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BRIBERY ACT

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

1. Short title
2. Interpretation
3. Implementation of the Act
4. Application of the Act

PART II – GENERAL BRIBERY OFFENCES

5. Giving a bribe
6. Receiving a bribe
7. Function or activity to which a bribe relates
8. Bribery of foreign public officials

PART III – REQUIREMENTS FOR PROCEDURES
FOR THE PREVENTION OF BRIBERY

9. Duty to have in place procedures for the prevention of bribery
10. Failure of private entity to prevent bribery
11. Meaning of associated person
12. Guidance about private entities preventing bribery
13. Activities intended to enable bribery

PART IV – OTHER PROVISIONS ON OFFENCES

14. Duty to report
15. Offences under this Act: territorial application
16. Offences under sections 6 and 13 by bodies corporate etc
17. Offences under sections 10 and 13 by partnerships

PART V – PENALTIES

18. Penalties
19. General penalty

PART VI – MISCELLANEOUS

20. Application of No. 3 of 2003
21. Protection of whistle blowers and witnesses
22. Regulations
23. Amendment of No. 3 of 2003
24. Amendment of section 56 of No. 3 of 2003
25. Amendment of section 11 of No. 22 of 2011
26. Amendment of section 3 of No. 3 of 2003
27. Pending bribery cases

NO. 47 OF 2016

BRIBERY ACT

[Date of assent: 23rd December, 2016.]

[Date of commencement: 13th January, 2017.]

AN ACT of Parliament to provide for the prevention, investigation and punishment of bribery, and for connected purposes

[Act No. 47 of 2016, Act No. 18 of 2018.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Bribery Act, 2016.

2. Interpretation

In this Act, unless the context otherwise requires—

"advantage" includes—

- (a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
- (b) any office, employment or contract;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;
- (d) any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;
- (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d); and,
- (f) any facilitation payment made to expedite or secure performance by another person;

"bribery" means bribery within the meaning of Part II;

"business" includes a trade or profession;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to justice;

"Commission" means the Ethics and Anti-Corruption Commission established under the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011);

"corruption" has the meaning assigned to it in the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003);

"economic crime" has the meaning assigned to it in the Anti-Corruption and Economic Crimes Act, 2003;

"foreign public official" includes —

- (a) any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected;
- (b) any person exercising a public function for a foreign country, including for a public agency or public enterprise; and
- (c) an international civil servant or any person who is authorized by such an organization to act on behalf of that organization;

"partnership" means —

- (a) a partnership within the Partnership Act (No. 16 of 2012); or
- (b) limited liability partnership under the Limited Liability Partnerships Act, 2011 (No. 42 of 2011);
- (c) a firm or entity of a similar character formed under the law of a country or territory outside Kenya;

"private entity" means any person or organization, not being a public entity, and includes a voluntary organization, charitable organization, faith based organization, religious-based organization, community based organization, company, partnership, club and any other body or organization howsoever constituted, and includes—

- (a) a body which is incorporated under the laws of Kenya and which carries on business within or outside Kenya;
- (b) any other body corporate however established which carries on business, or part of business, in Kenya;
- (c) a charity, or an organization established for charitable purpose under the laws of Kenya or any other country;
- (d) a partnership which is formed under the law of Kenya and which carries on business, within or outside Kenya;
- (e) any other partnership on a business, or part of a business, in Kenya;

"private sector" means the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces, rather than public authorities and other sectors of the economy not under the public sector or government;

"property" includes —

- (a) money;
- (b) all forms of property, real or personal, heritable or moveable;
- (c) things in actions and other intangible and incorporeal property;

"public entity" means —

- (a) the Government, including the national or county Government, or any department, State organ or agency service or undertaking of the national or county Government;
- (b) the Parliamentary Service;
- (c) any corporation, council, board, committee or other body which has power, to act under and for the purposes of any written law relating to undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

- (d) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition;
- (e) statutory public bodies;

"public international organization" means an organization whose members are—

- (a) countries or territories; or
- (b) governments of countries or territories;

"public office" has the meaning assigned to it under Article 260 of the Constitution;

"public officer" has the meaning assigned to it under Article 260 of the Constitution;

"Secretary" means the Secretary to the Commission appointed by the Commission under section 16 of the Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011);

"State officer" has the meaning assigned to it under Article 260 of the Constitution, and section 2 of the Leadership and Integrity Act, 2012 (No. 19 of 2012);

"senior officer" means —

- (a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate; and
- (b) in relation to a partnership, a partner in the partnership.

