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Bribery and corruption in telecommunications: the case of Kenya

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Abstract

Purpose – *This paper aims to examine how telecommunications in Kenya was affected by the absence of good governance and the presence of rent-seeking by ministers.*

Design/methodology/approach – *A single-country case study combining approaches of anti-corruption and telecommunications methodologies using secondary and legal sources.*

Findings – *Corruption has been a significant factor, but has also led to distortions in the market which may have been more significant.*

Research limitations/implications – *Given the sensitivity of corrupt dealing, it is impracticable to interview the principals, some of whose identities are concealed behind front companies.*

Practical implications – *It is necessary to modify telecommunications practice to eliminate the use of front companies and those registered in opaque registries to identify conflicts of interests.*

Originality/value – *This is one of only four countries examined in terms of bribery and corruption in telecommunications.*

Keywords *Case studies, Multinational companies, Governance, Telecommunications, Wireless, Legal systems*

Paper type *Research paper*

1. Introduction

The liberalisation of telecommunications in Kenya carried a very high risk of corruption. Global telecommunication markets have long been open to bribes, crony capitalism and nepotism (Sutherland, 2012). Kenyan politicians have engaged in a variety of rent-seeking activities, with state assets and revenues diverted for the accumulation of wealth, conspicuous consumption and vote buying (Southall, 1999; Wrong, 2009). Reforms of telecommunications markets brought policies of licensing, privatisation and the regulation of markets (Intven *et al.*, 2000), but without any counter-measures against the opportunities they created for corruption. The result in Kenya, as in many other countries, was that politicians quickly identified new ways to extract rents, which are now being analysed, as are the costs to the economies and to individual citizens. However, corruption in the telecommunications sector has largely been ignored by practitioners and academics, who exist in separate corruption and telecommunication "silos" in governments, inter-governmental organisations and universities.

Kenya was created by the United Kingdom, though it ruled for only six decades, leaving an independent nation state in 1963 that spanned over 40 cultural and linguistic groups, with an economy comprised mostly of small-scale and subsistence farmers, plus some cash crops for export. It grew rapidly, from 8 to 46 million people, making economic and social progress, but also encountering significant difficulties, though avoiding the resource curse of Equatorial Guinea and the genocidal strife of Rwanda (Hornby, 2012). Domestic challenges have been aggravated by the overspill of refugees and attacks by terrorists

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from Somalia, that provoked an ill-fated deployment of the Kenyan Defence Forces (Kumssa and Jones, 2014; Jaji, 2014; Kenyatta, 2014; Anderson and McKnight, 2015).

Under its first president (Table I), Kenya quickly became a one-party state, with a centralised administration built up by means of neopatrimonialism (Maxona, 2014). In 1992, it reverted to a multi-party democracy, largely based on ethnic clientelism, that demanded ever greater sums of money to "win" elections (Ajulu, 2002; Branch *et al.*, 2010). The 2007 elections were marred with and followed by very serious violence, with politicians stoking the flames of what seemed to be inter-ethnic disputes, but was really the division of the spoils among an elite that lacked ideological differences (Githongo, 2008; Carrier and Kochore, 2014). There followed controversial indictments of senior politicians before the International Criminal Court (2012), because of the failure of the Kenyan judicial system to hold them to account, only for the International Criminal Court too to fail (Mueller, 2014).

The government has an economic policy framework, termed "Vision 2030", with a medium-term plan for 2013 to 2017, intended to raise growth to an unprecedented double-digit level (GOK, 2014). This transformation requires much higher productivity and greatly improved infrastructure, including the provision and adoption of information and communications technologies (ICTs). Aligned with Vision 2030, the ICT Plan aspires to "a globally competitive knowledge-based economy" with business process outsourcing as its flagship (MICT, 2014). The Communications Commission of Kenya (CCK, 2013), the regulatory authority, supported these goals by aiming to double the 2.2 per cent contribution of ICTs to gross domestic product. It wanted Kenya to become the "leading information and knowledge economy hub" of East Africa, while ensuring "access to and use of information and communications services by all in Kenya by 2018".

In the 1980s, Kenya had typified African telecommunications, with few prospects for change. Services were exclusively provided by a government department operating on a small scale using electro-mechanical technology that was inflexible and expensive to maintain, with little effort to expand the network, despite long waiting lists. Yet by the late 1990s, pushed by international financial institutions (IFIs), peer pressure and financial difficulties, and pulled by the appearance of the first multinational operator groups, the government began to adopt and adapt economically liberal policies. What followed was to be capitalism with Kenyan characteristics.

From 1998, the government began to open telecommunication markets, generating strong sectoral growth. The dominant player was Safaricom, owned by Vodafone Group plc and the Government of Kenya (GOK). Other groups entered and left, finding the politico-regulatory environment unexpectedly difficult:

- Vivendi (France).
- Zain (Kuwait).
- Econet (Zimbabwe).
- Essar (India).

Concerns were expressed by the Kenyan parliament over mysterious "foreign investors" in the privatisations of Safaricom and Telkom Kenya, and about fraud in government supply contracts. One foreign manufacturer admitted passing on a bribe at the request of an

Table I Presidents of Kenya

Name	*Years in office*	*Tribe*	*Political party*
Jomo Kenyatta	1963-1977	Kikuyu	Kenya African National Union (KANU)
Daniel arap Moi	1977-2002	Kalenjin	KANU
Mwai Kibaki	2002-2013	Kikuyu	National Alliance of Kenya (NAK)/NARC (National Rainbow Coalition)
Uhuru Kenyatta	2013-	Kikuyu	KANU

operator. Unsurprisingly, the authorities proved unable to prosecute politicians, whose identities were obscured by offshore companies, combined with lamentable record-keeping, and a culture of impunity.

This paper considers first the problems of corruption in Kenya, followed by a brief analysis of liberalisation, privatisation and regulation of telecommunications markets. The development of the market for mobile telecommunications is then discussed. Two firms are then analysed, Mobitelea and Alcazar, respectively, in the privatisations of Safaricom and Kenya Telkom. The bribe paid by Alcatel through Vivendi is then considered. Finally, conclusions are drawn and issues raised for further research.

