

Telecommunication Regulation in Kenya
**A case for Generic Reforms due to Convergence in ICT (Information
Communication Technologies)**

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DECLARATION

I, Charles Orinda Dulo, do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

Signed:



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This thesis has been submitted for examination with my approval as the university supervisor.

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The author takes full responsibility for any shortcomings in this work.

DEDICATION

To the Almighty God, my late mum Herrine, Family and Myself.

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LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|--------|--|
| AG | Attorney General |
| BCAC | Broadcasting Content Advisory Council |
| Cap | Chapter |
| CCK | Communications Commission of Kenya |
| CMA | Capital Markets Authority |
| / | |
| EACSO | East Africa Common Services Organization |
| EAP&TC | East Africa Post & Telecommunication |
| ERB | Electricity Regulatory Board |
| FDI | Foreign Direct Investments |
| FM | Frequency Modulation |
| GSM | Global System for Mobile Communications |

| | |
|-------|---|
| IBEAC | Imperial British East Africa Company |
| ICT | Information Communication Technology |
| IT | Information Technology |
| ITU | International Telecommunication Union (UN Agency) |
| KACC | Kenya Anti-Corruption Commission |
| KBC | Kenya Broadcasting Corporation |
| KCA | Kenya Communications Act, 1998 |
| KCO | Kenya Consumers Organization |
| KEBS | Kenya Bureau of Standards |
| KNFCU | Kenya National Farmers Confederation Union |
| KP&TC | Kenya Post & Telecommunication Corporation |

Kenya Television Network

| | |
|---------|---|
| MOA | Media Owners Association |
| NARC | National Rainbow Coalition |
| OSPITEL | Supervisory Body for Private Investments in Telecommunication (Peru) |
| PAC | Public Accounts Committee (Kenya Parliament) |
| PCK | Postal Corporation of Kenya |
| PIC | Public Investments Committee (Kenya Parliament) |
| PPCRAB | Public Procurement Complaints Review & Appeals Board |
| PSTN | Public Switched Telephone Network |
| PUC | Public Utility Companies |
| RBA | Retirement Benefits Authority |

Section (of the Law)

| | |
|--------|---|
| SNO | Second National Operator |
| STV | Stella vision |
| TESPOK | Telecommunications Service Providers Association of Kenya |
| TV | Television |
| UK | United Kingdom |
| USA | United States of America |
| USO | Universal Service Obligation |
| VOIP | Voice Over Internet Protocol |
| VOK | Voice of Kenya |
| VSAT | Very Small Aperture Terminal |

TABLE OF STATUTES AND LEGAL INSTRUMENTS

1. Communications Act, 2003 (UK)
2. Communications Convergence Bill, 2001 (India)
3. Kenya Gazette Notice No 2431 Vol. CVIII No 24 dated 31st March, 2006
4. Exchequer and Audit (Public Procurement) Regulations, 2001, Legal Notice No. 51
5. Kenya Communications Regulations, 2001, Legal Notice No. 68
6. Kenya Communications Act, 1998
7. Kenya Broadcasting Corporation Act, Cap. 221 Laws of Kenya
8. State Corporations Act, Cap 446 Laws of Kenya
9. The Constitution of Kenya

PROLEGOMENON

Introduction

The continuous evolution of new technologies results in the inability to predict the future development of convergence. The development of new services like web casting and Voice Over Internet Protocol (VoiP) or internet telephony, requires the need for regulations which does not aim to predict the future but aspires to be flexible enough to accommodate and propagate any permutation and combination of technologies and services.

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The changing nature and orientation of communications enterprises creates new challenges for regulators. For instance, Internet service providers are providing audiovisual contents while telecommunication companies are moving into content and broadcasting areas.

This trend towards horizontal and vertical integrated enterprises can be explained by the search of economies of scope and scale, reduced transactions costs and simulation of innovation in the production of new services.

Convergence will require a shift from a vertical to horizontal regulatory structure, that is, instead of regulating telecommunications or broadcasting industry a horizontal approach would be structured around the regulation of similar activities.

Horizontal regulatory approach has a number of advantages. First it is more likely to ensure that regulations are technology neutral and that they impact on similar services in a consistent manner.

Second, horizontal regulatory structure allows changes to the regulation of carriage and content to occur at a different pace.

The big question is, should industry specific telecommunication regulator, the CCK be redesigned as a convergence regulator so that it can more comprehensively and systematically address the full range of convergence in ICT issues? Or should CCK be re-designed as a multi-sector regulator so as to enable it (CCK) leverage the synergies across infrastructures to promote the most rapid ICT network roll out?

Statement of the problem

Technology convergence may be defined as the ability of different network platform to carry essentially similar kinds of services. It enables traditionally distinct voice and data transmission to be transported over

the same network and to use integrated consumer devices for purposes such as telephone, television or personal computers.

Convergence in ICT has made significant changes in the type of services available. Digitalization and convergence enables new possibilities for development and creation of new services within and beyond the framework of traditional communication sectors.

These services often do not fit easily into the existing regulatory definitions and framework.

Convergence in electronic communications is bringing together industries in the communication areas, which were previously viewed as separate in both commercial and technological sense and which have quite distinct regulatory traditions.

The main issue of convergence is therefore concerned with the possibilities of exploring the industrial opportunities in creating a new dynamic ICT sector encompassing hitherto separate sectors.

Conceptual framework

In an endeavor to provide a panacea to the regulatory inertia in the telecommunication sector in Kenya, on one hand and the emergence of convergence in ICT on the other, this paper conceptualizes the relationship between two major variables in the study namely, technological changes and policy and regulatory framework.

It puts the conceptual model to test in an effort to establish the significance of the relationship between technological changes and regulatory framework and concludes that since the law generally lags behind technological innovations, there is need for legal reforms to update the regulatory framework to deal effectively with the emergent issues brought about by convergence in ICT.

If Kenya is to fully benefit from the convergence in ICT, then the legal and regulatory framework must be developed at the same pace as technological innovations.

Theoretical framework

In Kenya, as regulation is presently structured, industry specific telecommunication regulator, the CCK cannot come to grips with the challenge of fostering a rapid and efficient roll out of information infrastructure. Moreover, the building of the regulatory platform needed to promote ICT, electronic trade, network and information security and consumer protection among others, are beyond CCK's current legal mandate.

To this end, effective ICT regulation in Kenya, remains a pipe dream because the CCK is insufficiently resourced in terms of quality personnel, does not have a workable political independence and an enabling institutional and legal framework to make unbiased decisions.

Chapter Two of this paper therefore provides the theoretical framework for this study.

Justification for the study

The introduction of digital technology and the commercial pressures for convergence are creating pressures for change in telecommunication, broadcasting and ICT sectors.

Digitalization of content is one of the major drivers of convergence. In the digital world, the same content can be transmitted across different networks and different services can be offered based on the same content.

The synergy achieved goes far beyond the electronic communications forms and includes among others printing press.

There is also a considerable uncertainty as to where technology and commercial forces are leading and the speed with which these changes occur. Uncertainties of the speed of changes make it difficult for Government to determine the priority that should be given to reforms.

The current policies are varied and are implemented by a number of different agencies. Technology and market changes are reducing the effectiveness of some of these policies and requiring integrated consideration of issues which were previously handed separately.

The development of digital technology and convergence in ICT raises a number of challenges for policy and regulation. For example network owners can face a wide range of conflicting array of regulations. These include different regulation for delivery of telephony, broadcasting and internet despite the fact that the same network is delivering all.

From our definition of convergence, we noted that all communication networks whether telecoms, cable TV or terrestrial broadcast could carry any form of digital information (voice, image or data). This means that the regulatory policy should no longer distinguish between different communication infrastructures.

It is therefore essential that any new framework should treat all transport network infrastructure and associated services in an equivalent manner irrespective of the types of services carried.

From the foregoing, it is obvious that there have arisen policy concerns which cannot be addressed adequately by the existing policies and regulations.

Statement of objective

The major objective is to provide proposals for generic reforms to help in designing of the next generation telecommunication regulation that is capable of building the regulatory foundations for growth across information infrastructures to promote the most rapid ICT network rollout in Kenya.

The minor objective is to partially fulfill the requirements of an LLM degree course at the University of Nairobi.

Hypothesis

First, if Kenya is to fully benefit from the convergence in ICT then the legal and regulatory framework must be developed at the same pace as technological innovations.

Second, effective ICT regulation in Kenya remains a dream because the CCK is not sufficiently resourced in terms of quality personnel, does not have a workable political independence and an enabling institutional and legal framework to make unbiased decisions.

Third, effective regulation of ICT in Kenya is undermined by the CCK's restricted legal mandate as a sector specific regulator.

Fourth, the formation of multi sector regulator facilitates the development and implementation of uniform sector product standards upon which services and networks can be regulated.

Chapter breakdown

We have set out the statement of the problem in Chapter one, covering introduction and the need for legislative reforms in the telecommunication and broadcasting sub sectors in Kenya.

In Chapter Two, we have exclusively dealt with the current regulatory and institutional framework in the telecommunication and broadcasting sectors in Kenya. To this end, we have examined their weaknesses in the in the light of the emergent issues brought about by the convergence in ICT. We have discussed the institutional challenges that face CCK.

In Chapter Three, we have discussed the implications of convergence for regulation of electronic communication and also given a critique of the national ICT policy.

In Chapter Four, we have taken the reader through the proposed generic reforms in the telecommunication regulation. While in Chapter Five, we have dealt with multi-sector regulation by way of recommendation and conclusion.

CHAPTER 1

1.0 Introduction and overview

In this Chapter, we are going to lay the basis of research into this area of telecommunication regulation reforms by looking at the introduction, the background and the statement of the problem.

Until recently, in most countries, Kenya included, telecommunications, information technology (IT) and broadcasting are operating independently in terms of technology used, information transmitted and the networks employed.¹ For instance, television, telephones and computers are used for distinct purposes namely television for broadcasting, telephone for voice and data messages and computers for data and information storage.

Separate laws and different regulators regulate the services provided, with no obvious need for coherence between these separate laws and regulators. In Kenya the broadcasting sector, for example, is operated largely under the common libel laws and self regulation with regard to content while the telecommunication sector has been under specific Acts

¹ A Henten, R Samarajiva & W H Melody, *Designing Next Generation Telecom Regulation: ICT Convergence or Multi Sector Utility*, 2003. CITC Technical University of Denmark.

of Parliament namely the then Kenya Post and Telecommunications Corporation Act² and the Kenya Communications Act. (Hereinafter KCA).

If Kenya is to fully benefit from the convergence in information and communication technologies (ICT), then the legal and regulatory environment must develop at the same pace with technological innovations. The telecommunication regulatory regime in Kenya has essentially lagged behind technological changes. This is because technological innovations are taking place faster than the regulatory regime is being updated.

For example, the current regulatory regime in telecommunications in Kenya was enacted in 1998. In 2004, due to technological innovation brought about by convergence in ICT, the telecommunication sector developed Voice Over Internet Protocol (VoiP) telephony. This has presented a regulatory challenge in that, where, for example, there is a threat to national security, it is not possible to tap the VoiP or Internet telephony as you would a circuit-switched telephone such as a public switched telephone network (PSTN).

Digital technology and convergence now allows both traditional, for example, voice telephony or sending data via facsimile while using telephone line (Public Switched Telephone Network) and new

Cap. 411, Laws of Kenya.

communications services such as email, internet or VoiP telephony to be provided over the same network, which lowers the price of communication services due to increased efficiency and lower transmission costs.³

The continuously expanding applications of information communication technologies ICT are transforming local, national, regional and international economies into network economies that is, linked together into one global economy through ICT. For example, it is now possible to make an order locally here in Kenya for goods physically present in a country in Europe to be delivered in West Africa and paid for through an account in the United States America at the click of a mouse.

The foundation of information societies (a society in which the creation, distribution and manipulation of information is a significant economic and cultural activity) is being built upon expanded and upgraded national communication networks, the new information infrastructures.⁴

The point of entry to participate in these new economies and societies is through local communication infrastructures, for example, advanced telecommunication network, internet, ICT, broadcasting and cable, which determine the access possibilities thereby creating opportunities for

⁴ A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.
A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

individuals, organizations and countries. The productivity improvements and benefits that are actually realized by individuals, organizations and countries are dependant upon effective utilization of these networks.⁵

The telecommunication reform process in many countries, Kenya included, was directed at creating an environment to foster a massive expansion in the coverage and capabilities of the information infrastructure network. The national telecommunication regulators such as Communications Commission of Kenya (CCK) became the key implementers of these policies of reforms. The first phase of telecommunications reforms has focused on industry specific telecommunication policies and regulations.⁶

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The essential model for restructuring the telecommunication sector has been to separate the three primary functions of network operations, policy making and regulation. Incumbent operators have been commercialized, often privatized; additional operators have been licenced and network development objectives have been established.⁷

In Kenya for example Kenya Post and Telecommunication Corporation, which hitherto combined all the functions, was commercialized and , partly privatized giving rise to three distinct entities namely Telkom (K)

W.H. Melody, *Building the Regulatory Foundations for Growth in Network Economies*. 2002 Delft University of Technology. The Netherlands.

Op cit.

W.H. Melody, *Building the Regulatory Foundations for Growth in Network Economies*, supra note 5.

and Postal Corporation of Kenya (PCK) whose primary function remained telecommunication network operations and postal services, respectively. CCK whose main function is the development and implementation of policies and regulations in conjunction with the line Ministry's policy guidelines.

The second phase of these reforms will be influenced primarily by experience to-date and the rapid changes in technologies market and industry structures.⁸ For example, due to technological development it is now possible to have wireless internet connection thus reduce the need for reliance on telecommunication network. Second, it is also possible to have broadcasting over wireless Internet due to convergence in ICT and thus the changes in the industry structure.

The growth path of any industry or economic sector is significantly affected by the opportunities provided by the available technologies.

The technological opportunities provided by convergence in ICT include wireless Internet and VoiP telephony. These in turn create new opportunities for market forces to exploit, for example, convergence in ICT has created market opportunities through enlarged reach of consumers. Finally the directions and priorities of related Government

A Henten, et al, Designing Next Generation Telecom Regulation, supra note 1.

ICT policies and regulations can be a catalyst for development or a constraint upon it.⁹

These factors can be mutually supportive in stimulating growth and creating benefits or they can conflict with one another, creating major blockages to development. For example, a long waiting list of potential customers for connections to the network is an illustration where policy and regulation have blocked development.¹⁰

It should be noted, however, that the existence of development opportunities of itself does not guarantee the delivery of benefits in the real economy. Technological opportunities such as the ones presented by convergence in ICT must be productively applied. The market opportunities created by convergence in ICT must also be converted into desired services and Government policies must be implemented through effective regulation.¹¹

Where technologies and markets are changing slowly and in a predictable manner, without raising policy concerns, then policy and regulation can more readily be designed for this stable and predictable environment. But where technology and/or markets are changing

⁹ A Henten, *et al.* *Designing Next Generation Telecom Regulation*, *supra* note 1.

¹⁰ W.H. Melody, *Building the Regulatory Foundations for Growth in Network Economies*, *supra* note 5.

¹¹ A Henten, *et al.* *Designing Next Generation Telecom Regulation*, *supra* note 1.

rapidly, the policy on the regulatory environment must adapt to the changing circumstances as well.¹²

The issue of convergence in ICT should be of primary interest to policy makers in industry and Government and the national and international levels as well as the academic community now more than ever before. This is because technological convergence offers massive opportunities for development of new value added services.

For instance audiovisual contents that formerly were dedicated to specific sector (terrestrial broadcasting) can now be conveyed in different infrastructure because of the common digital form thereby expanding consumer choice allowing for both convenience and efficiency.¹³ But with these benefits came new policy and regulatory challenges. The need to facilitate electronic trade (e-commerce), control emerging cyber or virtual crime such as child pornography, electronic fraud, spamming, clogging of network and spreading of viruses among others.

The protection of intellectual property rights for instance copyright in cyber space. Other emerging public issues such as the right to receive and disseminate information without interference vis-a- vis the need to control hate speech or racial propaganda in the internet, individual's

W.H. Melody, *Building the Regulatory Foundations for Growth in Network Economies*, *supra* note 5.
A Henten, M Falch and R Tadayoni, *Some Implications for Regulation of ICT and Media Convergence*, 2002. CTI Technical University of Denmark.

right of privacy in the virtual world and protecting consumer interest when they engage in e-commerce.¹⁴

Unfortunately, technological innovations are taking place faster than regulatory developments. This leads to ineffective regulation. In a dynamic environment such as ICT, it is often technological changes that lead by creating new opportunities that are then exploited by market forces before policy and regulation are adapted to the new circumstances.¹⁵

This *lacuna* can be addressed by updating the regulatory framework and institutions to address emerging industry, market and public protection issues. Other measures include aligning national regulatory practices with international agreements and informing traditional policy making to consider convergence trends. This is because, we are part of the global information infrastructure network, thus there is need for high degree of international compatibility across many of the network regulations.¹⁶

In Kenya, for example, the development of e-commerce/electronic trade is not matched with legal framework, that can protect the interest of consumers, when for instance, they are faced with potential risk of electronic fraud, or non delivery of goods ordered and paid for through

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A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

W.H Melody, *Building the Regulatory Foundations for Growth in Network Economies*, *supra* note 5.

