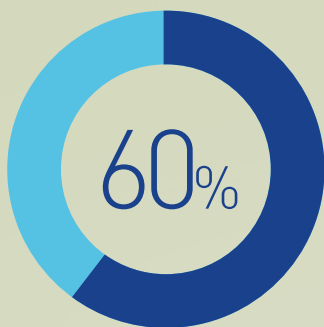
(USD 3.1 billion) in 2017 to

KES 390.2B

(USD 3.5 billion) in 2018

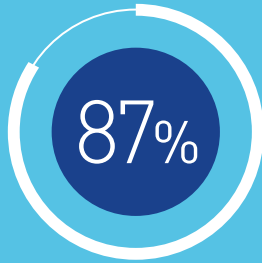
Driven by growth in the digital economy. The current administration has demonstrated that it perceives IT and attendant infrastructural developments as key drivers of socio-economic growth. Further, World Bank estimates indicate Kenya's ICT sector has expanded by over 28% in the past decade alone.

Much of the tremendous growth in the local digital economy can be attributed to the successes of mobile money and digital financial service technologies in Kenya.



Digital infrastructure and hardware investment account for nearly 60% of investments in the sector, with the rest going into ICT services.

Additionally, Kenya remains a regional leader in terms of connectivity and infrastructure.



The country currently has an internet penetration of approximately 87%.

According to the Communications Authority (CA) statistics, internet subscriptions reached

40.9 Million

in the quarter ending June 2020, up from

38.9 Million

in the period ending in March.

The availability of both cheaper smartphones, along with

3G/4G

and the relative affordability of mobile internet, are the biggest driving factors. This investment is set to continue, with Kenya becoming the second country on the continent to launch 5G connectivity.





The Kenyan Digital Economy Strategy 2020 is the primary legislative framework informing sector-relevant developments.

The strategy sets out the government's plans to develop critical IT infrastructure and spur growth in the digital economy. As part of this strategy, the government aims to promote both local and foreign investments toward: IT infrastructure and network development; digital content creation; e-commerce; and other revenue-generating activities.

The Digital Economy Strategy is based on the 2019 Digital Economy Blueprint, which is part of the Smart Africa Alliance (SAA) initiative - endorsed by the AU and other Sub-Saharan African intergovernmental agencies.

The blueprint is based on an implementation and intervention framework that includes six pillars: digital government; digital business; infrastructure; innovation-driven entrepreneurship; and digital skills and values.

Despite heavy investment in connectivity infrastructure and the digital economy writ large, there are still significant barriers to access and growth in the sector, including insufficient venture capital for Kenyan-led enterprises, high taxation, malpractice within the public sector, and multi-pronged cybersecurity threats.

The Digital Economy Blueprint, ICT Policy and various other regulatory and policy reforms attempt to find a balance between protecting citizens and fostering continued growth and innovation.

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Sector Policy Constraints

Sector Policy Constraints

4.1 Information and Communication (Amendment) Bill

The proposed Kenya Information and Communication (Amendment) Bill seeks to amend the Kenya Information and Communication Act (KICA) by introducing stringent regulations on the use of social media, introducing new obligations for social media users, bloggers and online platforms.

The bill notably requires social media platforms whose services are accessible in Kenya to obtain social media licences and establish a physical presence in the country, while requiring them to verify all users are of the age of maturity.

Under the bill, social media companies would be mandated to keep all data relating to their users and submit it to the Communications Authority (CA) when requested, raising privacy concerns. Failure to respect these conditions would lead to licence revocation.

Furthermore, it also requires social media users to ensure their published content is fair, accurate and unbiased, does not degrade or intimidate recipients, and is not prejudicial to persons or groups of people. The bill also proposes a mandatory requirement for bloggers to be licenced by the CA.

Under the provisions of the bill, group administrators would be responsible for approving members of the group and their published content, while "controlling undesirable content and discussion". Users contravening these provisions would be liable to fines of up to KES 200,000 (USD 2000) or face imprisonment of up to a year.

The bill's definition of "blogging" is wide and ambiguous, spelt out in the proposed legislation as "collecting, writing, editing and presenting of news or news articles on social media platforms or in [sic] the internet." This definition may be broad enough to include ordinary users of social media platforms, such as YouTube, Facebook and Twitter.