2. Corruption in Kenya

Corruption has been endemic in Kenya, its political system built on neopatrimonialism, funded from state assets and revenues (Southall, 1999). For example, state-owned land was systematically stolen under the first two presidents, who were themselves among the beneficiaries (Ndung'u, 2004; Southall, 2005). Ministers evaded prosecution, while using the many anti-corruption laws (Table II) to force officials to keep their corruption secret. Some of the proceeds were used to buy votes, while other votes were secured by allocating cash for development projects to selected ethnic groups and districts (Ajulu, 2002). Corruption permeates the judiciary and parliament, rendering them incapable of holding the executive to account (Ringera, 2003; Akech, 2011; Amukowa, 2013).

The Moi presidency was characterised by grand corruption, with his family and cronies becoming conspicuously wealthy. In the infamous Goldenberg scam, the government was defrauded of USD 600-1,000 million in a gold export compensation scheme, without any gold (Bosire, 2005; Warutere, 2005). Yet there were no prosecutions, with ministers not even called to give evidence before the commission of inquiry (*Republic of Kenya* v *Judicial*

Table II Legislation against corruption

1952	National Assembly (Powers and Privileges) Act	Guaranteed legislators freedom of speech to ensure "honest, unbiased and impartial examination and inquiry and criticism"
1956	Prevention of Corruption Act	General anti-corruption legislation
1987	Prevention of Corruption Amendment Act	Creation of Kenya Anti-Corruption Authority (KACA)
2003	High Court judgement	Declared KACA to be unconstitutional (*Stephen Mwai Gachiengo, Albert Muthhee Kahuria* v *Republic of Kenya*, 2000)
2003	Anti-Corruption and Economic Crimes Act	Established the Kenya Anti-Corruption Commission (KACC)
2003	United Nations Convention against Corruption	Ratified (UNCAC, 2014)
2004	African Union Convention on Preventing and Combating Corruption	Signed but not ratified (AU, 2014)
2005	Public Procurement and Disposal Act	Made a criminal offence of corrupt practices in procurement
2009	Public Officer Ethics Act	Required public officers to exercise a duty of professionalism. Prohibited improper enrichment, conflicts of interest, acting for foreigners, political partisanship and nepotism. However, the mandatory register of interests remains confidential, with a significant penalty for releasing its data
2010	Constitution	"Integrity" and "transparency" were declared national values. Art. 75 requires state officers to "behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties". Art. 201 states that "all aspects of public finance" should be guided by "accountability"
2011	Ethics & Anti-Corruption Commission Act	Repealed and replaced the Anti-corruption Act of 2003. Created the Ethics and Anti-Corruption Commission
2012	Leadership and Integrity Act	Prescribed a general leadership and integrity code for state officers, who must not "unlawfully or wrongfully enrich himself or herself or any other person"

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Commission of Inquiry into the Goldenberg Affair, 2004). Its criticism of one minister was struck down on the strange basis of "double jeopardy", as he had previously been "tried" and cleared by the "high court" of parliament (*Republic of Kenya* v *Judicial Commission of Inquiry into the Goldenberg Affair*, 2006).

Kenya Posts & Telecommunications Corporation (KPTC) was a food trough at which politicians ate (Macharia, 2007). Bribes were taken on equipment procured from foreign suppliers, either directly or by buying through intermediary importers that politicians had created and controlled. Government supporters, many with only primary schooling, were given jobs, leading to gross overstaffing. Money from subscribers was deposited with non-bank financial institutions owned by ministers, then lent to those same ministers, who defaulted, as the money had been spent, either in conspicuous consumption or in buying votes. The managing director abused his office by arbitrarily commissioning consultancy projects. Goodyear has admitted to paying bribes to sell tyres to various state-owned firms in Kenya, including Telkom Kenya (SEC, 2015).

In the absence of an independent anti-corruption authority, it fell to the next government to prosecute Moi and his ministers. Initially, Kibaki had seemed inclined to do so, by appointing John Githongo as Permanent Secretary for Ethics and Governance, and by the enactment of a new law. Yet the legitimacy of his government was eroded by its own corruption, notably the Anglo-Leasing (or Anglo-fleecing) scandal – a series of fraudulent government contracts named after an apparently non-existent company that was to supply machines to make tamperproof passports. Although these scams involved ministers, in part to fund the 2003 election campaign, Kibaki resisted domestic and foreign pressure to prosecute or, even, dismiss them, apparently because they came from ethnic groups whose support he considered essential for the 2007 election (Otieno, 2005; Githongo, 2005, 2008; Bachelard, 2010)[1].

Mis-invoicing of goods has been a significant problem, with corporations reducing the price of exports to avoid taxes, with the price subsequently increased in an offshore shell company, allowing profits to be hidden, or similarly reducing the price of imports to evade duties. Through such schemes the Kenyan economy may have been losing USD 1 billion annually (Clough *et al.*, 2014), a problem compounded by inadequate controls to prevent money laundering (ESAAMLG, 2011).

The Anglo-Leasing scams went further, with some firms failing to provide any goods or services, four of which concerned telecommunications (Table III). For example, Posta

Table III Telecommunication supply contracts signed by government

Contracting party	*Value (USD M)*	*Supplier*	*Comments*
LBA Systems Ltd Upper Largo, UK	24.6 29.7	Not known	Kenya prison security and telecommunications project. Phase I (1997) and Phase 2 (2002). Digital multi-channel security network
Midland Finance & Security Geneva, Switzerland	€49.6	Globetel Inc Cambridge, UK	Telecommunications network for police administration
First Mercantile Securities Corporation Geneva, Switzerland	12.7	Spacenet Inc. USA	Signed 7 November 2002. Purchase of VSAT hardware for Posta. Case lodged in January 2006, decided against GOK for USD 6 million, upheld on appeal and raised to USD 10.1 million. (*First Mercantile Securities Corp* v *Government of Kenya*, 2009; *Republic of Kenya* v *First Mercantile Securities Corporation*, 2012)
Universal SatSpace (North America) LLC Delaware, USA #3524065	19.0	Gilat[2]	Signed 7 November 2002. 10 year contract for space service for Posta. Initially taken to arbitration, but GOK did not sign agreement[3]. (*Universal Satspace (North America) LLC* v *Government of the Republic of Kenya*, 2013)

Source: NAO (2006)

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wanted a satellite-based network to provide Internet access at nearly 1,000 post offices. Rather than purchase the equipment and services directly, the Ministry signed contracts on its behalf, entering into finance deals with obscure third parties, allegedly at grossly inflated prices. Along with other Anglo-Leasing contracts, the government ceased payments on the satellite contract in 2004, triggering legal proceedings against it to recover the outstanding debts. After scrutinising the contract, the KACC (2006) recommended prosecuting the:

- Postmaster General;
- Minister and Permanent Secretary for Transport and Communications; and
- Minister for Finance and Financial Secretary.

