



British Chamber of Commerce Kenya

Bribery Act 2016 - Overview and implications for business

Nairobi

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Content

	The Bribery Act 2016	3-5
1	General bribery offences	6-13
2	Appropriate procedures	14-19
3	Failure to prevent bribery	20-22
4	Duty to prevent	23-25
	ISO 37001	26
5	Overview of ISO 37001	27-29
6	Outline of the standard	30-31
7	Certification	32-34



The Bribery Act 2016

The Bribery Act 2016

Introduction

- ❖ The Bribery Act 2016 was assented to on 23 December 2016 and commenced on 13 January 2017.
- ❖ The principle objective of the Act is to provide for the prevention, investigation and punishment of bribery.
- ❖ The Act builds on previous bribery and corruption legislation in Kenya, which only focused on the public sector, such as the Penal Code, the Anti-Corruption and Economic Crimes Act, the Public Procurement and Disposal Act and the Public Officers Ethics Act.
- ❖ The Act was modelled on the UK Bribery Act 2010.
- ❖ The Ethics and Anti-Corruption Commission (EACC) is responsible for the implementation and enforcement of the Act.

Key provisions of the Act

The Act has 4 key provisions

- ❖ General bribery offences.
- ❖ Duty on private and public entities to put in place 'appropriate procedures' for the prevention of bribery and corruption.
- ❖ Duty on private entities to prevent bribery.
- ❖ Duty to report bribery.



1 General bribery offences

1.1 General bribery offences

The Act sets out three general bribery offences:

- ❖ Giving a bribe.
- ❖ Receiving a bribe.
- ❖ Bribing a foreign public official.

1.2 Giving a bribe

A person (P) commits an offence under section 5 of the Act if P:

- ❖ Offers, promises or gives
- ❖ A financial or other **advantage** to another person (R)
- ❖ **Who** knows or believes
- ❖ **Acceptance** would itself constitute the **improper performance** of a **relevant function**.

“Advantage” is widely defined and includes ‘a favour or advantage of any description whatsoever’:

- ❖ Non-financial advantages.
- ❖ Facilitation payments (i.e., small bribes paid to facilitate routine Government action).

1.3 Giving a bribe continued

'Improper performance' is not defined, but the term 'improper' is a well understood term in commercial and criminal law.

Involves a 'relevant function'

Including:

- ❖ Function of a public nature.
- ❖ Activity connected with a business.
- ❖ Activity performed by or on behalf of a body of persons whether corporate or otherwise.

and

Is performed under one or more of the following conditions:

- ❖ Good faith.
- ❖ Impartially.
- ❖ Position of trust.

1.4 Giving a bribe continued

Other considerations;

- ❖ Extraterritoriality.
- ❖ What about bona fide hospitality.
- ❖ Payments made by third parties.
- ❖ Indirect payments.

1.5 Penalties

A person convicted of an offence under the Act is liable to a **fine** not exceeding **Kshs 10 million** or to **imprisonment** for a term not exceeding **10 years**, or to both.

A person convicted of bribery may be liable to **an additional mandatory fine** if they received a quantifiable benefit or any other person suffered a quantifiable loss. The additional mandatory fine will be set at **five** times the amount of the benefit and/or loss.



1.6 Penalties continued

Other enforcement remedies

In addition to fines and custodial sentences, the law provides for a range of other enforcement remedies such as:

- ❖ **disgorgement** of the advantage received from a bribe.
- ❖ **confiscation** of any property acquired as a result the advantage received from a bribe.
- ❖ **disqualification of an individual** from being a director or partner of a business for **up to 10 years**.
- ❖ **disqualification of a business** from transacting business with the National or County Government for **up to 10 years**.

1.7 Liability

Criminal liability for giving or receiving a bribe include:

- ❖ Principal offenders.
- ❖ Section 13 of the Act:
 - ❖ Knowingly assisting a person of private entity to give or receive a bribe.
 - ❖ Deemed corporate liability where an offence is committed by a director or senior officer of a private entity.
- ❖ The Penal Code:
 - ❖ Parties to offences (section 20).
 - ❖ Liability of those who control or manage a company (section 23).

Defences:

- Not aware of the offence (through no act or omission of that person).
- Took all reasonable steps to prevent the offence.



2 Appropriate procedures

2.1 Appropriate procedures

The Act requires **public and private entities** to put in place procedures for the prevention of bribery and corruption that are appropriate to its size and the scale and to the nature of its operations.



2.2 Public entities

The following are “**public entities**” under the Act:

- ❖ The national or county Government.
- ❖ Any department, State organ or agency service or undertaking of the national or county Government.
- ❖ The Parliamentary Service.
- ❖ 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
- ❖ 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.
- ❖ Statutory public bodies.

2.3 Private entities

The term "**private entity**" is widely defined as **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.
 - ❖ Any other body or organization howsoever constituted.

