



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

CU 2023/120/DTA/CEB/TSS

19th May, 2023

Secretary of the Conference of the States Parties to the United Nations Convention
against Corruption
United Nations Office on Drugs and Crime
Vienna International Centre
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RE: **RESPONSE TO REQUEST FOR INFORMATION ON STATE MEASURES TO
STRENGTHEN CORPORATE INTEGRITY**

We make reference to the above-mentioned matter and a questionnaire dated 13th April 2023 Reference: CU 2023/120/DTA/CEB/TSS. The Secretariat to the Conference of State Parties to the United Nations has requested for information regarding good practices and lessons learnt from engaging the private sector in the last decade.

We set out our responses below reflecting on Kenya's experience;

CHAPTER 1 – UNCAC AND PRIVATE SECTOR

1(a) – Measures taken to promote business integrity and/or reporting corruption in private sector

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| i. | <p>Enactment of Anti-Bribery legislation</p> <ul style="list-style-type: none"> ✓ The Bribery Act, 2016 came into force in 2017 with the object of providing a framework for the prevention, investigation and punishment of bribery and related offences in Kenya. The Act applies to all individuals and entities in the private and public sectors. Previously, the law did not impose significant responsibilities on the private sector in the fight against corruption. ✓ Section 14 of the Act imposes a duty to report bribery. All persons holding a position of authority in a public or private entity must report to the EACC any knowledge or suspicion of instances of |
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bribery. Failure to report the bribery within a period of 24 hours constitutes an offence.

- ✓ Part III of the Act obligates a public or private entity to put in place procedures for the prevention of bribery. Failure of private entities to put in place such procedures is an offence on the part of the director or senior officer of such private entity.
- ✓ The Act empowers the Cabinet Secretary for matters of corruption, in consultation with the EACC, to publish guidelines that will assist persons in private and public sectors to come up with procedures in their organisations to prevent bribery. For the moment, EACC is developing procedures for the prevention of bribery ready for adoption by public and private entities.
- ✓ The Act also makes it an offence for a private entity to fail to prevent bribery.

ii.

Beneficial Ownership Information (BOI) disclosure requirements for companies

- ✓ The Registrar of Companies operationalized the Beneficial Ownership (BO) E-register in October 2020. The net effect of this was that all registered companies in Kenya are now required to prepare a form/register setting out all the information relating to their beneficial ownership and lodge the same with the Registrar within thirty (30) days of its preparation.
- ✓ Prior to the enactment of the Companies Act 2015, companies in Kenya did not have any duty whatsoever to disclose information regarding their beneficial ownership. However, pursuant to the Companies (Amendment) Act, 2017 and subsequently the Statute Law (Miscellaneous Amendments) Act No. 12 of 2019 which introduced Section 93A to the Company Act, all companies incorporated or registered in Kenya are mandatorily required to keep a register of beneficial owners with the relevant information relating to the said beneficial owners as prescribed by the Companies (Beneficial Ownership Regulations) 2020 ('BO Regulations').
- ✓ The rationale for this disclosure requirement is on the basis that legal persons and Legal arrangements are potentially at risk of being misused to facilitate criminal activity such as corruption, money laundering, financing of terrorism, proliferation tax evasion, and other criminal activities.
- ✓ Legal persons and legal arrangements may also be exploited by persons who wish to retain anonymity that enables illegal activities to take place while hidden from law enforcement authorities. It was against this backdrop that it became necessary to create an accurate public disclosure regime that provides transparency in the beneficial ownership and control structures of companies. This aids in not only promoting investor confidence and good corporate governance practices but also in uncovering corruption-related schemes in companies majority of which are privately owned.