The KACC also sought mutual legal assistance (MLA) from the Swiss authorities to identify the beneficial owners of Midland Finance, a decision upheld by the Kenyan Court of Appeal overturning an attempt by the firm to block the investigation (*Kenya Anti-Corruption Commission* v *First Mercantile Securities Corporation*, 2010). However, the substantive cases made very little progress.

The scandal re-emerged in 2014, when the Kenyatta government announced it would pay KES 1.4 billion (USD 16 million) to the still unidentified litigants (Muga, 2014; The Star, 2014). The settlement arose from the failure of the government in two cases, one in Geneva and the other in London, where arbitration awards were confirmed by foreign courts against the Kenyan Government, with interest accruing on the awards and no prospect of further appeals (*First Mercantile Securities Corp* v *Government of Kenya*, 2009; *Universal Satspace (North America) LLC* v *Government of the Republic of Kenya*, 2013). These payments were opposed by the *Law Society of Kenya* (2014) acting in the public interest, which on appeal won an interim order for suspension of the payments (Ayodo, 2014).

The Ministry of Finance contracted PWC to investigate the alleged corruption in and failure to perform in the Anglo-Leasing contracts. Globetel and Midland Finance successfully blocked this in the High Court, which ruled that the investigation of corruption was exclusively for KACC, forbidding the Ministry and Attorney General from doing so, and striking investigation of the litigants from the PWC contract. More remarkably Mr Justice Nyamu ruled that any fraud or corruption in the execution of the contracts were exclusively matters for the court of arbitration, entirely ignoring Kenyan criminal law and international treaty obligations (*Midland Finance & Securities, Globetel Inc* v *Attorney General & Another*, 2008; *Nedermar Technology BV Ltd* v *Kenya Anti-Corruption Commission*, 2008)[4].

The payment of KES 1.4 billion in 2014 to unknown parties was authorised by Uhuru Kenyatta as President, which he had denounced as an MP, when the contracts were first exposed. The beneficiaries are presumed to be members of the political elite whom he dare not identify, perhaps because they had worked for his father, or are from ethnic groups he could not upset. While the possibility of prosecuting Moi had seemed for a time to undermine the neopatrimonial nature of the state, the failure to do so left in place a chain of corrupt "leaders", with little hope for accountability, with ageing and corrupt former presidents and ministers seemingly left in peaceful retirement (Taylor, 2006; Wolf, 2007). At the time of writing, the Director of Public Prosecutions had just authorised charges to be brought against individuals by the Ethics and Anti-Corruption Commission in the Anglo-Leasing contract scams, including ex-ministers (Olick, 2015). Telecommunications as the underpinning for digital government services was just another way to extract cash from the state, as an alternative to KPTC.

3. Liberalisation, privatisation and regulation

The Kenya Communications Act 1998 split the KPTC into:

- a policy unit, the National Communications Secretariat (NCS);
- a regulator, the Communications Commission of Kenya (CCK);

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- a network operator, Telkom Kenya;
- a postal service, the Postal Corporation of Kenya (POSTA); and
- an appellate body, the Communications Appeals Tribunal.

The introduction of a supposedly independent regulator followed global best practice (Melody, 1997). Yet it was alien to the highly centralised political and administrative traditions of Kenya, whose government controlled its budget (much less than the equivalent budget of Safaricom), and appointed permanent secretaries from government departments to serve as board members. Some were also directors of Safaricom, a gross conflict of interest[5]. There has been no effective parliamentary oversight of CCK and, apparently, only one case before the Appeal Tribunal. Moreover, CCK failed to adopt a range of techniques for good governance, such as public consultations with the publication of responses and reasoned replies, impact assessments and post-implementation reviews. Any hope that CCK might have become independent ended with its designation as a facilitator, engaging rather than standing back, on which it observes:

> The risk is that a traditional regulator could be seen as an interrupter to progress, a handbrake against change or an organ of government control (CCK, 2013).

The Kenya Information and Communications (Amendment) Act 2013 rebranded CCK as the Communications Authority of Kenya (CA) and while it re-stated its independence in s. 5A(1), there was no reason to suppose anything was different.

The first major change in the market came with the introduction of foreign commercial expertise and capital into the mobile network formerly run by KPTC, which had performed very poorly, becoming the highly successful Safaricom[6]. There are two accounts of its creation, which cannot be reconciled because recollections vary and crucial paperwork was never filed with the registrar of companies[7]. For example, whether the government contributed USD 30 million and how this might or might not have been recovered is now unknowable.

Telkom Kenya ran the monopoly fixed network, but also held 60 per cent of the Safaricom stock, from which it received substantial dividends, in addition to interconnection revenues. On the day before the government sold half of the shares of Telkom Kenya to Orange, it took over the shareholding in Safaricom. This was claimed to be offset by a range of debts which the government also took over, with no cash being paid, for what had been the biggest asset of Telkom. These transactions were complex and record-keeping poor, making it unclear if the exchange was equitable, if one party benefitted or if they even knew.

Competition was introduced by the licensing of a second and, after a pause, a third mobile operator (Table IV). In 2007, the licensing scheme was modified from traditional specific licences (e.g. GSM) to "unified licences", in effect allowing Telkom Kenya a backdoor into

Table IV Mobile network and spectrum licences issued in Kenya

Year	*Operator*	*Technology*	*Spectrum (MHz)*
1999	Safaricom	GSM	900 and 1,800
2000	Kencell	GSM	900
2003	Econet Kenya	GSM	900 and 1,800
2004	Safaricom	GPRS	–
2005	Celtel	GPRS	–
2007	Telkom Kenya	CDMA	800
2007	Safaricom	3G/UMTS	2,100
2009	Telkom Kenya	GSM	1,800
2010	Zain	3G/UMTS	2,100
2010	Telkom Kenya	3G/UMTS	2,100
2010	Airtel	3G/UMTS	2,100

Source: CCK (2013)

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offering mobile services, using the cheaper CDMA technology, though with only limited mobility.

