



ARTICLE 19 Eastern Africa

Memorandum

Public Consultation on the Finance Bill, 2020

**To: The National Assembly Departmental Committee on Finance
and National Planning**



Executive Summary

ARTICLE 19 Eastern Africa (or **ARTICLE 19 EA**) presents this memorandum in response to the Finance Bill, 2020 currently being considered by the National Assembly's Departmental Committee on Finance and National Planning (the **Committee**).

ARTICLE 19 EA has analysed the 'digital service tax' (or **DST**) proposals in the draft Finance Bill, 2020 for its compliance with international, regional and national freedom of expression (or **FOE**) and access to information (or **ATI**) standards. Notably, the DST proposals are intended to clarify and enforce the 'digital market-place' (*income*) tax measures contained in the Finance Act, 2019 by providing a clearer framework for the collection of income tax accrued for services offered via the 'digital market-place.'

ARTICLE 19 EA acknowledges that balancing diverse - government, business and consumers - interests is often a complex process. Nonetheless, this complexity demands complex responses and the adoption of a *differentiated approach* which takes into account the direct and indirect impact of digital tax provisions on people's human rights by the Kenyan government. ARTICLE 19 EA recognises the government's desire to widen the tax bracket and provide a 'stop-gap' measure pending the determination of proposals (on the issues of permanent establishment, threshold, amongst others) by the international community, especially during the COVID-19 global pandemic.

Despite this, ARTICLE 19 EA reiterates, first, that the Kenyan jurisdiction has a nascent digital economy whose dynamism should be encouraged, rather than stifled using ill-conceived taxation burdens. Secondly, the DST builds off the term 'digital market-place' tax which is vaguely defined in the constitutive framework, the Finance Act, 2019. This wanting definition has introduced uncertainty into Kenya's digital



sphere - for economic actors and consumers alike - which is essential for the realisation of consumers' rights to free expression and access to information.

Thirdly, the adoption of a *'one-size-fits-all'* approach fails to pay homage to the *financial and institutional* capabilities of diverse economic actors, including telecommunications infrastructure providers, electronic communications¹ and mobile network operators, who are essential to the advancement of digital rights in Kenya. Instructively, the imposition of a fixed DST rate of 1.5% for all economic actors - *irrespective of capability and capacity*- impacts big companies and micro, small & medium enterprises (or **MSMEs**) differently, placing a disproportionate burden on the latter, which is likely to result in a suspension and/or cessation of the provisions of certain services.

ARTICLE 19 EA magnifies the need to pay homage to regional, international and national standards, Kenya's Vision 2030 and the forward-looking tenets in Kenya's Digital Economy Blueprint (or **Blueprint**).² In order to ensure that trust, plurality and innovation are guaranteed online, the proposed DST should be re-conceptualised and supported by a sound and thorough cost-benefit assessment to ensure that the digital sphere - including the Internet and digital platforms - remain 'open and inclusive.'³

¹ ARTICLE 19 EA recognises that this term can include operators including Skype, WhatsApp, FaceTime, amongst others.

² Kenya's Digital Economy Blueprint <<https://ca.go.ke/the-digital-economy-blueprint/>>

³ ARTICLE 19 (2019) 'El Estado mexicano debe impulsar impuestos a la economía digital sin limitar la libertad de expresión ni la innovación' <<https://articulo19.org/el-estado-mexicano-debe-impulsar-impuestos-a-la-economia-digital-sin-limitar-la-libertad-de-expresion-ni-la-innovacion/#>>



The Republic of Kenya - International, regional and constitutional human rights commitments that must underpin Kenya’s approach to digital economy taxation

By virtue of Articles 2 (5) and (6), Constitution of Kenya, 2010, Kenya is bound by the ‘general rules of international law’ as well as ‘any treaty or convention ratified by Kenya,’ including the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights. Nationally, Article 19 (2), Bill of Rights, Constitution of Kenya, 2010 reiterates that the “*purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.*” Crucially, Articles 33 and 35, Constitution of Kenya, 2010 encapsulate Kenya’s obligations to protect and promote freedom of expression and access to information, and these provisions underpin Kenya’s obligations to advance these rights both offline and online.