iii.	<p>Conflict of Interest Bill, 2023</p> <ul style="list-style-type: none"> ✓ The Kenya Cabinet has approved the Conflict-of-Interest Bill and is currently pending approval and passage by Parliament. The motivating factor being runaway private interest that conflict with public interest. ✓ The object of the proposed law is to provide for the management of conflict of interest by public officials in the discharge of their duties. ✓ The Bill describes situations that amount to conflict of interest and imposes obligations on public officers to avoid conflict of interest. ✓ Another notable provision of the proposed law is the provision for compliance measures/steps that public officers should take when their private interests are likely to conflict with public interest. These include; recusal, declaration of income, assets and liabilities, divestiture.
iv.	<p>National Ethics and Anti-Corruption Policy</p> <ul style="list-style-type: none"> ✓ Kenya developed and adopted the National Ethics and Anti-Corruption Policy, 2018. The overall objective of the Policy is to reduce levels and prevalence of corruption and unethical practices in Kenya by providing a comprehensive, coordinated and integrated framework for the fight against corruption and promotion of ethics. ✓ Chapter Four of the Policy highlights anti-corruption strategies. The strategies are set out in 7 broad areas, namely: prevention, public education and awareness creation, criminalization, law enforcement and jurisdiction, prosecution of corruption and economic crimes, asset recovery, international cooperation and leadership and integrity. ✓ The Policy, therefore, gives the foundational framework and sets the stage for the enactment of specific anti-corruption legislation that is geared towards fighting private sector corruption. It is on the basis of the Policy that there currently in place the Conflict-of-Interest Bill, and Whistleblower Protection Bill, among other proposed laws.
v.	<p>Kenya Leadership and Integrity Forum (KLIF)</p> <ul style="list-style-type: none"> ✓ KLIF is a multi-sectoral forum consisting of over 15 sectors that are partnering in the fight against corruption and unethical practices in Kenya. ✓ KLIF brings together stakeholders from the public and private sectors, civil society and religious organizations to map out an integrated approach to preventing and combating corruption. As a multi-sectoral forum, it promotes unified stakeholder involvement in the fight against corruption. ✓ It was established to promote cooperation among all relevant anti-corruption stakeholders that includes private sector players. It is for that reason that membership to KLIF includes non-state actors like the media, private sector, civil society, faith sector and so forth.
vi.	<p>Kenya Integrity Plan</p> <ul style="list-style-type: none"> ✓ Since 2015, KLIF stakeholders that comprise state and none state actors, have been implementing the Kenyan Integrity Plan (KIP) (<i>KIP 2015-2019 and KIP 2019-2023</i>) which was formulated as a roadmap for all the KLIF sectors to implement a unified strategy to combat corruption in Kenya. ✓ All the sectors and the respective institutions implementing the KIP align their anti-corruption interventions to the KIP and develop

Annual action plans and progress implementation reports. These reports provide an opportunity to assess performance and measure impact of the stakeholder's anti-corruption activities.

- ✓ Since KIP 2019-2023 is set to expire this year, plans are underway to review and develop KIP 2023-2027.

vii.

Whistleblowing

- ✓ Though Kenya does not have a consolidated whistleblower protection law, whistleblowing 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 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 Witness Protection Agency (WPA)
- ✓ The Witness Protection Act, 2012 creates the 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.

viii.

The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

- ✓ This code 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(b) – Challenges Encountered

i.

The pending enactment of Guidelines for prevention of bribery means that many private entities do not have bribery prevention guidelines in place as envisaged under the Bribery Act

ii.

Slow pace of adjudication of anticorruption cases in court.

iii.

In terms of Mutual Legal Assistance (MLA) with foreign law enforcement agencies, the EACC and ODPP have cooperated with various foreign governments on multiple occasions. However, EACC and ODPP have challenges in reciprocation of MLA from foreign governments

iv.

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.

v.

There have been documented operational challenges due to uncoordinated nature of the various agencies involved in the fight against corruption. This

	has hampered the prosecution of corruption cases.
vi.	Kenya does not have a consolidated whistleblower protection law but this is covered under various pieces of legislation.
vii.	WPA does not protect a whistleblower unless they become a witness.
viii.	There is no independent whistleblower investigation/complaints authority or tribunal in Kenya.
ix.	The Companies Act makes no mention of criminalizing willful misrepresentation of beneficial ownership information or failure to disclose nominees fronting directors or shareholders.