Six consortia bid for the second mobile licence (CCK, 1999):

1. Vivendi Telcom International (France) & Sameer Investment Limited;
2. Investcom Global Limited (Lebanon) & Kilimanjaro Communications Limited;
3. France Telcom, IPS Group, Pension Scheme of Cooperative Sector & IFC;
4. Millicom International Cellular S.A. (Sweden), Amiran Communications Limited & Amiran Kenya Limited;
5. MTN International (South Africa), Telia Overseas AB (Sweden), Triton Network Limited, First Chartered Telecom, & ICDC Investment Company; and
6. GTE (USA), Orascom Telecom (Egypt), Kenya Flying Academy, Motorola (USA), Kenya Union of Savings & Credit Cooperatives (KUSCCO).

Kencell won with its bid of USD 55 million, launching a service in August 2000 (CCK, 2000). Table V shows the changes in its ownership, which was initially dominated by the Sameer Group, a conglomerate controlled by its Chairman, Naushad Merali[8]. It has been repeatedly alleged that Moi owned a substantial stake in Sameer (Kroll Associates, 2004). Vivendi was initially limited to 40 per cent by government policy concerning telecommunication operators, but this was increased almost immediately as the threshold was, conveniently, raised. In effect, Vivendi paid Sameer for winning the licence, while taking over part of its obligation to invest in network construction. The second mobile operator has changed hands three times, part of a far from fruitful pattern of large operator groups buying each other in pursuit of economies of scale and profits in Africa.

In 2003, CCK offered a third licence, attracting five consortia (Telegeography, 2003):

1. Econet Wireless (Zimbabwe) and the Kenya National Federation of Cooperatives (KNFC);
2. Mobile Systems International (MSI/Celtel) (Netherlands);
3. Kenya Telecommunications Investments Group (KTIG);
4. Telsar Solutions and Telcel International (South Africa); and
5. Swedtel (Sweden) and Al Byte (Kenya).

Table V Ownership of the second mobile network operator in Kenya

From	*To*	*Foreign investor*	*(%)*	*Kenyan investor*	*(%)*	*Notes*
1999	2001	Vivendi Universal[a]	40	Sameer Group	60	Vivendi purchased 20% in 2001 for an undisclosed sum. Initial investment of €19.5 million
2001	2004	Vivendi Universal[a]	60	Sameer Group	40	60% sold for USD 230 million (Onstad, 2004) (Vivendi, 2004)
2004	2004	–		Sameer Group	100	25 May for two hours (Eastern Standard, 2004)
2004	2005	Celtel[b]	60	Sameer Group	40	60% bought for USD 250 million
2005	2007	Zain[c]	60	Sameer Group	40	Zain acquired the Celtel Group: 85% in May 2005 and 15 per cent per cent in May 2007. Paying USD 3.4 billion (Zain annual reports)
2007	2009	Zain[c]	80	Sameer Group	20	Zain reported the purchase, but not the sum paid
2009	2010	Zain[c]	95	Sameer Group	5	Zain paid USD 63.75 million for 15%
2010	2011	Airtel[d]	95	Sameer Group	5	Bharti Airtel acquired Zain Africa for USD 10.7 billion (Zain, 2010)
2011	–	Airtel[d]	100	–	–	Deal completed in February 2011

Notes: [a]France; [b]The Netherlands; [c]Kuwait; [d]India

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Econet won with a bid of USD 27 million, though this proved controversial, since:

- KTIG complained about the lack of transparency;
- MPs complained about the weak financial state of Econet Wireless; and
- Econet and KNFC disputed their respective shareholdings.

The licence was withdrawn for failure to pay the fee, apparently due to the inability of KNFC to contribute its share, only to be reinstated (*Republic of Kenya* v *Minister for Information and Communications & 5 Others ex-parte Econet Wireless Kenya Ltd*, 2006). The service was repeatedly delayed, launched only in November 2008, five years after the licence had been awarded, by which time it was the fourth operator.

The Essar Group of India acquired a 49 per cent stake in the Econet holding company and thus an indirect interest in Econet Wireless Kenya (ETK) (Economic Times, 2008), moving on to purchase the entire Econet holding company stake in ETK (Telegeography, 2009). It renamed the firm Essar Telecom Kenya and began building a national network, marketed as Yu Mobile (Essar, 2009)[9]. Essar purchased the remaining 20 per cent from local businessmen Peter Kibiriti and Jos Konzolo, who had, apparently, acquired this from KNFC, but had failed to contribute to the recapitalisation. Thereafter, Essar reportedly met local investor requirements by having the legal firm of Anjarwalla & Khanna hold 20 per cent of the stock on its behalf, though it retained 100 per cent control (Akumu, 2008; Business Daily, 2010; Telegeography, 2010). Difficult market conditions caused Essar to sell its physical network to Safaricom and its business to Airtel, delayed by conditions demanded by the CA (Munda, 2014).

Like other developing countries, Kenya had been under pressure from the IFIs to privatise its state-owned operator, to create a more level playing field for rivals and to release funds to repay debt. An attempt at the privatisation of Telkom Kenya stalled when the government sought and failed to negotiate a higher price with the second and third highest bidders. This failure was allegedly contrived to avoid exposing corrupt procurement contracts involving ministers (Kane, 2002). The government tried again in 2007, attracting bids from[10]:

- Orange (France) & Alcazar (UAE);
- LAP Green Networks (Libya);[11]
- Reliance (India); and
- Telkom (South Africa).

Orange (formerly France Telecom) won, offering substantially more than its rivals at USD 390 million for 51 per cent (IFC, 2008). The transaction was completed on 21 December 2007, just six days before the general election and ten days before the implementation of the Privatization Act, which had received Presidential assent in 2005, but the commencement of which had been delayed by the outgoing minister. Consequently, its provisions did not apply to the sale of Telkom Kenya, in particular the transparency measures and the Privatization Appeals Tribunal.

A long-standing complaint in East Africa had been the absence of undersea cables, forcing the use of satellite links that were expensive and had limited capacity. Remarkably quickly this problem was solved with the laying of several cables (Table VI), some with government investment. Complaints about the failure of downstream retail prices to fall reflected the insufficiency of competition on Kenyan mobile and Internet markets, which meant operators did not need to pass on wholesale cost reductions. In parallel, the first phase of the National Optic Fibre Backbone Infrastructure (NOFBI) had been built, connecting all major towns and cities.