A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

the internet, or even a mechanism for returning wrong merchandise delivered with money back guaranteed system of refund.

The recent technological changes have broadened the service capabilities of the cable industry, which hitherto was considered a segment of the broadcasting industry on the production side.

The cable industry was mainly used to produce TV programmes. It is now technically possible to supply television, voice and data services on cable networks. This makes a stronger case for industry level convergence among telecom, data communication and cable industries.¹⁷

In terms of regulation, the formation of a multi-sector regulator would facilitate the development and implementation of uniform sector product standards upon which services and networks can be regulated. In Kenya, as regulation is presently structured, the industry specific telecommunication regulator, CCK cannot come to grips with the challenge of fostering a rapid and efficient roll out of ICT infrastructure. Moreover the development of the regulatory platform needed to promote ICT, electronic trade, network and information security and consumer protection among others are beyond CCK's current legal mandate.

¹⁷ R Samarajiva, A Mahan & A Barendse, *Multi-sector Utility Regulation*, 2002. Delft University of Technology.

Effective ICT regulation in Kenya will remain a pipe dream unless the CCK is sufficiently resourced in terms of qualified personnel both at technical and Board of Directors level (there is a serious shortage of technical staff and skilled regulators). CCK should also have a workable political independence and the institutional ability to make unbiased decisions. We will canvass these issues in more details in Chapter Two.

In conclusion therefore, if Kenya is to fully benefit from convergence in ICT, the legal and regulating environment must develop at the same pace with technology. New laws must be drafted in such a way as to be technology neutral¹⁸ (as opposed to the current situation), to take into account new developments and the needs of a number of different stakeholders.

A strong case therefore exists for turning CCK Board into a stakeholder's board such as the Capital Markets Authorities (CMA) and the Retirement Benefits Authority (RBA). It should be noted, however, that we are not advocating for a complete non involvement of Government in CCK's Board. On the contrary, Government being one of the major stakeholders in the communications industry should be represented in the proposed Board. But one of the criticisms of the current CCK Board

¹⁸See definitions *ibid*

is that its composition is currently dominated by Government representatives,¹⁹ making the Board too lopsided to be independent.

1.1 The opportunities created by convergence

The introduction of digital technology and the commercial pressures for convergence are creating pressures for change in telecommunication, broadcasting and ICT sectors.

Digitalization of content is one of the major drivers of convergence. In the digital world, the same content can be transmitted across different networks and different services can be offered based on the same content.

The synergy achieved goes far beyond the electronic communication forms and includes among others the printing press.²⁰ Digitalization and/or convergence in technology have made significant changes in the types of services available. Digitalization enables new possibilities for development and creation of new services within and beyond the framework of traditional communication sectors.²¹

¹⁹ Section 6 of KCA currently provides for more than half of CCK Board members to be Government representatives.

A Henten, *et al*, *Some Implications for Regulation of ICT and Media Convergence*, *supra* note 13.

A Henten, *et al*, *Some Implications for Regulation of ICT and Media Convergence*, *supra* note 13.

These services often do not fit easily into the existing regulatory definitions and framework for instance if audiovisual content (broadband visual services) is offered through the Internet, should this be considered as telecommunication or broadcasting? Should it be regulated as broadcasting?²²

The digital impact on broadcasting is both direct through the introduction of digital televisions and radio and indirect through the development of new services such as webcasting,²³ which have the potential to compete with broadcasting. Convergence also has implications for the effectiveness of policies directed at regulating content.

In the next sub-topic, we are going to define some of the key terms which will be used in this thesis.

1.2 Definition of Terms

Technology Convergence: This may be defined as the ability of different network platform to carry essentially similar kinds of services. It enables traditionally distinct voice and data transmissions to be transported over

²² See report by Dr Allan Stretton and Mr. Dimitri Ypsilanti, "*The Implications of Convergence for Regulation of Electronic Communications* presented to the Working Party on Telecommunications and Information Services of the OECD, 12th July, 2004. DSTI/ICPTISP (2003) 5/FINAL at bSgV/www.oecd.org (Last accessed on 22 Aug. 2006).

See definitions *ibid*.

the same network and to use integrated consumer devices for purposes such as telephones, television or personal computers.²⁴ The centerpiece of this fusion is ICT and the attendant amenities.

Telecommunication: This is the process of moving data, audio information (sound) and video information (pictures) over long distances through transmission lines. The basis of transmitting data and sound over media is the digital communication technology. The three main domains of telecommunications are audio transmission, video transmission and data communications or digital transmissions.

Information Communication Technologies: This means the technologies including computers, telecommunication and audio visual systems, that enable the collection, processing, transportation and delivery of information communication services to users.

Broadcasting: This means radio communication whether by sound or vision for reception by members of public.

Multi sector Regulation: This means the functioning of a single regulatory agency that has responsibility for diverse sectors.

A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

Internet: A global network connecting millions of computers linked into exchanges of data, news and opinions. Each internet computers also known as a host, is independent. Its operators can choose which internet services to use and which local services to make available to the global internet community. Access to the internet is through a variety of means such as online services or through commercial internet service providers (ISP). The internet is not synonymous with World Wide Web.

Web casting: To use the internet to broadcast live or delayed audio and/or video transmissions, much like traditional television or radio broadcasts. For example, a university may offer online courses in which the instructor web casts a pre-recorded or live lecture or an enterprise may web cast a press conference in lieu of or in addition to a conference call. Users typically must have the appropriate multi media application in order to view a web cast.

Electronic Communication: A macro term to describe all forms of communicating via electronic means such as the internet, facsimile, satellite, cable, television, computers, networks, email, video conferencing among others. It also means a communication by means of guided or unguided electromagnetic energy or both. It has also been defined as any transfer of signs, signals, writings, images, sound, data or intelligence of any nature transmitted in whole or in part by wire, radio,

electromagnetic, photo electronic or photo optical system that affects interstate or foreign commerce.²⁵

Technology neutral: means that the setting up of infrastructures and its use is not linked to the provision of a particular service by using a particular technology. Similar services can be provided using any facility and technology.

1.3 Brief historical development of broadcasting regulations in Kenya

Radio broadcasting was introduced in Kenya in 1928 to serve the British Colonial master's interest in the then Kenya colony. Between 1928 and 1961, Kenya broadcasting services operated broadcasting services in Kenya as a public service. In 1963 Kenya Broadcasting Services was privatized and renamed Kenya Broadcasting Corporation. In 1964, the Kenya Broadcasting Corporation was nationalized and renamed Voice of Kenya (VOK) under the Ministry of Information and Broadcasting.

The VOK had a monopoly over radio and television services for over two decades. In 1986 the Government of Kenya through the Sessional Paper no 1 (Economic Management for Renewed Growth) resolved to deregulate and liberalize the economy and to reduce monopolies. In 1988, Kenya

The USA Electronic Communications Privacy Act, 1986.

Broadcasting Corporation Act²⁶ transformed VOK into a semi autonomous legal entity to operate on commercial principles.

On 1 February, 1989 Kenya Broadcasting Corporation was established and assumed the functions and assets of VOK.

In 1990, the broadcasting sector was liberalized and Kenya Television Network (KTN) was licensed as the first independent television station in the country. This was followed in 1996 with the licensing of Stella vision (STV). In 1998, the Kenya Communications Act²⁷ was enacted. It established CCK as a regulatory body with the powers to licence broadcasting stations, while KBC retained the authority to licence receiving sets for wireless and television broadcasts as well as dealers in and repairs of such sets.

Consequently a number of radio and television stations were licenced to operate from 1999. In 2001, the Kenya Communications Regulations were promulgated. These together with KCA 1998 formed the policy and regulatory regime of the broadcasting sector

The policy was geared towards liberalization of the sector. CCK was to promote, develop and enforce fair competition and equality of treatment

* Act no 15 of 1988

²⁷ Act no 2 of 1998

among all licencees (R 5). CCK was to receive and handle complaints of unfair competition (R 7) and to resolve disputes among licencees (R8). On content regulation, there was no specific statutory provision regulating the standards. This was left mainly to the Board of Censors and common law libel laws enforced by the police, Attorney Generals office and the law courts.

1.4 Brief historical development of telecommunication regulations in Kenya.

Telecommunication regulation started in Kenya in 1888 when Imperial British East Africa Company (IBEAC) was given a Charter to develop and administer interior. In 1895, IBEAC developed a telegraph link between Mombasa and Lamu. In 1933 with increasing collaboration of the British Colonial Administration in Kenya, Uganda and Tanganyika communications of the three countries were amalgamated under a single Post Master General.

In 1961, with the independence of Tanzania, East Africa Common Services was created under East Africa Authority. East Africa Community was formed in 1967 and East African Common Services Organization converted into East Africa Post and Telecommunication Corporation (EAP&TC). This organization provided postal and telecommunication services in the three East African states until 1977

when the East African Community collapsed. In 1977, Kenya enacted the Kenya Post & Telecommunication Corporation Act, which created KP&TC. KP&TC was a monopoly which combined both operation and regulatory functions.

In 1991, however, there was a partial liberalization of the telecommunication sector with the licensing of Customer Premises Equipment and internal and external wiring. KP&TC licenced independent constructors to provide these services. This was followed with the licensing of value added services (VAS) for example telephone bureaus in 1994. In 1997, the Government of Kenya embarked on a series of initiatives to revitalize and transform the communication economy. The Government as sequel issued the telecommunication / sector policy, whose overall objective was to ensure the availability of efficient, reliable and affordable communication services.

Consequently in 1998, the Kenya Communication Act was enacted with the consequence that it repealed KP&TC Act. At the same time KP&TC was restructured and split into three entities namely: Telkom (K), Postal Corporation of Kenya and CCK which was established as the regulatory body for the sector.

The Government in tacit recognition of the role and/or the importance of in the economy, established through s84 of KCA, the national

communications secretariat. NCS's role was to formulate ICT policies, carry out telecommunication and postal policy research and analysis, advise the Government on the most efficient way of managing radio frequency spectrum, update sector policy statements, sessional papers and legislation pertaining to ICT, and finally assist in the preparation of country position papers for all international meetings and conferences in ICT. In 2001, the Government promulgated the Kenya Communications Regulations to supplement and operationalize some of the sections of KCA 1998.

1.5 Rationale for regulation in telecommunication

The most traditional and persistent rationale for Governmental regulation of a firm's prices and profits is the existence of natural monopoly. Some industries, it is claimed can not efficiently support more than one firm. For instance, electricity producers and local telephone companies find it progressively cheaper (upto a point) to supply extra units of electricity or telephone services.²⁸

These "economies of scale" are sufficiently so great so that unit cost of service would rise significantly if more than one firm supplied service in a particular area. Rather than have three connecting telephone companies laying separate cable where one would do, it may be more efficient to

Stephen Breyer,(1982) *Regulation and its Reform*, Harvard University Press, Cambridge, Massachusetts.

grant one firm a monopoly and subject it to Governmental regulation of its prices and profits.²⁹

Market failures mainly natural monopoly cost conditions in parts of the industry and a history of actual monopoly over nearly all the industry provide the rationale for policy intervention.³⁰ A monopolist if unregulated curtails production in order to raise prices. Although higher prices means less demand, the monopoly willingly foregoes sales because he can more than compensate for the lost revenue through increased prices of the units sold.

Where economies of scale renders competition wasteful the classical economist or regulator will try to set price near incremental cost in order to induce the natural monopolist to expand its output to a socially preferred level.³¹

The government can directly regulate monopoly. This approach has been taken for decades to the local telephone business and other utilities such as electricity.³² The underlying principle governing anti-trust (monopolies) law is the protection of competition as a process. If a single

²⁹ Stephen Breyer, (1982) *Regulation and its Reform*, note no 28.

Melvin Ayogu (2003) *Strengthening National Information and Communication Technology Policy in Africa: Governance, Equity and Institutional issues*. African Technology Policy Studies Network (ATPS) special paper series no 13, Nairobi.

Stephen Breyer, (1982) *Regulation and its Reform*, note no 28.

Carl Shapiro & Hal R Varian. *Information Rules: A strategic guide to Network Economy*. Harvard Business School Press, Boston Massachusetts.

firm is victorious and gains a monopoly position based on offering low prices and superior product quality, the competitive process has just worked fine. Competitive process would ultimately be best to spur economic growth and protect consumer interest.³³

Since Bell's invention of telephone in 1876, the telecommunication industry has grown in size and complexity. Customers now use a telecommunication network for many purposes other than basic voice telephony, each of which places different demands on network. In recent years the switching and transmission technology used in the industry has converged towards, those used in computing and broadcasting industries and a full account of telecommunications should include links between the three industries.³⁴

The pressure for convergence in regulation is from the increasing overlap of telecommunication regulation with content or broadcasting regulation. Advances in ICT particularly the internet have introduced new challenges in the regulatory and legislative regimes and have begun to blur, if not erode, the traditional definitions and jurisdictional boundaries. Fortunately for us in Kenya, large swaths of the information sector of our economy are subject to little or no regulation at all. It is this *lacuna*,

³⁴ Carl Shapiro & Hal R Varian. *Information Rules: A strategic guide to Network Economy* *supra* note 32.
Melvin Ayogu (2003) *Strengthening National Information and Communication Technology Policy in Africa* *supra* note 30.

which this paper seeks to address by putting forward these generic reforms.

In the next sub-topic, we are going to discuss the conceptual framework for the proposed reforms.

1.6 Conceptual framework

This thesis will seek to examine three broad areas in ICT namely; the nature of governance that is policy legislation, the institution of governance and finally the regulatory process.

In terms of policy formulation this paper seeks to answer the following questions. What role does the state of competition in ICT sector play in the choice of legislative framework? What are the current legislative issues in multi media, telecommunications, broadcasting, electronic transactions, competition, interconnection and licensing laws? Is there an enabling environment for effective promotion of ICTs?

How should policy legislation proceed? Should convergence of services require adaptation in the regulatory framework? Should a composite regulator handle broadcasting and cable television, telecommunication, distribution and sales and software content issues? Are there legal principles and issues deserving of separate regulators because of the

differences in telecommunication, broadcasting and intellectual property laws? How can we use ICT to improve political participation and equitable access to justice? For us to compete globally, we have to review and update laws and create or reform our institutions to take into account the growth of ICT.

In terms of institutions of governance we need to address the following; What is the optimal regulatory structure? What should be done to the existing or inherited framework? Will it be a single integrated agency or a multiple agency to govern each of the components of digital technology? Will the regulatory authority once created be independent of the dominant players? (The question of regulatory capture). Will the agency be independent from the political power? To whom is the agency accountable? How independent is independence?

What would be the governing structure of the agency? Will it be a collegial body governed by a director general, a board or other governance structure? What would be the optimal decision making or management style, that is, will it be active involvement, participatory or consultative, transparent, flexible extensive and accessible?

Finally, in terms of the regulatory process, how can we maximize the benefits of existing ICTs and promote its growth and development? In our quest for an optimal regulation, we need to encourage competition in

order to protect the process. While recognizing the dynamic nature of the sector, complex issues of the separation of content and transport regulation should be examined.

The issues to address is how competition should proceed in various segments such as basic services, long distance, cellular services, leased lines, cable television, internet and value added services, multi media among others. This should be consistent with promoting the development of IT capabilities, promoting the growth of robust applications environment for end users.

We should also be able to identify anti competitive concerns such as price cross subsidies, interconnection, market dominance among others.

There is also need to identify the inherent tensions between achieving universal service obligations and nurturing a competitive market and a dynamic ICT sector. We should also encourage innovations and give investment incentives. To this end, we need to recognize the types of positive regulatory actions such as standards, transparency, competition and exclusivity among others to promote efficient investments in modern technology.

We should also take cognizes of the fact that the means used to assign public resources can be an instrument that has implications for efficient use and can also exclude valued market participants and discourage

investments and innovations. We therefore need to have a constant review of our licensing regime to verify that it is not generating unintended negative consequences.

CHAPTER 2

2.0 Regulatory and Institutional Framework in Telecommunication and Broadcasting in Kenya

The fundamental underlying reason for reform is the inadequate performance of the old institutional arrangements in the light of the emergent issues brought convergence in ICT. In Kenya, the past decade (1997 to 2007) has seen telecommunication activities in the phase of policy development, basic institutional restructuring in preparation for liberalization to the implementation of the liberalized policies.

This therefore, makes it a good time to assess the progress that has been made to-date both with respect to policy development, institutional restructuring and effectiveness of the liberalized initiatives so far. Such an assessment may be helpful for determining prospects and priorities for effective implementation of the next steps in the telecommunication reform process. However, this assessment must be done against certain bench marks. To this end we need to lay down such benchmarks before examining the actual situation on the ground.

