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SUBMISSIONS ON THE TRADE DESCRIPTIONS (AMENDMENT) BILL, 2026

Kenya Gazette Supplement No. 153 (National Assembly Bills No. 42), Nairobi, 19th June 2026 — Sponsored by the Hon. Kimani Ichung'wah, Leader of Majority Party. Submitted pursuant to Article 118 of the Constitution and the invitation for public participation by the relevant Departmental Committee of the National Assembly

1. Introduction

The Consumers Federation of Kenya (COFEK) is Kenya's apex consumer body, mandated to advance consumer welfare through litigation, policy advocacy and institutional accountability. COFEK welcomes the opportunity to submit its views on the Trade Descriptions (Amendment) Bill, 2026 ("the Bill"), which proposes to amend the Trade Descriptions Act, Cap. 505 ("the principal Act" or "TDA"), a statute enacted in 1968 and substantially unamended since.

These submissions assess the Bill's consistency with Article 46 of the Constitution, the Consumer Protection Act, 2012 ("CPA"), the Sale of Goods Act, Cap. 31 ("SGA"), decided case law, and comparative practice. They identify the legitimate gap the Bill seeks to cure, flag specific constitutional risks in the drafting, and address the Committee's question on the consequences of merging this law with the CPA and the SGA.

2. Constitutional Framework — Article 46

Article 46(1) of the Constitution entitles consumers to goods and services of reasonable quality; to information necessary to gain full benefit from goods and services; to protection of their health, safety and economic interests; and to compensation for loss or injury arising from defects. Article 46(2) obliges Parliament to enact legislation for consumer protection and for fair, honest and decent advertising, while Article 46(3) extends the Article to both public and private suppliers.

The Court of Appeal's decision in *Nairobi Bottlers Limited v Ndung'u & another [2023] KECA 839 (KLR)* is the leading authority on how Article 46 interacts with ordinary consumer legislation. The Court held that the omission of nutritional, storage and contact information from glass Coca-Cola bottles (while the same information appeared on plastic bottles) violated the Article 46(1)(b) right to information and amounted to unfair discrimination under Article 27. Significantly, the Court adopted a "Constitution-compliant reading" of the CPA — reading the statute up to meet the constitutional floor, rather than treating Article 46 as merely aspirational. This confirms that <u>any TDA amendment will be measured not only against its own text but</u>

against whether it advances or falls short of the Article 46(1) guarantees, and that courts will read gaps in the Bill purposively in the consumer's favour.

Assessed against this standard, the Bill's core amendments — extending trade description obligations to digital platforms, adding "mileage" as a trade description parameter, and strengthening inspection and enforcement powers — are, in principle, consistent with and advance Article 46(1)(b) (information) and 46(1)(c) (economic interests). The concerns below relate not to the Bill's object, but to specific clauses whose drafting creates friction with other constitutional guarantees, chiefly Articles 47, 49–51 and 27.

3. Consistency with the Consumer Protection Act, 2012

The CPA already occupies much of the field the Bill legislates into. Sections 11–13 of the CPA prohibit "false, misleading or deceptive representation" and "unconscionable representation" in near-identical terms to the TDA's false trade description offences, and section 5(2) CPA voids any contractual attempt to exclude implied warranties under the SGA or the CPA itself. The CPA's definition of "consumer transaction" and "representation" is already broad enough to capture digital and social-media advertising, since it is not tied to a fixed medium.

Three consistency issues arise:

- Definitional duplication: the Bill inserts a definition of "digital platform" into the TDA (clause 2(a)(iv)) that does not exist in, and is not cross-referenced to, the CPA. Two statutes will now separately define overlapping digital-commerce concepts, inviting divergent interpretation over time.
- Parallel liability tracks: the same conduct — a false claim on an online marketplace — could attract a criminal prosecution under the amended TDA (fine up to KES 2 million or imprisonment up to five years, section 15 TDA) and, simultaneously, a civil unfair-practice claim with rescission and damages under CPA sections 11–13 and 16. Kenyan law does not clearly state whether these tracks are cumulative, alternative, or mutually exclusive, and the Bill does not address the point.
- Institutional fragmentation: "inspector" under the TDA is defined (section 2, Cap. 505) as an inspector of weights and measures, distinct from the Kenya Consumers Protection Advisory Committee and county consumer protection structures contemplated under the CPA. Expanding TDA inspectors' powers (arrest, search, seizure, platform takedown demands) without aligning them to the CPA's institutional architecture risks two regulators asserting jurisdiction over the same trader with different evidentiary thresholds.

