

BUSINESS INTEGRITY COUNTRY AGENDA (BICA) KENYA REPORT



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KENYA REPORT

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ACRONYMS

ACECA:	<i>Anti-corruption and Economic Crimes Act, 2003</i>
BICA:	<i>Business Integrity Country Agenda</i>
BKMS:	<i>Business Keeper Monitoring System</i>
BRS:	<i>Business Registration Services</i>
CBK:	<i>Central Bank of Kenya</i>
CMA:	<i>Capital Markets Authority</i>
CSR:	<i>Corporate Social Responsibility</i>
CSO:	<i>Civil Society Organisations</i>
COMESA:	<i>Common Market for Eastern and Southern Africa</i>
DCI:	<i>Directorate of Criminal Investigations</i>
DPP:	<i>Director of Public Prosecutions</i>
EABC:	<i>East Africa Business Council</i>
EACC:	<i>Ethics and Anti-Corruption Commission</i>
EAC:	<i>East African Community</i>
FRC:	<i>Financial Reporting Centre</i>
GDP:	<i>Gross Domestic Product</i>
IAASB:	<i>International Auditing and Assurance Standards Board</i>
ICPAK:	<i>Institute of Certified Public Accountants of Kenya</i>
ICPSK:	<i>Institute of Certified Public Secretaries of Kenya</i>
IEBC:	<i>Independent Electoral Boundaries Commission</i>
IFMIS:	<i>Integrated Financial Management Information System</i>
KAM:	<i>Kenya Association of Manufacturers</i>
KBA:	<i>Kenya Bankers Association</i>
KEPSA:	<i>Kenya Private Sector Alliance</i>
KISM:	<i>Kenya Institute of Supplies Management</i>
KRA:	<i>Kenya Revenue Authority</i>
MAT:	<i>Multi Agency Team</i>
MCK:	<i>Media Council of Kenya</i>
MLA:	<i>Mutual Legal Assistance</i>
MSEA:	<i>Micro and Small Enterprise Authority</i>
KRA:	<i>Kenya Revenue Authority</i>
NAG:	<i>National Advisory Group</i>
NSE:	<i>Nairobi Securities Exchange</i>
OAG:	<i>Office of the Auditor General</i>

- ODPP:** *Office of the Director of Public Prosecutions*
- OECD:** *Organisation for Economic Co-operation and Development*
- ORPP:** *Office of the Registrar of Political Parties*
- PIN:** *Personal Identification Number*
- POCAMLA:** *Proceeds of Crime and Anti Money Laundering Act*
- PPDA:** *Public Procurement and Asset Disposal Act*
- PPARB:** *Public Procurement Review Board*
- PPRA:** *Public Procurement Regulatory Authority*
- SFO:** *Serious Fraud Office*
- TI:** *Transparency International*
- TRAC:** *Transparency in Corporate Reporting*
- WPA:** *Witness Protection Agency*
- 1 USD= 101.25 Kenya Shillings**

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ABOUT BUSINESS INTEGRITY COUNTRY AGENDA (BICA)

The role of business integrity in fighting corruption

The Business Integrity Country Agenda (BICA) is an initiative of Transparency International (TI) developed both to enhance national level business integrity and to create a body of evidence on business integrity in various countries. BICA is a widely shared agenda for reform and acts as a collective momentum towards enhanced business integrity among key stakeholders. It is envisaged that BICA will become an important reference point for fighting corruption in business practices around the globe, including Kenya.

The private sector is generally viewed as the supply side of corruption, with the making of corrupt payments to gain business advantages: there is a common belief that companies that do not engage in corrupt practices may lose business prospects. The business environment is thus not a level playing field but improving business integrity is a way to create an environment in which all businesses can prosper.

Transparency International defines business integrity as “adherence to globally-recognised ethical standards; compliance with both the spirit and letter of laws and regulations; and the promotion of responsible core values such as honesty, fairness and trustworthiness”. Business integrity can promote a healthy working environment for employees and also foster a stronger community relationship. Commitment to business integrity drives companies to proactively pursue the objectives and values of available laws rather than just staying within the bounds of the law. BICA aims to establish collective action among three main stakeholders: the public sector, private sector and civil society. This is reflected in the BICA framework illustrated in Figure 1.

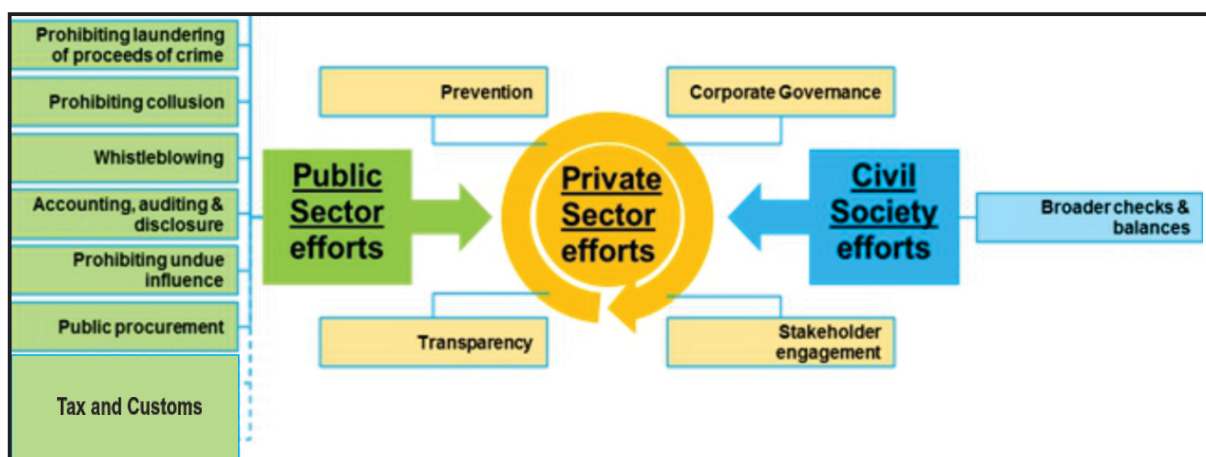


Figure 1. BICA Framework

Source: Transparency International¹

The BICA Framework illustrates the dynamism of collective efforts towards developing a business integrity environment among the three main stakeholders. Although the focus is the private sector, in order to foster sound business integrity, the active participation of both the public sector and civil society is necessary. Overall, there are 15 thematic areas and 51 indicators for assessment of the three stakeholder groups.

1. Transparency International 1 BICA Framework

Why BICA?

BICA is the first report to analyze the overall business integrity environment in a given country—in this case –Kenya - by looking at the efforts of all stakeholders. Furthermore, it is the first comprehensive assessment aimed at reducing private sector corruption. The report creates a body of evidence and acts as a benchmark to assess future progress in private sector anti-corruption movements. Additionally, BICA informs a collective action agenda that will be adopted based on the findings of the report. The BICA assessment is designed to encourage all stakeholders to use the findings and collaborate to improve business integrity and level the playing field for everyone.

Methodology

The three main stakeholder groups are assessed based on thematic areas. For the public sector there are nine thematic areas or assessment categories: prohibiting bribery of public officials; prohibiting commercial bribery; prohibiting the laundering of the proceeds of crime; prohibiting collusion; whistleblowing ; accounting, auditing and disclosure; prohibiting undue influence; public procurement; and taxes and customs. Each of these thematic areas has from three to six key indicators, each with a scoring question. The focus of the public sector assessment is to determine to what extent the country's laws and practices prevent, reduce and/or respond to corruption in the private sector.

For the private sector there are five thematic areas or assessment categories: integrity management; auditing and assurance; transparency and disclosure; stakeholder engagement; and board of directors. Likewise, each of these thematic areas has from three to four indicators, each with its scoring question. The focus of the private sector assessment is to determine to what extent private sector efforts prevent, reduce and/or respond to corruption in this sector.

Finally, civil society has just one thematic area or assessment category: broader checks and balances. This thematic area has three indicators with a scoring question for each. The focus of civil society assessment is to determine to what extent civil society efforts prevent, reduce and/or respond to corruption in the private sector.

The BICA adopts a multi-stakeholder approach in order to elicit a wealth of information and diverse views that may otherwise not be used or even be unknown. To this end a National Advisory Group (NAG) was established at the outset of the assessment. The NAG for the Kenya BICA comprised of nine members from each major stakeholder group, complemented by other national and international experts.

The main areas of responsibility of the NAG during the BICA Assessment were:

- Reviewing the assessment framework and proposal of adaptations to reflect the national context
- Assisting the external researcher in data collection and verification
- Reviewing and validating scoring of indicators
- Proposing recommendations for relevant stakeholder groups
- Supporting dissemination of assessment results after publication

The NAG met twice, on 12th July 2017 and 26th March 2018, and the full list of members is available in Annex².

2. For more information on the TRAC methodology, see https://www.transparency.org/news/feature/global_companies_global_transparency. It is important to note that the BICA uses this methodology as a basis for scoring of the indicator, transparency and disclosure

Data

The data was collected and validated through a comprehensive process that included:

- **Desk Research:** The main data source for the research was desk research of both primary and secondary sources. Data included information from laws, reports from various oversight institutions and law enforcement agencies, international institutions, local NGOs, private companies, and media publications. This was conducted in August and September of 2017 and additional data updated in January and February 2018.
- For the private sector assessment's indicators on corporate transparency and disclosure, an adaptation of TI's Transparency in Corporate Reporting (TRAC) methodology was used as a basis for collecting the relevant data. The questionnaire used can be found in ANNEX 2. Information on anti-corruption programmes, financial disclosure and stakeholder engagement among others was obtained by searching the companies' websites for policy documents, financial reports, activity reports, CSR and sustainability reports as well as any other information relevant to the study. Data for TRAC was collected in October 2017.
Expert Interviews: Where there was insufficient secondary data available to attribute a score, researchers conducted expert interviews from the public sector, private sector and civil society. These were conducted between August and October 2017.
Draft of the scores: Following the research, expert interviews and the references for each sub-indicator, TI Kenya generated the first draft of scores along with the comments related to each indicator and sub-indicator. The researchers based the proposed scores on their holistic analysis of the aggregated data.
- **Feedback from NAG:** TI - Kenya shared the indicator scores and comments with NAG members to validate the BICA report and to ensure the objectivity of the results. Three workshops were held to discuss each indicator and validate each score. Some of the scores were modified based on the recommendations and feedback of NAG members.
- **Final scores attribution:** Researchers revised the scores and comments based on NAG input and finalised the report. An independent expert reviewer edited and provided additional comments on the report.

Scoring

At the core of the BICA assessment framework are indicators which translate the (largely) qualitative information into a quantitative score (on a five-point scale with the options being 0, 25, 50, 75 and 100). Each indicator has an overall “scoring question” and more specific assessment criteria.

Indicator	Qualitative Judgement	Visualisation
0	The scoring question is answered, “No, not at all”. The evidence collected for the assessment criteria indicates that the requirements are not met at all.	Red
25	The scoring question is answered, “To a limited extent”. The evidence collected for the assessment criteria indicates that a few of the requirements are fully met; or that many requirements are met to a limited extent.	Red-Yellow
50	The scoring question is answered, “To some extent”. The evidence collected for the assessment criteria indicates that roughly half of the requirements are met; or that most requirements are met to some extent.	Yellow
75	The scoring question is answered, “Largely”. The evidence collected for the assessment criteria indicates that many of the requirements are met or most requirements are met to a great extent.	Yellow-Green
100	The scoring question is answered, “Yes, fully”. The evidence collected for the assessment criteria indicates that (almost) all of the requirements are met.	Green

In order to facilitate comprehension, the scoring results are visualised in traffic signal colours. The individual indicator results per thematic area are aggregated to an overall thematic area result, using a simple average calculation. Thus, each indicator within a thematic area is weighted equally. Again, the overall thematic area score is expressed through the traffic light analogy, using the colour symbol which corresponds closest to the aggregated score.

The idea of the scoring is not to cast a negative light on stakeholders or suggest that they lack willingness to improve the business integrity in Kenya. On the contrary, the purpose of scoring is to launch continued discussion and engagement with relevant stakeholders and to highlight where more efforts are needed in terms of law enforcement and legislative initiatives. A scoring metric creates benchmarks to assess continued progress, should TI- Kenya conduct a follow-up BICA assessment in future.

EXECUTIVE ASSESSMENT SUMMARY

The BICA assessment examines three main stakeholders: public sector, business sector and civil society, all of which are instrumental in building a strong business integrity environment. The stakeholders are analysed using 15 thematic areas and 51 indicators. In this summary, we present the key findings for the three stakeholder groups.

Assessment summary for the Public Sector

The public sector reviewed 29 indicators covering nine thematic areas as shown graphically below.

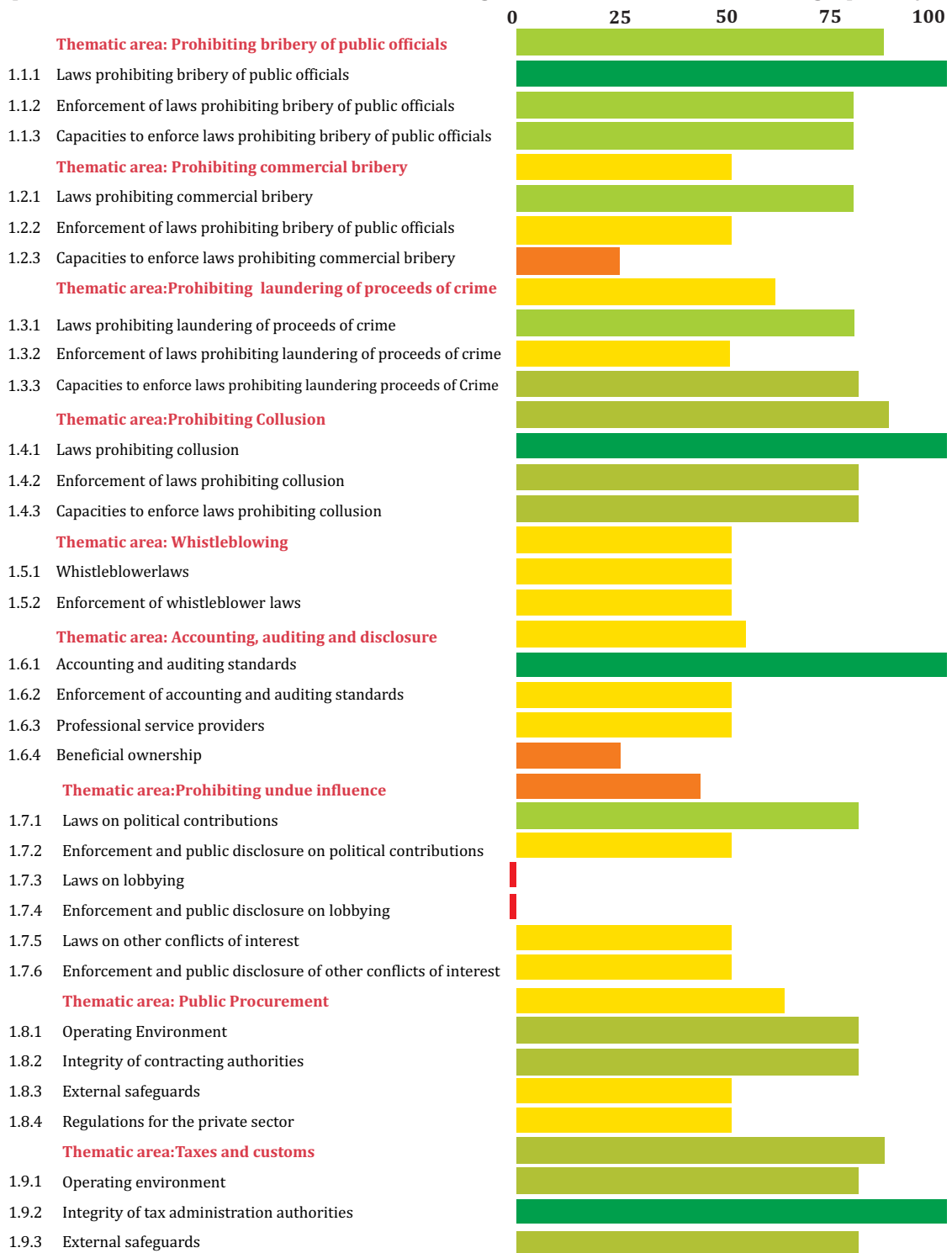


figure 2 :Assessment scores for public sector

The assessment finds that the Anti-corruption and Economic Crimes Act, 2003 (ACECA) and the Bribery Act 2016 contain sufficient provisions that **prohibit passive and active bribery of public and foreign officials**. Additionally, these laws have specific provisions that prohibit facilitation payments and include a broad category of what constitutes **undue advantage** to include money, employment, etc. The assessment however notes that there is no explicit provision prohibiting bribes as a tax deductible item.

The assessment notes that there is **some active enforcement** of the laws prohibiting bribery of public officials by the Ethics and Anti-Corruption Commission (EACC) and the Office of the Director of Public Prosecutions (ODPP) but under the ACECA. This therefore means that charges preferred against accused persons are currently reported (in ODPP and EACC reports) as economic crimes and not specifically bribery cases. The establishment of the Anti-corruption and Economic Crimes division at the Judiciary has also aided in the enforcement of the anti-corruption laws.

The EACC and the ODPP list **limited capacity** (Inadequate (human and financial resources) as a key challenge to execute their mandate; investigation and prosecution respectively. They also particularly note the arduous process associated with Mutual Legal Assistance (MLA) as another factor affecting proper enforcement.

The Bribery Act, 2016 prohibits passive and active **commercial bribery**. The enforcement of the Act on these provisions is yet to start as there have been no cases investigated or prosecuted so far. The development of regulations to boost implementation and enforcement is ongoing.

Capacities of the EACC and the ODPP for handling commercial bribery cases remain low as they are yet to adjust their resources accordingly. The assessment notes that the Bribery Act significantly expands the mandate of the EACC to focus on the private sector. The ODPP reports making efforts to improve its human resource capacity to handle anti-corruption matters in general.

The Proceeds of Crime and Anti Money Laundering Act (POCAMLA) 2009 contains provisions that **prohibit laundering of proceeds of crime**. This includes the concealment or disguise of property with knowledge that it was proceeds of crime; acquisition or use of property knowing that the property is the proceed of crime as well as association or participation in a conspiracy to facilitate, abet or counsel in the concealment or acquisition of proceeds of crime. The Act does not, however, have provisions that prohibit the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property.

The assessment notes that the Financial Reporting Centre (FRC) has the primary mandate to **enforce POCAMLA** with the assistance of various reporting institutions and supervisory bodies. It is however not possible to establish to what extent the law has being enforced, nor establish the capacity of the FRC as it hasn't produced any annual report since its formation in 2012.

The Competition Act, 2010 is the primary law that **prohibits collusion in Kenya**. The Act contains key provisions that prohibit making collusive tenders, fixing prices, sharing of markets by allocating customers, suppliers etc., and establishing output restriction quotas.

Enforcement of the Act is primarily the responsibility of the Competition Authority. The Authority, in its annual reports, has indicated active enforcement of collusion cases. Additionally, it has launched a leniency programme that is currently being rolled out to improve compliance to the Act.

The Authority reports having a working relationship with the Common Market for Eastern and Southern Africa (COMESA) Competition Commission and is involved in activities that aim to see the EAC Competition Commission operational. This boosts their enforcement capacity across member states. The Authority reports a relatively steady allocation of resources from the exchequer that allows them to execute their mandate with minimal challenges.

The assessment notes that the country does not have an individual **whistleblower protection** law. There are however provisions in other pieces of legislation such as the Bribery Act, 2016 that protect whistleblowers in the public and private spheres. The Bribery Act, however, has a specific definition of a whistleblower as one who makes a report to the Commission or the law enforcement agencies on acts of bribery or other forms of bribery.

The Act, while it provides for penalties to those who are responsible for retaliation to whistleblowers, it does not provide for remedies for whistleblowers that suffer detrimental action as a result of whistleblowing. Additionally, the act requires all law enforcement agencies to put up measures to protect whistleblowers but does not require other government agencies or private entities to do the same. The assessment however notes that listed companies require the board to ensure that a company has a Whistleblower Policy and are subject to the provisions of the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015. There is however, limited information on internal disclosure procedures used by public and private organisations to adequately protect employees who report wrongdoing.

Despite the fact there is **no independent whistleblower investigation/complaints authority or tribunal**, there are government agencies such as Kenya Revenue Authority (KRA) and EACC that receive and investigate reports from whistleblowers.

The Companies Act, 2015 contains provisions that require companies to prepare annual financial statements that adhere to **prescribed accounting and financial standards**, as set by the Institute of Certified Public Accountants Kenya (ICPAK). Additionally, the Act requires a company to keep accurate books of accounts at the company's registered office for a minimum of seven years. The Act further requires only listed companies to have external audits according to internationally recognised standards and for these companies to publish their external audit reports annually. The Act, however, does not require companies to set up internal control systems such as internal audit functions.

The assessment notes that there is a gap in **enforcement of these standards** as ICPAK can only ensure enforcement among its membership; ICPAK's membership is not required of all that serve as accounting professionals in various companies in the private sector. Additionally, the assessment notes that while there are legal requirements for **professional service providers** such as auditors, accountants and providers of rating or related advisory services to be licensed, there is significant proportion of practitioners in the market who are not licensed. This therefore poses a challenge to professional oversight bodies whose reach only extends to their licensed membership. Independence and autonomy of the service providers is mostly guaranteed through their ethical and professional standards as there is no legal or policy frameworks that speaks to this.

The Assessment also notes that annual reports submitted to the Business Registration Service and annual returns submitted to the KRA are not reviewed for compliance to accounting and auditing standards. Additionally, there is no legal or policy framework that would grant ICPAK access to these reports for review.

The Companies Act, 2015 outlines penalties and sanctions for directors that fail to prepare annual financial statements as per the requirements. Institutions in charge of enforcement such as The Central Bank of Kenya (CBK), the Capital Markets Authority (CMA) and ICPAK do not necessarily publish reports that show enforcement actions and decisions taken in individual cases, including accounting matters.