It is apparent there are three distinct, but related set of activities that are fundamental to reforms namely policy making, supplying of services and regulation.³⁵

The essential conditions required for the establishment of an institutional structure that clearly defines separate and distinct roles for policy making, regulation and operator management are;

First, policy development this should be directed towards fundamental issues of long term societal objectives and directions, not the day to day implementation and problem solving. To ensure that policy makers are informed and capable of addressing the need for policy change when it is required, it is important to have access to a specialized professional policy analysis unit.

Second, operation management must be clearly separated from the government so that neither the politician nor government bureaucrats can interfere into day to day operational decisions. The management must be accountable to a board of directors that is insulated from government interference. The board may have political appointees, but for terms of significant duration and mandates to act independently in achieving specified economic and social objectives.

³⁵ Melody, W H (Ed) 1997, *Telecom Reforms: Principles, Policies & Regulatory Practices*: Lyngby. Technical University of Denmark, Den Private Ingeniorfond.

Finally, regulation must be independent from both the industry and Government. The regulators task is to implement government policy. It ensures performance accountability by the industry to economics and social objectives, resolves disputes between competitors, consumers and operators, monitors changing industry conditions and advises government on development bearing policy. The regulator therefore, acts as a buffer between the operators and the government, and helping to ensure separation of functions.

The effectiveness by which these fundamental separations are achieved will have significant impact upon growth of the sector. The more effective the separation, the better will be the climate to attract financing and undertake investments. If each function can be performed well, each will provide clarity and stability in an institutional framework conducive to rapid growth and effective achievement of economic and social goals.³⁶ This requires both that independence of the different activities be established and that it be sufficiently transparent to be understood by all the direct affected parties and the public.

This Chapter will examine the legal framework governing CCK, the qualification, selection and appointment criteria of the CCK Board of Directors, the impact of other legislation on CCK's regulatory functions,

³⁶ Melody, W H (Ed) 1997, *Telecom Reforms: Principles, Policies & Regulatory Practices* supra note 35.

the broadcasting regulatory framework and the institutional challenges that face CCK, specifically limited technical staff and skilled regulators. This is because effective ICT regulation in Kenya will remain a pipe dream unless CCK is reformed to give it teeth, since it is the vessel through which the proposed reforms will be conveyed.

2.1 Legal Framework governing CCK

The Communications Commission of Kenya is established pursuant to section 3 of the KCA.³⁷ Section 5 sets out the object and purpose of the Commission as to licence and regulate telecommunication, radio communication and postal services in accordance with the provisions of the Act.³⁸

The scope and mandate of CCK as provided for by KCA is so narrow and restrictive that it cannot possibly be extended to cover and deal with the issues that pertain to ICT brought about by convergence. This therefore means that there is need to expand CCK's scope and legal mandate to enable CCK to deal effectively with emerging industry issues such as convergence in ICT.

³⁷ Act No 2 of 1998.

³⁸ KCA.

Section 5 of KCA, further provides that the Commission shall have all the powers necessary for the performance of its functions under the Act. This section in our view is ambiguous. This is because one, it does not define those powers and two, sections 28 to 34 and 44 to 45 of the Act creates certain offences with regard to telecommunication services and radio communications respectively. Yet the CCK does not have prosecutorial powers, which for the time being is constitutionally vested in the office of the Attorney General pursuant to section 26 of Kenya Constitution.

It is our humble view that prosecutorial powers are one such power necessary for CCK to perform its functions. This is because the changing trend of technology makes the issue of convergence in ICT extremely complex and lack of effective enforcement machinery can create a loophole, which criminals can easily exploit. For example, the enforcement of broadcasting standards with regard to pornography irrespective of the medium in which the material is conveyed.

CCK, like Kenya Bureau of Standards (KEBS), a statutory body created pursuant to Standards Act,³⁹ which also performs regulatory functions *inter alia* quality control and standards, should be given prosecutorial powers outside of the office of the Attorney General to enable it perform its regulatory functions better.

³⁹ Cap. 496, Laws of Kenya.

The following case will highlight this inherent lack of enforcement mechanism as a hindrance to CCK in the execution of its mandate. In 2004, Kiss FM radio station acting in legitimate business interest recruited five members of staff from a rival Citizen FM radio station, which retaliated by jamming Kiss FM radio station's airwaves for three consecutive days.

Remarkably, during the three days Kiss FM radio station was off air, its frequency was being used to offer particular vernacular songs associated with Citizen FM radio station.

Clearly, in this instance, Citizen FM radio station was in breach of section 45 of KCA, which prohibits the use of any station or apparatus to deliberately interfere with radio communication and Regulation 28(2)⁴⁰ which prohibits any licensee from using an unauthorized frequency or equipment to offer radio communication.

CCK conducted their 'investigations' and found Citizen FM radio station guilty' of jamming Kiss FM radio stations airwaves. It is instructive to note that CCK forwarded their recommendations to the then Minister for Transport and Communication Mr. John Michuki who "forgave" Citizen FM radio station. It is also important to note that the then Ministry of

⁴⁰ Kenya Communications Regulations 2001, Legal Notice No. 68.

Transport and Communications performed oversight functions over CCK pursuant to the State Corporations Act.⁴¹

Why didn't CCK in this instance recommend to the Attorney General the prosecution of Citizen FM radio station? We believe that, it was politically expedient to make recommendations to the Minister in charge of Communication rather than the Attorney General for action because the owners of the media house in question, Royal Media Services, were consorting with the then nascent National Rainbow Coalition (NARC) Government which they supported in exchange of political protection and patronage.

Another case involving Econet Wireless, a firm that "won" the licence to operate the 3rd mobile telephone services in Kenya. Regulation 4(2)⁴² state that fees payable to the Commission in connection with applications for licences, frequencies spectrum assignments or other matters shall be paid for in full before the licence is granted or the frequency assigned by the Commission.

It is instructive to note that Econet Wireless to date has failed, refused and/or neglected to pay part of the licence fees due to CCK, yet they have

⁴¹

446, Laws of Kenya.

⁴²

Kenya Communications Regulations, *supra* note 34.

been granted licence to operate the 3rd mobile telephone services in Kenya.

Clearly Econet Wireless is in breach of this regulation, yet it is on record that CCK in total disregard and express violation of this provision of the law, went ahead in November 2004, not only to issue Econet Wireless with a licence but also assigned Econet Wireless frequency spectrum to enable them operate.

What happens when the regulator, who is the custodian of the public interest, is in breach of the law like in this instance? Why has CCK not cancelled the licence it granted to Econet Wireless on the basis of the breach of this regulation? Is the breach politically motivated or CCK is just suffering from regulation inertia due to lack of enforcement mechanism and/or regulatory skills and capacity?

It is instructive to note that the regulation does not state who is responsible for its enforcement. The assumption here is that the office of the Attorney General should be responsible.

These are borderline cases, which can be explained by any of the above factors. It is for these reasons that we are strongly recommending prosecutorial powers for CCK independent of the Attorney General. We are, however, alive to the fact that section 26(6) of the constitution

exclusively vests prosecutorial powers in the office of the Attorney General to the exclusion of any other person or authority.

2.2 Powers of the Minister to appoint CCK Board of Directors

In our journey of examining the legal framework under which CCK operate, we now move from discussing the lack of enforcement mechanism to a more critical and substantive issue at the heart of this discourse namely;

The qualification, selection and appointment criteria of members of CCK Board of Directors. CCK's Board functions viz a vis the Ministerial power over CCK as a regulatory body. The need to foster a workable independence from the Government and indeed political interference.

One of the greatest threats to independence of sectoral regulatory agencies from the Government is the line Ministry, which previously combined the functions of policy setting, regulation and operation. However, following liberalization has been left with only the task of policy setting.⁴³

Reform of the operator usually results in greatly reduced powers of direct involvement by the Minister. Therefore, it is "natural" for the Minister to

³⁹ R- Samarajiva, *et al*, *Multi-sector Utility Regulation*, *supra* note 17.

seek authority over a specialized entity that will exercise oversight over the entire sector, namely, the new regulatory agency.⁴⁴ It is, in this light therefore that the role and functions of the Minister with regard to the appointment and revocation of CCK Board of Directors should be seen.

In approaching the problem of a workable independence from the Government for CCK as an independent regulator, it is useful to begin by asking whether the desirability of insulation from political pressure is unique to CCK. We will quote in *extensu* what Anders Henten *et al* said about the need for independence from Government of the regulatory bodies:-

Efficient and unbiased public administration requires a degree of protection from day to day-political pressures. The civil service protections written into many constitutions and laws around the world testify to this. Clear separation of policy setting functions and the implementation function with political accountability for the former, and the administrative or legal accountability for the latter is a basic element of sound public administration.

Additional insulation from political pressure is provided in certain exceptional cases such as investigative bodies dealing with corruption, Attorneys General and Central Banks. Do infrastructure regulatory agencies warrant such special protection? Added insulation from political pressure is critical where the Government as a whole does not have efficient and effective Government administration. In effect, the independence that is called for serves as a dyke to protect the island of good governance that the regulatory agency is intended to be, from the surrounding ocean of less

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A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

effective governance. This is generally seen as a developing country problem.⁴⁵

We couldn't agree more with the above statement. The Ash Council report⁴⁶ noted that the application of regulatory statutes, rules and regulations requires a bipartisan multimember body that can act without regard to partisan considerations which affects Congress or the Executive branch in the United States of America (USA).

The political pressure coming from Congress or the Executive branch unquestionably impinges on the impartiality of the Commission proceedings.

The theory behind the independent regulatory commission as conceived in the United States of America then was that, independence enabled a regulatory commission to bring expert judgment to bear upon technical and complex economic issues.⁴⁷

Its insulation from partisan political control; its capacity to provide both continuity and flexibility of policy; and its blending in a single tribunal a wide range of powers and functions allowed the agency to exercise broad

⁴⁵ A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

See the Report of President's Advisory Council on Executive Organizations. *A New Regulatory Framework, Report on Selected Regulatory Agencies*, Washington DC 1971 USA. Hereinafter The Ash Council Report. .

Mr. Philip Elma, *The Regulatory Process: A Personal view*. Excerpts from American Bar Association, 11th Aug. 1970, St. Louis, MO.

³⁹discretion in choosing the best tool for dealing with a particular problem.⁴⁸

Mr. Philip Elma, the then Federal Trade Commissioner (USA) noted that the independence of the regulatory agency would be a source of institutional strength insulating its members from partisan political pressures and enabling them to act creatively and boldly.

Mr. Elma further noted that its multi-member structure would ensure that agency decisions are reached after group deliberation, providing both a barrier to hasty or arbitrary action and assurance of judicious and prudent policies.

It is for this reason that we are proposing a workable political independence of regulatory bodies such as CCK. In the same vein, we are advocating the adoption of multi sector, multi member regulator as a further bulwark for the independence of the regulator.

The Ash Council Report noted that commissions could better serve the public interest in regulatory matters because their independence makes them immune from control by industries they regulate. We dare add that it is precisely for this reason that we are proposing multi sector regulator.

Mr. Philip Elma, *The Regulatory Process: A Personal view, supra note 47.*

Critics of independence of regulatory agencies, however, aver that they are undemocratic and lacking in legitimacy. Regulators are appointed not elected, yet they wield enormous powers. Regulators remain vested with nearly uncontrollable discretion, unelected, freed by wide statutory mandates from close judicial scrutiny and unchecked by professional discipline.⁴⁹

First, we believe that, these concerns can be addressed by having Parliament to play its rightful oversight function over such bodies. Second, their statutory mandate should be restricted and finally, it is not true that such bodies are freed from close judicial by wide statutory mandate. This is because Kenyan courts through judicial review have been able to competently supervise these statutory bodies.

We now turn to examine the qualification selection, appointment and revocation of the CCK Board of Directors within the legal framework that governs CCK. This is important because it will determine the level of working independence of the Board as an independent regulator.

Section 3 of KCA⁵⁰ establishes a Commission known as the Communications Commission of Kenya, while section 6 vests the

³⁹ Stephen Breyer,(1982) *Regulation and its Reform*,supra note no 28.
Act No. 2 of 1998.

management of the Commission in the Board of Directors. The Board of Directors is composed of a chairman appointed by the President, Director General appointed by the Minister, four Permanent Secretaries or their representatives and at least five other persons not public servants appointed by the Minister "by virtue of their knowledge or experience in matters relating to telecommunication, postal services, radio communications, commerce or related interests". This section also implores the Minister to have due regard to registered societies representing such interests while discharging his powers thereto.

With tremendous respect, what special regulatory skill and/or training do the four permanent secretaries or their representatives' possess to enable them discharge their functions effectively and efficiently at the CCK Board? This is because they hold their seat at the CCK Board by virtue of the Permanent Secretary position in their respective Ministries.

First, where for example, a medical doctor is appointed the Permanent Secretary in the Ministry of Finance or Office of the President in charge of Internal Security, he invariably and automatically becomes a Board Member of the CCK! Second, the holders of the offices of Permanent Secretaries are political appointees holding those offices at the pleasure of the President. This means that the President can at anytime remove, swap, retire and/or sack them at his whims.

Under the NARC Government, there have been three Government reshuffles in as many years affecting the above offices of the Permanent Secretaries. The turnover in the offices of the four Permanent Secretaries by implication invariably affects the composition of CCK Board of Directors. This is bad for a regulatory body's Board since it cannot develop and nurture an institutional memory conducive for the discharge of its regulatory function.

Third, the presence of six Government appointed Public Officers in CCK Board makes it impossible for the CCK Board to operate as an independent regulator as it is perceived as a Government controlled body.

Similarly, what about the other Board Members appointed by the Minister pursuant to section 6(g) of KCA? Their selection criteria being *"their knowledge or experience in matters relating to postal services, telecommunications, radio ..."* (Italics added).

These qualifications means that the CCK's Board of Directors can invariably be staffed by mostly former employees of the defunct incumbent operator, the Kenya Posts and Telecommunications Corporation or current industry players, namely, Postal Corporation of Kenya, Telkom (K) Ltd, or Kenya Broadcasting Corporation.

This as we as we shall see later in this Chapter under the institutional challenges that face CCK, will have the negative impact of industry capture as these former employees of the industry players will still have a mind set of the players in the industry rather than umpires or arbitrators who should be neutral in the discharge of their regulatory functions.

Second, such persons may possess the technical skills required for the industry but not necessarily the regulatory skill required for performing broader policy regulations. They are in our view, better placed to carry out the management of those policies. They would be better utilized as technical staff of CCK as they possess the repository knowledge of the industry as opposed to Board Members.

Third, we have seen the appointment of various members of the Board of Government bodies being used as a reward for paying political debts and/or rewarding kinsmen and cronies by the various Ministers under whose docket those Government bodies fall. The temptation to give a "deserving" friend or a political supporter a comfortable parastatal berth or a Board of Directorship is so high in our ethicized politics.

It is our considered view that some members of CCK Board of Directors constituted pursuant to section 6 of KCA have no regulatory capacity, training and/or skill necessary to enable CCK to discharge successfully

and efficiently its regulatory mandate. There is need to re-think and re-evaluate the qualifications, or core regulatory skills and competence, the selection and appointment criteria of CCK Board of Directors.

2.3 Impact of other Legislation on CCK's Regulatory Functions

CCK like most Government bodies in Kenya is created pursuant to statutes. This makes them amenable to the State Corporations Act,⁵¹ which unfortunately gives the Executive immense powers over such bodies. We shall now discuss how this undermines the independence of regulatory bodies such as the CCK.

We begin this discourse by defining a state corporation. Section 2 of the State Corporations Act⁵² defines a state corporation as a body established under section 3, which gives the President power by order to establish a state corporation to perform the functions specified in the order and a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law.

j' Cap. 446, Laws of Kenya.
Cap. 446, Laws of Kenya.

The Act⁵³ expressly excludes bodies such as Local Authorities, permanent Secretary Treasury, Co-operative Societies, Building Societies, Companies not wholly owned or controlled by the Government or by a State Corporation, Central Bank or any other body declared by the President in the Gazette notice not to be a State Corporation for the purposes of this Act.

A State Corporation includes a bank or financial institution licenced under Banking Act or any company incorporated under the Companies Act whose whole or the controlling majority of the shares or stock is owned by the Government or by another state corporation or a subsidiary of a state corporation.

From the foregoing it is abundantly clear that CCK by virtue of its creation (through an Act of Parliament)⁵⁴ is a state corporation within the meaning of the State Corporations Act. This makes CCK amenable to the State Corporations Act.⁵⁵ Sections 2 and 4 of State Corporations Act vests in the Minister for the time being responsible for the docket of information and broadcasting, the Ministerial responsibility over CCK and matters relating thereto.

⁵³ Cap. 446, Laws of Kenya.

⁵⁴ Act No. 2 of 1998.

⁵⁵ Cap. 446, Laws of Kenya.