4.1.1 Impact on the sector

If the Kenya Information and Communication (Amendment) Bill is enacted in its current form it will have far reaching implications on the use of social media in the country. Key implications are highlighted below:

- ① **Limit sector growth, technology advancements and service provision** – the bill proposes that social media platforms be required to obtain social media licenses and establish a physical presence in the county. This indicates that International social media platforms will need to invest in operational bases within the country – which may hinder the use of certain platforms in the country, consequently, scaling down growth and advancements in the sector and limiting opportunities for interaction with new technology platforms. Furthermore, this requirement overlooks the cross-border technological capabilities of these platforms that provide a number of useful services to Kenyans. The implantation of this requirement will limit the functionality offered by platforms in Kenya further hampering growth and investment.
- ② **Infringement on data privacy rights** – social media companies would be mandated to keep all data relating to their users and submit it to the Communications Authority when requested. This would pose data privacy concerns and breach international data privacy regulations such as the General Data Protection Regulation (GDPR). The passage and ongoing implementation of the Data Protection Act 2019 the sections of the bill that touch on data privacy may create confusion as they conflict with the existing legal framework. Creating uncertainty for investors and businesses.
- ③ **Hamper growth of the creative industry and local content creation** – the bill proposes a mandatory requirement for bloggers to be licenced by the Communications Authority. Licensing generally has cost implications to it and in this case, bloggers would need to pay for licenses to share their creativity and promote local content creation through their sites and social media pages. This may in turn discourage new local talent from joining the creative industry – hampering its growth.
- ④ **May lead to regression of the ICT sector** – The definition of blogging is wide and ambiguous and may be broad enough to include private users of social media platforms, such as YouTube, Facebook, and Twitter. This would imply that ordinary users would need to apply for licenses to use these platforms, impacting rights to freedom of expression and leading to a decline in the use of social media platforms which subsequently impact the sector.

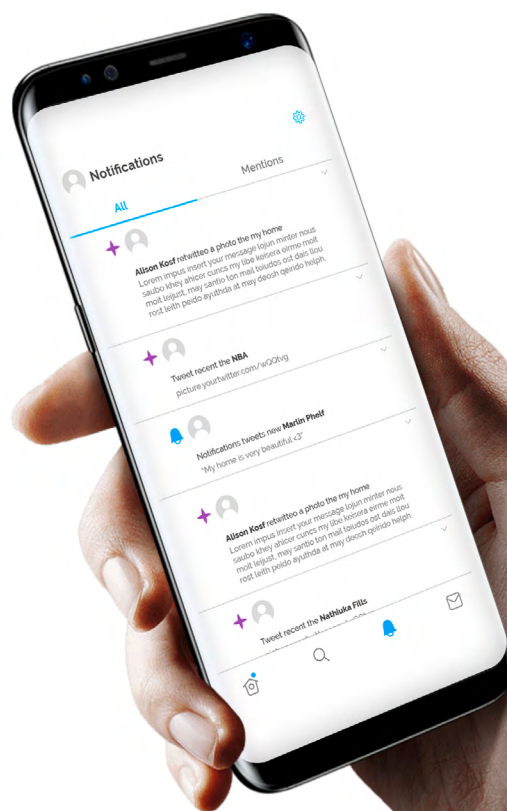
4.1.2 Impact on Investment Landscape

Some elements of the Kenya Information and Communication (Amendment) Bill will negatively affect the business environment. If implemented as is, this may impact the investment landscape negatively:

- ① **Deterring investors** – With the requirement to have a physical location within the country to operate a social media platform – international companies without local presence, may opt to withdraw their platforms from the market. Additionally with ambiguous terms in the proposed legislation, investors may not be comfortable proceeding with investments in the country – unable to determine the impact of the legislation on their businesses.
- ② **Increased compliance costs** – existing market operators, whose products or platforms utilise user generated content will face significant compliance and potentially legal costs as a result of this legislation.

4.1.3 Policy Position

The private sector understands that social media now forms an integral part of the public space and that parliament is keen to ensure that it remains a safe and dynamic space. However the current structure of the amendments to the Kenya Information and Communication Act would restrict the dynamism of social media and content platforms in Kenya and significantly increase the regulatory burden on investors, platforms and Kenyan content creators.



4.1.4 Policy Recommendation

- That the requirement for social media platforms to apply for a license be removed as this would create additional compliance costs and deter investment from investors/companies with social media platforms.
- The current framework in which the Communications Authority of Kenya Licenses, network facility providers, application service providers and content service providers all of whom submit quarterly compliance returns is sufficient regulatory oversight.
- That the requirement that social media platforms establish a physical presence in Kenya be removed. As the cost of doing so will be a significant deterrent to platforms. Rather the requirement should be that social media platforms obtain the necessary licenses/approvals that already exist (e.g. register as non-resident tax entity) that will allow them to operate in Kenya and pay taxes on revenues generated in Kenya.
- The definition of blogging be removed as definitions of illegal content are already included in existing legislation.
- That the privacy provision of the law be removed in light of the existing legal framework in the Data Protection and Privacy Act and its attendant regulations in order to prevent overlapping and potentially contradictory regulatory frameworks that would discourage investment and growth.