The Kenyan telecommunications market has been partially liberalised and partially privatised, but following a strange path that left the mobile market highly concentrated and

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Table VI Undersea cables landing at Kenya

Cable	*Route*	*Cost (USD M)*	*Capacity (T bps)*	*Interconnections*	*Comments and ownership*
EaSSY	South Africa to Sudan	265	4.72	Africa, Asia and Europe	Consortium of international and African operators (EaSSY, 2014)
LION2	Mombasa to Mauritius	€57	1.28	Asia, South Africa and Europe	Owned by France Telecom, with a link to Mayotte (Orange, 2012)
SEACOM	South Africa to Arabian Sea	650	1.28	Africa, Asia and Europe	Owned by Aga Khan Fund and entities controlled by South African politicians (SEACOM, 2014)
TEAMS	Mombasa to UAE	130	1.28	Europe and Asia	Constructed by Alcatel-Lucent for USD 82 million and launched in mid-2009 (IT News, 2009). Owned by consortium of Government, Kenyan operators and ISPs

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government in a very strong position to influence developments. Regulation is not independent, but controlled by government and linked to state-owned Safaricom, and it has not had any significant effect on competition, with the authority failing to track developments or to identify and remedy market bottlenecks. Given the political conditions, it is unsurprising that firms left the market.

4. The growth of mobile telephony

Safaricom grew strongly, tapping latent demand in the market, exploiting its first mover advantage and network effects, later reinforced by the same advantages for its mobile banking service (Table VII). There was sufficient competition to drive down prices, further expanding the market, as rivals tried, largely unsuccessfully, to take market share from Safaricom (Figure 1). The market remains highly concentrated, dominated by Safaricom, with little prospect of improvement, especially now that Yu/Essar has withdrawn (BT, 2015).

One of the surprising findings of a survey of the users was that 95 per cent of the respondents had an active Safaricom SIM card, while Airtel, Yu and Orange had, respectively, 22, 13 and 4 per cent (iHub Research and Research Solutions Africa, 2012, p. 25). Of those at the bottom of the pyramid, some 15 per cent had two or more SIM cards, to benefit from lower on-net calling rates. The dominance of Safaricom seems only slightly eroded, despite several years of muted, if unanalysed, competition. The government had intervened in the regulatory process to try to stop reductions of the interconnection rates, which protected the state-owned enterprise from competition, as this would have encouraged customers to switch to a rival, rather than to continue to call the large number of Safaricom customers on its own network.

Table VII Customer and financial data for Safaricom

	Subscribers (millions)	*Revenues (KES billions)*	*EBITDA (KES billions)*
2003	0.86	14.30	6.82
2004	1.53	18.86	9.81
2005	2.51	26.91	14.11
2006	3.94	34.97	18.57
2007	6.08	47.45	24.51
2008	10.23	61.37	28.15
2009	13.36	70.48	27.95
2010	15.79	83.96	36.60
2011	17.18	94.83	35.72
2012	19.07	107.00	37.50
2013	19.42	124.29	49.18
2014	21.57	144.67	60.94

Source: Annual reports

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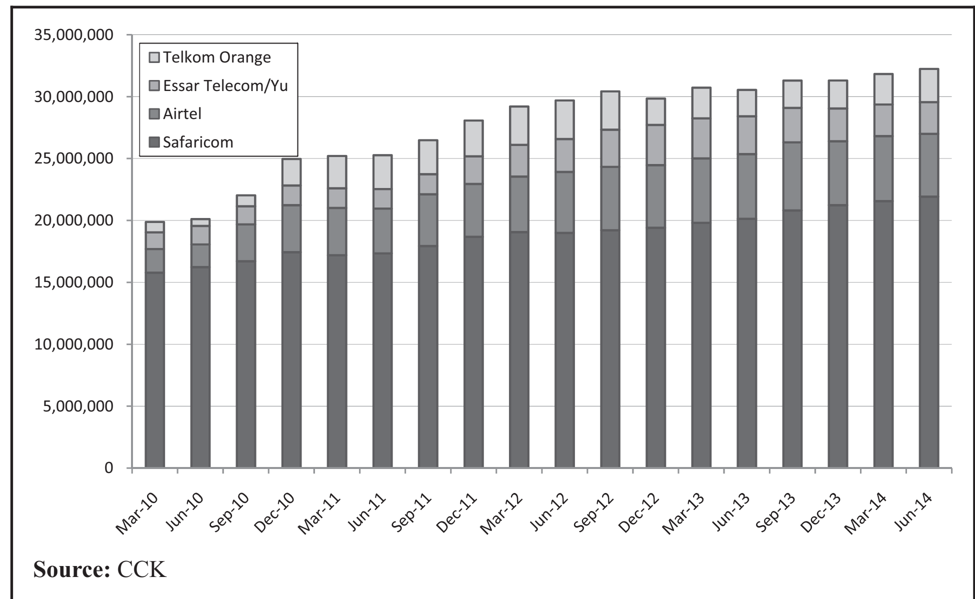
Figure 1 Growth of mobile subscriber numbers



Source: CCK

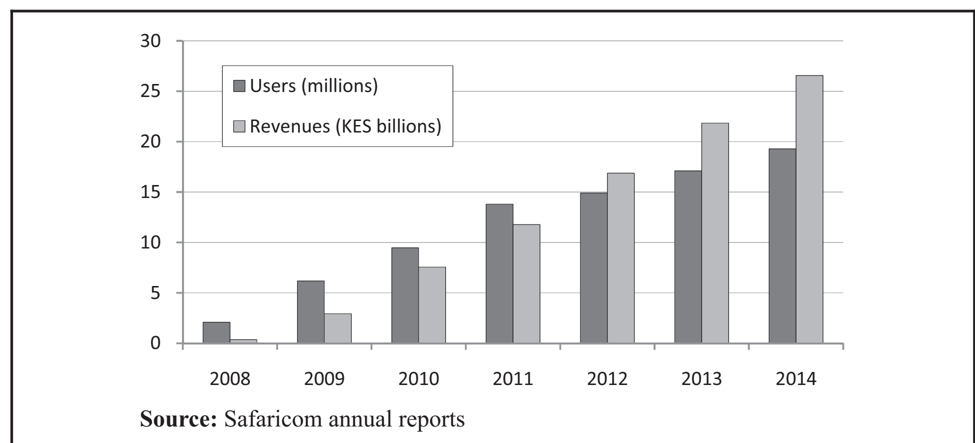
While mobile phones made individuals more accessible and so better able to find work:

> One in 5 respondents interviewed had foregone some usual expenditure in order to reload their phone with credit. Among those respondents who forgo a usual expense, it was established that on average, they forgo Ksh 72 weekly in order to reload and use their mobile phone, with the maximum amount being Ksh 999 and minimum being Ksh 10 (iHub Research and Research Solutions Africa, 2012, p. 10).