But can this power of Ministerial responsibility be interpreted to include powers to cancel a valid licence issued "legitimately" by CCK pursuant to its mandate, as the then Minister for Information and Broadcasting, Mr. Raphael Tuju, purportedly did in 2004 in the case of Econet Wireless Kenya's licence for the 3rd mobile telephony?⁵⁶

Section 5(4)(a) of KCA provides that the Commission shall in the performance of its functions under this Act pay attention to "*any policy guidelines of a general nature relating the provisions of the Act notified to it by the Minister and published in the Gazette*" (*italics added*)

In other words, the Minister's role is limited to merely policy guidelines of a general nature and such guidelines must be gazetted by the Minister before CCK can give them any effect. The purported cancellation of the 3rd mobile telephone licence, awarded to Econet Wireless Kenya by the Minister, in our view is *ultra vires* and therefore illegal and null and void *ab initio*.

The Minister's action therefore in this regard, undermines the independence of CCK as the regulator of the telecommunication industry and evidence of excess and immense powers that the State Corporation Act⁵⁷ gives the Executive in this regard.

⁵⁷ The matter is *subjudice*.
Cap. 446, Laws of Kenya.

The following example will suffice to highlight the problem of political interference by the Government in the operations and functions of the CCK. In March, 2005 the then Minister for Information and Communication Mr. Raphael Tuju dissolved CCK Board on spurious allegations of graft and ineptitude in conducting its affairs.⁵⁸

It got more "comical" when two months later he engaged in a game of musical chairs by merely swapping the same directors with others from the various State Corporations under his docket such as Telkom (K) and Postal Corporation of Kenya. Mr. Sammy Kirui, the then Director General of CCK swapped places with Eng. John Waweru the then Managing Director Telkom Kenya Ltd. The same applied to the Chairman of the CCK Board of Directors Major (Rtd) Peter Kariuki, who exchanged his place with his counterpart in the Postal Corporation of Kenya, Mr. Joseph Njagi.⁵⁹

The Minister's action drew quick and sharp response, with the Nation Media Group⁶⁰ in one of its most stinging rebuke of the Government, just a day after Minister R Tuju dissolved the CCK Board had this to say in its editorial page, Kenyans who work in regulatory and executive agencies seems to have little protection against political whims. Noting that this was anomalous, the executive agencies all over the world are

⁵⁹ ^{A,ari} Alare, "Now Tuju disbands CCK board", *Standard*, 8th March, 2005, Nairobi.
^w Muna Wahome, "Tuju picks new board for CCK", *Daily Nation* 12th May, 2005, Nairobi.
One of the leading local daily newspapers with the widest circulation in Kenya.

given some level of autonomy from the Government partly to protect them from arbitrary political actions. Yet in Kenya it seems the opposite is the case.

In exercising their (minister's) oversight functions over the various commissions and authorities, the Ministers enjoy too much power to do as they please. Most of the sackings have been unfair to the individual victims, affecting moreover, some of the most qualified and effective cadres. The editorial ended with a passionate appeal for a more transparent review mechanism probably and independent agency to govern dismissals and appointments to ensure an interview process that is always above board.⁶¹

The Minister's action, we submit was highly irregular and *ultra vires* as he had no such powers whatsoever. The KCA,⁶² which provides for the establishment of the Commission, does not grant any powers to dissolve the Board to the Minister.

The first schedule, which deals with the tenure of office of the Board members, is very clear on the Ministerial powers. The Minister can only
1 remove other members except the Chairman if they have been absent

⁶¹ Editorial "Tuju, tell us more on CCK", *Daily Nation* 9th March, 2005.
⁶² Act. No. 2 of 1998.

from three consecutive Board meetings without permission from the chairman, adjudged bankrupt, convicted of an offence involving dishonesty or fraud, or a criminal offence and sentenced to a term exceeding six months.

They may also be removed if one is incapacitated by physical or mental illness, fails to comply with the Act with regard to disclosure or is engaged in a communications firm which provides telecommunication services or equipment in Kenya as an owner, shareholder, partner or otherwise. From the foregoing, it is clear that the Minister's power to remove members of CCK Board is limited to the above circumstance pursuant to KCA. The Minister's action in this regard flies in the face of the rule of law, as he had no legal basis whatsoever to take the decision.

We have noted before that CCK is a state corporation and thus subject to State Corporations Act. Section 7 of the Act gives the President such immense powers over State Corporations. These include the powers to give general or specific directions to a Board with regard to the better exercise and performance of the functions of a state corporation.

But the punch line of the powers to dissolve the Board of a State Corporation by the President is contained in section 7(2) the Act⁶³ which we quote hereunder *in extensu*:

⁶³ Cap. 446, Laws of Kenya.

"Notwithstanding the provisions of any other written law or the Articles of Association establishing and governing a Board, the President may if at anytime it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such a period as he shall, in consultation with the committee determine."

This provision vests in the President such immense and autocratic powers that even if such an action by the President contravenes the provisions of any written law it will be legal. Moreover, there is no objective test of establishing the alleged failure by the Board. The standard is subjective to the President of what "appears" to be a failure by a Board in carrying out its functions in the national interest.

The big question to ponder is can these powers be delegated by the President to the Minister by dint of section 4 of the State Corporations Act? That section provides, that the President **shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice President and the several ministers as the President may by directions in writing determine.*(Italics added). Depending on one's answer to the above question, the line is a very fine one because it could go either way.

A commentator, Mr. Ochieng Rapuro⁶⁴ writing in the Financial Standard⁶⁵ has this to say on the State Corporations Act and its consequences:

"It leaves the President with overwhelming influence even to issue directions to the CEOs and to delegate the powers he has to Ministers. This, he noted, had turned Ministers in demi-gods lording it over Parastatal Chiefs. Clearly this meddling is not going to stop until the law is repealed."

In this day and age should the Minister and indeed the President be given such immense and autocratic powers over "independent" regulatory bodies such as CCK? We do not think so because such powers often brood political interference, which in turn undermine CCK's regulatory independence and may lead to capture of CCK by special interest political forces, especially in the lucrative field of telecommunication industry.

It is our considered view that, the difficulty of attracting to regulatory positions qualified personnel in administration and breadth of perspective is largely because of the procedures and traditions associated with the political appointments in this country. We shall demonstrate this with the example of CCK.

⁶⁴ Senior Associate Editor, Business, the *Standard Group Newspapers, Nairobi*.
Mr. Ochieng Rapuro, " Ministerial actions that fly in the face of reforms", the *Standard*, 22nd August, 2006, Nairobi.

One of the adverse consequences of making CCK to be subjected to State Corporations Act is that CCK cannot make independent financial decisions. This is because CCK will be fettered in its operations and functions by a host of other legislation such as the requirement to comply with the Exchequer and Audit Act⁶⁶ and the Regulation⁶⁷ made there under.

This in our view undermines CCK's ability to regulate effectively, a private sector industry. For example, Legal Notice no 51 has very elaborate procedures governing public procurement of goods and services by Government bodies. These rules make the process of granting a licence by CCK to be very cumbersome, expensive and unnecessarily long. The stillborn licensing by CCK of the SNO attests to this fact.

CCK must comply with the requirements of Legal Notice no 51 with regard to any licence that they issue. Unfortunately, the regulations are so detailed with a clause for complex dispute resolution mechanism through an Appeals Board. Take, for example, Regulation 13 of the Legal Notice no 51, set out the pre-qualification criteria that CCK being a procuring entity under the rules, must satisfy itself (CCK) that all the firms interested in applying for a licence from CCK meet certain financial and technical specifications.

⁶⁶ L^aP- 412, Laws of Kenya.

⁶⁷ The Exchequer and Audit (Public Procurement) Regulations 2001 Legal Notice No. 51.

CCK can only do this through due diligence study of all the firms that responds to any of CCK's international tender offers. CCK cannot undertake this onerous task, in our view, because they are ill equipped.

Moreover, the process also is time consuming bearing in mind that section 78 of KCA⁶⁸ provides, that the Commission shall give a sixty day notice period in the Kenya Gazette before granting any party a licence. This causes an inordinate delay in issuance of licence by CCK.

The net result is that CCK pre-qualifies firms with dubious financial background like in the case of Econet Wireless Kenya, which end up winning a licence they cannot afford to pay for.⁶⁹ The question to ponder is, did CCK do a proper due diligence study on Econet Wireless Kenya and indeed all the firms that responded to their invitation to tender and were pre-qualified by CCK? If so, why has Econet Wireless Kenya not paid the licence fee in full as per the requirement of the law?⁷⁰

⁶⁸Act. No. 2 of 1998.

Econet wireless Kenya won and were awarded licence to operate the third mobile telephony in Nov. 2004

⁶⁹ CCK. To date, they are yet to pay part of the licence fees.

⁷⁰ R 54(2) Kenya Communications Regulations, *supra* note 34.

The question may be posed differently. Did Econet Wireless Kenya give a true picture of their financial position at the time of pre-qualification? If yes, why have they not paid the licence fees?

If not, why were they not disqualified and/or punished for providing false and misleading information with regard to their financial capabilities pursuant to the Legal Notice no 51?⁷¹ Sections 46(2) 3 (b) provides for debarring from participating in public procurement any supplier who seriously neglects its obligation under a public procurement contract or who provides false information about its qualification.

It should also be noted that there has been intense media reports about Econet Wireless International (the parent company of Econet Wireless Kenya) financial woes in other jurisdictions such as Nigeria, Botswana and Papua New Guinea.⁷² Indeed the then Minister for information, Mr. Raphael Tuju, justified his purported cancellation of Econet Wireless Kenya's licence in parliament citing the firm's main shareholder's financial woes and their litigious nature in those countries.

ⁿ The Exchequer and Audit (Public Procurement) Regulations 2001, *supra* note 61.

ⁿ See The New York Times, January 15, 2004 online edition available at <http://www.nytimes.com> (Last accessed on 12/8/2006).

The legal framework, as it now stands, makes the whole process of granting telecommunications licence by CCK, unnecessarily slow, time consuming, complex and very expensive. In the end CCK might not get value for its money in terms of licence fees as market forces and other factors do not remain constant during the process and/or period.

The tender for Second National Operator (SNO) in landline telephony for instance, was stopped by the Public Procurements Appeals Tribunal for not conforming to the requirements of Legal Notice No 51.⁷³

The whole re-tendering process will take at least, a minimum of two hundred and one days arrived at as below. This is because according to the regulations an advertisement for an international tender should take forty days.

The pre-qualification process should take at least thirty days after the close of the advertisement period. Thereafter the pre-qualified firms are given the tender documents to fill and this must take another thirty days. The evaluation of tenders (both technical and financial) takes another thirty days.

There is the notification period of twenty one days given to both the winners and losers for purposes of appeal if any before a contract is awarded under the rules. After this very vigorous process, CCK must,

⁷³ PPCRAB Application No. 30/2004 of 5th Aug. 2004.

pursuant to section 78 of the KCA,⁷⁴ give another notice in the Kenya gazette of sixty days before finally granting a licence.

From the foregoing, it is not guaranteed that CCK will get the same amount of money it would have gotten given that there will be a change in the economic circumstances and since the price will be dictated by supply and demand amongst other economic factors.

CCK in order to mitigate its potential losses in this regard and to make the licence attractive has indicated that they are going to award a technology neutral licence to the second national landline operator to include provisions of Global System of Mobile Communications (GSM) mobile telephony and other value added services such as international gate way, data operation, Very Small Aperture Terminal (VSAT) among others.

We have seen how the current legal framework fetters CCK's powers to operate independently. The KCA exacerbates this further. Section 7(a) and 20(3) give CCK Board the powers to manage control and administer the assets of the Commission in such a manner and for such purposes as best promote the purposes for which the Commission was established and to appoint an independent auditor with approval of the Auditor General (Corporations) respectively. In the same breathe, sections 20(5)(6)(7) and (8) of KCA give the Auditor General (Corporation)

⁷⁴ Act No 2 of 1998.

unfettered powers over Commission finances with regard to the auditing of its accounts.

The import of this is that, Commission finances are again subjected to the Parliamentary Committees, namely the Public Investments Committee (PIC) and Public Accounts Committee (PAC) for further security.

PIC and PAC are parliamentary watchdogs, which are mandated by Parliament to scrutinize public spending and investment of public funds by the various Government Ministries and bodies or parastatals.

Their work is *post facto* mainly relying on Auditor General and Auditor General (Corporations)'s reports. This process, in our view does not add value to CCK's regulatory function. If anything, it fetters the powers of CCK Board to operate independently as a regulator by clogging its financial reporting structure, which then hinders CCK's ability to take quick decisions necessary to its functions, especially when such decisions have an impact on private sector investments

In the next sub-topic, we will now examine the regulatory framework of the broadcasting sector in Kenya.

2.4 The broadcasting regulatory framework: A Snapshot view

Historically, Governments when regulating broadcasting decided on the number of market players, provided individual licences to the players, and determined their service offerings through a range of licence conditions and regulations. Governments have determined broadcast licences based on both spectrum and social economic considerations. The following are characteristics of broadcasting regulations.⁷⁵

First, free to air or terrestrial broadcasters are more tightly regulated, reflecting their use of a public resource as well as their more pervasive influence in shaping community views.

Second, licences are often required for both spectrum use⁷⁶ and provision of a broadcasting service.⁷⁷ Third, licences are used to control entry and wide ranges of technical and content conditions are attached to licences. Fourth, Public Service Broadcasters are funded as a contribution to plurality, programme diversity and national identity.⁷⁸

See report by Dr Allan Stretton and Mr. Dimitri Ypsilanti, "*The Implications of Convergence for Regulation of Electronic Communications*" *supra* note no 22.

⁷⁷ R 16(3) and 18 Kenya Communication Regulations, *supra* note 34.

⁷⁸ Section 36 of KCA.

Kenya Broadcasting Corporation Act, Cap.221 Laws of Kenya establishes KBC for this purpose in Kenya.

Fifth, while most countries have policies directed at achieving cultural objectives, including supporting domestic programming, some countries such as UK, have a wider range of content obligations. These relate to diversity and quality of programming, the protection of children, upholding community standards in taste and decency and restrictions on advertising to meet national health and consumer protection objectives.⁷⁹

In Kenya, there is no clear-cut policy and regulatory framework for the broadcasting sector. The Government retains the power to licence public trunk network operators in selected frequency bands; through its regulatory arm the CCK vide section 36 of KCA.

This is because there are some frequency bands which cannot be issued for commercial purposes because they are reserved for use by national security agencies such as the police, military and other emergency services such as ambulances and also because of the scarcity of the spectrum.

CCK is charged with the responsibility of promoting, developing and enforcing fair competition and equality of treatment among all licencees in any business or service relating to communications including

In Kenya, there is a current debate on the Government's proposal to ban cigarette and alcohol advertisement in the broadcasting media.

broadcasting.⁸⁰ While section 21 of Kenya Broadcasting Corporation Act⁸¹ vests in the Kenya Broadcasting Corporation the power to licence broadcasting receiving apparatus and connected functions therein.

In terms of Kenya Government policies on radio communication, section 16(3) of KCA vests in CCK the responsibility of policy implementation through frequency planning, assignment, licensing and monitoring.

With regard to content regulation in Kenya, there is a grey area as there is no specific agency dealing with it. Some commentators like Dr Ben Sihanya urges that aspects of content regulation include pornography, sedition or alarmist reports, defamation, privacy, competition in content development and provision. These aspects, Dr Sihanya contends may be regulated by the police, Attorney General and Law Courts, Board of Censors, Monopolies and Price Commission.⁸²

These agencies in most cases are not appropriate and effective in content regulation. There is therefore a need for law reform to bring content regulation in communication, under one regulatory authority or body. From the foregoing, it is abundantly clear that Kenya is in dire need of legislative reforms in the areas of telecommunication and broadcasting due to convergence in ICT.

⁸⁰ R5 Kenya Communication Regulations, *supra* note no. 34.
^c Cap. 221, Laws of Kenya.

Dr- Ben Sihanya, "Information and Cyber law in Africa: Regulatory Benchmarks for the 3rd Millennium" Vol. 10 Transnational Law and Contemporary Problems at pgs 584-640.

The fact that all communications networks, whether telecommunication, cable TV or satellite and terrestrial broadcast, can carry any form of digital information (voice, image or data) means that any regulatory policy should no longer distinguish between communications infrastructure. It is essential therefore that any new regulatory framework treat all transport network infrastructure and associated services thereof in the same manner, irrespective of the services carried.

2.5 The institutional challenges that face CCK

Regulators generally have a difficult task of balancing the interests of the industry and the public or consumers to ensure that the latter is well served and that the former remains vigorously able to provide that service.⁸³

The task of a regulatory body such as the Communications Commission of Kenya is extremely complex and often misunderstood. The need to stand aside from the parties and play the role of arbitrator represents a significant challenge to any organization. A decisive factor in successfully

See The Ash Council Report. *Supra* note no 46.

accomplishing the task is to have clear objectives and an institutional culture that is built around them.⁸⁴

Regulation is the main vehicle for implementing Government policies like liberalization, rural telecommunication penetration or universal access. It is the responsibility of the regulator to ensure that the public gets the best services from communications service providers in terms of quality of service, access to and costs thereof.

Investors, on the other hand, would like to get reasonable returns on their investments within a specified timeframe, usually dictated by cost of capital in the money markets. This drives the service providers to come up with tariffs that would give them that kind of return but end up in most cases being unaffordable.