2.4 Appropriate procedures continued

The Act requires public and private entities to put in place procedures for the prevention of bribery and corruption that are **appropriate to its size and the scale and to the nature of its operations**.

Considerations

- ❖ The Cabinet Secretary, in consultation with the EACC, shall publish guidance on appropriate procedures.
- ❖ The EACC may provide assistance to any private or public entity or any other person in the implementation of appropriate procedures.
- ❖ The procedures must extend beyond ensuring that a business' employees are not involved in bribery and corruption. The procedures must cover all persons who perform services for or on behalf the business, such as agents.
- ❖ In some instances, senior officers of a business may also be liable for a business' failure to put in place procedures for the prevention of bribery.
- ❖ Bribery and **corruption**.

2.5 Corruption

The Anti-corruption and Economic Crimes Act defines corruption as including:

- ❖ Fraud.
- ❖ Embezzlement or misappropriation of public funds.
- ❖ Abuse of office.
- ❖ Breach of trust
- ❖ An offence involving dishonesty:
 - ❖ In connection with any tax, rate or impost levied under any Act; or
 - ❖ Under any written law relating to the elections of persons to public office.
- ❖ Certain other crimes under the Anti-corruption and Economic Crimes Act.



3 Failure to prevent bribery

3.1 Failure to prevent bribery

A **private entity** commits an offence under section 10 of the Act if:

- ❖ a person **associated** with the private entity
- ❖ Bribes another person
- ❖ Intending to obtain or retain
 - ❖ Business for the private entity or
 - ❖ advantage in the conduct of business by the private entity.

Associated person:

- ❖ Take into account all the relevant circumstances (including the relationship).
- ❖ A person is deemed to be associated where that person:
 - performs services for or on behalf of the private entity.
 - as an agent, employee or in any other capacity.

3.2 Failure to prevent bribery continued

Other considerations:

- ❖ Defence of adequate procedures?

UK adequate procedures defence – six principles:

- ❖ Proportionate procedures.
- ❖ Top-level commitment.
- ❖ Risk assessment.
- ❖ Due diligence.
- ❖ Communication (including training).
- ❖ Monitoring and review.

ISO 37001 Anti-bribery management system.



4 Duty to report bribery

4.1 Duty to report bribery

The Act introduces duty to report bribery:

- ❖ Every state officer, public officer or any other person holding a **position of authority** in a public or private entity
- ❖ Shall report to the EACC within 24 hours
- ❖ Any knowledge or **suspicion** of instances of bribery.

The Act does not expressly define a 'position of authority' but defines a 'senior officer' of a body corporate as a director, manager, secretary or other similar officer of the body corporate.

Other considerations:

- ❖ Existing whistleblower mechanisms.
- ❖ Protection of whistleblowers:
 - ❖ Defamation.
 - ❖ Retaliation.

4.2 Protection of whistleblowers

The Act provides for the following protection of whistleblowers:

- ❖ It is an offence to harass or intimidate whistleblowers for providing information to law enforcement institutions or giving testimony in a court of law.
- ❖ It is an offence for anyone to demote, admonish, dismiss from employment, or transfer to unfavorable working areas whistleblowers for providing information to law enforcement institutions or giving testimony in a court of law.
- ❖ A whistleblower is entitled to protection as determined by the Witness Protection Act.
- ❖ Law enforcement agencies must establish mechanisms to protect the identity of informants and witnesses.
- ❖ It is an offence to knowingly or negligently disclose information of informants and witnesses which disclosure results in their harassment or intimidation.



ISO 37001

2.1.1 Aim of ISO 37001

ISO 37001 is designed to:

- ❖ help an organization implement an anti-bribery management system; or
- ❖ enhance the controls an organization currently has.

This can be achieved through:

Prevention

- instilling an anti-bribery culture within an organization.

Detection

- implementing appropriate controls, which will in turn increase the chance of detecting bribery.

Mitigation

- reducing its incidence/impact.

2.1.2 Implementing an anti-bribery management system

Implementing an anti-bribery management system requires:



leadership and input from top management; and



the policy and programme must be communicated to all staff and external parties such as contractors, suppliers and joint venture partners.

2.1.3 Implementing an anti-bribery management system

It also requires implementing a series of measures such as:

1

Adopting an anti-bribery policy;

2

Appointing someone to oversee compliance with that policy

3

Vetting and training employees;

4

Undertaking risk assessments on projects and business associates;

5

Implementing financial and commercial controls; and

6

Instituting reporting and investigation procedures.