The August 2017 amendment to the Companies Act, 2015 brought in provisions **on beneficial ownership**. The amendments include a definition of a beneficial owner and requirements to provide information on beneficial owners in addition to that of directors and members. The information on beneficial owners should be included in the company register – kept at the company's registered address and lodged at the Registrar of Companies. The Act neither penalises willful misrepresentation of information on beneficial ownership nor failure to disclose nominees fronting directors or shareholders.

The Election Offences Act, 2016 and the Political Parties Act, 2011 have provisions that prohibit use of public resources for the purpose of campaigning during an election or a referendum by any person or referendum committee. Additionally, the Political Parties Act, 2011 provides for a mechanism that determines equitable and transparent **public funding to political parties**.

The Acts further provide for lawful sources of funding to political parties to include individuals and corporates, with limits put on corporate and donations from a single source. Anonymous contributions are banned. Political parties are required to keep records of their sources of funding (among other details of the same) as well as publish the parties audited accounts.

The Registrar of Political Parties and the Independent Electoral Boundaries Commission (IEBC) have the mandate to **enforce laws on political contributions**. The assessment notes that the Registrar reported full compliance from political parties in the last general elections and as such had not imposed any sanctions administrative or otherwise on any political party. The IEBC prepared and gazetted regulations on campaign financing but they were suspended by the National assembly.

There is currently no legal or policy framework in Kenya that regulates **lobbying** and as such no requirements on companies to disclose their lobbying activities.

The Public Officer Ethics Act, 2003 and Leadership and Integrity Act, 2003 are the two main laws that manage **conflicts of interests** between public and private sector. Public entities are required to keep a register of conflict of interest where public officers and state officers are required to declare conflicts of interest (gifts, benefits, hospitality etc.) on need basis. While these declarations are not made public, public entities are required to submit annual reports to the EACC on the gifts they have received, those they have disposed off or intend to dispose of. Further, the two Acts prohibit state and public officers from taking up other gainful employment. The laws do not, however, put a waiting period for elected public officials or senior civil servants intending to move to private sector or for corporate executives intending to move senior public offices and positions in government.

The assessment notes that information regarding public tenders is made publicly available on government websites nationwide circulation newspapers and other available public spaces.

The country adopted a digital system for use in public finance management, the Integrated Financial Management Information System (IFMIS). However, there have been reported challenges in the roll out of the system especially at the counties. Additionally, the **Public Procurement** and Asset Disposal Act, 2015 outlines procedures for various types of procurement, including those that require competitive bidding as per the financial threshold outlined.

The assessment notes that the Act requires prospective bidders to declare that they or their sub-contractors haven't been barred from participating in public procurement proceedings. They are further supposed to declare that they will not engage in any fraudulent or corrupt practice. Other than these declarations, there are no other anti-corruption requirements made on bidding entities to qualify them to respond to government tenders. Conversely, there are no incentives or advantages to prospective bidders that have effective anti-corruption programmes in place.

Contracting authorities, on the other hand are, subject to provisions of the Public Officers Ethics, Act 2003 and the Leadership and Integrity Act, 2013 with regards to setting **integrity management initiatives**. Such initiatives include wealth declaration by public officers, which is done once every two years. These declarations are however not made public but can be accessed through procedures laid down in the Acts. Additionally, the EACC provides advisory services on anti-corruption and mainstreaming of the same to various government agencies.

The Public Procurement Review Board (PPARB) offers aggrieved bidders a channel through which they can appeal the outcome of a procurement process. The decisions of the review board are available on the Public Procurement Regulatory Authority (PPRA) website. Additionally, the PPRA is charged with the responsibility of receiving and investigating complaints that are not subject of administrative review on

procurement and asset disposal proceedings. They however neither have a dedicated line nor mechanism that receives such complaints nor a voluntary disclosure programme that allows companies to report on corruption.

Despite provisions in the Act for cooperation between PPRA and non-state actors to improve the public procurement systems, not much has been done in this regard yet.

The Kenya Revenue Authority has the primary responsibility of **tax administration** in the country. They have standardised the process and method of collecting and paying taxes determined by the National Treasury and Ministry of Planning. The processes are digitised to a large extent with application for Personal Identification Number (PIN) numbers for individual and corporate tax payers as well as payment and filing of tax returns being done online. Information on number and level of tax rates, criteria for tax exemptions is readily available online. Information regarding tax deals with national and multi-national companies is managed by the National Treasury.

KRA has an intelligence and strategic operations department with the mandate of prevention, detection and investigation of corruption and unethical conduct in the Authority. They are guided by the KRA anti-corruption policy and a code of conduct that all employees sign and are regularly trained on. The internal audit department is also responsible for investigation of fraud and fraud related cases at the Authority and is relatively independent. Reports of their investigations are however not made public. Additionally, the Authority has a whistleblower policy that provides for protection of whistleblowers contacting the authority.

In terms of **external safeguards**, the assessment notes that KRA is subject to audit by the Office of the Auditor General (OAG) whose independence is guaranteed by the Constitution and the Public Audit Act, 2015. The Auditor General makes the results of the audits available on its website.

KRA operates a complaint and information center that receives complaints on corruption and other related operational matters of the authority via phone and email. The Authority does not however have a voluntary disclosure programme that allows companies to self-report on corruption cases in exchange for mitigation sanctions. They instead have an informer reward scheme that allows members of the public to report or provide information on unpaid taxes and get a percentage of the recovered amounts.

Assessment Summary for the Private Sector

The assessment on the private sector focuses on the anti-corruption efforts initiated by the business community to promote business integrity. It assesses 5 thematic areas and 17 indicators.

Below is a graphical representation of the key findings of the thematic areas:

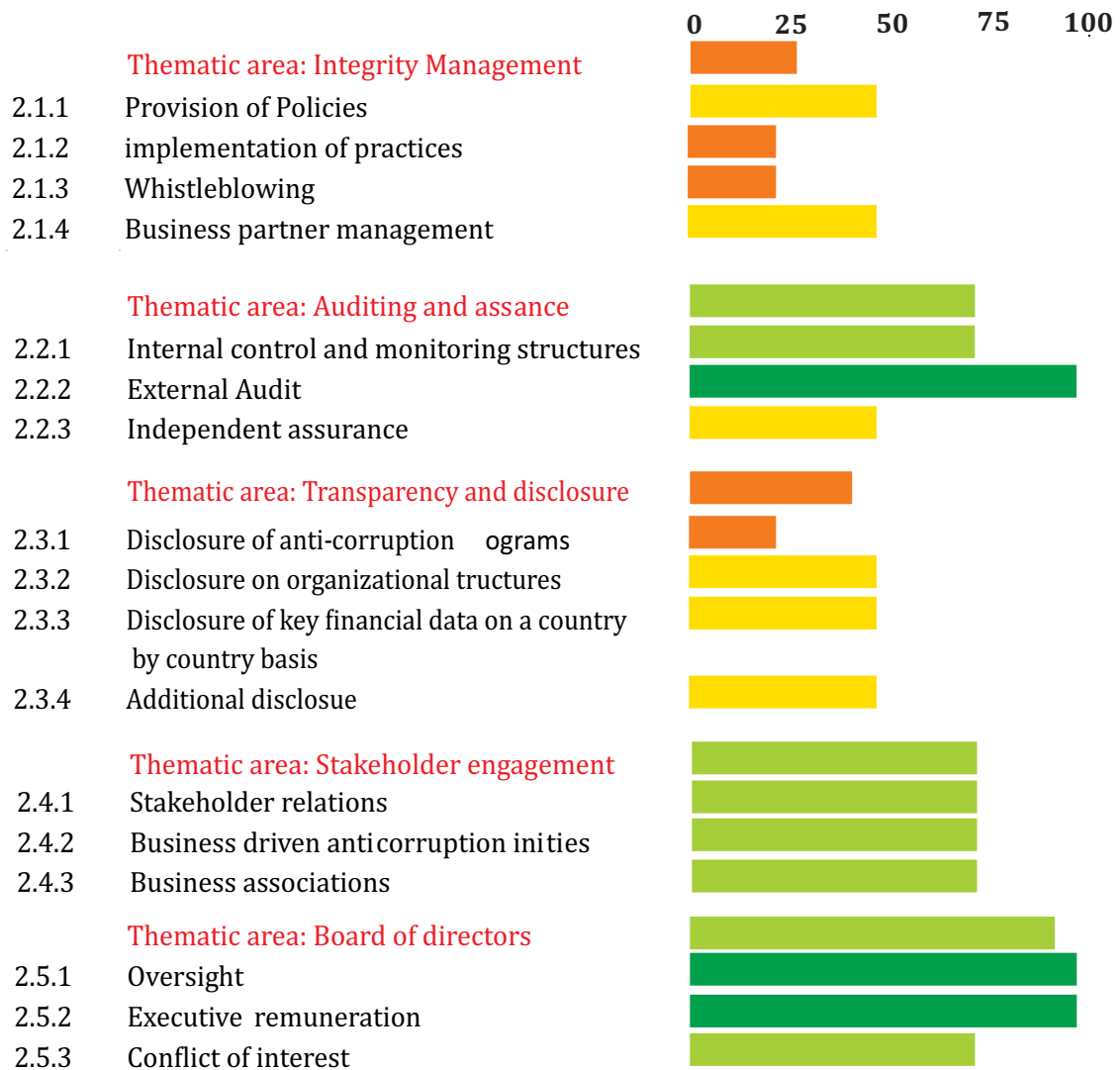


figure 3: Assessment scores for private sector

The assessment notes that **provision of anti-corruption policies** among companies is now mandatory after enactment of the Bribery Act, 2016. Prior to that, only specific categories of companies were required to have anti-corruption policies or programmes; companies listed at the Nairobi Securities Exchange (NSE), companies regulated by the Central Bank of Kenya and those that are signatories to the Code of Ethics for Businesses in Kenya.

There are no guidelines or minimum requirements for the content of anti-corruption policies or programmes. The Bribery Act 2016 requires companies to implement anti-corruption programmes according to size and risk while the CBK and the code of ethics for private business

has no specifications. All categories of policies outlined above require adherence across all levels and areas of the company.

For companies listed at the stock exchange and those regulated by the CBK, the board has the responsibility to ensure that the ethics and anti-corruption policies are adopted and implemented within the company.

There is no standard way in which the companies **implement their anti-corruption programmes**. Some programmes contain training aspects and feedback or review mechanisms to ensure effectiveness. For instance, companies listed at the stock exchange are however required to have annual governance audits while the other two codes do not have such a requirement. Only companies listed at the stock exchange are required to publish their codes while for the others it is discretionary.

The Bribery Act, 2016 does not require companies to put in place **whistleblower protection mechanisms**; only law enforcement agencies are required to do so. The Act has provisions that protect whistleblowers from retaliation from employers but does not offer remedial action for those that suffer detrimental action as a result of whistleblowing. Companies listed at the stock exchange are required to have a whistleblower policy but information on implementation of this was limited.

In terms of applying anti-corruption programmes to relevant business partners, signatories to the code of conduct, at the integrating and reporting level are encouraged to use their influence to encourage other companies to sign on to the code. The other two codes do not have similar provisions.

The assessment notes that there are legal and policy provisions that require companies to set up and maintain internal controls over accounting, record keeping and other business processes. These include keeping accurate books and records that document all financial transactions. However, only listed companies are required to have internal audit functions while there are no legal provisions for non-listed companies to establish the same.

The **Audit committees of listed companies have the mandate to review** the effectiveness of the internal audit function as well as ensure that recommendations from the internal audit reports are implemented. The Board of Directors is responsible for preparing and approving a financial statement of a company.

The Companies Act, 2015 requires companies to conduct **annual external audits**. These should be conducted by licensed auditors, and in good standing with ICPAK (for listed companies). The external auditors should be independent, not employees or board members and their families.

Additionally, external auditors of listed companies should be rotated every six to nine years. External audits reports should be presented as an annex to a company's annual statutory financial report, be sent out to members of the company and in case of public companies, be presented at an annual general meeting.

Companies listed at the stock exchange are required to undergo an annual governance audit, conducted by practitioners licensed by the Institute of Certified Public Secretaries of Kenya (ICPSK). There are no requirements to publicly disclose the assurance opinions.

The assessment reviewed **transparency and disclosure patterns of 35 out of 64 companies listed at the Nairobi Securities Exchange**. These companies represent a category of companies with stringent regulations and statutory obligations from the Companies Act, 2015 and the Capital Markets Authority (CMA).

The assessment notes **that anti-corruption programmes³ were the least disclosed** items in the assessment. Half of the companies assessed (18 out of 35) did not disclose any information on their anti-corruption programmes while 34% of the companies (12 out of 35) had a score of between 1 and 50% with the remaining five scoring more than 50%. None of the companies assessed got a perfect score.

In terms of disclosure of **organisational structures⁴**, 20% of the companies assessed (7 out of 35) did not disclose any information regarding their subsidiaries. This included companies that did not state whether or not they had any subsidiaries. Majority (74%) of the companies assessed obtained a score of more than 50% with 20% of the companies getting a perfect score.

In terms of disclosures of key **financial data on country-by- country basis⁵**, 44% of the companies assessed scored 50% and above while 22% scored 25% and a third of the companies scored zero. None of these companies got a perfect score.

The assessment notes that there are initiatives within the private sector that encourage sustainability of financially sound enterprises. These are usually **multi-stakeholder- led initiatives**, bringing together business member organisations and regulators. These include awards such as the Top 100 Mid-Sized Companies and FiRE Awards. It is however worth noting that in these initiatives, anti-corruption issues take little or no prominence. Various stakeholders involved in corporate governance processes have access to relevant information, but this is largely guided by best practice and statutory information.

3. Disclosure on details of an anti corruption program such as various policies (gifts and hospitality, prohibiting facilitation payments, political contributions), a code of conduct that applies to employees , board and external stakeholders among other elements of an anti corruption program.

4. Disclosure on subsidiaries (Consolidated and non-fully consolidated), their percentages, countries of operation and incorporation.

5. Disclosure on revenues, capital expenditure, pre-tax income, income tax and community contribution.

Other private sector led initiatives include a Code of Ethics for Business in Kenya that was spearheaded by apex **business associations** KAM, KEPSA and UN Global Compact Kenya. This is a voluntary initiative that has 700 signatories so far. Members that have been implementing it for a few years are taking lead promoting the benefits of signing on to the code among other members. The private sector has also collaborated with government and civil society in various forums such as the Kenya Leadership Integrity Forum.

There are also initiatives that are spearheaded at the sectoral level. For instance, the banking and manufacturing sectors provide support to members at sector and national level in form of training and provision of relevant materials.

The Companies Act, 2015; the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 and CBK Prudential guidelines charge the board with the responsibility of shaping and enforcing a company's governance practices. The board is also responsible for communicating, to various stakeholders, the level of compliance to the code of corporate governance. There are, however, no explicit provisions for mandatory compliance of the board with the company's anti-corruption programme. However, the code of corporate governance recommends that the board undergoes annual training on areas of governance from credible sources.

In terms of **executive remuneration**, the code recommends that the board has an independent remuneration committee to recommend to it the remuneration and structure of the compensation of the executive and non-executive directors. Further, the code recommends that the remuneration of the executive board should be linked to corporate performance, while that of executive directors should be in line with industry rates. Information on the directors' remuneration and benefits package should be approved by shareholders at an annual general meeting and should form part of the notes in the company's annual financial report.

The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, The Companies (general) Regulations and the Companies Act, 2015 have various provisions on conflict of interest of the board.

The **code recommends a balance of executive and non-executive members**, with the non-executive making up the majority and have a policy that ensures independence of the board. Additionally, the code requires that there be a policy to manage conflict of interest of the board. This should include a register of the board's **conflict of interest** declarations that should be updated by the company secretary. There are however no requirements to make this register public.

The Companies Act, 2015 requires that a director of a company avoids situations that can present a conflict of interest with the company. The regulations on the other hand, require that the directors declare the nature and extent of the conflict and avoids voting or be counted as quorum in matters relating to the declared conflict.

Assessment Summary for the Civil Society

The assessment of the civil society looks into their role in reducing, preventing and responding to corruption in the private sector. It assesses two thematic areas and three indicators. Overall, the assessment notes that in terms of broader checks and balances, the civil society performs averagely while they perform poorly in terms of engagement with the private sector. The findings are presented graphically below:

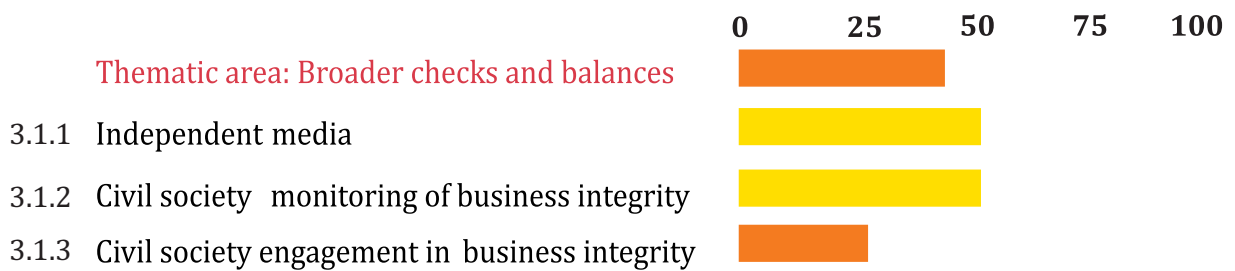


figure 4: Assessment scores for Civil Society

The **media** in Kenya is largely owned and controlled by the private sector for commercial purposes. This has been perceived to compromise their independence and reporting the private sector in negative light. The assessment further finds that media practitioners subscribe to a code of conduct prescribed and enforced by the Media Council of Kenya.

On the other hand, the Constitution of Kenya guarantees independence of the media from government. This however has been put to test several times, with government attempting, and sometimes succeeding, in undermining this through passage of various pieces of legislation such as the Security Laws Amendment act and the Media Council Act.

In terms of **civil society monitoring of business integrity**, the interventions undertaken are noted to be thematic and uncoordinated for the most part and have led to limited success. However, some successful initiatives of the civil society engaging the public sector in creating an enabling environment for the business sector have been recorded.

Nevertheless, there has been limited civil society engagement with the private sector. While there have been sector based initiatives and campaigns undertaken by the civil society, there are limited reports outlining the success of such initiatives.

INTRODUCTION

Country Context

Kenya's Gross Domestic Product (GDP) stands at 68.9 Billion US dollars while the per capita GDP stands at 1516.3 USD⁶. In 2015 it rebased its GDP after recalculating it using updated statistics thereby upgrading it to a lower middle income country⁷. According to the 2016 Human Development Index (HDI⁸, 39.1% of the Kenyan population of working age are unemployed compared to Tanzania's 24 %, Ethiopia's 21.6 %, Uganda's 18.1% and Rwanda's 17.1 %. The Kenya National Bureau of Statistics however notes that unemployment rate in Kenya stands at 7.5 %; this is those that are not working, available and looking for work.⁹

In terms of poverty, the Human Development Index(HDI) places Kenya at position 146 out of 188 with a value of 0.555- a value that has been increasing since 1990. Additionally, the HDI notes that 45.9% of the population lives below the National poverty line while 33.6% live on less than 1.90 USD per day – the international poverty line.

Kenya recorded a trade deficit of 87,276 Million Kenya Shillings in November of 2017. The Country mainly exports tea, coffee, tobacco and horticultural produce as well as iron and steel products, cement and petroleum products. The main export partners in this regard include the UK, Netherlands, Uganda, Tanzania, United States and Pakistan with Africa taking about 40% of the exports and the EAC accounting for slightly more than half. Her main import partners are China, India, UAE, South Africa, Saudi Arabia, Japan and United States. Kenya imports mostly machinery and transportation equipment, petroleum products, motor vehicles, iron and steel, resins and plastics¹⁰.

It is worth noting that China is Kenya's biggest trading partner with Kenya importing goods worth 175 Billion Kenya Shillings (USD 1.7 Billion)and Kenya exporting to China goods worth 314.7 Billion Kenya Shillings(USD 3.1 Billion)¹¹.

6. World Economic Forum, *Global Competitiveness Report – 2017-2018*

7. <https://www.nation.co.ke/news/Kenya-National-Bureau-of-Statistics-Income-Economy/-/1056/2469476/-/ubybwwz/-/index.html>

8. A composite index measuring average achievement in three basic dimensions of human development - a long and healthy life, knowledge and a decent standard of living

9. Kenya National Bureau of statistics – *Labor Force Basic Report, 2017*

10. <https://tradingeconomics.com/kenya/balance-of-trade>

11. Kenya National Bureau of Statistics -2017 Economic Survey

This comes amidst concerns that the East Africa Customs Union and Common Market Protocol has been facing challenges and has not achieved the desired results. One of the challenges facing intra EAC trade has been protectionism. Member states have individually, at different times, launched campaigns aimed at sensitising citizens to consume locally produced goods. Kampala and Kigali have launched the 'Made in Uganda' and 'Made in Rwanda' campaigns respectively, while Kenya has been pushing the 'Buy Kenya, Build Kenya' brand since 2015 and has recently started allowing controlled sale of products from incentive parks – Export Processing Zones – to be sold in the local market.

Kenya's economy grew from 5.6% in 2015 to 6.0% in 2016 with further growth projected in 2017(6.1%) and 2018(6.5%)¹². The Economy has traditionally taken hits as a result in political violence experienced during the general election cycle. In 2008, in the wake of a violent aftermath of a general election the economy almost ground to a halt, recording 0.2% growth. Despite the fact that there was no violence in 2013, slowdown was still experienced as a result of speculation and anticipation of violence. The World Bank noted that that indeed in 2017 there was a recorded dip in growth (4.9%) brought about by a combination of factors; drought, declining private sector access to credit and election related uncertainty.¹³ KEPSA estimates that the private sector lost 700 Billion Kenya Shillings (Approximately 7 Billion USD) as a result of disrupted transport and industrial operations during the election campaigns and a political stalemate /standoff experienced after a contentious presidential poll.¹⁴ The country has since returned to relative calm, with business slowly resuming normal operations.

The current administration, while not having a specific pledge or focus on the private sector, has a 4-point development agenda dubbed the big four. The big four agenda, which relies on public private partnerships to actualise, focuses on food security, affordable housing, manufacturing and infrastructure.

The Government recognises the private sector as the engine for economic growth. Between 2013 and 2017, it had a specific pledge to the business sector; help Kenya's business sector become as competitive as possible by reducing business taxation, removing unnecessary regulation and encouraging competition through new enterprise zones in each county¹⁵.