The regulator is then called upon to balance these interests. CCK as is presently constituted with the current regulatory framework cannot accomplish this delicate exercise. There must be well-established legal and technical principles that have to be followed. For example, appointment criteria of CCK Board and clearly well defined powers of policy and regulations.

This statement was made by a member of the Supervisory Body for Private Investments in Telecommunications in Peru (OSPITEL) in the *Case Study on Effective Regulation, Global Symposium for Regulators*, 3 Dec 2001 Geneva.

Due to limited human resources, capacity and indeed modern equipment, the CCK like all other regulators in the developing countries is ill-equipped to discharge this very important task.

The second challenge that CCK face today is regulatory capture. Autonomous regulation is a new concept in Kenya. CCK has had to rely mostly on personnel from the defunct Kenya Post and Telecommunication Corporation, because that was the only place where persons with relevant technical know-how could be found.

This is a disadvantage in itself in that it leads to regulatory capture because the mental attitude of the inherited staff has to be completely liberated and begin to think like a regulator. Certain sympathies which invariably arise out of past associations and loyalties that are counter regulatory in nature are unavoidable in such circumstances.

So far CCK has not demonstrated that it has the capacity to withstand pressure from the industry. The following examples will suffice to demonstrate this point. First, Telkom (K), a dominant player with significant market power in the telecommunication industry and indeed one of the Siamese twins of CCK (having been hived off from the defunct KP&TC together with CCK & Postal Corporation of Kenya) was given a five year fixed line telephone monopoly in Nairobi, despite liberalization in the telecommunication sector.

In order to enjoy the five year monopoly, Telkom (K) was given specific rollout targets as part of its licence requirement. Telkom (K) Ltd failed to achieve these targets and CCK appears powerless in enforcing its mandate by ensuring that Telkom (K) Ltd operates within its licence requirements and obligations.

Second, in mobile technology there is duopoly enjoyed by the two premier service providers, Safaricom and Celtel. Section 23(2)(a) of KCA provides that the Commission shall protect the interests of all users of the telecommunication services in Kenya with respect to prices charged for and the quality of services.

CCK is further mandated to maintain and promote effective competition between persons engaged in commercial activities connected with telecommunication services in Kenya in order to ensure efficiency and economy in the provision of such services and to encourage private investment in the telecommunication sector.⁸⁵

By having duopoly in the mobile telephony sector, is CCK maintaining and promoting effective competition between persons engaged in commercial activities connected with telecommunication services? Does the duopoly ensure efficiency and economy in the provision of

⁸⁵ Section 23(a) and (c) of KCA.

telecommunication services? We do not think so. It is our considered view that licencing of a 3rd mobile service provider is long overdue.

The problem of short supply of regulatory resources is not entirely a Kenyan problem. The markets for regulatory skills are no different from other markets in the sense that they are influenced by the forces of demand, supply and price.

Given the explosion of regulatory activities across the world in the last decade of the 20th century, it is reasonable to expect that persons with the necessary regulatory skills are in short supply in most countries as the educational systems were not prepared for increased production in short term.⁸⁶

Second, because regulations are considered a core part of Government, Governments have sought to staff their regulatory agencies with citizens. This makes them look for regulators in the domestic rather than international markets. Unfortunately, when the market for regulatory skills is conceptualized as a series of insulated national markets, the mismatch between supply and demand becomes exacerbated, especially in developing countries where educational systems are slower to respond

and the overall depth of human resources is shallower than in developed countries.⁸⁷

This point is captured by the experience of the Peruvian Telecommunication regulator, OSIPTEL,⁸⁸ in an address to the Global symposium for regulators in Geneva on 3rd December 2001. They underscored the need for specialized staff that is constantly in touch with the latest development hence OSIPTEL has put a heavy premium on human resource investments.

Reflecting on their formative days, OSIPTEL was unable to call on suitably trained staff because no such persons were to be found within the country and thus they were trained on the job. Consequently OSIPTEL now provides an annual extra mural course for university students nearing completion of their studies and who are interested in learning about telecommunications.

Today CCK faces an increasing number of complex issues involving convergence in IT, telecommunication and broadcasting sectors, changing trends and new concerns of the public such as privacy in the internet, harmful and pornographic materials on the web.

A Henten, et al, *Designing Next Generation Telecom Regulation*, supra note 1. Supervisory Body for Private Investments in Telecommunications in Peru.

If CCK is to be able to discharge its responsibility, it will have to pay close attention to formulating anticipatory policies of wider applicability. This is because in communications burgeoning technology has created new avenues for services and new products, which together complicate the task of regulation, and blurs the distinction between various forms of communication.⁸⁹

To accomplish this, CCK need to adopt more proactive methods of policy formulation through the issuance of rules and regulations, which reflect the changing trends in ICT and markets, a task they are ill prepared to do at the moment because of limited skilled technical staff and regulators. There is therefore a need for capacity building for CCK to ensure that it acquires the necessary capacity to meet this challenge and its overall core objective.

Third, another challenge that faces CCK is funding. Charging fees is one of the means of funding regulatory bodies among others. CCK levies licensing fees pursuant to section 25(3)(d) of KCA, on the basis of internationally benchmarked fees on new operators. Unfortunately, new operators like in the case of the 3rd mobile telephone operator in Kenya, Econet Wireless had difficulties in accepting and paying the new charges. Econet Wireless refused to pay the licence fees of US\$ 55M paid by both Safaricom and Celtel for their licences. It argued that the licence was

⁸⁹ The Ash Council Report, *supra* note 46.

worth much less at the time (November 2004), they instead offered and were willing to pay only US\$ 27 million, almost half of what the other operators had paid.

But the greatest challenge that CCK face is that the initial licence fees that they charge and collect, CCK remits everything to the Treasury (Ministry of Finance). CCK is thereafter entitled to an annual fee of 0.5% of the annual turnover of the licensee or the operator.

For instance, the Ministry of Finance had already factored the licence fee for the third mobile telephone operator into the 2004/2005 budget.⁹⁰ By factoring in the licence fees for the third mobile telephone operator in the budget, the regulatory independence of the CCK is undermined since the Ministry of Finance had pre-judged the issue. Yet it is the CCK that has the legal mandate of determining the cost of the licence fees through public tendering process.

Fourth, CCK faces the challenge of negative incentives. CCK and the Government of Kenya in a bid to fulfill its Universal Service Obligation (USO) under the International Telecommunication Union (ITU) framework came up with subventions as a source of funding the Universal Service Obligation.

⁹⁰ Supplement No. 85, Finance Act 2004.

This was to enable the service providers in the telecommunications sector to offer services in the remote and unprofitable areas of the country. Most international private investors are driven by profit margins **and** healthy return on their investments. They thus avoid remote areas **and** unprofitable services in what they offer. They also ask for free access to certain facilities and/or tax relief under the guise of accelerated penetration of services or assistance. These negative incentives compromise CCK as an independent impartial regulator.

In the next Chapter, we are going to discuss the implications of convergence for regulation of electronic communication and give a critique of the national ICT policy.

CHAPTER 3

3.0 The Implications of Convergence for Regulation of Electronic Communication

Convergence in electronic communications is bringing together industries in communications area which were previously viewed as separate in both commercial and technological sense, and which have quite distinct regulatory traditions. The main issues of convergence is therefore concerned with the possibilities for exploring the industrial opportunities in creating new dynamic ICT Sector encompassing hitherto separate sectors.⁹¹

The current policies are varied and are implemented by a number of different agencies. Technological and market changes are also reducing the effectiveness of some of these policies and requiring integrated consideration of issues which were previously handled separately.⁹²

There is also a considerable uncertainty as to where technology and commercial forces are leading and the speed with which these changes

⁹¹ A Henten, *et al*, *Some implications for Regulation of ICT and Media Convergence*, *supra* note 13.
⁹² Dr. A Stretton & Mr.D Ypsilanti *"The Implications of Convergence for Regulation of Electronic Communications," supra* note 22.

occur. Uncertainty over the speed of changes makes it difficult for Government to determine the priority that should be given to reforms.⁹³

We have observed in Chapter Two that Governments have policies directed at achieving cultural objectives such as supporting domestic programming for cultural diversity. Does the Government want these objectives to extend to new forms of content, which are emerging? If so, will the existing measures be effective?

Most regulations in broadcasting concerning cultural diversity and local content quotas were designed for analogue terrestrial broadcasting where there were generally a small number of domestic channels. Will these measures remain effective in a digital, multi-channel environment in which many channels have an international focus?

We had also noted earlier, that Governments have tightly controlled market entry with regard to broadcasting due to spectrum constraints. However, scarcity of spectrum has become less of a constraint due to digitalization and compression technologies. How will existing regulations governing market entry operate in a digital environment?

Dr A Stretton & Mr. D Ysilanti *"The Implications of Convergence for Regulation of Electronic Communications," supra note 22.*

The emergence of these new services challenges the existing broadcasting policy and regulation.

Content regulations become more difficult to implement. A situation could develop where the same or similar content faces different regulatory obligations, depending on how it is delivered.⁹⁴ Is this acceptable, given the different levels of control that the viewer can exercise?

While discussing the opportunities created by convergence earlier, we noted that convergence and digitalization is placing pressure for changes in the existing broadcasting regulatory framework as a result of more competition and the development of new services in a converged market.

The changing nature and orientation of communications enterprises will also create new challenges for regulators. For instance, Internet enterprises are seeking mergers with enterprises with libraries of traditional audio-visual content. Telecommunication companies are moving into content and broadcasting areas and Internet service providers are providing audio-visual content.⁹⁵

This trend towards horizontal and vertically integrated enterprises can be explained by the search for economies of scope and scale, reduced

Dr A Stretton & Mr. D Ypsilanti, *"The Implication of Convergence for Regulation of Electronic Communications"* *supra* note 22.

Dr A Stretton & Mr. D Ypsilanti, *"The Implications of Convergence for Regulation of Electronic Communications,"* *supra* note 22.

transactions costs and simulation of innovation in the production of new services. The question facing regulators is whether such integration will result in an unacceptable degree of control over gateway facilities.

As already discussed in Chapter Two, the current regulation of telecommunications and broadcasting in Kenya is structured along vertical or industry lines. Telecommunication is regulated separately from broadcasting and broadcasting regulation covers both carriage and content issues. The regulatory framework is based around delivery platform.

This characteristic developed in an analogue environment where delivery platforms are service specific. Digital technology allows a transmission network (terrestrial, cable or satellite) to deliver a large number of broadcasting channels or services within the same bandwidth and/or to deliver a wide range of communication services.⁹⁶

The development of digital technology raises a number of challenges for policy and regulation. For example, network owners can face a wide range of conflicting array of regulations. These include different

^{p.}
or A Stretton & Mr. D Ypsilanti, "*The Implications of Convergence for Regulation of Electronic Communications*," *supra* note 22.

regulations for delivery of telephony, broadcasting and the Internet despite the fact that the same network is delivering all.⁹⁷

From our definition of convergence we noted, that all communications networks, whether telecoms, cable TV or satellite and terrestrial broadcast could carry any form of digital information (voice, image or data). This means that the regulatory policy should no longer distinguish between different communications infrastructure.⁹⁸

It is therefore essential that any new framework should treat all transport network infrastructure and associated services in an equivalent manner, irrespective of the types of services carried. Consequently, a number of commentators have argued that convergence requires a shift from a vertical to horizontal regulatory structure, that is, instead of regulating the telecommunications industry or the broadcasting industry, a horizontal approach would be structured around the regulation of similar activities.⁹⁹

⁹⁷ Dr A Stretton & Mr. D Ypsilanti, *"The Implications of Convergence for Regulation of Electronic Communications," supra note 22.*

See The EU Communications Review, Nov 1999, Brussels.

Dr A Stretton & Mr. D Ypsilanti, *"The Implications of Convergence for Regulation of Electronic Communications," supra note 22.*

The horizontal regulatory approach has a number of advantages since it is more likely to ensure that regulations are technology neutral and that they impact on similar services in a consistent manner.¹⁰⁰

Second, a horizontal regulatory structure allows changes to the regulation of carriage and content to occur at a different pace. The big question is, should industry specific telecommunication regulator the CCK be redesigned as a convergence regulator so that it can more comprehensively and systematically address the full range of ICT convergence issues?¹⁰¹ Or should CCK be re-designed as a multi-sector regulator so as to enable it leverage the synergies, across infrastructures to promote the most rapid ICT network roll out? In this discourse, we will be proposing the latter for reasons that we will be explaining shortly.

Technology and market developments are increasingly blurring industry boundaries and the effectiveness of industry specific telecommunications regulations. It has become evident that the objectives, scope, powers and priorities of regulation for the 21st century network economies must be reassessed in the light of ICT and media convergence in the one hand and the network development possibilities of multi-sector utilities on the other hand.¹⁰²

Dr A Stretton & Mr. D Ypsilanti, *"The Implications of Convergence for Regulation of Electronic Communications," supra note 22.*

¹⁰² **A Henten**, *et al*, *Designing Next Generation Telecom Regulation*, *supra note 1.*

W.H. Melody, *Building Regulatory Foundations for Growth in Network Economies*, *supra note 5.*

Convergence as we have already seen refers to the provision of different kinds of services over the existing infrastructure and the enhancement of existing technologies so as to provide a wide variety of services.

The continuous evolution of new technologies results in an inability to predict the future development of convergence. The development of new services like web-casting and voice over internet protocol (VoIP) or internet telephony requires the need for regulations which does not aim to predict the future, but aspires to be flexible enough to accommodate and propagate any permutation and combination of technologies and services.¹⁰³

The future licensing structure should be hierarchically divided into four broad categories where each category is dependent on one or more of the others for the provision of services.¹⁰⁴

The structure should result in four different service providers namely:

- Network infrastructure facility provider for instance Telkom (K) Ltd
- Network service provider for instance Safaricom and Celtel
- Application service provider for instance Internet Service Providers
- Content application service provider for instance satellite or terrestrial free to air TV broadcasting.

¹⁰³ see the Communication Convergence Bill of India, available online at <http://www.indiantelevision.com/indianbroadcast/legalreso/ccb2kl.htm>. (Last accessed on 26th Aug, 2006).

¹⁰⁴ Adopted from Communications Convergence Bill of India, *supra* note 103.

In our generic reform proposal, we envisage that in an era of convergence, an Application Service Provider or Content Application Service Provider could utilize the services of any network service provider for carrying their application or content.

In turn, the network service provider would have the flexibility to utilize the infrastructure provided by any network facility provider and to carry application or content from any application service provider or content Application service provider. Similarly, the network facility provider can provide the infrastructure to any network service provider.¹⁰⁵

3.1 Background of the National ICT Policy¹⁰⁶

The National ICT Policy begins with the background, global trends, ICT growth in Kenya, the policy and regulatory framework and concluding in section one with policy focus and broad objectives.

It recognizes that rapid development in ICT accompanied by the convergence in telecommunication, broadcasting and computer technologies is creating new products and services, ways of learning, entertainment and doing business.

¹⁰⁵ c
¹⁰⁶ Appendix 1 for analysis of facilities and services.

Kenya Gazette Notice No 2431 Vol. CV111, No 24 dated 31st March, 2006.

The policy statement recognizes that the developments in global trends in the last decade (1996-2006) have led to the convergence of information technology (IT), broadcasting and telecommunications. This has created the opportunity of using technologies in communicating and sharing information on a global scale.

It notes that telecommunication and broadcasting services bridge the distance gap while IT provides the tools to develop innovative applications. The policy seeks *inter alia* to facilitate sustained economic growth, poverty reduction, promote social justice and equity, stimulate investments and innovation in ICT and achieve universal access among others.

Some of the policies guiding principle include infrastructure development and appropriate policy and regulatory framework.

3.2 The Challenges

The policy notes in section two, the broad challenge of harnessing the Potential of ICTs for economic growth and poverty reduction. Specific , challenges include lack of comprehensive policy and regulatory framework, inadequate infrastructure and insufficient skilled human resources.

The policy document looks at the current policy, legal and regulatory framework noting the various legislation that deals with ICT issues namely; The Science and Technology Act Cap 250 of 1977, The Kenya Broadcasting Corporation Act, Cap. 221 of 1988 and the Kenya Communications Act of 1998, which it recognizes as inadequate in dealing with convergence, electronic commerce and e-Government.

The policy therefore sought for a comprehensive policy, legal and regulatory framework to *inter alia* address issues of privacy, e-security, ICT legislation, cyber crimes and intellectual property rights among others and develop an institutional framework for policy development and review.

On e-Government, the policy notes that the major challenge facing Government is to provide services in an efficient and effective manner noting that e-Government provides a framework for improved service delivery and enhanced communication and information provision within Government.

On electronic commerce, the policy posits that the main challenge, effecting the application of e-commerce is the inadequate policy, legal and regulatory framework. There is need, therefore, for a conducive Policy framework and adequate legislation to support e-commerce.