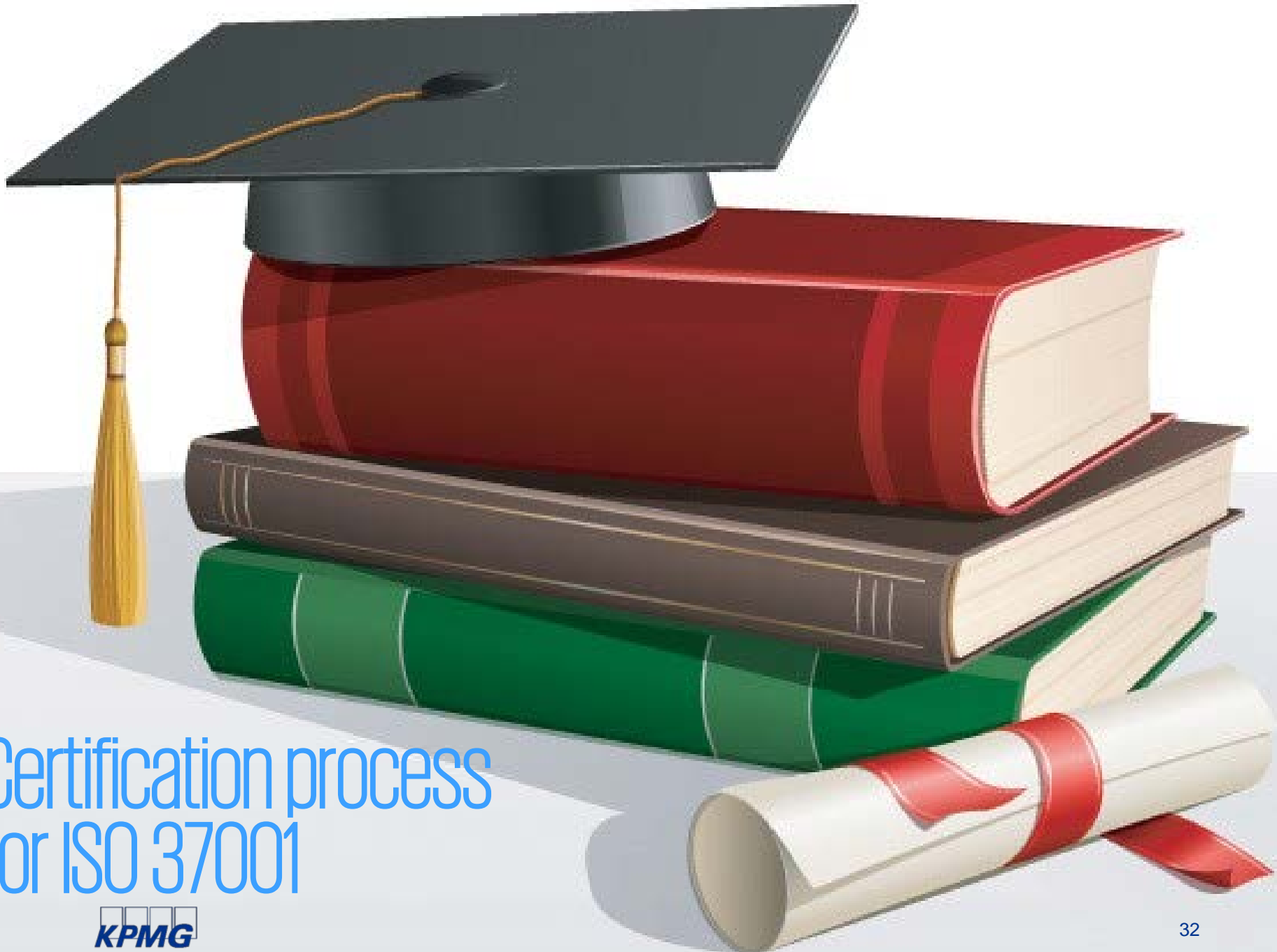
2.2.1 Contents of ISO 37001



2.2.2 What ISO 37001 addresses

ISO 37001 addresses the following in relation to the organization's activities:

- ❖ Bribery in the public, private and not-for-profit sectors;
- ❖ Bribery by the organization;
- ❖ Bribery by the organization's personnel acting on the organization's behalf or for its benefit;
- ❖ Bribery by the organization's business associates acting on the organization's behalf or for its benefit;
- ❖ Bribery of the organization;
- ❖ Bribery of the organization's personnel in relation to the organization's activities;
- ❖ Bribery of the organization's business associates in relation to the organization's activities; and
- ❖ Direct and indirect bribery (e.g. A bribe offered or accepted through or by a third party).



Certification process for ISO 37001



2.3 Certification process

Stage I

- Pre-Audit in accordance with the selected regulation, standard or norm with interviews.

Stage II

- Main Audit of the entire control framework inclusive of site inspection, technical implementation on configuration setting on IT-systems, all businesses processes and technical components of the effectively selected and predefined scope.

Post Audit

- Verification audit to ensure that non-conformities and deviations have been improved and corrective actions were measured.

2.3 Certification process- continued

An accredited organisation will then issue a detailed certification audit report regarding the results of the control review carried out and the fulfilment of each control objectives.

Certificate and confirmation letter will only be issued if all the control objectives have been successfully achieved.



Thank you



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