12. www.africaneconomicoutlook.org

13. <http://www.worldbank.org/en/news/press-release/2017/12/06/kenyas-gdp-growth-slumps-in-2017-but-can-rebound-over-the-medium-term>

14. <https://www.businessdailyafrica.com/news/Electioneering-has-cost-Kenya-s-economy-Sh700bn---Kepsa/539546-4153980-ogr27mz/index.html>

15. *The Jubilee Party Manifesto*

It was during this time that the government established the Ease of Doing Business Delivery Unit that has since seen the country's significant improvement in rank in the World Bank Ease of Doing Business rising from position 129 in 2015 to 90 in 2017. Improvements were indeed noted in the categories of dealing with construction permits, getting electricity, obtaining credit and starting a business.¹⁶

In a survey conducted by the World Bank, 57% of sampled firms cited taxes following registration as a reason for not registering, followed by 56% who cited the cost of registering, 47% citing no benefit from registering among others. Additionally, the survey noted that although informal business owners were aware of the benefits of formal operation, most opted to stay informal because of cumbersome registration procedures, as well as to avoid paying taxes.¹⁷

The World Bank's Ease of Doing Business puts Kenya at number 125 out of 190 countries ranked in terms of ease of paying taxes. The survey measures the tax compliance burden for businesses in Kenya. It notes that business in Kenya pay approximately¹⁷ 26 taxes per year compared to an average of 37.2 in Sub Saharan Africa and 10.9 in the Organisation for Economic Co-operation and Development (OECD) while it takes about 185.5 hours to comply compared to 280.8 in Sub Saharan Africa and 160.7 in the OECD¹⁸.

The World Competitiveness Index 2017-2018 notes that Kenya is relatively well placed in terms of total tax rate as a percentage of profit as it is ranked at position 70 out of 137 noting that taxes constitute 37.5% of the profits. Respondents from the same survey however still listed tax rates as the third most problematic factor for doing business and tax regulations as 8th most problematic factor.

According to the Small and Medium Establishment (MSME) Survey by Kenya National Bureau of Statistics, 79% of the sampled enterprises were unlicensed with net worth of 50,000 Kenya Shillings or less, further underscoring the magnitude and scale of the informal sector in Kenya. About 74% of these were not registered with the Business Registration Service but had licences from the respective County Governments. The survey additionally noted that eight out of ten unlicensed business did not keep official business records while those that did kept personal notes and cash and sale receipts.

16. World Bank, 2017 Ease of Doing Business

17. The World Bank's Informal Enterprise Survey

18. <http://www.doingbusiness.org/data/exploreeconomies/kenya#paying-taxes>

In terms of technological advancement, one of the notable successful innovations include a mobile money platform –M-PESA- operated by Safaricom PLC. The platform, which now operates in more than 10 countries has spurred the growth of other such platforms across the globe and is such an integral part of the Kenyan economy that it is said to have transacted 45% of the country's GDP in 2015¹⁹. Further, it has been credited for having facilitated banking and financial services to traditionally unbanked populations such as the rural poor and women²⁰. The 2017-2018 Global Competitiveness report has Kenya at a score of 4.7 out of 7 in terms of capacity to innovate and at position 38 out of 137²¹.

	Score out of 7	Rank out of 137
Capacity to innovate	4.7	38
Availability of latest technologies	5.1	48
Firm-level technology absorption	5.1	36
Effect of taxation on incentives to work	3.9	73

In terms of foreign direct investment, Kenya has seen reduced investments in this regard, even as her neighbours saw an increase. The World Investment report 2017 of the United Nations Conference on Trade and Development (UNCTAD) notes that Kenya had less Foreign direct investment (FDI) inflows in 2016 compared to the previous year; falling 36% to 40.7 Billion Kenya Shillings (USD 401.9 Million) while that of East Africa increased 13%.

Despite this, a report by Rand Merchant Bank (RMB) ranked Kenya at number six most attractive investment destination in Africa noting that investors were attracted by Kenya's diverse economic structure, pro-market policies and brisk growth in consumer spending.²²

Conversely, there have been noted exits by various companies, citing difficult operating conditions. They include Colgate Palmolive, Reckitt Benckiser, Cadbury Kenya, Bridgestone, Devki Steel, Procter & Gamble, Eveready and Tata chemicals.²³

Additionally, there have been concerns that devolution has introduced additional charges to businesses. One of the ways that counties generate their own revenue is by licencing and permits as outlined in the Constitution and the Public Finance Management Act, 2012. Each county therefore sets the costs and charges of the permits and licences as they see fit and list them in their respective Finance Acts. According to the Integrated Devolution Data Portal, different counties have varying charges for single business permits.²⁴

19. African Economic Outlook 2017

20. Global Findex Database, 2014

21. World Economic Forum, 2018 Global Competitive Report

22. RMB, Where to Invest in Africa, 2018

23. <https://www.standardmedia.co.ke/business/article/2000193411/manufacturing-nightmare-that-is-turning-kenya-into-graveyard-for-companies>

24. <http://data.crakenya.org/counties>

The discovery of oil reserves in Northern Kenya opened up new possibilities for the country's revenue stream with the discovery expected to earn the country between 800 Million and 3 Billion US Dollars annually depending on global prices²⁵.

Corruption profile

Both petty and grand corruption continue to be a problem in Kenya over the decades with successive regimes pledging to curb the vice through various interventions. It is thought-provoking to note that the biggest scandals recorded in the country involved private sector players.

For example, the Goldenberg affair between 1991 and 1993 involved an elaborate scheme by a private company, Goldenberg International Limited, colluding with senior government officials to get compensation for fictitious gold and diamond exports. The scandal is said to have cost the country somewhere between 600 Million and 1 Billion dollars or 9 to 16% of the Country's GDP then. The scandal was never definitively concluded despite investigations by the then anti-corruption commission as well as a commission of inquiry set up in 2006.

Another major scandal that rocked the country in 2004 was the Anglo Leasing scandal. Allegedly, senior government officials, colluded with private individuals to set up shell companies that were later awarded contracts at hugely inflated costs. Additionally, these companies managed to get valid, legally binding promissory notes that the government continues to honour to date, despite the fact that they never delivered a single item²⁶. It is unclear how much money was lost during this scandal as different government departments issue contradictory information regarding the matter.²⁷

It is worth noting that the above cases present intricate, elaborate schemes that intertwines political party financing, ethnicity, political patronage and culpability of the private sector which can perhaps explain the pace of investigation and adjudication of the cases and their conclusions²⁸.

More recently, there have been two scandals that involved procurement related irregularities that saw private companies benefit from inflated contracts and payment of goods that were not

25. <http://www.theeastafrican.co.ke/news/Civil-society-models-estimate-Kenya-earnings-from-Turkana-oil-/2558-3161728-ibvw4az/index.html>

26. <https://www.nation.co.ke/news/Uhuru-Kenyatta-Anglo-Leasing-Debt-National-Treasury/1056-2316458-12ld742/index.html>

27. <https://www.nation.co.ke/news/Anglo-Leasing-cases/1056-3792152-1jibxxz/index.html>

28. See <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf> and

delivered. In 2016, an audit report at the Ministry of Health showed that the ministry had lost 5 Billion Kenya Shillings (USD 49.3 Million) through payments for goods that were not delivered and in other instances double payment of goods.²⁹ In another scandal touching on the National Youth Service, it is alleged that the service lost 1.6 Billion Kenya Shillings (USD 15.8 Million) through payments for services and goods not delivered and in some instances, the companies in question had not been properly registered but managed to get government contracts and receive payments³⁰. Both matters are still under investigation.

Both the scandals at the health ministry and the National Youth Service involved a manipulation of the IFMIS, a system that was touted to increase accountability by enhancing transparency and oversight in government operations.³¹

The past two editions of the Corruption Perception Index also point to corruption being a major concern in the country despite it recording some marginal improvement in score. In 2017, Kenya had a score of 28 compared to 26 in the previous year.³²

According to the Global Competitiveness Reports for 2016-2017 and 2017-2018 corruption was listed as the most problematic factor for doing business in Kenya by 17.8% and 19.1% of respondents respectively. The same report (2017-2018) ranked Kenya at number 64 out of 137 with a score of 3.9 out of 7 in terms of ethical behavior of firms. This was an improvement from the 2016-2017 score of 3.8 at position 78 out of 138.³³

The PWC, Global Economic Crime and Fraud Survey 2018³⁴ report highlights corruption challenges experienced by the private sector. Overall, three-quarters of Kenyan respondents reported having experienced at least one form of economic crime in the past two years compared to the global average (49%) and the African average (62%). Additionally, this figure was a significant increase from the 61% that had the same experience in 2016. Further, 37% of respondents stated that the most disruptive economic crime over the past two years cost them at least 100 Million Kenya Shillings (USD 100,000).

The 2015 Global Corruption Barometer also provides an insight into citizens' perception of culpability of the private sector in matters of corruption. Thirty per cent of Kenyans (compared to a regional average of 42%) stated that most or all business executives were involved in corruption.

Business Integrity initiatives

There has been some focus on promoting business integrity in Kenya in the recent past at

29. http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf

30. <https://www.businessdailyafrica.com/economy/Revealed--Taxpayers-lose-Sh5bn-in-NYS-style-Afya-House-theft/3946234-3430494-fhiqtk/index.html>

31. <https://www.icpak.com/wp-content/uploads/2017/07/IFMIS-CPA-Andrew-Rori.pdf>

32. Transparency International, 2018 Corruption Perception Index

33. World Economic Forum, 2018 Global Competitive Report

34. The report interviewed 116 respondents drawn Board Members and Senior Managers who are part of Executive Management, Finance, Audit, Risk Management and other core functions in large, medium and small organisations. Of the 116 respondents, 38% represented listed companies, 42% private organisations and 20% public or non-governmental institutions.

sector, national and regional levels. Under the auspices of Kenya Association of Manufacturers and Kenya Private Sector Alliance (KEPSA), the private sector designed and rolled out a code of ethics for business in Kenya in 2012. By signing on the code, a company commits itself to conduct ethical business with all its stakeholders- shareholders, employees, government, consumers, environment, society, suppliers, contractors and agents³⁵. This is a voluntary mechanism that allows members to commit and implement the code gradually and eventually serve as champions to the cause. The code is founded on the UN Global Compact principles, and can be said to be the first major private sector –led attempt at infusing integrity and accountability measures within the private sector. So far about 700 companies have signed on to the initiative.

Similarly, in 2016, the East Africa Business Council, an apex regional business member organisation also rolled out a code of ethics for business within the East Africa region. Signatories commit to be actively involved in promoting integrity and preventing corruption among other things. While the initiative is also voluntary, it has enforcement and reward mechanisms that serve as incentives to the signatories. For instance, signatories are promised preferential business relations with key national, regional and international companies and institutions that sign on as collaborators to the Code³⁶.

Different sector business member organisations have also designed and implemented codes of ethics that serve to capture certain sector nuances. For instance, the Kenya Bankers Association (KBA) plans to adopt a Self-Regulatory Framework and Conduct Standards for member banks to enhance the code of ethics for businesses in Kenya³⁷.

The Presidential Roundtable (PRT) is also a vital forum through which the private sector engages the government on various matters pertaining the economy and business environment in Kenya. For instance, in the last round table held in April 2017, the forum had a chance to review progress made in the past four years with regard to improving business environment; amendment of the Companies Act , establishment of *Huduma Centers* among others.³⁸ The fourth presidential roundtable held in 2015 discussed, among other things, improving governance and the business environment. It is worth noting that the Bribery Act, 2016 was proposed by the KEPSA in 2015.

Civil society actors on the other hand, have for the most part continued to push for their interventions for the most part are targeted at strengthening the public sector interactions

35. <http://kam.co.ke/about-kam/global-compact-network-ke/>

36. http://eabc-online.com/uploads/EABC_code_of_conduct_booklet_B.pdf

37. <http://www.kba.co.ke/downloads/FAQs%20KBA%20over%20PM%2020%20April.pdf>

38. <http://kepsa.or.ke/2017/06/09/kepsa-holds-the-7th-presidential-roundtable/>

with the private sector.

Donor support for governance work in general has been decreasing in the last few years, with dwindling focus on governance in the private sector. Major supporters of governance work in Kenya include the Embassy of Netherlands, Embassy of Sweden, Embassy of Finland, UK Department of International Development (DFID), United States Agency for International Development (USAID) and The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). Other supporters of governance work include the Open Society for East Africa, the World Bank, Ford Foundation, OXFAM and Trademark East Africa. Out of these, those that have had programmes or initiatives that strengthen business integrity in the last five years include GIZ, which had a private sector integrity programme that lend support for the development of the codes of ethics in Kenya and the East Africa region. This programme is however not currently active.

1. ASSESSMENT CATEGORIES OF THE PUBLIC SECTOR

The assessment on the public sector is mainly focused on the laws and practices in preventing, reducing and responding to corruption in the private sector. It has 31 indicators covering 9 thematic areas. These include bribery of public officials, commercial bribery, laundering of proceeds of crime, collusion, whistleblower protection, auditing and regulatory framework, beneficial ownership, lobbying, political party funding, public procurement and tax and custom administration. Below are the results for each of the individual indicators in this category:

1.1 Prohibiting Bribery of Public Officials

83

The assessment notes that the country has strong laws that prohibit bribery of public officials. The capacity to enforce these laws is hampered to some extent by lack of adequate resources and personnel in the relevant institutions and this has affected adequate and timely enforcement

1.1.1: *Laws prohibiting bribery of public officials*

Scoring question: Do the country's laws prohibit bribery of national and foreign public officials?

100

This indicator assesses the legal provisions that prohibit bribery of national and foreign officials in Kenya.

There are two main laws that have provisions on corruption and economic crimes; the Anti-corruption and Economic Crimes Act, 2003 and the Bribery Act, 2016 with the latter mostly focused on bribery. The Bribery Act, 2016 has provisions that criminalise active and passive bribery of national, foreign and officials of public international organisations.

On active bribery, section 5 (1) of the Bribery Act states that a person commits an offence if the person promises or gives a financial or other advantage to another person, who knows or believes the acceptance of the financial or other advantage would itself constitute the improper performance of the relevant function or activity.³⁹ Section 8 (1) of the Act states that any person who bribes a foreign public official with the intention of influencing that official's capacity commits an offence. The Act defines a foreign official to include an official of a public international organisation in section 8(4)(b). It is worth noting that section 5(2) states that giving of the bribe is still criminal if it is offered through a third party or given to a different person other than the one whom the favour is expected.

On passive bribery, section 6 (1) and 6(2) of the Act states that a person commits an offence if the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity. Receiving of the bribe is still criminal if they agree to receive through a third party or given to a different person other than the one whom the favor is expected.

Section 2 (a–f) of the Act defines 'advantages' to include; financial incentives (money, loans, and commission), properties, employment or contract, protection from penalty or action from disciplinary or penal nature, facilitation payment to secure performance by another person among other inclusions. It does not, however, mention or expressly prohibit deductibility of bribes for tax purposes. The Income Tax Act, Cap 470, a law that outlines and governs tax matters in the country, does not outline bribe as a deductible tax item.

1.1.2: Enforcement of laws prohibiting bribery of public officials

Scoring question: Are sanctions and incentives applied in practice to deter bribery of public officials?

75

This indicator looks at the extent to which the laws prohibiting bribery of public officials are enforced.

Enforcement of the Bribery Act is primarily the responsibility of three institutions; the EACC, the ODPP and the Judiciary, with each of these institutions having distinct responsibilities in the process.

39. Section 7 (1) of the Act states that a function or activity shall be construed to be a 'relevant function or activity' if it includes; any function of a public nature, any function carried out by a State officer, public officer or a foreign public official pursuant to his or her duties.

During the year 2016/2017, a total of 143 case files on corruption and economic crime were finalised and submitted to the Director of Public Prosecutions (DPP) for action. Out of these files, the Commission recommended 110 for prosecution, 7 for administrative action and 26 for closure⁴⁰. It is worth noting that there is no further breakdown of the corruption and economic crimes and as such it is difficult to know what percentage constitutes bribery. The EACC annual report however noted that approximately 36% of the cases they took up and investigated were bribery related.⁴¹

The ODPP is an independent national prosecuting authority in Kenya which has been mandated by Article 157 of the constitution to prosecute all criminal cases in the country including corruption and economic crimes. The EACC does not have powers to prosecute and as such refers cases to the ODPP for prosecution. The ODPP determines which cases referred by the various agencies should be prosecuted.

In the year 2016, the ODPP received 128 investigation files from the EACC submitted under Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA). Out of these, the ODPP directed that 93 files be processed for prosecution, three files for further investigations, 15 files recommended for administrative action and 17 files for closure. According to the report, majority of the cases (over 90%) forwarded by EACC constitute cases involving bribery of public officials.⁴²

The Bribery Act, 2016 in section 18 and 19 outlines penalties for legal or natural persons found guilty of offences under various sections the Act. They include imprisonment, fines and disqualifications from holding certain positions in private and public entities among others. The offences outlined in this Act do not have a statute of limitation. The Act does not however provide any form of mitigation incentives such as leniency programmes or suspended sanctions to legal or natural persons.

The Judiciary, a key link in the enforcement of anti-corruption laws, has received some backlash from the EACC, the Attorney General and the ODPP over the slow pace of adjudication of anti-corruption cases. During the 2016 Statehouse Governance ,Anti-Corruption and Accountability Summit the three noted that the courts had only concluded 198 cases between 2009 and 2016 with a further 600 pending in court.⁴³

40. Report of activities and financial statements for the financial year 2016/2017 for the Ethics and Anti-Corruption Commission (EACC)

41. Report of activities and financial statements for the financial year 2016/2017 for the Ethics and Anti-Corruption Commission (EACC)

42. The ODPP Annual Anti-Corruption Report, Jan -Dec 2016

43. <http://www.president.go.ke/2016/10/18/judiciary-independent-departments-on-the-spot-over-war-on-corruption/>

The Judiciary set up an anti-corruption and economic crime division that is mandated to hear all corruption related cases brought to court. This division, operationalised in April 2016, is touted to clear backlog of anti-corruption cases, one of the main issues continuously cited as key impediments in the fight against corruption.⁴⁴ The State of the Judiciary and the Administration of Justice 2015-2016 Annual Report, provides a breakdown of cases handled in the various courts by type, case and court station. Bribery is characterised as an economic crime and presented as such and no further breakdown is provided. This therefore provides a challenge in establishing the rate of resolution of bribery cases presented at the courts.

Both ACECA and the Bribery Act prescribe penalties for persons found to have contravened provisions on bribery of public officials.

1.1.3: Capacities to enforce laws prohibiting bribery of public officials

Scoring question: Do relevant public authorities possess adequate capacities for enforcing laws prohibiting bribery of public officials?

75

This indicator looks at the capacities of the various authorities to enforce laws prohibiting bribery of public officials. It assesses their capacity in terms of funding and operational independence. It also looks at mechanisms for cooperation locally and mutual legal assistance with foreign law enforcement agencies.

The three institutions that are primarily in charge of enforcing laws prohibiting bribery; the EACC, ODPP and the Judiciary have various capacities to enforce the law.

The EACC is headed by a chairman and commissioners who are appointed by the President with the approval of the National Assembly. They are supposed to serve for a term of six years and are not eligible for reappointment. The day-to-day administration and management of the affairs of the commission is done by a secretariat headed by a Chief Executive Officer (CEO) who is also the secretary to the Commission. The CEO is appointed by the Commission with the approval of the National Assembly and should serve for a period not exceeding six years and is not eligible for reappointment. The Commission may remove the secretary from office through writing, citing the reasons for removal where she/he should be given a chance to respond in writing. The reasons for removal include mental/physical incapacity, gross misconduct or misbehaviour, incompetence or violation of the constitution. The rest of the staff serving under the secretariat are recruited by the Public Service Commission. There, however, have been documented clashes between the commissioners and the secretariat. In one such instance in 2015, the CEO revoked a suspension order issued to the deputy CEO by the then Chairperson, bringing to light friction between the commissioners and the secretariat. By May of 2015 the

44. State of The Judiciary and the Administration of Justice Annual Report, 2015-2016

chairperson and other commissioners resigned leaving the secretariat intact.⁴⁵ The resignations presented challenges to the secretariat as the cases that were forwarded to the ODPP for prosecution during this time were later dismissed by the courts. The court of appeal in Nairobi found that:

*Whereas the EACC, even in the absence of the commissioners, could continue with its statutory functions, it could not perform one of its core mandate of recommending to the DPP the prosecution of any acts of corruption or economic crimes or violation of Codes of Ethics or other matter prescribed under the EACC Act, the Anti-corruption & Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.*⁴⁶

It is worth noting that the EACC, while not listed among the independent commissions and institutions in article 248 of the constitution, was created by an Act of Parliament to function as one. It therefore enjoys operational independence as per the provisions of article 249(2) of the Constitution.

In terms of finances, the Commission got an exchequer allocation of Kenya Shillings 3,180,080,000 (USD 31,408,198) for the financial year 2016/2017 compared to Kenya Shillings 2,957,220,000 (USD 29,207,111.11) in the year 2015/2016.⁴⁷ This amount represents a 7% increase in their allocation.

On human and physical capacity, the EACC reported a staff complement of 675 against a recommended 2,246 noting that this was one of the challenges they faced while executing their mandate. These numbers are bound to be strained further with the enactment of the Bribery Act, 2016 that effectively expands the EACC mandate.⁴⁸

The ODPP is an independent national prosecuting authority in Kenya which has been mandated by Article 157 of the constitution to prosecute all criminal cases in the country including corruption and economic crimes. It has presence in all the 47 counties in Kenya with its headquarters in Nairobi. A Chief County Prosecutor (CCP) heads each ODPP County Office and is responsible for working with the courts and the investigative agencies to provide high quality prosecution services in their jurisdiction.