"witness" has the meaning assigned to it under the Witness Protection Act, 2006;

"Witness Protection Agency" means the Witness Protection Agency established under the Witness Protection Act, 2006 (No. 16 of 2006); and

"whistle blower" means a person who makes a report to the Commission or the law enforcement agencies on acts of bribery or other forms of bribery.

3. Implementation of the Act

The Commission shall be responsible for the enforcement of this Act.

4. Application of the Act

This Act shall apply to the public, public officers and private entities.

PART II – GENERAL BRIBERY OFFENCES

5. Giving a bribe

(1) A person commits the offence of giving a bribe if the person offers, 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 a relevant function or activity.

(2) Subject to subsection (1), it shall not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned, or whether the advantage is offered, promised or given by a person directly or through a third party.

6. Receiving a bribe

- (1) A person commits the offence of receiving a bribe if —
- (a) the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;
 - (b) 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.
 - (c) in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence.
- (2) For purposes of subsection (1)(a) and (c) it shall not matter—
- (a) if the recipient requests for, agrees to receive or receives or intends to request for, agree to receive or to accept the advantage directly or through a third party; or
 - (b) if the advantage is or is intended to be for the benefit of the recipient or another person.
- (3) For purpose of subsection (1) it shall not matter whether —
- (a) the recipient is performing the function or activity;
 - (b) the person giving the bribe knows or believes that the performance of the function or activity is improper; or
 - (c) where a person other than the recipient is performing the function or activity, whether that person knows or believes that the performance of the function or activity is improper.

7. Function or activity to which a bribe relates

- (1) For the purposes of this Act, a function or activity shall be construed to be a relevant function or activity if —
- (a) it includes —
 - (i) any function of a public nature;
 - (ii) any function carried out by a State officer or public officer, pursuant to his or her duties;
 - (iii) any function carried out by a foreign public official, pursuant to his or her duties;
 - (iv) any activity connected with a business;
 - (v) any activity performed in the course of a person's employment, and
 - (vi) any activity performed by or on behalf of a body of persons whether corporate or otherwise;
 - (b) it meets one or more of the following conditions —
 - (i) that the person performing the function or activity is expected to perform it in good faith;
 - (ii) that the person performing the function or activity is expected to perform it impartially; and

- (iii) that the person performing the function or activity is in a position of trust by virtue of performing it.

(2) For purpose of this section, a function or activity is a relevant function or activity even if it is performed in a county or territory outside Kenya.

8. Bribery of foreign public officials

(1) Any person who bribes a foreign public official with the intention of influencing that official's capacity commits an offence.

(2) A person commits the offence of bribery under subsection (1) if —

- (a) directly or through a third party, the person promises or gives any financial or other advantage to the foreign official or to another person at the foreign official's request or with the foreign official's assent or acquiescence; and
- (b) the foreign official is neither permitted nor required by the written law applicable to him or her to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

(3) In this section, influencing a foreign official means influencing such foreign official in the performance of their functions, including —

- (a) any omission to exercise those functions; and
- (b) any use of the position as such an official, even if not within the official's authority.

(4) For the purposes of subsection (2)(b), the written law applicable to a foreign official shall —

- (a) where the performance of the functions intended to be influenced would be subject to the law of Kenya;
- (b) where the official is an agent of a public international organization, the applicable written rules of that organization; or
- (c) in any other case, the law of the country or territory which applies to the foreign official so far as that law is contained in —
- (i) any provision made by or under legislation, applicable to the country or territory concerned, or
- (ii) any judicial decision which is so applicable and is evidenced in published written sources.

PART III – REQUIREMENTS FOR PROCEDURES FOR THE PREVENTION OF BRIBERY

9. Duty to have in place procedures for the prevention of bribery

(1) A public or private entity shall 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.

(2) Where a private entity fails to put in place procedures under this section, and where that failure is proved to have been committed with the consent or connivance of —

- (a) a director or senior officer of the private entity, or
- (b) a person purporting to act in such a capacity, or occupying such a position, by whatever name called,

the director, senior officer or other person commits an offence.

(3) The Commission shall assist private entities, public entities, and any interested person, to develop and put in place procedures for the purposes of this section.

10. Failure of private entity to prevent bribery

A private entity commits an offence under this section if a person associated with it, bribes another person intending to obtain or retain —

- (a) business for the private entity; or
- (b) advantage in the conduct of business by the private entity.

