

## REPORT

17 May 2019

### A GAP ANALYSIS ON STANDARDS FOR ENVIRONMENT, SOCIAL AND GOVERNANCE: A GUIDE

#### PROJECT PARTNERS

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# REPORTING STANDARDS FOR ENVIRONMENT, SOCIAL AND GOVERNANCE

## A GUIDE FOR KENYA

### I. INTRODUCTION

This report is prepared by JMiles & Co. under a terms of contract with FSD Africa to carry out a gap analysis between the international ESG reporting standards and the Kenyan ESG reporting standards. The client is the Ministry of Petroleum and Mining who is the owner of the report. The project funder is FSD Africa.

FSD Africa is a non-profit company which aims to increase prosperity, create jobs and reduce poverty by bringing about a transformation in financial markets SSA, and in the economies they serve. It provides know-how and capital to champions of change whose ideas, influence and actions will make finance more useful to African businesses and households. It is funded by the UK aid from the UK Government.

This report will (a) provide a guide to international environment, social and governance requirements when contemplating international financing; (b) identify Kenyan standards relevant to environment, social and governance, and (c) highlight the gaps in the Kenyan legislation/regulation/guidelines in Kenya.

Each section of this report sets out: (i) general observations on each section; (ii) the GRI reporting requirements, which any organisation would have to comply with in order to be competitive in obtaining international financing (in **blue**); (iii) the relevant international standards and the sources from which they are drawn (in **black**); (iv) the relevant Kenyan standards and the sources from which they are drawn (in **red**); and (v) the gap if any, between international and local standards (in **green**).

### II. SUMMARY OF STANDARDS

The headline topic are summarised below and follow the same numbering throughout the report:

#### **Environment**

##### Energy

1. Energy consumption within the organisation
2. Energy consumption outside of the organisation
3. Energy intensity
4. Reduction of energy consumption
5. Reduction in energy requirements of products and services

##### Water and Effluents

6. Interactions with water as a shared resource
7. Management of water discharge-related impacts
8. Water withdrawal
9. Water discharge
10. Water consumption

### Biodiversity

11. Operational sites owned, leased, managed in, or adjacent to, protected areas and areas of high biodiversity value outside protected areas
12. Significant impacts of activities, products, and services on biodiversity
13. Habitats protected or restored
14. IUCN Red List species and national conservation list species with habitats in areas affected by operations

### Emissions

15. Direct (Scope 1) GHG emissions
16. Energy indirect (Scope 2) GHG emissions
17. Other indirect (Scope 3) GHG emissions
18. GHG emissions intensity
19. Reduction of GHG emissions
20. Emissions of ozone-depleting substances (ODS)
21. Nitrogen oxides (NOX), sulfur oxides (SOX), and other significant air emissions

### Environmental Compliance

22. Non-compliance with environmental laws and regulations

### Supplier Environmental Assessment

23. New suppliers that were screened using environmental criteria
24. Negative environmental impacts in the supply chain and actions taken
- 24(a) Waste and Land Contamination

## **Social**

### Labour

25. Employment
26. Labour / Management Relations
27. Training and Education
28. Diversity and equal opportunity
29. Non-discrimination

### Human Rights and Community

30. Occupational Health & Safety
31. Freedom of association and collective bargaining
32. Child Labour
33. Forced or compulsory labour
34. Security Practices
35. Rights of indigenous people
36. Human rights assessment
37. Local Communities

### Customer Responsibility

38. Supplier Social Assessment
39. Public Policy
40. Customer Health Safety
41. Marketing and Labelling
42. Customer Privacy
43. Socioeconomic Compliance

### **Governance**

#### Governance and Risk Management

44. Governance Structure
45. Delegating Authority
46. Executive level responsibility for economic, environment and social topics
47. Consulting stakeholders on economic, environment and social topics
48. Composition of the highest governance body and its committee
49. Chair of the highest governance body
50. Nominating and selecting the highest governance body
51. Conflicts of interest
52. Role of highest governance body in setting purpose, values and strategy
53. Collective knowledge of highest governing body
54. Evaluating the highest governance body's performance
55. Identifying and managing economic, environmental, and social topics
56. Effectiveness of risk management processed
57. Review of economic, environmental and social topics
58. Highest governance body's role in sustainability reporting
59. Communicating critical concerns
60. Nature and total number of critical concerns
61. Remuneration policies
62. Process for determining remuneration
63. Stakeholders involvement in remuneration
64. Annual total compensation ratio
65. Percentage increase in annual total compensation ratio

#### Anti-Corruption

66. Operations assessed for risks related to corruption
67. Communications and training about anti-corruption policies and procedures
68. Confirmed incidents of corruption and actions taken

## **ENVIRONMENT**

### **OBSERVATIONS ON STANDARDS IN KENYA**

During our research into international and local standards we would make the following observations:

- i. With regard to energy conservation, the local standards cover the broad requirements of the international standards. However, there are still gaps in providing guidance on the various initiatives that companies can undertake to improve efficiency and conserve energy. The Energy Act 2019 confers wide powers to the Ministry of Energy to implement regulations and policies dealing with the same. We anticipate given that the Energy Act 2019 came into force very recently, that regulations will be promulgated that cater for current gaps.
- ii. Local standards on water and effluents broadly meet the requirements under international standards. However, it is noteworthy that under local standards a number of the international standards on water and effluents are only applicable to companies, which are required to undertake an Environmental Impact Assessment (EIA) to obtain a licence or permit under the relevant legislations. In the gap analysis we have taken the application of such local standards as satisfying the relevant international standards relating to all companies (regardless of whether an EIA is applicable or not).
- iii. For protected areas, there are wide gaps between the international and local standards. The international standards provide for specific conservation obligations and restriction of activities in all protected areas. The local standards do not have uniform standards for all protected areas. We have relied on the Wildlife Conservation and Management (Activities in Protected Areas) Regulations 2015 and Wildlife Conservation and Management (Marine Protected and Marine Conservation Areas) Regulations 2016 in the Report. However, we were unable to ascertain if those regulations are already in force. The local standards do not cover areas surrounding protected areas.
- iv. With regard to biodiversity and emissions, the local standards comply with the international standards.
- v. With regard to waste and land contamination, the local standards broadly meet the requirements of international standards. However, it is noteworthy that under local standards a number of the international standards on waste are only applicable to companies which are required to undertake and Environmental Impact Assessment (EIA) to obtain a licence or permit under the relevant legislation. Notwithstanding this, in the gap analysis we have taken the application of such local standards as satisfying the relevant international standards relating to all companies (regardless of whether an EIA is applicable or not). Furthermore, with regard to transboundary movement of waste, the key international standards are contained in the Basel and the Bamako Conventions. Both Conventions have been ratified by Kenya and we have used them as the applicable local standards (though they have not been fully incorporated in local law).
- vi. There is a gap in the international and local standards relating to internal policies on environmental awareness and supplier environmental analysis. While local standards encourage companies to implement policies to raise awareness of environmental issues with employees and down the supply chain, the obligation to comply with the international standard are limited to a particular class of companies (those that are regulated by the relevant legislation).

## **A. CURRENT INTERNATIONAL AND LOCAL TOPICS AND STANDARDS**

1. Energy consumption within the organisation
2. Energy consumption outside of the organisation
3. Energy intensity

#### GRI Reporting Standards (302-1)

- a. Total fuel consumption within the organisation from non-renewable sources, in joules or multiples, and including fuel types used.
- b. Total fuel consumption within the organisation from renewable sources, in joules or multiples, and including fuel types used.
- c. In joules, watt-hours or multiples, the total:
  - i. electricity consumption;
  - ii. heating consumption;
  - iii. cooling consumption; and
  - iv. steam consumption.
- d. In joules, watt-hours or multiples, the total:
  - i. electricity sold;
  - ii. heating sold;
  - iii. cooling sold; and
  - iv. steam sold.
- e. Total energy consumption within the organisation, in joules or multiples.
- f. Standards, methodologies, assumptions, and/or calculation tools used.
- g. Source of the conversion factors used.

#### GRI Reporting Standards (302-2)

- a. Energy consumption outside of the organisation, in joules or multiples.
- b. Standards, methodologies, assumptions, and/or calculation tools used.
- c. Source of the conversion factors used.

#### GRI Reporting Standards (302-3)

- a. Energy intensity ratio for the organisation.
- b. Organisation-specific metric (the denominator) chosen to calculate the ratio.
- c. Types of energy included in the intensity ratio; whether fuel, electricity, heating, cooling, steam, or all.

- d. Whether the ratio uses energy consumption within the organisation, outside of it, or both.

### Standards

All of the above standards deal with calculation of energy consumption and, as far as we are aware, there are no international standards for these items.

## **4. Reduction in Energy Consumption (Energy Conservation)**

### GRI Reporting Standards (302-4)

- a. Amount of reductions in energy consumption achieved as a direct result of conservation and efficiency initiative, in joules or multiples;
- b. Types of energy included in the reductions; whether fuel, electricity, heating, cooling, steam, or all;
- c. Basis for calculating reductions in energy consumption, such as base year or baseline, including rationale for choosing it; and
- d. Standards, methodologies, assumptions, and/or calculation tools used.

### Standards

- (a) To implement technical and financially feasible and cost effective measures for improving efficiency in its consumption of energy. Integrate the principles of cleaner production into product design and production processes with the objective of conserving energy.<sup>1</sup>
  - Comply with the national energy efficiency and conservation programme.<sup>2</sup>
  - Comply with the methods of energy utilisation for purposes of energy efficiency and conservation.<sup>3</sup>
  - Furnish factual information on energy utilization for the purpose of inspection and to assure that energy conservation measures are in accordance with the standards, criteria and procedures provided in regulations.<sup>4</sup>
  - Carry out energy audits, with energy auditors licensed by the Energy Regulatory Commission (“**ERC**”), at least once every three years.<sup>5</sup>
  - Implement at least 50% of the energy audit recommendations within three years.<sup>6</sup>
  - Submit all energy audit reports, implementation plans and energy policies.<sup>7</sup>

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<sup>1</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 2; See also Sessional Paper Number 4 Energy Policy of Kenya, S. 6.6.6 (1)

<sup>2</sup> Energy Act 2019, S. 187

<sup>3</sup> Energy Act 2019, S. 188 (1)

<sup>4</sup> Energy Act 2019, S. 188 (2)

<sup>5</sup> The Energy (Energy Management) Regulations 2012, s. 6(1)

<sup>6</sup> The Energy (Energy Management) Regulations 2012, s. 8 (1)

<sup>7</sup> The Energy (Energy Management) Regulations 2012, s. 9(1); See also Sessional Paper Number 4 Energy Policy of Kenya, S. 6.6.6 (1)

- Keep records of information required under regulations under this Act at the designated factory for a minimum of five years.<sup>8</sup>
  - There are sufficient local standards which provide a framework for methods of improving efficiency in energy consumption. However, the ERC is yet to implement the various programmes and standards under the new Energy Act. The current regulations dealing with energy efficiency deal with promoting energy efficiency but there is limited guidance on the types of initiatives to be undertaken to conserve energy. Companies looking for investment should comply with international standards on technical and financially feasible and cost effective measures for improving efficiency in their consumption of energy.
- (b) Implement an Energy Management Program, which should include:
- i. identification, and regular measurement and reporting of principal energy flows within a facility at unit process level;
  - ii. preparation of mass and energy balance;
  - iii. definitions and regular reviews of energy performance targets, which are adjusted to account for changes in major influencing factors on energy use;
  - iv. Regular comparison and monitoring of energy flows with performance targets to identify where action should be taken to reduce energy use; and
  - v. Regular reviews of targets, which may include comparison with benchmark data, to confirm that targets are set at appropriate levels.<sup>9</sup>
- Adopt and implement measures to conserve energy and improve efficiency in harnessing, processing, conversion, transportation, storage of energy, cogeneration, heat recovery and in the use of energy as shall be required.<sup>10</sup>
  - Certain designated factories and building under the new Energy Act require owners to conserve energy and audit and analyse energy consumption.
  - The provisions of the Energy (Energy Management) Regulation, 2012 apply with regard to preparation of audit reports.
  - The current local standards comply with the requirement for preparation and content of energy management programs, in the international standard. As such, there is no gap.
- (c) For energy-using systems, a systematic analysis of energy efficiency improvements and cost reduction opportunities:
- i. Demand/Load Side Management by reducing loads on energy system;

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<sup>8</sup> Energy Act 2019, S. 188

<sup>9</sup> Article 8 (2) (b) of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects and IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 2

<sup>10</sup> Energy Act 2019, s. 200

- ii. Supply side Management by:
  - a. Reducing losses in energy distribution;
  - b. Improve energy conservation efficiency;
  - c. Exploit energy purchasing opportunities; and
  - d. Use lower-carbon fuels.<sup>11</sup>
- Shall conserve energy, audit and analyses energy consumption in a building in accordance with the standards, criteria, and procedures as prescribed by regulations.<sup>12</sup>
- There are no local standards dealing with energy efficiency and conservation in energy-using systems. Companies seeking investment should comply with international standards on energy efficiency in energy-using systems.
- (d) In process heating, an analysis of saving opportunities should be undertaken and applied in each of the following processes:
  - i. Heating Load Reduction (such as, recover heat from hot process or exhaust streams to reduce system loads);
  - ii. Heat Distribution Systems (such as, use of flash steam recovery systems to reduce losses due to evaporation of high pressure condensate); and
  - iii. Energy Conversion System Efficiency Improvements (such as, regularly monitoring CO, oxygen or CO<sub>2</sub> content of flue gases to verify that the combustion system are using the minimum practical excess air volumes).<sup>13</sup>
- Install and use of solar heating systems in all premises within the jurisdiction of local authorities with hot water requirements of a capacity exceeding one hundred.<sup>14</sup>
- Incorporate solar water heating systems in all new premises designs and extensions or alterations to existing premises.<sup>15</sup>
- Save for the use of solar heating, there are no local standards dealing with energy efficiency and conservation in process heating. Companies looking for investment should comply with international standards on energy conservation in process heating.
- (e) In process cooling, cost efficient measures to improve process cooling should be applied by:
  - i. Load Reduction (such as, ensuring adequate insulation to reduce heat gains through cooling system structure and to below-ambient temperature refrigerant pipes and vessels);

<sup>11</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 2

<sup>12</sup> Energy Act 2019, S. 189 (1)

<sup>13</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 2

<sup>14</sup> The Energy (Solar Water Heating) Regulations 2012, S. 3(1) and (2)

<sup>15</sup> Ibid

- ii. Energy Conversion (such as, improving system design, minimizing temperature differences, elevating evaporating temperature); and
  - iii. Refrigerant Compression Efficiency (such as, considering turndown efficiency when specifying chillers).<sup>16</sup>
- Local standards are limited to restriction of use of HCFCs and CFC in cooling processes (discussed below).
  - There are no local standards dealing with energy efficiency and conservation in process cooling. Companies looking for investment should comply with the international standard on energy efficiency in cooling processes.
- (f) Reduction or efficient use of energy in compressed air systems:
- i. Load Reduction (such as, examination of each true user of compressed air to identify the air volume needed and the pressure at which this should be delivered); and
  - ii. Distribution (monitor pressure losses in filters and replace as appropriate).<sup>17</sup>
- No local standards.
  - There are no specific guidelines or local standards dealing with energy efficiency and conservation in process cooling. Companies looking for investment should comply with the international standard on energy efficiency in cooling processes.
- (g) Use of energy efficient technologies, products and services.<sup>18</sup>
- Establishment of a renewable energy feed-in-tariff system with the objective of encouraging uptake of, and stimulate innovation in, renewable energy technology<sup>19</sup>.
  - The National Energy Plan shall guide the selection of appropriate technology to meet energy demands<sup>20</sup>
  - Requiring installation of new technology to reduce air pollution<sup>21</sup>
  - Local standards comply with the requirements under the international standard. As such, there is no gap.

## 5. Reduction in energy requirements of products and services

<sup>16</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 2

<sup>17</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 2

<sup>18</sup> Article 6(3) of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects

<sup>19</sup> Section 91, Energy Act 2019

<sup>20</sup> Section 5(5)(d), Energy Act 2019

<sup>21</sup> Section 78(c), Environmental Management and Co-ordination Act, 1999

### GRI Reporting Standards (302-5)

- a. Reductions in energy requirements of sold products and services achieved during the reporting period, in joules or multiples.
- b. Basis for calculating reductions in energy consumption, such as base year or baseline, including the rationale for choosing it.
- c. Standards, methodologies, assumptions, and/or calculation tools used.

### Standards

The above reporting obligations deal with calculation only, and, we have not included the international standards within this report.

## **6 - 10. Water and Effluents**

Water is a finite and shared resource. As well as being a basic human right and fundamental to healthy ecosystems, water is vital to the functioning of the global economy. However, increasing demand and competition, climate change and pollution are putting pressure on global water resources, creating risks for business and society. This in turn generates risks and opportunities for investors.<sup>22</sup>

Water is a national resource and is vested and held by the national government in trust for the people of Kenya.<sup>23</sup> The Constitution of Kenya provides that every person has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation.<sup>24</sup>

### GRI Reporting Standards (303-1)

- a. A description of how the organisation interacts with water, including how and where water is withdrawn, consumed, and discharged, and the water-related impacts caused or contributed to, or directly linked to the organisation's activities, products or services by a business relationship (e.g., impacts caused by runoff).
- b. A description of the approach used to identify water-related impacts, including the scope of assessments, their timeframe, and any tools or methodologies used.
- c. A description of how water-related impacts are addressed, including how the organisation works with stakeholders to steward water as a shared resource, and how it engages with suppliers or customers with significant water-related impacts.
- d. An explanation of the process for setting any water-related goals and targets that are part of the organisation's management approach, and how they relate to public policy and the local context of each area with water stress.

### GRI Reporting Standards (303-2)

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<sup>22</sup> <https://www.unpri.org/esg-issues/environmental-issues/water>

<sup>23</sup> Section 5 of the Water Act

<sup>24</sup> Article 43 (d) of the Constitution

- a. A description of any minimum standards set for the quality of effluent discharge, and how these minimum standards were determined, including:
  - i. how standards for facilities operating in locations with no local discharge requirements were determined;
  - ii. any internally developed water quality standards or guidelines;
  - iii. any sector-specific standards considered; and
  - iv. whether the profile of the receiving waterbody was considered.

#### GRI Reporting Standards (303-3)

- a. Total water withdrawal from all areas in mega litres, and a breakdown of this total by the following sources, if applicable:
  - i. Surface water;
  - ii. Groundwater;
  - iii. Seawater;
  - iv. Produced water; and
  - v. Third-party water.
- b. Total water withdrawal from all areas with water stress in megaliters, and a breakdown of this total by the following sources, if applicable:
  - i. Surface water;
  - ii. Groundwater;
  - iii. Seawater;
  - iv. Produced water; and
  - v. Third-party water, and a breakdown of this total by the withdrawal sources listed in i-iv.
- c. Breakdown of total water withdrawal from each of the sources listed in Disclosures 303-3-a and 303-3-b in megaliters by the following categories:
  - i. Freshwater ( $\leq 1,000$  mg/L Total Dissolved Solids);
  - ii. Other water ( $> 1,000$  mg/L Total Dissolved Solids).
- d. Any contextual information necessary to understand how the data has been compiled, such as any standards, methodologies, and assumptions used.

#### GRI Reporting Standards (303-4)

- a. Total water discharge to all areas in megaliters, and a breakdown of this total by the following types of destination, if applicable:
  - i. Surface water;
  - ii. Groundwater;
  - iii. Seawater; and
  - iv. Third-party water and the volume of this total sent for use to other organizations, if applicable.

- b. A breakdown of total water discharge to all areas in megaliters by the following categories:
  - i. Freshwater ( $\leq 1,000$  mg/L Total Dissolved Solids); and
  - ii. Other water ( $> 1,000$  mg/L Total Dissolved Solids).
- c. Total water discharge to all areas with water stress in megaliters, and a breakdown of this total by the following categories:
  - i. Freshwater ( $\leq 1,000$  mg/L Total Dissolved Solids); and
  - ii. Other water ( $> 1,000$  mg/L Total Dissolved Solids).
- d. Priority substances of concern for which discharges are treated, including:
  - i. how priority substances of concern were defined, and any international standard;
  - ii. authoritative list, or criteria used;
  - iii. the approach for setting discharge limits for priority substances of concern; and
  - iv. number of incidents of non-compliance with discharge limits.
- e. Any contextual information necessary to understand how the data have been compiled, such as any standards, methodologies, and assumptions used.

#### GRI Reporting Standards (303-5)

- a. Total water consumption from all areas in megaliters.
- b. Total water consumption from all areas with water stress in megaliters.
- c. Change in water storage in megaliters, if water storage has been identified as having a significant water-related impact.
- d. Any contextual information necessary to understand how the data have been compiled, such as any standards, methodologies, and assumptions used, including whether the information is calculated, estimated, modelled, or sourced from direct measurements, and the approach taken for this, such as the use of any sector-specific factors.

#### Standards

- (a) Collaborate with local communities to ensure water is responsibly governed and shared.<sup>25</sup> This includes supporting and strengthening the participation of local communities in improving water and sanitation management.<sup>26</sup>
  - Ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.<sup>27</sup>
  - Public consultation when issuing of permits and licences concerning water use<sup>28</sup>

<sup>25</sup> <https://www.worldwildlife.org/initiatives/corporate-water-stewardship>

<sup>26</sup> IFC Performance standards ,EHS

<sup>27</sup> Article 69(2) of the Constitution of Kenya

<sup>28</sup> Section 40(4) and 87, Water Act 2016

- As a general requirement on stakeholder consultation on environmental issues:
  - With regard to projects on community land, there needs to be consultation with stakeholders and the community on environmental, social, cultural and economic impact<sup>29</sup>.
  - All activities requiring an EIA, including activities under the Mining Act and Petroleum (Exploration, Development and Production) Act, need to go through consultation and public participation. Information regarding all project activities within the project cycle (planning, implementation, decommissioning) materials used, products, waste and waste disposal, economic and social benefits should be provided. The views of the public on all these activities should be incorporated in the project report<sup>30</sup>.
  - The requirement for public participation is also covered in the EMCA<sup>31</sup>

### Draft Legislation

- Build the capacity of local communities in negotiations for benefit sharing and implementation of related projects.<sup>32</sup>
  - The local standards comply with the requirements under the international standard. As such, there is no gap.
- (b) Water footprint analysis<sup>33</sup> by conducting a comprehensive water-use assessment to understand the extent to which the organisation uses water in the direct production of goods and services and across the value chain.<sup>34</sup> Organisations are also encouraged to conduct an independent verification of water use data to include independent verification by third party and international assurance standard used and level of assurance declared.<sup>35</sup>
- There is no requirement to carry out a footprint analysis, however this information may be requested at the stage of conducting and Environmental Impact Assessment (“EIA”) or an environment audit.
  - Organisations carrying out activities requiring an EIA will need to provide water use data<sup>36</sup>.
  - Local standards comply with international standards in so far as providing independently verified water use data. As such, there is no gap in this respect. However, companies looking for investment should carry out a water footprint analysis to comply with international standards.
- (c) Collaborate with other water users and stakeholders to address shared risks, including water stressed sites and seize opportunities.<sup>37</sup>

<sup>29</sup> Section 36, Community Land Act, Act No. 27 of 2016

<sup>30</sup> Guideline 2.44, Environment Impact Assessment Guidelines and Administrative Procedures

<sup>31</sup> Sections 3(5)(a), 37(1) and 40(2) of EMCA

<sup>32</sup> Natural Resources (Benefit Sharing) Bill, 2018

<sup>33</sup> [https://d2ouvy59p0dg6k.cloudfront.net/downloads/sabmiller\\_water\\_footprinting\\_report\\_final\\_.pdf](https://d2ouvy59p0dg6k.cloudfront.net/downloads/sabmiller_water_footprinting_report_final_.pdf) ; <http://www.waterfootprint.org/>

<sup>34</sup> <https://ceowatermandate.org/about/the-six-commitment-areas/#1529600036526-75d9e107-daea>

<sup>35</sup> EWT 07 FTSE Russell ESG RC5 Data Model Methodology

<sup>36</sup> Section 40(4), Water Act 2016

<sup>37</sup> <https://ceowatermandate.org/about/the-six-commitment-areas/#1529600036526-75d9e107-daea>; IFC Performance Standards ; EWT 25 and EWT 08, FTSE Russell RC5 Data Model Methodology

- In water stressed sites, the Water Resource Authority (WRA) can require that water users apply or reapply for a permit. Following the application, the WRA shall re-allocate the water use per applicant. The allocation shall be subject to public consultation<sup>38</sup>.
  - The local standards do not cover voluntary collaboration with stakeholders. Companies looking for investment should comply with international standards and have policies in place to voluntarily collaborate with other water users and stakeholder to address shared risk in stressed sites.
- (d) Develop and implement good water governance policies, setting out clear goals and guidelines for action. The policy should identify the organisation's impact on water, defining water management practices and the mitigation factors.<sup>39</sup>
- There are no corresponding local standards requiring all companies to implement such policies. However, companies requiring a permit or a licence for water use will be required to undertake an EIA. The EIA will require the company to implement policies and action plans on water management practices and action plans for the project cycle<sup>40</sup>. In addition, Strategic Environmental Assessments are required to be carried out before implementation of policies, plans and programmes<sup>41</sup>.
  - Local standards only require companies to have internal policies if an EIA is required. Where applicable, companies looking to comply with ESG standards should develop and implement good water governance policies regardless of whether an EIA is required.
- (e) Set targets for processes related to water conservation and waste-water treatment.<sup>42</sup>
- There are no corresponding local standards requiring all organisations to set target related to water conservation and waste-water treatment. Organisations requiring a permit or a licence for water use will be required to undertake an EIA. The EIA may require the organisation to set such targets, however there is no definitive requirement<sup>43</sup>. Furthermore, organisations are encouraged to implement internal policies in line with local, international laws, and local strategies on water.<sup>44</sup>
  - The local standards do not make the setting of targets on water conservation and waste-water treatment a requirement. Where applicable, companies looking to comply with ESG standards should set targets for processes related to water conservation and waste-water treatment.
- (f) Raise awareness of water sustainability within the organisation, suppliers and consumers.<sup>45</sup>

<sup>38</sup> Section 47, Water Act 2016

<sup>39</sup>

[https://d2ouvy59p0dg6k.cloudfront.net/downloads/ceo\\_water\\_mandate\\_guide\\_to\\_responsible\\_business\\_engagement\\_wit\\_h\\_water\\_policy.pdf](https://d2ouvy59p0dg6k.cloudfront.net/downloads/ceo_water_mandate_guide_to_responsible_business_engagement_wit_h_water_policy.pdf) ; Alliance for Water Stewardship; EWT 08 and EWT 13, FTSE Russell ESG RC5 Data Model Methodology

<sup>40</sup> Section 7, Environmental (Impact Assessment and Audit) Regulations 2003

<sup>41</sup> Chapter 4, NEMA – Environmental Impact Assessment Guidelines and Administrative Procedure

<sup>42</sup>

<https://ceowatermandate.org/about/the-six-commitment-areas/#1529600036526-75d9e107-daea>; The GEMI Water Sustainability; EWT34 and EWT 35, FTSE Russell RC5 Data Model Methodology

<sup>43</sup> Section 7, Environmental (Impact Assessment and Audit) Regulations 2003

<sup>44</sup> Water Act No.43 of 2016

<sup>45</sup> <https://ceowatermandate.org/about/the-six-commitment-areas/#1529600036526-75d9e107-daea> ; Alliance for Water Stewardship

- There are no local standards requiring organisations to raise awareness of water sustainability within the organisation, supplier and consumers. However, during an EIA, an applicant is required to set programmes on internal training on environmental impact.<sup>46</sup>
  - Local standards do not address the requirement of raising awareness on water sustainability in the international standard. Companies looking to comply with ESG standards should have policies in place to raise awareness of water sustainability down the supply chain.
- (g) Monitor and communicate performance with internal and external stakeholders.<sup>47</sup>
- There is no requirement for all organisations to monitor and communicate performance with internal and external stakeholders. Those organisations subject to an EIA are meant to put in place policies and programmes monitoring environmental issues. Furthermore, NEMA can subject an entity to an audit process which requires monitoring and stakeholder involvement.
  - The local standards have no specific provisions on monitoring and communicating performance with internal and external stakeholders. This requirement is covered in the EIA process but there are no specific requirement<sup>48</sup>. Companies looking for investment should comply with the requirement to monitor and communicate performance with internal and external stakeholders in the international standard.
- (h) Determine the volume of wastewater discharged, the types and loads of pollutants within that wastewater, the short- and long-term effects of those pollutants on receiving waterways, and the impacts of those changes on human health, human access to safe water, and ecosystem function.<sup>49</sup>
- Obtaining an effluent discharge license before discharging any effluent from sewage treatment works industry or other point sources.<sup>50</sup> Point sources mean, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit, tunnel, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged.” An applicant for an effluent discharge should, among others, analyse and disclose the nature and composition of effluent, maximum quantities of discharge and point of discharge.<sup>51</sup>
  - A licensee is required to carry out daily effluent discharge quality and quantity monitoring and submit quarterly records to NEMA.<sup>52</sup>
  - The local standards meet the requirements of the international standard. As such, there is no gap.
- (i) Build infrastructure to treat contaminated water.<sup>53</sup>

<sup>46</sup> NEMA, Environmental Impact Assessment Guidelines and Administrative Procedure

<sup>47</sup> [https://docs.wbcsd.org/2012/08/Water\\_for\\_Business\\_Interactive.pdf](https://docs.wbcsd.org/2012/08/Water_for_Business_Interactive.pdf) ; IFC

<sup>48</sup> Chapter 3, Environmental Impact Assessment Guidelines and Administrative Procedures

<sup>49</sup> <https://ceowatermandate.org/accounting/core-functions/water-quality/> ; The GEMI Water Sustainability Tool ; EWT 30 and EWT 31 FTSE Russel RC5 Data Model Methodology

<sup>50</sup> Regulation 6(a) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>51</sup> Seventh Schedule of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>52</sup> Regulation 14 of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>53</sup> <https://ceowatermandate.org/about/the-six-commitment-areas/#1529600036526-75d9e107-daaa> ; IFC Performance Standards

- Implementing conditions imposed on the effluent discharge license, such as installing water treatment plants, so as not to exceed the prescribed pollution levels.<sup>54</sup>
  - Local standards comply with requirements under the international standard. As such, there is no gap.
- (j) Treat contaminated water to make it safe for human consumption and aquatic life before discharge.<sup>55</sup>
- Ensuring that there are measures in place for the receipt and handling of the effluent without causing pollution to the environment, harm to human health, damage to the sewerage system or contravening applicable laws.<sup>56</sup>
  - Implementing the conditions imposed on the effluent discharge license and also implement measures, such as installing water treatment plants, so as not to exceed the prescribed pollution levels.<sup>57</sup>
  - The local standards comply with requirements under the international standard. As such, there is no gap.
- (k) Develop appropriate response policy to address the organisation's source of pollution or contamination.<sup>58</sup>
- Organisations should refrain from any act which directly or indirectly causes, or may cause immediate or subsequent water pollution<sup>59</sup>.
  - Organisations subject to an EIA, are required to put in place programmes for the reduction of pollution and contamination and appropriate mitigation measure<sup>60</sup>.
  - The local standards meet the international requirement with regard to entities that have to undertake an EIA. In order to meet international standards, all companies should comply with the international standard.
- (l) Minimise the quantity of solids generated by the water treatment process through optimising coagulation processes.<sup>61</sup>
- There are no corresponding local standards. However, this can be imposed as a requirement to permit or licence for water use and/or discharge.