45. <https://www.businessdailyafrica.com/economy/EACC-chief-revokes-Matemu-suspension-of-the-deputy-CEO/3946234-2648912-n496pl/index.html>

46. <http://kenyalaw.org/caselaw/cases/view/139163/>

47. Report of activities and financial statements for the financial year 2016/2017 for the Ethics and Anti-Corruption Commission

48. Report of activities and financial statements for the financial year 2016/2017 for the Ethics and Anti-Corruption Commission

The DPP is appointed by the President with the approval of the National Assembly. The Director is supposed to serve a term of eight years and is not eligible for reappointment. According to Article 158 of the constitution, the DPP may be removed from office due to incompetence, gross misconduct, and bankruptcy among others. In addition, a person desiring the removal of the DPP may present a petition to the Public Service Commission in writing, stating the allegations instituting removal from office. The DPP has the power to direct the Inspector General (IG) of police to investigate any information or allegation of criminal conduct and the IG is obliged to comply. He doesn't require the consent of any person for commencement of criminal proceedings in the exercise of his/her powers.

The ODPP reported having acute financial constraints occasioned by inadequate budgetary allocation from the National treasury. They also reported inadequate human resource as one of the challenges that hindered adequate delivery of their mandate.⁴⁹ In their Anti-Corruption Annual Report 2016, the ODPP noted that there was a high turnover of counsel brought about by poor terms and conditions of service.⁵⁰

The Judiciary on the other hand, as earlier noted, established the anti-corruption and economic crimes division in a bid to expedite the adjudication of corruption related cases.

In terms of Mutual Legal Assistance (MLA) with foreign law enforcement agencies, the EACC and ODPP both reported having cooperated with various foreign governments on multiple occasions; they however cited challenges in reciprocation of MLA from foreign governments.⁵¹ One example cited was the provision of information that led to the subsequent prosecution and conviction in the United Kingdom of Smith and Ouzman⁵², officials from a UK company charged with offering bribes to the then Interim Independent Boundaries Commission (IIBC) officials for the award of a contract. EACC indicated that they have had challenges prosecuting officials of the IIBC in Kenya citing challenges related to slow response from their counterparts in the Serious Fraud Office (SFO) in the UK.⁵³

The Attorney General, after concerns were raised by various stakeholders over the pace and vitality of the fight against corruption, established the Multi Agency Team (MAT). The team is made up of eight principal members⁵⁴ while other key agencies are co-opted from time to time depending on need.⁵⁵

The team has bolstered the fight against corruption as it enhanced investigations and allowed for; joint investigations where necessary, sharing of information, quick interventions in investigations, recovery and or preservations of property acquired through corruption and or organised crimes.⁵⁶

49. *State of The Judiciary and the Administration of Justice, 2015-2016*

50. *The ODPP Annual Anti-Corruption Report, Jan –Dec 2016*

51. *Expert interviews separately with the EACC and ODPP on 1st and 24th August 2017 respectively.*

52. <https://www.sfo.gov.uk/cases/smith-ouzman-ltd/>

53. *Expert Interviews with the EACC on 1st August 2017*

54. *Ethics and Anti-Corruption Commission (EACC), Director of Public Prosecutions (ODPP), Directorate of Criminal Investigations (DCI), National Intelligence Service (NIS), Financial Reporting Centre (FRC), Asset Recovery Agency (ARA), Kenya Revenue Authority (KRA)*

55. *So far, the Communications Authority of Kenya (CAK), Kenya Wildlife Services (KWS), Kenya Forestry Services (KFS), Anti Counterfeit Agency (ACA), National Transport and Safety Authority (NTSA) have been co-opted in the team.*

56. *State of the Judiciary and Administration of Justice, Annual Report 2015 - 2016*

1.2 Prohibiting Commercial Bribery

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Overall, the assessment notes that the enactment of the Bribery Act, 2016 ensures that there are laws that prohibit commercial bribery. The enforcement of these provisions in the Act has been challenging due to lack of regulations as well as limited capacity of the relevant enforcement agencies.

1.2.1: Laws prohibiting commercial bribery

Scoring question: Do the country's laws prohibit commercial bribery?	75
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This indicator looks at the legal provisions on commercial bribery; active and passive, as well as deductibility of bribes for tax purposes.

One of the progressive provisions in the Bribery Act, 2016 relates to commercial bribery as the Anti corruption and Economic Crimes Act , 2003 did not have provisions that related to the private sector.

Over and above provisions in section 5(1), 6(1) and 7(1) on active and passive bribery within the private sector, section 10 of the Bribery Act further states that a private entity commits an offence under this section if a person associated with it, bribes another person intending to obtain or retain business for the private entity; or advantage in the conduct of business by the private entity.

Section 2 (a-f) of the Act defines 'advantages' to include; financial incentives (money, loans, and commission), properties, employment or contract, protection from penalty or action from disciplinary or penal nature, facilitation payment to secure performance by another person among other inclusions. The Act does not however mention or expressly prohibit deductibility of bribes for tax purposes. The Income Tax Act, a law that outlines and governs tax matters in the country does not outline bribe as a deductible tax item.

The Bribery Act, 2016 in addition to sanctions and penalties on persons that contravene it, provides for setting up mechanisms to prevent bribery. Section 9(2) of the Act states that where a private entity fails to put in place procedures appropriate to its size and the scale and to the nature of its operation for the prevention of bribery and corruption, and where that failure is proved to have been committed with the consent or connivance of a director or senior officer of the private entity, or a person purporting to act in such a capacity, or occupying such a position, by whatever name called, the person commits an offence.

57. Expert interviews separately with the ODPP on 24th August 2017 and EACC on 1st August 2017

1.2.2: Enforcement of laws prohibiting commercial bribery

Scoring question: Are sanctions and incentives applied in practice to deter commercial bribery?

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This indicator assesses to what extent the laws prohibiting bribery are enforced. It is important to note that provisions on commercial bribery the Bribery Act, 2016 are yet to be fully operational. To this end, the EACC and the ODPP indicated that they haven't had the opportunity to investigate or prosecute any persons under these provisions.⁵⁷ There are however provisions for penalties in section 18 and 19 of the Bribery Act, 2016 for offences committed under the Act.

1.2.3: Capacities to enforce laws prohibiting commercial bribery

Scoring question: Do relevant public authorities possess adequate capacities for enforcing laws prohibiting commercial bribery?

25

This indicator looks at the capacity of enforcement agencies to enforce laws prohibiting commercial bribery.

As previously stated, the three main entities in charge of enforcement of bribery laws; the EACC, ODPP and the Judiciary have all reported challenges with regards to budgetary and personnel capacities. There have also been documented operational challenges that have hampered the prosecution of corruption related cases. The creation of MAT, formed to cure some of these operational challenges, has already recorded some success.

It is worth noting that the provisions on commercial bribery in the Bribery Act, 2016 now casts a wider net on bribery cases as it now also focuses on the private sector. This therefore means that enforcement agencies have an expanded mandate which they are yet to adjust to in terms of budgetary allocation and personnel.

1.3 Prohibiting Laundering of Proceeds of Crime

67

The assessment notes that the proceeds of crime and anti money laundering act, 2009 contains provisions that prohibit laundering of proceeds of crime to a large extent. The Financial Reporting Centre is (FRC) charged with the primary responsibility of enforcing the act. It does so through reporting institutions which include Designated Non Financial Businesses and Professions (DNFBPs). The FRC has not put out any annual reports since its formation in 2012 and as such it is difficult to ascertain the extent of implementation and their capacity for the same. It can however be assumed that the reporting institutions and DNFBPs have the requisite capacity to flag out suspicious transactions and report the same to FRC ; the FRC has powers to impose administrative and civil sanctions against reporting institutions that contravene POCAMLA.

1.3.1: Laws prohibiting laundering of proceeds of crime

Scoring question: Do the country's laws prohibit laundering of proceeds of crime?

75

Additionally, the Act prohibits participation in, association with or conspiracy to acquire property knowing that it is a proceed of crime as well as concealment of property knowing it is a proceed of crime. Section 3(b) (ii and iii) states that a person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and enables or assists any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.

The Act does not however have provisions prohibiting the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property.

1.3.2: Enforcement of laws prohibiting laundering of proceeds of crime

Scoring question: Are sanctions and incentives applied in practice to deter the laundering of proceeds of crime?

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This indicator evaluates the extent to which laws prohibiting laundering proceeds of crime are enforced.

The Financial Reporting Centre (FRC, or the Centre) is a Government institution created by the Proceeds of Crime and Anti-Money Laundering Act, 2009, with the principal objective of assisting in the identification of the proceeds of crime and the combating of money laundering. The FRC does this through use of reporting institutions and supervisory bodies which provide reports on suspicious activities or transactions, provide cash transaction reports that meet a given threshold, provide reports on cross-border conveyancing of monetary instruments. These reporting institutions include financial institutions and Designated Non-Financial Businesses and Professions (DNFBP) while supervisory bodies include regulators such as the Central Bank of Kenya and Insurance Regulatory Authority among others. In instances where the reporting institutions have a regulator, FRC engages the regulator to implement anti-money laundering obligations, otherwise it engages the institution directly.⁵⁸ The Centre provides an Annual Compliance Report Template to the reporting institutions to collect requisite information. These reports are however not made public and as such it is difficult to tell the extent to which the Act is being enforced.

Further, section 16 of the Proceeds of Crime and Anti-Money Laundering Act 2009, provides for penalties on natural persons and body corporates that contravene various sections of the Act. The penalties include imprisonment, fines or both depending on the section contravened. Additionally, section 24B and 24C of the Act also give the FRC powers to impose civil penalties and administrative action against a person or a reporting institution that fails to comply with or is in breach of instruction, direction or rules issued by the Centre as per provisions of section 24A of the Act. It does not, however, have provisions for mitigation incentives or leniency programmes in the form of reduced or suspended sanctions for legal and natural persons.

⁵⁸ <http://frc.go.ke/>

It is worth noting that anti-money laundering related offences are criminal offences and as such do not have statute of limitations therefore, one can be prosecuted for at any time regardless of how long ago the crime was committed.

1.3.3: *Capacities to enforce laws prohibiting laundering proceeds of crime*

Scoring question : Are adequate enforcement capacities available for enforcing laws prohibiting laundering of proceeds of crime?	75
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This indicator looks at the capacity of relevant authorities charged with the responsibility of enforcing laws that prohibit laundering of proceeds of crime. This includes their financial capacity, operational independence as well as their level of cooperation with other law enforcement agencies.

The FRC is headed by a Director General who is appointed by the Cabinet Secretary (in charge of the National Treasury and Ministry of Planning) on recommendation of the Anti-money Laundering Advisory Board and approval by the National Assembly. The Director General serves for a four -year term which is subject to renewal for one further term.

Section 11(2) of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 states that the Centre shall determine its own staff establishment and may appoint other officers as are necessary for the proper discharge of its functions under this Act in accordance with the approved general terms and conditions of service.

To a large extent, the Centre therefore reports to the Cabinet Secretary and this might affect their level of independence. In addition to the members of the Anti-money Laundering Advisory Board being drawn from various law enforcement agencies including the National Police Service and the National Intelligence Service the FRC is a principal member of the Multi Agency Team (MAT). This allows for reduced bureaucracy in investigation and prosecution of anti-money laundering related offences.

Part XII of the Proceeds of Crime and Anti Money Laundering Act, 2009 contains provisions on international assistance in investigations and proceedings relating to the Act. However, information on extent of international assistance and the operational and funding capacities of the FRC is not readily available as the FRC has not produced any annual reports since it was established in 2012.⁵⁹

1.4 Prohibiting collusion

83

The assessment notes that the Competition Act, 2010 contains robust provisions that prohibit collusion. Additionally, the Act establishes the Competition Authority of Kenya which reports active enforcement of the act.

59. The researcher was not able to secure an interview with the FRC.

1.4.1: Laws prohibiting collusion

Scoring question: Do the country's laws prohibit collusion?

100

This indicator assesses the laws that prohibit collusion. It looks at provisions on price fixing and bid rigging among others.

The Competition Act, 2010 has various provisions prohibiting collusion activities such as fixing prices and making collusive tenders among other activities.

Section 21 (1) of the Act prohibits agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya unless exempted as per specifications provided in section C of the Act.

Section 21 (3) specifies agreements, decisions or concerted practices which constitute the restrictive trade practices spelt out in section 21 (1). These include directly or indirectly fixing purchase or selling prices or any other trading conditions; collusive tendering; dividing markets by allocating customers, suppliers, areas or specific types of goods or services; limiting or controlling production, market outlets or access, technical development or investment.

1.4.2: Enforcement of laws prohibiting collusion

Scoring question: Are sanctions and incentives applied in practice to deter collusive practices?

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This indicator assesses the extent to which the Competition Act, 2010 is enforced. It looks at sanctions applied for cases of collusion, whether there are provisions for mitigation incentives as well as active enforcement of collusion cases.

The Competition Act, 2010 outlines penalties for persons (including a body corporate) who contravene provisions of the Act. Sections 21(9), 22(6) and 24 (3) state that a person who contravenes the provisions of the respective sections commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equivalent to 10% of their annual turnover, or both. Finally, section 91 states that a person convicted of an offence under this Act, for which no penalty has been specified under this Act shall be liable to a fine not exceeding five hundred thousand Kenya Shillings (USD 4938), or to imprisonment for a term not exceeding three years, or both. It is worth noting that this Act defines person to include body corporate. Offences under the Act have statute of limitations and as such one cannot be prosecuted for collusion related offences two years after the offence was committed. The competition Act, 2010 creates the Competition Authority of Kenya which is charged with the sole responsibility of enforcing the provisions of the Act.

The Authority reported having handled 27 enforcement and compliance cases with at least 17 of them relating to collusion. Out of these cases, 12 had been concluded while investigations were ongoing in the remaining cases.⁶⁰ It is noteworthy that the Act provides for a leniency programme under section 89A to enhance effectiveness in detection, finalisation and general compliance with the Act, specifically regarding Section 21 and 22. To this end, the Authority developed Leniency Programme Guidelines which were meant to be operationalised in the year 2016/2017.⁶¹ They are currently rolling this out and sensitising various stakeholders on the same.

1.4.3: Capacities to enforce laws prohibiting collusion

Scoring question: Are adequate enforcement capacities available for enforcing laws prohibiting collusion?

75

This indicator assesses the capacity of the competition authority to enforce the Competition Act, 2010. It looks at their financial and human resources as well as existing areas of cooperation with other law enforcement agencies.

The Competition Authority of Kenya was introduced by the Competition Act, 2010 with the mandate of enhancing the welfare of the people of Kenya by promoting and protecting effective competition markets and preventing misleading market conduct in Kenya. In the financial year 2016/2017, the Authority got an exchequer allocation of Kenya Shillings 340,000,000 (USD 3,358,025) with about 30% of this amount spent on salaries and remuneration. The Annual Report however does not make any assertions regarding staffing levels or budgetary constraints at the Authority.

In terms of operational independence, the Competition Authority is made up of 10 members, five of whom are appointed by the Cabinet Secretary – Ministry of Industry, Trade and Cooperatives; vetted and approved by the National Assembly. The other members of the Authority include the Attorney General, the Permanent Secretary in the Ministry for the time being responsible for finance or his representative; the Principal Secretary in the Ministry for the time being responsible for trade or his representative, a non-executive chairman and the Director General (can also be referred to as the CEO).

The head of the Authority is the chairman who is appointed by the Cabinet Secretary while the CEO is appointed by the Authority with the approval of the National Assembly, and holds office for a renewable term of 5 years, for a maximum of two terms.

The Authority has a statutory obligation under section 83 of the Competition Act, 2010 to prepare an Annual Report for transmission to the National Assembly by the Cabinet Secretary. The Annual Report captures the overall performance by the Authority, based on its

⁶⁰ The Competition Authority of Kenya 2015/2016 Annual report

⁶¹ The Competition Authority of Kenya 2015/2016 Annual report

key interventions and performance indicators.⁶² Unlike other authorities such as the National Environmental Management Authority, the Competition Authority lacks prosecutorial powers and as such works closely with the ODPP to get cases of collusion prosecuted.

The Competition Authority reports having participated in initiatives aimed at ensuring collaboration with enforcement authorities at regional and international levels. These initiatives include signing a Memorandum of Understanding with the Common Market for Eastern and Southern Africa (COMESA) Competition Commission as well as participating in activities geared towards operationalisation of East African Community (EAC) Competition Authority.⁶³

1.5 Whistleblowing

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Kenya does not have a consolidated whistleblower protection law but this is covered under various pieces of legislation. The Bribery Act, 2016 contains whistleblower protection for those in the public and private sectors and provides for penalties for those that retaliate against whistleblowers. The implementation of this is yet to be tested.

1.5.1: Whistleblower laws

Scoring question :Do the country's laws provide for protection to public and private sector whistleblowers regarding corruption?	50
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This indicator looks at various legal provisions on protection of whistleblowers. It looks at whether the laws provide for a definition of a protected whistleblower, sanctions for those who retaliate against whistleblowers, remedies for whistleblowers who suffer detrimental action among other provisions.

It is important to note that the country does not have a stand-alone whistleblower protection law. There is a Bill (Whistleblower Protection Bill) that is currently at the Attorney General's office that is yet to be tabled at the National Assembly. There are however provisions for protection of informants and whistleblowers in corruption cases captured in various laws.

The Witness Protection Act, 2012 creates the Witness Protection Agency (WPA) with the express mandate of ensuring safety and welfare of witnesses and protected persons. The Act defines a witness as a person who needs protection from a threat or risk which exists on account of his being a crucial witness; who has given or agreed to give, evidence on behalf of the State or has given or agreed to give evidence in relation to the commission or possible commission of an offence against a law of Kenya; is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya. According to the WPA, the Agency does not however protect a whistleblower unless they become a witness as per the definitions above. They report to have processed at least ten witnesses under their protection that started off as whistleblowers.⁶⁴

62. The Competition Act, 2010

63. The Competition Authority of Kenya 2015/2016 Annual Report

64. Expert interview with the Witness Protection Agency on 6th September 2017

The Anti-Corruption and Economic Crimes Act, 2003 has provisions for protection of persons that assist EACC in investigations or persons that provide information to the Commission with regards to economic crimes. Section 65 states that no action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of assistance given by the person to the Commission or an investigator; or a disclosure of information made by the person to the Commission or an investigator. The Act, however, does not spell out penalties for persons that contravene these provisions.

The Bribery Act, 2016 on the other hand has provisions for protection of whistleblowers in the public and private spheres on matters relating to bribery. The Act defines a whistleblower as a person who makes a report to the Commission or the law enforcement agencies on acts of bribery or other forms of bribery. Further, section 21(3) states that a whistleblower or witness under this Act is entitled to witness protection as may be determined by the WPA. It is worth noting that both ACECA and the Bribery Act, 2016 do not expressly limit the categories of persons that can be considered as whistleblowers based on their relationship with the entity they are providing information on. There is however more protection offered to employees through various provisions of the Bribery Act, 2016. Section 21(2) of the Act states that a person who demotes, admonishes, dismisses from employment, transfers to unfavorable working areas or otherwise harasses and intimidates a whistleblower or a witness under this section is guilty of an offence and shall be liable upon conviction to a fine not exceeding one million Kenya Shillings (USD 9,877) or to imprisonment for a term not exceeding one year or to both. The Act does not however offer remedy for whistleblowers who suffer reprisal or detrimental action as a result of their action.

Additionally, the Bribery Act 2016 in section 21(4) requires every law enforcement agency to put up measures to ensure protection of whistleblowers. It does not make provisions for other public entities and private entities to put up such measures. Despite this, the private sector is not completely left out. The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 requires that the board of listed companies have a whistleblower policy to ensure, among other things, that all employees feel supported in speaking up in confidence and reporting matters they suspect may involve anything improper, unethical or inappropriate. This code is also meant to provide a clear procedure for reporting such matters as well as provide assurance that all disclosures shall be taken seriously; treated as confidential and managed without fear of retaliation.

1.5.2: Enforcement of whistleblower laws

Scoring question: To what extent does the public sector enforce the laws protecting whistleblowers in the public and private sector?

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This indicator reviews the extent to which laws protecting whistleblowers are enforced. It looks at existence of internal reporting channels in regulatory agencies, anonymous reporting channels to auditors and independent reporting channels among other provisions.

There is no independent whistleblower investigation/complaints authority or tribunal in Kenya. However, various law enforcement agencies are charged with the responsibility of investigating disclosures and complaints from whistleblowers depending on the nature of the complaint; EACC, KRA, CBK, FRC, CMA, OAG and the Directorate of Criminal Investigations (DCI).

The EACC, for example, has a portal on their website where one can lodge a report. The portal is based on the Business Keeper Monitoring System (BKMS®) that ensures anonymity and confidentiality of reports.⁶⁵ Section 60 (1) of the Public Audit Act 2015 requires the Auditor General to put in place a mechanism for confidential reporting about the officers of the Auditor General relating to unlawful acts or orders relating to violation of laws in relation to public funds, gross wastage, mismanagement and abuse of authority. The Act further provides for persons reporting misconduct to be treated with utmost confidentiality in section 60(2). The OAG has not put up a specific mechanism for confidential reporting, rather it receives corruption reports through its general number. If the complaint relates to an officer in the Auditor General's office, the report is forwarded to the Human Resources office which falls under the Deputy Auditor General in charge of corporate services. If the report relates to an external matter, it is then forwarded to the EACC for further action.

It is worth noting that none of these law enforcement agencies put out specific reports regarding enforcement of whistleblower protection laws or policies or even action taken on reports received from whistleblowers.

1.6 Accounting, Auditing and disclosure

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The accounting and auditing standards in Kenya are in line with the International Financial reporting standards which are promoted by the Institute of Certified Public Accountants Kenya (ICPAK). They are further reinforced by a legislative framework outlined in the Companies Act, 2015 and the Accountants act. Enforcement of these standards is however limited to members of ICPAK. Additionally, there is no legal requirements for professional accounting, auditing and advisory related services to be members of ICPAK thus creating a gap in enforcement.

In terms of beneficial ownership transparency, the Companies Amendment act, 2107 now requires companies to keep a register of its beneficial owners if any and file the same with the Business registration service. However, the BRS does not yet have a public register of beneficial owners of companies.

65. www.eacc.go.ke

1.6.1: Accounting and auditing standards

Scoring question: Does the country's accounting and auditing regulatory frameworks adhere to internationally recognized standards (for example, International Financial Reporting Standards)?

100

This indicator reviews the country's auditing and accounting standards against the internationally recognised standards.

The Companies Act, 2015 and the Accountants Act, 2008 largely contain provisions for accounting and auditing frameworks in the country.