4.2 Data Protection and Privacy Act and Regulations, 2021

In November 2019, President Kenyatta signed the Data Protection Act (DPA), 2019 into law. The Act gave effect to Article 31 (c) and Article 31 (d) of the Constitution of Kenya, which guarantees the right of every person to safeguard their sensitive data and personally identifiable information (PII), in addition to the right not to have “the privacy of their communications infringed” upon. The draft Data Protection (General) Regulations 2021 outline the statutory requirements the Office of the Data Protection Commissioner (ODPC), and relevant regulators will exercise to enforce data protection regulations and attempts to safeguard the rights of data subjects.

Key definitions and terms assigned to stakeholders under the 2019 Data Protection Act have remained unaltered and, as articulated elsewhere the draft Data Protection (General) Regulations 2021, are closely aligned with global standards i.e. the GDPR and PbD principles. Data processors or controllers are henceforth directed to align their data-processing activities and policies with PbD principles. Data protection with respect to PbD principles is expressed in areas encompassing integrity and confidentiality, lawfulness, transparency, purpose and storage limitations, as well as the notion of data minimisation.

Prior to the publication of the 2021 draft Data Protection regulations data controllers and processors were unable to wholly comply with guidelines informing the registration process for relevant stakeholders, such as carrying out impact assessments or implementing safeguards to facilitate cross-border transfers, in line with the DPA.

With the publication of draft Data Controllers and Processors Regulation 2021, the OPDC has attempted to address the latter bottlenecks by detailing the thresholds required for mandatory registration and other details relevant to the application process for data controllers and processors. In sum, Kenya's data protection statutory obligations place a particular emphasis on data governance and internal processing protocols that are "grounded in principles of purpose and transparency."

Data processors or controls are henceforth mandated to demonstrate the specificity and relevance of data processing activities to subjects, in addition to operationalising personal data retention schedules. Despite the compliance and enforcement challenges that lie ahead, the government's renewed interest in regulating data processing activities has the potential to benefit and safeguard data subjects and SMEs in the sector from cybersecurity risks and other data-related threats.

A critical aspect of the regulations is proposed measures on the cross-border transfer of sensitive personal data, around which there are opposing views, issuing from the public sector, civil society, and local and international businesses. The concerns touch on security and technical considerations, compatibility with the current digital global marketplace within the context of multinational organisations, and the right of a data subject to determine where his or her data should be stored.

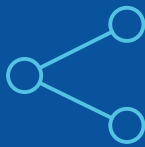
This is an evolving area of regulation both locally and internationally, but it is likely that Kenyan regulators will allow personal data transfers outside of Kenya, where the receiving jurisdiction has a legal data protection framework in place that provides similar or greater safeguards to Kenyan regulations.

4.2.1 Impact on the sector

The Data Protection Act will impact the ICT sector as highlighted below:



Legal and compliance: Many organisations will require a Data Protection Officer (DPO) who will have a key role in ensuring compliance. If the DPA is not complied with, organisations will face the heaviest fines yet – up to 2% of the previous year turnover. Additionally, organizations may need to review how they write privacy policies to make these easier to understand and enforce compliance. These additional compliance requirements will have cost implications for a number of firms, particularly to SME's who may find the costs prohibitive.



Technology: Security breaches will have to be notified to regulators within 72 hours, meaning the implementation of new or enhanced data security approaches and incident response procedures for organizations. This may provide an opportunity for the development of more advanced technologies by the ICT sector, resulting in its growth. However, documented Data Protection Impact Assessments are expected to become common across organisations over the next few years and are likely to result in high risk to the rights and freedoms of data subjects.



Data: Individuals and teams tasked with data and information management will be challenged to provide clearer oversight on data storage, journeys, and lineage, which will also have an impact on Third Party vendors (who can themselves be difficult to identify) that an organization works with, such as insurance companies. Consequently, players in the ICT sector will be challenged to develop new systems and innovations around data management further progressing advancements in the sector.



Cross border transfers of data: under the draft regulations, Data processors or controllers who transfer personal data beyond Kenya's jurisdiction are prohibited from doing so unless the recipient country or territory is found to have compatible and comparable legal requirements and with regard to sensitive personal data the user must offer explicit consent. It is currently unclear which territories which meet adequacy requirements attached to cross-border data transfer regulations, and whether all or some of the requirements must be satisfied. This lack of clarity can have a significant impact on companies that process data in other jurisdictions or utilise cloud-based services which may rely on data processing/storage sites in multiple jurisdictions.



