AMCHAM
KENYA

Eng. John Tanui, MBS
Principle Secretary
State Department for ICT and The Digital Economy
10th Floor, Telposta Towers
Kenyatta Avenue
PO Box 30035 - 00100
NAIROBI

31 July 2023

Dear Sir,

RE: CALL FOR COMMENTS FOR REMOVAL OF 30% LOCAL SHAREHOLDING FOR FOREIGN ICT BASED COMPANIES

We welcome the Ministry of ICT's proposal to remove the 30% local equity participation requirements that were introduced under the 2019 National ICT policy (amended in 2020 and 2021). We ask that the Ministry confirms the removal of the 30% local shareholding for foreign based ICT companies by amending the National ICT Policy.

This revision aligns with the statements made by President Dr. William Samoei Ruto during the American Chamber of Commerce Regional Business Summit on 30th March 2023 during which he stated that the requirement for foreign ICT entities to have 30% domestic equity to set up in Kenya is untenable and impedes significant foreign corporate investments in Kenya citing that the requirement will be evaluated and eliminated to facilitate greater investment in the ICT sector.

Additionally, the objective of the 30% local shareholding requirement is to ensure and encourage participation of locals in ICT, whereas this can alternatively be achieved through other means highlighted in the annexure. Please see annexed to this letter a schedule setting out our comments and proposals relating to the proposal to remove the 30% local shareholding for foreign ICT based companies.

Should you require any clarifications, please do not hesitate to contact me at Maxwell@amcham.co.ke.

Yours faithfully,

Maxwell Okello

Chief Executive Officer
American Chamber of Commerce, Kenya

Issue/Concern	Impact/Comment
We propose the elimination of the requirement for 30% local shareholding for companies offering Information, Communications, and Technology services ("ICT") as stated in policy 6.2.4.	This revision aligns with the statements made by President Dr. William Samoei Ruto during the American Chamber of Commerce Regional Business Summit on 30th March 2023 during which he stated that the requirement for foreign ICT entities to have 30% domestic equity to set up in Kenya is untenable and impedes significant foreign corporate investments in Kenya citing that the requirement will be evaluated and eliminated to facilitate greater investment in the ICT sector. Additionally, the objective of the 30% local shareholding requirement is to ensure and encourage participation of locals in ICT, whereas this can alternatively be achieved through: - a. ***public-private partnerships for projects associated with critical national infrastructure.*** Creation of these PPPs in place of local equity participation requirements, will hasten the rollout of technological infrastructure, such as data centres and internet exchange points and networks, facilitating more rapid digital transformation where foreign investment, shareholding and ownership is not restricted by foreign equity restrictions. *b.* ***local content regulations such as specific quotas on procurement.*** This includes the use of policies imposed by government that require firms to use domestically manufactured goods or domestically supplied services in order to operate in an economy largely in an effort to improve domestic employment and industrial performance. c. ***reservation of unskilled employment opportunities for Kenyans and mandatory training requirements for locals and marginalized persons/communities.*** This will ensure that knowledge and expertise is shared, skills developed, and technology transferred from foreign companies to local companies. USAID for example is reported to partly fund IT and e-Government projects worldwide, examples include projects in Croatia, Macedonia, Georgia and Jordan (USAID/Croatia, 2006; USAID/ Macedonia, 2006; REACH, 2000[1]). The Kenya Education for Sustainable Development Policy for Education Sector (2017) and the National ICT Policy (2019) have stated incentives to enable ICT companies to participate in ICT training and apprenticeship for students from tertiary institutions. For example, the Education and Sustainable Development Policy (2017) commits the government to provide tax incentives to companies offering apprenticeships. To

	address imbalances in the labour market and to further induce firms to engage more actively in training and human resource development activities and/or to encourage the expansion of certain skill-intensive functions the government may opt to introduce employment and training requirements for Kenyans as an alternative to the local shareholding requirement. Additionally, compliance with the local shareholding requirement has been met with various challenges including but not limited to: - ***a) Contradictions with Sector ICT Policy and Key Government Objectives*** When the requirement was introduced in 2001, the policy was nested under an effort to enhance competition and liberalization as one of the 2 principles (other than Universal Service Access). Instead, by limiting foreign direct investment through barriers such as this, in the past 20 years since liberalization, the telecommunications sector is still one of the sectors where competition is limited to a few firms. There is limited choice which has had an impact on cost of service and availability of infrastructure. b) ***unavailability of local capital or credit for capital-intensive business***. Some foreign companies, particularly start-ups and small businesses that rely majorly on external funding or foreign direct investment, requiring a fixed 30% substantial Kenyan ownership may not be feasible. This is largely because only a few Kenyans have the necessary capital required to participate at the required level by foreign companies, leaving control to a small clique of wealthy persons which stands in the way of government efforts to redistribute wealth in Kenya. By removing this constraint, businesses are free to decide their ownership structure in accordance with their unique requirements regarding operating capital. ***c) Enablement of an Anticompetitive Market.*** While the proposition was sound in the backdrop of new liberalization policies in the telecommunications sector in the late 90s and early 2000s so as to permit the growth of local companies and enable them to sufficiently scale to compete internationally as part of a plan for cautious and steady competition within a newly liberalized telecommunications sector, the same conditions do not exist anymore and local telecommunications companies such as Safaricom have been able to scale to enable them to even enter international markets as demonstrated by the recent expansion by Safaricom into Ethiopia. If the current policy remains