Section 635(1) of the Companies Act, 2015 provides that directors of every company shall prepare a financial statement for the company⁶⁶ for each of financial year of the company. Section 638 (c) provides that the statement complies with the 'prescribed financial accounting standards'. The Act defines 'prescribed financial accounting standards' as statements of standard accounting practice issued by a professional body or bodies in accounting and finance recognised by law in Kenya. In Kenya, ICPAK is the body charged with promoting standards of professional competence and practice amongst members of the Institute as well as prescribing accounting standards in Kenya which are aligned to IFRS. ICPAK is a member of the International Federation of Accountants which has the International Auditing and Assurance Standards Board (IAASB) that is responsible for revising and setting new standards. These standards prohibit inappropriate accounting acts including but not limited to: the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditure, the entry of liabilities with incorrect identification of their objects, the use of false documents and the intentional destruction of bookkeeping.

Section 628 of the Companies Act, 2015 requires each company to keep proper accounting records according to the various provisions while section 629 states that a company that fails to do so and the officer at fault commit an offence. Section 630 (2) provides that the company preserve the records for a minimum of seven years. Further, section 630 (1) (a) and (b) provide that these records shall be kept at the company's registered office and are at all times available for inspection by officers of the company.

In terms of establishing and maintaining effective control systems the Companies Act, 2015 in section 770 (1), requires that the audit committee of a listed company set out the corporate governance principles that are appropriate for the nature and scope of the company's business; establish policies and strategies for achieving them; and annually assess the extent to which the company has observed those policies and strategies. This requirement does not extend to non-listed companies. Additionally, there is no requirement in the Companies Act, 2015 for companies to have internal audit functions. There are provisions however for external audits.

66. Section 638(b) provides that the statement contains a true and fair view of the financial position of the company.

Section 721 of the same Act requires a publicly traded company to have an auditor or auditors for each financial year of the company, unless the directors reasonably resolve otherwise on the ground that an audited financial statement is unlikely to be required for a particular financial year. Section 727 (b), requires that the auditor makes a report to members of the company on all annual financial statements of the company to be presented at the annual general meeting.

1.6.2: Enforcement of accounting and auditing standards

Scoring question: Is the adherence of the country's accounting and auditing regulatory framework enforced in practice?	50
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This indicator looks at enforcement of the accounting and auditing standards by law enforcement agencies and various oversight agencies.

The Companies Act, 2015 also outlines various penalties for altering, falsification or mutilating company documents. Section 635 (3) of the Act states that directors that fail to prepare a financial statement as per the requirements commits to a fine and is liable to pay a fine not exceeding one million Kenya Shillings (USD 9,877) upon conviction. Additionally, section 1009 also requires companies to ensure that adequate precaution is taken to guard against falsification of records as well as facilitate discovery of any falsification that might occur. Failure to do so attracts a fine or imprisonment.

Oversight agencies such as the CMA and the CBK ensure that entities under their purview adhere to the accounting and regulatory framework in Kenya. ICPAK, on the other hand, ensures that the accounting and regulatory framework is enforced across its membership. At the moment, companies are not required to have their accounting / finance professionals to be members of ICPAK but there is a Bill currently under development to make this mandatory.⁶⁷ Members of ICPAK found to have failed to keep proper books by omission or falsification of records are subject to ICPAK disciplinary procedures which include fines, re-training and removal from the register.⁶⁸

Financial returns form part of the statutory returns to be filed to the Business Registration Services (BRS). There is however no mechanism to check whether the reports filed have adhered to the prescribed accounting and regulatory framework. This is also true of the returns filed at KRA; their focus is on a company's tax liability issues and compliance to the same. There is, however, no framework that requires ICPAK to review financial reports shared with KRA and BRS and as mentioned earlier, ICPAK can only enforce compliance within their membership.

⁶⁷.Expert interview with ICPAK on 4th August 2017

⁶⁸. Ibid

Information on enforcement action is not made public by oversight authorities although there may be media reports of the prosecution of persons involved in such cases. For instance, the Central Bank of Kenya, when putting Imperial Bank Limited under receivership, issued a press statement citing existence of unsound business conditions as one of the reasons.⁶⁹ No further information is provided in this regard. There was however a lot of media coverage regarding the collapse of the bank detailing massive fraud that took place at the financial institution.⁷⁰

1.6.3: Professional service providers

Scoring question : Are the country's professional service providers (for accounting, auditing, rating or other related advisory services) required to comply with internationally recognized standards?	50
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This indicator looks at the standards which professional service providers in accounting or auditing are required to comply with.

Section 3 of the Accountants Act, 2008 establishes the Institute of Certified Public Accountants (ICPAK) mandated to, among others, promote standards of professional competence and practice amongst members of the Institute. According to section 18, no person shall practice as an accountant unless he / she is the holder of a practicing certificate and a licence to practice that are in force. Section 22 of the Act requires the holder of a practicing certificate who intends to practice as a firm, whether as a sole practitioner or in a partnership, to apply to the Registration Committee for an annual licence, furnishing the Registration Committee with such details of the firm as it may require.

It is worth mentioning that while the Accountants Act prohibits accountants from practicing without a licence, there are a lot of unlicensed practitioners operating in the private sector and ICPAK is only able to enforce these standards among its membership.

There is no legal or policy framework that speaks to the independence or lack thereof of these professional service providers other than that guided by their ethical and professional standards. There was a concern that was raised by the Central Bank after the collapse of Imperial Bank Kenya Limited that audits did not represent the true and accurate picture of the company's finances. This led to a recommendation that financial institutions regulated by the CBK rotate their external auditors every three years but this recommendation was never formalised and implemented.⁷¹

As previously mentioned, professional bodies such as ICPAK and the Institute of Certified Public Secretaries Kenya (ICPSK) play an oversight role on their membership.

69. https://www.centralbank.go.ke/images/docs/media/Press%20Releases/Press_Release_-_Imperial_Bank.pdf

70. <https://www.businessdailyafrica.com/539546-2932556-6yc9lj/index.html>

71. <https://www.businessdailyafrica.com/Opinion-and-Analysis/Three-year-bank-audit-plan-masks-underlying-issues/539548-3353938-2eep81/>

1.6.4: Beneficial ownership

Scoring question: Do the country's laws require public information on beneficial ownership for companies, trusts and other legal structures?	25
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This indicator assesses the country's laws on provisions of disclosure of beneficial ownership. It checks on key provisions such as existence of a public register showing beneficial owners of companies and criminalisation of willful misinformation of beneficial ownership among other provisions.

The Companies Act, 2015 has various provisions requiring companies to keep registers with information on members and directors. Section 93 of the Act states that all companies shall keep a register of its members containing their names, address and the date they became members. If a company has a share capital, the company shall enter in its register of members, along with the name and address of each member, a statement of the shares held by the member.

Additionally, section 135 states that a company shall keep its register of directors open for inspection at its registered office or at some other place prescribed or authorised by the regulations. A company shall ensure that its register of directors is kept open during its ordinary hours of business for inspection by any member of the company without charge; and any other person on payment of a fee. This register of directors should contain the person's name and any former name; (b) a service address; (c) the country or state (or part of Kenya) in which the person is usually resident; (d) the person's nationality; (e) the person's business or occupation (if any); (f) the person's date of birth. If the director is a body corporate, its name and registered office should be shown.

Section 94 states that a company shall keep its register of members at their registered office and lodge a copy with the Registrar of Companies. Additionally, section 96 requires that this register be open to inspection by a member of the company (free of charge) and by any other person upon payment of an administrative fee. The Act does not however specify a format or a template for the register. It is worth noting that there are penalties involved with a company refusing inspection of its members' register but there are no penalties spelt out for companies that willfully misrepresent members' information.

The Companies (amendment) Act 2017, now has provisions on beneficial ownership. Section 93 (1) was amended to state that all companies shall keep a register of its members, which shall include information relating to beneficial owners if any. Section 93 (2) was amended to include name and addresses of beneficial members as part of the information required. Additionally, section 93(8) was amended to include information on beneficial owners be part of the information contained in the register of members lodged at the Registrar of Companies. The Business Registration Service is in the process of preparing a template to guide the collection of information on beneficial ownership.⁷²

⁷². Expert interview with the BRS on 10th October 2017

Section 135 was amended to include an addition that the register also contains a person's other company directorships. This does not however include the name of nominees fronting the directors or beneficial owners behind the nominees.

The Companies Act does not have provisions for trustees to collect information on beneficiaries of trust they administer. However, section 54B of the Income Tax Act, requires that in cases of a trust, full identity and address details of trustees, settlors and beneficiaries of the trust be availed to KRA. The Companies Act makes no mention of criminalising wilful misrepresentation of beneficial ownership information or failure to disclose nominees fronting directors or shareholders.

1.7 Prohibiting undue influence

42

Largely, Kenya has a strong legal framework that guides political party and campaign financing. The Registrar of Political Parties and the Independent Electoral and Boundaries Commission (IEBC) are the two institutions charged with the mandate of enforcement of these laws. There are however various documented challenges associated with the enforcement of these laws this creating room for undue influence. This is further compounded by a lack of a legislation or policy framework that regulates lobbying in Kenya.

Other matters of conflict of interest are provided for to some extent in Chapter six of the Constitution, Leadership and Integrity Act, 2013 and the Public Officer Ethics Act, 2003 with the EACC charged with the mandate to enforce.

1.7.1: Laws on political contributions

Scoring question: Is undue influence in the form of political contributions from the private sector to political parties and/or individual candidates prohibited by law?

75

This indicator looks at the country's law regarding contributions to political parties. It looks at what provisions exist regarding use of state resources for political campaign, corporate donations to political parties and anonymous donations among other key provisions.

There are four main laws that govern political contributions in Kenya; The Political Parties Act 2011, Elections Act, 2011, the Election Campaign Financing Act, 2013 and the Election Offences Act, 2016.

Section 14 of the Election Offences Act, 2016 states that except as authorised under the Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum. Additionally, section 14 of the Political Parties Act, 2011 states that a candidate/ political/ referendum shall not receive donation from the State, State institution or public resource.

A State or public officer is also prohibited from using public resources to support campaigns or support organisations that support campaigns. A candidate who receives such money should within forty-eight hours submit the contribution to the IEBC and failure to do so shall result into disqualification from contesting in an election.

Despite these provisions, the Political Parties Act, 2011 makes certain exceptions. Section 23 establishes a political parties' fund, financed by the exchequer. Section 26 (1) provides that the fund be used for purposes compatible with promoting democracy including covering the election expenses of a political party. A mechanism on how to distribute the funds is spelt out in section 25 of the Act.

Other than the Political Parties Fund (for parties that qualify), political parties can raise funds from various (lawful) sources including individual donations and corporates etc. There are however limits on these donations. Section 12(1) of the Election Campaign Financing Act, 2013 requires IEBC to prescribe, at least 12 months before a general election, limits to contributions to political parties with regard to; total contributions, contributions from a single source, paid-up media coverage and loan forming part of a contribution. Further, section 12 (3) requires IEBC to prescribe limits beyond which contributions from a single source maybe disclosed.

Section 12(2) limits the amount of campaign financing contribution from a single source not to exceed 20% of the total contributions received by that candidate, political party or referendum committee. Exceptions are made where contribution is from a candidate to that candidate's campaign financing account, or from a political party or a referendum committee to that political parties' or referendum committee's campaign financing account. Additionally, section 28(2) of the Political Parties Act, 2011 states that no person or organisation (other than a founding member of the party as an initial contribution of assets to the party) shall, in any one year, contribute to a political party an amount, whether in cash or in kind exceeding five percent of the total expenditure of the political party.

Election Campaign Financing Act, 2013 has provisions that prohibit political parties from receiving anonymous contributions. Section 13 states that a candidate or a political party shall not receive and keep cash from anonymous contributions or contribution from an illegal source. If a candidate or a political party receives cash from anonymous or illegal sources, they are supposed to submit such cash to the IEBC within 14 days. A candidate or political party that fails to report the anonymous or funds from an illegal source within the stipulated time commits an offence.

1.7.2: Enforcement and public disclosure on political contributions

Scoring question: Is the prohibition of undue influence in the form of political contributions from the private sector to political parties and/or individual candidates monitored in practice?

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Political parties are further required to keep records of their financial contributions. Section 17 of the Political Parties Act, 2011 requires that political parties keep records of particulars of any contribution, donation or pledge of a contribution or donation, whether in cash or in kind, made by the founding members of the political party. Additionally, political parties are required to keep the latest audited books of accounts showing the sources of the funds of the political party, membership dues paid; and donations in cash or in kind.

Section 16(1) of the election campaign financing act requires that a political party, a candidate or referendum committee that receives contributions exceeding twenty thousand Kenya Shillings (USD 198) shall issue an official receipt for such. Further in section 16(3) the Act requires disclosure on the amount and source of contributions received for campaign for a nomination, an election or a referendum.

This indicator looks at the extent to which laws prohibiting undue influence by political parties are enforced. It particularly focuses on how financial information of political parties is monitored, audited, made available to the public or reported by political parties.

Section 23 of the Political Parties Act, 2011 establishes the Office of the Registrar of Political Parties (ORPP), an independent office, whose duties include registering, regulating, monitoring, investigating and supervising political parties to ensure compliance with the Act. The Act has various provisions regarding finances of political parties. During the election period, the election campaign financing Act requires that the IEBC be responsible for the administration and regulation of campaign financing, including but not limited to monitoring and regulating campaign expenses. It is worth noting that the IEBC prepared regulations on campaign financing in 2016 but the National Assembly suspended their implementation.⁷³ Neither the ORPP nor the IEBC make public reports of their activities regarding monitoring political parties' financial records.

Section 17 (d) of the Political Parties Act requires that political parties keep accurate and correct records of particulars of any contribution, donation or pledge of a contribution or donation, whether in cash or in kind, made by the founding members of the political party. Further, Section 17(g) requires political parties' source of funds, names and addresses for the persons who have contributed, membership dues paid, cash or in kind donations; all receipts, income and expenditure transactions of a political party. Additionally, section 29 of the Act requires that political parties, at the end of each financial year, publish their sources of funding (amount of money received from the fund, amount of money received from members and

73. <https://www.standardmedia.co.ke/article/2000227396/house-team-declares-kenya-s-campaign-financing-regulations-null-and-void>

supporters, and amount and sources of donations). Parties are also required to publish their income and expenditures as well as their assets and liabilities. This information should be published in at least 2 nationwide circulation newspapers. According the Registrar of Political Parties, they have not had to deregister or impose a fine on any political party as a result of non-compliance with the provisions.⁷⁴

Section 31 of The Political Parties Act, 2011 provides for an annual audit of the accounts of every political party; the audited accounts are supposed to be submitted to the Registrar of Political Parties and tabled in the National Assembly. Audited accounts that have been tabled in the National Assembly automatically become public record after 14 days according to the Public Audit Act section 32(3). Indeed, the office of the Auditor General publishes various audit reports on their website. However, currently, there is no audited report of any political party uploaded. These reports are however available from the ORPP at an administrative fee.

Additionally, section 17 of the Political Parties Act, 2011 provides for members of the political parties to inspect and obtain copies of the records of a political party maintained at its head office or county office upon paying the prescribed fees while section 31(5) provides for access by any person to the audited accounts of a political party upon payment of the prescribed fees by the registrar.

1.7.3: Laws on lobbying

Scoring question: Is undue influence in the form of lobbying by the private sector prohibited by law?	0
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This indicator looks at laws that prohibit undue influence through lobbying.

Currently there are no laws or policies against lobbying in Kenya. There was an attempt to introduce the same as a result of allegations of bribery by one of the corporations to affect the outcome on a legislation but the Bill did not go through.

1.7.4: Enforcement and public disclosure on lobbying

Scoring question: Is the prohibition of undue influence in the form of lobbying by the private sector monitored in practice?	0
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This indicator looks at enforcement of laws on lobbying by the private sector. There is currently no legislation or policy that regulates lobbying in Kenya.

1.7.5: Laws on other conflicts of interest

Scoring question: Is undue influence in the form of other conflicts of interest between the private and the public sector prohibited by law?	50
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This indicator looks at laws in the country that govern management of conflict of interest between the public and private sectors.

74. Expert interview with the Office of the Registrar of Political Parties on 29th September 2017

Generally, there are two laws that regulate conflict of interest in the public sector; Leadership and Integrity Act, 2012 and the Public Officer Ethics Act, 2003.

Section 16(2) of the Leadership and Integrity Act, 2013 prohibits a state officer or a public officer from holding shares or having any other interest in a corporation directly or through another person if by doing so results in a conflict of the State Officer's or public officer's personal interest and the officer's official duties. In the event a State or Public Officer's personal interests conflict with their official duties, section 16(3) of the Act requires the officer to declare the personal interests to the respective the employing government agency.

Section 14(1) of the same act requires that a gift or donation given to a State Officer on a public or official occasion be treated as a gift or donation to the State. Further, section 14(5) requires a State Officer who receives a gift or donation to declare the gift or donation to the commission and the public entity they represent. This is however required of gifts that do not comply with the provisions set out in section 14(2)⁷⁵. Section 12(1, 2, 3) and section 11(3) of the Public Officer Ethics Act, 2003 have similar provisions. None of these Acts provide for a set frequency of declaration of conflict of interest, rather require declaration on need basis.

Finally, section 14(6a) requires that every public entity keep a register of gifts received by a State Officer serving in the public entity while section 16(11) requires every public entity maintain an open register of conflicts of interest in which an affected State officer or public officer can register the particulars of registrable interests, stating the nature and extent of the conflict. The Act does not require that gifts and conflict of interest registers be made public.

It is worth noting that both Acts have provisions prohibiting State Officers and public officers from engaging in any other employment. For public officers, this is a total prohibition while for State Officers, there is a qualification.

Additionally, none of the two Acts⁷⁶ provide for a cooling off period for public or State officials wishing to transition to the private sector or corporate executives moving to senior public posts or positions.

1.7.6: Enforcement and public disclosure of other conflicts of interest

Scoring question: Is the prohibition of undue influence in the form of other conflicts of interest between the private and the public sector monitored in practice?

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This indicator assesses to what extent conflict of interest issues are monitored. It looks at how regularly public officers declare interest, which institutions are charged with the mandate to monitor this.

75. a State officer may receive a gift given to the State officer in an official capacity, provided that—
 a. the gift is within the ordinary bounds of propriety, a usual expression of courtesy or protocol and within the ordinary standards of hospitality;
 b. the gift is not monetary; and
 c. the gift does not exceed such value as may be prescribed by the Commission in the regulations.

76. Section 8 of the Public officer Ethics Act, 2003 and section 26 of the Leadership and Integrity Act, 2013

As previously mentioned, section 14(6a) of the Leadership and Integrity Act, 2012 requires that every public entity keep a register of gifts received by a State Officer serving in the public entity while section 16(11) requires every public entity maintain an open register of conflicts of interest in which an affected State Officer or public officer shall register the particulars of registrable interests, stating the nature and extent of the conflict.

The EACC is tasked with the mandate to enforce the Leadership and Integrity Act 2012, the Public Officer Ethics Act, 2003 and the administration of chapter six of the constitution on leadership and integrity. They make reports on the status of enforcement in their annual reports. For instance, in their 2015 /2016 Annual Report, they handled a case where the Commission conducted investigations into allegations of conflict of interest and influencing award of tenders by an employee of Sports Stadia Management Board to his Magazine, *The East African Business Times*.

Additionally, section 9(1) of the leadership and integrity regulations, 2015 requires public entities furnish the Commission with a report specifying gifts received, gifts the entity intends to and has disposed of within the reporting year. According to section 13(1) of the same regulations, the register of conflict of interest is to be kept in the custody of the accounting officer of the public entity. Any person can make a request to the relevant public entity to inspect the conflict of interest register as per the laid down regulations; the public entity is required to acknowledge receipt within seven days and avail the information. Additionally, section 16(10) of the Leadership and Integrity Act requires the speakers of the Senate, National and County assemblies maintain a conflict of interest register that is open to inspection by members of the public.

Additionally, none of the two Acts provide for a cooling off period for public or state officials wishing to transition to the private sector or corporate executives moving to senior public positions and as such no monitoring of the same is required.

1.8 Public Procurement

63

There is a fairly robust legislative, policy and institutional framework that guides public procurement in Kenya. This includes the Public Finance Management Act, 2012 and the Public Procurement and Disposal of Assets Act ,2015 as well as the Public Procurement and Regulatory Authority and the Integrated Finance Management Information System (IFMIS). This, largely ensures that there is an impartial public procurement process in the country, though with some documented challenges.

There are also external safeguards put in place to detect corruption and report violations though these are not robust enough to maintain the integrity of public procurement processes. Additionally, other than signing a suppliers code of conduct, the private sector is not required to have in place any other integrity management mechanism before they can bid and get awarded public contracts.

1.8.1: Operating environment

Scoring question: To what extent do the country's public procurement processes ensure that contracts are awarded in a fair and impartial manner?	75
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This indicator looks at the impartiality of awarding contracts in the public procurement processes in the country. It looks at the process of how tenders are advertised and awarded as well as the anti-corruption safeguards put in place during these processes.

Public procurement in Kenya is governed by the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012. Section 53(2) of the Public Procurement and Asset Disposal Act, 2015 requires that an accounting officer prepares an annual procurement plan which is realistic, within the approved budget, prior to commencement of each financial year as part of the annual budget preparation process. Section 96 (1) requires that the accounting officer of the procuring entity takes reasonable steps to ensure that the invitation to tender to the attention of those who may wish to submit tenders. The steps mentioned include advertisements placed in nationwide circulation newspapers, procuring entity websites and dedicated government tender portals among others. Section 98 further requires that the accounting officer avails tender documents as per the invitation to tender, including uploading them on the website while section 138 requires the accounting officer to publish and publicise all contract awards on their notice boards at conspicuous places and website, if available.

The First Schedule of the Public Procurement and Disposal (amendment) Regulations, 2013 provide a threshold matrix through which public procurement is subject to. The matrix outlines the maximum or minimum level of expenditure allowed for the use of a particular procurement method for goods, services and works. The regulations, however, do not provide for inclusion of integrity pacts for any level of expenditure.

