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TECHNOLOGY, MEDIA & TELECOMMUNICATIONS ALERT

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KENYA

Changes to the timelines for compliance with the local shareholding requirements in the Information, Communications and Technology (ICT) sector in Kenya

On 9 April 2021, Gazette Notice Number 3192 (the Notice) was published in the Kenya Gazette for purposes of amending the National ICT Policy Guidelines, 2020 (the Policy Guidelines). The Notice seeks to amend and clarify the timelines for compliance with the requirement for licensees in the ICT sector to have a minimum Kenyan shareholding of 30% (the Equity Requirement). This alert provides a summary of the changes made to the Policy Guidelines through the Notice.

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Background of the Policy Guidelines and the Equity Requirement

The Kenya Information and Communications Act, 1998 (the KICA) empowers the Cabinet Secretary in charge of ICT (the Cabinet Secretary) to issue ICT policy guidelines to the Communications Authority of Kenya (the CA). The CA is, in turn, required to regard the Policy Guidelines in the performance of its functions.

The Cabinet Secretary previously issued ICT policy guidelines in 2001 and 2006. In 2020, however, the Policy Guidelines were issued to, among others, enhance the minimum Kenyan shareholding requirement for licensees within the ICT sector from 20% to 30%. A three-year compliance grace period, that could be extended upon application by up to one year, was also provided for.

Summary of the changes and clarifications made to the timelines for compliance with the Equity Requirement

A summary of the revised compliance timelines as per the Notice are as follows:

Description of Licensee	Previous timeline for compliance with the Equity Requirement	Current timeline for compliance with the Equity Requirement (as per the Notice)	Comments
Any existing licensee with: a) less than 20% local equity ownership; and b) an unexpired 3-year grace period for compliance with the Equity Requirement.	Three years.	Three years.	The Policy Guidelines are unclear on when this 3-year grace period is deemed to begin. The Notice does not clarify this issue. As such, it would be prudent for licensees to review the terms of their licences and/or consult the CA to get clarity on this point.

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Description of Licensee	Previous timeline for compliance with the Equity Requirement	Current timeline for compliance with the Equity Requirement (as per the Notice)	Comments
Any licensee which, as at 7 August 2020, had 20% or more (but less than 30% local equity ownership).	Three years.	Two years from 7 August 2020 (i.e. by 7 August 2022)	These licensees now have a shorter period (i.e. 1 less year) to comply with the Equity Requirement. The Notice also clarifies when the grace period begins.
Any licensee which had obtained a waiver of the Equity Requirement under the ICT Sector Policy Guidelines, 2006.	No deadline (due to the waiver of the Equity Requirement).	3 years from the date of the Notice (i.e. by 25 March 2024).	The waivers have essentially been revoked and these licensees must now comply with the Equity Requirement before 25 March 2024.
A successful new applicant for a licence.	Three years from the date of issuance of the licence.	Three years from the date of issuance of the licence.	No changes.
A company registered to exclusively offer Business Process Outsourcing (BPO) services	Three years (The Policy Guidelines were unclear on whether this timeline ran from the date of the licence or the date of gazettelement of the Policy Guidelines.)	None.	This type of licensee is now exempt from the Equity Requirement.

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The Notice also sets out an express provision that allows licensees to apply to the Cabinet Secretary for an exemption to the Equity Requirement.

Further Changes

The Notice also removes the one-year cap that had been placed on possible extensions of the compliance timelines. The Cabinet Secretary therefore now has discretion regarding the length of any such extensions of time.

The Notice also sets out an *express* provision that allows licensees to apply to the Cabinet Secretary for an exemption to the Equity Requirement.

Conclusion

The Equity Requirement aims to facilitate and improve the level of Kenyan ownership and participation in the ICT sector. The gazettement of the Notice is likely to inject fresh momentum into the race for compliance with the Equity Requirement and fuel corporate investment deal activity within the ICT sector over the next few years. Non-compliant ICT sector licensees will however need to overcome various challenges in their bid to attract local investors including the economic downturn triggered by the COVID-19 pandemic and the concomitant profitability challenges that exist in some cases.

The CA is nevertheless likely to keep an eye on compliance levels during its review of the yearly returns which licensees are required to present to it and it will be interesting to see what position the government takes towards requests for extension of time and exemption from non-complaint entities should these arise. It is worth noting that non-compliance could have far reaching consequences including the revocation of licences, therefore, it is important for licensees to take note of the compliance timelines under the Notice and to ensure:

- a) timely compliance with the Equity Requirement; or
- b) the timely filing of applications:
 - i) for exemption from compliance; or
 - ii) for extensions of the timelines for compliance.

The above alert is meant for general information and does not constitute legal advice. In case of any inquiries or if you require any further information or advice on how the Notice could affect your business, please feel free to contact Shem Otanga.

Shem Otanga

OUR TEAM

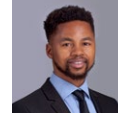
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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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