	entrenched, the local market will now suffer the harmful side-effects of stifled competition within the ICT sector due to lack of diversity enforced by FDI restrictions. d) ***Financing mobilization challenges by the local domestic capital market***. Several companies have not been able to comply with the shareholding requirements within the period stipulated in the National ICT Policy Guidelines given that a large number underwent a severe loss-making period from 2019 to 2022 necessitating various retrenchment and restructuring exercises. The COVID-19 pandemic negatively affected the bottom-line of most companies and reduced investments; amendment of the National ICT Policy Guidelines requirement from 20% to 30% resulted in potential investors re-evaluating investment in the market, fuelling uncertainty in implementation. e) Further to the reasons outlined above, with ***the current state of the economy - the economic downturn, inflation, and currency depreciation;*** – investment in companies in the technology sector has declined. This means, for example, that licensed telecommunications companies must expend substantial resources and time in assessing what is practically, economically, and legally viable to meet the local equity participation requirement. This has proven to be a stumbling block in achieving regulatory compliance. f) ***Lack of investor interest in the ICT sector; and matchmaking challenges***. In certain cases, the historic or present corporate structure and arrangements do not enable or necessitate a company's expansion in terms of local operations and hiring of more employees or onboarding local shareholders. This is prevalent in cases where the holding company or foreign holding company is the sole shareholder and customer of the local subsidiary that is licensed and operational in Kenya. Such a company's structural needs, fiscal pressures and demands make it difficult to comply with such restrictive local equity participation requirements. Companies have required longer timelines and extensive capital investment to improve their attractiveness to potential investors, to obtain the necessary approvals from shareholders, and further undertake restructuring to comply with the National ICT Policy Guidelines. g) ***Companies have varying internal shareholder approval processes under the different company establishment (constitution) documents.*** These internal approval processes vary in complexity and timelines depending on the needs of

	the company, financial targets, and economic situation in each jurisdiction. In addition, one must bear in mind the equity, sustainability and governance policies of companies which require companies to operate under certain sustainability principles that enable them to be good corporate citizens. It is important to note that foreign companies are regulated in their home countries, making it difficult to give shares to locals of another country. Also, KYC requirements, listing requirements in their home countries and reporting requirements create several regulatory hurdles for these companies to get approvals from their regulators to grant shares in line with our local shareholding requirements. Additionally, our capital markets are not deep enough to enable any listing of these companies where they would achieve the correct valuations and capital being raised in IPOs should they seek the Listing route. h) ***Organizational restructuring costs of foreign ICT incumbents***: Under the current policy, at the end of a 3-year grace period, incumbent foreign investors in the ICT industry would have to restructure their equity ownership to integrate local partners. Companies publicly listed on foreign stock exchanges will view this 30% minimum equity localization as dilution of their shareholder's equity value, which is against the management's fiduciary duty towards company shareholders. If unchanged, the policy will likely lead these companies to withdraw from Kenya after their grace period lapses. i) ***Widening the digital skills and workforce development gap***: A low level of ICT FDI will translate into a low level of job-related skills diffusion and a low level of educational, training and certification programs that foreign ICT companies typically rollout with their investments. Deterring foreign investment in the ICT sector via application of local shareholding requirements is in direct contrast with the intended aims of the Digital Skills pillar within the National Digital Masterplan 2022-2032 where foreign ICT companies could play a vital role in developing the digital capacity among Kenyan citizens. j) ***Compliance hurdles: Operators in the ICT sector have met challenges in complying with this policy requirement such as:*** unavailability of local capital or credit for capital-intensive business; financing mobilization challenges by the local domestic capital market; lack of investor interest in ICT sector; and match making challenges. In the current economic environment, it is difficult to find local investors with the capacity to commit to a 30% shareholding in large scale projects – and possibly continue to inject cash in the future so as not to be diluted below the 30% threshold.

	Benefits of removing the 30% local shareholding requirement: Removing the 30% local shareholding requirements will have clear benefits to the Kenyan economy and ICT sector: a) ***Legislative consistency:*** In addition to enhancing Kenya's overall ease of doing business, removing the 30% local ownership requirement will fortify the legislative consistency in Kenya's governance framework for foreign investors, aligning the National ICT policy with the Kenya Investment Policy (KIP) 2019, Kenya's Vision 2030, The Foreign Investments Protection Act and the Investment Promotion Act. b) ***Spur the Digital Economy for Economic Growth:*** removing equity localization requirements would make opening international businesses in Kenya's ICT sector simpler. The increased FDI will create ICT jobs, help reduce unemployment in the country, and will translate into higher incomes and buying power, boosting the overall economy. c) ***Digital skills and workforce development***: Skills that ICT employees gain through training and experience resulting from ICT FDI can boost the technological and digital education of Kenya's ICT workforce. Through a ripple effect this can diffuse to other sectors of Kenya's economy. d) ***Technological spill overs:*** an increase in ICT FDI will be accompanied by cutting edge tools, and operational best practices from across the globe. The introduction of newer and enhanced technologies into Kenya's ICT industry, will result in enhanced efficiency and effectiveness. e) ***Increase in services exports:*** Services produced by the ICT sector often have global markets. An increase in ICT related FDI will result in increased Kenyan ICT exports. f) ***Increasing ICT market competition:*** By facilitating the entry of foreign organizations into the domestic marketplace, FDI helps create a competitive environment. A healthy competitive environment pushes firms to continuously enhance their processes and product offerings, thereby fostering innovation. Consumers also gain access to a wider range of competitively priced products. g) ***Climate Change.*** Foreign investors are likely to come with the latest technology and best practices in areas such as climate change mitigation and adaptation. These can help a country like Kenya meet some of its key sustainable development goals.