With regard to e-security, the policy avers that the challenge is for the country to establish adequate legal framework and capacity to deal with national security, network security, cyber crime and terrorism and to establish mechanisms for international cooperation to combat cross border crimes.

3.3 Some Key Highlights of the Policy

In section three, the policy deals with information technology (IT). It states that the rapid advancements in the field of information technology and the resultant explosive growth of information service sector have radically changed the world's economic and social landscape. These changes have given rise to a new society based on information and knowledge.

The broad objectives of IT policy includes using IT to achieve alleviation of poverty, improve healthcare and general welfare of the population using e-Government as a tool for improved internal efficiency and quality of public service delivery and help in the fight against corruption. Encourage and accelerate investments and growth in IT hardware, software, internet, training, IT enabled services, telecommunications and electronic commerce. The policy also aims to provide adequate infrastructure in the country for IT to flourish.

The Government hoped to achieve the above objectives by putting in place measures to encourage provision of infrastructure for access to local national and international information resources. A nationwide network consisting of fibre optics, satellite and terrestrial radio communication networks will be established.

The Government will encourage the sharing of the capacity of public and private utility providers for instance power, water, railway, that have rights of way to develop the national information infrastructure.

On electronic commerce, the document states that in recognition of the important role e-commerce plays in economic development, the use of e-commerce in trade and investments as a means of integrating Kenya into the global economy will be promoted.

To this end the Government will support the development of e-commerce by enacting appropriate legislation to support e-business, mount campaigns to raise public awareness on the potential opportunities presented by e-commerce and to promote collaboration with international community in developing equitable framework for e-commerce.

Through e-Government services, the Government hopes to reduce transaction costs for the Government, citizens and private sector through the provision of products and services electronically.

On information technology standards, the Government will institutionalize the standardization of IT products and services for quality assurance and adherence to the national and international standards. To this end, the mandates and institutional capacities of Kenya Bureau of Standards (KEBS) and CCK will be strengthened to ensure quality and compatibility of IT products and services.

The broadcasting sector is covered under section four. The policy notes that broadcast media have emerged as one of the most powerful communication tools in the 21st century thus revolutionizing the way in which individuals and society interact.

The aim of the policy is to provide a rational and comprehensive framework governing the establishment, ownership control management and delivery of information, entertainment and educational services to Kenyans through provision of efficient and reliable broadcasting.

Specific policy objectives include; development of a legal and regulatory framework as a basis for investment and growth and sustenance of broadcasting services and for dispute resolution.

Encouraging the growth of a broadcasting industry that is efficient, competitive and responsive to audience needs and susceptibilities. The provision of a licensing process and for the acquisition of licences and allocation of frequencies through an equitable process.

Promoting fair competition, innovation and investment in the broadcasting industry and ensuring adherence to social responsibility by encouraging the development of and respect of codes of practice by all broadcasting licencees. Finally ensuring universal access to and viability of public service broadcasting.

The following strategies will be employed by the Government to achieve the above objectives namely:-

First on legal and regulatory framework CCK will be designated as the sector regulator for broadcasting and appropriate legislation will be developed to cover regulation, policy, and advisory and dispute resolution for the sector.

Second, the Kenya Broadcasting Corporation will be restructured to ensure its relevance and viability in the market. Appropriate amendments will be made to KBC Act to reflect the nature, structure and mandate and funding of the corporation as a public broadcaster.

Third, a Broadcasting Content Advisory Council will be set up to advise CCK on broadcasting contents standards to enable it monitor broadcast content, handle complaints from operators and consumers, monitor compliance of broadcasters with the programming code and finally monitor broadcasting ethics compliance.

Fourth, programming decisions will be made by broadcasters based on professional criteria and the public's right to know. All broadcasters will be required to act in the public interest and be guided by a code of conduct which the policy list some of the guiding principles.

The policy makes it mandatory for any person wishing to provide broadcasting services to obtain the necessary licences, which the policy categorizes. There is a provision that all broadcasters including those re-broadcasting free to air programme must meet the prescribed local content level.

The CCK will be responsible for developing criteria for technical evaluation and fair and equitable grant of licences and allocation of frequencies. Licensing of community broadcasters will follow a free market approach where prospective service providers will make application to CCK. The licenses will be granted after evaluation and based on clear conditions and availability of frequencies in the service

area. On digital broadcasting, the Government will promote the introduction and uptake of digital broadcasting in the country by managing the transition from analogue to digital broadcasts.

The telecommunication policy is covered under section five of the policy document. It begins with the Government recognition that the provision of modern telecommunications infrastructures and information network is key to rapid socio economic development of a country. Telecommunication is a critical component for the development of the ICT Industry.

The overall Government objective for the sector is to optimize its contribution to the development of the Kenya economy as a whole by ensuring the availability of efficient, reliable and affordable telecommunications services throughout the country. A key element of the new telecommunications policy is attracting and stimulating investments.

Specific objectives of the policy include creating a modern and efficient telecommunications infrastructure in order to position Kenya as a hub of industrial, commercial and financial services in the region. Promoting and strengthening Research and Development, innovation and manufacturing activities in the country.

To achieve these objectives the Government will adopt the following strategies among others. First, promote competition, increased customer choice and accelerated investments through liberalization of the sector and the licensing of new players in the various telecommunications market segments. Second, establish technology neutral licencing framework that enhances innovation in service delivery. Third, establish universal access mechanisms for promotion by wider access to telecommunication services. Finally, require that physical infrastructure providers for instance railways, roads, pipeline, property developers and power to make provisions for future installation of ICT facilities.

The policy sets very ambitious targets for the sector. For instance improve fixed line teledensity in rural areas from current 0.33 lines to 5 lines per 100 inhabitants the year 2015. Expand current international internet bandwidth from the current 69 Mbps to 1Gbps by the year 2015. To provide all primary schools with affordable internet access by the year 2015 and all secondary schools and tertiary institutions by the years 2010.

On telecommunications liberalization, the policy notes that the Government will continue with the ongoing liberalization of the various market segments in the sector. To this end the Government will put in place an appropriate regulatory framework and promote competition. The policy framework focuses on establishing a market structure that

attracts investments in the sector. It names the various market segments.

On other facility based providers, the policy states that there exists private long distance utility infrastructure and facilities built and operated by corporate bodies such as Kenya Pipeline Company, Kenya Power and Lighting Company and Kenya Railways.

These facilities, the policy asserts will continue to be operated by the same organization under licence. In order to ensure optimum utilization of the country's' utility and ICT infrastructure resources, the organizations will be allowed to lease such capacity to licenced operators under mutually agreed commercial and operational terms.

On multi media services, the policy states that licenced telecommunication operators will be allowed to offer multi media services such as Voice Over Internet Protocol (VoIP) with standard features and as far as possible the same level of consumer protection as traditional voice services. Section 5:13 deals with standardization and states that to enable the establishment of an integrated telecommunications infrastructure, compatible standards with respect to equipment and service will be encouraged.

On telecommunication research and development, the policy recognizes that telecommunications is a core component of ICT and thus research and development in the sector will be encouraged. Steps will be taken to ensure that the industry invest adequately in research and development and to promote local industrial growth and hasten technology transfer.

On network security and reliability the policy state that telecommunicates infrastructure and networks are critical components of the national infrastructure. Regulations will therefore be developed to ensure that such infrastructure and networks are robust and resilient and have adequate security, redundancy and back up arrangements.

The policy captures radio frequency spectrum in section seven. Radio frequency spectrum the policy notes is a scared public resource that goes to waste if not optimally used. The frequency spectrum will therefore, be managed in line with public policy objectives, with a view to making if available to all users under specific and clear conditions. This process the policy states, will maintain a balance between the public and private interests and in case of a conflict between the two, the public interest shall prevail.

. Specific policy objectives include enhanced national security and defence, enhanced emergency preparedness against disaster, efficient national and international transportation systems and efficient and

affordable telecommunication services. Radio communication standards will be developed jointly by the CCK and the Kenya Bureau of Standards in conformity with international standards.

Users of spectrum will be required to implement technology and operational standards in order to mitigate harmful interference and as a measure for ensure that access and utilization of the spectrum is maximized. The policy concludes in section nine with institutional framework for policy implementation. The existence of a cohesive and well functioning institutional framework is essential for the attainment of all the objectives of thus policy.

The aim is to ensure that the various institutions within the ICT sector / effectively play their respective roles with a view to promoting effective competition, progressive liberalization and universal access to services.

The Government's role in the sector will include *inter alia* development, implementation and coordination of policy, regulation and licencing, dispute settlement and resolution and finally provision of an enabling environment for investment in the sector.

The CCK established through the Kenya Communications Act 1998 is designated as the ICT sector regulator. On ICT professional bodies, the Government, the policy states will recognize and encourage the formation

of national ICT professional bodies registered under and laws of Kenya to foster professional ethics, standards and human resource development.

3.4 Gaps in the National ICT Policy: A critique

While what the Government has done is laudable, it falls short of addressing issues posed by the emergence of convergence in ICT. The policy takes the long term market regulation view that is; it recognizes that competition in liberalized markets can provide significant benefits.

Unfortunately in reality it is a very imperfect instrument for achieving sector socio economic objectives. This is because, the policy borrows heavily from the rationale of telecom regulation aimed at checking potential abuse of monopoly powers of dominant operators, ensure that barriers to entry are minimized, to protect consumers and ensure the social objectives of universal service is achieved.¹⁰⁷

The model envisions a stronger more independent form of regulation but with a remit narrowly focused on the telecom service sector. It focuses more on detailed oversight supervision and enforcement of the conditions enabling competition, while maintaining universal service objective.

W. H. Melody, *Designing a Workable Telecom Regulatory Structure for 21st Century Information Societies. Telecom Reform: Principles, Policies and Regulatory Practices.* Lyngby 1997. Technical University of Denmark.

A weakness of this approach and other public utility regulation is that its role has been essentially reactive. It is almost restraining and negative. The regulators role shifts to become partly a policeman and partly a referee of disputes involving competitors.¹⁰⁸

Due to convergence in ICT and the transient nature of technology we would advocate for pure deregulation. Under this approach, there is a very limited and narrowly focused role for regulation to facilitate the liberalization of the industry and then go out of business.

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The goal is to eliminate regulation as soon as competition can be established so that market forces can be the driving force behind the information society transformation process.¹⁰⁹ Technology neutral laws can achieve this. We will now look at specific gaps in the ICT policy.

First, the common thread that runs through out the policy document is that the Government will put in place a comprehensive policy and appropriate legal and regulatory framework to meet the policy objective.

This is all good unfortunately there is no time line for this development. When will the Government roll up its sleeves and don its gloves to do this? This is the point of departure between our reform proposals and

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W. H. Melody, *Designing a Workable Telecom Regulatory Structure for 21st Century Information Societies*, *supra* note 107.
W. H. Melody, *Designing a Workable Telecom Regulatory Structure for 21st Century Information Societies*, *supra* note 107.

the Government strategies. We believe that the time for action is nigh and we should start at least somewhere lest we be overtaken by events.

Second, another thread that runs through the policy document is the attraction of investments in the development of the various infrastructures. We wish to point out that this is putting the cart before the horse since you cannot hope to attract any investment in the absence of a policy, legal and regulatory framework.

Investors will only come in when they know that there are laws to protect their investment. Certainty of the legal and institutional framework spurs investments. Network infrastructure requires huge investments, which must be protected by an appropriate legal and regulatory framework.

Third, the Government will encourage the sharing of capacity of public and private utility providers such as powers, water, railway and pipeline among others that have right of way to develop the national information infrastructure.

This strategy is good but unworkable on the following reasons. First, the Government envisages a multi-sector utility regulation. Unfortunately the current legal framework militates against it. For instance if power companies were to provide national information infrastructure, will they

be regulated by the CCK or the Electricity Regulatory Board (ERB)? How do you harmonize the regulatory functions of the two bodies?

Second, as we shall see when discussing multi-sector regulation in Chapter Five, there is a practical difficulty of realizing cost saving rationale, unless several infrastructure sectors are reformed simultaneously which is not the case in most countries Kenya included.

In Kenya, currently the railway has being concessioned under special concession agreement for twenty-five years. If railway were to provide national information infrastructure as envisaged in the Government policy, under what regulatory framework would that arrangement be realized? Who will be the regulatory authority? Will CCK also regulate the rail transport business?

Fourth, on sector standards, the Government policy identifies CCK and KEBS as the bodies to ensure quality assurance adherence to the national and international standards. The mandates and institutional capacities of these two bodes will be strengthened.

With tremendous respect, we disagree with this proposal. This is because one, it will create duplication and overlap of function between the two bodies. In Kenya, we recently witnessed such a clash in the fight against corruption where two Government organs, the Attorney General

and Kenya Anti Corruption Commission engaged in turf wars as to who has the final say in prosecuting corruption cases. (ii) The policy document does not identify the custodian of ICT sector standards. In our proposal, we have identified the CCK.

Two, as intimated earlier in Chapter 2.2 under the legal framework governing CCK, we argued for CCK to have prosecutorial power to enable it prosecute and enforce ICT sector crimes and standards respectively. Unfortunately, this may not become a reality since section 26(6) of the Kenyan Constitution expressly bars the Attorney General from delegating these powers. Unless the constitution is amended which is highly unlikely, the Attorney General's office as is presently constituted has no capacity to neither competently prosecute ICT sector crimes nor enforce the standards. This is because digital forensic is a complex process, which requires specialized staff and equipment.

The acquisition, safeguarding and analysis of computer data in such a way that the findings can be used in a court of law, as evidence are a complex task. The following are some of the distinct challenges that digital forensic presents. It is difficult to acquire and preserve evidence particularly when the attacks originate in another country. Losses are hard to quantify except for financial fraud for instance, denial of service attack. It is not clear, what may or may not be admissible in a court of

law globally. Finally, the nature of the offence will determine whether the prosecution will take place in a civil or criminal court.

From the forgoing it is of paramount importance that we give CCK prosecutorial powers independent of the Attorney General.

Fifth, on broadcasting standards, the policy is silent on who is to develop and enforce the code. Will the code of conduct be self-regulating? Will it have the force of law? Six, on the Broadcasting Content Advisory Council, the policy does not provide its composition or membership. Second, we feel that this is creating further bureaucracy and duplication of function. In our reform proposals contained in Chapter three, we have given this function to CCK as we believe that a revamped CCK can competently handle this role.

In any event as we have noted there is a shortage of regulatory skills so, where will the Government get regulators to be members of the Broadcasting Contents Advisory Council? Finally there is no enabling legal framework to ensure that what is contained in the policy will be given effect.

Seven, on broadcasting licencing, a category of licences have been given. Unfortunate the list is not exhaustive since it omits services such as web

casting. The question is how do you regulate content in such a scenario? In our reform proposal, we envisaged this problem and proposed technology neutral regulation.

Eight, the Government has not given due weight and attention to digital broadcasting, merely noting that they will promote the uptake of digital broadcasting in the country by managing the transition from analogue to digital broadcast. We wish to point out here that the ITU has 2015 as the deadline for phasing out analogue broadcasting and replacing it with digital broadcasting.

Nine, one of the strategies for the realization of telecommunication policy objectives is the establishment of technology neutral licensing framework that enhance innovation in service delivery. Regrettably again there is nothing tangible put on the table to realize this objective.

We noted in Chapter one that in Kenya, technological changes and regulatory framework does not develop at the same pace. Further the law in general lags behind technology. It is out of recognition of this fact that we made specific proposals on the realization of technology neutral regulation including an appendix I, which discuss in details, the description of infrastructure facilities and communication services.

We find it a contradiction of terms that the policy has a market structure and market segment for purposes of licensing the telecommunication sector yet the same policy aspires for the establishment of technology neutral licensing framework.

Ten, on network security and reliability we wish to point out that the policy assumes that this is achievable without an enabling environment. There can never be network security without an enabling legal environment and framework. For instance in Chapter one, we noted that our ICT regulation should be in tandem with regulations elsewhere in the world, that is, aligning national regulatory practices with international agreements. This is because we are part of the global information infrastructure and thus the need for international compatibility across many network regulations.

This will ensure network security and in event of a breach, we can call on our international collaborators to help in tracking down criminals because we have similar regulatory practices. This will also become handy in the event of negotiating extradition treaties for ICT criminals.

Eleven, on radio frequency spectrum the policy document betrays a dangerous mix of ignorance of digital technology. It is proceeding on the false premise that radio frequency spectrum is a scarce public resource that goes to waste if not optimally used, and goes on to discuss policy

issues based on analogue technology. This is a fatal omission for a policy which seeks to integrate ICT issues.

We noted in Chapter 3.6 that scarcity of spectrum has become less of a constraint as a result of digitalization and compression technologies. We also noted that new range of technologies capable of providing "broadcasting" and "web casting" to households is steadily weakening the argument that terrestrial broadcasting has a significant social impact. It is absurd that a national ICT policy can ignore these very basic facts.

Finally on the institutional framework for policy implementation, the policy states that the Government will provide leadership and direction in the ICT sector and in the implementation of the policy objectives and goes on to define the Governments' role in the sector.