The Act also outlines the internal organisation that is designed at limiting discretionary decision making through use of ad hoc committees. Section 46 of the Act provides for the accounting officer setting up of an ad hoc evaluation committee made up of three to five members, on a rotational basis with the mandate of advice on the evaluation of tender documents. Section 48 requires the accounting officer to set up ad hoc inspection and acceptance committees with the mandate of inspecting and reviewing the goods, works and services to ensure compliance with contract specifications.

Additionally, section 12 (e) of the Public Finance Management Act, 2012 requires the National Treasury to design and prescribe an efficient financial management system to ensure transparent financial management and standard financial reporting. The National Treasury has since done this through design and implementation of the Integrated Finance Management System (IFMIS). Ideally, all government procurement should now be online through this

system but there have been documented challenges associated with rolling out IFMIS, particularly in the counties, that has hampered this.⁷⁷

The Public Procurement and Asset Disposal Act has made provisions for anti-corruption measures to be undertaken by prospective bidders. Section 62 of the Act now requires that a tender, proposal or quotation submitted by a person include a declaration that the person will not engage in any corrupt or fraudulent practice and a declaration that the person or his or her sub-contractors have not been debarred from participating in procurement proceedings. Further section 63 (1) states that a person, whether an applicant or the contracting authority, shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.

1.8.2: Integrity of contracting authorities

Scoring question: To what extent do the country's contracting authorities and their employees adhere to internationally recognised standards of integrity and ethical behaviour?	75
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This indicator looks at the integrity management initiatives in contracting entities in Kenya and adherence of the same. These initiatives include provision of anonymous whistleblower channels, anti-corruption policies and training on the policies and asset declaration of senior managers among others.

All government agencies that have a budgetary allocation from the exchequer can be characterised as a procuring entity. This therefore means that the Public and State Officers working in these agencies are subject to provisions of chapter six of the constitution, the Leadership and Integrity Act, 2012 and the Public Officer Ethics Act, 2003 which outline various integrity management initiatives to be instituted by respective public entities.

Additionally, section 11(1b) of the EACC Act, 2011 charges the EACC with the responsibility to work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption. In their annual reports, the EACC records the number of public entities they assisted to mainstream anti-corruption initiatives. For example, in their 2015/2016 report, they recorded providing 1,370 advisories to 265 public institutions under the Performance Contracting (PC) framework and also to 13 Counties not included in the Performance Contracting. This involved analysing, acknowledging and providing feedback to Ministries, Departments and Agencies (MDAs) under the Corruption Eradication Indicator for Performance Contracting Period. Further, the Commission visited 13 public institutions to verify the level of implementation of the anti-corruption indicator in the Performance Contracting framework. The EACC however cites the low rating of the anti-corruption indicator (5%) in the framework as a challenge in the fight against corruption.⁷⁸ Unfortunately, reports on the implementation of the performance contracting are submitted to the Division of Performance Contracting in the Ministry of Devolution and Arid & Semi-Arid Land (ASAL) Areas and are not publicly available.

77. www.ifmis.go.ke

78. EACC, 2016 Report on the achievements in the fight against corruption

Another key integrity management initiative that employees of contracting authorities are meant to adhere to are wealth declarations as outlined in Section 27(1) of the Public Officer Ethics Act, 2003. It requires every public officer to submit to the responsible Commission a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years. These declarations, done once every two years, are not made public. They however, can be accessed by any person upon application to the responsible Commission, upon demonstrating to the satisfaction of the responsible Commission that he or she has a legitimate interest and good cause in furtherance of the objectives of the Act.

The EACC contends that corruption is most prevalent in the procurement sector, contributing to 46% of all corruption cases. This involves collusion between public officials and suppliers. The EACC reports that at least three convictions on procurement related cases took place in the year 2016.⁷⁹

The Public Procurement and Asset Disposal Act, 2015 outlines various penalties for contravening their anti-corruption provisions. Section 66 of the Act provides that a person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding. A person who contravenes the provisions of that sub-section commits an offence; is liable to be disqualified from entering into a contract for a procurement or asset disposal proceeding; or if a contract has already been entered into with the person, the contract shall be voidable. Section 177 of the same act provides that a person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction, to a fine not exceeding four million Kenya Shillings (USD 39, 506) or to imprisonment for a term not exceeding ten years or to both. For external stakeholders, section 9(p) of the Public Procurement and Asset Disposal Act, 2015 requires the Procurement Regulatory Authority to develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities; so far, a draft suppliers' code has so far been prepared.⁸⁰

Additionally, the National Treasury, in 2016, issued a circular requiring the procurement function in a procuring entity be handled by a procurement professional. This professional is defined as a person who has professional qualifications in procurement or supply chain management from a recognised institution and is a member of the Kenya Institute of Supplies Management (KISM) established under the Supplies Practitioners Management Act, 2007. Members of KISM are required to sign and abide by a code of conduct.

It is worth noting that the PPRA does not have provisions for protecting whistleblowers.

⁷⁹ EACC, 2016 Reports on the achievements in the fight against corruption

⁸⁰ <http://www.ppoa.go.ke/code-of-ethics-for-suppliers>

Section 21(4) of the Bribery Act, 2016 compels all law enforcement agencies to put in place such mechanisms but technically, the PPRA is an oversight authority not really a law enforcement agency and as such is not subject to this provision.

The Public Procurement and Asset Disposal Act, 2015 the Public Finance Management Act, 2012 and the Supplies Practitioners Management Act, 2007 only outline qualifications and job descriptions of procurement professionals; they make no mention of any remuneration of the same. It is worth noting that salaries for State and public officers are guided by the Salaries and Remuneration Commission (SRC) who also do not outline any specific remuneration perks for procurement positions.

Section 73(1) of the Public Finance Management Act, 2012 requires every national government entity to have appropriate arrangements in place for conducting internal audit according to the guidelines of the Accounting Standards Board. Section 153 requires that County governments establish the same.

Section 162 (1) of the Public Finance Management Regulations, states that the Head of Internal Audit unit under a national government entity shall enjoy operational independence through the reporting structure by reporting administratively to the accounting officer and functionally to the Audit Committee. Section 162 (2) states that an accounting Officer shall ensure that the organisational structure of the internal audit unit facilitates the internal auditor to be independent of the programs, operations and activities he or she audits to ensure the impartiality and credibility of the internal audit work undertaken.

1.8.3: External safeguards

Scoring question: To what extent do the country's public procurement processes include external safeguards for detecting and reporting violations?	50
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This indicator looks at safeguards put in place to detect and report violations in the country's public procurement processes. It looks at independence of audit functions, existence of complaint reporting mechanisms, independent appeals processes for aggrieved bidders among other safeguards.

According to article 226(3) of the Constitution, all government and State organs shall be audited by the Auditor General. The public Audit Act, 2015 outlines the independence of the Auditor General in section 10 by stating that the Auditor General shall not be subject to direction or control by any person or authority in carrying out his or her functions under the Constitution or under this Act; the Auditor General and his or her staff shall perform their functions impartially, without fear, favour or prejudice and shall exercise their powers independently subject to the provisions of the Article 249 (2) of the Constitution, the provision of this Act and any other written law.

Section 32 of the Public Audit Act, 2015 requires that all reports of an audit be submitted to the

National Assembly or the relevant County Assembly. Parliament is then required to publicise on its official website and other public spaces within seven days of receiving the report and 14 days after the lapse of the seven days, the Auditor General should publish on their official website. The office of the Auditor General's website currently has the 2014/2015 national government report and reports of the 47 county governments.⁸¹

Section 8(1)(h) of the Public Procurement and Asset Disposal Act, 2015 establishes the Public Procurement Oversight Authority (PPOA)⁸². Section 9(1)(h) lists one of the authority's mandate to include investigation and action on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.

Further, section 35 of the Acts states that the PPOA has the mandate to undertake investigations, at any reasonable time, by examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding; or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach as per the Act or regulations.

It is worth noting that the PPOA does not have an anonymous mechanism through which someone can make a report. There are general contacts provided on the website⁸³ through which members of the public can call and get directed to the manager in charge of complaints. It however, does not provide a voluntary disclosure programme that allows companies to report corruption in return for leniency.

The Public Procurement and Asset Disposal Act, 2015 does however provide for administrative and judicial review of aggrieved bidders' complaints. Section 167 of the Act states that a candidate or a tenderer, who claims to have suffered or risked suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

This review is to be carried out by the Public Procurement Administrative Review Board - a central independent procurement appeals review board – which has a mandate to review, hear and determine all tendering and asset disposal disputes. Additionally, according to section 175(1) a person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within 14 days from the date of the Review Board's decision, failure to which the decision of the Board shall be final and binding to both parties.

Section 9(q) of the Public Procurement and Asset Disposal Act requires the PPOA to cooperate

81. PPOA is meant to transition to PPRA (Public Procurement

82. Regulatory Authority and this is still ongoing.

83. <http://www.ppoa.go.ke/>

with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved. Mechanisms to actualise this have not been set up.

1.8.4: Regulations for the private sector

Scoring question: To what extent do the country's public procurement processes require integrity measures in bidding entities?

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This indicator looks at what integrity measures bidding entities are required to have in place before participating in public procurement processes.

Section 62 of the Public Procurement and Asset Disposal Act, 2015 requires the persons submitting tenders, proposals or quotations to include a declaration that the person will not engage in any corrupt or fraudulent practice and a declaration that the person or his or her sub-contractors are not debarred from participating in procurement proceedings. The PPOA indeed has provided a code of conduct; Code of Ethics for Suppliers in Public Procurement and Disposal, applicable to suppliers participating in public procurement and disposal of public assets. The Act makes no other requirements of bidding entities with regards to their anti-corruption measures. There are also no incentives or preferential treatment offered to companies with effective anti-corruption programmes. Additionally, there are no restrictions placed on companies whose ownership structure is unclear and one that does not disclose the ultimate beneficiary of associated and parent companies.

According to section 55, of the Public Procurement and Asset Disposal Act, 2015 a person is not eligible to bid if such a person has been convicted of corrupt or fraudulent practices. Additionally, Section 176 of the PPDA Act, 2015 outlines penalties and sanctions against employees of procuring entities and suppliers who commit offences under the act. Some of the actions outlined include:

- Payment of fines not exceeding four million Kenya Shillings (USD 39,506) or imprisonment for a term not exceeding ten years or both (for individuals)
- A fine not exceeding ten million Kenya Shillings (USD 9,877) for a body corporate.
- Public /State officers involved are subject to disciplinary action while those that are not State /public officers get debarred.

Section 167 of the Public Procurement and Asset Disposal Act, 2015 provides avenues through which aggrieved bidders can seek redress. The PPARB publishes outcomes of the reviews on the Public Procurement Regulatory Authority website.⁸⁴

⁸⁴. PPOA.go.ke

1.9 Taxes and Customs

83

Kenya Revenue Authority is charged with the mandate of tax and custom administration in the Country as per Article 2019 of the Constitution and the Tax Procedures Act, 2015. It proactively makes public (for instance on their website) information regarding tax obligations of individuals and corporate entities as well as tax and custom receipts to the National Treasury. Additionally, KRA has digitised key processes such as tax registration and filing tax returns.

KRA also has strong integrity management initiatives that apply to their staff and external stakeholders and are subject to external safeguards provided by the Office of the Auditor General.

1.9.1: Operating environment

Scoring question: Are the country's tax and custom administrations utilising processes in accordance with internationally recognized standards

75

This indicator assesses the at the country's tax and custom administration system and to what extent it compares with the internationally recognised standards.

According to KRA, the country's tax system conforms with the 2013 World Customs Organization standards to a large extent in terms of tariff, harmonisation and immediate release system.⁸⁵ The Tax Procedures Act, 2015 outlines various procedures related to tax administration in Kenya. KRA, on their website, also provide various information regarding number and type of taxes to be paid by different entities and persons. In terms of regulation of taxes between National and County government, Article 209 of the Constitution outlines categories of taxes that may be imposed by each level of government.

Moreover, and as per KRA provisions, types and number of taxes as well as information on tax deals made with national and multinational companies, including advance tax deals are not made by the revenue collection body but by the National Treasury, with KRA's role remaining as implementers.⁸⁶ Information on tax deals with various national and multinational corporates is however not readily available as what can be accessed at the National Treasury is mostly about double tax agreements with various countries.

KRA submits information on taxes and custom fees to the Treasury on a monthly basis, then publishes this report on its website. This information is also published in the Annual Economic Survey compiled by the Kenya National Bureau of Statistics. For example, in the 2017 Economic Survey, gross receipts are broken down as follows:

85. Expert interview with KRA on 28th September 2017

86. Expert interview with KRA on 28th August 2017

Sources of income	Amount in Ksh in Millions	Amount in USD in Millions
Taxes on income, profits and capital gains	662,854.07	6,546.71
Taxes on property	100.00	0.99
Value Added Tax (VAT)	338,680.18	3,344.99
Taxes on other goods and services	205,016.46	2,024.85
Taxes on international trade transactions	119,643.24	1,181.66

Additionally; this information is available upon request from the Commissioner General of the KRA.

In terms of procedures and systems used to collect taxes, Section 75 of the Tax Procedures Act, 2015 outlines instances where an electronic tax system may be used. This includes:

- an application for registration under a tax law;
- the submitting or lodging of a tax return or other document under a tax law;
- the payment or repayment of a tax under a tax law; or
- a certificate of registration, service of a notice among others.

To this end, KRA instituted an online system of filing returns and requires all persons or corporations with tax liabilities to file their returns using the system.⁸⁷ Additionally, registration of taxpayers as well as payment of custom fees at the port is now done online. KRA has tried to ensure that there is limited interaction between customers and tax authority employees.

1.9.2: Integrity of tax administration authorities

Scoring question: Are the country's tax and custom administrations and its employees committed to internationally recognised standards of integrity and ethical behavior?	100
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This indicator looks at standards of ethics and integrity used by the tax and administration authority in Kenya. It assesses the extent to which these standards compare with internationally recognised standards.

In addition to the provisions of chapter six of the Constitution; the Public Officer Ethics Act, 2003 and the Leadership and Integrity Act, 2012, the Kenya Revenue Authority has an Anti-Corruption policy.

The policy applies to all KRA staff and stakeholders and is aimed at providing guidance and direction to management staff and other stakeholders on action to be taken on corruption issues in order to promote ethical environment and discourage corruption. Additionally, KRA has intelligence and strategic operations department which is charged with, among other things, corruption prevention, investigation of staff involved in malpractices, lifestyle audits and background checks.

⁸⁷ <https://itax.kra.go.ke/KRA-Portal/>

All KRA employees are required to sign the code of conduct and receive regular training on the integrity programme and the code of conduct. The last training session was held between March and May 2017.⁸⁸ There are also integrity assurance officers across various departments at the head office and regional offices.

According to the Anti-corruption policy, the Head of Internal Affairs shall ensure that where possible, the amount of any loss is quantified for all fraud investigations. Where the investigation establishes evidence of fraud, misappropriation, theft, financial malpractice or corruption of a substantial nature, law enforcement agencies are requested to undertake a criminal inquiry. The Authority then seeks to recover the losses incurred as a result of fraud and corruption. Where the loss is substantial, legal advice is obtained about the options available – which may include the need to freeze the suspect's assets through the courts -pending conclusion of the investigation.⁸⁹

Section 104 of the Tax Procedures Act, 2015 outlines sanctions for offences related to tax committed by tax agents and employees of KRA as well as a tax payer. For instance, a person who defaults on their tax obligations is guilty of an offence and is liable to a fine not exceeding ten million Kenya Shillings (USD 98,760) or double the tax evaded; an employee or officer convicted of offences outlined in section 102 is liable to a fine not exceeding two million Kenya Shillings (USD 19,753) and to imprisonment for a term not exceeding five years of both.

Members of the public as well as employees are encouraged to report any corruption related concerns through the various established channels which include email and telephone. The Authority then carries out a full investigation on the reports received.⁹⁰

Managers are required to maintain confidentiality with respect to complaints or matters referred to them. Any statements, reports or letters regarding the internal investigation should be enclosed in a sealed envelope and clearly marked “confidential”. The Authority also has a whistleblowing policy which applies to all staff (permanent and temporary staff) and officers of the Authority as well as other stakeholders. The policy states that the Authority will not retaliate or allow any retaliation or discrimination against any employee who submitted a complaint in good faith. It protects whistleblowers from discharge, demotion, suspension, threats, harassment or any other form of discrimination or retaliation.⁹¹

The salaries of the staff working for KRA are controlled by Salaries and Remuneration Commission since it is a public institution.

88. Expert interview with KRA on 28th August 2017

89. KRA Anti-Corruption policy

90. KRA Anti-Corruption policy

91. KRA Whistle blowing policy

1.9.3: External safeguards

Scoring question: Are the country's tax and revenue collection processes integrating external safeguards for detecting and reporting violations	75
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This indicator looks at what external safeguards for detecting and reporting violations in the tax and revenue collection processes.

Section 11 of the Tax Procedures Act, 2015 states that the Commissioner shall issue a number, to be known as a Personal Identification Number (PIN), to a person registered for the purposes of a tax law and that person shall use the PIN as may be required under this Act.

According to article 226(3) of the Constitution of, all Government and State organs shall be audited by the Auditor General. The Public Audit Act, 2015 outlines the independence of the Auditor General in section 10 by stating that the Auditor General shall not be subject to direction or control by any person or authority in carrying out his or her functions under the Constitution or under this Act; the Auditor-General and his or her staff shall perform their functions impartially, without fear, favour or prejudice and shall exercise their powers independently subject to the provisions of the Article 249 (2) of the Constitution, the provision of this Act and any other written law. Section 32 of the Public Audit Act, 2015 requires that all reports of an audit be submitted to the National Assembly or the relevant County Assembly. The legislative body is then required to publicise on its official website and other public spaces within seven days of receiving the report and 14 days after the lapse of the seven days, the Auditor General should publish on their official website. The office of the Auditor General website currently has the 2014/2015 national government and 47 county governments' audit reports.⁹²

With regards to handling complaints, the KRA has set up an independent Complaints and Information Centre whose mandate is to receive, resolve and refer complaints pertaining to operations at the Authority, including those related to corruption.⁹³ The Centre has a phone number and an email address that is used to receive the reports.

Additionally, KRA has an informer reward scheme where those offering information that leads to the identification or recovery of taxes that have not been previously detected, receive a rewards based on the tax involved. This scheme, based on provisions of the KRA Act, 1995 does not however, contain self-reporting mechanisms or frameworks in return for mitigation sanctions.

⁹².www.kenao.go.ke

⁹³. <http://www.kra.go.ke/index.php/complaints-and-information-centre>

2. ASSESSMENT CATEGORIES FOR THE PRIVATE SECTOR

The private assessment of the private sector focussed on five main thematic areas; integrity management auditing and assurance, transparency and disclosure, stakeholder engagement and board of directors. Below are the results for each of the individual indicators in this category:

2.1 Integrity Management

38

2.1.1: Provision of policies

Scoring question: To what extent do companies establish formal policies to counter corruption?	50
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This indicator assesses the extent to which companies establish formal policies to counter corruption, how visible the policies are to all parties and applicability of the policies across the company.

Section 9 of the Bribery Act, 2016 now requires private entities to also put in place procedures for prevention of bribery and corruption. Failure to put up such procedures is deemed to be an offence. The EACC is charged with the responsibility of assisting private entities to put in place these procedures. According to EACC, they are yet to roll out a programme to assist private entities as they are awaiting publication of regulations by the Attorney General to guide implementation of the Act.⁹⁴

Prior to enactment of the Bribery Act, there was no legislation that compelled the private sector to put up such mechanisms. However, there are policies that made requirements of specific sectors. For example, for institutions regulated by the Central Bank of Kenya, there are requirements that organisation's board ensures appropriate steps are taken to communicate throughout the Bank the corporate values, professional standards or codes of conduct it sets, together with supporting policies and procedures. The Bank's code of conduct should disallow behaviour such as bribery and corruption.⁹⁵ Publicly listed companies are subject to additional regulation from the CMA. The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 requires that the board develop a Code of Ethics and Conduct and ensure the implementation of appropriate internal systems to support, promote and ensure compliance.

Additionally, the apex business member organisation in conjunction with various stakeholders developed a code of ethics for private business in Kenya. Companies that have signed on to the code are required to establish, among other things, anti-corruption management programmes within the second year of signing on to the code. So far at least 700 companies have signed on to the code.⁹⁶

94. Expert Interview with EACC on 1st August 2017

95. Central Bank of Kenya, 2013 Prudential guidelines for institutions licenced under the Banking Act

96. Act Expert Interview with the UN Global Compact Kenya in 28th September 2017

It is worth noting that the Bribery Act, code of ethics for private business and the code of corporate governance are not explicit on the categories to be included in the code. This therefore means companies have the discretion of including or excluding items in the code. A cursory glance at the codes of ethics publicly available from the listed companies confirms this. For example, the Kenya Airways code contains categories such as gift and hospitality, facilitation payments, money laundering among others while the Equity Bank code has provisions on a handful of the provisions – largely to conform to prudential guidelines.

Signatories to the code of ethics for business in Kenya are supposed to publicly report on the progress made on implementation of the code through means such as their websites, annual reports and the Global Compact Communication on Progress report. The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 requires that a summary of the code of ethics and conduct be made available on the company's website.

Other than these provisions, there are no requirements for companies to make public their policies; this is discretionary. Signatories to the code of ethics for business in Kenya commit to apply the code within their organisation. For publicly listed companies, there is a requirement that the company adopts and implements the Code of Corporate Governance for Issuers of Securities to the Public, 2015. This code to a large extent is applicable to all levels of the company including the board. Information on other categories of companies is limited.

2.1.2: Implementation of practices

Scoring Question: To what extent do companies have anti-corruption programmes in place?

25

This indicator evaluates the extent to which companies implement anti-corruption programs according to their particular risks, how regularly the programme is reviewed, sanctions applied for violations and to which categories of employees the programme applies.

Section 9 (1) of the Bribery Act ,2016 requires a public or private entity to put in place procedures appropriate to its size and the scale and to the nature of its operation, for the prevention of bribery and corruption. Section 9(2) of the bribery finds that where an entity fails to put in place procedures for prevention of bribery and corruption and the failure is proven to be done with the connivance of a director or a person working in a similar activity, that person commits an offence. The level of implementation and operationalisation of this Act is still low as it is relatively new.