The March 2007 launch of the mobile money service M-Pesa, attracted significant numbers of customers and revenues for Safaricom, keeping them within its system of agents and customers and generating substantial additional revenues (Figure 2) (Hughes and Lonie, 2007)[12]. After two years, it claimed to have reached 40 per cent of the adult population (Jack and Suri, 2011), being used for urban-to-rural remittances and to solve temporary financial problems (Morawczynskia, 2009).

One of the surprising successes has been the appearance of "app" labs, with entrepreneurs emerging, finding venture capital and supplying apps for smartphones and

Figure 2 Growth of M-Pesa



Source: Safaricom annual reports

tablet computers (Murugesan, 2013). It may mark an important advance from merely consuming technologies developed in Asia, Europe and North America.

Safaricom is substantially more dominant than would be expected, given the apparent implementation of global best practice in telecommunications policy, namely, the presence of rivals, a plausible legal framework and a regulatory authority that should have ensured fair competition. There ought to have been erosion of its market share, a failure explained by the misuse by government of market opening and the near absence of pro-competitive regulation.

5. Mobitelea Ventures Limited

The government sold 10 billion Safaricom shares (25 per cent of the total), raising KES 51.75 billion in a public flotation (The Standard, 2008). Having been oversubscribed five times, the shares immediately rose on the Nairobi Stock Exchange, valuing Safaricom at around USD 4.5 billion. Preparations had exposed a discrepancy between the Vodafone Group which owned 35 per cent and Safaricom which recorded Vodafone Kenya Ltd (VKL) as owning 40 per cent (Safaricom, 2008). The missing holding belonged to Mobitelea (Figure 3) and was then worth about USD 225 million.

The Parliamentary Public Investments Committee (PIC) inquired into how the VKL stake in Safaricom had risen above 30 per cent, the then limit for foreign investors. It noted "grievous discrepancies" in the dates and record-keeping, differences in recollection and crucially failed to find a written request from Vodafone to increase its holding. The raising of the ceiling on foreign holdings to 40 per cent led the PIC to conclude that:

> It would appear therefore that the policy was thereafter amended to accommodate M/s/ Mobitelea Ventures. (PIC, 2008, p. 180)

VKL had signed a confidentiality agreement, binding it not to disclose the identity of the owners of Mobitelea, unless compelled by a court. Michael Joseph, the then CEO of Safaricom, declined to explain the ownership to the PIC, while Gavin Darby provided details of the transactions (Table VIII), but not the beneficial owners (Darby, 2007; Rice, 2007).

Figure 3 The ownership of Safaricom from 2003 to 2008

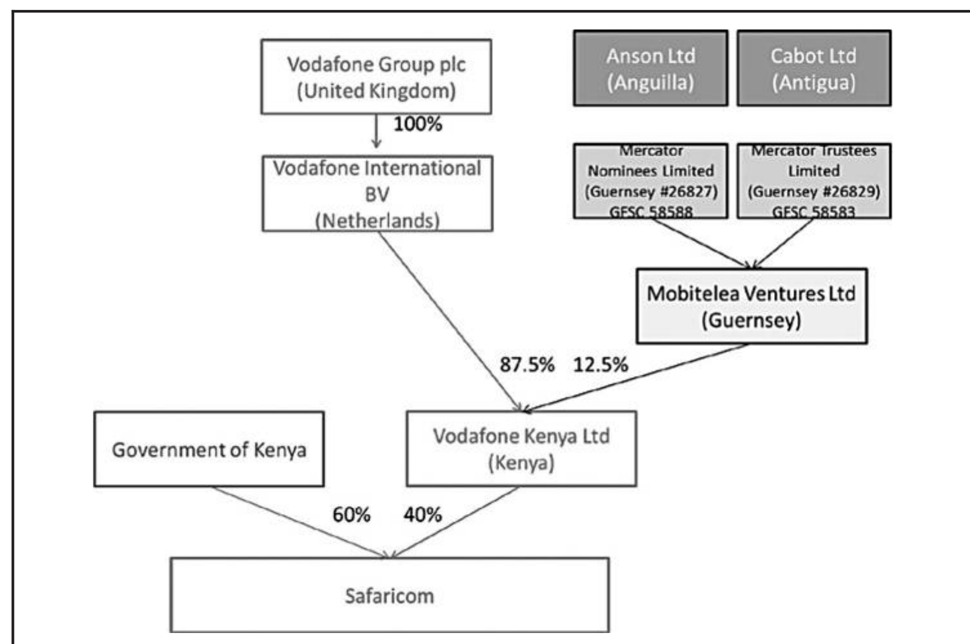


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Table VIII Mobitelea transactions in Vodafone Kenya Limited

Date	*Transaction*	*USD millions*	*Stake in Safaricom (%)*
2001	Mobitelea bought 25% of VKL	10.5	10
2003	VKL bought 12.5% back from Mobitelea (Vodafone, 2003)	11.2	5
2009	VKL bought 12.5% back from Mobitelea (Vodafone, 2009)	33.6	0

The justification for the involvement of Mobitelea was its expertise and "valued advice" about Kenya. The PIC was perplexed that its reward for this was only an opportunity to invest and that sometime after the advice. However, the costs of the "investment" were quickly recouped, generating a small profit, perhaps to cover interest on a loan for the initial purchase. Some years later, Vodafone bought out Mobitelea, suggesting it paid the very low sum of USD 34 million[13], though there had also been dividends received from Safaricom.

The committee concluded that:

> (xiv) it is appalling that Vodafone Plc a Company registered in the United Kingdom involved itself in underhand activities of [a] corrupt nature aimed at depriving Kenyan citizens of billions of shillings through M/s/ Mobitelea Ventures, despite the fact that the UK has been in the forefront of campaigning against corruption in developing countries. (PIC, 2008, p. 181)

Mobitelea had, according to Vodafone, neither been represented on the board of VKL nor on the board of Safaricom. Vodafone had also received guarantees from Mobitelea that no "prohibited parties" had benefited from its holding in VKL.

A leaked report by Kroll Associates (2004) identified the owners of Mobitelea as:

- Nicholas Kipyator Biwott[14] (a former minister of commerce);
- Charles Field-Marsham (a son-in-law of Biwott); and
- Gideon Moi (a son of former President Moi).