While this is commendable, it falls short of naming the Government agency to give this leadership. For example, the issues of e-Government are exclusively handled in the office of the President under the Directorate of e-Government while national ICT policy is in the docket of Ministry of Information and Communications.

Our history in this country has shown that the Government departments are fond of fighting turf wars in the event of policy overlap. To avoid this,

the Government should have named its lead agency in ICT management and running of the programmes.

CHAPTER 4

4.0 The proposed generic reforms in the telecommunication regulations

In this Chapter we are going to discuss the proposed generic reforms as enumerated below. The issues raised are complex but there are many options open to the Government.

First, better personnel qualification, selection and appointment procedures of the CCK Board of Directors. Second, institutional reform, especially expanding the scope of CCK and its legal mandate.

As we have already discussed in Chapter Two, the emergence of new electronic communication markets where traditional separate distinctions between broadcasting and telecommunications are becoming increasingly blurred calls into question the logic of maintaining existing separate regulatory framework for telecommunications and broadcasting.¹¹⁰

The process of integration is complex as it requires a review of the existing legal and policy framework covering a formally distinct sector

¹⁰ Dr A. Stretton & Mr. D Ypsilanti, *"The Implications of Convergence for Regulation of Electronic Communications"* supra note 22.

that is telecommunication and broadcasting sectors. The process also involves the creation of a single policy framework, which is coherent across the electronic communications sector.¹¹¹

The regulatory reform proposals must therefore focus on ICT sector and the issues associated with converging technologies such as the digitalization of all forms of content, electronic trading and other core next generation of Internet services.¹¹²

One of the main aspects of convergence is that different services can be transmitted within different networks. This opportunity created by convergence can be used by the developing countries, Kenya included, to extend the penetration of basic communication services.¹¹³ For example, cable TV networks can be used to offer telephony and Internet services.

This possibility of re-use of infrastructure is only possible if an adequate regulatory framework is established, facilitating efficient utilization of available resources in different networks.¹¹⁴ These new developments do not imply that existing regulations need to extend their coverage over other platforms or services rather they offer an opportunity to review and lighten the existing regulations.

¹¹¹ Dr A. Stretton & Mr. D Ypsilanti, "The Implications of Convergence for Regulation of Electronic Communications," *supra* note 22.

¹¹² A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

A Henten, *et al*, *Some Implications for Regulation of ICT and Media Convergence*, *supra* note 13.

A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

It is this opportunity that we have taken with humility to propose these reforms in the following format, namely: better personnel qualification, selection and appointment procedures of the CCK Board of Directors. We will be proposing within this context, that The CCK Board of Directors as regulators should only concern themselves with the sole responsibility of developing broader policies and regulations. While the management staff of CCK be in charge of implementation of the policies and regulation as passed by the CCK Board of Directors.

The choice of this format is deliberate as it is intended to deal with the twin issues namely, critics of the collegial bodies and the dilemma of regulatory capture by employees as we have discussed in Chapter Two.

First, collegial bodies are effective for making broad policy but are ineffective for carrying out the management of that policy. Extensive deliberations, multiple and conflicting values and disparate views are necessary to developing broader policy are the very factors which create inefficiency in trying to implement policy through management of resources in day-to-day operations.¹¹⁵

Indeed, as early as 1937, the President Committee on Administrative Management in the U.S.A. observed:

¹¹⁵ The Ash Council Report, *supra* note 46.

"For the purposes of management, boards and commissions have turned out to be failures. Their mechanisms are inevitably slow, cumbersome, wasteful and ineffective and do not lend itself readily to cooperation with other agencies. Even strong men on the board find that their individual opinions are watered down in reaching board decisions."¹¹⁶

It is for this reason that we are proposing to separate these functions. The report of the President's committee above, noted that, when freed from the work of the management, the Board such as CCK are, however extremely useful and necessary for consultation, discussion and advice. They provide for representation of diverse views and citizen opinion for quasi-judicial action and a repository for corporate powers.¹¹⁷

Second, the factual information base needed to carry out the many regulatory activities such as for example how spectrum frequencies should be allotted is enormous.¹¹⁸ This calls for specialized staff within each sector for instance telecommunication and broadcasting or IT that can do much of the gathering and analysis of information necessary to clarify standards and develop explicit goals and priorities.

In Chapter 2.2, we noted that the CCK management staff ought to have detailed knowledge of the industry. This is because those familiar enough with the industry will possess the necessary skills and in majority of cases are likely to have had some prior industry connections.

See the Report of President's Committee on Administrative Management. 1937, Washington DC.

⁷ *Op cit.*

¹¹⁸ Stephen Breyer, *Regulation and its Reform*, *supra* note 28.

Such people with the knowledge of the industry are familiar with its workings, problems and standards. They can often move far more quickly and effectively than those coming fresh to the problem.¹¹⁹ But as we have already discussed, we need to guard against regulatory capture by the former employees of the industry players now working as the regulator.

With these proposals it is possible to have an effective policy formulation at the CCK Board of Directors level and an efficient policy implementation at the CCK management staff level. There should be a link between these two levels of administration and this can be provided by the Director General of CCK, who will be answerable to the CCK / Board of Directors but will be directly in charge of the day-to-day management of the CCK.

4.1 Better Personnel Qualification, Selection and Appointment procedures of the CCK Board

CCK being the repository of telecommunications policy and regulation will play a key and important role in the proposed reform process. We have identified CCK as the vehicle in which the reform process should be

¹¹⁹ Stephen Breyer, *Regulation and its Reform*, *supra* note 28.

conveyed. It is equally important that CCK be reformed first to enable us achieve the successful implementation of the proposed reforms.

Mr. James Landis¹²⁰ pointed in his report¹²¹ to President Kennedy "the prime key to improvement of the administrative process is the selection of qualified personnel. Good men make poor laws workable; poor men will wreak havoc with good laws".¹²²

In Kenya, as we have exhaustively discussed in Chapter Two, most appointments to Government bodies are politically motivated and the appointments of CCK Board of Directors are no exception.

This appointment criterion as it has operated in Kenya in the past has /
not consistently resulted in the selection of people best equipped to handle regulatory responsibility such as that of the CCK.

Critics of better personnel approach concede that better personnel is indeed a solution to any institutional problems but argue that their number (of better people) are limited.¹²³ They argue that in the US there is no practical proposal for a system more likely to achieve administration by better people. The President of the US does not

¹²⁰ Former Dean, Harvard Law School. Reported in Regulation and its Reform by S. Breyer *supra* note 28. Report on Regulatory Agencies to the President-Elect, Senate Comm. On Judiciary 86th Congress. Washington DC.

~ Stephen Breyer, *Regulation and its Reform*, *supra* note 28.

We will discuss this in details when proposing multi-sector regulator as a means of addressing shortage of skilled regulators.

deliberately appoint poorly qualified people. Rather the present system leads him to nominate appointees who are neither better nor worse than would be produced by any other selection method.¹²⁴

In order for us in Kenya to avoid the pitfalls experienced in the US, we should reform the selection and appointment criteria of persons to serve as the CCK Board of Directors. We are proposing that we should have an office that would develop standards for selection and if need be, consult an advisory committee, and then select on the basis of competence, experience and integrity not politics.

The selection of the Board members to serve in CCK Board should be handled by an "independent body" or an advisory committee of Parliament who will evaluate the nominees, before advising the appointing authority of the most qualified candidates for the appointment to serve in the CCK Board.

A systematic recruitment operation should be developed and sustained for regulatory appointments. Where talent banks¹²⁵ mechanism is used, such banks should contain a small and select number of applications

¹²⁴ Stephen Breyer, *Regulation and its Reform*, *supra* note 28.

¹²⁵ Talent bank is a system used mostly in developed countries for posting resumes and CVs of potential applicants to various posts that fall vacant for purposes of head hunting.

that have been carefully evaluated. Such a list should be periodically reviewed and updated.¹²⁶

An informal broad based advisory committee should be set up to suggest and evaluate possible candidates for appointment. Such a committee should include representatives of consumers and other public interest groups and organizations. An in-depth interview with the potential board members should then be conducted prior to announcement of a nomination.

Critics, however, point out that as long as the President (Executive) appoints and Parliament confirms, the appointment process will remain political. They argue that if the politics of the day favour the / appointment of an experienced person of integrity that is likely to be done and the reverse is also true. The extent to which politicians heed the advice of the advisory committee itself depends upon political factors.

4.2 Confirmation of appointments of CCK Board by Parliament

In order to introduce some checks and balances in the appointment of the CCK Board, we are proposing that Parliament should play its rightful

¹²⁶ See Kennedy-Rubicoff report: Principal Recommendations and Findings of the Study on Federal Regulation, Joint Report, 96th Congress (Committee on Governmental Affairs and Judiciary) US Senate.

role of being a watchdog of the Executive excesses but at the same time observing the principle of separation of powers between the two organs.

To this end, we are proposing that members of the CCK Board should be appointed by the President (Executive), upon the advice and consent of Parliament to serve at the pleasure of the President. To achieve this goal, Parliament should establish the following general standards¹²⁷ to be applied in the confirmation of the appointments of CCK Board of Directors.

That by reason of background, training or experience the proposed members of the CCK Board are affirmatively qualified. In order to achieve this section 6 of KCA should be amended to have a provision which / explicitly sets out the qualification criteria for the appointment to the CCK Board of Directors to read thus *"the CCK Board of Directors shall be composed of members who by reason of training, education and experience in the field of telecommunications, broadcasting, ICT, law, economics, administration and security qualified to carry out the functions of the commission (Italics added).*

In considering a regulatory appointment to a collegial body such as CCK, Parliament shall consider the existing composition of that body and

¹²⁷ Adopted from the Regulatory Appointment Process. See Principal Recommendations of the Kennedy-Rubicoff Report, *supra* note 126.

whether or not a single sector or groups in a society are too heavily represented. This will ensure equitable representation in such bodies.

The proposed members of the CCK Board should be committed to enforcement of the regulatory framework as established by Parliament in the relevant statute. A committee of Parliament with jurisdiction over the regulatory body appointees submits to Parliament seven days in advance every proposed appointment a written report containing the conclusions, recommendations and any dissenting opinions thereof of the committee on the nominee.

The President should nominate and Parliament should confirm only individuals with the breadth of vision, intellect and energy to manage a / large Governmental organization. Only those with demonstrated ability should be selected as Chairman.

When a person is nominated to serve in the CCK Board and it is also the intention of the President to designate that person Chairman of Commission, the nomination papers to Parliament shall include a statement of the President's intention as far as the chairmanship designation.

Parliament should require the President to submit as part of the nomination papers, a statement indicating the reason for a particular

selection and pointing out any relevant factors in the nominee's background or training that qualified him or her for the appointment.

If CCK is transformed into a multi-sector regulator as we are proposing, the composition of its Board of Directors should not exceed eight persons to be drawn from the following sectors namely, telecommunication, broadcasting, ICT, an economist, an administrator, a lawyer or a regulator, a member from consumer organization such Kenya Consumers Organization (KCO) or Telecommunications Service Providers Association of Kenya (TESPOK) or Media Owners Association (MOA) and an expert in security from the state security organs such as internal security and defence. This combination will be a truly representative of stakeholders' Board of Directors.

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In order to enhance skills brought by members of the CCK Board, a series of seminars to cover such areas as planning, budget and managing of regulatory programmes should be organized for the Board members. This will provide the Commission members with a forum for discussing problems in decision making and leadership by a collegial body.

If these appointment and selection criteria are adopted with regard to the CCK Board of Directors, it is only fair that such appointees be granted security of tenure, higher salaries and more powers and authority in

order to enable them discharge their regulatory functions effectively, efficiently and fearlessly.

We now turn to address the next limb of this discourse, which will now focus on the institutional reform of the CCK.

4.3 Institutional Reform: Expanding CCK's legal mandate

Good organizations do not automatically produce good results. Good men are also required. It is equally true that effectiveness of able administrators can be seriously impeded by inadequate organizational structure. The managerial ability to respond to the variety of challenges posed by the regulatory process, together with a structure that allows for / such a response, is as important as knowledge of the specific subject matter.¹²⁸

The point we are making is that we have made a strong case for better qualification, selection and appointment criteria to the CCK board, but this will come to a naught without institutional reforms. It is on this basis, therefore, that in this limb of the discourse we will dedicate it to the necessary institutional and legal reforms at CCK to enable it discharge its regulatory mandate efficiently and effectively.

¹²⁸ see Kennedy-Rubicoff report: Principal Recommendations and Findings of the Study of Federal Regulation, *supra* note 126.

The starting point for these reforms should be the legal framework; chief among them is the amendment of the State Corporations Act¹²⁹ or its repeal altogether. Section 2(b) which defines a state corporation should be amended to exclude independent regulatory bodies such as the CCK from its provisions. This will free the CCK from all the legal strictures we dealt with in Chapter Two.

We are alive to the fact that under s.2 (b) (VI1) of the Act,¹³⁰ the President can use powers conferred upon him by the Act to declare any other body corporate established by or under any written law, by a notice through the Gazette not to be a State Corporation. But as we have already noted in Chapter Two, the powers conferred by the State Corporation Act, has been abused before and the need for independent / regulatory body is far too important to be left to the whims of a President. It must be expressly provided for in very clear and unequivocal terms.

The next step would be to amend section 26(6) of the Constitution to allow the Attorney General to delegate specifically prosecutorial powers to CCK for the purposes of prosecuting ICT sector crimes and the enforcement of sector standards.

¹²⁹ n 446, Laws of Kenya.

¹³⁰ *Op cit.*

As we have seen earlier, while technology may be bringing telecommunications, broadcasting and Internet closer together, the regulatory framework within which the industries operate remain quite separate but also focused on different objectives.¹³¹

In telecommunication sector, the drive to liberalize the telecommunication market has seen the development of regulatory framework specifically to manage the transition from monopoly to competition and to stimulate the roll out of new technologies and services with most countries (Kenya included) adopting sector specific legislation and "independent regulators."

The major influences underlying the regulation of broadcasting, on the / other hand, have been social and cultural impact of the industry and the shortage of spectrum. Broadcasting remains highly regulated. Licences are used to control entry¹³² and a wide range of technical and content conditions is attached to licences. (See part V of KCA and part VI of Legal Notice No 68).

Dr. A Stretton & Mr. D. Ypsilanti," *The Implications of Convergence for Regulation of Electronic Communications,* "supra note 22.

The Nation Media Group attempts in the 1990s to obtain broadcasting licence attest to this fact.

In contrast to telecommunications and broadcasting, Internet has faced little sector specific regulation. In fact, in Kenya, it remains unregulated. While ICT sector in Kenya is still at the policy stage.¹³³

It is with this in mind that we now propose that the objectives, scope and powers of the CCK be expanded to meet these challenges.

4.4 Proposed Objectives and guiding principles of CCK

CCK while exercising its functions shall be guided by the following principles: CCK to ensure that, the communication sector is developed in a competitive environment and that market dominance in a converged market is suitably regulated.

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CCK to ensure that communication services are made available at affordable cost to all and that there is increasing access to information for greater empowerment of citizens and towards economic development.

CCK to ensure that quality, plurality, diversity and choice of services are promoted and that a modern and effective communication infrastructure is established taking into account the convergence of information technology, media, telecom, and consumer electronics.

¹³³ See Gazette Notice No. 2431, Vol CVIII No. 24, National Policy on ICT sector in Kenya, 31st March 2006.

CCK to ensure that introduction of new technologies, investment in services and infrastructure, and maximization of communications facilities and services including tele-density are encouraged. CCK to ensure that there is equitable, non-discriminatory interconnection across various networks is promoted and that the principle of a level playing field for all operators serving consumer interest, including existing operators on the date of the changes made to the KCA is promoted.

CCK to ensure that licensing criteria are transparent and made known to the public and an open licensing policy allowing any number of new entrants (except in specific cases constrained by limited resources such as the spectrum) is promoted while at the same time ensuring that defense and security interest of the country are fully protected

4.5 Proposed Powers, Duties and Functions of CCK

It shall be the duty of CCK to facilitate and regulate all matters relating to carriage and content of communications. Without prejudice to the generality of the foregoing CCK shall:

Carry out management, planning, engineering and monitoring of the spectrum for non-strategic or commercial usages. Grant licences and

assigns frequencies for this purpose and determines and enforce licence conditions including fees (for usage of spectrum) wherever required.

In granting licences above, CCK shall endeavour to give effect to one of the basic objectives of this Act, namely to provide for a regulatory mechanism which facilitates convergence. This objective can be achieved as we have discussed earlier in Chapter Three by providing technology neutral licences in the following four categories namely:

- Network infrastructure facility provider
 - Network service provider
 - Application service provider
 - Content application service provider.¹³⁴
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CCK shall determine appropriate tariffs and rates for licenced services, wherever considered necessary and keeping in view the objectives and guiding principles of the Act.

CCK shall promote competition and efficiency in the operation of communication services and network infrastructure facilities and formulate and determine conditions for fair, equitable and non-

The above classification is technology and service sector neutral. Setting up an infrastructural facility and its use is not linked to the provision of a particular service by using a particular technology. Thus the classification of licences under these four categories aims to achieve the basic objective of convergence.

discriminatory access to a network infrastructure facility or network service and such other related matters in respect thereof.