The Human Rights Council’s resolution on “The Promotion, Protection and Enjoyment of Human Rights on the Internet”⁴ magnifies the “*importance of building confidence and trust in the Internet, not least with regard to freedom of expression, privacy and other human rights so that the potential of the Internet as, inter alia, an enabler for development and innovation can be realized, with full cooperation between governments, civil society, the private sector, the technical community and academia.*”

⁴ Human Rights Council (2018) ‘The promotion, protection and enjoyment of human rights on the Internet, A/HRC/38/L.10/Rev.1 ’
<https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/L.10/Rev.1>



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The Republic of Kenya has reaffirmed its commitment to these principles through its Freedom Online Coalition (or **FOC**) membership. Notably, the Republic of Kenya pledged to “*adopt and encourage policies and practices, nationally and internationally, that promote the protection of human rights and fundamental freedoms online*”,⁵ including on the Internet and through connectivity infrastructure, platforms and technologies. In the ‘Nairobi Terms of Reference’, the Republic of Kenya committed herself to “*collaborating closely to support... the ability of individuals... to exercise their human rights through the Internet and connection technologies,*”⁶ including entering into a plural dialogue with diverse stakeholders such as civil society organizations.

The Republic of Kenya stand guides by Principle 38 (3), Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019 which maintains that “*states shall only adopt economic measures, including taxes, levies and duties, on internet and information and communication technology service end-users that do not undermine universal, equitable, affordable and meaningful access to the internet and that are justifiable and compatible with international human rights law and standards.*”⁷

⁵ Freedom Online Coalition (2014) ‘*The Tallinn Agenda - Recommendations for Freedom Online*’ <<https://freedomonlinecoalition.com/underpinning-documents/>>

⁶ Freedom Online Coalition (2012) ‘*The Nairobi Terms of Reference*’
<<https://freedomonlinecoalition.com/underpinning-documents/>>

⁷ African Commission on Human and Peoples’ Rights ‘*Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019*’
<<https://www.achpr.org/legalinstruments/detail?id=69>>

The logo for ARTICLE 19 is a red, stylized shape resembling a paper airplane or a banner, with the words "ARTICLE 19" written in white, bold, sans-serif capital letters across its center.

These standards, principles and commitments constitute part of the Republic of Kenya's obligations to protect and promote social justice and online and offline freedom of expression and access to information, and should inform Kenyan legislators' approach while shaping digital taxation measures.

Recommendations

1. Cost-Benefit Assessment:

- a. As a point of first call, the Committee should ensure that any digital economy taxes, such as the proposed DST, are founded on a prior and thorough cost-benefit assessment⁸ - including a human rights impact assessment - which has to be subjected to extensive public scrutiny. Where the cost-benefit assessment has not been conducted, ARTICLE 19 EA recommends the imposition of a moratorium on all existing and proposed digital tax measures (*at the income tax and VAT levels*) in Kenya until this process is completed.
2. In order to mitigate against any disproportionate impacts of tax provisions on the rights to FOE and ATI and ensure that the dynamism of Kenya's digital sphere, including the Internet, is protected, ARTICLE 19 EA recommends:

⁸ ARTICLE 19 EA notes assertions by the Kenya Revenue Authority claiming that this a cost-benefit assessment has been conducted. Despite repeated calls for this to be released to the public for commentary, this document is not available in the public domain.



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a. **Actionable Suggestions:** The Committee should ensure that more comprehensive amendments are introduced into the Finance Bill, 2020, which is amending the Finance Act, 2019. Notably, the following amendments should be introduced:

i. Definitional Amendments:

1. The Committee should ensure that the Finance Bill, 2020 provides a clear and unambiguous definition of the term ‘digital market-place’ under sections 3 (income tax) and 18 (VAT), Finance Act, 2019 and clearly defines which markets and economic actors are captured by this definition;
2. The Committee should ensure that the Finance Bill, 2020 provides a clear and unambiguous definition of the term ‘digital services’. In other words, the Finance Bill, 2020 should ensure clarity and legal certainty, for economic actors and citizens alike, about which services are included in the definition - and thus subject to the digital service tax- and which services are not.

ii. Adoption of a differentiated approach to digital economy taxation in Kenya:

1. The Committee should ensure that any digital economy taxation proposals introduced under the Finance Bill, 2020 is based on a *differentiated approach* which takes into account the direct and indirect impact of digital tax provisions on people's human rights rather than on a ‘one-size-fits-all’ approach. This approach will permit the Committee to recognise the diverse financial and institutional capabilities of diverse economic actors, including