The PIC never confirmed the identities of the beneficial owners of Mobitelea nor whether they had influenced the raising of the ceiling on foreign investment. The Serious Fraud Office (SFO) in the United Kingdom ruled out an inquiry, on the grounds of lack of resources (Macintyre, 2008). Thus the ownership mystery remains unsolved, while the total paid to them is unknown.

6. Alcazar Capital and Orange

The first stage of the privatisation of Telkom Kenya was the sale of 51 per cent to Orange East Africa (OrEA), rather than to the parent group (Figure 4), introducing the mysterious Alcazar, with a 10.9 per cent stake. Perhaps coincidentally, the second phase of privatisation was to be an IPO of 19 per cent of the Telkom Kenya stock held by the government and 11 per cent of that held by OrEA, which would have allowed Alacazar to cash in its holding. The Parliamentary Investments Committee (PIC) expressed considerable interest in the beneficial owners of Alcazar, with its echoes of Mobitelea. However, by the time of its hearings, Orange (2012a), (2012b) had bought out Alcazar for an undisclosed, but allegedly small sum, and removed its CEO from the Telkom Kenya board (Adaramola, 2013; Okuttah, 2013).

Alcazar had been established in 2007 as the private equity arm of Agility Logistics to invest in non-logistics businesses. In mid-2009, there was a management buy-out, creating an independent private equity house, which provided little more information than the address of its offices and the statement that it was regulated by the Dubai Financial Services Authority.

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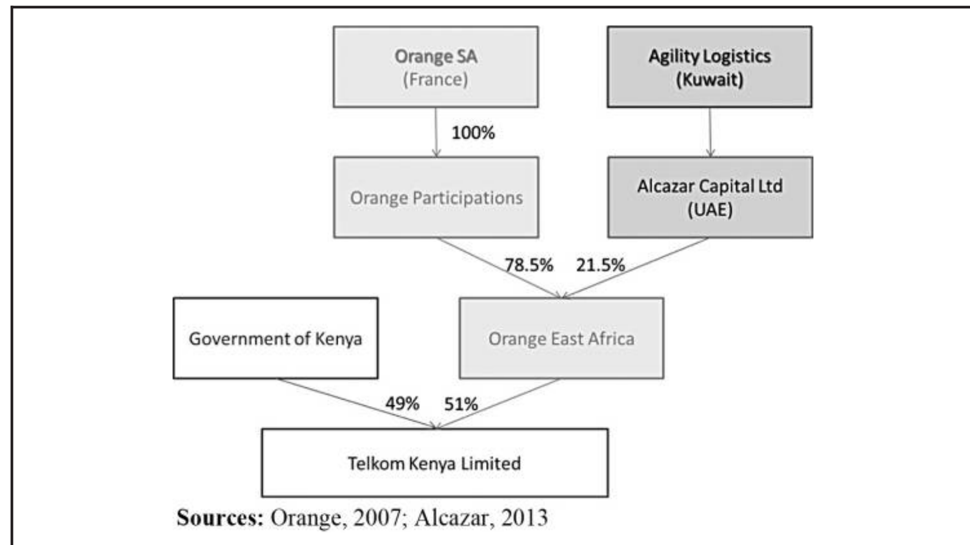
Figure 4 Ownership of Telkom Kenya Limited in 2007



Sources: Orange, 2007; Alcazar, 2013

Agility Logistics, formerly the Public Warehousing Company of Kuwait, was listed on the Kuwait and Dubai stock exchanges. It reported its investment, through Alcazar, in Telkom Kenya, and that the sale of the stake resulted in a loss of KWD 11.2 million (USD 40 million) (Agility, 2007, 2013)[15].

In late 2012, OrEA raised its holding in Telkom Kenya Ltd (TKL), again the subject of an inquiry by the PIC. In December 2012, the two shareholders had agreed to write off loans, lowering the government stake from 49 to 30 per cent, while raising Orange to 70 per cent. The agreement provided an option for the government to increase its stake to 40 per cent, for KES 2.4 billion (€22 million), though this was not taken up, for reasons the PIC could not determine. Its chairman complained that it seemed: "a very well calculated plan to fleece the people of Kenya" (Wokabi, 2013). If it was, then it may have failed, as:

> In 2014, Orange intended to implement certain solutions allowing to respond to Telkom Kenya's financial difficulties. During the fourth quarter, due to continuing disagreements with the Government of Kenya, its co-shareholder, Orange concluded it was contractually unable to implement these solutions without the latter's agreement. This led the Group to conclude that it had lost control over the entity. (Orange, 2015, p. 36)

The Orange story in Kenya is complex and its future uncertain, not least since the Group has sold some of its African holdings. The motivation for involving Agility and Alcazar remains as opaque as the identities of their beneficial owners.

7. Alcatel SA

Investigations by the USA Department of Justice, the Securities and Exchange Commission (SEC) and by Alcatel itself into its possible violations of the Foreign Corrupt Practices Act (FCPA) led to an admission that Alcatel had paid bribes to a series of operators in return for contracts to supply equipment (*USA* v *Alcatel-Lucent SA*, 2010; *SEC* v *Alcatel-Lucent*, 2010). In the case of Kenya, the money was believed to have been channelled to officials on behalf of a mobile operator. The USA authorities removed many of the names, though the following are easily and unambiguously identifiable: Kencell, Sameer Group and Vivendi[16].

When Kencell won its licence, it invited tenders from manufacturers to provide network equipment and associated services, estimated at USD 87 million, including a switching centre and an operations and maintenance centre. Vivendi, representing Kencell, informed Alcatel, one of a short list of two suppliers, that it would win on condition it hire an

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"intermediary" whose fees of USD 20 million were to be added to the contract price. A side agreement provided that Kencell would reimburse Alcatel those fees, in the event of the underlying contract being cancelled. The contracts were signed with different entities to avoid a conspicuous single payment and the money transferred to three banks in Mauritius. The intermediary provided reports about African telecommunications, but not about Kenya. USA prosecutors found a "high probability" that all or a large portion of the USD 20 million was passed to Kenyan government officials involved in awarding the licence to Kencell.

French prosecutors subsequently investigated Jean Caillet, as the intermediary, and his firms: Swiss-registered Telliac SA and Mauritius-registered Aamil Ltd (Teyie, 2011)[17]. They sought MLA from Kenya in October 2008, requesting Naushad Merali be interviewed as having signed contracts with Caillet. The Kenyan authorities took no action.