1(c) – Steps Taken to Overcome Challenge

i.	EACC has prepared model guidelines for adoption by private entities.
ii.	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, operationalized 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
iii.	Government through Office of Attorney General and Ministry of Foreign and Diaspora has entered into bilateral engagements with relevant foreign governments on MLA and reciprocation of MLA from foreign governments
iv.	There has been progressive increase (yearly) in budgetary allocation for agencies in the justice sector
v.	The State Law Office formed Multi Agency Team (MAT) to cure operational challenges of the various agencies involved in the fight against corruption. The coordination under the auspices of MAT has already recorded some success.
vi.	There is being developed a Whistle-Blower Protection Bill. The same has been subjected to review and comments by Cabinet. 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)

CHAPTER 2 – ENGAGING THE PRIVATE SECTOR

2 (a) – Summary of good practices taken to promote integrity through anti-corruption programmes in private sector

i.	<p>The Government of Kenya through the Ethics and Anti-Corruption Commission (EACC) has introduced education programmes for those who would wish to go into the private sector.</p> <p>The EACC launched a National Integrity Academy through which it hopes to entrench good governance with specialized training on ethics and anti-corruption. The Academy is set to provide specialized ethics, integrity, Leadership, Good Governance and Anti- Corruption training to both the public and private sector institutions in the country and the region.</p>
ii.	Establishment of the Multi-Sectoral Anti-Corruption Forum. This Forum provides a platform that brings together public and private entities to form a strong pillar in the fight against corruption in the business community.
iii.	Section 12 of the Bribery Act, 2016 mandates the Office of the Attorney General in consultation with EACC to publish guidelines to assist private and public entities in the preparation of procedures for prevention of bribery and corruption.
iv.	The Government of Kenya has embarked on a nationwide sensitization and

	awareness creation campaign aimed at changing the attitude of the people towards corruption.
v.	The umbrella body Kenya Private Sector Alliance (KEPSA) is one of the agencies that implement the National Anti-Corruption Plan (NACP) under the Kenya Integrity Forum (KIF) through the Association of Professional Societies of Eastern Africa (APSEA) and Institute of Certified Public Accountants of Kenya (ICPAK). These professional bodies regulate the conduct of their members which is important in the fight against corruption.
vi.	The Centre for Corporate Governance trains private companies on proper corporate governance including development of necessary instruments.

2(b) – Summary of good practices used to encourage transparency, public reporting and/or public participation thro' anti-corruption programmes

i.	Establishment of civilian oversight committees across the devolved units in Kenya to receive complaints and address corruption issues at the grassroots level and generating credible data to inform and affirm campaign strategies and activities through research/studies on corruption
ii.	Facilitating advocacy campaigns
iii.	Adoption of the Code of Ethics for Business in Kenya to nurture an ethical climate for conducting business.
iv.	Private organizations in Kenya have signed up for the UN Global Compact, a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. The Global Compact incorporates a transparency and accountability policy known as the Communication on Progress. Over 260 companies in Kenya have signed up for the UN Global Compact.
v.	Article 10 of the Constitution of Kenya recognizes public participation as a national value and principle in Kenya. The Constitution mandates all state organs and public officers to promote participation of the Kenyan people in the execution of their public duties, including in the development of legislation.
vi.	Undertaking Corruption Risk Assessment targeting key functional areas in the private and public sector

2(c) – Impact of Measures described in 2 (a) and (b) above

i.	Notable increase in the level of awareness on matters ethics and integrity among members of the private sector.
ii.	Increased collaboration between public entities and private sector in the multi-sectoral forums to monitor implementation and progress on the fight against corruption.
iii.	The private sector assists in the mobilization of resources to support anti-corruption initiatives.