Data Localisation: The Act and draft regulations require that personal data that is processed for the purpose of actualizing a public good is required to take place on a local server and data centre, with at least one serving copy of the concerned PII data stored in a centre located in Kenya. The localization requirements on processing activities for the purpose of 'actualizing a public good' in the draft Data Protection (General) Regulations (Reg.25) expand beyond the data localization envisaged by the DPA. Whilst the DPA provides that localization may be prescribed based "on grounds of strategic interests of the state or protection of revenue", the DPR localization requirements broadly apply to (i) identify management and civil registration activities, (ii) data that facilitate access of primary and secondary education, (iii) data generated in the context of elections, (iv) electronic payments system, (v) revenue administration systems, (vi) health data when not processed for providing healthcare. This will essentially force companies that store or process data that is utilised by a public entity to store it in Kenya.



Regulatory harmonisation: Various sectors (health, financial services, insurance , etc.) have existing data privacy framework and guidelines which will need to be aligned with the overarching regulatory framework. Given the slow pace of regulatory drafting and approval in Kenya it is likely that many of these sector specific frameworks will be finalised in the medium to long term (18 months+) potentially opening significant legal Lacunas and regulatory uncertainty.



Automated decision making: There are reporting obligations and restrictions related to automated decision making. Considering the wide scale use of algorithm based decision making this may limit solutions that companies are willing to deploy in Kenya and limit innovation.



4.2.2 Impact on Investment Landscape

Attract more investment: A comprehensive data protection policy in the country that complies with existing global standards (e.g. GDPR), may open the country to further investments from foreign investors and international companies. The policy will allow Kenya to embrace its full potential when it comes to tech- innovations, start-ups and to attract more investments in ICT.

Deter Investment: However, a data protection framework that is overly restrictive or has significant ambiguity that will lead to multiple interpretations, will act as a deterrent to investment as it not only complicate Kenya's digital governance and increase compliance costs, it would mark Kenya as a noncompliant jurisdiction leading investors and companies to avoid the market.

4.2.3 Policy Position

The Data Protection Act 2019 and its attendant regulations represent an important element of Kenya's ICT legal and regulatory framework. Data protection is a key global issue and having robust and internationally compatible data protection regulations in place will cement Kenya's position as a leading ICT hub on the continent. Thus, it is key that the data protection regulations be written in such a way that would reassure both Kenyan and global ICT companies and investors of their ability to base operations in Kenya that can have global reach.

4.2.4 Policy Recommendations

- ① That a number of ambiguous definitions contained in the proposed definitions be clarified to ensure that the regulations can be implemented in the least disruptive way possible these include:
 - a. Definition of "Transferring entity" should exclude entities that transmit data through Kenya that are not resident in Kenya and who do not process the data of Kenyans.
 - b. Provide a clearer list of activities that require local data activities.

- ② The Data Protection Regulations (DPR) should explicitly distinguish the roles and responsibilities of the data controller and data processor. Although the Data Protection Act provides different definitions for controllers and processors, the DPR jointly refers to data controllers and data processors, leaving to the reader the responsibility to determine whether the obligation applies to the controller or processor.

The lack of clarity around the obligations of data controllers and data processors' obligations creates ambiguity and implies that obligations appropriate for data controllers could also apply to data processors.

This is impractical since data processors, unlike data controllers, do not own or control the data and do not have a relationship with the data subject. As per international best practices, there is a need for differentiating and distinguishing into separate Chapters under Part IV of the DPR.

- ④ Clear guidelines on which territories meet the adequacy requirements for cross border data flows should be published and updated regularly. This will provide certainty to existing operators and investors on which jurisdictions can process data of Kenyan citizens. Data localization should be limited to the situation envisaged by the DPA, specifically "strategic interests of the state" and the "protection of revenue". For consistency purposes and to align to other respected privacy regimes (such as the GDPR), the protection of personal data should be subject to the same requirements regardless of whether the data controller is a public or private sector entity.
- ④ Data protection regulations worldwide generally encourage self-regulation. The cross-border transmission of data provisions should be structured to encourage this rather than be too prescriptive. This is in line with the DPA as self-regulation is recognised in the DPA in any event.
- ④ A timeline of implementation should be published by the ODPC, this will create regulatory certainty as firms are now able to plan appropriately.
- ④ Removing registration requirements for Data Processors. The DPR sets extensive registration requirements for both the data controllers and data processors. This requirement is impractical for data processors as they often do not have sight of their customer's data, and hence will not be able to establish whether personal data is being processed. Such requirements would appear impractical as virtually all commercial operators would simultaneously engage the ODPC to request a registration. This poses practical questions on the bandwidth of the ODPC to simultaneously process a huge volume of registration requests. In alignment with international best practices such as the GDPR, we recommend that the DPR does not impose registration requirements on data processors.
- ④ A timeline and collaborative mechanism with the private sector and other sector regulators be published and implemented. This will provide clarity to other sectors that data protection requirements and the regulations have private sector input.

