



ARTICLE 19 Eastern Africa and KICTANET Joint Submission on Finance Bill 2019 To National Assembly Departmental Committee On Finance And National Planning



Executive Summary

The Finance Bill 2019 currently being considered by the Finance Committee of the National Assembly needs significant revisions to ensure that its protections are in harmony with those of fundamental rights of freedom of expression (or **FOE**) and the right to information (or **RTI**) as recognized by the Constitution of Kenya and international law.

The current draft fails to recognise that the Kenyan jurisdiction has a nascent digital economy whose dynamism will be stifled via the imposition of onerous taxation burdens which are not adequate to protect freedom of expression and no provisions on ensuring that the law is consistent with the Access to Information Act and the Constitution. Instructively, Uganda's failed imposition of Over the Top (or **OTT**) taxation not only led to declining internet penetration rates, but also denied existing, vulnerable and marginalised communities their rights to access information and freely express themselves.

Recommendations:

1. The Finance Committee of the National Assembly should re-define its definition of a 'digital marketplace' which is vague and may impact FOE and RTI disproportionately.
2. The Finance Committee of the National Assembly should postpone the imposition of taxation on Kenya's nascent digital economy¹ until a thorough cost-benefit assessment has been conducted and takes account of the difficulty latent in determining economic presence in dynamic digital transactions.

¹ More mature economies apply a digital service tax (or **DST**) on large tech corporations. Instructively, France imposes a DST of three percent (3%) on revenue accrued by corporations with a 'turnover of €750 million for services provided worldwide for which EUR 25 million are provided in France'. See: Global VAT Compliance (2019) 'France approved Digital Service Tax' <<https://www.globalvatcompliance.com/france-digital-service-tax-approved/>> accessed 8 August 2019.

SOME MATRIX PRESENTATION

Clause	Provision	Proposal	Justification
<p>Section 3</p>	<p>Amends section 3 of the Income Tax Act and proposes introducing income tax on income accrued through a ‘digital market place’</p>	<p>We recommend the deletion of this clause.</p>	<p>The definition of a ‘digital marketplace’ is vague and fails to specify which platforms fall under this tax bracket (i.e., start-ups, corporations, cloud platforms etc.) and <i>how</i> they will be taxed (i.e., proposed calculation of tax to be imposed).</p> <p>Secondly, Kenya is nurturing a nascent digital economy; imposing additional and onerous tax burdens prior to conducting a thorough cost-benefit assessment and recognising the dynamism of digital transactions will stifle citizens’ constitutional rights to free expression and access to information. Instructively, Uganda’s Over-the-Top (or OTT) tax regime has negatively impacted these rights. Instructively, internet penetration dropped to thirty-five percent (35%) from forty-seven point four percent (47.4%) between June and</p>

			<p>September 2018.² This costly taxation barrier to access social media platforms <i>at the source</i> not only affected existing users but further ensured that marginalised and vulnerable communities continued to be denied access to the internet, to information and stifled their ability to freely express themselves online.</p> <p>Further, the definition may impose intermediary liability on platforms. Additionally the definition imposes a liability on the tech platforms to break end to end encryption of some of their platforms and keep snooping what consumers are doing and this goes against Article 31-33 of the Constitution of Kenya.</p> <p>Intermediaries merely act as a conduit for third party suppliers and buyers, including foreign platforms with no physical presence in Kenya.</p>
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² CIPESA (2019) 'Social Media Tax Cuts Ugandan Internet Users by Five Million, Penetration Down From 47% to 35%' <<https://cipesa.org/2019/01/%ef%bb%bfsocial-media-tax-cuts-ugandan-internet-users-by-five-million-penetration-down-from-47-to-35/>> accessed on 8 July 2019.

			<p>Thirdly, additional income tax threatens to stifle online entrepreneurship via the disproportionate application of tax on small and medium digital platforms already grappling with financial and tax burdens.</p>
Section 12	<p>Amends the First Schedule of the Income Tax Act and exempts individuals registered under the Ajira Digital Program from paying income tax for three (3) years commencing 1 January 2020.</p>	<p>We recommend the deletion of this clause.</p>	<p>This selective tax exemption is discriminatory and amounts to an implied coercion requiring citizens to register for the Program in order to benefit.</p>
Section 16	<p>Amends section 5 of the Value Added Tax (or VAT) Act and proposes to introduce VAT tax supplies made through a digital marketplace’</p>	<p>We recommend the deletion of this clause.</p>	<p>The definition of a ‘digital marketplace’ is vague and fails to specify which platforms fall under this tax bracket (i.e., start-ups, corporations, cloud platforms etc.) and <i>how</i> they will be taxed (i.e., proposed calculation of tax to be imposed).</p> <p>Secondly, yhis clause is not clear. It fails to specify what ‘supplies made though a digital market place’ means.</p> <p>Thirdly, this clause may shift the tax</p>



			burden on to low-earning customers, who often end up catering for VAT at the 'sale' stage of the supply chain.
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About the Partners

ARTICLE 19 EASTERN AFRICA:- ARTICLE 19 Eastern Africa is a regional human rights organisation duly registered in 2007 as a non-governmental organisation in Kenya. It operates in fourteen (14) Eastern Africa countries and is affiliated to ARTICLE 19, a thirty (30) year old leading international NGO that advocates for freedom of expression collaboratively with over ninety (90) partners worldwide. ARTICLE 19 Eastern Africa leads advocacy processes on the continent on behalf of and with our sister organisations ARTICLE 19 West Africa and ARTICLE 19 Middle East and North Africa.

Over the past 10 years, we have built a wealth of experience defending and promoting digital rights at the local, regional, and international levels. We have contributed to several Internet Freedom Policies, Data Protection and Cybercrime Bills including the Draft Uganda Data Protection Bill, the Kenya Cybercrime and Computer Related Crimes Bill 2014 and the Tanzania Cybercrime Act, 2015 among many others. We were also part of the Inter-Agency Technical Committee of the Ministry of ICT that developed the Kenya Cybercrime Bill, 2016 and the Kenya Data Protection Bill, 2018.

If you would like to discuss this analysis further, please contact us at kenya@article19.org or +254 727 862 230.

KICTNAET:- KICTANet is a multi-stakeholder platform for people and institutions interested and involved in ICT policy and regulation.

The network aims to act as a catalyst for reform in the ICT sector in support of the national aim of ICT enabled growth and development.

KICTANet is a space for translating the ideas given by listers into meaningful proposals for resolution of challenges facing the ICT sector.

The network has largely operated as a listserv and for example in the last 10 years, over 30,500 messages have been exchanged. There have been over 8,000 different discussion threads. Most discussions happened between 2011 to 2013, and again in 2016. Top threads included the *Vision 2030 and misplaced priorities*, *Hate text messages/KICA section 29*, *Digital migration and mass ignorance*. Notably, the ICT policy discussions have had the most engagement, with over **27,000** exchanges. This confirms that KICTANet is indeed an ICT policy platform and a reservoir of critical dialogue on matters ICT policy.

If you would like to discuss this analysis further, please contact us at Grace Githaiga <ggithaiga@kictanet.or.ke>.