CCK shall take measures to protect consumer interests and promote and enforce universal service obligations and formulate and lay down programme and advertising codes in respect of content application services.

CCK shall take steps to regulate or curtail the harmful and illegal content on the internet and other communication services and formulate and lay down codes and technical standards and norms to ensure quality and interoperability of services and network infrastructure facilities (including equipment).

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CCK shall carry out any study and publish findings on matters of importance to consumers, service providers and the communications industry. Institutionalize appropriate mechanisms and interact on a continual basis with all sectors of industry and consumers, so as to facilitate and promote the basic objectives of the Act.

CCK shall have powers to undertake research and development work in connection with any matter to which they have functions. Powers to Promote the carrying out of such research and development by others or otherwise to arrange for it to be carried out by others.

CCK shall have powers to institute and carry on criminal proceedings in Kenya for offences relating to a matter in relation to which they have functions.

It shall be the principal duty of CCK in carrying out its functions to further the interests of citizens in relation to communication matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In carrying out its principal functions, CCK shall be required to secure the following:

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The optimal use of wireless telegraphy of the electromagnetic spectrum and the availability throughout Kenya a wide range of electronic /
communications services. The availability throughout Kenya of a wide range of television and radio services which are both of high quality and calculated to appeal to a variety of tastes and interests. The maintenance of a sufficient plurality of providers of different television and radio services.

The application in case of all content providers, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful materials in such services. CCK shall perform functions in relation to matters that concern the content of anything,

which is or may be broadcast or otherwise transmitted by means of electronic communications network.

The application in case of all television and radio services, of standards that provide adequate protection to the members of the public and all other persons from both unfair treatment in programmes in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

CCK shall perform all or any functions in furtherance of the objects of this Act, or such as may be prescribed. The Commission may by notification make rules consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

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This chapter will not be complete without a part of it being dedicated to the definition of terms since we are proposing a legislative reform. Accordingly, we have attached as Appendix Two the definition of terms.

CHAPTER 5

5.0 Multi Sector Regulation

In Chapter 3, we alluded to the fact that in this thesis, we will be rooting for multi sector regulation. This is borne out of the fact that, one it will act as a bulwark against political interference and industry capture and two due to lack of regulatory skills, we can enjoy the synergies created by it.

Multi sector regulation is understood to be the functioning of a single regulatory agency that has responsibility for diverse sectors.¹³⁵ Although the integration of telecommunications and broadcasting media and its regulations is most often presented as a case of convergence in ICT, it has more characteristics of multi-sector integrations than convergence.¹³⁶

Attempts at industry integrations have not realized significant convergence benefits and the major regulatory issues remain very different. Even from a multi-sectoral perspective, essential commonalities

R Samarajiva, *et al*, *Multi-sector Utility Regulation*, *supra* note 17.

A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

between telecommunications and broadcasting operations and regulations are not evident.¹³⁷

The case for multi-sectoral regulations is not driven by convergence but rather by the potential efficiency in regulating issues that are common to several industry sectors and to the most effective design of regulatory institutions.¹³⁸

We are alive to the fact that in any given system, there are both advantages and disadvantages. The same is true with multi sector regulation and therefore we have set them out herein. This will enable us to have an objective view and appreciate why we are strongly lobbying for it.

5.1 Advantages of multi-sector regulations

For developing countries such as Kenya, the case for multi-sector regulator is strong because of major shortages of regulatory skills as we have discussed in Chapter Two.

The case for multi-sector regulations will be strong if it can be shown that specialized regulatory skills such as those of accountants,

Samarajiva, et al, Multi-sector Utility Regulation, supra note 17.

T Schwartz & D Satola, Telecommunications Legislation in Transitional and Developing Economies. World Bank Technical Paper no 489. (2000) Washington DC available at <http://globalO11.worldbank.org/site/products.nsf>. (Last accessed on 22nd Aug, 2006).

economists and engineers engage in inter-connection, cost studies and tariff approvals can be used across sectors. The economies of scale in use of one set of high calibre of professionals such as economists, lawyers, financial analysts. Such economies are particularly important during the early stages of liberalization and privatization.¹³⁹

The US experience with public utility companies (PUC) shows that there may be significant economies in such areas as use of buildings, libraries and training facilities in common. The economies of scale in administrative and support services such as computers, office space, support staff. This is particularly important where the costs of regulation can have a real impact on the affordability of basic services.¹⁴⁰

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One of the main advantages of multi-sector regulations according to Schwartz and Satola,¹⁴¹ is the shield that it provides against capture both by industry and special interest political forces. The argument is that a multi-sector regulatory agency is more likely to be independent and therefore give greater certainty to investors and better protection for consumers through good governance.

There is a reduced risk of political capture because a regulator with responsibility for more than one sector will necessarily be more

¹³⁹ R Samarajiva, *et al*, *Multi-sector Utility Regulation*, *supra* note 17.

¹⁴¹ A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.
Senior Counsel, World Bank.

independent of the relevant line Ministries. The broader range of entities regulated by such a regulator will be more likely to resist political interference in a decision on, say, price regulation in one sector since it could set precedent for other sectors.

Further more, there is a reduced risk of industry capture because the creation of a regulator with responsibility for more than one sector can help to avoid the rule making process being captured by industry specific groups.

It will create more precedents and therefore less uncertainty for investors because a decision by multi-sector regulator in relation to one sector on a regulatory issue common to other sectors (for instance the application / of price cap regulation or cost accounting rules) will set precedent that is valuable to potential investors in those other sectors.¹⁴²

The economies of scale in the development and implementation of regulatory agency whereby, for example, uniform rules on licence award or dispute settlement procedures can be extended to more than one sector, and therefore avoid the need to "re-invent the wheel" for each sector.¹⁴³

¹⁴² R Samarajiva, *et al*, *Multi-sector Utility Regulation*, *supra* note 17.

¹⁴³ Schwartz & Satola, *Telecommunications Legislation in Transitional and Developing Economies* *supra* note 138.

Multi-sector regulator improves the chances of creating a modern competition oriented regulator that will not be beholden to incumbent operators. As we have already discussed in Chapter Two, CCK is staffed more or less completely by people who have spent their entire careers in incumbent operators. But with multi-sector regulator, there is no direct path from incumbent to the regulator.

While some staff may be recruited from the incumbent, they will at least be balanced by staff from another incumbent in a different sector. It is also hoped that the new organization will recruit economists, lawyers and other professionals from the private sector who are not impaired by Government monopoly mindsets and who will be capable of balancing the recruits from the restructured incumbent in the various industries.¹⁴⁴

We also stand to benefit from the transfer of regulatory know how between regulators responsible for different sectors. This is particularly important when a country has limited experience and lacks critical human resources in regulation.

Multi-sector regulation provides an effective means of dealing with converging sectors for instance, telecommunications and broadcasting where it is increasingly difficult to decide what is telecommunication and

¹⁴⁴ A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

what is broadcasting services, for example, video on demand or telecommunications and posts for example e-mail and fax remailing.¹⁴⁵

5.2 Disadvantages of multi-sector regulations

One of the strongest points for multi-sector regulation is the cost saving rationale. However, there is the practical difficulty of actually realizing the promised savings. This is because, unless several infrastructure sectors are reformed simultaneously, which is not the case in most countries a multi-sector regulatory agency would not be created from scratch,¹⁴⁶ but would have to be the result of merging the existing agencies or the incremental growth in the first agency such as CCK as other sectors are added to its due jurisdiction as we are proposing.

Shwartz and Satola recognize the practical difficulties in achieving the economies of regulation through multi-sector regulation and the negative aspects of merging sector specific agencies. They propose that multi-sector regulatory agency be established in the first instance even if only one sector is reformed, or that the first sector specific agency established be given added responsibilities and resources as other sectors are being reformed.¹⁴⁷

¹⁴⁵A Henten, *et al*, *Designing Next Generation Telecom Regulation*, *supra* note 1.

¹⁴⁶R Samarajiva, *et al*, *Multi-sector Utility Regulation*, *supra* note 17.

¹⁴⁷Schwartz & Satola, *Telecommunications Legislation in Transitional and Developing Economies*, *supra* note 138.

There is an increased risk of industry capture by a dominant industry player not only of the single sector regulator but of the entire multi-sector regulatory body and the failure by the regulator cascades to other sectors. Further more, there will dilution of sector specific technical expertise required where, for example, the skills of a tariff expert from one sector is not transferable to similar tariffing issues in another sector.

There is increased risk that a precedent set in relation to one sector could be applied inappropriately in another sector although this can also be mitigated by creating strong sector specific departments underneath a central multi-sectoral decision-making body.¹⁴⁸

There is also the difficulty in achieving acceptance by the relevant line /
Ministries of the concept of having a multi-sector regulation, and the subsequent difficulty in achieving consensus from the relevant line Ministries on the type of multi-sector regulator to be established.

This coupled with the greater complexity in establishing the legal framework for the multi-sector regulation, including the level of independence and allocation of functions as between the Minister(s) and the regulator.¹⁴⁹

¹⁴⁸ R Samarajiva, *et al*, *Multi-sector Utility Regulation*, *supra* note 17.

Schwartz & Satola, *Telecommunications Legislation in Transitional and Developing Economies*, *supra* note 138.

If Kenya is to fully benefit from the convergence in information and communication technologies (ICT), then the time to update the regulatory environment is now. The starting point for effective ICT regulation in Kenya is to consider seriously the above-proposed generic reforms.

5.3 Conclusion and Recommendations

There is one overriding reason why independent regulation is particularly important to achieving the competition goals of telecommunications reforms. It is absolutely essential that competition among the major industry players be moved from the arena of politics and bureaucracy to market place, and to achieving the industry objectives of government policy.¹⁵⁰ This will only happen if regulatory decisions are made on their / substantive merits, not on the basis of political favouritism or the back door influence of the most powerful industry players. Only independent, transparent regulatory process that is seen to be so by all the affected parties and public can achieve this.

The case for continuing regulation is based upon the failure of unregulated markets, but that does not guarantee regulation will succeed. Regulation can fail as well as markets, and instances of regulatory failure are not difficult to find. The reform challenge is to establish regulation that can

¹⁵³ Melody, W H (Ed) 1997, *Telecom Reforms: Principles, Policies & Regulatory Practices* supra note 35.

implement new policies effectively for the foreseeable future.¹⁵¹ This is not an easy task and requires careful attention to the design, structure and operation of the regulations and the regulatory body. Regulator must rapidly establish transparent, participatory process and decision criteria to minimize uncertainty and enhance credibility.

In a very real sense, telecommunication regulators will be market managers for the future development of the information infrastructure of the next century. Under progressive management by informed professional regulators, there can be enormous public and private benefits, far exceeding what could be hoped for under either government monopoly or unregulated markets.¹⁵²

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The independent regulator must be subject to standards of accountability to the government, the industry and public. The regulator should file annually reports on the extent to which the industry has achieved the policy objectives set out by the government. The results of the regulator's monitoring of industry developments and measures of the regulator on performance of regulatory activities. In addition, procedures for administrative due process, public justification of decisions, appeal to the

¹⁵¹W. H. Melody, *Designing a Workable Telecom Regulatory Structure for 21st Century Information Societies* *supra* note 107.

¹⁵³ Melody, W H (Ed) 1997, *Telecom Reforms: Principles, Policies & Regulatory Practices* *supra* note 35.

court and public access to information, all help to ensure the accountability of the regulator.¹⁵³

Of course there is no guarantee that these proposals will lead to meaningful reforms in the electronic communication sector. We will require the support of all the stakeholders, especially within the Government (both the Executive and the Legislature). Depending on the political climate, neither the Executive nor Parliament may take the requirement to produce reform proposals seriously.

Nonetheless, although we must remain skeptical of the ability of any proposal to bring about large scale regulatory reforms, we are content with this type of proposal being used to provide an institutional base for continued interest in reforms in the telecommunication sector.

We are, however, convinced that it stands some chance of producing some action. The action we hope will be consistent with the framework set therein. Indeed, that framework has been created to help those interested in meaningful and substantive regulatory reforms to design just such specific proposals.

¹⁵³ Melody, W H (Ed) 1997, *Telecom Reforms: Principles, Policies & Regulatory Practices* supra note 35.

APPENDIX II

Analysis of Infrastructure and services¹⁵⁴

Description of Network Infrastructure facilities and communication services covered under various categories of licences.

1. Network infrastructure facilities include all of the following network facilities.
 - a. Earth stations;
 - b. Fixed links and cables;
 - c. Public payphone facilities;
 - d. Radio communication transmitters and links;
 - e. Satellite hubs; or
 - f. Towers, poles, ducts and pits used in conjunction with other network facilities.
2. Network services may include all of the following network services.
 - a. Bandwidth services;
 - b. Broadcasting distribution services;
 - c. Cellular mobile services;
 - d. Customer access services; or
 - e. Mobile satellite service.
3. Application services include all of the following applications services:
 - a. PSTN telephony;
 - b. Public cellular telephony services;

¹⁵⁴ Communications Convergence Bill of India 2001, *supra* note 103.

- c. IP telephony;
- d. Public payphone services; or
- e. Public switched data services.

Content application services may include all of the following content applications services.

- a. Satellite broadcasting;
- b. Subscription broadcasting;
- c. Terrestrial free to air TV broadcasting;
- d. Terrestrial radio broadcasting.

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APPENDIX II

Definition of Terms¹⁵⁵

The following definitions shall apply: In this Act, unless otherwise provided;

'Application service' means the service provided by means of one or more network services and includes such other services as may be prescribed.

'Broadcasting service' means a content application service for providing television programmes, or radio programmes, to persons having equipment appropriate or receiving that service regardless of the means /
of delivery of that service, but does not include:

First, a service (including a teletext service) that provides only data, or text with or without associated still images); or

Second, a service that makes programmes available on demand on a point to point basis, including dial up service; or

Third, a service or a class of services that the Government may notify in the gazette, as not being a broadcasting service.

'Channel' means a set of frequencies used for transmission of a programme.

¹⁵⁵ Communication Convergence Bill of India 2001, *supra* note 103.

'Commission' means CCK established under s.3 (1) of KCA.

'Communication' means the process of conveyance of content through transmission, emission or reception of signals by wire or other electromagnetic emissions.

'Communication service' means a network service or an application service, or a content application service.

'Content' means any sound, text data, picture - still or moving, or other audio-visual representation, signal or intelligence of any nature or any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically.

'Content application service' means an application or service, which provides content and includes such other services as may be prescribed.

'Customer premises equipment' means any equipment, apparatus or instrument along with its connecting link up to the interface unit located at the customer premises connecting with the network infrastructure facility.

'Encrypted'* means treated electronically or otherwise for the purpose of preventing intelligible reception by unauthorized persons.

'Frequency'* means frequency of electro-magnetic waves used for providing a communication service.

'Foreign satellite broadcasting service'* means a broadcasting service provided by using a satellite, uplinked from a foreign country receivable in Kenya.

'Free to air broadcasting service'* means a non-encrypted broadcasting service made available for reception by receiving equipment commonly available to public without requiring payment of a subscription fee.

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'Licence' means a licence issued by the commission under this Act.

'Licencee' means any person who has been granted a licence.

'Licenced service'* means a service licenced under this Act.

'Network infrastructure facilities'* means any element or combination of elements of physical infrastructure used principally for or in connection with, the provision of network services, but does not include

customer premises equipment and includes such other services as may be prescribed.

'Network infrastructure facility provider' means a person who owns or operates any network infrastructure facility.

'Network service'* means a service for carrying communications by means of guided or unguided electromagnetic radiation and includes such other services as may be prescribed.

'Notification' means a notification published in the official Kenya Gazette and the expression "notified" shall be construed accordingly.

'Post'* means a post and includes a pole, tower, standard, stay, strut, cabinet, pillar or any above ground contrivance for carrying suspending or supporting any network infrastructure facility.

'Prescribed' means prescribed by rules made by the Commission or Government under this Act.

'Programme' means television or radio programme including advertising or sponsorship, whether or not of a commercial kind.

'Programme code' means the code developed by the Commission pursuant to this Act.

'Public service broadcaster' means any body created by an Act of Parliament for the purpose of public service broadcasting.

'Registered service' means a foreign satellite broadcasting service registered with the commission for its reception in Kenya.

'Regulation' means regulations made by the Commission or Government under this Act.

'Service provider' means any person who provides a communication service.

'Spectrum' means a continuous range of continuous electromagnetic wave frequencies up to and including a frequency of the highest giga hertz.

'Subscriber of a service' means a person who subscribes to a communication service primarily for his/her own use.

'Subscription fee' means any form of consideration given by a subscriber.

'Up linking' with reference to satellite broadcast service means up linking of programme transmitted from an earth station to the satellite.

'Wireless equipment' means any equipment in use or capable of use in wireless communication and includes any article or apparatus as may be notified by the Government in this behalf.

'Wireless communication' means any communication without the use of wire or cable.

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