- The ODPC should invest in online licencing, compliance and reporting mechanisms, that would significantly lower the costs of compliance.
- The DPR should expand the legal basis for collecting and processing personal data. The DPA considers multiple legal bases for the processing of personal data. However, by focusing on consent under Part II "enabling the rights of a data subject", the DPR suggests that consent is the primary lawful basis to collect and process personal data. Consent may not be an absolute guarantee to protect customer interest. 'Written' or 'oral' consent may not be always feasible.

We recommend the explicit inclusion in the DPR of the legal grounds, other than consent, considered in the DPA, to ensure that developments in technology, particularly IoT, are supported by the lawful collection of personal data. The DPR should consider the benefits of all the legal basis envisaged in the DPA – (i) performance of a contract, (ii) compliance with a legal obligation, (iii) the interests of the data subjects, (iv) public interest, (v) "legitimate interests" which in most cases provides even more protection than consent.

- The ODPC should endeavour to ensure alignment of Kenya's data protection laws and regulations with existing African Union AU efforts to harmonize data protection across Africa, enshrined in the Malabo convention. The alignment would serve to encourage and enhance intra-African digital trade, this is especially important with the planned implementation of the Africa Continental Free Trade Area.



4.3 Localisation and Equity requirements

The ICT Ministry published updated local content and equity participation requirements under the ICT policy 2019. A key aspect of the policy is equity participation, which was developed to encourage an increase in the participation of Kenyans in the ICT sector. The respective clause mandates that only companies with at least 30% substantive Kenyan ownership, whether corporate or individual, will be licensed to provide ICT services in the country. However, corporate shareholders without majority Kenyan ownership will not be considered Kenyan and will therefore not be allowed to form part of the 30% ownership. This is a shift from the previous position where telecommunication companies were required to have at least 20% local ownership/ shareholding (This provision will however not affect broadcasting companies, who are already required to have 30% local ownership). The government will allow companies three years to meet the equity ownership requirements, after which they may apply to the ICT Cabinet Secretary for a one-year extension.

4.3.1 Impact on the sector

The localisation and equity requirements have been perceived as a benefit, especially for local stakeholders, while some international firms and investors have seen this as a hurdle.

- **Organizational restructuring** will be a key feature because of this requirement. International firms and foreign investors in the ICT industry, over the 3-year grace period, will need to restructure their equity ownership to integrate local capacity.
- **Investment impediment:** The localisation and equity requirement will require investors to have a local partner if they intend to set up operations within Kenya. This may discourage investors whose business models are not structured for equity partners from the local market.
- **Skills building within the local workforce:** This will present opportunities for Kenyans to be more involved in higher level operations of international firms resulting in knowledge transfer, especially in learning new technologies. However, any gaps in locally available skills may become hurdles for investors who may have to engage in a lengthy and uncertain work permit process to fill those gaps.

4.3.2 Impact on Investment Landscape

The reason behind the new requirements is touted as an effort to 'encourage local participation in the ICT sector through equity ownership and ease the barriers to entry in the country. However, the current set up, especially of the tech-start-up ecosystem, may result in a situation where the opposite effect is achieved.

The local content and equity participation requirements have already attracted significant scrutiny and are likely to act as a deterrent for international investors. Various players in the sector have already voiced concerns around the enforcement of the requirements especially in terms of the funding disparity as there is an absence of local funders within the country.

Furthermore, Kenya's relatively vibrant start-up and ICT spheres have long benefitted from an international perception of ease of doing business in the country, especially when contrasted with most of its neighbours, but the new policies put this into question. The requirements, if not met within the stipulated time by foreign investors may lead to their withdrawal from the country to more friendly regulatory regimes.

4.3.3 Policy Position

Industry players recognize the benefit of the localization and equity requirements in building capacity and skills for the local workforce and promoting local investment and ownership and driving economic growth.

However, the current structure of the requirements will impose significant compliance costs and make investors think twice about investing in Kenya's ICT. The public and private sectors can work collaboratively to further develop the regulations to meet the goals of increasing Kenyan participation and ownership in the sector and maintaining Kenya's reputation as an ICT investment hub.