For companies regulated by the Central Bank of Kenya, the board should ensure that the company's ethical standards (as stated in the code of conduct and related policies) are integrated into all the institution's strategies and operations. The code of conduct should be supplemented by several ethics-related policies that provide detailed guidelines for dealing with specific issues which would adversely impact or influence the market or dent the reputation of the institution such as engaging in manipulative trading and unfair business practices. Additionally, the board should provide effective leadership based on an ethical foundation. The board should ensure that integrity permeates all aspects of the institution and its operations and that the institution's vision, mission and strategic objectives are ethically sound. The level of compliance on this is high.

For publicly listed companies, the corporate governance code requires the board to formalise its ethical standards through the development of a Code of Ethics and Conduct and shall ensure that it is complied with. It recommends that an ethics risk profile be compiled, reflecting the company's negative ethics risks (threats) as well as its positive ethics risks (opportunities). This will enable the company to exploit the risk opportunities while avoiding the risks threats. The code does not spell out specific areas that the risk profile should cover. The code further charges the board with the responsibility of setting standards of ethical behaviour required of its members, senior executives and all employees and ensure observance of those standards. The board is meant to reinforce good ethical conduct and sanction any misconduct.

The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 also requires companies to carry out a governance audit annually. In this instance, a governance audit refers to an assessment to determine the degree of adherence to good corporate governance practices. It recommends that the code be reviewed and updated on a regular basis. Signatories to the code of conduct for business in Kenya commit to, among other things, establish an internal ethics and anti-corruption management programme as part of adherence to the code. It requires signatories to promote and enhance ethics in line with the ten principles of the UN Global Compact in the areas of Human Rights, Labour Standards, Environment and Anti-corruption. It does not however explicitly require signatories to implement a specific risk based programme. Top management should ensure the code is implemented within their companies as well as their business partners. The code has provisions for sanctions against signatories that do not adhere to the code. It does not however spell out reward or sanction measures to be included in the internal ethics and anti-corruption management programmes meant to be implemented by signatories. The code also requires signatories at the integration and reporting stage to report annually on the progress it has made on, among other things, effectiveness of implementation; training; awareness; and monitoring and review of the internal ethics and anti-corruption management programme. The Bribery Act has no provisions for companies to review anti-corruption programmes and as such this is really discretionary to the company's need.

In terms of cooperation with relevant authorities in connection to corruption investigations and corruption information, the PWC Global Economic Crimes and Fraud Survey for Kenya⁹⁷ notes that 79% of Kenya respondents believe local law enforcement agencies are not adequately resourced to combat economic crime. Despite this, 55% of organisations reported internal fraudsters to law enforcement agencies in addition to dismissal. A similar percentage reported external fraudsters to law enforcement agencies with 40% reporting to relevant regulatory agencies as the second most preferred course of action taken against external fraudsters.

2.1.3: Whistleblowing

Scoring question : <i>To what extent do companies provide secure and accessible channels to raise concerns and report violations (whistleblowing) in confidence and without risk of reprisal?</i>	25
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This indicator looks at what whistleblowing channels companies put in place where someone can report violations securely and anonymously without risk of retaliation.

Section 21(1) of the Bribery Act provides for protection of a whistleblower, informant or witnesses in a complaint or a case of bribery. Section 21(4) requires law enforcement agencies to put in place reasonable mechanisms to protect witnesses and informants. It does not require the same of other public or private entities. Additionally, section 21 (2) of the Act provides for conviction (jail term or fines or both) of persons found guilty of actions related to harassment, intimidation or retaliation against whistleblowers and witnesses in a corruption related case.

The code of ethics for private business in Kenya does not have provisions on protection of whistleblowers. On the other hand, the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, requires the board to establish and put into effect a whistleblowing policy for the company. This provision is aimed at, among other things, to ensure all employees feel supported in speaking up in confidence and reporting matters they suspect may involve anything improper, unethical or inappropriate. It also recommends that the board establish a whistleblower policy that shall provide for assurances that all disclosures be taken seriously, treated as confidential and managed without fear of retaliation. Other provisions include a procedure for management of all disclosures in a timely, consistent and professional manner.

The level of implementation on these provisions is varied among companies as the Bribery Act is still awaiting full implementation while companies are encouraged to implement the code immediately is gazetted. Additionally, the code of corporate governance requires companies to apply the code or explain non - adherence or departure. It is therefore safe to say that the level of compliance among listed companies is high, though the CMA has not produced reports indicating to what extent the code has been applied.

97. www.pwc.com/ke

2.1.4: Business partner management

Scoring question : To what extent do companies apply their anti-corruption programme to relevant business partners?

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This indicator looks at integrity management practices between companies and entities they have control over or those that they may have business relationships with.

Section 628(5) of the Companies Act, 2015 has provisions for a parent company that has a subsidiary undertaking to take reasonable steps to ensure that the undertaking keeps such accounting records as will enable the directors of the parent company to ensure that every financial statement required to be prepared complies with the requirements of this act.

The code of ethics for business in Kenya encourages signatories to visibly promote responsible business conduct and exert influence on other companies also to commit to the Code. Some signatories at the integrating and reporting level are already doing this. For example, Safaricom PLC. now requires their suppliers to sign the code of ethics for businesses in Kenya before they can do business together.⁹⁸ There are no reports as to whether they require this of any other companies they have business relationships with. In most instances, companies require their subsidiaries to comply with policies of their parent companies.

2.2 Auditing and Assurance

75

The Bribery Act, 2016 now requires all private entities to establish internal mechanisms to detect and prevent corruption. Previously, only certain categories of companies were legally required to do so. Companies that have signed on to the code of conduct for private business in Kenya voluntarily established such mechanisms. Independent assurance of anti corruption programs is only required for companies listed at the securities exchange.

In terms of external audits, all companies (except dormant companies and companies described as small company's regime in the Companies Act,2015).

2.2.1: Internal control and monitoring structures

Scoring question : To what extent do companies establish internal control and monitoring structures that seek to detect and prevent corruption?

75

This indicator evaluates the internal control and monitoring mechanisms that companies put up to detect and prevent corruption. It looks at establishment and effectiveness of internal audit functions as well as the integrity of financial statements.

In addition to the Bribery Act,2016 that requires private entities to put in place mechanisms to prevent and mitigate corruption, the Companies Act, 2015 also has some provisions that require companies to do so.

98. https://www.safaricom.co.ke/sustainabilityreport_2016/ebook/files/assets/common/downloads/page0034.pdf

Section 770(1) requires that the audit committee of a listed company set out the corporate governance principles that are appropriate for the nature and scope of the company's business; establish policies and strategies for achieving them; and annually assess the extent to which the company has observed those policies and strategies.

Section 770(2) also tasks the audit committee with establishing standards of business conduct and ethical behaviour for directors, managers and other personnel, including policies on private transactions, self-dealing and other transactions or practices of a non-arm's length nature. The Capital Markets Authority is in charge of enforcement of this and additional framework provided in the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015. The Act does not provide for a similar framework for non-listed companies.

Section 628 (1) of the Companies Act, 2015 requires every company to keep proper accounting records that show and explain the transactions of the company; disclose with reasonable accuracy, up to the end of the previous three month trading period, the financial position of the company at that time; and enable the directors to ensure that every financial statement to be prepared complies with the requirements of the Act.

Further, Section 635 requires the directors of the company to prepare a financial statement for the company for each of the financial year of the company. Additionally, section 636 (t1) requires the directors of a company to approve a financial statement only if they are satisfied that the statement gives a true and fair view of the assets, liabilities and profit or loss.

The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 requires that the Board establishes an internal audit function, whether internally based or externally sourced and identify a head of internal audit who reports directly to the Audit Committee. The head of internal audit should have relevant accounting or auditing qualifications and be responsible for providing assurance to the Board that internal controls are operating effectively. Internal auditors should carry out their functions in accordance with the Code of Ethics and Conduct, International Standards in Auditing (ISA), any standards promulgated by the Institute of Internal Auditors (IIA).

The Audit committee of a quoted company is charged with the responsibility of ensuring the effectiveness of the internal audit function as outlined in the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015. It requires the audit committee to review the internal audit programme and results of the internal audit process and where necessary ensure that appropriate action is taken on the recommendations of the internal audit function. No other provisions are made with regards to an independent review of the internal audit function.

Section 769 (1) of the Companies Act requires directors of a quoted company to ensure that the company has an audit committee (appointed by the shareholders) of a size and capability appropriate for the business conducted by the company.

Additionally, the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 requires that boards set up audit committees of at least three independent and non-executive directors. The Capital Markets Authority is the regulator for all publicly listed companies and is in charge of enforcing compliance of this and other provisions.

2.2.2: External audit

Scoring question: To what extent do companies subject their financial reporting to external audits?	100
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This indicator assesses the extent to which companies undergo external audits, the expertise of the auditors, their independence as well as the frequency of their rotation. It also looks at whether companies publicly report on their external audits.

The Companies Act, 2015 has several provisions on external audits in Kenya. Section 709(1) of the act requires the directors of a company to ensure that the company's annual financial statements for a financial year are audited unless the company is exempt as per the provisions outlined in section 711 (small company's regime) or 714 (dormant). Section 717 and 721 further requires that a company (private and public) appoints an auditor or auditors for each financial year of the company, unless the directors reasonably resolve otherwise on the ground that an audited financial statement is unlikely to be required.

Section 774 (1) outlines persons or institutions ineligible as external auditors. These include: an officer or employee of the audited company; a partner or employee of the audited company, or a partnership of which such a person is a partner; an officer or employee of an associated undertaking of the audited company. Additionally, Section 774(3) provides that an auditor of an audited company is not to be regarded as an officer or employee of the company. Further, the Companies (general) Regulations, 2015 prohibits a director to hold the office of the auditor.

Section 772 of the Companies Act, 2015 states that a natural person or firm is eligible for appointment as an auditor only if the person, or each partners of the firm, is the holder of a practicing certificate issued under section 21 of the Accountants Act; and has a valid annual license issued under section 22 of the Accountants Act. Additionally, the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 recommends that the auditor of a public listed company be a member (in good standing) of ICPAK and shall comply with the International Auditing Standards. The Code of Corporate Governance Practices further recommends that companies rotate their auditors (audit firm) every six to nine years.

In terms of making external audit reports publicly available, section 620 (2)(c) of the Companies Act provides that unquoted companies' annual financial statement and reports for a financial year consist of the auditor's report on the financial statement and directors' report unless the company is exempt from audit. Section 620 (3)(d) provides that quoted companies in its annual financial statement and reports for a financial year consist of the auditor's report on the financial statement; the auditable part of the directors' remuneration report; and the directors report. Further, section 676 (1) states that when publishing its statutory financial statement, a company shall enclose with or annex to, the statement a copy of the auditor's report on that financial statement unless the company is exempt from audit and the directors have taken advantage of that exemption.

Additionally, section 727(1) requires that the auditor make a report to the members of the company on all annual financial statements of the company of which copies are to be sent out to members in case of a private company and for public companies, the report should be presented at a general meeting.

The level of compliance on provisions of external audits is high among companies.⁹⁹

2.2.3: Independent assurance

Scoring Question : To what extent do companies undergo voluntary independent assurance on the design, implementation and/or effectiveness of the anti-corruption programme?	50
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This indicator looks at independent assurance of the design and implementation of anti-corruption programme.

The code of ethics for business in Kenya does not have an audit or independent review requirement for the signatories in a mandatory or voluntary capacity. There are however legal provisions in the Companies Act, 2015 and the code of corporate governance practices in the issuance of securities, 2015 for a governance audit.

Section 770 (1 a & b) of the Companies Act requires that audit committees of a quoted company set out the corporate governance principles that are appropriate for the nature and scope of the company's business and establish policies and strategies to achieve them. Section 770 (1c) requires the audit committee to annually assess the extent to which the company has observed those policies and strategies. Additionally, the Code of Corporate Governance Practices requires that the board of a listed company subject the company to an annual governance audit. This should be by a competent and recognised professional accredited for that purpose by the ICPSK, in order to check on the level of compliance with sound governance practices.

99. Separate Expert Interviews with Capital Markets Authority on 19th August 2017; ICPAK on 4th August 2017 and PWC Kenya on 3rd October 2017.

The ICPSK designed a Governance Auditors Accreditation Course to train, refine and accredit its members as Governance Auditors to competently undertake Governance Audits and related assignments for both public and private sectors.

There are no provisions in the Companies Act or the code to publicly disclose assurance opinions from the governance audit. However, the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, recommends that the Board assess the company's performance on ethics, and disclose findings to internal and external stakeholders. After undergoing the governance audit, the Board is required to provide an explicit statement on the level of compliance.

2.3 Transparency and Disclosure

44

Transparency and disclosure patterns of 35 out of 64 companies listed at the Nairobi Securities Exchange were assessed. These companies, randomly picked from each of the categories listed, represented the agricultural, automobile and accessories, energy and petroleum, finance and insurance as well as telecommunication sectors among others. These companies also local and Multi-National Companies. The assessment did not however attempt to compare the disclosure patterns of these types of companies, rather provided the findings of the 35 as a homogenous group.

It is worth noting that Companies listed at the stock exchange have above average reporting requirements as they are subject to provisions of the Companies Act, 2015 and Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015.

This thematic area looks at transparency and disclosure habits of companies in Kenya. It assessed at what companies disclose about their anti-corruption programmes, their organisational structures as well as financial information of their companies in their countries of operation. The assessment delved into the companies' websites, annual reports, integrated reports or sustainability reports to get the requisite information.

Of the four disclosure items assessed, anti corruption programs were the least disclosed.

2.3.1: Disclosure of anti-corruption programmes

Scoring question : To what extent do companies report publicly on their anti-corruption programmes?

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A total of 13 questions were used to assess this indicator. This included assessing details of their anti-corruption programmes, provision of key policies such as whistle blowing, facilitation payments, gifts and hospitality; review of anti-corruption programmes as well as commitment from the board in spearheading anti-corruption initiatives in the organisation.

- The assessment found that 29% of companies assessed had publicly stated commitments to anti-corruption. These statements were either on the websites or in their annual/integrated/sustainability reports or their anti-corruption policies or codes of ethics available on their websites. Only 3% of companies made general comments regarding anti-corruption with the remaining 68% having no mention of their anti-corruption efforts in any context.
- About a third of the companies had explicit commitment to compliance with all relevant laws including anti-corruption laws with majority (71%) of the companies lacking such commitments.
- Only 11% of the companies assessed had senior management and or board demonstrate support for the organisation's anti-corruption initiatives.
- Fourteen per cent of the companies assessed stated that their codes of conduct / anti-corruption policies applied to employees and board of directors while 6% were not explicit about their applicability to the board. The remaining 80% had no statement either way. Additionally, only 11% of these codes of conduct / anti-corruption policies extended their application to agents and other intermediaries such as advisors and consultants with 9% extending their application to non-controlled persons such as suppliers.
- Eleven percent of the companies assessed reported having anti-corruption training programmes for employees and directors in place. Only 6% reported having a training programme for employees only, with no mention of the board. The remaining companies had no mention of an anti-corruption training programme.
- Fourteen percent of anti-corruption policies had provisions for gifts hospitality and travel expenses. These policies have regulations for offering and receiving such gifts as well as applicable thresholds for the gifts.¹⁰⁰ Only 11% of the policies / codes of conduct had provisions prohibiting facilitation payments.¹⁰¹
- Twenty-six percent of company policies assessed had provisions to protect persons that report violations of the anti-corruption policy.
- Seventeen percent of the policies outlined channels that assured full confidentiality and anonymity through which employees could report violations. A further 9% had confidential channels but they did not assure a two-way communication.
- Only 3% of the companies reported on regular monitoring of its anti-corruption programmes with a further 3% making mention of monitoring in general, not specifically about their anti-corruption programmes.
- Only 6% of companies had a policy that prohibited political contributions; most policies provided for internal approval or had regulations that guided political contributions. Additionally, none of the company policies reviewed disclosed political contributions in their countries of operation.

¹⁰⁰.For example, see *British American Tobacco Standards of Business Conduct*

¹⁰¹.For example, see the *Barclays Way code of conduct*

*2.3.2: Disclosure on organisational structures***To what extent do companies report publicly on their organisational structure?****50**

This indicator is concerned with disclosures surrounding subsidiaries, holdings and joint ventures; their countries of incorporation and operation as well as percentage of ownership. Disclosure of such information is vital in keeping stakeholders abreast of financial flows, relationships (if any) to other companies among other key information. Information on this indicator was gathered by checking annual reports and financial reports of the identified companies.

- Majority of the companies (80%) provided a list of their fully consolidated subsidiaries, including the percentage of ownership.
- Seventy-one percent of the companies provided information on countries of incorporation of their fully consolidated subsidiaries while only 54% provided information regarding countries of operation of these subsidiaries.
- Fifty-seven per cent of companies provided a list of their non-fully consolidated subsidiary with a similar percentage disclosing their percentage of ownership.
- Fifty-two percent of the companies assessed provided information regarding the countries of incorporation of their non-fully consolidated subsidiaries while only 39% provided information on the countries of operation of these subsidiaries.
- None of the companies assessed gave information on beneficial owners of their companies. The Companies (amendment) Act, 2017 came into effect in August 2017 and as such no companies have started reporting on provisions on beneficial ownership.

*2.3.3 Disclosure of key financial data on a country-by-country basis***Scoring question :Do companies report publicly on their countries of operation?****50**

This indicator looks at disclosure patterns of companies with regards to financial data in their various countries of incorporation and operation. Results from domestic operations were not included in the assessment while 18 of the 35 companies had subsidiaries outside of Kenya.

- Fifty-seven percent of the companies that had operations outside of the country provided information about their sales or revenue in the different countries.
- Fourteen percent of the companies that had operations outside of the country provided information about their capital expenditure in the different countries.
- Thirty-three percent of the companies that had operations outside of the country provided information regarding the pre- tax income in the in the different countries.
- Fourteen percent of the companies that had operations outside of the country provided information about their income tax in the different countries.
- Almost all companies provided information regarding their corporate social responsibilities in their different countries of operation. However, only 14% of provided monetary information about their community contribution in the different countries.

2.3.4: Additional disclosure

Scoring question: To what extent do companies publish information on charitable contributions, sponsorships and lobbying activities both domestically and internationally (for example corporate reporting or corporate social responsibility reports)?	50
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This indicator assesses the kind of information companies publish regarding their charitable contributions, sponsorships and lobbying activities.

Majority of the companies assessed provided information on CSR activities carried out by the company, however, not all contained the monetary value of the activities carried out. Additionally, none of the companies disclosed any information on their lobbying activities.

2.4 Stakeholder Engagement

75

Business member organisations are at the frontline in bringing stakeholders together aimed at reducing corruption. They have come up with various initiatives aimed at fostering and promoting business integrity.

2.4.1: Stakeholder relations

Scoring question :To what extent do companies engage in multi-stakeholder initiatives aimed at reducing corruption?	75
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This indicator assesses the extent to which different stakeholders collaborate to fight corruption in Kenya.

Through Business Member Organisations such as Kenya Association of Manufacturers (KAM), Kenya Private Sector Association (KEPSA), Kenya Bankers Association (KBA) and regulators such as the Capital Markets Authority and the Micro and Small Enterprise Authority (MSEA) among others, there is a renewed push to establish financially sound enterprises. Initiatives such as the Top 100 Mid-Sized Companies¹⁰² and FiRe Awards¹⁰³ promote sustainability of financially sound enterprises. The top one hundred mid-size company survey is an initiative of the Nation Media Group and KPMG and is aimed at identifying East Africa fastest growing medium sized company. A top 100 company is one that is ahead of its peers in revenue and profit growth, returns to shareholders and cash liquidity. This company is described as one that has succeeded in growing its market position in the industry in which it operates, the growth has translated into returns for its shareholders and a sound financial position.

On the other hand, the FiRe Awards, a joint initiative of ICPAK, CMA and the NSE, was founded and held for the first time in 2002. The primary objective of the award is to strengthen financial markets and attract investment, business entities would have to make disclosure of their activities to enable a wide range of stakeholders use such information in making economic decisions.

¹⁰²<http://eastafricatop100.com/the-survey/overview/>

¹⁰³<https://fireaward.org/>

Another award launched in 2016 by the Kenya Bankers Association, the Catalyst Award, creates a unique platform for financial institutions to showcase their industrial leadership skills and innovation while reinforcing the role they play towards sustainable development. The awards, based on the Sustainable Financial Initiative (SFI) which Kenyan banks have adopted, honours financial institutions, including banks that have demonstrated their leadership in implementing the SFI principles.¹⁰⁴ One of the SFI main principles include enhancing business practice, leadership and governance.

In terms of information available to stakeholders participating in corporate governance processes for the most part, regulators and government agencies have access to this kind of information while other stakeholders can only access what is:

- Legally required to be made public – this includes the annual reports and financial statements as well as annual returns.
- That the company voluntarily makes public as a best practice – this includes sustainability reports.

There are however provisions for employees and other stakeholders to communicate concerns about unethical practice to the board. The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 requires the board to establish a corporate culture with ethical conduct that permeates the whole company. The Board is required to develop a Code of Ethics and Conduct and ensure the implementation of appropriate internal systems to support, promote and ensure compliance. Additionally, the Code of Ethics and Conduct should include appropriate communication and feedback mechanisms which facilitate whistle-blowing.

Shareholders also have a right to be informed about and to participate in decisions concerning fundamental corporate changes. The Code of Corporate Governance Practices provides for shareholders to participate in corporate affairs as below:

- Right to appoint and remove directors
- Approval of directors' remuneration
- Appoint external auditors

¹⁰⁴www.kba.or.ke

2.4.2: Business driven anti-corruption initiatives

Scoring question :To what extent do companies engage in multi -stakeholder initiatives aimed at reducing corruption?	75
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This indicator looks at anti-corruption initiatives led by the private sector in collaboration with other sectors.