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<sup>54</sup> Regulation 4 of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>55</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation; Alliance for Water Stewardship

<sup>56</sup> Section 108 of the Water Act

<sup>57</sup> Regulation 4 of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>58</sup> <https://ceowatermandate.org/about/the-six-commitment-areas/#1529600036526-75d9e107-daea> ; Alliance for Water Stewardship

<sup>59</sup> Regulation 4 of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>60</sup> Chapter 2, The Environmental Impact Assessment Guidelines and Administrative Procedures

<sup>61</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation;

- There are local standards dealing with installing anti-pollution equipment for the treatment of waste emanating from the activities of an organisation.<sup>62</sup> An anti-pollution equipment shall be determined by the best practicable means, environmentally sound practice or other prescribed guidelines.<sup>63</sup> However, these provisions do not specifically deal with the reduction of quantity of solids generated from water treatment
  - The local standards do not specifically require the minimisations of solids in waste treatment. Where applicable, companies looking for investment should have mechanisms and processes in place to minimise the solids in waste treatment.
- (m) Sample water before discharge to evaluate potential adverse effects on ground water or surface water.<sup>64</sup>
- Obtaining an effluent discharge license before discharging any effluent from sewage treatment works industry or other point sources.<sup>65</sup> A licensee is required to carry out daily effluent discharge quality and quantity monitoring and submit quarterly records to NEMA. The daily monitoring will guide an organisation on whether the discharge meets the prescribed standard and whether it has any adverse effects on ground water or surface water.
  - Obtaining a water permit before discharging a pollutant into any water resource.<sup>66</sup> A water resource is defined as any *,"means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground, and includes sea water and transboundary waters within the territorial jurisdiction of Kenya"*<sup>67</sup>
  - Local standards require sampling of water only if a licence, permit or EIA is required. All companies looking for investment should comply with the international standard.
- (n) Assess potential impact on soil, groundwater, and surface water, in the context of protection, conservation and long-term sustainability of water and land resources, when land is used as part of any waste or wastewater treatment system.<sup>68</sup>
- It is a requirement to obtain an effluent discharge license before discharging any effluent from sewage treatment works industry or other point sources<sup>69</sup>. A licensee is required to carry out daily effluent discharge quality and quantity monitoring and submit quarterly records to NEMA.
  - Conducting an environmental impact assessment and obtaining a license for any activity that is likely to have adverse impact on the environment.<sup>70</sup>
  - Local standards comply with the requirements under international standards. As such, there is no gap.

<sup>62</sup> Regulation 14 (1) of the Environmental Management and Co-ordination (Waste Management Regulations), 2006.

<sup>63</sup> Regulation 14 (2) of the Environmental Management and Co-ordination (Waste Management Regulations), 2006

<sup>64</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>65</sup> Regulation 6(a) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>66</sup> Section 36 (c) of the Water Act No.43 of 2016

<sup>67</sup> Section 2 of the Water Act No.43 of 2016

<sup>68</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>69</sup> Regulation 6(a) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>70</sup> Regulation 6(b) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

- (o) Special disposal of sludge if the source water contains elevated levels of toxic metals, such as arsenic, radionuclides.<sup>71</sup>
- Obtaining an effluent discharge license before discharging any effluent from sewage treatment works industry or other point sources.<sup>72</sup> NEMA may impose such terms and conditions when issuing an effluent discharge license which may include special disposal of sludge.
  - Local standards do not specifically require special disposal of sludge if source water contains elevated levels of toxic metals. Where applicable, companies should comply with this international standard.
- (p) Regenerate activated carbon in water treatment (e.g. by returning spent carbon to the supplier).<sup>73</sup>
- No applicable local standards.
  - Where applicable, companies looking for investments should comply with the requirements of the international standard.
- (q) Evaluate potential adverse effects of surface water withdrawal on the downstream ecosystems and use of appropriate environmental flow assessment to determine acceptable withdrawal rates.<sup>74</sup>
- Conducting an EIA and obtaining a license for any activity that is likely to have adverse impact on the quantity and quality of water<sup>75</sup> which includes water withdrawal. NEMA may issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.<sup>76</sup>
  - Obtaining a water permit before using water from a water resource.<sup>77</sup> One of the considerations for granting a permit, among others, is the likely effect of proposed water use on the water resource and on other water user which means that an organisation should evaluate potential adverse effects of surface water withdrawal.
  - Local standards comply with the requirements in international standards. As such, there is no gap.
- (r) Design structures related to surface water withdrawal, including dams and water intake structures, to minimise impacts on aquatic life.<sup>78</sup>
- Obtaining approval to erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake, sea or wetland.<sup>79</sup>

<sup>71</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>72</sup> Regulation 6(a) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>73</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>74</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>75</sup> Regulation 6(b) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>76</sup> Section 63 of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>77</sup> Section 36 (a) Water Act No.43 of 2016. This does not apply to use of water for domestic purposes, abstraction of water in a spring situated wholly within the boundaries of a land owner or for storage of water in or abstraction of water from a reservoir constructed for storage purposes as provided by Section 37 of the Water Act.

<sup>78</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>79</sup> Section 42 (1) of the Environmental Management and Co-ordination Act

- Obtaining an environmental impact assessment license for any activity that is likely to have adverse impact on the quantity and quality of water<sup>80</sup> which may include designing structures related to surface withdrawal.
  - Local standards meet the requirements in the international standard. As such, there is no gap.
- (s) Evaluate potential adverse effects of groundwater withdrawal and modify extraction rates and locations.<sup>81</sup>
- Obtaining an environmental impact assessment license before abstracting ground water or carrying out any activity, near lakes, rivers, streams, springs and wells, that is likely to have any adverse impact on the quantity and quality of water.<sup>82</sup>
  - Obtaining a water permit before using water from a water resource subject to the exemptions provided.<sup>83</sup>
  - Local standards meet the requirements in the international standard. As such, there is no gap.
- (t) Mitigate water related risks by reducing, reusing, recycling, restoring and recovering water.<sup>84</sup>
- There are no corresponding local standards. However, organisations have a duty to implement environmentally sound management practices as well as comply with the prescribed pollution mitigation measures.<sup>85</sup>
  - There are no specific local standards dealing with reuse of water. Companies looking for investment should have measures in place to mitigate water related risks by reducing, reusing, recycling, restoring and recovering water.
- (u) Disclosing an organisation's water management plan (including water recycling) at the company level/site specific. This should also include disclosure on the organisation's number and/or proportion of sites with a water management plan<sup>86</sup>.
- (v) Identifying an organisation's operations in water stressed levels regions and disclosing the number and/or proportion of facilities, assets, production, revenue in the water-stressed regions<sup>87</sup>.
- (w) Disclosing the number of incidents of non-compliance with water quality/quantity permits, standards and regulations<sup>88</sup>.

<sup>80</sup> Regulation 6(b) of the Environmental Management and Co-ordination (Water Quality) Regulations, 2006

<sup>81</sup> IFC Performance standards, Environmental, Health, and Safety Guidelines for Water and Sanitation

<sup>82</sup> Regulation 6 (b) of the Environmental and Co-ordination (Water Quality) Regulations, 2006

<sup>83</sup> Refer to fn 44

<sup>84</sup> [file:///C:/Users/ek/Downloads/WBCSD\\_Business%20Guide%20to%20Circular%20Water%20Management.pdf](file:///C:/Users/ek/Downloads/WBCSD_Business%20Guide%20to%20Circular%20Water%20Management.pdf)

<sup>85</sup> Regulation 8 of the Environmental and Co-ordination (Water Quality) Regulations, 2006; Climate Change Act

<sup>86</sup> EWT 24, FTSE Russell RC5 Data Model Methodology

<sup>87</sup> EWT 26, FTSE Russell RC5 Data Model Methodology

<sup>88</sup> EWT29, FTSE Russell RC5 Data Model Methodology

- With regard to international standards (u), (v) and (w) above, all entities which are required to obtain an EIA are meant to disclose any water management plan, details relating to operations in water stressed areas and incidents of water quality and quantity permits. The disclosure shall be made to NEMA and other agencies. There is no requirement to disclose this information to other stakeholders.
- Local standards do not provide for disclosure of this information outside of the licencing and EIA process. Companies looking for investment should comply with the international standard.

#### 11. Operational sites owned, leased, managed in, or adjacent to, protected areas or areas of high biodiversity value outside protected areas

A *protected area* is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.

Article 8 of the Convention on Biological Diversity<sup>89</sup> deals with Protected Areas and requires:

- Regulation or management of biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use; and
- Promotion of environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas.

#### GRI Reporting Standards (304-1)

- For each operational site owned, leased, managed in, or adjacent to, protected areas and areas of high biodiversity value outside protected areas, the following information:
  - Geographic location;
  - Subsurface and underground land that may be owned, leased, or managed by the organisation;
  - Position in relation to the protected area (in the area, adjacent to, or containing portions of the protected area) or the high biodiversity value area outside protected areas;
  - Type of operation (office, manufacturing or production, or extractive);
  - Size of operational site in km<sup>2</sup> (or another unit, if appropriate);
  - Biodiversity value characterized by the attribute of the protected area or area of high biodiversity value outside the protected area (terrestrial, freshwater, or maritime ecosystem); and
  - Biodiversity value characterised by listing of protected status (such as IUCN Protected Area Management Categories, Ramsar Convention, national legislation).

#### Standards

<sup>89</sup> United Nations Convention on Biological Diversity 1992

(a) All protected areas should aim to:

- i. conserve the composition, structure, functions and evolutionary potential of diversity;
- ii. contribute to regional conservation;
- iii. maintain diversity of landscape or habitat and of associated species and ecosystems;
- iv. be of sufficient size to ensure the integrity and long-term maintenance of the specified conservation targets or be capable of being increased to achieve this end;
- v. maintain value for which it was assigned in perpetuity;
- vi. be operating under the guidance of a management plan, and a monitoring and evaluation programme that supports adaptive management; and
- vii. possess a clear and equitable governance system.<sup>90</sup>

All protected areas should aim where appropriate to:

- i. conserve significant landscape features, geomorphology and geology;
- ii. provide regulatory ecosystem services, including buffering against the impacts of climate change;
- iii. conserve natural and scenic areas of national and international significance for cultural, spiritual and scientific purposes;
- iv. deliver benefits to resident and local communities consistent with the other objectives of management;
- v. deliver recreational benefits consistent with the other objectives of management;
- vi. facilitate low-impact scientific research activities and ecological monitoring related to and consistent with the values of the protected area; and
- vii. use adaptive management strategies to improve management effectiveness and governance quality over time.<sup>91</sup>

• The Cabinet Secretary for Tourism and Wildlife may declare an area to be a:

- i. National park protected area;
- ii. Marine protected area;
- iii. Wetland protected area; and
- iv. Zoned to have wildlife conservation and management as their land use priority<sup>92</sup>.

• The Cabinet Secretary of Environment may declare any area of land, sea, lake, forests or river to be a protected natural environment for the purpose of promoting and preserving specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general<sup>93</sup>

• Under local standards, protected areas are not categorised based on conservation objectives and principles but based on sector. There is no uniform law dealing with all protected areas in Kenya or specific conservation initiatives which are unique to protected areas. The broad international standards for conservation initiatives in protected areas are covered in Management Plans<sup>94</sup>. Local standards only provide for activities which are regulated in different protected areas. As such,

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<sup>90</sup> IUCN Guidelines for Applying Protected Area Management Categories 2008

<sup>91</sup> IUCN Guidelines for Applying Protected Area Management Categories 2008

<sup>92</sup> Section 31 and Schedule 11, Wildlife Conservation and Management Act No. 47 of 2013

<sup>93</sup> Section 54, Environment Management and Co-ordination Act No. 8 of 1999

<sup>94</sup> Schedule 5, Wildlife Conservation and Management Act

companies looking for investment should comply with international standards on conservation initiatives in protected areas.

- (b) The types of activities that protected areas would normally prohibit in all sites that are part of the formal protected areas system include:
- i. killing, taking or disturbing any endangered, threatened or otherwise legally protected native species, whether marine or terrestrial;
  - ii. disturbing or damaging the critical habitat of any endangered, threatened or otherwise legally protected native species, including removing the nest or contents of the nest of a species;
  - iii. destroying or damaging a site serving important ecosystem functions that has been designated or identified for special protection (for example, a protected water catchment area);
  - iv. removing, damaging, demolishing or excavating any part of a cultural site, natural monument, historic shipwreck or other significant cultural site inside a protected area;
  - v. entering any part of an area that is closed to that user group or individual;
  - vi. interfering with, damaging, removing or replacing any official notices or signs;
  - vii. introducing any Invasive Alien Species or exotic species;
  - viii. using explosives or poisons;
  - ix. using or having in possession any prohibited weapon, including any firearm or spear-fishing gun;
  - x. discharging toxic or hazardous substances, including but not limited to petroleum or substances made from petroleum, and household cleaners;
  - xi. landing an aircraft or driving or otherwise using a motorized vehicle in areas where doing so is prohibited, whether on land or water;
  - xii. flying an aircraft in prohibited airspace above a protected area;
  - xiii. disposing of or dumping sewage, solid waste, refuse, rubbish or litter anywhere other than in designated containers or areas;
  - xiv. damaging or defacing any physical structures inside a protected area; and
  - xv. conducting any mining exploration or exploitation activities within or directly affecting a protected area, whether terrestrial or marine.<sup>95</sup>

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<sup>95</sup> IUCN Guidelines for Protected Areas Legislation

- Section 15 of the Wildlife Conservation and Management (Marine Protected and Marine Conservation Areas) Regulations 2016 (“**WCMMR**”), lists activities which are prohibited in marine conservation and marine prohibited areas.
- Any activity which is likely to have adverse effects on the environment, including the seepage of toxic waste into streams, rivers, lakes and wetlands is prohibited.<sup>96</sup>
- No person shall mine or quarry in a national park. Mining and quarrying in a national parks will only be allowed with a licence, if<sup>97</sup>:
  - i. the area does not contain endangered or threatened species;
  - ii. the area is not a critical habitat and ecosystem wildlife;
  - iii. the area is not an important catchment area or source of springs; and
  - iv. the miner has undertaken a bond the value of the rehabilitation of the site.
- It is an offence to<sup>98</sup>:
  - i. enter or resides in a national park or reserve otherwise than under licence, permit or in the course of his duty as authorized officer or a person lawfully employed in the park or reserve, as the case may be;
  - ii. set fire to any vegetation in any wildlife protected area or allows any fire lighted by himself or his servants to enter a wildlife protected area;
  - iii. carry out logging in a national park or reserve;
  - iv. clear and cultivates any land in the national park or reserve;
  - v. wilfully damage any object of geological, prehistoric, archaeological, historic, marine or other scientific interest within a wildlife protected area, or knowingly removes or attempts to remove any such object or any portion than in the course of his duty thereof from wildlife protected areas;
  - vi. convey into a protected area or is found within a protected area in possession of any firearm, ammuniton, arrow, spear, snare, trap or similar device without authorization; and
  - vii. undertake any extractive activity in marine protected areas.
- Local standards on prohibited activities in protected areas are based on sector. There are gaps in the activities which are prohibited under international standards and local standards. A company

<sup>96</sup> Section 30, Wildlife Conservation and Management Act No. 47 of 2013

<sup>97</sup> Section 45, Wildlife Conservation and Management Act No. 47 of 2013

<sup>98</sup> Section 102, Wildlife Conservation and Management Act No. 47 of 2013

looking to comply with international standards should not carry out any of the prohibited activities in any designated protected area in Kenya.

- (c) Activities in Protected Areas requiring written permission are as follows:
- i. reside on, occupy or cultivate any land or plant, or otherwise grow or harvest any crop, whether on land or sea;
  - ii. access, explore or harvest any genetic resources;
  - iii. use or manipulate any waters within a protected area;
  - iv. take, collect, remove or alter any flora or fauna (with the exception of endangered, threatened or otherwise legally protected flora or fauna, where such actions should be prohibited, as noted above);
  - v. hunting or fishing by specific communities or groups for subsistence purposes;
  - vi. hunt or fish for sport or recreation;
  - vii. construct or destroy any building or other structure, whether on land or sea;
  - viii. undertake scientific research at the student or professional level, whether for public, private or academic purposes;
  - ix. carry on any still photography or make any film or video recording for sale or commercial use;
  - x. operate a business or solicit, sell or attempt to sell any goods or services, including tour companies and tourist businesses;
  - xi. distribute pamphlets, leaflets, announcements or other information of a commercial or community nature;
  - xii. land an aircraft on land or sea, or fly in protected airspace above a protected area;
  - xiii. engage in any charitable or fund-raising activity;
  - xiv. organize or arrange a special public event (such as a concert);
  - xv. organize or arrange a private event (such as a wedding) where the gathering is over a specified number of people (for example, 25 persons, depending on the capacity of the site); and
  - xvi. remove or excavate any earth or beach sand.<sup>99</sup>
- Section 7 of the Wildlife Conservation and Management (Activities in Protected Areas) Regulations (“WCMAPA”) provides for prohibited activities in protected areas which require the special permission of the KWS.

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<sup>99</sup> IUCN Guidelines for Protected Areas Legislation

- No person shall undertake research on the wildlife sector without a permit granted by the Wildlife Research and Training Institute<sup>100</sup>.
- Section 8 of the WCMAPA authorises the following activities (with prior authorisation of KWS): night game viewing filming for commercial purposes; research; mining; restoration of ecosystems; infrastructure development; collecting stamps, free entry; and sport fishing in terrestrial parks.
- With regard to marine protected areas, section 7 of the WCMMR states that:
  - a. Except on a grant of permit from the KWS, no person shall be allowed to injure, damage, take, or possess any living, or cultural, marine resource whether for personal or commercial interest.
  - b. KWS may grant a permit for research in a marine protected area.
- With regard to protected wetlands, the only activities permitted are: research; eco-tourism; restoration or enhancement of wetlands.<sup>101</sup>
- With regard to protected wetlands, the regulated activities are: brick making; sports fishing and other recreational activities; cultivation; drainage; commercial exploitation of wetland resources; sewerage filtration; fishing using fishing gear and weirs; fishing farming and other forms of aquaculture; construction of roads and railways; installation of telephone lines and other communication facilities; burning.<sup>102</sup>
- The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations 2006 (“**Biodiversity Regulations**”), requires that in a Protected National Environment declared under the EMCA, the following activities will only be permitted with a Licence:
  - a. activities which have an adverse impact on any ecosystem;
  - b. activities which lead to the introduction of any exotic species; and
  - c. lead to unsustainable use of natural resources.
- Under local standards, activities requiring prior approval do not cover all the activities under international standards. In addition, the activities that do require prior approval are not applicable to all protected areas. Companies looking for investment should be cautious when carrying out activities in protected areas which require prior approval under international standards.

## 12. Significant impacts of activities, products, and services on biodiversity

### GRI Reporting Standard (304-2)

- a. Nature of significant direct and indirect impacts on biodiversity with reference to one or more of the following:

<sup>100</sup> Section 59, Wildlife Conservation and Management Act No. 47 of 2013

<sup>101</sup> Regulation 8, EMC (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009

<sup>102</sup> Schedule 2, Regulation 8, EMC (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations, 2009

- i. Construction or use of manufacturing plants, mines, and transport infrastructure;
- ii. Pollution (introduction of substances that do not naturally occur in the habitat from point and non-point sources);
- iii. Introduction of invasive species, pests, and pathogens;
- iv. Reduction of species;
- v. Habitat conversion;
- vi. Changes in ecological processes outside the natural range of variation (such as salinity or changes in groundwater level); and
- vii. Significant direct and indirect positive and negative impacts with reference to the following: i. Species affected; ii. Extent of areas impacted; iii. Duration of impacts; iv. Reversibility or irreversibility of the impacts.

### Standards

- (a) Identify processes and categories of activities that have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects.<sup>103</sup> Key considerations in the identification process include:
  - i. would the project potentially cause adverse impacts to habitats (e.g. modified, natural, and critical habitats) and/or ecosystems and ecosystem services?
  - ii. are any project activities proposed within or adjacent to critical habitats and/or environmentally sensitive areas, including legally protected areas (e.g. nature reserve, national park), areas proposed for protection, or recognized as such by authoritative sources and/or indigenous peoples or local communities? does the project involve changes to the use of lands and resources that may have adverse impacts on habitats, ecosystems, and/or livelihoods?
  - iii. would project activities pose risks to endangered species?
  - iv. would the project pose a risk of introducing invasive alien species?
  - v. does the project involve harvesting of natural forests, plantation development, or reforestation?
  - vi. does the project involve the production and/or harvesting of fish populations or other aquatic species?
  - vii. does the project involve significant extraction, diversion or containment of surface or ground water?
  - viii. does the project involve utilization of genetic resources? (e.g. collection and/or harvesting, commercial development)

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<sup>103</sup> Article 7(c) of the Convention on Biological Diversity 1992

- ix. would the project generate potential adverse transboundary or global environmental concerns?
  - x. would the project result in secondary or consequential development activities which could lead to adverse social and environmental effects, or would it generate cumulative impacts with other known existing or planned activities in the area?<sup>104</sup>
- All policies, plans and programmes for implementation shall be subject to an Environmental Impact Assessment (EIA)<sup>105</sup>.
  - When applying of an EIA licence, a project report will include details *inter alia* concerning the nature of the project, potential environmental impacts and mitigation measures<sup>106</sup>.
  - If NEMA finds that the project will have a significant impact on the environment without adequate mitigation measures, it will require the proponent to undertake an EIA<sup>107</sup>. The EIA will include the all the considerations at regulation 16 and 18 and Schedule 2 of the Environment (Impact Assessment and Audit) Regulations 2003.
  - Local standards satisfy the requirements under international standards. As such, there is no gap.

### 13. Habitats Protected or Restored

*Area Protected:* “area that is protected from any harm during operational activities, and where the environment remains in its original state with a healthy and functioning ecosystem.”

*Area Restored:* “area that was used during or affected by operational activities, and where remediation measures have either restored the environment to its original state, or to a state where it has a healthy and functioning ecosystem”

*Biodiversity:* “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems<sup>108</sup>”

#### GRI Reporting Standards (304-3)

- (a) Size and location of all habitat areas protected or restored, and whether the success of the restoration measure was or is approved by independent external professionals.
- (b) Whether partnerships exist with third parties to protect or restore habitat areas distinct from where the organisation has overseen and implemented restoration or protection measures.
- (c) Status of each area based on its condition at the close of the reporting period.

<sup>104</sup> UNDP Social and Environment Standards – Standard 1: Biodiversity Conservation and Sustainable Natural Resource Management (Guidance Note)

<sup>105</sup> Section 57A, Environment Management and Co-ordination Act No. 8 of 1999

<sup>106</sup> Regulation 7, Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>108</sup> Article 2 of the Convention on Biological Diversity 1992

(d) Standards, methodologies, and assumptions used.

### Standards

(a) In-situ conservation initiatives:

- i. promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings<sup>109</sup>;
- Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.<sup>110</sup>
- Proponents should have regard to management plans which are put in place to manage national parks, marine protected areas, wildlife conservancy and sanctuaries, to ensure that a project is in compliance with the relevant management policy for a particular area<sup>111</sup>. The management plan will include the information contained in the fifth schedule of WCMA. It is an offence to wilfully and without reasonable cause to contravene an approved management plan.<sup>112</sup>
- NEMA must approve the following activities in relation to a rivers, lake, sea or wetland in Kenya:
  - a) erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake, sea or wetland;
  - b) excavate, drill, tunnel or disturb the river, lake, sea or wetland;
  - c) introduce any animal, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland;
  - d) introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake, sea or wetland;
  - e) deposit any substance in a lake, river or wetland or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake, sea or wetland;
  - f) direct or block any river, lake, sea or wetland from its natural and normal course; and
  - g) drain any lake, river, sea or wetland.<sup>113</sup>
- NEMA shall issue guidelines and prescribe measures for the sustainable use of hill tops, hill sides and mountainous areas<sup>114</sup>. We are in the process of researching whether these guidelines were published.

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<sup>109</sup> Article 8 (a), Convention on Biological Diversity 1992

<sup>110</sup> Article 69(1), Constitution of Kenya 2010

<sup>111</sup> Section 44, Wildlife Conservation and Management Act No. 47 of 2013

<sup>112</sup> Section 88, Wildlife Conservation and Management Act No. 47 of 2013

<sup>113</sup> Section 42, Environment Management and Co-ordination Act No. 8 of 1999

<sup>114</sup> Section 47, Environment Management and Co-ordination Act No. 8 of 1999

- No person shall engage in bio-prospecting involving any wildlife resources or export from Kenya any wildlife resources for the purpose of bio-prospecting without a permit<sup>115</sup>
- The National Land Commission shall identify ecologically sensitive areas that are within public lands and demarcate or take any other justified action on those areas and act to prevent environmental degradation and climate change<sup>116</sup>.
- The local standards on the promotion and protection of ecosystems, natural habitats and the maintenance of viable populations of species, comply with the requirements in international standards. As such, there is no gap.

