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Henry K. Rotich, EGH

Cabinet Secretary

The National Treasury

Treasury Building, Harambee Avenue

P. O. Box 30007 - 00100

NAIROBI

Dear

**RE: AN ADVISORY OPINION ON TREASURY CIRCULAR NO. 13/2016 ON
COMMITMENT CONTROL AND EXPENDITURE MEASURES**

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The attention of the Commission has been drawn to Circular No. 13/2016 by the National Treasury of 12th July 2016 regarding the implementation of the budget for 2016/2017 financial year. Notably, the Circular purports to rationalize spending through curtailing expenditure on a number of items.

Worryingly, the National Treasury has unilaterally proceeded to implement this Circular by, *inter alia*, withholding part of the allocation of public entities for the First Quarter of the Financial Year 2016/17. While appreciating the importance of rationalization of expenditure in the public sector and the role of the National Treasury therein, the manner of issuance of Circular No. 13/2016 and its implementation raises serious constitutional and legal issues that have the potential of impacting negatively on public administration in Kenya. In accordance with our mandate under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act, we hereby render our Advisory Opinion on the matter which we hope will enable you to take appropriate action therein.

I. THE PROCESS AND IMPLEMENTATION OF THE BUDGET

The budgetary process is an integral part of public finance under the Constitution, the Public Finance Management Act (PFMA), 2012 and the Public Finance Management (National Government) Regulations (PFMR), 2015 among other legislation. The budgetary process and implementation as well as the roles of every stakeholder are well prescribed in the law. While the Executive through the Cabinet Secretary for the National Treasury plays a leading role in the preparation of the budget estimates, Parliament is the sole authority for appropriation of funds as proposed in the budget estimates [A. 95, 96 & 221 of the Constitution; Section 37 of PFMA; & Section 39 of PFMR]. In approving the estimates, Parliament can adjust the proposals, but which must be in line with the Constitution and Section 39(3) of PFMA. It is worthwhile to note that the budgetary process is consultative and participatory. In preparation of the estimates, the National Assembly is required to consult Ministries and government departments. To this end, the National Assembly has always set budgetary ceilings for every public entity and held consultative meetings on the process. This forms the basis of the final estimates submitted to Parliament by the National Treasury for approval. This is the process that was followed in the preparation and approval of the budget for the 2016/17 Financial Year.

II. IMPORT OF THE TREASURY CIRCULAR NO. 13/2016

While appreciating the need for prudent and responsible use of resources as per Article 201(d) of the Constitution and the delegated role of the

National Treasury in relation to public finance, any such action should be in consonance with the letter and spirit of the Constitution. In relation to circulars by the National Treasury, the same should not undermine the Constitution. We have examined the aforesaid Circular and its implementation, and noted that it raises following fundamental issues:

- a) It contravenes the Constitution and the PFMA insofar it usurps the role of Parliament through review of the budget estimates after parliamentary approval. It bears restating that Parliament is the sole authority for appropriation of funds for expenditure; the National Treasury does not have such mandate or powers. While the National Treasury can prescribe measures for administration of public finance, the same does not extend to approval of expenditure. The import of the foregoing is that once approved by Parliament, the various government departments and ministries can access their resources as per the approved allocations. The National Treasury should facilitate such access without putting obstacles.

An examination of the Circular No. 13/2016 clearly shows an attempt by the National Treasury to circumvent the Constitution thereby undermining the role of Parliament in the budgeting process. Given the role of Parliament in the budgeting process, any review or adjustment of the budget should be done its approval. There is no evidence that the National Treasury sought and obtained the approval of Parliament before issuing the Circular. Indeed, the issuance of the Circular on 12th July 2016, just 11 days after the commencement of the Financial Year 2016/17 raises more questions than answers. Moreover, the same was issued before the uploading of the budgets, work plans and procurement plans in the Integrated Financial Management Information System (IFMIS). Furthermore, the National Treasury has already unilaterally commenced the implementation of the Circular by withholding part of the allocations for government ministries and departments for the First Quarter of the Financial Year 2016/17. This raises the question whether it was a mere coincidence or a predetermined action by the National Treasury even as it presented the budget estimates to Parliament for approval. Evidently, the action by the National Treasury amounted to revision of the budget estimates which can only be done by or under the authority of Parliament.

b) It undermines the independence and functioning of government departments and ministries, especially the Constitutional Commissions and Independent Offices. It is worth noting that the budgeting process is consultative and is based on the ceilings prescribed by the National Treasury for every sector and institution. This process of consultations and negotiations is led by the National Treasury. Once agreed upon, the National Treasury draws up the final estimates for presentation to Parliament. While Parliament may amend the estimates, the final estimates by the National Treasury invariably forms the basis of preparations of annual work plans and procurement plans for government departments and ministries. The allocations for government departments and ministries can only be released upon the uploading of the annual work plans and procurement plans.