The purpose of the USD 20 million bribe remains uncertain, but is disproportionate for the equipment contract. The USA authorities suggested it was for officials (i.e. ministers) for the licence, though French prosecutors believed it was to be the capital which Merali needed to fund the Kencell network, effectively providing his investment from revenues to be extracted from future customers, while paying a substantial percentage to Caillet. Vivendi was not prosecuted in the USA, France or Kenya (*SEC* v *Vivendi Universal, S.A., Messier and Hannezo*, 2003).

8. Conclusion

The case of Kenya adds to the small body of work on corruption in the telecommunications sector and confirms the value of further such studies, helping to link two largely distinct areas of research. Once there is a sufficiency of material, it would be desirable to see a history of the liberalisation of global telecommunications markets in the "archaeological" tradition of Foucault (1969), fully incorporating the role of corruption.

There are accounting challenges, primarily concerning disclosure of the identity of business owners and partners, plus some transactions. The need to be able to identify the beneficial owners of operators and vendors is clear, especially eliminating opaque offshore registries. Practically, it needs a prohibition by governments and regulatory authorities against the use of shell companies, both directly in holding licences and in being awarded contracts, and indirectly as partners in those operators and vendors. To be effective, the company ownership details must be audited and published, including any intermediary companies and partners. Similarly, a ban on transactions in the days after contracts, licences and shares have been assigned seems essential, perhaps for as long as two years, to avoid the postponement of corrupt transactions. While researchers have access to a growing number of tools to find and analyse open data (Open Corporates (2014)), it requires governments to publish more such data (e.g. contracts, licences and spectrum holdings)[18]. Researchers have not pursued beneficial ownership in Kenya or in telecommunications more generally, apparently failing to distinguish real and corrupt or fraudulent investors and suppliers, even when some firms are fronts for politicians. A greater challenge is to build a case to require firms to report the beneficial ownership of their partners and the true values of dividends paid and all transactions in their holdings.

The Mobitelea ownership structure, through a chain of post-imperial British islands, has something of John Le Carré about it, a level of sophistication that suggests it was designed not to evade the modest and, sadly, weak Kenyan controls, but the more rigorous provisions of the USA FCPA. It may be the first recorded attempt to disguise bribes as an investment and thus evade prohibitions against direct and indirect benefits for ministers and presidents. This potential loophole requires further legal analysis, as it would imply the need to revise laws and treaties. It is also presents an opportunity to search out other uses of the same technique, even building a diffusion model to identify its source and vectors.

Kenyans might baulk at the suggestion, but the money siphoned from telecommunications operators by politicians was not enormous and is probably more than offset by the

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economic gains from widespread access to mobile telephony, mobile banking and the Internet, plus an emerging ICT innovation economy. Substantially greater damage seems to have been done by the previously unnoticed failure to address the conflicts of interest and the limited competition on the market, notably delays in privatisation and the launch of service by the third mobile licensee, both leading to their eventual failures. Surprisingly, studies of the telecommunications market and m-banking have largely ignored questions of competition, market failures and the absence of pro-competitive regulatory measures. Standard tools for better regulation, such as competition analysis, impact assessment, post implementation review, a system of appeals, parliamentary oversight and peer review, were avoided or ineffective, while their omission was largely ignored.

Kenya adopted liberalisation in the absence of good governance, having to suffer substantial interference by politicians. There does not seem to have been any interest at the parliament, ministry or regulatory authority in creating a competitive market, failing to measure the level of competition or to take action to remove bottlenecks, despite this being a central policy objective of liberalisation. Analyses of laws and policies, and of their implementation, largely ignored these problems, accepting reports of market growth at face value, focusing instead on the regulatory authority, without considering the conflicted roles of the state and its officers. In future, it will be essential to examine the whole system and to consider the substantial literature on corruption.

Until effective controls are introduced, rent-seeking by government ministers through front companies created to "win" procurement contracts will continue. The frauds concerning the procurement of networks needed to support the police and army are especially serious, given the internal and external threats faced by Kenya. They contribute to the problems of ensuring the safety of citizens and require further analysis, beyond the ease of stealing money from the budget of the secret state.

Notes

1. Kibaki had served as a cabinet minister under Jomo Kenyatta and then Moi, holding the following portfolios: Finance (1969-1981), Home Affairs (1982-1988) and Health (1988-1991).
2. In 2001, CCK licensed Gilat Alldean Ltd as the second VSAT operator, after Telkom. Alldean is owned by the Wananchi Group. Gilat is a foreign supplier of satellite-based communication services, which Alldean resells.
3. For discussion of the arbitration and court decision, see Allen (2014).
4. The judge was subsequently removed from the bench.
5. e.g., Joseph Kinyua, as permanent secretary at the Treasury, served on both boards.
6. It had launched an analogue ETACS service in 1993, followed by a digital GSM service in 1996.
7. No penalty or charges were brought against the firms and individuals.
8. Merali only stood down as Chairman of Airtel Kenya in 2014.
9. The Essar Group had telecommunications interests in India, Congo, Kenya and Uganda, plus a partnership with Dhabi Group (t/a Warid Telecom).
10. There was a failed sale of 49% to the Mt. Kenya Consortium comprising: KPN (Netherlands), Econet Wireless (Zimbabwe) and South African state-owned firms Eskom Enterprises and Transtel. It had beaten Telekom Malaysia and Orascom (Egypt).
11. At that time a front for the Ghaddafi family interests.
12. *Pesa* is Swahili for cash. However, the idea originated in Somalia.
13. The Vodafone annual report states:
    During the year ended 31 March 2009, under an agreement with Mobitelea Ventures Limited, the Group completed the purchase of a 5% indirect equity stake in Safaricom increasing the Group's effective interest in Safaricom to 40%.
    At 31 March 2009, the fair value of Safaricom Limited was KES 48 billion (£421 million) based on the closing quoted share price on the Nairobi Stock Exchange.
    On that day, KES 48 billion was worth USD 600 million. Safaricom had a market capitalisation of KES 120 billion, of which 5 per cent would have been KES 6 billion (USD 75 million).

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14. He served as Minister of Tourism, Commerce and Industry from 1999 to 2001, then as Minister of Trade and Industry from 2001 to 2002.
15. Agility is also a partner with Orange in Korek Telecom, a mobile operator in Iraq.
16. US documents refer to "French Telecom", which is clearly neither France Telecom nor Orange.
17. Caillet was allegedly involved as an intermediary for Total in the Iraq oil for food scandal (de Senneville, 2013).
18. Kenya is already a member of the Open Government Partnership (OGP, 2014).

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