There are various multi- stakeholder initiatives aimed at reducing corruption drawing stakeholders from the public sector and the civil society that companies are involved in. One such initiative is the Kenya Leadership and Integrity Forum. This is a platform that brings together civil society, private sector, religious sector as well various government agencies including regulators and law enforcement agencies. The Forum is a vehicle through which the Kenya Integrity Plan (2015 -2019) gets implemented. The Integrity Plan adopts a multi sectoral, structured approach to fighting corruption. Each sector is encouraged to mainstream the integrity plan activities in their institutions work plans, performance contracting and strategies as well as make budgetary provisions for them. Each sector has a coordinating committee that is tasked with development of an implementation plan and spearhead the implementation of the sector activities. The private sector is represented by KAM, KEPSA and the Kenya National Chamber of Commerce and Industry.¹⁰⁵

Additionally, the Apex business member organisations, KAM and KEPSA and the UN Global Compact Kenya came together and prepared a code of ethics for businesses in Kenya. The code is a voluntary initiative aimed at promoting business ethics in line with the UN Global Compact in the areas of Human Rights, Labour Standards, Environment and Anti-corruption.¹⁰⁶

There are also Sector Business member organisations such as KBA who have signed the code of conduct for business in Kenya and have encouraged their members to also sign the code at individual capacity. Additionally, KBA is in the process of preparing specific ethical standards and requirements that KBA members must adhere to.¹⁰⁷

There are individual companies that publicly promote the benefits of engaging in multi stakeholder initiatives. For example, companies that are at the integration and reporting stage of the code of ethics for business in Kenya actively encourage other companies to join in the code of ethics.

¹⁰⁵.www.eacc.go.ke

¹⁰⁶. <http://www.globalcompactkenya.org/index.php/en/about/code-of-ethics>

¹⁰⁷. <http://www.kba.co.ke/news16.php>

2.4.3: Business associations

Scoring question: To what extent do business associations support companies in fighting corruption?

75

This indicator looks at the role of business associations in fighting corruption. It looks at how visible they are in fighting corruption, the kind of support they offer to companies to strengthen their anti-corruption efforts.

To a large extent, where they exist, business associations play a big role in fighting corruption in the private sector. Apex Business associations such as KAM, KEPSA and the East Africa Business Council (EABC) have been instrumental in taking a visible stance against corruption as mentioned previously in this report. They are also instrumental in providing support materials that enable companies to strengthen their anti-corruption efforts. According to the UN Global Compact, signatories to the code of conduct receive support from the network to set up anti-corruption programme. Additionally, they have various programmes aimed at instilling ethics and integrity in day-to-day business activities for local companies targeting middle level managers. One such programme includes the Anti-Corruption training offered three (3) times a year by KAM in collaboration with the Global Compact Network Kenya with support from the Centre for International Private Enterprise.¹⁰⁸ None of the associations have extended this support to initiatives such as certifying business coalitions.

2.5 Board of Directors

92

Board of directors are charged with the responsibility of overall oversight of the company's governance practices. The board is also meant to get training on governance matters from credible sources to aid in the oversight.

There are legislative and policy frameworks that guide the remuneration of the board as well as other matters regarding conflict of interest of the board. These include the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 and the Company's (general regulations, 2015.

2.5.1: Oversight

Scoring question :To what extent is the Board of Directors responsible for the oversight of their company's anti-corruption programmes?

100

This indicator looks at the role of board of directors in the oversight of a company's anti-corruption programme.

The Companies Act, 2015 and Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 confers the responsibility of oversight of company's governance practices to the board. Section 770 (2)(b) of the Companies Act, 2015 tasks the audit committee to establish standards of business conduct and ethical behaviour for directors, managers and other

108. <http://kam.co.ke/about-kam/>

personnel, including policies on private transactions, self-dealing, and other transactions or practices of a non-arm's length nature. Additionally, the board needs to develop a Code of Ethics and Conduct and ensure the implementation of appropriate internal systems to support, promote and ensure compliance.

The code of corporate governance further recommends that the board subjects the company to an annual governance audit to check on the level of compliance with sound governance practices. The board is additionally responsible to report non-compliance to the code of governance practices to relevant stakeholders with a commitment to move to full compliance. The code also recommends that a formal program be established and ensure that every incoming member is inducted upon joining the board as well as update their skills and knowledge at regular intervals. The code further requires board members get at least 12 hours of board development per year on areas of governance from credible sources.

2.5.2: Executive remuneration

Scoring question: To what extent are the Board member and senior executive remuneration of companies determined according to good corporate governance standards?	100
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This indicator looks at various factors and provisions that determine remuneration of board members and senior executives.

Issues regarding board members' remuneration are provided for in the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 and Companies (general) regulations, 2015. Section 28 of the companies' regulations states that directors' remuneration may only be made by the company at a general meeting. The code of corporate governance practices recommends that the board of directors set up an independent remuneration committee or assign a mandate to a nomination committee or such other committee executing the functions of a nomination committee, consisting mainly of independent and non-executive directors, to recommend to the Board the remuneration of the executive and non-executive directors and the structure of their compensation package. The code also requires that the board establishes and approves formal and transparent remuneration policies and procedures that attract and retain board members.

The code of corporate governance practices also outlines various guidelines regarding the remuneration of directors (executive and non-executive). It provides for the remuneration of the executive directors to include an element that is linked to corporate performance, including a share option scheme, so as to ensure the maximisation of the shareholders' value. For non-executive directors, it should be competitive in line with industry standards. The package shall retroactively be approved by shareholders in an Annual General Meeting.

Finally, section 20 of the Companies (General) Regulations, 2015 requires that information on directors' remuneration be included in the notes to the financial statements of a company for a financial year. The information should include the aggregate amount of the remuneration paid to or receivable by the directors of the company in respect of their qualifying services; and if any such remuneration consists of a benefit otherwise than in cash, the nature of that benefit.

2.5.3: Executive conflict of interest

Scoring question 2.5.3 To what extent are safeguards in place to govern Board of Directors conflicts of interest?	75
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This assessment looks at provisions that have been put in place to guard against conflict of interest of the board of directors. It looks at independence of the board from the company management, insider trading by the board of directors, monitoring of conflict of interest of management, board and shareholders as well as disclosure of conflict of interest of the board.

The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 outlines various guidelines regarding independence of the board of directors in public companies to ensure effective oversight. The code recommends that the board comprises a balance of executive and non-executive directors, with a majority of non-executive directors. Independent non-executive directors shall be at least one third of the total number of the board members and the status of independent board members shall be assessed annually by the entire board.

Additionally, the code requires that the board have policies and procedures to ensure independence of its members and disclose in its annual report whether independent and other non-executive directors constitute at least two thirds of the board and if it satisfies the representation of the minority shareholders.

The code defines conflict of interest to mean a situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self-interest and professional interest or public interest. It has provisions that guard against potential conflict of interest of the board members. It requires that the board put in place a policy to manage conflict of interest. Additionally, the code requires directors to declare any real or perceived conflict of interest with the company. Where a conflict exists, the code recommends that directors don't take part in any discussions or decision-making regarding any subject or transactions in which they have a conflict of interest. The code further recommends that a company keeps a register of declared conflict of interest to be maintained and updated by the Company Secretary. There are however no provisions to publicise the register or other information regarding conflict of interest of the board.

The Companies (general) regulations 2015 requires a director having a conflict of interest to declare the nature and extent of the director's interest to the other directors in accordance with section 151 of the Companies Act. Such a director is not supposed to vote in respect of the transaction, arrangement or contract in which the director is so interested and is also not supposed to be counted for quorum purposes in respect of the transaction, arrangement or contract.

Finally, section 146 of the Companies Act, 2015 states that a director of a company shall avoid a situation in which the director has, or can have, a direct or indirect interest that conflicts, or may conflict, with the interests of the company. This provision applies in particular to the exploitation of any property, information or opportunity, and it does not matter whether the company could take advantage of the property, information or opportunity.

3. ASSESSMENT CATEGORIES FOR CIVIL SOCIETY

Civil society plays a pivotal role in oversight of both the private and public sectors. The Business Integrity Country Agenda looks at the role of civil society in playing that oversight role. It looks at the role of the media in this process, civil society engagement in business integrity and civil

3.1 Broader checks and Balances

42

The assessment notes that to some extent, media is not independent from the private sector and government and this has compromised their watchdog role. It is also noted that civil society monitoring of the private sector was not well developed though there were some targeted campaigns aimed at improving business integrity. There is however limited engagement of civil society with the business sector. Below are the results for each of the individual indicators in this category:

3.1.1 Independent media

Scoring question: To what extent is the country's media perceived as being free and independent?	50
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This indicator looks at the independence of media from government and private sector as well as objectivity of media especially in exposing and reporting corruption in the private sector.

Media ownership can largely be classified as government, religious institutions, academic institutions, community, individuals (politically exposed persons as well as industrialists) and corporates. A significant proportion of these is privately owned and is profit driven.

According to Price Waterhouse Coopers (PWC), the Kenyan entertainment and media market was worth US\$2.1 billion in 2016 with revenue from the magazines at US\$72 million, newspapers at US\$172 million, radio at US\$342 million and TV and video at US\$532 million. Advertising in TV accounted for 64.4% of the total TV revenue, while newspaper, advertising

accounted for 73.8% of total newspaper revenue. Advertising revenues are derived solely from broadcast revenues, with advertisement opportunities driven by strong economic growth¹⁰⁹

In 2014, the Media Council of Kenya conducted a survey with respondents being mainly journalists (reporters, anchors, editors and correspondents). In this survey, 65% of the respondents noted that media owners influence editorial decisions, story angles and prominence of stories on governance. Respondents revealed that sometimes editorial managers acting on behalf of media owners re-wrote edited and cleared stories before publication. Additionally, 83% of the respondents agreed (55% of them strongly) that media commercialisation has affected the quality of reporting in relations to good governance.¹⁰⁰

Freedom and independence of electronic, print and all other types of media is guaranteed, under certain conditions,¹¹¹ in article 34 (1) and of the Constitution. Additionally, the independence of State- owned media is also guaranteed in article 34(4). The Constitution, in article 34(5) however, calls for the National Assembly to enact legislation that will establish a body that will be responsible for setting media standards and monitoring compliance of media standards. This has been realised through the enactment of the Media Council Act, 2013.

In the 2017 World Press Freedom Index, prepared by Reporters Without Borders, Kenya was ranked at position 95 out of 180 countries covered in the survey. The report pointed out that Kenya has seen a slow erosion of media freedom in recent years. The passage of the Security Laws Amendment Act was seen to have restricted media freedom while terrorist attacks by Al-Shabaab were used in 2016 as grounds for restricting freedom of information.¹¹² Additionally, the Governance Assessment Kenya Report 2016¹¹³ noted that one of the factors that threatened the freedom and independence of the media was the implementation of the Kenya Information and Communications (Amendment) Act (KICA) Act, 2013 and the Media Council Act, 2013. The High Court in Nairobi in May 2016 however, declared section 6(2) (c) of the Media Council Act unconstitutional for being vague in its definition of national security issues. The report further noted attacks on the media in the form of physical assaults, noting that between August 2014 and September 2015, at least 66 journalists were attacked, harassed, threatened, and jailed, while one was killed. These attacks were accompanied by hostile comments from senior government officials.

109. <https://www.pwc.co.za/en/assets/pdf/entertainment-and-media-outlook-2017.pdf>

110. Media Council of Kenya 2014, *Guarding the Guardians*

111. *Freedom of expression does not extend to*

- *propaganda for war;*
- *incitement to violence;*
- *hate speech;*
- *or advocacy of hatred that—*
 - *constitutes ethnic incitement, vilification of others or incitement to cause harm; or*
 - *is based on any ground of discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

112. <https://rsf.org>

113. <https://freedomhouse.org/sites/default/files/Governance%20Assessment%20>

The Second Schedule of the Media Council Act 2013 outlines the Code of Conduct for the Practice of Journalism in Kenya and governs the conduct and practice of all media practitioners in the country. Further, one of the functions of the Media Council of Kenya is to develop and regulate ethical and disciplinary standards for journalists, media practitioners and media enterprises.

According to a survey by the Media Council of Kenya, 32% of the respondents revealed that accuracy and fairness were some of the most violated ethical principles while 18% indicated that integrity had suffered as a consequence of their reporting on governance issues. Some respondents, however, indicated that their violations of the principles were justified by their commitment to public interest and the public's right to know.¹¹⁴

The media has played a crucial role in exposing cases of corruption both in the private and public sectors. These cases have attracted the interest of anti-corruption agencies, who have then gone on to investigate. A survey by the Media Council of Kenya, *Guarding the guardians*, noted that a majority of the respondents (41%) felt that sometimes media reports on bad governance played a role in the corrective measures and action while 28% thought that this occasionally happened.¹¹⁵ There have been concerns, however, about brown envelope journalism in Kenya with allegations of journalists being compromised to bury stories. According to the same report, respondents noted that corruption was rife in the media and that money influences the publication or 'killing' of stories. Some journalists are also often bribed to change stories or publish false information. Indeed, 68% of the respondents agreed that poor pay had promoted the brown envelop syndrome which has become a major hindrance to good reporting on issues of accountability and transparency.¹¹⁶

Despite these sentiments by media practitioners, the media in Kenya enjoys immense public approval for their role in the fight against corruption. In the 2017 East Africa Bribery Index¹¹⁷ citizens rated the role of the media in this regard as good (a score of 3.8 against a full score of 5). The media and religious institutions were the best rated institutions of the non-state actors listed in the survey.

3.1.2 Civil society monitoring of business integrity

Scoring question: To what extent are civil society organizations engaged with companies in order to strengthen their commitment towards integrity, accountability and transparency?	25
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This indicator seeks to evaluate civil society engagements with the private sector in a bid to improve companies' commitment towards business integrity.

114. Media Council of Kenya 2014, *Guarding the Guardians*

115. *Ibid*

116. Media Council of Kenya 2014, *Guarding the Guardians*

117. Transparency International Kenya, 2017

Civil society Organisations (CSOs) have been involved in various, but limited, private sector reform initiatives. These include participating in review of laws crucial in creating an enabling environment for the private sector. These efforts however have been fragmented for the most part but have nevertheless achieved desired results. Under initiatives such as the Parliamentary Initiative Network (PIN), CSOs in the network have managed to push and succeed in reforms in Public procurement and public audit Acts.¹¹⁸

3.1.3: Civil society engagement in business integrity

Scoring question: To what extent does the country have an active and engaged civil society monitoring private sector corruption?	50
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This indicator seeks to assess to what extent civil society plays an oversight role over business integrity. It also evaluates the extent to which advocacy activities of the civil society with regard to business integrity have borne fruit.

Civil society working in private sector engagement has been limited. What exists for the most part is engagement in specific thematic areas; extractives, tax matters etc. Organisations such as Tax Justice Network Africa and Haki Madini have programmes that deal with these thematic areas. For example, in 2015, Tax Justice Network Africa launched a campaign dubbed Stop the bleeding whose main aim was to stop Illicit financial flows (IFFs) from Africa. The campaign, based on the findings of the Mbeki High Level Panel report on Illicit Financial Flows posits that IFFs in Africa stem from three main components; commercial activities, criminal activities and corruption with commercial activities accounting for the largest part by far.¹¹⁹

Haki Madini on the other hand advocates for responsible stewardship of mining resources. Among the initiatives undertaken by Haki Madini under corporate responsibility looks to support a local communities affected by extractives projects and the wider public to get access to information about signed mining concessions (licences and contracts), revenues created (royalties and taxes) as well as revenue distribution and management by the government (national and county level).¹²⁰

It is unclear to what extent these initiatives have managed to resonate with the private sector enough for them to take positive action.

118. <http://www.pin.or.ke/resources/memorandum>

119. <http://stopthebleedingafrica.org/sign/>

120. <http://hakimadinikenya.org/our-work/corporate-accountability>

RECOMMENDATION

Public Sector assessment recommends as follows :

In the short term:

	Recommendation	Agency
1.	Establish a policy or Legal framework for the Multi Agency Team (MAT) to concretise collaborative efforts of the agencies involved. This will improve the rate of resolution (investigation, prosecution and conviction) of corruption cases.	Attorney General
2.	Fast track the establishment of a public register showing beneficial ownership of companies.	Business Registration Service
3.	Expedite the development of regulations to aid in the full implementation of the Bribery Act.	EACC/ODPP
4.	Adjust the budgetary allocation to EACC and ODPP to allow them expand accordingly to accommodate the additional mandate brought about by the enactment of the Bribery Act, 2016.	EACC, ODPP, National Treasury
5.	Fast track the enactment of a Whistleblower Protection Law to enhance the fight against corruption.	Attorney General
6.	PPRA should set up a dedicated corruption reporting mechanism to receive all procurement related corruption reports.	PPRA

In the Mid term :

	Recommendation	Agency
1.	Amend the Bribery Act, 2016:	EACC, KRA
	a. To an express prohibition of deductibility of bribes for tax purposes.	
	b. To include provisions for all government entities to put in place whistleblower protection mechanisms as part of their anti-corruption programme.	EACC, KEPSA, KAM
	c. To include remedy for whistleblowers that suffer reprisal as a result of their actions.	EACC, Attorney General
2.	Amend the Companies Act, 2015 include crucial aspects of beneficial ownership disclosure particularly criminalisation of willful misrepresentation of beneficial ownership information.	Business Registration Service
3.	Amend the Accountants Act to ensure mandatory registration of practicing accounting professionals to ICPAK to ensure proper application and enforcement of accounting and auditing standards in Kenya	ICPAK, Attorney General

In the long term:

	Recommendation	Agency
1.	Enact legislation to regulate lobbying in Kenya.	Attorney General , KEPSA ,KAM
2.	The Public Procurement Regulatory Authority should incorporate integrity pacts as accountability measures in the procurement process. This can be done with the help of the civil society sector to actualise provisions of section 9 (1q) of the Public Procurement and Asset Disposal Act (PPDA) 2015. Additionally, regulations for the PPDA 2015 Act should include a clause compelling procuring entities to include civil society organisations oversight during the procurement process for procurement above a certain threshold.	PPRA
3.	To enhance accountability and integrity of bidding entities , the PPDA 2015 should be amended to include preference or certain advantages for companies with effective anti corruption programmes	PPRA, National Treasury, KEPSA/KAM

Private Sector assessment recommends as follows :**In the Short term :**

	Recommendation	Agency
1.	Amend the Bribery Act 2016 to include provisions for private companies to provide for Whistleblower protection mechanisms as part of their anti-corruption programmes	EACC, KEPSA ,KAM
2.	Civil society, in collaboration with the EACC and Business Member Organisations to sensitise the private sector on the importance of business integrity. This can begin with a sensitisation campaign on the provisions of the Bribery Act.	EACC, KEPSA ,KAM

In the mid-term:

	Recommendation	Agency
1.	KEPSA, KAM and the UN Global compact should prepare sample anti-corruption policy with minimum requirements to be adopted by signatories to the code of ethics for companies in Kenya	KEPSA ,KAM, UN Global Compact
2.	Consider including an indicator on adoption and implementation of integrity management mechanisms as an assessment criteria in the existing award initiatives such as FiRe Awards to encourage accountability in the private sector	CMA,ICPAK, EACC,KAM,KEPSA

In the long term:

	Recommendation	Agency
1.	There is need for the country to adopt cohesive integrity standards that apply to all categories of companies.	KEPSA, CMA,

Civil sector assessment recommends as follows :

In the short term:

	Recommendation	Agency
1.	There is a need to civil society to have a concerted effort to engage the private sector in matters of business integrity. They can leverage their experience in engaging the public sector to engage the private sector on governance matters. For instance, civil society can seek observer status in Business Member Organisation initiatives.	CSOs, KEPSA ,KAM

In the Mid term :

	Recommendation	Agency
1.	Strengthen the enforcement mechanism at the Media Council of Kenya to check issues of integrity among journalists.	Media Council of Kenya
2.	There is need for civil society organisations to convene a forum that focuses on business integrity. Similar fora have seen some level of success in the initiatives undertaken in the public sector.	Civil Society

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Annex 1 – National Advisory Group Members

	Organization	Sector
1.	Kenya Revenue Authority	Government
2.	Office of the Attorney General/ Business registration Bureau	Government
3.	Ethics and Anti-Corruption Commission	Government
4.	UN Global Compact Kenya – UNGC-K	Private Sector
5.	KAM	Business Member Organization
6.	GlaxoSmithKline	Private Sector
7.	Kenya Bankers Association	Private Sector
8.	Institute of Certified Public Accountants Kenya - ICPAK	Professional Body
9.	CUTS-Nairobi	CSO

Annex 2- TRAC Questionnaire

REPORTING ON ANTI-CORRUPTION PROGRAMMES (ACP)

1. Does the company have a publicly stated commitment to anti-corruption?
2. Does the company publicly commit to be in compliance with all relevant laws, including anti-corruption laws?
3. Does the company leadership (senior member[s] of management or the board) demonstrate support for anti-corruption?
4. Does the company's code of conduct/ anti-corruption policy explicitly apply to all employees and the board of directors?
5. Does the company's anti-corruption policy explicitly apply to persons who are not employees, but are authorised to act on behalf of the company or represent it, for example agents, advisors, representatives or intermediaries?
6. Does the company make anti-corruption requirements on non-controlled persons or entities that provide goods or services under contract, for example contractors, subcontractors or suppliers?
7. Does the company have an anti-corruption training programme in place for its employees and directors?
8. Does the company have a policy on gifts, hospitality and expenses?
9. Is there a policy that explicitly prohibits facilitation payments?
10. Does the programme enable employees and others to raise concerns and report violations of the programme without risk of reprisal?
11. Does the company provide a channel through which employees can report suspected breaches of anti-corruption policies, and does the channel allow for confidential and/or anonymous reporting (whistleblowing)?

12. Does the company carry out regular monitoring of its anti-corruption programme to review the programme's suitability, adequacy and effectiveness, and implement improvements as appropriate?
13. Does the company have a policy on political contributions that either prohibits such contributions or requires contributions to be publicly disclosed?

ORGANISATIONAL TRANSPARENCY (OT)

1. Does the company disclose all of its fully consolidated subsidiaries?
2. Does the company disclose percentages owned in each of its fully consolidated subsidiaries?
3. Does the company disclose countries of incorporation for each of its fully consolidated subsidiaries?
4. Does the company disclose countries of operations for each of its fully consolidated subsidiaries?
5. Does the company disclose all of its non-fully consolidated holdings?
6. Does the company disclose percentages owned in each of its non-fully consolidated holdings?
7. Does the company disclose countries of incorporation for each of its non-fully consolidated holdings?
8. Does the company disclose countries of operations for each of its non-fully consolidated holdings?



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