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MSMEs and large corporations, whilst taking into account the profit earned by these different actors in Kenya and their role in the redistribution of wealth in the country. Indeed, ARTICLE 19 EA acknowledges that the imposition of adequate taxation on revenues generated in Kenya by digital actors is - in principle- a matter of social justice. For this reason, ARTICLE 19 EA recalls that tax provisions should be shaped in a way that, while asking multinational actors to pay a fair contribution to the public purse, they do not limit freedom of expression and do not kill innovation and local entrepreneurship.

iii. Minimum threshold requirement:

1. The Committee should ensure that, as part of adopting a differentiated and rights-centric approach, that a *minimum threshold requirement* is applied in Kenya which pays homage to the divergent financial and institutional capabilities of diverse economic actors offering services using digital platforms and technologies, including the Internet.



MATRIX PRESENTATION

Clause	Provision	Proposal	Justification
Clause 4	<p>12E (1) <i>Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall be payable by a person whose income from services is derived from or accrues in Kenya through a digital market place:</i></p> <p><i>Provided that a resident person or non-resident person with a permanent establishment in Kenya shall offset the digital service tax paid against the tax payable for that year of income.</i></p>	<p>We recommend amendments to clause 4 (amends section 12, and introduces clause 12E, Income Tax Act, CAP 470)</p>	<p>ARTICLE 19 EA notes that clause 4, Finance Bill, 2020 provides an insufficient response to a complex situation. The DST proposal entrenches existing inadequacies stemming from the foundational framework (i.e., Finance Act, 2019) seeking to tax economic actors in the digital market-place. Instructively, the proposed DST relies on the vague term, ‘digital market-place’ which is poorly defined in the Finance Act, 2019. Notably, the continued failure by the CS to introduce regulations clarifying <i>which</i> specific economic actors are captured by the ‘digital market-place’ term (i.e., start-ups, corporations, cloud platforms etc.) and <i>how</i> these economic actors will be taxed (including the existence of a digital tax infrastructure) continues to entrench uncertainty in Kenya’s digital sphere. ARTICLE 19 EA notes that this vagueness is replicated under the Finance Bill, 2020, given the failure to define the term ‘digital service.’ Therefore, the Committee should clarify which ‘digital services’ (e.g., software, multimedia, advertising agencies, data sellers) are captured by this term and thus subject to the tax.</p> <p>Secondly, the DST provision adopts a ‘one-size-fits-all’ approach for diverse economic actors offering services using digital platforms and technologies, including the Internet, instead of adopting a <i>differentiated approach</i> which takes into account the direct and</p>



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	<p>(2) <i>The tax payable under subsection (1) shall be due at the time of the transfer of the payment for the service to the service provider.</i></p>		<p>indirect impact of digital tax provisions on people's human rights. This differentiated approach should impose a <i>minimum threshold requirement</i> which pays homage to the divergent financial and institutional capabilities of various economic actors e.g., MSMEs and large corporations. ARTICLE 19 EA notes that the Kenyan jurisdiction has already competently demonstrated its ability to adopt and implement thresholds in the competition sector, as evidenced by the Kenyan Competition (General) Rules, 2019 (General Rules) containing the Merger Threshold Guidelines.</p> <p>Thirdly, ARTICLE 19 EA notes that the current DST approach risks imposing a disproportionate burden on core digital economy players - including electronic communications and mobile network operators and infrastructure service providers - who are essential to the realisation of FOE and ATI in the digital sphere. Kenya's Blueprint acknowledges that "<i>the <u>current trend of governments imposing heavy taxation on digital infrastructure equipment, digital devices and telecommunication services leads to un-affordability</u> of such digital infrastructure, digital devices and telecommunication services.</i>"⁹</p> <p>ARTICLE 19 EA acknowledges that the 1.5% DST rate is arguably not as exorbitant as the rates currently being discussed in other countries, including The Philippines, Indonesia (10%) and France (3%). Nonetheless, once one factors in registration costs,</p>
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⁹ Kenya's Digital Economy Blueprint, pp. 46 <<https://ca.go.ke/the-digital-economy-blueprint/>>