4.3.4 Policy Recommendations

- Extend the Grace period to 5 years, this will allow more time for companies and investors to comply (find appropriate local partners and offload equity).
- That the government consider corporate shareholders who have a minority Kenyan stake of a similar 30% as Kenyan.

- ③ Develop a regulatory framework that is conducive to Foreign Direct Investment (FDI) and create a thriving digital hub, whilst working with industry players to roll out digital skills programs to fill the local workforce skills gap.
- ③ The Communications Authority of Kenya, Capital Markets Authority, Retirement Benefits Authority, and the Insurance Regulatory Authority come together with the private sector to develop a framework through which Kenyan private equity, venture capital, investment, and pension funds can become local equity holders in ICT firms.
- ③ That the Communications Authority work with the private sector, such as the AMCHAM Kenya ICT taskforce, to identify skills gaps in the sector and facilitate the hiring of non-Kenya's to fill those gaps that are coupled with a training/capacity building mechanism to build local skills in those areas. This would meet the government's goal of domestic skills development as well as ensure that where skills gaps exist it is not disruptive to companies or investors.

4.4 Computer Misuse and Cybercrimes Act, 2018

The CMCA establishes various offences, including cyber terrorism, false publication of data, cyber harassment, identity theft, impersonation, and computer fraud. It contains provisions that service providers are to assist in the investigation of offences, specifically by collecting and providing data to law enforcement. The CMCA includes penalties for non-compliance. Over the last year, the government has used this legislation to threaten action against people spreading COVID-19 dis/misinformation online. Prior to the commencement of the CMCA, the Bloggers Association of Kenya (BAKE), with support from the rights group Article 19, filed a petition — on the basis that the law was unconstitutional and infringes on and threatens freedom of expression and the right to privacy, property, and a fair hearing — that led a court to temporarily suspend 26 sections of the Computer Misuse and Cybercrimes Act before it came into effect in May 2018. However, in February 2020, the High Court dismissed the petition and lifted the suspension of the 26 sections, which set high fines and prison sentences for a variety of online activities, including publishing false information and cyber harassment. The Act also permits a police officer or authorized person to apply to the court for a production order against a service provider to provide access to specific subscriber information. The CMCA also applies to service providers in the context of expedited preservation orders and disclosure of traffic data and interception of content data.

Furthermore, as a matter of compliance, companies must now ensure the implementation of effective cybersecurity measures that prevent unauthorised persons from accessing private data and restricted computer systems.

Employees now have the responsibility to securely relinquish all codes and access rights of their employer's computer network and systems upon the termination of their employment. Where damage can be attributed to the negligent cybersecurity standards of a company or a failed responsibility of the employee, the Act imposes substantial fines and/or imprisonment upon conviction.

In 2021, the National Assembly has proposed an amendment to the CMCA. The amendments would amend the act to penalise sharing of pornography, terrorism and religious extremism and cult-like activities on the Internet. In addition to empowering the National Computer and Cybercrimes Coordination Committee to recommend websites that may be rendered inaccessible within Kenya for publishing and sharing offending content.

4.4.1 Impact on the sector

- ① **Infringement on citizen rights:** On the other hand, civil society players have criticised the government and influential citizens for misusing aspects of the Computer Misuse and Cybercrimes Act - Many individuals have been threatened or charged with the 'publication of false information' provision, targeting content that is critical of the government, politicians, high-profile individuals, or content that exposes corruption. It has also been used as a tool by influential citizens to harass content creators and bloggers.
- ② **Ambiguous definitions:** the ambiguous and malleable definitions contained within the bill open up the possibility of broad interpretation by law enforcement and regulators. This could expose companies or investors that develop content or whose platforms host content to enforcement/regulatory action and potentially banning.

4.4.2 Impact on Investment Landscape

- ③ **Compliance costs:** Current and potential investors will likely incur significant costs to upgrade their cyber security systems to meet the compliance requirements in accordance with the act. Furthermore, owners/operators of content platforms will have to invest in monitoring and content moderation systems.

- On the other hand, foreign investors and international organizations, especially in the ICT sector are very keen on adhering to citizens freedoms as enshrined international laws. With the perceived infringement on rights such as freedom of expression online and rights to a fair hearing, as a result of the Computer Misuse and Cybercrimes Act, foreign firms may opt to withdraw their businesses from the country.

4.4.3 Policy Position

The need to ensure online safety, especially for children and curb cybercrime cannot be gainsaid. However, the amendments to the act as currently written are ambiguous and would expose companies to broad and unnecessary regulatory and legal action and potentially endanger Kenya's human rights protection regime.