### Forest

- Work to achieve and maintain tree cover of at least 10% of the land and area in Kenya<sup>117</sup>
- Plots shall not be allocated<sup>118</sup>:
  - within an important water catchment area;
  - on a slope exceeding 30% inclination;
  - within 30 meters on either side of a river course or wetland, spring or other water source;
  - in a firebreak, road reserve, natural glade, natural forest area and an area under mature plantation.
- The Kenya Forest Service (KFS) shall only give its consent for quarrying operations in a forest area if:
  - the area does not contain rare, threatened or endangered species;
  - the forest does not have cultural importance or contain sacred trees or groves;
  - an EIA or audit has been carried out; or
  - the forest is an important catchment area or source of springs<sup>119</sup>
- Prohibited activities in forest except under a licence or permit, include:<sup>120</sup>
  - fell, cut, take, burn, injure or remove any forest produce;
  - be or remain therein between the hours of 7 p.m. and 6 a.m. unless using a recognised road or footpath, or is taking part in cultural, scientific or recreational activities;
  - erect any building or livestock enclosure, except where the same is allowed for a prescribed fee;

<sup>115</sup> Section 22, Wildlife Conservation and Management Act No. 47 of 2013

<sup>116</sup> Section 11, Land Act No. 6 of 2012

<sup>117</sup> Article 69(2), Constitution of Kenya 2010

<sup>119</sup> Section 46, Forest Conservation and Management Act No. 34 of 2016

<sup>120</sup> Section 64, Forest Conservation and Management Act No. 34 of 2016

- iv. smoke, where smoking is by notice prohibited, or kindle, carry or throw down any fire, match or other lighted material;
  - v. de-pasture or allow any livestock to be therein;
  - vi. clear, cultivate or break up land for cultivation or for any other purpose;
  - vii. enter any part thereof which may be closed to any person;
  - viii. collect any honey or beeswax, or hang on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or enter therein for the purpose of collecting honey and beeswax, or be therein with any equipment designed for the purpose of collecting honey or beeswax;
  - ix. construct any road or path;
  - x. set fire to, or assist any person to set fire to, any grass or undergrowth or any forest produce;
  - xi. possess, bring or introduce any chain saw or logging tools or equipment; and damage, alter, shift, remove or interfere in any way whatsoever with any beacon, boundary mark, fence notice or notice board.
- Ensure compliance with management plans for the sustainable use of forests.<sup>121</sup>
  - No person shall fell, cut, damage or remove, trade in or export any protected tree species.<sup>122</sup>
  - Requirement for a permit from KFS for the import or export of any forest produce.
  - The local standards on *in situ* conservation initiatives in forests comply with the requirements under international standards. As such, there is no gaps.
- ii. promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas<sup>123</sup>;
  - The Cabinet Secretary for Tourism and Wildlife is mandated to provide guidelines on the “*selection and management of buffer zones near protected area*”<sup>124</sup>. Buffer zones near protected areas are identified in certain Management Programmes, however there are no specific guidelines for applicants.
  - There are no local standards dealing with the same. Companies looking for investment should comply with international standards relating to sustainable development in areas adjacent to protected areas.

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<sup>121</sup> Section 42 and 45, Forest Conservation and Management Act No. 34 of 2016

<sup>122</sup> Section 40, Forest Conservation and Management Act No. 34 of 2016

<sup>123</sup> Article 8(e), Convention of Biological Diversity, 1992

<sup>124</sup> Section 51 (b), Environment Management and Co-ordination Act No. 8 of 1999

- iii. rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies<sup>125</sup>;
- See local standards for (viii) below.
- Local standards comply with the requirement in the international standard on the recovery of threatened species.
- iv. establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health<sup>126</sup>;
- Under the Biosafety Act<sup>127</sup>, a person shall not introduce into the environment a genetically modified organism without the written approval of the National Biosafety Authority<sup>128</sup>
- A person wishing to import a genetically modified organism shall apply for and obtain written approval from the Biosafety Authority<sup>129</sup>.
- A person shall not:
  - a. release into the environment a genetically modified organism without the approval of the National Biosafety Authority; and
  - b. place on the market a genetically modified organism without the approval of the National Biosafety Authority<sup>130</sup>.
- Where there is release on genetically modified organisms into the environment, the National Biosafety Authority and the applicant shall take measures to monitor the release, protect human health and the environment and promote public awareness and participation of the environmental release<sup>131</sup>
- The local standards comply with the requirements in the international standard concerning the management and control of living modified organisms. As such, there is no gap.
- v. prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species<sup>132</sup>;
- NEMA must approve activity that may result in the introduction of “exotic species”<sup>133</sup>

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<sup>125</sup> Article 8(f), Convention on Biological Diversity, 1992

<sup>126</sup> Article 8(g) Convention on Biological Diversity, 1992

<sup>127</sup> Biosafety Act No. 2 of 2009

<sup>128</sup> Section 19 of the Biosafety Act No. 2 of 2009

<sup>129</sup> Regulation 4, Biosafety (Import, Export and Transit) Regulations, 2011

<sup>130</sup> Regulation 5 and 6, Biosafety (Environmental Release) Regulations, 2009

<sup>131</sup> Regulations 10,11, 12, Biosafety (Environmental Release) Regulations, 2009

<sup>132</sup> Article 8(h), Convention of Biodiversity, 1992

<sup>133</sup> Regulation 4, Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

- The local standards comply with the requirements in the international standard concerning the introduction of “alien species”. As such, there is no gap.
- vi. endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components<sup>134</sup>;
- One of the main goals of the Kenya National Biodiversity Strategy Action Plan is to promote compatibility between present uses and the conservation of biological diversity and the sustainable use of its components.
  - The local standards comply with the requirement in the international standard concerning compatibility between present uses and the conservation of biological diversity. As such, there is no gap.
- vii. subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices;
- The Cabinet Secretary in the Ministry of Environment may declare traditional interests of local communities customarily resident within or around a lake basin, wetland, coastal zone or river basin or forest to be a protected interest<sup>135</sup>
  - NEMA shall maintain and monitor an inventory of biological diversity in Kenya<sup>136</sup>.
  - A proponent shall include in a project report the economic and socio-cultural impacts to the local community and the nation in general<sup>137</sup>
  - Ecological consideration to be taken into account when considering an environmental impact assessment include: biological diversity; sustainable use; ecosystem maintenance; social considerations; landscape; land uses; and water<sup>138</sup>
  - The Protection of Traditional Knowledge and Cultural Expressions Act<sup>139</sup>, provides for the:
    - a. protection of traditional knowledge
    - b. the right to every community to have the exclusive right to authorise or prevent the exploitation of traditional knowledge
    - c. access to traditional knowledge associated with genetic resources

<sup>134</sup> Article 8(i), Convention on Biological Diversity, 1992

<sup>135</sup> Section 43, Environment Management and Co-ordination Act No. 8 of 1999

<sup>136</sup> Regulations 6 and 7, Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

<sup>137</sup> Regulation 7, Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>138</sup> Schedule 2, Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>139</sup> Act No. 33 of 2016

- d. protection of cultural heritage
  - e. protection of traditional knowledge and cultural expressions against unlawful acts
  - Local standards comply with the requirement in the international standard. As such, there is no gap.
- viii. protection of threatened species and populations<sup>140</sup>;
- Schedule 6 of the WCMA contains a list of species declared to be critically endangered, vulnerable, nearly threatened and protected species<sup>141</sup>. A person cannot carry out any activity involving a specimen of a listed species without the approval of the KWS<sup>142</sup>.
  - NEMA shall impose bans, restrictions or similar measures on the access and use of any threatened species<sup>143</sup>. NEMA shall:
    - a. issue licences for the establishment and maintenance of facilities for the recovery and rehabilitation of threatened species.
    - b. determine full recovery and rehabilitation measures of threatened species to ensure restoration into its natural habitat.
  - Under the Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations 2016:
    - a. The activities in regulation 6 on listed ecosystems are prohibited.
    - b. Regulation 9 provides for the restricted activities with regard to listed species.
    - c. Regulation 10 provides for the management of listed species.
  - Local standards comply with the requirements in international standards concerning protection of threatened species and populations. As such, there is no gap.
- ix. where a significant adverse effect on biological diversity has been determined, regulate or manage the relevant processes and categories of activities.<sup>144</sup>
- If a significant adverse effect on biological diversity is identified, NEMA can require that processes and activities are regulated following an EIA or audit report<sup>145</sup>. However, there are no local standards on the categories of activities to be regulated.
  - Companies looking for investment should comply with the requirements in the international standard to manage activities where significant adverse effect on biological diversity has been determined.

<sup>140</sup> Article 8(k), Convention on Biological Diversity, 1992

<sup>141</sup> Section 47, Wildlife Conservation and Management Act No. 47 of 2013

<sup>142</sup> Section 48, Wildlife Conservation and Management Act No. 47 of 2013

<sup>143</sup> Regulation 5, Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

<sup>144</sup> Article 8 (l) of the Convention on Biological Diversity 1992

<sup>145</sup> Section 58, Environmental Management and Co-ordination Act

- (b) Ex-situ conservation initiatives<sup>146</sup>:
- i. adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions.
- The KWS shall develop and implement recovery plans for the conservation and management of listed species<sup>147</sup>
  - NEMA is mandated to issue guidelines for the management of:
    - a. germplasm banks;
    - b. botanical gardens;
    - c. zoos and aquaria;
    - d. animal orphanages;
    - e. any other facilities recommended by NEMA.
  - NEMA is also mandated to ensure that species threatened with extinction which are conserved *ex situ* are re-introduced into their native habitats and ecosystems where –
    - (a) the threat to the species has been terminated; or
    - (b) a viable population of the threatened species has been achieved<sup>148</sup>.
  - Local standards comply with the international requirements on the recovery and rehabilitation of threatened species. As such, there is no gap.
- (c) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity.<sup>149</sup>
- Protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.<sup>150</sup>
  - Protect genetic resources and biological diversity.<sup>151</sup>
  - Any person who intends to access genetic resources in Kenya shall apply to NEMA for an access permit.<sup>152</sup>

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<sup>146</sup> Article 9 of the Convention on Biological Diversity 1992

<sup>147</sup> Section 49 and Schedule 7, Wildlife Conservation and Management Act No. 47 of 2013

<sup>148</sup> Section 52, Environment Management and Co-ordination Act No. 8 of 1999

<sup>149</sup> Article 10 (b) of the Convention on Biological Diversity 1992

<sup>150</sup> Article 69 1 (c), Constitution of Kenya 2010

<sup>151</sup> Article 69 1 (e), Constitution of Kenya 2010

<sup>152</sup> Regulation 9, Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

- Key terms and conditions of an access permit shall include<sup>153</sup>:
  - a. duplicates and holotypes of all genetic resources collected shall be deposited with the relevant lead agency;
  - b. records of all intangible components of plant genetic material collected shall be deposited with the NEMA;
  - c. reasonable access to all genetic resources collected shall be guaranteed to all Kenyan citizens whether such genetic resources and intangible components are held locally or abroad;
  - d. all agreements entered into with respect to access of genetic resources shall be strictly for the purposes for which they were entered into;
  - e. the furnishing of quarterly reports to the NEMA on the status of research, including all discoveries from research involving genetic resources and/or intangible components thereof;
  - f. the holder of an access permit shall inform the NEMA of all discoveries made during the exercise of the right of access granted under the access permit; and
  - g. Any scientific research concerning genetic resources will require a licence from the National Commission for Science, Technology and Innovation. No licence shall be granted for activities which adversely impact the environment and/or may result in the exploitation of intellectual property of communities' rights to traditional knowledge<sup>154</sup>.
  
- The local standards comply with the requirements in the international standard on the use of biological resources. As such, there is no gap.
  
- (d) There shall be no significant conversion or degradation of natural habitats, unless all the following are demonstrated:
  - i. no other viable alternatives within the region exists for development of the project on modified habitat;
  - ii. consultation has established the views of stakeholders, including affected communities, with respect to the extent of conversion and degradation; and
  - iii. any conversion or degradation is mitigated according to the mitigation hierarchy.<sup>155</sup>
  
- There are no local standards addressing degradation of natural habitats.
  
- Companies looking for investment should comply with the international standard when projects involve conversion or degradation of natural habitats.

<sup>153</sup> Regulation 15, Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

<sup>154</sup> Section 12, Science, Technology and Innovation Act 28 of 2013

<sup>155</sup> IFC - Biodiversity Conservation and Sustainable Management of Living Natural Resources - Performance Standard 6

- (e) In areas of natural habitat, mitigation measures will be designed to achieve no net loss of biodiversity where feasible. Appropriate actions include:
- i. avoiding impacts on biodiversity through the identification and protection of set-asides;
  - ii. implementing measures to minimize habitat fragmentation, such as biological corridors;
  - iii. restoring habitats during operations and/or after operations; and
  - iv. implementing biodiversity offsets.<sup>156</sup>
- There are no local standards addressing mitigation measures in natural habitats.
  - Companies whose projects are on or affect natural habitats should comply with the international standard on mitigation measures.
- (f) In areas of critical habitat, project activities will not be implemented unless the following is demonstrated:
- i. no other viable alternatives within the region exists for development of the project on modified or natural habitats that are not critical;
  - ii. the project does not lead to measurable adverse impacts on those biodiversity values for which the critical habitat was designated, and on the ecological processes supporting those biodiversity values;
  - iii. the project does not lead to a net reduction in the global and/or national/regional population of any critically endangered or endangered species over a reasonable period of time; and
  - iv. a robust, appropriately designed, and long-term biodiversity monitoring and evaluation program is integrated into the management program.<sup>157</sup>
- NEMA and other lead agencies shall monitor: environmental phenomena; operations of an industry; environmental changes generally and in relation to particular projects.<sup>158</sup>
  - KWS and NEMA have the mandate to publish national wildlife conservation and management strategies.<sup>159</sup>
  - Based on baseline data of the EIA, a comprehensive monitoring and evaluation plan should be designed, this would be important in implementation and operation stages of the project as a measure of compliance.<sup>160</sup>

<sup>156</sup> IFC - Biodiversity Conservation and Sustainable Management of Living Natural Resources - Performance Standard 6

<sup>157</sup> IFC - Biodiversity Conservation and Sustainable Management of Living Natural Resources - Performance Standard 6

<sup>158</sup> Regulation 40, Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>159</sup> Section 5, Wildlife Conservation and Management Act No. 47 of 2013 and section 41A Environment Management and Co-ordination Act No. 8 of 1999

<sup>160</sup> Guideline 2.6.5, NEMA Impact Assessment Guidelines and Administrative Procedures 2002

- The Cabinet Secretary for Tourism and Wildlife may declare any land to be a national reserve where the land is:
    - a. rich in biodiversity and wildlife resources or contains endangered and threatened species;
    - b. an important catchment area critical for the sustenance of a wildlife conservation area; or
    - c. an important wildlife buffer, zone, migratory route, corridor or dispersal areas<sup>161</sup>.
  - The Cabinet Secretary for Tourism and Wildlife may declare any marine area to be a marine conservation area where the area is –
    - a. rich in biodiversity or harbours endangered and threatened marine species; and
    - b. a critical habitat for a variety of marine resources<sup>162</sup>.
  - Local standards comply with requirements in international standards concerning critical habitats. As such, there is no gap.
- (g) Employ a mitigation hierarchy as a framework for managing the risks and potential impacts of development projects on biodiversity and ecosystem services:
- i. Avoidance – measures taken to anticipate and prevent adverse impacts on biodiversity before actions or decisions are taken that could lead to such impacts (examples: site selection; project design; and scheduling).
  - ii. Minimisation – measures taken to reduce the duration, intensity, significance and/or extent of impacts (including, direct, indirect and cumulative impacts, as appropriate) that cannot be completely avoided, as far as is practically feasible (examples: physical controls; operational controls; abatement controls).
  - iii. Restoration – measures take to repair degradation or damage to specific biodiversity features and ecosystem services of concern.
- NEMA may issue and serve on any person in respect of any matter relating to the management of the environment an environmental restoration order to restore the environment or prevent the person of whom it is served from taking any action which would harm the environment<sup>163</sup>
  - An environmental restoration order may require a person on whom it is served to— (a) take such action as will prevent the commencement or continuation or cause of pollution; (b) restore land, including the replacement of soil, the replanting of trees and other flora and the restoration as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land or sea as may be specified in the particular order; (c) take such action to prevent the commencement or continuation or cause of environmental hazard; (d) cease to take any action which is causing or may contribute to causing pollution or an environmental hazard; (e) remove or alleviate any injury to land or the environment or to the amenities of the area;

<sup>161</sup> Section 35(1), Wildlife Conservation and Management Act No. 47 of 2013

<sup>162</sup> Section 36, Wildlife Conservation and Management Act No. 47 of 2013

<sup>163</sup> Section 108, Environment Management and Co-ordination Act No. 8 of 1999

- (f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on or under or about the land or sea specified in the order or land or the environment contiguous to the land or sea specified in the order; (g) remove any waste or refuse deposited on the land or sea specified in the order and dispose of the same in accordance with the provisions of the order; and (h) pay any compensation specified in the order.
- The holder of a mining prospecting licence shall comply with terms of an environmental rehabilitation and restoration plan<sup>164</sup>
  - An applicant for a prospecting licence, a retention licence or a mining licence shall provide a bond or some other form of financial security called an environmental protection bond sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations<sup>165</sup>
  - Local standards do not have a requirement for a mitigation hierarchy covering avoidance, minimisation and restoration. Companies looking for investment should employ a mitigation hierarchy to manage risks and potential impacts of development projects on biodiversity and ecosystem services, in accordance with the international standard.
- iv. Offsets – measurable conservation outcomes, resulting from actions applied to areas not impacted by the project, that compensate for significant, adverse impacts of a project that cannot be avoided, minimized and/or restored (examples: ‘Restoration’ offsets; ‘Protection’ offsets).<sup>166</sup>
- The EIA study report shall include information on alternative technologies and processes available and reasons for preferring the chosen technology and processes. The report should also include alternatives including project site and a management plan on mitigation measures<sup>167</sup>. Local standards do not provide specific requirements for offsets.
  - Companies looking for investment should include and employ offsets in their mitigation hierarchy and projects in order to comply with the international standard.
- (h) Organisations should use qualified professionals to properly identify biodiversity values and ecosystem services and to propose appropriate mitigation options<sup>168</sup>
- The project report and the EIA shall be carried out by an expert approved by NEMA<sup>169</sup>
  - The report in the EIA shall identify fully the proposed measures that shall be implemented to address the identified adverse effects. Similarly, the effectiveness of these measures towards achieving desired objectives shall be assessed. A wide range of options will be proposed to prevent, reduce, remedy, or compensate for the various adverse effects.<sup>170</sup>

<sup>164</sup> Section 77, Wildlife Conservation and Management Act No. 47 of 2013

<sup>165</sup> Section 181, Mining Act No. 12 of 2016

<sup>166</sup> CSBI – A cross-sector guide for implementing the Mitigation Hierarchy (The Biodiversity Consultancy)

<sup>167</sup> Regulation 18, Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>168</sup> UNDP Social and Environment Standards – Standard 1: Biodiversity Conservation and Sustainable Natural Resource Management (Guidance Note)

<sup>169</sup> Regulation 13, Environmental (Impact Assessment and Audit) Regulations, 2003

<sup>170</sup> Guideline 2.6.4, NEMA Impact Assessment Guidelines and Administrative Procedures 2002

- Local standards comply with the requirements in international standards for the use of qualified professionals to identify biodiversity issues. As such, there is no gap.

#### 14. IUCN Red List species and national conservation list species with habitats in areas affected by operations

##### GRI Reporting Standards (304-4)

- (a) Total number of IUCN Red List species and national conservation list species with habitats in areas affected by the operations of the organisation, by level of extinction risk:
- i. critically endangered;
  - ii. endangered;
  - iii. vulnerable;
  - iv. near threatened; and
  - v. least concern.

##### Standards

- (a) The project should not lead to a net reduction in the global and/or national/regional population of any Critically Endangered or Endangered species<sup>171</sup> over a reasonable period of time.
- (b) The export of any specimen of a species included in Appendix I to III of the United Nations Convention on International Trade in Endangered Species of Wild Flora and Fauna 1979, shall require the prior grant and presentation of an export permit.
- Schedule 6 of the Wildlife Conservation and Management Act contains a list of species declared to be critically endangered, vulnerable, nearly threatened and protected species<sup>172</sup>. A person cannot carry out any activity involving a specimen of a listed species without the approval of the KWS<sup>173</sup>.
  - NEMA shall impose bans, restrictions or similar measures on the access and use of any threatened species<sup>174</sup>. NEMA shall:
    - (a) issue licences for the establishment and maintenance of facilities for the recovery and rehabilitation of threatened species; and
    - (b) determine full recovery and rehabilitation measures of threatened species to ensure restoration into its natural habitat.
  - Local standards comply with requirements in the international standard on conservation of listed species. As such, there is no gap.

#### 15. - 19. Emissions

<sup>171</sup> As listed in the IUCN Red List of threatened species

<sup>172</sup> Section 47, Wildlife Conservation and Management Act No. 47 of 2013

<sup>173</sup> Section 48, Wildlife Conservation and Management Act No. 47 of 2013

<sup>174</sup> Regulation 5, Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006

Green House Gases (“GHG”) are gases that trap heat in the atmosphere and contribute to climate change. These gases include, and not limited to, carbon dioxide, methane, nitrous oxide and fluorinated gases. Increased consumption of non-renewable energy has led to an increase in GHGs emissions leading to global warming. International standards are required to determine the impact an organisation has on the environment and can indicate an organisations’ contribution to sustainable development.<sup>175</sup>

Direct emissions occur from sources that are controlled by an organisation, for example, emissions from production, motor vehicles among others. Indirect emissions come from the generation of electricity purchased for consumption in the organisation whereas other emissions occur from sources not owned or controlled by an organisation such as transport related activities.

Emissions are regulated at the national level. The Constitution provides that every person has the right to a clean and healthy environment<sup>176</sup> which includes the right to protect the environment for the benefit of future generations.<sup>177</sup> These rights are to be achieved through the State’s sustainable exploitation, utilisation and conservation of the environment and natural resources and to ensure equitable sharing of the benefits.<sup>178</sup> There are no legislation on corporate standards, however, the Climate Change Act Council may impose climate change obligations on private entities.<sup>179</sup>

#### Global Reporting Standards (305-1)

- a. Gross direct (Scope 1) GHG emissions in metric tonnes of CO2 equivalent.
- b. Gases included in the calculation; whether CO2, CH4, N2O, HFCs, PFCs, SF6, NF3, or all.
- c. Biogenic CO2 emissions in metric tons of CO2 equivalent.
- d. Base year for the calculation, if applicable, including:
  - i. the rationale for choosing it;
  - ii. emissions in the base year; and
  - iii. the context for any significant changes in emissions that triggered recalculations of base year emissions.
- e. Source of the emission factors and the global warming potential (GWP) rates used, or a reference to the GWP source.
- f. Consolidation approach for emissions; whether equity share, financial control, or operational control.
- g. Standards, methodologies, assumptions, and/or calculation tools used.

#### Global Reporting Standards (305-2)

- a. Gross location-based energy indirect (Scope 2) GHG emissions in metric tons of CO2 equivalent.
- b. If applicable, gross market-based energy indirect (Scope 2) GHG emissions in metric tons of CO2 equivalent.

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<sup>175</sup> GRI standards- 305 on emissions.

<sup>176</sup> Article 42 of the Constitution

<sup>177</sup> Article 42(a) of the Constitution

<sup>178</sup> Article 69 (1) (a) of the Constitution

<sup>179</sup> Section 16 of the Climate Change Act No.11 of 2016

- c. If available, the gases included in the calculation; whether CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, SF<sub>6</sub>, NF<sub>3</sub>, or all.
- d. Base year for the calculation, if applicable, including:
  - i. the rationale for choosing it;
  - ii. emissions in the base year;
  - iii. the context for any significant changes in emissions that triggered recalculations of base year emissions; and
- e. Source of the emission factors and the global warming potential (GWP) rates used, or a reference to the GWP source.
- f. Consolidation approach for emissions; whether equity share, financial control, or operational control.
- g. Standards, methodologies, assumptions, and/or calculation tools used.

#### Global Reporting Standards (305-3)

- a. Gross other indirect (Scope 3) GHG emissions in metric tons of CO<sub>2</sub> equivalent.
- b. If available, the gases included in the calculation; whether CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, SF<sub>6</sub>, NF<sub>3</sub>, or all.
- c. Biogenic CO<sub>2</sub> emissions in metric tons of CO<sub>2</sub> equivalent.
- d. Other indirect (Scope 3) GHG emissions categories and activities included in the calculation.
- e. Base year for the calculation, if applicable, including:
  - i. the rationale for choosing it;
  - ii. emissions in the base year; and
  - iii. the context for any significant changes in emissions that triggered recalculations of base year emissions.
- f. Source of the emission factors and the global warming potential (GWP) rates used, or a reference to the GWP source.
- g. Standards, methodologies, assumptions, and/or calculation tools used.

#### Global Reporting Standards (305-4)

- a. GHG emissions intensity ratio for the organization.
- b. Organisation-specific metric (the denominator) chosen to calculate the ratio.
- c. Types of GHG emissions included in the intensity ratio; whether direct (Scope 1), energy indirect (Scope 2), and/or other indirect (Scope 3).
- d. Gases included in the calculation; whether CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, SF<sub>6</sub>, NF<sub>3</sub>, or all.

## Global Reporting Standards (305-5)

- a. GHG emissions reduced as a direct result of reduction initiatives, in metric tons of CO<sub>2</sub> equivalent.
- b. Gases included in the calculation; whether CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, SF<sub>6</sub>, NF<sub>3</sub>, or all.
- c. Base year or baseline, including the rationale for choosing it.
- d. Scopes in which reductions took place; whether direct (Scope 1), energy indirect (Scope 2), and/or other indirect (Scope 3).
- e. Standards, methodologies, assumptions, and/or calculation tools used.

## Standards

- (a) Carbon footprint analysis. This is done by identifying and calculating GHG emission.<sup>180</sup> Identification and calculation of GHG emission defers from sector to sector and organisation are advised to use the most accurate calculation approach and appropriate for their reporting context.<sup>181</sup>
  - The local standards do not require a carbon foot print analysis.
  - An organisation would be able to conduct a carbon footprint analysis if the following prescribed requirements are met:
    - a. Measuring emission and exposure levels in accordance with the prescribed test methods.<sup>182</sup>This analysis is only expected of organisations whose activities fall under the prescribed list of stationary sources of pollution. Stationary source of pollution means, “any fixed building, structure, facility, installation, equipment or any motor vehicle, waterborne craft, aircraft or diesel locomotive deposited, parked, moored, or otherwise remaining temporarily in place, which emits or may emit any air pollutant.”<sup>183</sup>
    - b. Submitting an annual emissions report <sup>184</sup>in the prescribed format.<sup>185</sup> This is a requirement for controlled facilities only.<sup>186</sup> An organisation should confirm whether its activities fall in the list of controlled facilities<sup>187</sup>.
    - c. Monitoring and controlling the emission of priority air pollutants from mobile emission sources to avoid exceeding the prescribed emissions limit.<sup>188</sup> Mobile emission sources relate to engines

<sup>180</sup> GHG Protocol, Corporate Accounting and Reporting Standard;

<sup>181</sup> The UNEP, UN-Habitat and world bank recommend that emissions are reported from four categories i.e. energy, agriculture, forestry and other land use change (known as AFOLU) and waste  
<http://siteresources.worldbank.org/INTUWM/Resources/340232-1205330656272/4768406-1291309208465/Annexes.pdf> ; IPPCC Guidelines, 1996 also refer to a hierarchy of calculation approaches and techniques

<sup>182</sup> Regulation 52(1) of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>183</sup> Section 2 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>184</sup> Regulation 19 (1) of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>185</sup> Part V of the Fifth Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>186</sup> Regulation 19 (1) of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>187</sup> Fourteenth Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>188</sup> Regulation 25 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014; Priority air pollutants are listed in the Second Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

and equipment that can be moved from one location to the next and include pollution from road, rail, air, marine and inland water transport and conveyance equipment.<sup>189</sup>

- d. Analysing the levels of emission. The local standards have a general prohibition on natural persons and organisations against emissions of any liquid, solid or gaseous substances in levels exceeding the prescribed limit of priority air pollutants, which would upset or exceed the ambient air tolerance limit.<sup>190</sup>The prescribed priority air pollutant limits includes the limit for gases which fall under GHGs.<sup>191</sup> By conducting an analysis on the levels of emissions, an organisation would be able to conduct a carbon footprint analysis.
    - Companies looking for investment should comply with the international standard and produce a carbon footprint analysis.
- (b) Annual quantification of direct and indirect GHG emissions in accordance with estimated sector methodologies or good practice.<sup>192</sup> Projects that produce more than 25,000 tonnes of carbon dioxide should quantify the direct, indirect and other emissions.<sup>193</sup> To promote transparency, organisations should be encouraged to conduct independent verification of operational GHG emissions data by a third party or an international assurance standard.<sup>194</sup>
- Controlled facilities should submit an annual emission report. The emissions report should include estimates of annual emissions in the prescribed format.<sup>195</sup> The emissions report includes quantification of direct and indirect GHG emissions.
  - There are no specific local standards for organisations that produce more than 25,000 tonnes of carbon dioxide, however an organisation's level of emission of gaseous substances should not exceed the prescribed limits for ambient air quality standards.<sup>196</sup>In addition, controlled and non-controlled facilities should not exceed the prescribed emission limits.<sup>197</sup> Controlled facilities are required to obtain an emissions licence.<sup>198</sup> A non-controlled facility that exceeds the prescribed emission levels more than three times in a period of six months shall be required to make an application for an emissions licence.<sup>199</sup>
  - Local standards comply with international requirements on annual quantification of direct and indirect GHG emissions. As such, there is no gap.

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<sup>189</sup> Part IV of the of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>190</sup> Regulation 5 and 6 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014. Ambient Air Quality Standards are requisite to protect human health and allow an adequate margin of safety

<sup>191</sup> Listed in the First Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>192</sup> The Intergovernmental Panel on Climate Change provides estimation methodologies. This can also be found in various intergovernmental agencies and international conventions

<sup>193</sup> IFC Performance Standards on Environmental and Social Sustainability 2012- Standard 3

<sup>194</sup> ECC41 FTSE Russell RC5 Data Model Methodology

<sup>195</sup> Part V of the Fifth Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>196</sup> Paragraph 5 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014.