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			<p>application and licensing costs, type approval costs, infrastructural costs, annual operating fees, operating costs (including cushioning wanting infrastructural gaps and high electricity costs), and other related taxes, including VAT, excise duty, amongst others, the heaviness of this seemingly minimal rate - especially for MSMEs - begins to take form.</p> <p>Inevitably, the imposition of this ill-conceived DST tax burden will likely be passed on to consumers, thus severely impacting consumers' ability to access and use digital services in an inclusive, affordable and open manner. This will likely erect further affordability barriers for various groups, including the poor, persons living in rural, unserved and underserved areas, women, persons with disabilities, the youth, amongst others; barriers which are already being exacerbated by the COVID-19 pandemic.</p> <p>Despite the recognition that the burden of the DST rests with <i>businesses</i>, rather than <i>consumers</i>, clause 4, Finance Bill, 2020 fails to incorporate measures which mitigate against a <i>direct or indirect</i> transfer of this burden to consumers. ARTICLE 19 EA further highlights that economic actors may refrain from transferring additional costs to consumers where this adversely affects their consumer base. However, this statement only applies in <i>mature and competitive (digital) markets</i>, and it is likely that large corporations will be able to cushion the risk of consumer exit, whilst still transferring this burden to consumers.</p>
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			<p>Instructively, ARTICLE 19 EA reminds the Committee of the knock-off effect of the fifteen percent (15%) excise duty tax which was imposed on telephone and internet services following the enactment of the Finance Act, 2018. It was widely reported that telecommunications operators, including mobile network and fibre providers, increased the cost of calls and data overnight. Safaricom PLC “raised the cost of calls by 30 cents, and SMS by 10 cents effective midnight whereas fibre providers, such as Zuku raised the ‘cost of its 10mbps package from Sh3,999 up from Sh3,500.’¹⁰ As the Law Society of Kenya noted in its submissions,¹¹ the 15% excise duty tax was onerous and hampered digitisation efforts, perpetuated marginalisation and stifled freedom of expression and access to information in Kenya.</p> <p>ARTICLE 19 EA insists that the adoption of a one-size-fits-all approach - advanced by the DST proposals - risks entrenching the ‘phenomenon of concentration in (in itself highly concentrated) markets’,¹² including digital markets. This phenomenon risks entrenching the position of dominant actors, and creating imbalances in Kenya’s digital (economy) market, including between resident and non-resident economic actors.</p>
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¹⁰ Doreen Wainainah (2018) ‘Safaricom in call, data price increases over recent taxes’

<<https://www.businessdailyafrica.com/corporate/companies/Safaricom-voice-call-data-price-increase-taxes/4003102-4810418-15ne88gz/index.html>>

¹¹ Jacqueline Kubania (2018) ‘LSK fights Uhuru's internet tax, says Kenyans' rights violated’

<<https://www.nation.co.ke/news/LSK-makes-case-against-internet-tax/1056-4787340-ox240ez/index.html>>

¹²



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			<p>ARTICLE 19 EA further draws the Committee’s attention to the demonstrable impact of ill-conceived taxation measures on consumers’ access to the Internet and digital technologies in Eastern Africa. Despite salient differences between Kenya’s DST and Uganda’s ‘Over-the-Top’ (or OTT) taxation, the Committee can draw insight from two (2) core facts. Firstly, the OTT tax severely impacted ‘internet access’ drives and led to a twelve point four percent (12.4%) plunge in internet penetration rates within three (3) months (i.e., between June and September 2018).¹³ Secondly, the OTT tax failed to achieve the government’s desired objectives, as evidenced by the Uganda Revenue Authority’s reported ‘deficit of UGX 234.48 billion’¹⁴ (circa \$61,308,700 million) from its estimated OTT revenue targets.</p> <p>Additionally, the failure to adopt a differentiated approach, and the entrenchment of uncertainty in Kenya’s digital sphere risks stifling <i>plurality, inclusivity and innovation</i>, which are core pillars underpinning Kenya’s Blueprint and Kenya’s immersion into the global digital economy. Plurality, inclusivity and innovation have facilitated the growth of Kenya’s gig economy and the heightened availability of digital platforms and technologies in Kenya. In turn, this has assisted the government in its efforts to reduce</p>
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¹³ 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.