4.4.4 Policy Recommendation

- The ambiguous definitions contained within the bill should be rewritten to be more precise and align with existing criminal/civil statutes and the court that already define pornography, terrorism and religious extremism and cult-like activities. This will give certainty to content platforms as to what content is illegal and enable the design of mechanisms to block that content.
- Define a clear set of criteria which will guide the National Computer and Cybercrimes Coordination Committee to recommend websites that may be rendered inaccessible within the Kenya. With a mechanism of appeal. This will ensure that that content platforms cannot be banned on unpredictable grounds.
- That parliament should ensure that the law is in compliance with the Kenya Constitution 2010 and the international human rights regime.
- The ability of law enforcement to apply to the court for a production order to provide access to specific subscriber information is acknowledged. However broad rights to access subscriber or consumer data coupled with the language on interception of content data is of concern and contrary to the of DPA. Narrowing and alignment with the DPA of this language and/or outlining specific exceptional scenarios where such access is permissible would create clarity for courts and companies.



4.5 Lack of Public-Private engagement and coordination

There is a need for engagement and coordination between industry and government to ensure that legislation, policy and regulation take industry and investor issues under consideration.

The lack of a consistent public-private engagement and coordination mechanism presents gaps in the policymaking process such as misalignment of policies or development of unresponsive regulation. For instance, access to data remains a key challenge in the delivery of the sustainable development agenda in Kenya and across Africa. Barriers include the need to protect citizens' privacy, complex data security requirements and the absence of policy and legal frameworks for unlocking and sharing data. Consequently, there is a need to co-create a data sharing and privacy framework that meets the provisions of Kenya's Data protection law.

4.5.1 Impact on the sector

- **Limits partnership opportunities:** The lack of public-private engagement and coordination limits the potential for partnerships between public and private sectors. Specifically, in the ICT sector, it impacts the opportunities for private sector players to introduce new technologies and innovations and creates regulatory risk that deters investment.
- **Challenges in addressing arising policy and operation issues:** Engagement and coordination between public and private sectors provide avenues to address policy challenges and foster a more favourable environment for doing business, a lack thereof has negative impacts of the ICT sector as there would be a lack of trust between government and private sector players, and reforms would not be sustained..

4.5.2 Impact on Investment Landscape

Public – private engagement and coordination is an opportunity for the private sector to press a government to improve its own performance, record reform, create a more transparent business climate and enable sector competitiveness. With a robust ICT policy landscape and with impending new regulations in the sector, the lack of engagement and coordination between the private and public sectors is bound to discourage potential investors as it presents an unfriendly business environment. Furthermore, this may frustrate current investors who may opt to leave the market, as their concerns are not being addressed.

4.5.3 Policy Position

Private-Public collaboration is key to creating an environment that develops regulatory frameworks that meet the goals of the private sector (predictable, cost-effective business environment) as well as public sector priorities (economic growth, job creation and general welfare). Beyond, policy creation, regular structured engagement between the private and public sectors can be used to address issues before they become disputes.

4.5.4 Policy Recommendation

It is critical that an engagement and collaborative working group with clear terms of reference be established with representatives from the private sector and the Ministry of ICT, that meets on a regular basis (e.g. quarterly) to discuss issues pertinent to both the government and the private sector and investors.

The structure and scope of the working group should be set out in an MoU between the Ministry and AMCHAM Kenya that will also function as the terms of reference for the working group.

Considering the impact that ICT and digitisation has on the economy as a whole, the Terms of Reference of the working group should include the ability to invite representatives of other ministries and government agencies to join on an ad-hoc or permanent basis. Such a partnership will also be forward leaning, bringing into focus best practice that will advance sector growth.

4.6 Unfavourable Investment climate

Foreign businesses operating in Kenya still face aggressive tax regimes and significant bureaucratic processes and delays in issuing necessary business licenses. Furthermore, corruption remains prevalent, and Transparency International's (TI) 2019 Global Corruption Perception Index ranked Kenya 137 out of 198 countries, worsening by seven spots compared to 2018 .

There are a number of laws that are a deterrent to investors such as the Certified Managers Bill 2021, aspects of the Information and Communications Amendment Bill, Localisation and Equity requirements, aspects of and the Computer Misuse and cybercrimes act.

Furthermore, Kenya's tax environment has been unpredictable. The government makes substantive annual changes to the national tax framework which in the last three years has seen the introduction and adjustment of Digital Service Taxes, Digital Value Added Taxes and increased excise taxes on data.