None of this renders the Bill unconstitutional, but it does mean the Bill, if passed in its current form, will not cure fragmentation — it will add a third overlapping enforcement track alongside the CPA and the common law of sale.

4. Consistency with the Sale of Goods Act, Cap. 31

The SGA already implies, into every contract of sale, conditions that goods sold by description correspond with that description (section 15), and that goods are of merchantable quality and reasonably fit for purpose where bought from a seller dealing in goods of that description (section 16). A false trade description under the TDA and a breach of the section 15 implied condition under the SGA will frequently arise from the same facts.

The Bill does not amend the SGA, nor does it insert a saving or harmonisation clause preserving the consumer's SGA remedies (rejection of goods, damages, rescission) alongside the new TDA offences. The consumer is left to navigate three separate causes of action — criminal prosecution under the TDA, statutory unfair-practice relief under the CPA, and a private civil claim under the SGA — for a single wrong, each with different limitation periods, standards of proof, and forums (criminal courts, the Kenya Consumers Protection Advisory Committee, and civil courts respectively).

5. Clause-Specific Constitutional Concerns

5.1 Reverse onus — new section 14A ("Presumption concerning possession")

Clause 6 inserts section 14A, deeming a person in possession of falsely described goods on trade premises to hold them for trade, with "the onus of proving the contrary" placed on that person. This is a classic reverse-onus provision and engages the presumption of innocence under Article 50(2)(a).

Kenyan courts apply the proportionality (Oakes) test to such clauses: see *Okiya Omtatah Okoiti v Attorney General & another (Constitutional Petition No. 3 of 2019)* and *Johnstone Muthama v DPP & 2 others (Petition No. 430 of 2015)*, both of which struck down or scrutinised reverse-onus clauses that shifted the burden of disproving guilt onto the accused without adequate justification. The South African Constitutional Court's reasoning in *S v Bhulwana; S v Gwadiso* — that a presumption is unconstitutional where there is no logical connection between the fact proved (possession) and the fact presumed (possession for a prohibited purpose) — is instructive and persuasive here. Mere possession of goods on trade premises is not, without more, logically indicative of intent to trade in falsely described goods rather than, for example, unopened stock awaiting inspection, returned goods, or goods held for re-export. COFEK recommends that section 14A be redrafted as an evidential (rather than legal) burden, or supported by an explicit rational-connection threshold, to survive constitutional scrutiny.

5.2 Search, arrest and seizure powers — new sections 21A and 21B

Clause 10 grants inspectors power to stop, detain and arrest without warrant, search persons, ships, aircraft and vehicles, and seize goods and documents. Unlike section 21(3) of the principal Act — which requires a magistrate's warrant to enter a dwelling — the new section 21A does not on its face preserve this safeguard for the arrest and stop-and-search powers, creating a gap with Article 31 (privacy) and Article 49 (rights of arrested persons). The proviso limiting arrest to obstruction, flight risk, or false identification is a reasonable proportionality anchor, consistent with ordinary police-power drafting, but COFEK recommends an express cross-reference preserving the section 21(3) warrant requirement for dwellings in all new inspection, search and arrest powers, not only the original inspection power.

5.3 Digital platform takedown powers — new section 21A(c)

The power to require platform owners to remove traders, pull down advertisements, and disclose trader information is a legitimate and increasingly common regulatory tool (see the comparative discussion below), but as drafted it contains no notice-and-hearing step, no appeal mechanism, and no timeline, before an inspector's determination that a trader has "contravened the provisions of this Act" triggers removal. This engages Article 47 (fair administrative action) and, for the trader whose goods or advertisement is removed, Article 27 (equal protection) and potentially Article 40 (protection of property in the economic sense of trading rights). COFEK recommends the Bill require inspectors to issue a compliance notice with a defined cure period before a takedown demand issues, save in cases of imminent public-safety risk, mirroring due-process safeguards found in comparable digital-enforcement regimes (e.g. Kenya's Data Protection Act enforcement notices).

5.4 Vicarious liability of employers and partners — new sections 16A and 16B

Clause 8 makes an employer or business partner criminally liable for the acts of an agent, servant or fellow partner "in so far as they concern the business," without an express due-diligence defence. Kenyan and comparable common-law courts have generally required that vicarious criminal liability, as opposed to civil liability, include a statutory due-diligence or "no knowledge and reasonable precautions" defence to avoid strict criminalisation of an innocent principal, which would otherwise sit uneasily with Article 50(2)(a). COFEK recommends inserting such a defence.