¹⁴ Uganda Revenue Authority (2019) ‘Revenue Performance FY 2018/19’, pp. 18

<<https://www.ura.go.ug/Resources/webuploads/GNRART/Annual%20Revenue%20Report%20FY%202018-19.pdf>>



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			<p>youth unemployment in Kenya. Crucially, predictive statistics indicate that Kenya’s gig economy may “grow at an annual rate of 33%, with the total size of the gig economy reaching \$345 million and employing 93,875 gig workers by 2023.”¹⁵</p> <p>ARTICLE 19 EA is concerned that the DST proposal may thwart <i>existing</i> and <i>future</i> successes in this arena. Firstly, ARTICLE 19 EA notes with concern, that there are no exemptions provided to persons who accrue income for services offered via the Ajira Digital Program. Secondly, the economic slowdown occasioned by the COVID-19 global pandemic continues to expose the small percentage of employed Kenyans to salary cuts, unpaid (mandatory) leave and job losses. Thirdly, there is also a need to clarify whether this DST is applicable to the ‘digital market-place’ <i>operators</i> or the <i>sellers</i> of services. During COVID-19 times, this distinction between a platform provider and the seller of a service has become blurred, following the rise of platforms which simultaneously offer services themselves (e.g., doctors/hospitals offering patient services online).</p> <p>Invariably, adopting a differentiated approach will protect and incentivise Kenya’s multi-faceted gig economy and offer reprieve to MSMEs. This will also simultaneously satisfy the government’s desire to collect <i>proportionate</i> taxes from non-resident and large corporations accruing profits in Kenya.</p>
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¹⁵ Ngene, Gituku (2019) ‘*The Rise (and Rise) of the Gig Economy in Kenya – And How to Take It to the Next Level*’ <<https://nextbillion.net/kenya-gig-economy-next-level/>>



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			ARTICLE 19 EA reminds the Committee that the DST proposal is laden with significant human rights implications. By virtue of Kenya’s international, regional and national commitments, Kenya is obliged to protect and promote these rights, both online and offline (<i>see obligations and commitments above</i>).
Clause 9	12. The rate of tax in respect of digital service tax under section 12E shall be one point five per cent of the gross transaction value.	We recommend amendments to clause 9 (<i>amends Head B, Third Schedule and introduces Paragraph 12, Income Tax Act, CAP 470</i>)	ARTICLE 19 EA reiterates its call for the adoption of a <i>differentiated approach</i> which takes into account the direct and indirect impact of digital tax provisions on people's human rights in Kenya. Crucially, Kenya’s Blueprint stipulates that the government is mandated to “ <i>strike a balance between ease of collection and fairness...care must be taken to avoid unintended consequences arising from tax policies on entrepreneurs, small businesses and the poorest members of society.</i> ” ¹⁶ Despite the foregoing, the proposed DST rate (1.5%) in clause 9, Finance Bill, 2020 will impose a disproportionate tax burden on MSMEs, ‘entrepreneurs and the poorest members of society’. As noted above, this DST tax will pile on unsustainable burdens for these groups, and will likely stifle innovation and local entrepreneurship in Kenya. ARTICLE 19 EA notes that a comprehensive assessment of the divergent institutional and financial capacities between MSMEs and large corporations will enable the Committee to arrive at a satisfactory <i>minimum</i> threshold, enabling the capture of

¹⁶ Kenya’s Digital Economy Blueprint, pp. 71 <<https://ca.go.ke/the-digital-economy-blueprint/>>



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			<p>economic actors with heightened capacity to adapt to, and comply with, the DST obligations.</p> <p>Instructively, ARTICLE 19 (Mexico) noted that the inability of certain companies/platforms - particularly micro, small and medium economic actors - to meet disproportionate tax requirements may result in:</p> <ul style="list-style-type: none">• ‘a geographic restriction of access to services in these jurisdictions, especially by MSMEs, where an additional tax burden impacts their profit base; and• a suspension in the connection of applications, services and online content by platforms/companies who fail to meet these tax requirements.’¹⁷
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¹⁷ ARTICLE 19 (2019) ‘*El Estado mexicano debe impulsar impuestos a la economía digital sin limitar la libertad de expresión ni la innovación*’
<<https://articulo19.org/el-estado-mexicano-debe-impulsar-impuestos-a-la-economia-digital-sin-limitar-la-libertad-de-expresion-ni-la-innovacion/#>>



About 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, Cybercrime Bills and TV White Space Frameworks including Uganda's Data Protection and Privacy Act (2019), Uganda's Draft TV White Space Guidelines (2018), Kenya's Data Protection Bill(s) (2018/2019), the Kenya Cybercrime and Computer Related Crimes Bill 2014, the Kenya Huduma Bill (2019), the Kenya Draft Dynamic Spectrum Access Framework for Authorisation of the Use of TV White Spaces (2020), 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 email us at kenya@article19.org - with Mugambi Kiai (mugambikiai@article19.org) in copy - or call +254 727 862 230.