4.6.1 Impact on the sector

A good investment climate fosters productive private investment which is the engine for growth and poverty reduction. It creates opportunities and jobs and expands the variety of goods and services available and reduces their cost which directly benefits consumers. It also supports a sustainable source of tax revenues to fund other important social goals. Specifically, in the ICT sector, an unfriendly investment climate will:

- **Stifle sector growth:** Current players in the sector with more advanced technologies and solutions will opt not to invest in the country, denying opportunities for sector growth, and decreasing knowledge transfer opportunities to local companies. Digital innovation has been poised as a means of removing governance bottlenecks and facilitating sectoral development through digitisation. It promotes the development of online marketplaces and encourages the development of innovation to tackle operational challenges. With the lack of investments in the sector due to an unfriendly investment climate, opportunities for economic growth will be limited.
- **Lack of advancement in legislation/regulation:** Foreign firms operating within a good investment climate tend to participate more in the improvement of legislative or regulatory frameworks that are conducive to their business. This participation is beneficial to the sector as it is informed by international best practice which in turn presents opportunities for the country to advance its legislative / regulatory frameworks.

4.6.2 Impact on Investment Landscape

- **Limited expansion of foreign firms and Reduced job opportunities for locals:** A good investment climate generates profits for firms, which is one of the key aspects' investors look for. Their investment decisions are affected by their own ideas, capabilities, and strategies, in addition to an assessment of the opportunities and incentives in particular locations or countries. Investment climates that are not friendly increase barriers limiting opportunities and competition and obstruct innovation which leads to decreased productivity. This in turn affects the availability of job opportunities and limits the growth of companies to new markets.
- **Uncertainty impacting investment decisions:** The uncertainty of an unfriendly investment environment (e.g. unpredictable tax environment) deters investment as potential investors consider the risk of investment too high in comparison to other jurisdictions that have a more welcoming investment environment.

4.6.3 Policy Position

Kenya has taken significant positive steps to improving its business and investment environment as evidenced by the improvement in Kenya's ease of doing business ranking. There are still a number of steps that can be taken to further improve Kenya's investment environment and attract more FDI.

4.6.4 Policy Recommendation

- That Kenya adopt a tax policy that provides certainty on the country's macro-tax environment and in the ICT sector, removing the annual uncertainty associated with the Finance Bill.
- That the regulatory impact assessments of new policies and regulations include a requirement to conduct assessments on the impact/costs on investors and trade.

4.7 Lack of alignment with international agreements

Kenya is not party to the new two-pillar plan to reform international tax rules and ensure that multinational enterprises pay a fair share of tax wherever they operate. This reform is under The Organisation for Economic Co-operation and Development (OECD) and has been signed by 133 countries and jurisdictions, representing more than 90% of global GDP.

The reform aims to ensure that large Multinational Enterprises (MNEs) pay tax where they operate and earn profits, while adding much-needed certainty and stability to the international tax system. Pillar One, will ensure a fairer distribution of profits and taxing rights among countries with respect to the largest MNEs, including digital companies. It would re-allocate some taxing rights over MNEs from their home countries to the markets where they have business activities and earn profits, regardless of whether firms have a physical presence there. Pillar Two seeks to put a floor on competition over corporate income tax, through the introduction of a global minimum corporate tax rate that countries can use to protect their tax bases.

4.7.1 Impact on the sector

If Kenya becomes a signatory to these reforms, multinationals including digital companies operating in the country will re-allocate some taxes from their home countries to the markets where they have business activities and earn profits, regardless of whether firms have a physical presence there. Additionally, companies will have a set corporate tax threshold of at least 15% which is estimated to generate around USD 150 billion in additional global tax revenues annually. This is projected to have additional benefits arising from the stabilisation of the international tax system and the increased tax certainty for both taxpayers and tax administrations.

4.7.2 Impact on Investment Landscape

The OECD tax reforms will impact the operations of multinational firms and their decisions to expand and invest in various countries. Specifically, it would increase the right to tax profits from source countries into destination countries especially for digital companies, which mainly operate online. Decisions to invest would be impacted by the new complexities in the tax regimes the foreign firms would be facing. Kenya's lack of participation allows it to implement its own digital tax regime, burdening potential investors and companies operating in the country with a different set of compliance requirements and potentially higher taxes, discouraging investment and the growth of the sector.

4.7.3 Policy Position

Kenya's variance from international agreements creates uncertainty and additional compliance costs for companies operating in Kenya and for those considering investing in Kenya.

4.7.4 Policy Recommendation

That Kenya adopt or align its ICT tax and regulatory frameworks with international agreements. This would encourage FDI into Kenya by providing regulatory certainty to investors and lowering the costs of investment, and further enhance Kenya's position as a regional hub.



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