<sup>197</sup> Third Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014. The Fourteenth Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014 provides a list of the Controlled Facilities

<sup>198</sup> Regulation 14 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>199</sup> Paragraph 14(2) of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

- (c) Setting GHG emissions targets and monitoring the progress in achieving the targets set.<sup>200</sup> The type of target an organisation chooses depends on its products and production methods, policy environment, and business model.
- There are no specific local standards on setting GHG emission targets and monitoring the progress in achieving the targets set. However, an organisation's internal target for emissions level of liquids, solids or gaseous substances should not exceed the prescribed standards for emission.<sup>201</sup>
  - Companies looking for investment should set targets and monitor GHG emissions in accordance with the international standards.
- (d) Reducing GHG emissions from core business and project related emissions, which includes direct indirect and other emissions.<sup>202</sup>
- Reducing GHG emissions to reach the prescribed emission level due to the general prohibition on exceeding the prescribed levels of emission of priority air pollutants which include GHGs. In addition, controlled and non-controlled facilities should reduce their GHG emissions to meet the prescribed parameters of emission.<sup>203</sup>
  - Using a fuel catalyst which improves fuel economy, enhances combustion, and reduces harmful emissions that adversely affect human, animal and plant health and degrade the environment.<sup>204</sup>
  - Any internal combustion engine should not emit smoke or other air contaminants in excess of the prescribed emission standards.<sup>205</sup>
  - Develop policies and strategies for reducing GHG emissions.<sup>206</sup>
  - If likely to emit, poisonous, harmful, injurious or offensive substances, into the atmosphere, they shall use the best practicable means to— (a) prevent such emissions into the atmosphere; and (b) render harmless and inoffensive the substances which may be emitted.<sup>207</sup>
  - Local standards comply with the requirement in the international standard. As such, there is no gap.
- (e) Use of climate technologies to reduce GHGs emissions which include use renewable sources to produce energy such as solar power, wind energy or hydropower as energy consumption accounts for the majority of their directly measurable GHG emissions.<sup>208</sup> Use of 'soft' climate technologies,

<sup>200</sup> GHG Protocol, Corporate Accounting and Reporting Standard; IFC Performance Standards on Environmental and Social Sustainability 2012; ECC 38 and 39 FTSE Russell ESG RC5 Date Model Methodology

<sup>201</sup> Third Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014.

<sup>202</sup> IFC Performance Standards on Environmental and Social Sustainability 2012- Standard 3, Paris Agreement , 29 January 2016

<sup>203</sup> Second and Third Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>204</sup> Regulation 7 of the Environmental Management and Co-ordination (Fossil Fuel Emission ) Regulations, 2007

<sup>205</sup> Regulation 4 of the Environmental Management and Co-ordination (Fossil Fuel Emission ) Regulations, 2007 and First Schedule of the Regulations

<sup>206</sup> Climate Change Act

<sup>207</sup> Occupational Safety and Health Act, No 15 of 2007

<sup>208</sup> <https://www.unenvironment.org/explore-topics/energy/what-we-do/renewable-energy> ; UN Framework Convention on Climate Change

such as energy-efficient practices or training for using equipment<sup>209</sup>. This may also be enhanced by formulating and implementing policies or commitment statements to address the issue, reduce or avoid the impact or improve efficiency.<sup>210</sup>

- Adapting or installing air pollution technologies for mitigation of GHGs in accordance with the prescribed guidelines.<sup>211</sup> Equipment used in the control of GHGs is presumed to meet best available technology if the owner or operator can demonstrate that the prescribed emission levels can be met.<sup>212</sup>
  - Ensure utilisation of the renewable energy technologies such as solar, wind power, geothermal among others.<sup>213</sup>
  - Using a fuel catalyst which improves fuel economy, enhances combustion, and reduces harmful emissions that adversely affect human, animal and plant health and degrade the environment.<sup>214</sup>
  - Researching, designing and developing energy efficient technologies as well as championing the growth of bio-fuels and renewable energies as alternative sources of energy.<sup>215</sup>
  - Local standards comply with requirements in international standards on use of best available technologies for reduction in GHG emissions. As such, there is no gap.
- (f) Promotion of sustainable forms of agriculture.<sup>216</sup>
- Encouraging the adoption of environmental friendly management techniques in agriculture<sup>217</sup>.
  - Land owners and lessees of agricultural land, being stewards, have the obligation to cultivate the lands they own or lease and make the land economically productive on a sustainable and environmentally friendly manner.<sup>218</sup>
  - Formulation of policies and strategies that promote sustainable agriculture.<sup>219</sup>

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[https://unfccc.int/tclear/misc\\_/StaticFiles/gnwoerk\\_static/NAD\\_EBG/54b3b39e25b84f96aeada52180215ade/b8ce50e79b574690886602169f4f479b.pdf](https://unfccc.int/tclear/misc_/StaticFiles/gnwoerk_static/NAD_EBG/54b3b39e25b84f96aeada52180215ade/b8ce50e79b574690886602169f4f479b.pdf)

<sup>210</sup> ECC31 FTSE Russell ESG RC5 Data Model Methodology

<sup>211</sup> Regulation 71 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014. The guidelines on technologies are set out at Part X of the Fifth Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014.

<sup>212</sup> Part X paragraph (a) of the Fifth Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014. The prescribed emission levels are set out at the Third Schedule of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014.

<sup>213</sup> The Energy Act 2006, Article 6 of the Kyoto Protocol

<sup>214</sup> Regulation 7 of the Environmental Management and Co-ordination (Fossil Fuel Emission ) Regulations, 2007

<sup>215</sup> An initiative under the Kenya Industrial Research and Development Institute (KIRDI) which is a national research institute established in 1979 under the Ministry of Trade and Industry.

<sup>216</sup> Kyoto Protocol

<sup>217</sup> Constitution of Kenya, The East African Community Treaty,

<sup>218</sup> Section 4 of the Crops Act No.16 of 2013

<sup>219</sup> Kenya Climate Smart Agriculture Implementation Framework, 2018-2027 (KCSAIF) <http://www.kilimo.go.ke/wp-content/uploads/2018/11/KCSAIF-2018-2027-1.pdf>

- Developing appropriate systems to promote balanced, diversified and sustained agricultural development and to optimise agricultural production through adaptive and investigative research.<sup>220</sup>
  - Local standards comply with requirements in international standards on use of sustainable forms of agriculture. As such, there is no gap.
- (g) Considering mitigation of the effects of global warming by re-forestation<sup>221</sup> and afforestation projects. This may also include membership of business associations and the organisation's position on public policy and regulation.<sup>222</sup>
- Working to achieve and maintain a tree cover of at least 10% of the land area in Kenya<sup>223</sup> by promotion of afforestation activities.<sup>224</sup>
  - Nurturing, promotion and supporting innovations and best practices in forest conservation.<sup>225</sup>
  - Raising awareness on effects of deforestation, reforestation and afforestation on global warming.<sup>226</sup>
  - Implementing principles of international conventions such as the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, Paris Agreement and any other convention which forms part of the Kenyan legislation.
  - Local standards comply with requirements in the international standard. As such, there is no gap.
- (h) Track emissions to compare emissions over the years which should also take into account structural changes such as mergers or acquisitions.<sup>227</sup> This should also cover tracking the intensity of the emissions measured, disclosed and reduced.<sup>228</sup>
- There are no specific local standards in relation to tracking of emissions. However, as noted above, the local legislations have a general prohibition on natural persons and organisations against emissions of any liquid, solid or gaseous substances in levels exceeding the prescribed limit of priority air pollutants and, which would upset or exceed the ambient air tolerance limit. By continuous monitoring of emission levels, an organisation would be able to track its emissions over the years.
  - Licensees of controlled facilities have a reporting obligation and are required to prepare and submit an annual emissions report.<sup>229</sup> The annual emission reports can be used to track emissions over the years.
  - Companies looking for investment should carry out an analysis comparing the emissions over the years in accordance with the international standard.

<sup>220</sup> Section 32 of the Kenya Agricultural And Livestock Research Act No. 17 of 2013

<sup>221</sup> <https://www.cfr.org/report/global-climate-change-regime>

<sup>222</sup> ECC03 FTSE Russell ESG RC5 Data Model Methodology

<sup>223</sup> Article 69 (b) of the Constitution of Kenya

<sup>224</sup> Section 21 of the Forest Conservation and Management Act No.34 of 2016

<sup>225</sup> Section 27 of the Forest Conservation and Management Act No.34 of 2016

<sup>226</sup> <http://www.environment.go.ke/?cat=29> ; Green Belt Movement, WWF

<sup>227</sup> GHG Protocol, Corporate Accounting and Reporting Standard

<sup>228</sup> ECC12 FTSE Russell ESG RC5 Data Model Methodology

<sup>229</sup> Paragraph 19 (1) of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014; and

- (i) Quantification of other emissions into the air such as nitrogen oxides (NOX), sulphur oxides (SOX), and other significant air emissions.<sup>230</sup>
- There are local standards for quantification of other emissions into the air<sup>231</sup>. As noted above, the local legislations have a general prohibition on natural persons and organisations against emissions of any liquid, solid or gaseous substances in levels exceeding the prescribed limit and which include nitrogen oxides (NOX), sulphur oxides (SOX), and other emissions.
  - Local standards comply with international standards on quantification of other emissions in the international standard. As such, there is no gap.
- (j) Report reductions in GHG emissions by reporting direct, indirect and other emissions separately.<sup>232</sup>
- There are no specific local standards in reporting reductions. However and as mentioned above, licensees of controlled facilities have a reporting obligation and the report would reveal any reduction in emission levels.
  - State departments and national government entities have a duty to;
    - (a) Report on sectoral GHG emissions for the national inventory.<sup>233</sup>
    - (b) Report annually to the Climate Change Council on the status and progress of performance and implementation of all assigned climate change duties and functions.<sup>234</sup>
  - Companies looking for investment should report reductions in GHG emissions as required in the international standard.
- (k) Carbon financing.<sup>235</sup> Carbon markets aim to reduce GHG emissions cost-effectively by setting limits on emissions and enabling the trading of emission units, which are instruments representing emission reductions. Trading enables entities that can reduce emissions at lower cost to be paid to do so by higher-cost emitters, thus lowering the economic cost of reducing emissions.<sup>236</sup>
- Implementing the Clean Development Mechanisms (CDM) under the Kyoto Protocol<sup>237</sup>. The Energy Act<sup>238</sup> defines Clean Development Mechanisms as, “a mechanism that allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits each equivalent to one tonne of carbon dioxide, which can be traded or sold, or used by industrialized countries to a meet a part of their emission reduction targets under the Kyoto Protocol”<sup>239</sup>

<sup>230</sup> GHG Protocol, Corporate Accounting and Reporting Standard; Global Reporting Initiative

<sup>231</sup> Section 52 and 53 of the Environmental Management and Co-ordination (Air Quality) Regulations, 2014

<sup>232</sup> GHG Protocol, Corporate Accounting and Reporting Standard; ECC 40 FTSE Russell ESG RC5 Date Model Methodology

<sup>233</sup> Section 15 of the Climate Change Act No.11 of 2016

<sup>234</sup> Section 15(5)(d) of the Climate Change Act No. 11 of 2016

<sup>235</sup> <https://www.unhcr.org/55005b069.pdf>

<sup>236</sup> <http://www.sdfinance.undp.org/content/sdfinance/en/home/solutions/carbon-markets.html#mst-0>

<sup>237</sup> the Kyoto Protocol came into force on 26 May 2005 and forms part of the Kenyan law

<sup>238</sup> No.12 of 2006

<sup>239</sup> Regulation 2 of the Energy (Solar Water Heating) Regulations, 2012.

- Harnessing opportunities for carbon credit trading to promote the development and exploitation of renewable energy sources.<sup>240</sup> These opportunities are not specified however, some organisation have implemented and registered projects that generate carbon credits.<sup>241</sup> These projects are registered with the CDM registry.<sup>242</sup>
  - Sustainable exploitation, utilisation and conservation of the environment and natural resources.<sup>243</sup> Carbon trading promotes sustainable development by reducing carbon emissions. Therefore, this constitutional provision may be interpreted to include carbon trading as well as other means of sustainable development.
  - Training farmers in sustainable land management.<sup>244</sup>
  - Local standards comply with the requirements regarding carbon trading in the international standard. As such, there is no gap.
- (l) Formulate policies or commitment statements to (a) address the issue of emissions, (b) reduce or avoid the impact of emissions or improve efficiency<sup>245</sup> and to support policy initiatives on reduction of emissions.<sup>246</sup>
- Implementing policies and strategies formulated in the National Action Plan on Climate Change.<sup>247</sup>
  - Local standards comply with the requirements regarding formulating policies and commitment statements in the international standard. As such, there is no gap.
- (m) Capacity building for employees on GHG-reducing practices and practices adopted by the company.<sup>248</sup> This also includes incorporating climate-related risk management procedures in the organisation.<sup>249</sup>
- Encouraging public participation in the management, protection and conservation of the environment<sup>250</sup>, including public participation in the development of strategies, laws and policies relating to climate change.<sup>251</sup>
  - The Government should raise awareness on environmental conservation and management.<sup>252</sup> This also includes implementation of environmental education in the curriculum.<sup>253</sup>
  - Requirement for capacity development in the National Action Plan on Climate Change.

<sup>240</sup> Section 103 (g) of the Energy Act

<sup>241</sup> For example, Kenya Electricity Generating Company (KenGen) has implemented green projects.

<sup>242</sup> <https://cdm.unfccc.int/about/index.html>

<sup>243</sup> Article 69 ( 1) (a) of the Constitution of Kenya

<sup>244</sup> <http://projects-beta.worldbank.org/en/results/2015/08/18/training-kenyan-farmers-sustainable-land-management>

<sup>245</sup> ECC01 ,FTSE Russell ESG RC5 Data Model Methodology

<sup>246</sup> GHG Protocol, Corporate Accounting and Reporting Standard

<sup>247</sup> <http://www.kccap.info/>

<sup>248</sup> GHG Protocol, Corporate Accounting and Reporting Standard

<sup>249</sup> ECC 50, FTSE Russell ESG RC5 Data Model Methodology

<sup>250</sup> Article 69 (d) of the Constitution of Kenya;

<sup>251</sup> Section 24 (1) of the Climate Change Act;

<sup>252</sup> <http://www.environment.go.ke/?p=91>

<sup>253</sup> [http://www.unesco.org/new/en/nairobi/about-this-office/single-view/news/kenya\\_launched\\_its\\_first\\_education\\_for\\_sustainable\\_developme/](http://www.unesco.org/new/en/nairobi/about-this-office/single-view/news/kenya_launched_its_first_education_for_sustainable_developme/)

- The local standards on capacity development on GHG emissions do not apply to companies. Companies looking for investment should adopt policies and practices to educate employees on GHG-reducing practices, in accordance with the international standard.
- (n) Promote good practice in environmental management and design.<sup>254</sup>
- No local standard obligating companies to promote good practice in environment management and design.
  - Companies looking for investment should promote good practice in environmental management and design, in accordance with the international standard.

## 20. Emissions of ozone-depleting substances (ODS)

Ozone depleting substances are chemicals that destroy the Earth's protective ozone and include chlorofluorocarbons (CFCs), halon, carbon tetrachloride (CCl<sub>4</sub>), methyl chloroform (CH<sub>3</sub>CCl<sub>3</sub>), hydrobromofluorocarbons (HBFCs), hydrochlorofluorocarbons (HCFCs), methyl bromide (CH<sub>3</sub>Br), and bromochloromethane (CH<sub>2</sub>BrCl) among others.

The Montreal Protocol's objective is to cut down the production and consumption of ozone-depleting substances, in order to reduce their presence in the atmosphere and thus protect the Earth's ozone layer.

Kenya has ratified the 1985 Vienna Convention on the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and its subsequent amendments. As such, these convention form part of Kenyan law.

### Global Reporting Standards (305-6)

- Production, imports, and exports of ODS in metric tons of CFC-11 (trichlorofluoromethane) equivalent.
- Substances included in the calculation.
- Source of the emission factors used.
- Standards, methodologies, assumptions, and/or calculation tools used

### Standards

- Replace ODS-dependent equipment used in industries with ozone friendly equipment.<sup>255</sup>
  - Encouraging and promotion of replacement of ODS-dependent equipment in industries with ozone friendly equipment.<sup>256</sup>

<sup>254</sup> [https://www.ifad.org/elearning/IFAD\\_ESA\\_Procedures\\_FINAL.pdf](https://www.ifad.org/elearning/IFAD_ESA_Procedures_FINAL.pdf)

<sup>255</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

<sup>256</sup> Montreal Protocol

- Continually phasing out ODS-dependent equipment.<sup>257</sup>
  - Local standards comply with the international standard. As such, there is no gap.
- (b) Use air-conditioning and refrigeration equipment that do not use HCFCs as refrigerant.<sup>258</sup>
- Encouraging and promotion of air-conditioning and refrigeration equipment that do not use HCFCs as refrigerant. This is being achieved by the Ministry of Environment's commissioning of the Refrigeration and Air Conditioning (RAC) Policy Workshop.<sup>259</sup>
  - Continually phasing out refrigeration equipment that uses HCFCs and adopting modern cooling technologies with low energy consumption and operate using natural refrigerants.<sup>260</sup>
  - Local standards comply with the international standard. As such, there is no gap
- (c) Buy and use of aerosol products that do not use HCFCs or CFCs as propellants.<sup>261</sup>
- Encouraging and promotion of use of aerosol products that use HCFCs or CFCs as propellants<sup>262</sup>
  - Gradually phasing out buy and use of aerosol products that do use HCFCs or CFCs as propellants<sup>263</sup>
  - Local standards comply with the international standard. As such, there is no gap.
- (d) Conduct regular inspection and maintenance of air-conditioning and refrigeration appliances to prevent and minimise refrigerant leakage.<sup>264</sup>
- Encourage regular inspection and maintenance of air-conditioning and refrigeration appliances to prevent and minimise refrigerant leakage.<sup>265</sup>
  - Local standards comply with the international standard. As such, there is no gap
- (e) For existing air-conditioning and refrigeration appliances that operate on HCFCs or CFCs, the refrigerant should be recovered or recycled whenever an overhaul of equipment is carried out.<sup>266</sup>

<sup>257</sup> Montreal Protocol; <http://www.environment.go.ke/?p=4803>

<sup>258</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

<sup>259</sup> <http://www.environment.go.ke/?p=4803>

<sup>260</sup> <http://www.environment.go.ke/?p=4803>

<sup>261</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

<sup>262</sup> Montreal Protocol

<sup>263</sup> Regulation 13 of the Environmental Management and Co-ordination (Controlled Substances) Regulations, 2007

<sup>264</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

<sup>265</sup> Montreal Protocol

<sup>266</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

- Encourage recovery or recycling of equipment whenever an overhaul is carried out.<sup>267</sup>
  - Local standards comply with the international standard. As such, there is no gap
- (f) Replace or retrofit such equipment to operate on non-HCFCs refrigerant should also be considered.<sup>268</sup>
- Gradually phasing out equipment to operate on non-HCFCs refrigerant.<sup>269</sup>
  - Local standards comply with the international standard. As such, there is no gap
- (g) When motor vehicle air-conditioners need servicing, make sure that the refrigerants are properly recovered and recycled instead of being vented to the atmosphere.<sup>270</sup>
- Promoting and encouraging recovery and recycling of refrigerants.<sup>271</sup>
  - Local standards comply with the international standard. As such, there is no gap
- (h) Develop/select alternatives mainly in refrigeration, air-conditioning, and foam products that are climate-friendly and do not release CFCs.<sup>272</sup>
- Encouraging use and adoption of technology that mitigates climate change risk.<sup>273</sup>
  - Local standards comply with the international standard. As such, there is no gap
- (i) Quantification of ODPs and reporting.<sup>274</sup>
- There are no corresponding local standards.
  - Companies looking for investment should quantify ODP's and report on the same, in accordance with the international standard.
- (j) Set targets on reduction of ODPs.<sup>275</sup>
- There are no local standards on setting targets on reduction of ODPs.
  - Companies looking for investment should set targets on reduction of ODP's and report on the same, in accordance with the international standard.

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<sup>267</sup> Montreal Protocol

<sup>268</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

<sup>269</sup> Montreal Protocol

<sup>270</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ; Montreal Protocol

<sup>271</sup> Montreal Protocol

<sup>272</sup> <http://projects.worldbank.org/P036004/montreal-protocol-reduction-consumption-ozone-depleting-substances-project?lang=en> ;

<sup>273</sup> Montreal Protocol; Climate Change Act

<sup>274</sup>,GRI Standards

<sup>275</sup> GRI Standards

## 21. Nitrogen oxides (NOX), sulfur oxides (SOX), and other significant air emissions

### Global Reporting Standards (305-7)

- a. Significant air emissions, in kilograms or multiples, for each of the following:
  - i. NOX
  - ii. SOX
  - iii. Persistent organic pollutants (POP)
  - iv. Volatile organic compounds (VOC)
  - v. Hazardous air pollutants (HAP)
  - vi. Particulate matter (PM)
  - vii. Other standard categories of air emissions identified in relevant regulations
- b. Source of the emission factors used.
- c. Standards, methodologies, assumptions, and/or calculation tools used.

### Standards

See Standards 15 – 19 above for the international and local standards and gap analysis.

## 22. Non-compliance with environmental laws and regulations

Environmental compliance relates to an organisation's conformity to environmental laws, regulations, standards under domestic and international laws.

### GRI Reporting Standards (307)

- a. Significant fines and non-monetary sanctions for non-compliance with environmental laws and/or regulations in terms of:
  - i. total monetary value of significant fines;
  - ii. total number of non-monetary sanctions; and
  - iii. cases brought through dispute resolution mechanisms.
- b. If the organisation has not identified any non-compliance with environmental laws and/or regulations, a brief statement of this fact is sufficient.

### Standards

- (a) Develop and implement internal policies in line with local and global standards on environmental compliance.<sup>276</sup>

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<sup>276</sup> Draft Guidelines

<http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/GuidanceNoteonEnvironmentalRegulationandStandardsupdate.pdf>; <https://www.oecd.org/environment/outreach/34499651.pdf>

- No local standards on developing and implementing policies in line with local and global standards on environmental compliance.
  - Companies looking for investment should comply with the international standard.
- (b) Raise awareness within the organisation and within the supply chain relating to environmental compliances and policies adopted by an organisation.<sup>277</sup>
- There are no corresponding local standards. However, Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence.<sup>278</sup> Therefore, an organisation should aim to raise awareness on environmental compliance.
  - Companies looking for investment should comply with the international standard.
- (c) Monitor local and global development on environmental laws and reporting standards.<sup>279</sup>
- There are no corresponding local standards.
  - Companies looking for investment should have internal policies in place to comply with the international standard.

### 23. & 24. Supplier Environmental Assessment

In order to keep track and reduce adverse environmental impacts it is paramount to consider the entire supply chain to achieve a common goal. Businesses are therefore encouraged to support a precautionary approach to environmental challenges.<sup>280</sup>

#### GRI Reporting Standard (308-1)

- a. Percentage of new suppliers that were screened using environmental criteria.

#### GRI Reporting Standards (308-2)

- a. Number of suppliers assessed for environmental impacts.
- b. Number of suppliers identified as having significant actual and potential negative environmental impacts.
- c. Significant actual and potential negative environmental impacts identified in the supply chain.
- d. Percentage of suppliers identified as having significant actual and potential negative environmental impacts with which improvements were agreed upon because of assessment.

<sup>277</sup>

<http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/GuidanceNoteonEnvironmentalRegulationandStandardsupdate.pdf> ; <https://www.oecd.org/environment/outreach/34499651.pdf> ; GRI Standards

<sup>278</sup> Section 7 of the Penal Code Cap 63 , Laws of Kenya

<sup>279</sup>

<http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/GuidanceNoteonEnvironmentalRegulationandStandardsupdate.pdf> ; <https://www.oecd.org/environment/outreach/34499651.pdf>

<sup>280</sup> <https://www.unglobalcompact.org/what-is-gc/mission/principles>

- e. Percentage of suppliers identified as having significant actual and potential negative environmental impacts with which relationships were terminated because of assessment, and why.

### Standards

- (a) Conduct due diligence on new and existing suppliers for environmental impacts and compliance.<sup>281</sup>
- There are no corresponding local standards. However, organisations should take collective responsibility to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources which on interpretation may include conducting due diligence.<sup>282</sup>
  - Companies looking for investment should comply with the international standard. Raising awareness on the need to protect the environment as a collective responsibility will encourage and promote environmental management and compliance at organisation level, stakeholder level and at national level.
- (b) Report on the organisation's awareness of potential negative environmental impacts in the supply chain.<sup>283</sup>
- There are no corresponding local standards.
  - Companies looking for investment should comply with the international standard.
- (c) Undertake initiatives to promote greater environmental responsibility.<sup>284</sup>
- There are no corresponding local standards however, organisation should take collective responsibility in the protection and conservation of the environment, to ensure ecologically sustainable development and use of natural resources<sup>285</sup>.
  - Companies looking for investment should comply with the international standard.
- (d) Implement policies addressing environmental impacts that may include changing an organisation's procurement practices, adjusting performance expectations, capacity building, training, changes to processes, as well as terminating supplier relationships.<sup>286</sup>
- There are no corresponding local standards however, organisations should promote awareness on the importance of sustainable management of the environment and its resources with a view to ensuring a balanced and equitable use of such resources for the benefit of present and future generations.<sup>287</sup>

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<sup>281</sup>

<http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/GuidanceNoteonEnvironmentalRegulationandStandardsupdate.pdf> ; <https://www.oecd.org/environment/outreach/34499651.pdf> ; GRI Standards; ESC 09 FTSE Russell ESG RC5 Data Model Methodology

<sup>282</sup> Article 69 (2) of the Constitution of Kenya

<sup>283</sup> GRI Standards; ESC 10 FTSE Russell ESG RC5 Data Model Methodology

<sup>284</sup> <https://www.unglobalcompact.org/what-is-gc/mission/principles>;

<sup>285</sup> Article 69 (2) of the Constitution of Kenya

<sup>286</sup> GRI Standards ;ESC 08 , ESC 12 FTSE Russell ESG RC5 Data Model Methodology

<sup>287</sup> Article 69 (1) (b) of the Constitution of Kenya

- Companies looking for investment should comply with the international standard.
- (e) Encourage the development and diffusion of environmentally friendly technologies.<sup>288</sup>
- There are no local standards.
  - Promote awareness on the importance of sustainable management of the environment and its resources with a view to ensuring a balanced and equitable use of such resources for the benefit of present and future generations<sup>289</sup>.
  - Companies looking for investment should comply with the international standard.
- (f) Collaborate with suppliers to mitigate negative environmental impacts.<sup>290</sup>
- There are no corresponding local standards however, organisations should take collective responsibility to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
  - Companies looking for investment should comply with the international standard.
- (g) Monitoring of suppliers including disclosure of (a) physical inspection audits, or reporting on number or proportion of suppliers monitored or audited and (b) results and specific action taken on any non-compliance by suppliers.<sup>291</sup>
- There are no corresponding local standards however, organisations should take collective responsibility to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
  - Companies looking for investment should comply with the international standard.
- (h) Formulate and implement supplier /sourcing policies or commitment statement that addresses: energy use, climate change impact including CO2/GHG emissions, water use, biodiversity impacts, Environmental issues, pollution, waste and resource use.<sup>292</sup>
- There are no corresponding local standards however, organisations should take collective responsibility to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
  - Companies looking for investment should comply with the international standard.

## 24 (a) Waste and Land Contamination

<sup>288</sup> <https://www.unglobalcompact.org/what-is-gc/mission/principles>

<sup>289</sup> Article 69 (1) (b) of the Constitution of Kenya

<sup>290</sup> GRI Standards; <https://www.unglobalcompact.org/what-is-gc/mission/principles> ;ESC 10 FTSE Russell ESG RC5 Data Model Methodology

<sup>291</sup> ESC11, FTSE Russell ESG RC5 Data Model Methodology

<sup>292</sup> ESC 02,03,04,05 of FTSE Russell ESG RC5 Data Model Methodology

### GRI Reporting Standard (306 -2)

- a. Total weight of hazardous waste, with a breakdown by the following disposal methods where applicable: i. Reuse; ii. Recycling; iii. Composting; iv. Recovery, including energy recovery; v. Incineration (mass burn); vi. Deep well injection; vii. Landfill; viii. On-site storage.
- b. Total weight of non-hazardous waste, with a breakdown by the following disposal methods where applicable: i. Reuse; ii. Recycling; iii. Composting; iv. Recovery, including energy recovery; v. Incineration (mass burn); vi. Deep well injection; vii. Landfill; viii. On-site storage;
- c. How the waste disposal method has been determined: i. Disposed of directly by the organization, or otherwise directly confirmed; ii. Information provided by the waste disposal contractor; and iii. Organizational defaults of the waste disposal contractor.