In the 2016/17 Financial Year, government departments and ministries had prepared their work plans and procurement plans based on the estimates presented to Parliament by the National Treasury. The issuance of the Circular to curtail spending just 12 days after the beginning of the 2016/17 Financial Year even before the budget was uploaded in the IFMIS system was, therefore, surprising, irrational, improper and unlawful. The import of the Circular defeats the very purpose of the budgeting process if the National Treasury can set the budget ceilings for government departments and ministries, and immediately and unilaterally review the allocations even before commencement of implementation of the budget. It smacks bad faith and violates the express provisions of Article 201(a) of the Constitution which requires 'openness and accountability in financial matters.' The issuance of Circulars by the National Treasury on matters relating to public finance is not absolute; it has to conform to the law. If the cuts in the Circular were necessary, the same could have effectively been achieved during the preparation of the budget estimates which was spearheaded by the National Treasury. This action has the potential of destabilising public administration and service delivery.

c) The withholding of part of the allocations for government ministries and departments raises issues of legality and accountability. As stated earlier, Parliament is the sole agency for appropriation of funds for expenditure. It is not clear whether the withholding of part of the allocations by the National Treasury was sanctioned by Parliament

since it amounts to revision of the budget. Moreover, it is not clear to whom the withheld funds would be allocated, the purpose and accountability thereof. Oversight by Parliament on expenditure only relates to funds appropriated for use by a particular government department or ministry. The import of the foregoing is that it may not be possible for Parliament to oversight the use of the withheld funds.

III. OTHER ACTIONS THAT UNDERMINE GOOD GOVERNANCE

Beyond the Circular, we have noted with concern, the National Treasury's increasing actions in budget allocation and expenditure control which the operations of public agencies.

i) Allocation of Resources

The allocations for some public agencies have always been inadequate and sometimes arbitrary. In particular, Constitutional Commissions and Independent Offices have always experienced inadequate allocation despite the provision of Article 249(3) of the Constitution which requires 'adequate allocation to enable them perform their functions.' as a result, these oversight institutions have had to shelve, delay or down grade their programmes and activities, including acquisition of appropriate software, research and training of staff. Moreover, lack of equity and unfair treatment of Commissions and Independent Offices in comparison with other Government employees in terms of budgetary allocation for the Car Loan and Mortgage Scheme has been noted. The inadequate allocation, which can be evidenced by their allocations to these bodies over the years, greatly undermines the discharge of their oversight functions.

ii) Placement of Oversight Institutions in the MTEF Process

Part of the reason for the inadequate allocation for the Commissions and Independent Offices stems from their placement in broad thematic sectors in the budget process where they are lumped with other large institutions that eventually get the lion share of resources. This classification is limiting to these bodies especially on projects or activities that require significant outlay of funds.

iii) Disbursement of Funds by the National Treasury

Instances of delay in disbursing funds to public agencies by the National Treasury have been noted with concern. The import is that funds disbursed late cannot be spent due to limited time for implementation. While we appreciate the possibility of challenges relating to revenue collection, the action of disbursing funds late towards the end of the reporting period cannot be justified. Indeed, the only conclusion therefrom is control of spending by public agencies on the pretext of challenges in revenue collection.

iv) The Integrated Financial Management Information System

The Integrated Financial Management Information System has been used to unlawfully control expenditure thereby undermining the operations and independence of public agencies, especially the oversight bodies. For instance, we have noted the National Treasury's frequent and sometimes arbitrary closure of IFMIS targeting specific items without notice thereby undermining service delivery. In the Financial Year 2015/16, the National Treasury not only released the funds for the Fourth Quarter late, but also shot down IFMIS on 27th June 2016 thus affecting operations and leading to pending bills. Whereas the primary objective of IFMIS in financial management is noble, it has become a tool by the National Treasury to unlawfully control public expenditure.

IV. WAY FORWARD

On the basis of the foregoing and the need for good public administration, we advise as follows:

- i) The National Treasury should issue another circular to withdraw the offending part of Circular No. 13/2016 due to the above mentioned reasons;
- ii) The National Treasury should immediately disburse the total quarterly funds allocated for every government department or

ministry. Where part of the funds for the First Quarter have been withheld, the same should be disbursed to the relevant department or ministry;

- iii) Where there is need for revision of estimates, the National Treasury should consult with the affected public agencies in advance and further ensure parliamentary approval before implementation;
- iv) The National Treasury should publish in the Kenya Gazette and at least two newspapers of national coverage, the funds that have been withheld, the beneficiaries, and the accountability thereof;
- v) The National Treasury and the National Assembly should allocate adequate resources to public agencies, especially the Constitutional Commissions and Independent Offices in line with Article 249(3) of the Constitution to enable them discharge their responsibilities effectively. This should be based on their activities and projections as guided by their mandates and Strategic Plans;
- vi) The National Treasury should consider establishing a separate and distinct thematic sector for Constitutional Commissions and Independent Offices for budgeting purposes to full bring the provisions of Article 249(3) on their resource allocation to fruition; and
- vii) The shut-down of IFMIS system should be avoided at all costs unless necessary, justified and unavoidable. In the event a shut-down is necessary and unavoidable, notice should be given in advance.

We thank you for your continued co-operation and assure you of our highest regards.

Yours

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CHAIR OF THE COMMISSION

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3. All Constitutional Commissions and Independent Offices