6. Comparative Practice: The United Kingdom Precedent

Kenya's TDA, Cap. 505, and the UK's Trade Descriptions Act 1968, share a common lineage and near-identical drafting (both derive from the Merchandise Marks Act tradition). In 2008, the United Kingdom repealed the substantive provisions of its Trade Descriptions Act and folded them into the Consumer Protection from Unfair Trading Regulations 2008, which implemented the EU Unfair Commercial Practices Directive. The stated purpose of that consolidation was, in the words of the implementing instrument's drafters, to "avoid a duplication of laws" and to "reunite the legislation dealing with false or misleading price indications with the legislation dealing with other false or misleading descriptions of goods or services" under a single unfair-commercial-practices standard. The UK Trade Descriptions Act remains nominally on the statute book but is now almost entirely spent.

This history is directly relevant to the Committee's question: the jurisdiction on which Kenya's TDA is modelled has already concluded that maintaining a standalone trade-descriptions statute alongside a general consumer-protection statute produces exactly the duplication problems identified in Part 3 above, and resolved it by merger rather than parallel amendment.

7. What the Bill Is Genuinely "Curing"

Notwithstanding the drafting concerns above, the Bill responds to real and largely undisputed gaps in the 1968-era TDA that the CPA, despite its breadth, does not squarely close:

- No coverage of digital platforms, online marketplaces or social-media advertising in the definition of "advertisement" or "trade" (clause 2).
- No inclusion of "mileage" as a trade description parameter — a live and recurring problem in Kenya's used-vehicle import market (clause 5).
- No provision addressing goods that are "processed or reconditioned" rather than strictly "manufactured or produced" (clause 4).
- Weak enforcement architecture: the existing inspection regime (section 21, Cap. 505) has no seizure-notice form, no test-purchase power, and no power to compel digital intermediaries to act — all now proposed (clauses 9–11).
- No accountability mechanism for employers or business partners who benefit from an agent's false trade description (clause 8).

These are legitimate legislative objects consistent with Article 46(2)'s mandate to legislate for "fair, honest and decent advertising," and COFEK does not oppose the Bill's core purpose.

8. The Merger Question: Risk and Recommendation

If the Bill is enacted as a standalone amendment to the TDA — leaving the CPA and SGA untouched and unreferenced — Kenya will have three parallel, unharmonised statutory regimes addressing substantially the same conduct (false description of goods and services), each with a different forum, standard of proof, remedy and limitation period. The principal risks are:

- Forum-shopping and inconsistent outcomes for materially identical facts, depending on whether a complainant or prosecutor proceeds under the TDA, the CPA, or the SGA.
- Possible double-jeopardy tension under Article 50(2)(o) where a trader faces TDA criminal prosecution after already being subject to a CPA unfair-practice determination arising from the same transaction.
- Regulatory duplication and confusion for traders attempting compliance, and for county and national consumer-protection institutions with unclear jurisdictional lines.
- Definitional drift, as "digital platform," "advertisement" and "representation" acquire slightly different meanings across three statutes over time, exactly the problem the UK's 2008 reform was designed to prevent.

COFEK's recommendation is not that the Bill be withdrawn, but that Parliament treat it as the first step toward the consolidation the UK experience commends: either (a) insert an express harmonisation clause in the Bill stating that TDA remedies are without prejudice to, and read together with, the CPA and SGA, with a single set of cross-referenced definitions; or (b), as a medium-term reform, commission the Kenya Law Reform Commission — which has itself flagged the need for "rationalisation of the law" on consumer rights — to fold the Trade Descriptions Act into a consolidated Consumer Protection Code, following the UK precedent, so that Kenya's Article 46 framework speaks with one voice rather than three.

9. Summary of Recommendations

- Retain the Bill's substantive modernisation (digital platforms, mileage, processed/reconditioned goods, enforcement tools) as consistent with Article 46(2).
- Redraft section 14A's presumption of possession as an evidential burden with a rational-connection threshold, to withstand Article 50(2)(a) scrutiny.
- Extend the section 21(3) dwelling-warrant safeguard expressly to the new sections 21A and 21B search, seizure and arrest powers.
- Insert a compliance-notice-and-cure-period requirement before digital-platform takedown demands under section 21A(c), save for imminent public-safety cases.
- Insert a due-diligence defence into the new sections 16A and 16B employer/partner liability provisions.
- Insert an express harmonisation clause aligning TDA remedies with the Consumer Protection Act, 2012 and the Sale of Goods Act, Cap. 31, and adopt shared definitions across the three statutes.
- Refer the broader question of statutory consolidation to the Kenya Law Reform Commission, drawing on the United Kingdom's 2008 merger of the Trade Descriptions Act into the Consumer Protection from Unfair Trading Regulations.

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