### GRI Reporting Standard (306-4)

- a. Total weight for each of the following: i. Hazardous waste transported; ii. Hazardous waste imported; iii. Hazardous waste exported; iv. Hazardous waste treated.
- b. Percentage of hazardous waste shipped internationally.
- c. Standards, methodologies, and assumptions used.

### Standards

- (a) Ensure that the generation of hazardous waste and other wastes is reduced<sup>293</sup>.
  - No person shall discharge or dispose of any wastes, whether generated within or outside Kenya, in such manner as to cause pollution to the environment or ill health to any person.<sup>294</sup>
  - Any person who own or controls a facility or premises which generates waste shall minimize the waste generated by adopting cleaner production principles.<sup>295</sup>
  - Local standards comply with the requirements in the international standard. As such, there is no gap.
- (b) Persons involved in the management of hazardous wastes or other wastes should take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management<sup>296</sup>.
  - The Environmental Management and Co-ordination (Waste Management) Regulations, 2006 ("**Waste Management Regulations**"), provides for the following:
    - (a) The use of waste generators to minimize waste generated and segregation of waste by generator.

<sup>293</sup> Article 2(a) of the Basel Convention

<sup>294</sup> Section 87, Environment Management and Co-ordination Act No. 8 of 1999

<sup>295</sup> Section 6, Waste Management Regulation

<sup>296</sup> Article 2 (c) of the Basel Convention

- (b) Every trade or industrial undertaking shall install at its premises anti-pollution equipment for the treatment of waste emanating from such trade or industrial undertaking;
  - (c) No industry shall discharge or dispose of any waste in any state into the environment unless the waste has been treated in a treatment facility.
  - (d) A licence is required for activity likely to generate hazardous waste (Schedule 1 of the Regulations).
  - (e) If any toxic or hazardous waste is produced, the waste should be treated by incinerators (Schedule 3).
  - (f) A company that generates bio-medical waste shall obtain an EIA Licence.
  - (g) The holder of a mining permit or licence shall ensure that that the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and that disposal any toxic waste is done in the approved areas only.<sup>297</sup>
  - (h) During petroleum operations, dispose of waste oil, salt water and refuse in accordance with good international petroleum industry practice, avoiding pollution.<sup>298</sup>
- Local standards comply with the requirements in the international standards. As such, there is no gap.
- (c) Ensure person involved in the management of hazardous wastes or other wastes take steps to prevent pollution due to hazardous and take steps to minimize consequences thereof.
- Persons involved in waste management and disposal must obtain a licence from NEMA and ensure that the waste disposal site or plant operates in an environmentally sound manner<sup>299</sup>
  - Local standards comply with the requirements in the international standards. As such, there is no gap.
- (d) Should not export hazardous wastes or other wastes to a Party to the Basel Convention, particularly developing countries who have legislated against such import<sup>300</sup>.
- Kenya has ratified the Basel Convention.
  - Local standards comply with international standards. As such, there is no gap.
- (e) No person in a Basel Convention State shall permit hazardous waste or other wastes to be exported to a non-party or to be imported from a non-party<sup>301</sup>.

<sup>297</sup> Section 179, Mining Act

<sup>298</sup> Model Production Sharing Contract – Petroleum (Exploration and Production) Regulations, 1984

<sup>299</sup> Section 11, 12, 13 of the Waste Management Regulations

<sup>300</sup> Article 2(e) of the Basel Convention

<sup>301</sup> Article 5 of the Basel Convention

- Kenya has ratified the Basel Convention.
  - Local standards comply with international standards. As such, there is no gap.
- (f) A person can only transport or dispose hazardous waste if authorised to do so<sup>302</sup>.
- A person may only transport waste with a licence issued by NEMA<sup>303</sup>
  - Local standards comply with the requirements in the international standards. As such, there is no gap.
- (g) Hazardous wastes and other wastes that are to be subject of a transboundary movement should be packaged, labelled, and transported in conformity with international recognised practice<sup>304</sup>.
- Every generator of hazardous waste shall ensure every container or package for storing such waste is securely packaged and labelled.
  - Local standards comply with the requirements in the international standards. As such, there is no gap.
- (h) Hazardous wastes and other wastes should be accompanied by a movement document from the point at which a transboundary movement commences to the point of disposal<sup>305</sup>.
- Kenya has ratified the Basel Convention.
  - Local standards comply with international standards. As such, there is no gap.
- (i) Any export of waste of hazardous waste shall follow the notice and consent provisions in the Basel Convention<sup>306</sup>.
- No person shall export hazardous wastes without a valid permit issued by the Authority and prior consent from the receiving country<sup>307</sup>
  - Local standards comply with the requirements in the international standard. As such, there is no gap.
- (j) Hazardous waste generators should produce a report on wastes that they generate<sup>308</sup>
- Reporting requirement pursuant to an EIA.

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<sup>302</sup> Article 7(a) of the Basel Convention

<sup>303</sup> Section 9, Waste Management Regulations

<sup>304</sup> Article 7(b) of the Basel Convention

<sup>305</sup> Article 7 (c) of the Basel Convention

<sup>306</sup> Article 9 of the Basel Convention

<sup>307</sup> Section 27, Waste Management Regulations

<sup>308</sup> Article 3(a) Bamako Convention

- Local standards comply with the requirements in the international standards. As such, there is no gap.
- (k) Imposition of strict, unlimited liability as well as joint and several liability on hazardous waste generators<sup>309</sup>
- Kenya is party to the Bamako Convention.
  - In petroleum operations, if petroleum operations may endanger persons or property, cause pollution, harm marine life or interfere with navigation and fishing, the Minister of Petroleum and Mining may order the contractor to take reasonable remedial measures or order the contractor to discontinue the relevant petroleum operations until such measures, or mutually agreed alternatives thereto, are implemented<sup>310</sup>.
  - Local standards comply with the requirements in the international standard. As such, there is no gap.
- (l) Transboundary movement of hazardous wastes under the following situations shall be deemed to be illegal traffic<sup>311</sup>:
- i. If carried out without notification;
  - ii. If carried out without consent;
  - iii. If consent is obtained from States concerned through falsification, misrepresentation or fraud;
  - iv. If it does not conform in a material way with the documents; or
  - v. If it results in deliberate disposal of hazardous waste in contravention of international law.
- Kenya is party to the Bamako Convention.
  - Local standards comply with the international standard. As such, there is no gap.
- (m) Land should be managed to avoid contamination and the risk to human health and ecological receptors<sup>312</sup>
- The EIA should contain information relating to<sup>313</sup>:
    - Effect of the proposal on land use and land use potentials; and
    - Effect of the proposal on surrounding land use and land use potential.
  - The holder of a mineral right shall not engage in wasteful mining or treatment practices<sup>314</sup>

<sup>309</sup> Article 3(b) Bamako Convention

<sup>310</sup> Model Production Sharing Contract – Petroleum (Exploration and Production) Regulations, 1984

<sup>311</sup> Article 9 Bamako Convention

<sup>312</sup> IFC – EHS Guidelines on Contaminated Land

<sup>313</sup> Schedule 2, Environment (Impact Assessment and Audit) Regulations, 2003

<sup>314</sup> Section 43, Mining Act

- Any person who dumps any solid, liquid, toxic or other wastes in a forest without authority of the forest manager commits an offence<sup>315</sup>
- Where an environmental auditor is conducting a control audit on a project, the environmental auditor shall identify any source of land contamination<sup>316</sup>
- Companies looking for investment should comply with the international standard.

## SOCIAL

### OBSERVATIONS ON THE INTERNATIONAL AND LOCAL TOPICS AND STANDARDS

During our research into international and local standards, we made the following observations, relevant to social standards in Kenya:

- The laws of Kenya conform to a majority of the international standards with respect to labour topics and standards, human rights and community, and customer responsibility.
- One of the reports taken into account, when analysing the international standards, was the FTSE Russell ESG Data Model – 5th Research Recycle (2018/19) (“**FTSE Russell**”), which is focused on applying the highest industry standards for ESG compliance. We found that these standards are very specific as opposed to the general standards provided by international Conventions. As a result of this, we established that only a few provisions of the labour laws in Kenya conform to the requirements of FTSE Russell. Our recommendation therefore, is that where Kenyan laws do not satisfy the FTSE Russell standard, companies wishing to comply with ESG requirements should make provision for it.
- When preparing the Social international standards, we did not include the requirements that are specific to particular industry sectors, because this Report is general in its nature, in the sense that it is applicable to all companies that wish to comply with ESG requirements. Particularly, we have not included any international standards on Customer Responsibility from FTSE Russell because all the standards on this topic are specific to varying sectors.
- Kenya has ratified a number of international Conventions, which form part of Kenyan law by virtue of Article 2(6) of the Constitution of Kenya which provides that... *any treaty or convention ratified by Kenya shall form part of the law of Kenya...* The Conventions particularly relevant to Social standards are attached to this report as Annexe 1. There are instances where there is no local statute or regulation satisfying the international standard, which is derived from a Convention that has been ratified by Kenya. In this regard, even though Kenyan statutes and regulations do not meet the requirements of the international standard, our analysis is that there is no gap on the basis that the convention has been ratified through the constitution.
- We also took note of at least two discrepancies between some Kenyan statutes and international Conventions ratified by Kenya (thereby forming part of Kenyan law by virtue of article 2(6) of the Constitution of Kenya). An example of the discrepancy is the period provided for maternity leave, by the Employment Act and the Maternity Protection Act Our recommendation is that companies that

<sup>315</sup> Section 8, Forest Conservation and Management Act

<sup>316</sup> Section 35(3), Environment (Impact Assessment and Audit) Regulations, 2003

wish to comply with ESG requirements should make provision for the international standard in their company policies.

- vi. Lastly, on customer privacy standards at Topic 42 below, it is notable that Kenya is yet to enact a law on Data protection. There is therefore a vacuum in terms of local legislation that exhaustively deals with this topic. However, we are aware that on 3 July 2018, the Data Protection Bill (“the Bill”) was introduced to establish a comprehensive data protection regime in Kenya, in tandem with article 31 of the Constitution. The principal object of the Bill is to protect personal data collected, used or stored by both private and public entities. It is now before Parliament, and is awaiting the final reading, before it is presented to the President for assent. Once signed into law, this Act will satisfy the set international standards under customer privacy. In the meantime, our recommendation is that companies wishing to comply with ESG requirements should make provision for the international standards set out for customer privacy.

## **B. CURRENT INTERNATIONAL AND LOCAL (KENYAN) STANDARDS**

### **LABOUR TOPICS AND STANDARDS**

#### **25. Employment**

An employment relationship is a legal relationship between a worker and an organisation that confers rights and obligations to both parties. This relationship is usually the means for determining whether employment or labour law is applicable or whether commercial law is applicable.

#### **GRI Reporting Standards (401)**

- (a) New Employee hires and employee turnover by age group, gender and region
- (b) Benefits, which are standard for full time employees, but are not provided to temporary or part time employees these include as minimum:
- i. life insurance
  - ii. health care
  - iii. disability and invalidity cover
  - iv. parental leave
  - v. retirement provision
  - vi. stock ownership
  - vii. other
- (c)
- i. Total number of employees that were entitled to parental leave by gender
  - ii. Total number that took parental leave
  - iii. Total Number that returned to work
  - iv. Total number that returned to work and were there 12 months later
  - v. Return to work and retention rates by gender

#### **Standards**

(a) Medical care and medical insurance

- i. Employees are entitled to medical care.<sup>317</sup> The classes of employees entitled to medical care are as prescribed by national laws and regulations, and these employees should constitute not less than 50% of all employees of the particular organisation, together with their wives and children.<sup>318</sup>
- If, in a contract of service or collective agreement, provision is made for the payment of any allowance in kind to an employee with the employee's consent, the payment may with such consent be made only if the allowance is for the personal use and benefit of the employee, and does not consist of, or include any intoxicating spirit or noxious drug.<sup>319</sup>
  - An employer should ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness contracted during a period when the employee was present at the workplace.<sup>320</sup>
  - Employees are liable to pay a standard contribution to the National Hospital Insurance Fund. Such contribution should be through monthly deductions from the employee's salary or other remuneration, and the employer of such person is liable to deduct and to pay the contribution to the National Hospital Insurance Fund Management Board, on behalf of the employee.<sup>321</sup>
  - The above international standard subjects the entitlement to medical care for employees to national laws and regulations. On this basis, there is no gap between the international standard and Kenyan statutes, as the latter require employers to ensure standard contribution to the National Hospital Insurance Fund, which is mandatory for employees working in Kenya. Also, the Employment Act requires employers to ensure that there has been medical attendance for employees who contract illnesses while at the workplace.
  - Further, Kenya has ratified the ILO Social Security (Minimum Standards) Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
- ii. A sick employee should not be expected to work. National laws and regulations of a particular state should further elaborate on this.<sup>322</sup>
- After two consecutive months of service with his employer, an employee is entitled to sick leave of not less than 7 days with full pay, and thereafter to sick leave of 7 days with half paying each period of 12 consecutive months of service.<sup>323</sup>
  - On the basis that the international standard is subject to national laws and regulations, local law adequately satisfies the requirements of the international standard; hence there is no gap.

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<sup>317</sup> Part II of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952; article 8 of ILO's Medical Care and Sickness Benefits Convention (No. 130), 1969

<sup>318</sup> Article 9 of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952

<sup>319</sup> Section 17(5) of the Employment Act No. 11 of 2007

<sup>320</sup> Section 34 of the Employment Act No. 11 of 2007

<sup>321</sup> Section 16(1) of the National Hospital Insurance Fund Act No. 9 of 1998

<sup>322</sup> Article 14 of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952

<sup>323</sup> Section 30(1) of the Employment Act No. 11 of 2007

iii. Medical insurance should include general practitioner care, specialist care at hospitals for in-patients and out-patients, essential pharmaceutical supplies, pre-natal and post-natal care in cases of pregnancy and hospitalisation where necessary.<sup>324</sup>

- The benefits that should be paid out of the National Hospital Insurance Fund should include a daily allowance in respect of hospital treatment and such other benefits in respect of medical treatment as may from time to time be prescribed.<sup>325</sup>
- Kenya has ratified the ILO Social Security (Minimum Standards) Convention (No. 102) of 1952. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.

(b) Unemployment benefit

i. Subject to national laws and regulations, employers should encourage freely chosen and productive employment for identified categories of disadvantaged persons having, or liable to have difficulties in finding lasting employment, such as women, young workers, disabled persons, older workers, the long-term unemployed, migrant workers lawfully resident in the country and workers affected by structural change.<sup>326</sup>

- An employer should promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.<sup>327</sup>
- No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status, in respect of recruitment.<sup>328</sup>
- A person seeking employment in Kenya should register with the National Employment Authority. The Authority will establish vacancies available in the private sector and convey this information to the job seekers with qualifications that fit the specifications and qualifications required by the prospective employers.<sup>329</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap. Further, Kenya has ratified the ILO Employment Promotion against Unemployment Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.

(c) Old age benefit

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<sup>324</sup> Article 10 of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952

<sup>325</sup><sup>325</sup> Section 10(1) of the National Hospital Insurance Fund Act Chapter 255 Laws of Kenya

<sup>326</sup> Article 8 of ILO's Employment Promotion and Protection against Unemployment Convention (No. 168), 1988

<sup>327</sup> Section 5(2) of the Employment Act No. 11 of 2007

<sup>328</sup> Section 5(3) of the Employment Act No. 11 of 2007

<sup>329</sup> Sections 20 and 29 of the National Employment Authority Act No. 3 of 2016

- i. The prescribed age for retirement from employment should not be more than 65 years or such higher age as may be fixed by national laws and regulations, with due regard to the working ability of elderly persons in the country concerned.<sup>330</sup>
  - The President may require an officer to retire from the service of the Government at any time after the officer attains the age of fifty years.<sup>331</sup>
  - Section 9 of the Pension Act only provides for the retirement age for government workers, and not those in the private sector. Employers in the private sector may therefore use this provision as a guide as to the laws on retirement age in Kenya.
  - Further, Kenya has ratified the ILO Social Security (Minimum Standards) Convention and the ILO Invalidity, Old Age and Survivors' Benefits Convention, which are the sources of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
  - Therefore, companies in the private sector that wish to comply with ESG standards may use these conventions as a guide relevant to retirement age.
- ii. National laws and regulations should provide for the benefit that a person above the prescribed age should be entitled to. Such entitlement may be suspended if such a person is engaged in gainful activity.<sup>332</sup>
  - It is mandatory for an employer to pay to the National Social Security Fund in respect of each employee in his or her employment, the employer's contribution at 6% of the employee's monthly pensionable earnings, and the employee's contribution at 6% of the employee's pensionable earnings deducted from the employee's earnings.<sup>333</sup> These payments are deemed to be contributions towards the employee's retirement, and payable to an employee upon retirement.<sup>334</sup>
  - An employer may, with the approval of his employees, pay any statutory contributions in respect of such employees into any scheme fund prescribed for that purpose.<sup>335</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

(d) Employment injury benefit

- i. Employees are entitled to compensation for accidents or prescribed diseases resulting from employment.<sup>336</sup> In the event that an employee's injury results in incapacity of work, total loss of earning capacity likely to be permanent, or death, the compensation shall be a periodical payment

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<sup>330</sup> Article 26(2) of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952; articles 14 to 18 of ILO's Invalidity, Old-Age and Survivors' Benefits Convention (No. 128), 1967

<sup>331</sup> Section 9 of the Pensions Act Chapter 189 Laws of Kenya

<sup>332</sup> Article 26(3) of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952

<sup>333</sup> Section 20(1) of the National Social Security Fund Act No. 45 of 2013

<sup>334</sup> Section 36 of the National Social Security Fund Act No. 45 of 2013

<sup>335</sup> Section 33 of the Retirement Benefits Act No. 3 of 1997

<sup>336</sup> Article 32 of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952; article 6 of ILO's Employment Injury Benefits Convention (No. 121), 1964

representing a suitable proportion of the total loss of earning capacity. In the event of death, these periodical payments should be made to the widower / widow and children of such person.<sup>337</sup>

- An employee who is involved in an accident arising out of or in the course of employment, resulting in the employee's disablement or death is entitled to the benefits set out in the Work Injury Benefits Act.<sup>338</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- ii. Each state should prescribe a list of diseases, comprising at least the diseases set out at schedule 1 of ILO's Employment Injury Benefits Convention (No. 121), 1964, which shall be regarded as occupational diseases, or include in its legislation a general definition of occupational diseases broad enough to cover at least the diseases set out at schedule 1 of ILO's Employment Injury Benefits Convention (No. 121), 1964.<sup>339</sup>
  - Schedule 2 of the Work Injury Benefits Act<sup>340</sup> and Schedule 2 of the Occupational Safety and Health Act<sup>341</sup> set out the prescribed occupational diseases under Kenyan law.
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- iii. Such compensation would include medical care, which should comprise general practitioner and specialist in-patient care and out-patient care, dental care, nursing care, maintenance in hospitals, dental, pharmaceutical and other medical or surgical supplies, and care furnished by members of such other professions as may be legally required from time to time.<sup>342</sup>
  - An employer should defray any expenses reasonably incurred by an employee as a result of an accident arising out of, and in the course of employment in respect of the following matters:
    - (a) Dental, medical, surgical or hospital treatment;
    - (b) Skilled nursing services;
    - (c) The supply of medicine and surgical dressing;
    - (d) Travelling and subsistence in connection with the employee's journey for treatment in a place within Kenya; and
    - (e) The supply, maintenance, repair and replacement of artificial limbs, crutches and other appliances and apparatus used by persons who are physically disabled.<sup>343</sup>
  - An employer against whom a claim for compensation under section 26 of the Work Injury Benefits Act is lodged should settle the claim within 90 days of lodging of the claim.<sup>344</sup>
  - An employee who suffers temporary total disablement due to an accident that incapacitates the employee for 3 days or longer is entitled to receive periodical payments equivalent to the employee's

<sup>337</sup> Articles 36 to 38 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952; article 18 of ILO's Employment Injury Benefits Convention (No. 121), 1964

<sup>338</sup> Section 10(1) & (4) of the Work Injury Benefits Act No. 13 of 2007

<sup>339</sup> Article 8 of ILO's Employment Injury Benefits Convention (No. 121), 1964

<sup>340</sup> No. 13 of 2007

<sup>341</sup> No. 15 of 2007

<sup>342</sup> Articles 34(1) and (2) of ILO's Social Security (Minimum Standards) Convention (No. 102), 1952; article 10 of ILO's Employment Injury Benefits Convention (No. 121), 1964

<sup>343</sup> Section 47(1) of the Work Injury Benefits Act No. 13 of 2007

<sup>344</sup> Section 26(4) of the Work Injury Benefits Act No. 13 of 2007

earnings, subject to the minimum and maximum amounts fixed by the Cabinet Secretary for Labour from time to time.<sup>345</sup> The periodical payments should not be made after expiry of a period of 12 months.<sup>346</sup>

- Compensation for permanent disablement should be calculated on the basis of 96 months' earnings subject to the minimum and maximum amounts determined by the Cabinet Secretary in charge of Labour.<sup>347</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- iv. Employers should take measures to prevent industrial accidents and occupational diseases, provide rehabilitation services designed to prepare a disabled person wherever possible for the resumption of his previous activity or other suitable gainful activity.<sup>348</sup>
- Every occupier should ensure the safety, health and welfare at work of all employees working in his workplace.<sup>349</sup>
- If an injury in respect of which compensation is payable causes disablement of such a nature that the employee is unable to perform the essential functions of life without the constant assistance of another person, the Director of Occupational Safety and Health Services should grant an allowance payable by the employer in addition to any other benefit provided under the Work Injury Benefits Act towards the cost of such help as may be required for a specified period.<sup>350</sup>
- The provisions of the Occupational Safety and Health Act and the Work Injury Benefits Act are set within the spirit of international standards; hence there is no gap.
- v. Employers should treat migrant workers the same way as nationals, as regards employment injury benefits.<sup>351</sup>
- An employer should promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.<sup>352</sup>
- An employer should not discriminate directly or indirectly, against an employee or prospective employee, or harass an employee or prospective employee on grounds of race, colour, language or nationality.<sup>353</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.

(e) Family benefit

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<sup>345</sup> Section 28(1) of the Work Injury Benefits Act No. 13 of 2007

<sup>346</sup> Section 28(3) of the Work Injury Benefits Act No. 13 of 2007

<sup>347</sup> Section 30(1) of the Work Injury Benefits Act No. 13 of 2007

<sup>348</sup> Article 26 of ILO's Employment Injury Benefits Convention (No. 121), 1964

<sup>349</sup> Section 6(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>350</sup> Section 15(1) of the Work Injury Benefits Act No. 13 of 2007

<sup>351</sup> Article 27 of ILO's Employment Injury Benefits Convention (No. 121), 1964

<sup>352</sup> Section 5(2) of the Employment Act No. 11 of 2007

<sup>353</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

- i. This covers responsibility for the maintenance of children, as prescribed by national laws and regulations.<sup>354</sup> Employees are entitled to a periodical payment or the provision of food, clothing, housing, holidays or domestic help, for purposes of maintenance of their children.<sup>355</sup>
- Kenya has ratified the ILO Social Security (Minimum Standards) Convention (No. 102) of 1952. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.
  - On the above basis, there is no gap between the international standard and the local standard
- (f) Women in employment and maternity benefit
- i. Female employees are entitled to maternity medical care, which should include at least, pre-natal, confinement and post-natal care either by medical practitioners or by qualified midwives, and hospitalisation where necessary.<sup>356</sup>
- If, in a contract of service or collective agreement, provision is made for the payment of any allowance in kind to an employee with the employee's consent, the payment may with such consent be made only if the allowance is for the personal use and benefit of the employee, and does not consist of, or include any intoxicating spirit or noxious drug.<sup>357</sup>
  - An employer should ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness contracted during a period when the employee was present at the workplace.<sup>358</sup>
  - Employees are liable to pay a standard contribution to the National Hospital Insurance Fund. Such contribution should be through monthly deductions from the employee's salary or other remuneration, and the employer of such person is liable to deduct and to pay the contribution to the National Hospital Insurance Fund Management Board, on behalf of the employee.<sup>359</sup>
  - The Employment Act and the National Hospital Insurance Fund Act are set within the spirit of the international standard. In addition to this, Kenya has ratified the ILO Social Security (Minimum Standards) Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
- ii. Women falling under the maternity benefit are entitled to periodical payment (a total of their previous earnings).<sup>360</sup>
- Women in maternity leave are entitled to full pay.<sup>361</sup>
  - Local law adequately satisfies the requirements of the international standard.

<sup>354</sup> Article 40 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>355</sup> Article 42 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>356</sup> Article 49(1) and (2) of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>357</sup> Section 17(5) of the Employment Act No. 11 of 2007

<sup>358</sup> Section 34 of the Employment Act No. 11 of 2007

<sup>359</sup> Section 16(1) of the National Hospital Insurance Fund Act No. 9 of 1998

<sup>360</sup> Article 50, read together with article 65 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>361</sup> Section 29(1) of the Employment Act No. 11 of 2007

- iii. Employers should ensure that appropriate measures are adopted to ensure that pregnant or breastfeeding women are not obliged to perform work which is prejudicial to the health of the mother or child.<sup>362</sup>
- Employers should not dismiss an employee, injure the employee, or discriminate against or disadvantage an employee in respect of the employee's employment, or alter the employee's position to the detriment of the employee by reason only that the employee has made a complaint about a matter which the employee considers is not safe or is a risk to his health.<sup>363</sup>
  - An employee who has left a work place, which the employee has reasonable justification to believe presents imminent and serious danger to life and health should not be dismissed, discriminated against or disadvantaged for such action by the employer.<sup>364</sup>
  - Although the Occupational Health and Safety Act does not make a specific provision in relation to pregnant and lactating mothers, the above provisions are set within the spirit of international standards.
  - In addition to this, Kenya has ratified the ILO Maternity Protection Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
- iv. Women are entitled to maternity leave of not less than 14 weeks.<sup>365</sup>
- A female employee is entitled to 3 months maternity leave with full pay.<sup>366</sup>
  - Kenya has ratified the ILO Maternity Protection Convention (No. 183) of 2000. In accordance with article 2(6) of the Constitution of Kenya, the standard also forms part of the laws of Kenya.
  - From a reading of the international standard derived from the ILO Maternity Protection Convention and the provision under the Employment Act, one notes that there is a disparity between the periods of maternity leave. The international standard provides for 14 weeks of maternity leave while the Employment Act provides for 3 months, which equates to 12 weeks.
  - Kenya has ratified the ILO Maternity Protection Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
  - There is therefore a contradiction between the two laws. Companies in Kenya however generally comply with the provisions of the Employment Act as far as maternity leave is concerned. For companies looking to meet the ESG requirements, it is advisable for employers to comply with the international standard.
- v. Women are entitled to leave, before and after the maternity leave period in the case of illness, complications or risk of complications arising out of pregnancy or childbirth. The nature and the

<sup>362</sup> Article 3 of ILO's Maternity Protection Convention (No. 183), 2000

<sup>363</sup> Article 8(1)(a) of the Occupational Safety and Health Act No. 15 of 2007

<sup>364</sup> Section 14(2) of the Occupational Safety and Health Act No. 15 of 2007

<sup>365</sup> Article 4(1) of ILO's Maternity protection Convention (No. 183), 2000

<sup>366</sup> Section 29(1) of the Employment Act No. 11 of 2007

maximum duration of such leave may be specified in accordance with national laws and regulations.<sup>367</sup>

- Where the maternity leave has been extended with the consent of the employer, or immediately on expiry of maternity leave before resuming her duties, a female employee proceeds on sick leave or with the consent of the employer, on annual leave, compassionate leave or any other leave, the 3 months maternity leave will be deemed to expire on the last day of such extended leave.<sup>368</sup>
  - After two consecutive months of service with his employer, an employee is entitled to sick leave of not less than 7 days with full pay, and thereafter to sick leave of 7 days with half paying each period of 12 consecutive months of service.<sup>369</sup>
  - Local law adequately satisfies the requirements of the international standard.
- vi. Medical benefits should be provided to the woman and her child in accordance with national laws and regulations. Medical benefits include prenatal, childbirth and post-natal care, as well as hospitalisation care where necessary.<sup>370</sup>
- If, in a contract of service or collective agreement, provision is made for the payment of any allowance in kind to an employee with the employee's consent, the payment may with such consent be made only if the allowance is for the personal use and benefit of the employee, and does not consist of, or include any intoxicating spirit or noxious drug.<sup>371</sup>
  - An employer should ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness contracted during a period when the employee was present at the workplace.<sup>372</sup>
  - Employees are liable to pay a standard contribution to the National Hospital Insurance Fund. Such contribution should be through monthly deductions from the employee's salary or other remuneration, and the employer of such person is liable to deduct and to pay the contribution to the National Hospital Insurance Fund Management Board, on behalf of the employee.<sup>373</sup>
  - Local law adequately satisfies the requirements of the international standard.
- vii. It is unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave (maternity leave or leave due to sickness) during a period following her return to work, except on grounds unrelated to the pregnancy or childbirth.<sup>374</sup>
- On expiry of a female employee's maternity leave, the female employee has the right to return to the job which he held immediately prior to her maternity leave or to a reasonable suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.<sup>375</sup>

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<sup>367</sup> Article 5 of ILO's Maternity protection Convention (No. 183), 2000

<sup>368</sup> Section 29(3) of the Employment Act No. 11 of 2007

<sup>369</sup> Section 30(1) of the Employment Act No. 11 of 2007

<sup>370</sup> Article 6(7) of ILO's Maternity protection Convention (No. 183), 2000

<sup>371</sup> Section 17(5) of the Employment Act No. 11 of 2007

<sup>372</sup> Section 34 of the Employment Act No. 11 of 2007

<sup>373</sup> Section 16(1) of the National Hospital Insurance Fund Act No. 9 of 1998

<sup>374</sup> Article 8(1) of ILO's Maternity protection Convention (No. 183), 2000

<sup>375</sup> Section 29(2) of the Employment Act No. 11 of 2007

- A female employee's pregnancy or any reason connected with her pregnancy does not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty.<sup>376</sup>
  - Local law adequately satisfies the requirements of the international standard.
- viii. A woman is guaranteed the right to return to the same position or an equivalent position, and paid at the same rate at the end of her maternity leave.<sup>377</sup>
- On expiry of a female employee's maternity leave, the female employee has the right to return to the job which she held immediately prior to her maternity leave or to a reasonable suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.<sup>378</sup>
  - Local law adequately satisfies the requirements of the international standard.
- ix. Maternity should not constitute a source of discrimination in employment, and this includes a prohibition from requiring a test for pregnancy when a woman is applying for employment.<sup>379</sup>
- An employer should not discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of pregnancy,<sup>380</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>381</sup>
  - Local law adequately satisfies the requirements of the international standard.
- x. A woman has the right to take one or more daily breaks or a daily reduction of hours of work to breastfeed her child. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.<sup>382</sup>
- Kenya has ratified the ILO Maternity Protection Convention (No. 183) of 2000. In accordance with article 2(6) of the Constitution of Kenya, the standard forms part of the laws of Kenya.
  - On the above basis, there is no gap between the international standard and the local standard
- xi. Employers should provide support services and facilities, such as on-site child care at workplaces and flexible working arrangements for women.<sup>383</sup>
- No local standard.