11. Meaning of associated person

(1) A person shall be deemed to be associated with another person if the person performs services for or on behalf of that other person as an agent, employee, or in any other capacity.

(2) The determination as to whether a person performs services on behalf of another person shall be made by reference to all the relevant circumstances and not only the reference to the nature of the relationship.

12. Guidance about private entities preventing bribery

(1) The Cabinet Secretary shall, in consultation with the Commission, publish guidelines to assist private and public entities in the preparation of procedures required under this Part.

(2) The guidelines under subsection (1), shall be in the Gazette and such other manner as the Cabinet Secretary may consider appropriate.

(3) The Commission may provide such assistance as may be necessary to any private or public entity or any other person in the implementation of procedures issued under this section.

13. Activities intended to enable bribery

(1) Any person who knowingly assists a person or a private entity to give or receive a bribe by —

- (a) obtaining property intended for use in bribery;
- (b) using, having possession of or transferring property which was obtained as a result of or in connection with bribery; or
- (c) acquiring property which was obtained as a result of or in connection with bribery; or
- (d) recording property which was obtained as result of or in connection with bribery in the accounting records of any private entity,

commits an offence.

(2) Where an offence under this section is committed by a director or senior officer of a private entity such private entity shall be deemed to have committed the offence.

[Act No. 18 of 2018, Sch.]

PART IV – OTHER PROVISIONS ON OFFENCES

14. Duty to report

(1) Every state officer, public officer or any other person holding a position of authority in a public or private entity shall report to the Commission within a period of twenty-four hours any knowledge or suspicion of instances of bribery.

(2) A State officer, a public officer or any other person who, despite being aware of or suspicious of the commission of an offence under this Act, fails to report the act to the Commission within the specified period commits an offence.

15. Offences under this Act: territorial application

(1) Conduct by a citizen of Kenya or by a private or public entity within the meaning of sections 11 and 12 which takes place outside Kenya, shall constitute an offence under this Act if the conduct would constitute an offence under this Act if it took place in Kenya.

(2) For the avoidance of doubt, sub-section (1) shall apply irrespective of whether the acts or omissions which form part of the offence take place within or outside Kenya.

16. Offences under sections 6 and 13 by bodies corporate etc

(1) This section applies if an offence under sections 6 and 13 is committed by a private entity or partnership.

(2) If the offence is proved to have been committed with the consent or connivance of —

- (a) a senior officer of the private entity or partnership, or
- (b) a person purporting to act in such a capacity;

the senior officer or other person, and the body corporate or partnership, shall be deemed to have committed an offence and liable for prosecution.

[Act No. 18 of 2018, Sch.]

17. Offences under sections 10 and 13 by partnerships

(1) Proceedings for an offence under sections 10 and 13 alleged to have been committed by a partnership shall be brought in the name of the partners and the partnership.

(2) For the purposes of proceedings under subsection (1) —

- (a) the rules of court relating to the service of documents shall have effect as if the partnership were a body corporate, and
- (b) the following provisions shall apply as they apply in relation to a body corporate —
 - (i) the provisions of the Companies Act, 2015, (No. 17 of 2015.) relating to liability of a company, its directors or its employees if found guilty of a criminal offence;
 - (ii) the provisions of the Partnerships Act, 2012, (No 16. of 2012) relating to the liability of a partnership or its partners if found guilty of a criminal offence;
 - (iii) the provisions of the Limited Liability Partnerships Act, 2011 relating to the liability of a partnership or its partners if found guilty of committing a criminal offence; and
 - (iv) the provisions of the Criminal Procedure Code, (Cap. 75) relating to the liability of a company or its directors or a partnership or its partners if found guilty of committing a criminal offence.

(3) A fine imposed on the partnership on its conviction for an offence under sections 10 and 13 shall be paid out of the partnerships assets.