2(d) – Challenges Encountered in implementing measures in 2(a) and (b) above

i.	Cooperation between law enforcement agencies and the private sector entities is weak.
ii.	There are no structured internal corruption reporting mechanisms in the private sector
iii.	Enforcement of most codes of conduct lacks the backing of the law and heavily relies on the goodwill of members.
iv.	Stakeholders awareness on existing anti-corruption measures is low in the private sector

CHAPTER 3 – USING SANCTIONS AND INCENTIVES

PART A – SANCTIONS

3(a) – Sanctions used to strengthen business integrity in private sector

- i. The Bribery Act, 2016 outlines penalties for legal or natural persons found guilty of offences under various sections the Act. These includes:
 - imprisonment
 - Monetary fine
 - Disqualification of a convicted person from transacting business with the national or county government for period of ten years after such conviction
 - Reimbursement to the Government of the amount or value of any advantage received by a person found guilty
 - Court can order confiscation of any property acquired as a result of the advantage received by the convicted person or private entity.
 - Barring of guilty state officers from holding public office
 - If the convicted person is a director of a company, such person shall be disqualified from holding the position of director in that or any other company in Kenya for a period of not more than ten years.
 - If the convicted person is a partner in a firm, such person shall be disqualified from serving as a partner in that or any other firm in Kenya, for a period of not more than ten years.

ii. Imposition of administrative and civil sanctions against reporting institutions that contravene Proceeds of Crime and Anti-Money Laundering Act.

iii. Monetary fines for corporate bodies

iv. 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.

v. Under the Public Procurement and Asset Disposal Act, a person convicted of corrupt or fraudulent practices becomes ineligible to bid for government tenders

vi. Debarment of Companies

vii. Forfeiture to the State of corruptly acquired and unexplained Assets

3(b) – Main challenges faced in enforcing sanctions

i. Lenient sanctions/sentences that do not deter corruption

ii. Lack of sufficient and efficient enforcement mechanisms for prescribed sanctions

iii. Constitutional references and judicial review applications that either delay or stays court orders sanctioning individuals and companies

iv. The Bribery Act does not provide any form of mitigation incentives such as leniency programmes or suspended sanctions to legal or natural persons.

v. The Public Procurement Regulatory Authority (PPRA) does not have sufficient technical and operational capacity to enforce sanctions provided in procurement laws

vi. Willful disobedience and non-compliance of sanctions by well-connected and highly-placed individuals

vii. There are no enough incentives or preferential treatment offered to companies with effective anti-corruption programmes

viii. 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.

3 (c) – Steps taken to overcome such challenges

- i. Improved investigation and collection of evidence to support imposition of stiffer penalties on individuals and companies found to have engaged in corruption

ii.	Advocacy and lobbying for review of anti-corruption laws to provide for more stiffer penalties with reduced options for monetary fines
iii.	Capacity building amongst stakeholders
iv.	
PART B – INCENTIVES	
3(d) – Incentives used to strengthen business integrity	
i.	Preferential business relations for companies that sign on as collaborators to the code of ethics for business within the East Africa region.
ii.	Public recognition of companies compliant with anti-corruption measures and strategies
3 (e) – Impact of such incentives	
i.	Kenya's focus has been on sanctions. There are hardly enough incentives used to strengthen business integrity. In effect, there impact of such incentives remains very low
PART C – ADDITIONAL MEASURES	
3(f) – Other additional measures used to strengthen business integrity and/or reduce corruption in private sector	
i.	The Kenya Integrity Plan 2019 – 2023 encourages the signing of Integrity Pacts by private sector actors in public procurement processes.
ii.	The private sector is encouraged to make legislative proposals to promote good governance and sustainable development.
iii.	Promotion of whistle-blowing
iv.	The Bribery Act, 2016 requires private entities to adopt guidelines being developed by EACC to help in the prevention of bribery and corruption in the workplace.

Submitted for your information.


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