<sup>376</sup> Section 46(a) of the Employment Act No. 11 of 2007

<sup>377</sup> Article 8(2) of ILO's Maternity protection Convention (No. 183), 2000

<sup>378</sup> Section 29(2) of the Employment Act No. 11 of 2007

<sup>379</sup> Article 9 of ILO's Maternity protection Convention (No. 183), 2000

<sup>380</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>381</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>382</sup> Article 10 of ILO's Maternity protection Convention (No. 183), 2000

<sup>383</sup> Article 180(b) of the Beijing Declaration and Platform for Action) Fourth World Conference on Women

- There is no legal requirement for employers to provide on-site child care at workplaces and flexible working arrangements. Therefore, companies looking to comply with ESG requirements should implement this international standard.
- xii. Governments should enact and enforce laws against sexual and other forms of harassment in all workplaces.<sup>384</sup>
- An employer who employs 20 or more employees should issue a policy statement on sexual harassment after consultation with the employees or their representatives. This policy should be brought to the attention of all employees. The policy should stipulate:
    - (a) That every employee is entitled to employment that is free of sexual harassment;
    - (b) That the employer will take steps to ensure that no employee is subjected to sexual harassment;
    - (c) That the employer will take disciplinary measures against any person who subjects any employee to sexual harassment;
    - (d) How complaints of sexual harassment may be brought to the attention of the employer; and
    - (e) That the employer will not disclose the name of the complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.<sup>385</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (g) Disability and invalidity benefit
- i. This benefit covers inability to engage in any gainful activity to an extent prescribed by national laws and regulations, which inability is likely to be permanent or persists after the exhaustion of sickness benefit.<sup>386</sup> Such employees are entitled to periodical payment, and such payment would vary for different categories of employees.<sup>387</sup>
- The Persons with Disabilities Act establishes the National Development Fund for persons with disabilities as a permanent fund, and the income therefrom should be for the benefit of persons with disabilities in Kenya.<sup>388</sup>
  - A member of the National Social Security Fund will be entitled to invalidity pension if he suffers mental or physical disability of a permanent total incapacity as certified by a medical board, and had made not less than 36 monthly contributions immediately preceding the date of the invalidity.<sup>389</sup>
  - The provisions of the Persons with Disabilities Act and the National Social Security Fund Act are set within the spirit of international standards.

<sup>384</sup> Article 180(c) of the Beijing Declaration and Platform for Action) Fourth World Conference on Women; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS30 at page 89

<sup>385</sup> Section 6(3) of the Employment Act No. 11 of 2007

<sup>386</sup> Article 54 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>387</sup> Article 56 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>388</sup> Section 32 of the Persons with Disabilities Act No. 14 of 2003

<sup>389</sup> Section 38(1) of the National Social Security Fund No. 45 of 2013

- Further, Kenya has ratified the ILO Social Security (Minimum Standards) Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.

ii. Such payment would be granted throughout a specified period, or until the old age benefit becomes payable.<sup>390</sup>

- Kenya has ratified the ILO Social Security (Minimum Standards) Convention (No. 102) of 1952. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.

- On the above basis, there is no gap between the international standard and the local standard

(h) Survivors' benefit

i. This benefit covers loss of support suffered by a widow or child as a result of the death of the breadwinner. In the case of the widow, the right to benefit is conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.<sup>391</sup>

- A survivors' pension should be paid to the dependents, if a member of the National Social Security Fund dies before pensionable age and was contributing to the pension fund at the time of his death, and not less than 36 monthly contributions had been made by the said member immediately preceding the date of death.<sup>392</sup>

- Local law adequately satisfies the requirements of the international standard; hence there is no gap.

ii. This benefit also extends to the beneficiaries of the breadwinner.<sup>393</sup>

- Kenya has ratified the ILO Invalidity, Old Age and Survivors' Benefits Convention (no. 128) of 1967. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.

- On the above basis, there is no gap between the international standard and the local standard

iii. Persons falling under this benefit shall be entitled to periodical payment, as prescribed by national laws and regulations.<sup>394</sup>

- Kenya has ratified the ILO Social Security (Minimum Standards) Convention (No. 102) of 1952. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.

- On the above basis, there is no gap between the international standard and the local standard

(i) Equality of treatment of non-national residents

<sup>390</sup> Article 58 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>391</sup> Article 60 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>392</sup> Section 37(1) of the National Social Security Fund No. 45 of 2013

<sup>393</sup> Article 22(1)(b) of ILO's Invalidity, Old Age and Survivors' Benefits Convention (No. 128), 1967

<sup>394</sup> Article 62 of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

- i. Non-national residents should have the same rights at the workplace as national residents.<sup>395</sup>
- It is the duty of the Cabinet Secretary in charge of labour, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.<sup>396</sup>
  - An employer should not discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.<sup>397</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (j) Family responsibilities
- i. In promoting harmonisation of work and family responsibilities for women and men, employers should adopt appropriate measures so that women and men are able to take temporary leave from employment, have transferable employment and retirement benefits and make arrangements to modify work hours without sacrificing their prospects for development and advancement at work and in their careers.<sup>398</sup>
- A female employee is entitled to 3 months maternity leave with full pay.<sup>399</sup>
  - A male employee is entitled to 2 weeks paternity leave with full pay.<sup>400</sup>
  - Other than provision of maternity and paternity leave, the Employment Act does not provide for any special leave or special treatment that men and women with family responsibilities should enjoy. Therefore, companies looking to comply with ESG requirements should consider incorporating this international standard into their policies.
- ii. Persons with family responsibilities who are engaged / wish to engage in employment should exercise this right without being subject to discrimination and without conflict between their employment and family responsibilities.<sup>401</sup>
- Employers should not discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>402</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

<sup>395</sup> Article 68(1) of ILO's Social Security (Minimum Standards) Convention (No.102), 1952

<sup>396</sup> Section 5(1)(b) of Employment Act No. 11 of 2007

<sup>397</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>398</sup> Article 180(a) of the Beijing Declaration and Platform for Action) Fourth World Conference on Women

<sup>399</sup> Section 29(1) of the Employment Act No. 11 of 2007

<sup>400</sup> Section 29(8) of the Employment Act No. 11 of 2007

<sup>401</sup> Article 3 of ILO's Workers with family responsibilities convention (No. 156), 1981

<sup>402</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

- iii. Measures compatible with national conditions and possibilities should take account of the needs of workers with family responsibilities in community planning, and to develop community services, public or private, such as child care and family services and facilities.<sup>403</sup>
    - Kenya has ratified the ILO Workers with Family Responsibilities Convention (No. 156) of 1981. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.
    - On the above basis, there is no gap between the international standard and the local standard
  - iv. Measures compatible with national conditions and possibilities shall be taken to enable workers with family responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities.<sup>404</sup>
    - Kenya has ratified the ILO Workers with Family Responsibilities Convention (No. 156) of 1981. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.
    - On the above basis, there is no gap between the international standard and the local standard
  - v. Family responsibilities will not constitute a valid reason for termination of employment.<sup>405</sup>
    - No employer should terminate the employment of an employee unfairly.<sup>406</sup> A termination of employment by an employer is unfair if the employer fails to prove:
      - (a) That the reason for termination is valid;
      - (b) That the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility, or based on the operational requirements of the employer; and
      - (c) That the employment was terminated in accordance with fair procedure.<sup>407</sup>
    - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (k) Employee remuneration
- i. Each state should establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that the coverage would be appropriate.<sup>408</sup>
    - The Cabinet Secretary in charge of labour practices in Kenya has a duty to establish a General Wages Council, an Agricultural Wages Council and an Export Processing Zones Wages Council, whose functions shall be to:
      - (a) Investigate the remuneration and conditions of employment in any sector;

<sup>403</sup> Article 5 of ILO's Workers with family responsibilities convention (No. 156), 1981

<sup>404</sup> Article 7 of ILO's Workers with family responsibilities convention (No. 156), 1981

<sup>405</sup> Article 8 of ILO's Workers with family responsibilities convention (No. 156), 1981

<sup>406</sup> Section 45(1) of the Employment Act No. 11 of 2007

<sup>407</sup> Section 45(2) of the Employment Act No. 11 of 2007

<sup>408</sup> Article 1 of ILO's Minimum Wage Fixing Convention (No. 131), 1970; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS08 at page 88; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS14 at page 88

- (b) Invite and consider written and oral representations from interested parties; and
  - (c) Make recommendations to the Cabinet Secretary on minimum wage remuneration and conditions of employment.<sup>409</sup>
- After considering the recommendations of the wages council, the Cabinet Secretary should publish a wages order in the Kenya Gazette. The wages order should constitute the minimum rates of remuneration or conditions of employment, which cannot be varied by agreement.<sup>410</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- ii. Set minimum wages should not be abated, and failure to apply them should make the person or persons concerned liable to appropriate penal or other sanctions.<sup>411</sup>
- Every worker has the right to fair remuneration.<sup>412</sup>
  - If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, then the remuneration established by the wages order should be inserted in the contract in substitution of those terms.<sup>413</sup>
  - An employer who fails to pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration commits an offence. If an employer is found guilty of this offence, the court may, in addition to any other penalty, order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.<sup>414</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (l) Paid educational leave
- i. Employees are entitled to paid educational leave. Paid educational leave should not be denied to workers on the ground of race, colour, sex, religion, political opinion, national extraction or social origin.<sup>415</sup>
- Kenya has ratified the ILO Paid Education Leave Convention (No. 140) of 1974. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.
  - On the above basis, there is no gap between the international standard and the local standard
- (m) Holidays with pay

<sup>409</sup> Sections 43 and 44 of the Labour Institutions Act No. 12 of 2007

<sup>410</sup> Sections 46 and 48 of the Labour Institutions Act No. 12 of 2007

<sup>411</sup> Article 2(1) of ILO's Minimum Wage Fixing Convention (No. 131), 1970

<sup>412</sup> Article 41(2)(a) of the Constitution of Kenya 2010

<sup>413</sup> Section 48(1)(b) of the Labour Institutions Act No. 12 of 2007

<sup>414</sup> Section 48(3) of the Labour Institutions Act No. 12 of 2007

<sup>415</sup> Article 8 of ILO's Paid education leave convention (No.140), 1974

- i. Employees are entitled to an annual paid holiday of a specified minimum length, specified by national laws and regulations. The length however, should not be less than three working weeks for one year of service.<sup>416</sup>
  - An employee is entitled to not less than 21 working days of leave with full pay, after every 12 consecutive months of service with his employer.<sup>417</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- ii. A minimum period of service may be required for entitlement to any annual holiday with pay. This period shall be determined through the appropriate machinery in the country concerned. However, such period cannot exceed 6 months.<sup>418</sup>
  - For 21 days of annual leave, an employee ought to have completed 12 consecutive months of service with his employer.<sup>419</sup>
  - Kenya has ratified the ILO Holidays with Pay Convention (No. 132) of 1970. In accordance with article 2(6) of the Constitution of Kenya, the standard also forms part of the laws of Kenya.
  - From a reading of the international standard and the provision under the Employment Act, one notes that there is a disparity between the limit for the period of service for entitlement to any annual holiday with pay. The international standard provides for a limit of 6 months while the Employment Act provides for 12 months.
  - Kenya has ratified the ILO Holidays with Pay Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
  - There is therefore a contradiction between the two laws. Companies in Kenya however generally comply with the provisions of the Employment Act in terms of the period of service for entitlement to any annual holiday with pay.
  - Companies looking to comply with ESG standards should conform to this international standard.
- iii. Public and customary holiday should not be counted as part of the minimum annual holiday.<sup>420</sup>
  - An employee is entitled to not less than 21 working days of leave with full pay, after every 12 consecutive months of service with his employer.<sup>421</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

<sup>416</sup> Article 3 of ILO's Holidays with pay convention (No. 132), 1970

<sup>417</sup> Section 28(1)(a) of the Employment Act No. 11 of 2007

<sup>418</sup> Article 5(1) and (2) of ILO's Holidays with pay convention (No. 132), 1970

<sup>419</sup> Section 28(1)(a) of the Employment Act No. 11 of 2007

<sup>420</sup> Article 6(1) of ILO's Holidays with pay convention (No. 132), 1970

<sup>421</sup> Section 28(1)(a) of the Employment Act No. 11 of 2007

- iv. Periods of incapacity for work resulting from sickness or injury should not be counted as part of the minimum annual holiday. National laws and regulations may set out what conditions have to be met.<sup>422</sup>
- After two consecutive months of service with his employer, an employee is entitled to sick leave of not less than 7 days with full pay, and thereafter to sick leave of 7 days with half paying each period of 12 consecutive months of service.<sup>423</sup> The Employment Act provides for both sick leave and annual leave separately.<sup>424</sup>
  - The provisions of the Employment Act are set within the spirit of international standards.
- v. Every person taking a holiday should receive in respect of the full period of that holiday at least his normal remuneration.<sup>425</sup>
- An employee is entitled to not less than 21 working days of leave with full pay, after every 12 consecutive months of service with his employer.<sup>426</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- vi. Unless fixed by national laws and regulations, the time at which the holiday is to be taken is to be determined by the employer, after consultation with the employed person.<sup>427</sup>
- Unless otherwise provided for in an agreement between the employer and the employee, or in a collective agreement, an employer may divide the minimum annual leave entitlement into different parts to be taken at different intervals, upon receiving the employee's consent.<sup>428</sup> One part of these parts should consist of at least 2 uninterrupted working weeks.<sup>429</sup> This 2 week period should be granted and taken during the 12 consecutive months of service with the employee's employer, and the remainder of the annual leave with pay to be taken not later than 18 months from the end of the leave earning period.<sup>430</sup>
  - On the basis that the international standard is subject to national laws and regulations, local law adequately satisfies the requirements of the international standard; hence there is no gap.
- vii. Upon termination of employment, a person who has completed a minimum period of service (length of which shall be determined by national laws and regulations, but shall not exceed 6 months) should receive a holiday with pay proportionate to the length of service for which he has not received such a holiday, or compensation in lieu thereof, or the equivalent holiday credit.<sup>431</sup>

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<sup>422</sup> Article 6(2) of ILO's Holidays with pay convention (No. 132), 1970

<sup>423</sup> Section 30(1) of the Employment Act No. 11 of 2007

<sup>424</sup> Sections 28 and 30 of the Employment Act

<sup>425</sup> Article 7(10) of ILO's Holidays with pay convention (No. 132), 1970

<sup>426</sup> Section 28(1)(a) of the Employment Act No. 11 of 2007

<sup>427</sup> Article 10(1) of ILO's Holidays with pay convention (No. 132), 1970

<sup>428</sup> Section 28(2) of the Employment Act No. 11 of 2007

<sup>429</sup> Section 28(3) of the Employment Act No. 11 of 2007

<sup>430</sup> Section 28(4) of the Employment Act No. 11 of 2007

<sup>431</sup> Article 11 of ILO's Holidays with pay convention (No. 132), 1970

- Where employment is terminated after completion of two or more consecutive months of service, an employee is entitled to not less than 1.75 days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.<sup>432</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.

(n) Migrant workers

- i. Migrant workers should enjoy the same treatment accorded to nationals of the particular state, in respect of remuneration, conditions of work and terms of employment.<sup>433</sup>
- It is the duty of the Cabinet Secretary in charge of labour, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of a migrant worker, lawfully within Kenya.<sup>434</sup>
  - An employer should promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.<sup>435</sup>
  - An employer should not discriminate directly or indirectly, against an employee or prospective employee, or harass an employee or prospective employee on grounds of race, colour, language or nationality.<sup>436</sup>
  - An employer should pay his employees equal remuneration for work of equal value.<sup>437</sup>
  - Local laws adequately satisfies the requirements of the international standard; hence there is no gap.

(o) Hours of work

- i. The working hours of persons employed in any public or private industrial undertaking or in any branch thereof, should not exceed 8 hours in the day, and 48 hours in the week.<sup>438</sup> This limit of hours of work may be exceeded:
- In case of accident, actual or threatened, or in case of urgent work to be done to machinery or plant, or in case of "force majeure", but only so far as may be necessary to avoid serious interference with the ordinary working of the undertaking.<sup>439</sup>
  - In those processes which are required because of the nature of the process to be carried on continuously by a succession of shifts, subject to the condition that the working hours shall not exceed fifty-six in the week on the average. Such regulation of the hours of work shall in no

<sup>432</sup> Section 28(1)(b) of the Employment Act No. 11 of 2007

<sup>433</sup> Article 25(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their families

<sup>434</sup> Section 5(1)(b) of the Employment Act No. 11 of 2007

<sup>435</sup> Section 5(2) of the Employment Act No. 11 of 2007

<sup>436</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>437</sup> Section 5(5) of the Employment Act No. 11 of 2007

<sup>438</sup> Article 2 of ILO's Hours of Work (Industry) Convention (No. 001) 1919; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS07 at page 88; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS14 at page 88

<sup>439</sup> Article 3 of ILO's Hours of Work (Industry) Convention (No. 001) 1919

case affect any rest days which may be secured by the national law to the workers in such processes in compensation for the weekly rest day.<sup>440</sup>

ii. The hours of work of persons working in the following establishments should not exceed 48 hours in the week and 8 hours in the day:

- commercial or trading establishments, including postal, telegraph and telephone services and commercial or trading branches of any other establishments;
- establishments and administrative services in which the persons employed are mainly engaged in office work; and
- mixed commercial and industrial establishments, unless they are deemed to be industrial establishments.<sup>441</sup>

- An employer should regulate the working hours of each employee. An employee should be entitled to at least 1 rest day in every period of 7 days.<sup>442</sup>
- Kenya has ratified the ILO Hours of Work (Industry) Convention (No. 001) of 1919, and the ILO Hours of Work (Commerce & Offices) Convention (No. 030) of 1930. In accordance with article 2(6) of the Constitution of Kenya, the standard also forms part of the laws of Kenya.
- The Employment Act does not prescribe the maximum number of hours an employee should work for in day, and section 27 gives the employer the discretion to make a determination on this matter. Notably, Kenya has ratified the conventions setting out the international standards on hours of work. Therefore, a company that is keen comply with ESG requirements should make provision for this international standard.

(p) Multinational enterprises

i. Multinational enterprises situated in various states should respect the rights of employees, giving regard to the applicable law and prevailing labour relations and employment practices and applicable international labour standards.<sup>443</sup>

- An employer is defined as any person, public body, firm, corporation or company which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such a person, public body, firm, corporation or company.<sup>444</sup>
- Terms and conditions of employment set out in the Employment Act of Kenya constitute the minimum terms and conditions of employment of an employee and any agreement to relinquish vary or amend the said terms will be null and void.<sup>445</sup>

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<sup>440</sup> Article 3 of ILO's Hours of Work (Industry) Convention (No. 001) 1919

<sup>441</sup> Article 3 of the Hours of Work (Commerce & Offices) Convention (No. 030) 1930; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS07 at page 88; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS14 at page 88

<sup>442</sup> Section 27 of the Employment Act No. 11 of 2007

<sup>443</sup> Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>444</sup> Section 2 of the Employment Act No. 11 of 2007

<sup>445</sup> Section 3(6) of the Employment Act No. 11 of 2007

- A multinational enterprise falls within the description of an employer under the Employment Act. Therefore, local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- ii. In considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, multinational enterprises should provide reasonable notice of such changes to representatives of the workers in their employment and their organisations. Multinational enterprises should also co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects.<sup>446</sup>
- If an employer wishes to terminate an employment contract on account of redundancy, the employer has to notify the trade union to which the employee is a member (if the employee is a member of a trade union), and the labour officer in charge of the area where the employee is employed, of the reasons for, and the extent of the intended redundancy not less than 1 month prior to the date of the intended date of termination on account of redundancy.<sup>447</sup> Where the employee is not a member of a trade union, the employer should notify the employee personally in writing, and the labour office.<sup>448</sup>
  - Local laws adequately satisfies the requirements of the international standard; hence there is no gap.
- iii. Multinational enterprises should give priority to the employment, occupational development, promotion and advancement of nationals of the host country at all levels in cooperation.<sup>449</sup>
- The National Employment Authority Act which has the purpose of providing a framework and facilitation of employment of Kenyans in the national government, the private sector and the informal sector in Kenya,<sup>450</sup> defines an employer as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.<sup>451</sup>
  - The National Employment Authority of Kenya encourages private and public institutions to employ Kenyans in all positions, including positions of leadership and management.<sup>452</sup> The Government of Kenya shall take affirmative action measures and actions designed to promote the employment of Kenyans in management and other levels of employment regardless of their years of employment.<sup>453</sup>
  - Local laws adequately satisfies the requirements of the international standard; hence there is no gap.

## 26. Labour / Management Relations

This is an organisation's consultative practices with employees and their representatives, including its approach to communicating significant operational changes.

<sup>446</sup> Clause 6 of Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>447</sup> Section 40(1)(a) of the Employment Act No. 11 of 2007

<sup>448</sup> Section 40(1)(b) of the Employment Act No. 11 of 2007

<sup>449</sup> Article 1 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

<sup>450</sup> Section 3 of the National Employment Authority Act No. 3 of 2016

<sup>451</sup> Section 2 of the National Employment Authority Act No. 3 of 2016

<sup>452</sup> Section 37(1) of the National Employment Authority Act No. 3 of 2016

<sup>453</sup> Section 37(3) of the National Employment Authority Act No. 3 of 2016

## GRI Reporting Standards (402)

- a. Minimum number of weeks' notice provided to employees prior to implementation of significant operational changes that could affect them
- b. For organisations with collective bargaining agreements report whether the notice period and provisions for consultation and negotiation are specified in collective agreements.

### Standards

- (a) Both workers and employers have the right to establish and join organisations of their own choosing without interference from public authorities. In exercising this right, workers and employers shall have due regard to the law of the land (the law of the land shall not be such as to impair this right).<sup>454</sup>
  - Every worker has the right to form, join or participate in the activities and programmes of a trade union.<sup>455</sup> Every employer has the right to form and join an employer's organisation and to participate in its activities and programmes.<sup>456</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Employees are entitled to join trade unions. An employer cannot dismiss or otherwise prejudice a worker by reason of his membership to a particular trade union.<sup>457</sup>
  - Every worker has the right to form, join or participate in the activities and programmes of a trade union.<sup>458</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (c) Employees have a right to enter into collective bargaining agreements (agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other hand). Collective bargaining agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Stipulations in employment contracts which are contrary to a collective bargaining agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective bargaining agreement.<sup>459</sup>

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<sup>454</sup> Articles 2 – 9 of ILO's Freedom of Association and Protection of the Right to Organise Convention (No. 87), 1948; article 48 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

<sup>455</sup> Article 41(2)(c) of the Constitution of Kenya 2010

<sup>456</sup> Article 41(3) of the Constitution of Kenya 2010

<sup>457</sup> Article 1 of ILO's Right to Organise and Collective Bargaining Convention (No. 98), 1949; article 48 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); Paragraph 1(b), Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>458</sup> Article 41(2)(c) of the Constitution of Kenya 2010

<sup>459</sup> Articles 1 – 3 of ILO's Collective Agreements Recommendation (No. 91), 1951; articles 5 and 6 of Collective Bargaining Convention (No. 154), 1981; article 55 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); Paragraph 2(a), Section V of the OECD Guidelines for Multinational Enterprises (2011)

- Every trade union, employers' organisation and employer has the right to engage in collective bargaining.<sup>460</sup>
  - A collective agreement binds the parties to the agreement, all unionisable employees employed by the employer, or the employers who are, or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.<sup>461</sup>
  - The terms of the collective agreement should be incorporated into the contract of employment of every employee covered by the collective agreement.<sup>462</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (d) Employers and workers should promote consultation and cooperation on matters of mutual concern not within the scope of collective bargaining machinery, or not normally dealt with by other machinery concerned with the determination of terms and conditions of employment.<sup>463</sup>
- No local standard
  - This international standard is not a requirement under Kenyan legislation. Therefore, companies that are keen to comply with ESG requirements should make provision for it.
- (e) Employers should provide information to workers' representatives which is needed for meaningful negotiations on conditions of employment, and enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.<sup>464</sup>
- An employer should disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.<sup>465</sup>
  - The Labour Relations Act are set within the spirit of international standards; hence there is no gap.
- (f) Workers' representatives should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.<sup>466</sup>
- The following do not constitute fair reasons for dismissal or imposition of a disciplinary penalty:
    - (a) An employee's membership or proposed membership of a trade union;
    - (b) The participation or proposed participation of an employee in the activities of a trade union outside working hours, or, with the consent of the employer, within working hours; and/or

<sup>460</sup> Article 41(5) of the Constitution of Kenya 2010

<sup>461</sup> Section 59(1) of the Labour Relations Act No. 14 of 2007

<sup>462</sup> Section 59(3) of the Labour Relations Act No. 14 of 2007

<sup>463</sup> Article 1 of ILO's Co-operation at the Level of the Undertaking Recommendation (No. 94), 1952; article 63 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006), Paragraph 3, Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>464</sup> Paragraphs 2(b) and (c), Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>465</sup> Section 57(2) of the Labour Relations Act No. 14 of 2007

<sup>466</sup> Article 1 of ILO's Workers' Representatives Convention (No. 135), 1971; article 53 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS14 at page 88

- (c) An employee seeking office as, or acting, or having acted in the capacity of an officer of a trade union or a workers' representative.<sup>467</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (g) Adequate welfare facilities and services should be provided for seafarers both in port and on board ship.<sup>468</sup>
- The Kenya Maritime Authority has the duty to oversee matters pertaining to the training, recruitment and welfare of seafarers<sup>469</sup>.
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (h) The employment of a worker should not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.<sup>470</sup>
- No employer should terminate the employment of an employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid, that the reason for the termination is a fair reason, and that the employment was terminated in accordance with fair procedure.<sup>471</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (i) The employment of a worker should not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.<sup>472</sup>
- Before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, an employer should explain to the employee the reason for which the employer is considering termination. The employee will be entitled to have another employee or a shop floor union representative of his choice present during this explanation.<sup>473</sup> An employer should consider any representations the employee may have.<sup>474</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (j) A worker who considers that his employment has been unjustifiably terminated is entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.<sup>475</sup>

<sup>467</sup> Section 46(c), (d) & (e) of the Employment Act No. 11 of 2007

<sup>468</sup> Article 2 of ILO's Seafarers' Welfare Convention (No. 163), 1987

<sup>469</sup> Section 51 of the Kenya Maritime Authority Act CAP 370 of the Laws of Kenya