PART V – PENALTIES

18. Penalties

- (1) An individual found guilty of an offence under section 5, 6, or 13 —
 - (a) shall be liable on conviction, to imprisonment for a term not exceeding ten years, or to a fine not exceeding five million shillings, or both; and
 - (b) may be liable to an additional mandatory fine if, as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.
- (2) The mandatory fine referred to in subsection (1)(b) shall be —
 - (a) equal to five times the amount of the benefit or loss described in subsection (1)(b);
 - (b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), equal to five times the sum of the amount of the benefit and the amount of the loss.
- (3) Any other person who commits an offence under section 5, 6, or 15 shall be liable on conviction to a fine not exceeding five million shillings.
- (4) A person or private entity found guilty of an offence under section 10 is liable on conviction to a fine.
- (5) In determining the fine to be paid under subsection (4), the court shall not only seek to mete out punishment for the offence committed but also seek to deter similar offences by the same or other private entities.
- (6) In addition to the imprisonment or fine stipulated in this section, the court may order the convicted person or private entity, or in appropriate cases, a public body, to pay back the amount or value of any advantage received by him to the Government.
- (7) Notwithstanding the penalty prescribed in subsection (5), the court shall order the confiscation of any property acquired as a result of the advantage received by the convicted person or private entity.
- (8) If the convicted person is a State officer or a public officer, such person shall be barred from holding public office, in accordance with the provisions of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), the Public Officer Ethics Act, 2003 (No. 4 of 2003), and the Leadership and Integrity Act, 2012 (No. 19 of 2012).
- (9) 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.
- (10) 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.
- (11) A person who is convicted of an offence involving bribery shall be disqualified from being elected or appointed to hold a state office or a public office for a period of not more than ten years after conviction.
- (12) A person, other than a natural person, convicted of bribery, shall be disqualified from transacting business with the national or county government for period of ten years after such conviction.

19. General penalty

Any person who is convicted of an offence under this Act, for which no penalty is expressly provided, shall be liable on conviction to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding ten years, or to both.

PART VI – MISCELLANEOUS**20. Application of No. 3 of 2003**

(1) The provisions of the Anti-Corruption and Economic Crimes Act on investigation and prosecution of offences shall apply to the investigation and prosecution of offences under this Act.

(2) Sections 62 to 66 of the Anti-Corruption and Economic Crimes Act, 2003 relating to, inter alia, the suspension of or disqualification of a person charged or convicted of corruption or economic crime, and obstructing persons, shall apply, with the necessary modifications, to offences under this Act.

21. Protection of whistle blowers and witnesses

(1) A whistle blower, informant or a witness in a complaint or a case of bribery shall not be intimidated or harassed for providing information to law enforcement institutions or giving testimony in a court of law.

(2) A person who demotes, admonishes, dismisses from employment, transfers to unfavourable working areas or otherwise harasses and intimidates a whistle blower or a witness under this Section is guilty of an offence and shall be liable upon conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.

(3) A whistle blower or a witness under this Act shall be entitled to protection of such extent as may be determined by the Witness Protection Agency.

(4) Every law enforcement agency shall put in place reasonable mechanisms to protect the identity of informants and witnesses.

(5) Any person who knowingly or negligently discloses the information of informants and witnesses and a result of which those informants are harassed or intimidated commits an offence and shall be liable upon conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.

22. Regulations

(1) The Cabinet Secretary may, on the recommendation of the Commission, make Regulations for the better carrying out of the provisions of this Act.

(2) For the purposes of Article 94(6) of the Constitution;

- (a) the purpose and objective of delegation under this to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect of the provisions of this Act and to enable the County Authorities to their functions more effectively;
- (b) the authority of the Cabinet Secretary to make regulations under this Act will be limited to bringing into effect the provisions of this Act and to fulfil the objectives specified under this section;
- (c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013.

23. Amendment of No. 3 of 2003

The Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003) is amended by deleting Section 39.

24. Amendment of section 56 of No. 3 of 2003

Section 56 of the Anti-Corruption and Economic Crimes Act, 2003, is amended in subsection (1) by deleting the words "on evidence" and substituting thereof the words "if it is satisfied that there are reasonable grounds to suspect."

25. Amendment of section 11 of No. 22 of 2011

The Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011), is amended in section 11(1)(d), by inserting the word "bribery" immediately after the word "corruption".

26. Amendment of section 3 of No. 3 of 2003

The Anti-Corruption and Economic Crimes Act, 2003, is amended in section 3, by inserting the word "bribery" immediately after the word "corruption".

27. Pending bribery cases

(1) This section applies with respect to bribery offences or suspected bribery offences under the Anti-corruption and Economic Crimes Act, 2003.

(2) Any investigation or prosecution or court proceedings instituted before the commencement of the Act based on an offence under the Anti-Corruption and Economic Crimes Act, 2003 shall be continued under the Anti-Corruption and Economic Crimes Act, 2003.

[Act No. 18 of 2018, Sch.]