<sup>470</sup> Article 4 of ILO's Termination of Employment Convention (No. 158), 1982

<sup>471</sup> Section 45(1) & (2) of the Employment Act No. 11 of 2007

<sup>472</sup> Article 7 of ILO's Termination of Employment Convention (No. 158), 1982

<sup>473</sup> Section 41(1) of the Employment Act No. 11 of 2007

<sup>474</sup> Section 41(2) of the Employment Act No. 11 of 2007

<sup>475</sup> Article 8(1) of ILO's Termination of Employment Convention (No. 158), 1982

- An employee who has been summarily dismissed, or his employer has unfairly terminated his employment without justification, may, within 3 months of the date of dismissal present a complaint to a labour officer.<sup>476</sup>
  - An employee may also refer this issue to the Employment and Labour Relation Court.<sup>477</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (k) A worker whose employment is to be terminated is entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.<sup>478</sup> Arbitrary dismissal procedures should be avoided.<sup>479</sup>
- Where the employment contract is for daily payment of wages, it is terminable by either the employer or the employee at the close of any day without notice.<sup>480</sup>
  - Where the contract is for payment of wages periodically at intervals of less than one month, the contract is terminable by either the employer or the employee at the end of the next period following the giving of notice in writing.<sup>481</sup>
  - Where the contract is to pay wages or salaries periodically at intervals of one month or more, the contract is terminable by either the employer or the employee at the period of 28 days following the giving of a notice in writing.<sup>482</sup> Either the employer or employee may terminate the employment contract without notice upon payment to the other party of the remuneration which would have been earned.<sup>483</sup>
  - The provisions of the Employment Act are set within the spirit of international standards; hence there is no gap.
- (l) A worker whose employment has been terminated is entitled, in accordance with national law and practice, to:
- i. a severance allowance or other separation benefits, the amount of which should be based on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
  - ii. benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
  - iii. a combination of such allowance and benefits.<sup>484</sup>

<sup>476</sup> Section 47(1) of the Employment Act No. 11 of 2007

<sup>477</sup> Section 47(4) of the Employment Act No. 11 of 2007; Section 12 of the Employment and Labour Relations Act No. 20 of 2011

<sup>478</sup> Article 11 of ILO's Termination of Employment Convention (No. 158), 1982

<sup>479</sup> Article 35 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

<sup>480</sup> Section 35(1)(a) of the Employment Act No. 11 of 2007

<sup>481</sup> Section 35(1)(b) of the Employment Act No. 11 of 2007

<sup>482</sup> Section 35(1)(c) of the Employment Act No. 11 of 2007

<sup>483</sup> Section 36 of the Employment Act No. 11 of 2007

<sup>484</sup> Article 12(1) of ILO's Termination of Employment Convention (No. 158), 1982; Article 36 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

- Where the contract to pay wages or salaries periodically at intervals of one month or more is terminated by an employer, the employee is entitled to service pay for every year worked.<sup>485</sup>
  - The provisions of the Employment Act are set within the spirit of international standards; hence there is no gap.
- (m) When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer should:
27. provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and
  28. give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.<sup>486</sup>
- If an employer wishes to terminate an employment contract on account of redundancy, the employer has to notify the trade union to which the employee is a member (if the employee is a member of a trade union), and the labour officer in charge of the area where the employee is employed, of the reasons for, and the extent of the intended redundancy not less than 1 month prior to the date of the intended date of termination on account of redundancy.<sup>487</sup> Where the employee is not a member of a trade union, the employer should notify the employee personally in writing, and the labour office.<sup>488</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (n) When an employer contemplates terminations for reasons of an economic, technological, structural or similar nature, it should notify, in accordance with national law and practice, the competent authority as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.<sup>489</sup>
- If an employer wishes to terminate an employment contract on account of redundancy, the employer has to notify the trade union to which the employee is a member (if the employee is a member of a trade union), and the labour officer in charge of the area where the employee is employed, of the reasons for, and the extent of the intended redundancy not less than 1 month prior to the date of the intended date of termination on account of redundancy.<sup>490</sup> Where the employee is not a member of a trade union, the employer should notify the employee personally in writing, and the labour office.<sup>491</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

<sup>485</sup> Section 35(5) of the Employment Act No. 11 of 2007

<sup>486</sup> Article 13(1) of ILO's Termination of Employment Convention (No. 158), 1982; paragraph 6, Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>487</sup> Section 40(1)(a) of the Employment Act No. 11 of 2007

<sup>488</sup> Section 40(1)(b) of the Employment Act No. 11 of 2007

<sup>489</sup> Article 14(1) of ILO's Termination of Employment Convention (No. 158), 1982

<sup>490</sup> Section 40(1)(a) of the Employment Act No. 11 of 2007

<sup>491</sup> Section 40(1)(b) of the Employment Act No. 11 of 2007

- (o) There should be a prescribed minimum period of time specified by national laws and regulations before carrying out employee terminations for reasons of an economic, technological, structural or similar nature.<sup>492</sup>
- Under Kenyan law, it should be a period of not less than one month.<sup>493</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (p) There ought to be company involvement in initiatives or commitment to frameworks, on labour standards, including participation in workshops or industry / topic specific initiatives or collaboration, and membership of, or public commitment to a recognised international framework.<sup>494</sup>
- No local standard
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (q) Company policy on labour standards should be communicated globally to employees and translated into relevant languages.<sup>495</sup>
- No local standard
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (r) An employer should conduct risk assessment regarding labour issues for potential new operations or projects (due diligence), and existing operations or projects.<sup>496</sup>
- No local standard
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (s) In instances of labour standards non-compliance, a company should disclose the number of incidents and the specific action taken regarding the non-compliance.<sup>497</sup>

<sup>492</sup> Article 14(3) of ILO's Termination of Employment Convention (No. 158), 1982

<sup>493</sup> Section 40(1) of the Employment Act No. 11 of 2007

<sup>494</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS10 at page 88

<sup>495</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS12 at page 88

<sup>496</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS13 at page 88

<sup>497</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS21 at page 89

- No local standard
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (t) A company should address bullying and/or harassment by providing a confidential reporting channel or whistleblowing system or manager training on training on handling of reports or instances of bullying or harassment.<sup>498</sup>
- No local standard
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (u) A company should have a record of: (i) full time staff voluntary turnover rates; (ii) percentage of employees that are contractors or temporary staff; (iii) percentage of global staff with a disability; and percentage of women in the global workforce.<sup>499</sup>
- An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract.<sup>500</sup>
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.

## 27. Training and Education

Training and upgrading employee skills, and performance and career development reviews. It also includes transition assistance programs to facilitate continued employability, and the management of career endings due to retirement or termination.

### GRI Reporting Standards (404)

- a. Average hours of training that the organisation’s employees have undertaken during the reporting period by (1) gender (2) employee category.
- b. Type and scope of programs implemented and assistance provided to upgrade employee skills.

<sup>498</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS30 at page 89

<sup>499</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS24, SLS25, SLS32 & SLS33 at page 89

<sup>500</sup> Section 74 of the Employment Act, No. 11 of 2007

- c. Transition assistance programs provided to facilitate continued employability and the management of career endings resulting from retirement or termination of employment.
- d. Percentage of total employee by gender and by employment category who received who received a regular performance and career development review during the reporting period.

### Standards

- (a) An employee is entitled to paid educational leave for a specified period of time during working hours, with adequate financial entitlement, to be prescribed by national laws and regulations.<sup>501</sup>
  - Kenya has ratified the ILO Paid Education Leave Convention (No. 140) of 1974. In accordance with article 2(6) of the Constitution of Kenya, this standard forms part of the laws of Kenya.
  - On the above basis, local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Leadership and self-esteem training should be provided, to assist women and girls, particularly those with special needs, women with disabilities and women belonging to racial and ethnic minorities to strengthen their self-esteem and to encourage them to take decision-making positions.<sup>502</sup>
  - No local standards
  - Kenyan laws do not require companies to meet the above international standard. Therefore, a company that wishes to comply with ESG requirements should make provision for this international standard.
- (c) Gender-sensitive training for women and men should be provided to promote non-discriminatory working relationships and respect for diversity in work and management styles.<sup>503</sup>
  - No local standards
  - Kenyan laws do not require companies to meet the above international standard. Therefore, a company that wishes to comply with ESG requirements should make provision for this international standard.
- (d) Employers should encourage employee personal development training to enhance abilities to individual skills, through policy or commitment statements to provide employee personal development training, and a detailed description of the personal development training that is provided.<sup>504</sup>
  - No local standards

<sup>501</sup> Article 1 of Paid Educational Leave Convention (No. 140), 1974

<sup>502</sup> Paragraph 195(a) of the Beijing Declaration and Platform for Action: Fourth World Conference on Women

<sup>503</sup> Paragraph 195(d) of the Beijing Declaration and Platform for Action: Fourth World Conference on Women

<sup>504</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS29 at page 89; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS26 at page 90

- Kenyan laws do not require companies to meet the above international standard. Therefore, a company that wishes to comply with ESG requirements should make provision for this international standard.
- (e) Multinational enterprises should facilitate training opportunities for their employees.<sup>505</sup>
- **No local standards**
  - Kenyan laws do not require companies to meet the above international standard. Therefore, a company that wishes to comply with ESG requirements should make provision for this international standard.
- (f) Multinational enterprises should ensure that relevant training is provided for all levels of workers employed by them in the host country, as appropriate, to meet the needs of the enterprise as well as the development policies of the country. Such training should, to the extent possible, develop generally useful skills and promote career opportunities and lifelong learning.<sup>506</sup>
- **No local standards**
  - Kenyan laws do not require companies to meet the above international standard. Therefore, a company that wishes to comply with ESG requirements should make provision for this international standard.
- (g) Multinational enterprises operating in developing countries should participate, along with national enterprises, in programmes, including special funds, encouraged by host governments and supported by employers' and workers' organisations. These programmes should have the aim of encouraging skill formation, lifelong learning and development as well as providing vocational guidance, and should be jointly administered by the parties which support them.<sup>507</sup>
- **No local standards**
  - Kenyan laws do not require companies to meet the above international standard. Therefore, a company that wishes to comply with ESG requirements should make provision for this international standard.

## 28. Diversity and Equal Opportunity

When an organisation actively promotes diversity and equality at work, it can generate significant benefits for both the organisation and workers. For example, the organisation can gain access to a larger and more diverse set of potential workers. These benefits also flow through to society in general, as greater equality promotes social stability and supports further economic development.

### GRI Reporting Standards (405)

- a. Percentage of individuals within the organisation's governance bodies in each of the following diversity categories:

<sup>505</sup> Paragraph 4, Section II of the OECD Guidelines for Multinational Enterprises (2011)

<sup>506</sup> Article 38 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

<sup>507</sup> Article 39 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

- i. Gender;
  - ii. Age group (under 30; 30-50 and over 50); and
  - iii. Other indicators of diversity when relevant.
- b. Percentage of employees per employee category in each of the following diversity categories:
- i. Gender;
  - ii. Age Group; and
  - iii. Other Indicators, such as minority or vulnerable groups.
- c. Ratio of the basic salary and remuneration of women to men for each employee category by significant location of operations.
- d. Definition used for 'significant locations of operations'

### Standards

- (a) The principle of equal remuneration for men and women workers for work of equal value should apply to all workers. This principle may be applied by means of national laws or regulations, legally established or recognised machinery for wage determination, collective agreements between employers and workers, or a combination of these various means.<sup>508</sup>
- Women and men have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres.<sup>509</sup>
  - An employer should pay his employees equal remuneration for work of equal value.<sup>510</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Employers should promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin.<sup>511</sup>
- Every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>512</sup>
  - An employer should not discriminate directly or indirectly against an employee on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability religion, political or other opinion, nationality, conscience, belief, culture, dress, language,

<sup>508</sup> Article 2 of ILO's Equal Remuneration Convention (No. 100), 1951; paragraph 178(a) of the Beijing Declaration and Platform for Action: Fourth World Conference on Women; article 29 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

<sup>509</sup> Article 27(3) of the Constitution of Kenya, 2010

<sup>510</sup> Section 5(5) of the Employment Act No. 11 of 2007

<sup>511</sup> Article 2 of ILO's Discrimination (Employment and Occupation) Convention (No. 111), 1958; article 28 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS03 at page 87; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS16 at page 89

<sup>512</sup> Article 27(1) of the Constitution of Kenya 2010

HIV status or birth,<sup>513</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>514</sup>

- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (c) Every person, without distinction as to race, colour, or national or ethnic origin, has the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, just and favourable remuneration, and the right to form and join a trade union.<sup>515</sup>
- It is the duty of the Cabinet Secretary in charge of labour, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.<sup>516</sup> No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race or nationality,<sup>517</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>518</sup>
  - An employer should pay his employees equal remuneration for work of equal value.<sup>519</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (d) Special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. Particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force.<sup>520</sup>
- It is the duty of the Cabinet Secretary in charge of labour, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.<sup>521</sup>
  - No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, nationality, ethnic or social origin,<sup>522</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>523</sup>
  - An employer should pay his employees equal remuneration for work of equal value.<sup>524</sup>

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<sup>513</sup> Article 27(4) & (5) of the Constitution of Kenya 2010; section 5(3) of the Employment Act No. 11 of 2007

<sup>514</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>515</sup> Article 5(e)(i) & (ii) of the UN Convention on the Elimination of All Forms of Racial Discrimination (1965)

<sup>516</sup> Section 5(1)(b) of the Employment Act No. 11 of 2007

<sup>517</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>518</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>519</sup> Section 5(5) of the Employment Act No. 11 of 2007

<sup>520</sup> Article 9(2) of the UNESCO Declaration on Race and Racial Prejudice (1978)

<sup>521</sup> Section 5(1)(b) of the Employment Act No. 11 of 2007

<sup>522</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>523</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>524</sup> Section 5(5) of the Employment Act No. 11 of 2007

- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (e) Discrimination against women in the field of employment should be eliminated, in order to ensure, on a basis of equality of men and women, the same rights, in particular:
- i. the right to work;
  - ii. the right to the same employment opportunities as men, including the application of the same criteria for selection in matters of employment;
  - iii. the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - iv. the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - v. the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; and
  - vi. the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.<sup>525</sup>
- Women and men have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres.<sup>526</sup>
  - An employer should pay his employees equal remuneration for work of equal value.<sup>527</sup>
  - No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of sex,<sup>528</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>529</sup>
  - The provisions of the Employment Act are set within the spirit of international standards; hence there is no gap.
- (f) In a bid to strengthen women's economic capacity and commercial networks, mechanisms should be established to grant contracts on a non-discriminatory basis.
- No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of sex,<sup>530</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>531</sup>

<sup>525</sup> Article 11(1) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women

<sup>526</sup> Article 27(3) of the Constitution of Kenya, 2010

<sup>527</sup> Section 5(5) of the Employment Act No. 11 of 2007

<sup>528</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>529</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>530</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>531</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

- The provisions of the Employment Act are set within the spirit of international standards; hence there is no gap.
- (g) Employers should develop workplace policies against gender discrimination, especially considering older women workers, in hiring and promotion, and in the extension of employment benefits and social security, as well as regarding discriminatory working conditions and sexual harassment.
- No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of sex,<sup>532</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>533</sup>
  - An employer who employs 20 or more employees should issue a policy statement on sexual harassment after consultation with the employees or their representatives. This policy should be brought to the attention of all employees. The policy should stipulate:
    - (a) That every employee is entitled to employment that is free of sexual harassment;
    - (b) That the employer will take steps to ensure that no employee is subjected to sexual harassment;
    - (c) That the employer will take disciplinary measures against any person who subjects any employee to sexual harassment;
    - (d) How complaints of sexual harassment may be brought to the attention of the employer; and
    - (e) That the employer will not disclose the name of the complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.<sup>534</sup>
  - The provisions of the Employment Act are set within the spirit of international standards. However, there is no express provision for older women. The Employment Act factors in women in general when making provision with regards to gender discrimination and sexual harassment. Therefore, in order for a company to fully comply with the Social requirements under ESG, then precise provision has to be made for this international standard.
- (h) Employees have the right to freedom of thought, conscience and religion. This right includes the freedom to have a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No employee should be discriminated on grounds of religion or belief.<sup>535</sup>
- Every person has the right to freedom of conscience, religion, thought, belief and opinion. Every person has the right, either individually or in community with others, in public or in private, to manifest

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<sup>532</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>533</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>534</sup> Section 6(3) of the Employment Act No. 11 of 2007

<sup>535</sup> Articles 1, 2 & 6 of the United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion and Belief (1981)

any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.<sup>536</sup>

- No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of religion,<sup>537</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>538</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (i) Employees belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination, without prejudice to the enjoyment by all persons of universally recognised human rights and fundamental freedoms.<sup>539</sup>
- Every person has the right to freedom of conscience, religion, thought, belief and opinion. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.<sup>540</sup>
  - No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of religion, language, ethnic or social origin,<sup>541</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>542</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (j) Employers should take measures to ensure women's equal access to full participation in power structures and decision-making in the organisation.<sup>543</sup>
- No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of sex,<sup>544</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>545</sup>
  - The provisions of the Employment Act are set within the spirit of international standards; hence there is no gap.
- (k) Multinational enterprises should be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to

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<sup>536</sup> Article 32(1) & (2) of the Constitution of Kenya 2010

<sup>537</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>538</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>539</sup> Articles 2(1) and 8(2) of the United Nations Declaration on the Rights of Persons belonging to National and Ethnic, Religious and Linguistic Minorities (1992)

<sup>540</sup> Article 32(1) & (2) of the Constitution of Kenya 2010

<sup>541</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>542</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>543</sup> Article 192 of the Beijing Declaration and Platform for Action: Fourth World Conference on Women

<sup>544</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>545</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status, unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.<sup>546</sup>

- An employer is defined as any person, public body, firm, corporation or company which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such a person, public body, firm, corporation or company.<sup>547</sup>
- Every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>548</sup> An employer should not discriminate directly or indirectly against an employee on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability religion, political or other opinion, nationality, conscience, belief, culture, dress, language, HIV status or birth,<sup>549</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>550</sup>
- A multinational enterprise falls within the description of an employer under the Employment Act. Therefore, local laws adequately satisfy the requirements of the international standard; hence there is no gap.

## 29. Non-discrimination

Discrimination is the act and the result of treating people unequally by imposing unequal burdens or denying benefits, instead of treating each person fairly on the basis of individual merit. Discrimination can also include harassment. This is defined as a course of comments or actions that are unwelcome, or should reasonably be known to be unwelcome, to the person towards whom they are addressed.

### GRI Reporting Standards (406)

- Total number of incidents of discrimination during the reporting period.
- Status of the incidents and the actions taken with reference to the following:
  - Incident renewed by the organisation;
  - Remediation plans being implemented;
  - Remediation plans that have been implemented with results renewed; and
  - Incident no longer subject to action.

### Standards

- Please refer to the international and local standards set out under 'Diversity and Equal Opportunity', at Standard 28 above.

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<sup>546</sup> Paragraph 1(e) Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>547</sup> Section 2 of the Employment Act No. 11 of 2007

<sup>548</sup> Article 27(1) of the Constitution of Kenya 2010

<sup>549</sup> Article 27(4) & (5) of the Constitution of Kenya 2010; section 5(3) of the Employment Act No. 11 of 2007

<sup>550</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

- (b) Migrant workers should not be discriminated based on their sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.<sup>551</sup>
- It is the duty of the Cabinet Secretary in charge of labour, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.<sup>552</sup> No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race or nationality,<sup>553</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>554</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (c) Migrant workers should not be discriminated and treated less favourably than nationals of the State of employment in respect of remuneration and other conditions of work, which include: (a) overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; and (b) other terms of employment, which include, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.<sup>555</sup>
- It is the duty of the Cabinet Secretary in charge of labour, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.<sup>556</sup>
  - No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race or nationality,<sup>557</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>558</sup>
  - An employer should pay his employees equal remuneration for work of equal value.<sup>559</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (d) Migrant workers shall not be discriminated against taking part in meetings and activities of trade unions.<sup>560</sup>

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<sup>551</sup> Article 7 of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (1990)

<sup>552</sup> Section 5(1)(b) of the Employment Act No. 11 of 2007

<sup>553</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>554</sup> Section 5(30)(b) of the Employment Act No. 11 of 2007

<sup>555</sup> Article 25(1) of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (1990)

<sup>556</sup> Section 5(1)(b) of the Employment Act No. 11 of 2007

<sup>557</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>558</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>559</sup> Section 5(5) of the Employment Act No. 11 of 2007

<sup>560</sup> Article 26 of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (1990)

- Every worker has the right to form, join or participate in the activities and programmes of a trade union.<sup>561</sup>
- An employer should promote and guarantee equality of opportunity in employment and strive to eliminate discrimination in any employment policy or practice.<sup>562</sup>
- The provisions of the Constitution of Kenya, the Employment Act and the Labour Relations Act are set within the spirit of international standards.

## HUMAN RIGHTS AND COMMUNITY TOPICS AND STANDARDS

### 30. Occupational Health and Safety

The right to a healthy and safe workplace is recognised as a human right. The health and safety of workers can be affected by both the work they perform and the workplace where it is performed.

#### GRI Reporting Standards (403)

- The level at which each formal joint management – worker health and safety committee typically operates within the organisation.
- Percentage of workers whose
  - work or workplace is controlled by the organisation, that is controlled by the organisation that are represented by formal joint management – worker health and safety committees.
  - Types of injury, injury rate occupational disease rate, lost day rate, absentee rate and work related fatalities for all employees, with a breakdown by:
    - region; and
    - gender.
  - Types of injury, injury rate and work related fatalities for all workers (excluding employees) whose work or workplace is controlled by the organisation with a breakdown by:
    - region; and
    - gender.
  - System of rules applied in recording and reporting accidents statistics.
  - Whether there are workers whose work or workplace is controlled by the organisation involved in occupational activities who have a high incident or high risk of specific diseases.
  - Whether formal agreements (whether local or global) with trade unions cover health and safety.

<sup>561</sup> Article 41(2)(c) of the Constitution of Kenya 2010

<sup>562</sup> Section 5(2) of the Employment Act No. 11 of 2007; Section 8 of the Labour Relations Act No. 14 of 2007

- i. If so the extent as a percentage, to which various health and safety topics are covered by these agreements.

## Standards

- (a) Employees should be trained in one capacity or another, for purposes of achieving adequate levels of safety and health at the workplace.<sup>563</sup>
  - Employers should ensure that employees participate in the application and review of safety and health measures.<sup>564</sup>
  - Employers should ensure that an employee from other undertakings or establishments including contractors engaged in work at the occupier's workplace receive appropriate instructions regarding safety and health risks including emergency procedures at the workplace during their activities at the workplace and action to be taken in case of an emergency.<sup>565</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Each state should formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment, in order to prevent accidents and injury to health arising out of, linked with or occurring in the course of work.<sup>566</sup> The national policy shall indicate the functions of employers in respect of occupational safety and health and the working environment.<sup>567</sup>
  - The Director of Occupational Safety and Health Services should ensure adequate consultations on proposed occupational safety and health standards regulations and codes of practice, and should develop a 5 year strategic plan for improving occupational safety and health, and ensure that this plan meets the existing and future needs of industry and the community.<sup>568</sup>
  - Under the Occupational Safety and Health Act, the mandate of formulating, implementing and reviewing rules in relation to occupational health and safety is bestowed upon a director of occupational safety and health services. The provisions of the Act are therefore set within the spirit of international standards.
  - Additionally, Kenya has ratified the ILO Occupational Safety and Health Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
- (c) Employers, in consultation with workers and their representatives, should set out in writing an Occupational Safety and Health policy, which should be:

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<sup>563</sup> Article 6 of ILO's Occupational Safety and Health Convention (No. 155), 1981; article 53 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006), Paragraph 4(c) Section V of the OECD Guidelines for Multinational Enterprises (2011); Article 19(d) of ILO's Occupational Safety and Health Convention (No. 155), 1981; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS05 at page 70 & SHS13 at page 71

<sup>564</sup> Section 6(2)(g) of the Occupational Safety and Health Act No. 15 of 2007

<sup>565</sup> Section 99(4) of the Occupational Safety and Health Act No. 15 of 2007

<sup>566</sup> Article 4 of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>567</sup> Article 6 of ILO's Occupational Safety and Health Convention (No. 155), 1981; article 53 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006), Paragraph 4(c) Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>568</sup> Section 23(3) & (4) of the Occupational Safety and Health Act No. 15 of 2007

- i. specific to the organisation and appropriate to its size and the nature of its activities;
  - ii. concise, clearly written, dated and made effective by the signature or endorsement of the employer or the most senior accountable person in the organisation;
  - iii. communicated and readily accessible to all persons at their place of work;
  - iv. reviewed for continuing suitability; and
  - v. made available to relevant external interested parties, as appropriate.<sup>569</sup>
- Employers should prepare and as often as may be appropriate, revise a written statement of their general policies with respect to the safety and health at work of its employees and the organisation and arrangements for the time being in force for carrying out that policy.<sup>570</sup>
  - While Kenyan law requires a company to have in place a policy with regards to the safety and health a work of its employees, this requirement is not specific, as it does not specify what a company should ensure is included in the policy. Therefore, companies that wish to comply with ESG requirements should ensure that its health and safety policy conforms to the international standard.
- (d) An employer should ensure that there is board oversight of management of health and safety risks at the workplace, and there should be a named position responsible for this at the board level.<sup>571</sup>
- No local standard
  - As far as we are aware, there is a gap under Kenyan law, as far as this particular standard is concerned, as there is no legal requirement under Kenyan law, mandating the board of directors to oversee health and safety risks at the workplace. Kenyan legislation does not make any provisions that satisfy the above international standard.
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (e) A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health, shall be protected from undue consequences in accordance with national conditions and practice.<sup>572</sup>
- Employers should not dismiss an employee, injure the employee, or discriminate against or disadvantage an employee in respect of the employee's employment, or alter the employee's position to the detriment of the employee by reason only that the employee has made a complaint about a matter which the employee considers is not safe or is a risk to his health.<sup>573</sup>

<sup>569</sup> Article 3.1.1 of the ILO Guidelines on Occupational Safety and Health Management Systems (2001); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS01, SHS04, SHS05 & SHS39 at page 70, SHS08 at page 71

<sup>570</sup> Section 7(1)(a) of the Occupational Safety and Health Act No. 15 of 2007

<sup>571</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS03 at page 70

<sup>572</sup> Article 13 of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>573</sup> Article 8(1)(a) of the Occupational Safety and Health Act No. 15 of 2007

- An employer should not make any deduction from an employee's remuneration or levy, or permit to be levied on any of his employees and any charge in respect of anything done or provided in pursuance of the Occupational Safety and Health Act.<sup>574</sup>
  - An employee who has left a work place, which the employee has reasonable justification to believe presents imminent and serious danger to life and health should not be dismissed, discriminated against or disadvantaged for such action by the employer.<sup>575</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (f) Employers are required to ensure that, in as far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.<sup>576</sup>
- Employers should carry out appropriate risk assessments in relation to the safety and health of employees, and on the basis of these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all machinery, equipment, tools and processes under the control of the employer are safe and are without risk to health and comply with the requirements of safety and health provisions of the Occupational Safety and Health Act.<sup>577</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (g) Employers are required to ensure that, in so far as is reasonably practicable, the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken.<sup>578</sup>
- Every occupier (including employers) should carry out appropriate risk assessments in relation to the safety and health of employees, and on the basis of these results, adopt preventive and protective measures to ensure that under all conditions of their intended use, all chemicals, machinery, equipment, tools and processes under the control of the occupier are safe and are without risk to health and comply with the requirements of safety and health provisions of the Occupational Safety and Health Act.<sup>579</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (h) Employers are required to provide, where necessary, adequate protective clothing and protective equipment to prevent, in so far as is reasonably practicable, risk of accidents or of adverse effects on health.<sup>580</sup>
- Every employer should provide and maintain for the use of employees in any workplace where employees are exposed to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including where necessary, suitable gloves, footwear, goggles and head covering.<sup>581</sup>

<sup>574</sup> Section 10(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>575</sup> Section 14(2) of the Occupational Safety and Health Act No. 15 of 2007

<sup>576</sup> Article 16(1) of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>577</sup> Section 6(3) of the Occupational Safety and Health Act No. 15 of 2007

<sup>578</sup> Article 16(2) of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>579</sup> Section 6(3) of the Occupational Safety and Health Act No. 15 of 2007

<sup>580</sup> Article 16(3) of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>581</sup> Section 101 of the Occupational Safety and Health Act No. 15 of 2007

- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (i) Employers are required to provide, where necessary, measures to deal with emergencies and accidents, including adequate first-aid arrangements.<sup>582</sup>
- An employer should provide and maintain appliances and services for the rendering of first aid to its employees in case of any accident.<sup>583</sup>
  - Every employer should ensure that an employee from other undertakings or establishments including contractors engaged in work at the occupier's workplace receive appropriate instructions regarding safety and health risks including emergency procedures at the workplace during their activities at the workplace and action to be taken in case of an emergency.<sup>584</sup>
- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (j) Occupational safety and health measures should not involve any expenditure for the workers.<sup>585</sup>
- An employer should ensure that the medical examination of employees working in hazardous environments which may be prescribed by the Cabinet Secretary in charge of labour from time to time should take place without loss of earnings for the employees and if possible within normal working hours during their employment.<sup>586</sup>
  - Every employer should ensure that an employee from other undertakings or establishments including contractors engaged in work at the occupier's workplace receive appropriate instructions regarding safety and health risks including emergency procedures at the workplace during their activities at the workplace and action to be taken in case of an emergency.<sup>587</sup> This training should not be at the expense of the employee and shall take place during working hours.<sup>588</sup>
  - The Occupational Safety and Health Act is specific in terms of what should not involve any expenditure for the workers. Sections 99 and 103 of the Occupational Safety and Health Act only envisage training in relation to safety and health risks at the workplace, and any medical examination of employees working in hazardous environments. While these provisions are set within the spirit of international standards, they do not cover all measures.
  - However, Kenya has ratified the ILO Occupational Safety and Health Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
- (k) Employers should establish occupational health services in consultation with worker representatives and workers. Occupational health services shall be established by laws or regulations, or by collective agreements, or in any other manner approved by the state after consultation with the representative organisations of employers and workers concerned.<sup>589</sup>

<sup>582</sup> Article 18 of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>583</sup> Section 45 of the Work Injury Benefits Act No. 13 of 2007

<sup>584</sup> Section 99(4) of the Occupational Safety and Health Act No. 15 of 2007

<sup>585</sup> Article 21 of ILO's Occupational Safety and Health Convention (No. 155), 1981

<sup>586</sup> Section 103 of the Occupational Safety and Health Act No. 15 of 2007

<sup>587</sup> Section 99(4) of the Occupational Safety and Health Act No. 15 of 2007

<sup>588</sup> Section 99(5) of the Occupational Safety and Health Act No. 15 of 2007

<sup>589</sup> Articles 3(2) and 6 of ILO's Occupational Health Services Convention (No. 161), 1985

- Employers should establish a safety and health committee at the workplace in accordance with prescribed regulations if there are 20 or more persons employed at the workplace, or if the Director of the Occupational Safety and Health Services directs the establishment of such a committee at a workplace.<sup>590</sup>
  - Employers should ensure that a thorough safety and health audit of its workplace is carried out at least once every 12 months by a safety and health advisor, who shall issue a report of such an audit containing the prescribed particulars to the occupier.<sup>591</sup>
  - The Occupational Safety and Health Act complies with the requirement of the international standard, save that the former establishes a requirement for formation of a safety and health committee at the workplace, if there are 20 or more persons employed at the workplace. The international standard requires all companies regardless of the number of employees, to comply with the requirement. Companies that wish to comply with ESG requirements should therefore make provision for this international standard.
- (l) Personnel providing occupational health services should enjoy full professional independence from employers, workers, and their representatives, where they exist.<sup>592</sup>
- The Occupational Safety and Health Act establishes the office of the director of occupational safety and health services responsible for the administration of the Act. The role of the director is independent from that of the employer and the workers.<sup>593</sup>
  - The provisions of the Occupational Safety and Health Act are set within the spirit of international standards; hence there is no gap.
- (m) The surveillance of workers' health in relation to work should involve no loss of earnings for them, should be free of charge and should take place as far as possible during working hours.<sup>594</sup>
- An employer should ensure that the medical examination of employees working in hazardous environments which may be prescribed by the Cabinet Secretary in charge of labour from time to time should take place without loss of earnings for the employees and if possible within normal working hours during their employment.<sup>595</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (n) Workers should be informed of health hazards involved in their work.<sup>596</sup>
- Every employer should maintain a record of hazardous chemicals used at the workplace, cross-referenced to the appropriate chemical safety data sheets, which record should be accessible to all employees concerned and their representatives.<sup>597</sup>

<sup>590</sup> Section 9(1)(b) of the Occupational Safety and Health Act No. 15 of 2007

<sup>591</sup> Section 11(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>592</sup> Article 10 of ILO's Occupational Health Services Convention (No. 161), 1985

<sup>593</sup> Section 27 of the Occupational Safety and Health Act No. 15 of 2007

<sup>594</sup> Article 12 of ILO's Occupational Health Services Convention (No. 161), 1985

<sup>595</sup> Section 103 of the Occupational Safety and Health Act No. 15 of 2007

<sup>596</sup> Article 13 of ILO's Occupational Health Services Convention (No. 161), 1985

<sup>597</sup> Section 85(8) of the Occupational Safety and Health Act No. 15 of 2007

- Employers should ensure that employees participate in the application and review of safety and health measures.<sup>598</sup>
  - Employers should ensure that an employee from other undertakings or establishments including contractors engaged in work at the occupier's workplace receive appropriate instructions regarding safety and health risks including emergency procedures at the workplace during their activities at the workplace and action to be taken in case of an emergency.<sup>599</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (o) Occupational health services should be informed of occurrences of ill health amongst workers and absence from work for health reasons, in order to be able to identify whether there is any relation between the reasons for ill health or absence and any health hazards which may be present at the workplace. Personnel providing occupational health services shall not be required by the employer to verify the reasons for absence from work.<sup>600</sup>
- An employer should notify the area occupational safety and health officer of any accident, dangerous occurrence or occupational poisoning which has occurred at the workplace.<sup>601</sup> Where an accident in a workplace causes the death of a person, the employer should inform the area occupational safety and health officer within 24 hours of the occurrence of the accident.<sup>602</sup>
  - The provisions of the Occupational Safety and Health Act are set within the spirit of international standards; hence there is no gap.
- (p) Employers should take into account pregnant and lactating mothers when developing policies required to alleviate and eliminate environmental and occupational health hazards associated with work in the workplace.<sup>603</sup>
- No local standard
  - As far as we are aware, there is a gap under Kenyan law, as far as this particular standard is concerned, as there is no legal requirement under Kenyan law, specifically mandating a company to take into account the above international standard, as far as occupational health hazards are concerned.
  - The Occupational Health and Safety Act is however set within the spirit of international standards as it provides this requirement for all employees, and does not categorise employees into different classes.
  - Companies that wish to comply with ESG requirements should nevertheless make specific provision for this international standard.

<sup>598</sup> Section 6(2)(g) of the Occupational Safety and Health Act No. 15 of 2007

<sup>599</sup> Section 99(4) of the Occupational Safety and Health Act No. 15 of 2007

<sup>600</sup> Article 15 of ILO's Occupational Health Services Convention (No. 161), 1985

<sup>601</sup> Section 21(1) of the Occupational Safety and Health Act No. 15 of 2007; Section 22(1) of the Work Injury Benefits Act No. 13 of 2007

<sup>602</sup> Section 21(2)(a) of the Occupational Safety and Health Act No. 15 of 2007

<sup>603</sup> Paragraph 106(p) of the Beijing Declaration and Platform for Action: Fourth World Conference on Women

- (q) Employers should record and investigate occupational accidents and diseases, commuting accidents and dangerous occurrences and incidents.<sup>604</sup>
- An employer should send a written notice of any disease specified in the second schedule of the Occupational Safety and Health Act occurring in a workplace to the Director of Occupational Safety and Health Services.<sup>605</sup>
  - Whilst the Occupational Health and Safety Act is set within the spirit of international standards as it mandates an employer to report any accidents occurring at the workplace, it does not require the employer to keep a record of, or investigate, the incidents. Therefore, companies that wish to comply with ESG requirements should make specific provision for this international standard.
- (r) Employers should keep a record of work-related fatalities over 3 years per 1000 employees relative to sector peers.<sup>606</sup>
- An employer should notify the area occupational safety and health officer of any accident, dangerous occurrence or occupational poisoning which has occurred at the workplace.<sup>607</sup> Where an accident in a workplace causes the death of a person, the employer should inform the area occupational safety and health officer within 24 hours of the occurrence of the accident, and send a written notice of the accident in the prescribed form to the area occupational safety and health officer within 7 days of the occurrence of the accident.<sup>608</sup>
  - The provision of the Occupational Safety and Health Act does not match the requirement of the international standard. However, it is set within the spirit of international standards as it makes it a requirement for a company to report on such matters. This would imply that a company also has to keep a record. However, for good measure, companies that wish to comply with ESG requirements should make provision for this international standard.
- (s) Workers and their representatives should be given appropriate information by the employer about the arrangements for recording and notifying information required for benefits in the case of occupational injury and occupational disease, occupational accidents, occupational diseases, commuting accidents, dangerous occurrences and incidents.<sup>609</sup>
- No local standard
  - The provisions under Kenyan legislation only go as far as to provide for the requirements set out in (r) above. There is therefore a gap in terms of this international standard. Companies that wish to comply with ESG requirements should make provision for this international standard.
- (t) Employers should ensure that there is independent verification by a third party, of the health and safety data generated by the employer, and that there are clear disclosures of the international assurance standard used, and the level of assurance.<sup>610</sup>

<sup>604</sup> Article 2.1.1 of ILO's Code of Practice in Recording and Notification of Occupational Accidents and Diseases (1996); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS37, SHS15, SHS38 & SHS40 at page 71

<sup>605</sup> Section 22(3) of the Occupational Safety and Health Act No. 15 of 2007

<sup>606</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS36 at page 74

<sup>607</sup> Section 21(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>608</sup> Section 21(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>609</sup> Article 3.1.9 of ILO's Code of Practice in Recording and Notification of Occupational Accidents and Diseases (1996); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS37 at page 71

<sup>610</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS10 at page 71

- An occupational safety and health officer has the power to enter, inspect and examine, by day or by night, a workplace, when he has reasonable cause to believe that any person is employed therein. The occupational health and safety officer may require the production of the registers, certificates, notices and documents kept in pursuance of the Occupational Safety and Health Act.
  - The provisions of the Occupational Safety and Health Act are set within the spirit of international standards. On this basis, there is no gap.
- (u) Employers should be in a position to provide a percentage of sites with OHSAS 1801 certification (which involves a framework used to identify, control and decrease the risks associated with health and safety within the workplace).<sup>611</sup>
- Every occupier (including employers) should ensure the safety, health and welfare at work of all persons at the workplace. This would include, the provision and maintenance of plant and systems and procedures of work that are safe and without risks to health, arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances, the provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed, the maintenance of any workplace under the employer's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health, the provision and maintenance of a working environment for every person employed that is safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work, informing all persons employed of any risks from new technologies and imminent danger, and ensuring that every person employed participates in the application and review of safety and health measures.<sup>612</sup>
  - The provisions of the Occupational Safety and Health Act are set within the spirit of international standards. On this basis, there is no gap.
- (v) Employers should put in place a company statement on programmes to address global health issues including HIV/AIDS, tuberculosis and malaria.<sup>613</sup>
- No local standard.
  - There is no requirement for the fulfilment of the above standard under Kenyan law. Therefore, companies that wish to comply with ESG requirements should make provision for this international standard.
- (w) Multinational enterprises should make available their relevant experience within the organisation as a whole, including any knowledge of special hazards. They should also make available to the representatives of the workers, and upon request, to the competent authorities and the workers' and employers' organizations in all countries in which they operate, information on the safety and health standards relevant to their local operations, which they observe in other countries.<sup>614</sup>

<sup>611</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS12 at page 71

<sup>612</sup> Section 6(1) & (2) of the Occupational Safety and Health Act No. 15 of 2007

<sup>613</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHS02 & SHS11 at page 71

<sup>614</sup> Article 44 of ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006)

- Every occupier (including employers) should ensure the safety, health and welfare at work of all persons at the workplace. The duty of an occupier includes the provision of such information as is necessary to ensure the safety and health at work of every person employed.<sup>615</sup>
- An employer is defined as any person, public body, firm, corporation or company which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such a person, public body, firm, corporation or company.<sup>616</sup>
- On the basis that multinational enterprises fall within the definition of an employer under the Employment Act, then the provisions of the Occupational Safety and Health Act are set within the spirit of international standards. There is therefore no gap with respect to this international standard.

### 31. Freedom of Association and Collective Bargaining

Freedom of association refers to the right of employers and workers to form, to join and to run their own organisations without prior authorisation or interference by the state or any other entity. Collective bargaining refers to all negotiations, which take place between one or more employers' organisations, on the one hand, and one or more workers' organisations (trade unions), the other, for determining working conditions and terms of employment or for regulating relations between employers and workers.

#### GRI Reporting Standards (407)

- Operations and suppliers in which workers rights to exercise freedom of association or collective bargaining may be violated or at significant risk either in in terms of:
  - type of operation (manufacturing plant) and supplier; and
  - continues or geographic areas with operations and suppliers considered at risk.
- Measures taken by the organisation in the reporting period intended to support rights to exercise freedom of association and collective bargaining.

#### Standards

- Workers have the right to establish and join organisations of their own choosing without previous authorisation.<sup>617</sup> No worker should be compelled to join an association.<sup>618</sup>
- Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. A person should not be compelled to join an association of any kind.<sup>619</sup>

<sup>615</sup> Section 6(1) & (2) of the Occupational Safety and Health Act No. 15 of 2007

<sup>616</sup> Section 2 of the Employment Act No. 11 of 2007

<sup>617</sup> Article 2 of ILO's Freedom of Association and Protection of the Right to Organise Convention (No. 87), 1948; article 20(1) of the Universal Declaration of Human Rights (1948); article 22(1) of the United Nations International Covenant on Civil and Political Rights; article 48 of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS05 at page 87

<sup>618</sup> Article 2092) of the Universal Declaration of Human Rights (1948); article 48 of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006)

<sup>619</sup> Article 36(1) & (2) of the Constitution of Kenya 2010

- Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.<sup>620</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Workers' organisations have the right to establish and join federations and confederations. Such organisation, federation or confederation has the right to affiliate with international organisations of workers and employers.<sup>621</sup>
- Every trade union has the right to participate in forming a federation of trade unions, join a federation of trade unions and to participate in its lawful activities, and affiliate with, and participate in the affairs of any international workers organisation.<sup>622</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (c) Workers have a right to join trade unions.<sup>623</sup>
- Every worker has the right to form, join or participate in the activities and programmes of a trade union.<sup>624</sup>
  - Every employee has the right to participate in forming a trade union or federation of trade unions, join a trade union or leave a trade union.<sup>625</sup>
  - An employee who has not attained the age of 18 years but appears to be above the apparent age of 16 years may be a member of a trade union and shall enjoy all the rights of a member, but shall not form part of the executive or trustee of the trade union.<sup>626</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (d) Employers should eliminate racial discrimination amongst their employees, and guarantee the right to peaceful assembly and association.<sup>627</sup>
- No person shall discriminate against an employee or any person seeking employment for exercising the right to freedom of association.<sup>628</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

<sup>620</sup>Article 36 of the Constitution of Kenya 2010

<sup>621</sup>Article 5 of ILO's Freedom of Association and Protection of the Right to Organise Convention (No. 87), 1948; article 8(b) of the United Nations International Covenant on Economic, Social and Cultural Rights (1966)

<sup>622</sup>Section 8 of the Labour Relations Act No. 14 of 2007; article 41(4)(c) of the Constitution of Kenya 2010

<sup>623</sup>Article 1 of ILO's Right to Organise and Collective Bargaining Convention (No. 98), 1949; article 155 of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006), Paragraph 1(a), Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>624</sup>Article 41(2)(c) of the Constitution of Kenya, 2010; section 5(2) of the Labour Relations Act No. 14 of 2007

<sup>625</sup>Section 4(1) of the Labour Relations Act No. 14 of 2007

<sup>626</sup>Section 32 of the Labour Relations Act No. 14 of 2007

<sup>627</sup>Article 5(ix) of the United Nations Convention on the Elimination of all forms of Racial Discrimination (1965)

<sup>628</sup>Section 5(1) of the Labour Relations Act No. 14 of 2007

- (e) Collective bargaining should be made possible for all groups of workers.<sup>629</sup>
- Every trade union has the right to engage in collective bargaining.<sup>630</sup>
  - An employer should recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.<sup>631</sup>
  - An employer that has recognised a trade union should conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees.<sup>632</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (f) Migrant workers have the right to form associations and trade unions in the state of employment for the promotion and protection of their economic, social, cultural and other interests,<sup>633</sup> to join freely any trade union and any such association as aforesaid, subject only to the rules of the organisation concerned, and to seek the aid and assistance of any trade union.<sup>634</sup>
- No person should discriminate against an employee or any person seeking employment for exercising the right to freedom of association.<sup>635</sup>
  - Although it does not specifically provide for migrant workers, the provisions of the Labour Relations Act satisfies the requirements of the above international standard. We therefore there conclude that there is no gap.
  - Also, Kenya has ratified the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.

## 32. Child Labour

Work which deprives children of their childhood, their potential and their dignity and that is harmful to their physical or mental development, including by interfering with their education.

### GRI Reporting Standards (408)

- a. Operations and supplies considered to have significant risk for incidents of:
- i. child labour; and/or
  - ii. young workers exposed to hazardous work

<sup>629</sup> Article 5(2)(a) of ILO's Collective Bargaining Convention (No. 154), 1981; paragraphs 1(b) & 2(a) Section V of the OECD Guidelines for Multinational Enterprises (2011); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS06 at page 87

<sup>630</sup> Article 41(5) of the Constitution of Kenya, 2010

<sup>631</sup> Section 54 of the Labour Relations Act No. 14 of 2007

<sup>632</sup> Section 57 of the Labour Relations Act No. 14 of 2007

<sup>633</sup> Article 40(1) of the United Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990).

<sup>634</sup> Article 26(b) & (c) of the United Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990)

<sup>635</sup> Section 5(1) of the Labour Relations Act No. 14 of 2007

- b. As in (a) above in terms of:
- i. type of operation (such as manufacturing) and supplier; and
  - ii. countries of geographic areas with operations and suppliers considered at risk.
- c. Measures taken by the organisation in the reporting period intended to contribute to the effective abolition of child labour.

### Standards

- (a) Employers should not employ anyone under the minimum age prescribed by national laws and regulations for admission to employment or work.<sup>636</sup>
- No person should employ a child who has not attained the age of 13 years whether gainfully or otherwise in any undertaking.<sup>637</sup>
  - Every child (who has not attained the age of 18 years) should be protected from economic exploitation and any work that is likely to interfere with the child's education, or be harmful to the child's physical, mental, spiritual, moral or social development.<sup>638</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Minimum age prescribed by national laws and regulations should not be less than the age of completion of compulsory schooling and, in any case, should not be less than 15 years.<sup>639</sup> Minimum age for employment could be specified to 14 years for states whose economy and educational facilities are insufficiently developed.<sup>640</sup>
- No person should employ a child who has not attained the age of 13 years whether gainfully or otherwise in any undertaking.<sup>641</sup>
  - The provision of the Employment Act does not conform to the requirement of the international standard, because, whilst the international standard stipulates that minimum age prescribed by national laws and regulations should not be less than the age of completion of compulsory schooling, and in any event, not less than 15 years, the Employment Act provides for 13 years as the minimum age. There is therefore a discrepancy in terms of the international standards and the Employment Act.
  - However, Kenya is a signatory to the ILO Minimum Age Convention. Further, Kenya has ratified the ILO Social Security (Minimum Standards) Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya.

<sup>636</sup> Article 2(1) of ILO's Minimum Age Convention (No. 138), 1973; article 26 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); paragraph 1(c) Section V of the OECD Guidelines for Multinational Enterprises (2011); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS14 at page 88; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS01 at page 87

<sup>637</sup> Section 56(1) of the Employment Act No. 11 of 2007

<sup>638</sup> Section 10(1) of the Children Act No. 8 of 2001

<sup>639</sup> Article 2(3) of ILO's Minimum Age Convention (No. 138), 1973

<sup>640</sup> Article 2(4) of ILO's Minimum Age Convention (No. 138), 1973

<sup>641</sup> Section 56(1) of the Employment Act No. 11 of 2007

- There is disparity between the Employment Act and the convention. Companies that wish to comply with ESG requirements should make provision for this international standard.
- (c) The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years.<sup>642</sup> However, competent authorities may authorise employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected by the employer, and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.<sup>643</sup>
- Employers should not allow a person below the apparent age of 18 years to be employed at any workplace or work process, or perform work, which by its nature or the circumstances, in which it is carried out, is likely to harm the person's safety or health.<sup>644</sup>
  - Each child should be protected from any work that is likely to be hazardous or harmful to the child's health.<sup>645</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (d) Subject to national laws and regulations, employment or work of persons aged 13 to 15 years on light work which is not likely to be harmful to their health or development, and not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes is allowed.<sup>646</sup>
- A child between 13 and 16 years of age may be employed to perform light work which is:
    - (a) Not likely to be harmful to the child's health or development; or
    - (b) Not such as to prejudice the child's attendance at school, his participation in vocational orientation or training programmes approved by the Cabinet Secretary in charge of labour relations. The Cabinet Secretary may make rules prescribing light work in which a child of between 13 – 16 years of age may be employed and the terms and conditions of that employment.<sup>647</sup>
  - No person should employ a child between 13 – 16 years of age, other than one serving under a contract of apprenticeship or indentured learnership in accordance with the provisions of the Industrial Training Act, in an industrial undertaking to attend to machinery.<sup>648</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

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<sup>642</sup> Article 3(1) of ILO's Minimum Age Convention (No. 138), 1973; article 32 of the United Nations Convention on the Rights of the Child (1989)

<sup>643</sup> Article 3(3) of ILO's Minimum Age Convention (No. 138), 1973

<sup>644</sup> Section 97 of the Occupational Safety and Health Act No 15 of 2007

<sup>645</sup> Section 10(1) of the Children Act No. 8 of 2001

<sup>646</sup> Article 7(1) of ILO's Minimum Age Convention (No. 138), 1973

<sup>647</sup> Section 56 of the Employment Act No. 11 of 2007

<sup>648</sup> Section 58 of the Employment Act No. 11 of 2007

- (e) Employers should not subject children (under the age of 18), to the worst forms of child labour which comprise:
- i. all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
  - ii. the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
  - iii. the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and/or
  - iv. work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.<sup>649</sup>
- No person should employ a child in any activity which constitutes worst form of child labour. The Cabinet Secretary concerned with labour matters should make regulations declaring any work, activity or contract of service harmful to the health, safety or morals of a child.<sup>650</sup> Rule 12(3) read together with Schedule 4 of the Employment (General) Rules set out a list of activities deemed to be harmful to the health, safety and morals of a child.<sup>651</sup>
  - The Employment Act and the Employment (General) Rules do not provide an exhaustive list encompassing all the examples provided by the international standards. There is therefore a gap in this respect.
  - However, Kenya has ratified the ILO Worst Forms of Child Labour Convention, which is the source of this international standard. By virtue of article 2 (6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya.

### 33. Forced or compulsory labour

All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

#### GRI Reporting Standards (409)

- a. Operations and suppliers considered to have significant risk for incidents of forced or compulsory labour either in terms of:
  - i. type of operation (such as manufacturing plant) and supplier; and
  - ii. countries or geographic areas with operations and suppliers considered at risk.
- b. Measures taken by the organisation in the reporting period intended to contribute to the elimination of all forms of forced or compulsory labour.

<sup>649</sup> Article 2(3) of ILO's Worst Forms of Child Labour Convention (No. 182), 1999; article 26 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); Paragraph 1(c) Section V of the OECD Guidelines for Multinational Enterprises (2011)

<sup>650</sup> Section 53 of the Employment Act No. 11 of 2007

<sup>651</sup> Employment (General) Rules 2014

## Standards

- (a) No employee should be held in slavery or servitude.<sup>652</sup>
- A person should not be held in slavery or servitude.<sup>653</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) Employers should not subject their employees to forced or compulsory labour.<sup>654</sup>
- A person should not be required to perform forced labour.<sup>655</sup>
  - No person shall use or assist any other person in recruiting, trafficking or using forced labour.<sup>656</sup>
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.

### **34. Security Practices**

Conduct of security personnel trained in human rights and policies towards third parties and the potential risk for excessive use of force or other violations of human rights.

#### GRI Reporting Standards (410)

- (a) Percentage of security personnel who have received formal training in the organisation's human right policies or specific procedures and their application to security.
- (b) Whether training requirements also apply to third party organisations providing security personnel.

## Standards

- (a) To operate in accordance with the Code.<sup>657</sup>
- Under Kenyan law, there is established the Private Security Regulation Act which applies to private security officers, security guards, private security service providers, private security firms and private investigators.<sup>658</sup>

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<sup>652</sup> Article 8(1) and (2) of the United Nations Convention on Civil and Political Rights (1966); the United Nations Slavery Convention (1926); article 4 of the United Nations Universal Declaration of Human Rights (1948); article 11(1) of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990)

<sup>653</sup> Article 30(1) of the Constitution of Kenya, 2010

<sup>654</sup> Article 1 of ILO's Forced Labour Convention, 1930 (No. 29); Article 11(2) of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990); paragraphs 23 – 25 of the of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006); paragraph 1(d) Section V of the OECD Guidelines for Multinational Enterprises (2011); FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS02 at page 87; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS14 at page 88

<sup>655</sup> Article 30(2) of the Constitution of Kenya, 2010

<sup>656</sup> Section 4 of the Employment Act No. 11 of 2007

<sup>657</sup> International Code of Conduct for Private Security Service Providers (ICCPSSP) (2010) Paragraphs 16 and 44

<sup>658</sup> Section 4 of the Private Security Regulation Act No. 13 of 2016

- A registered private security provider should not act in a manner that violates national or international law.<sup>659</sup>
  - The International Code of Conduct for Private Security Service Providers does not form part of Kenyan law. However, Kenya has in place the Private Security Regulation Act which governs the conduct of private security providers. This Act also requires private security providers not to act in a manner that violates international law. In this respect, it could be said that private security providers are mandated to comply with the International Code of Conduct for Private Security Service Providers. Local law therefore adequately satisfies the requirements of the international standard; hence there is no gap.
- (b) To establish and maintain an effective internal governance framework in order to deter, monitor, report and effectively address adverse impacts on human rights.<sup>660</sup>
- A registered private security provider should develop internal systems of governance including a code of conduct, and policies on the recruitment, training, financial and contractual policies and registration of employees, amongst other things, and these systems will be open to public scrutiny at all times.<sup>661</sup>
  - A registered private security provider should promptly and thoroughly investigate complaints of inappropriate or illegal behaviours by staff, and should inform the police of these actions when appropriate.<sup>662</sup>
  - Although the Private Security Regulation Act does not expressly provide for the requirement of a framework to monitor adverse impacts on human rights, it requires each security services provider to develop internal systems of governance which would include a code of conduct. It also requires a private security provider to investigate complaints of inappropriate or illegal behaviours by its staff. One could therefore say that these provisions would encompass a framework to monitor adverse impacts on human rights.
  - However, for good measure, companies that wish to comply with ESG requirements should make specific provision for this international standard.
- (c) To establish objective and measurable standards for providing security services based on the code.<sup>663</sup>
- A registered private security provider should develop internal systems of governance including a code of conduct, and policies on the recruitment, training, financial and contractual policies and registration of employees, amongst other things, and these systems will be open to public scrutiny at all times.<sup>664</sup>

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<sup>659</sup> Section 68 read together with paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>660</sup> ICCPSSP paragraphs 21 and 25; IFC Performance Standards on Environmental and Social Sustainability 2012 Standard 4

<sup>661</sup> Section 68 read together with paragraph j, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>662</sup> Section 68 read together with paragraph k, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>663</sup> ICCPSSP paragraphs 27; IFC PSESS Standard 4

<sup>664</sup> Section 68 read together with paragraph j, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

- Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (d) To comply with all human rights laws.<sup>665</sup>
- The rights and fundamental freedoms set out in the Constitution of Kenya bind all state organs and all persons.<sup>666</sup> This will include security service providers.
  - Local law adequately satisfies the requirements of the international standard; hence there is no gap.
- (e) Security personnel must take all reasonable steps to avoid the use of force. If force is used it shall be in a manner consistent with applicable law.<sup>667</sup>
- A registered private security provider should develop standard operating procedures and put in place strict and detailed guidelines on the use of minimal force in accordance with international best practices.<sup>668</sup>
  - Local laws adequately satisfies the requirements of the international standard; hence there is no gap.
- (f) No use of firearms against persons except in self defence or defence of others against the imminent threat of death or several injury.<sup>669</sup>
- A private security service provider should not allow the use of firearms in the rendering of security service.<sup>670</sup>
  - Under Kenyan law, private security firms are not permitted to use firearms. This international standard is therefore currently not applicable for companies in Kenya. However, the Private Security Regulatory Authority, in January 2019 gave a green light to private security officers to carry guns as the first line of defence against any incident, after undergoing a rigorous six-month mandatory training on the use and handling of guns.<sup>671</sup> We are therefore monitoring any changes that may be effected on the laws, given this new development.
- (g) No seizure or holding of any person except when apprehending persons to defend themselves or others against an imminent threat of violence or following an attack or crime committed by such persons against organisation personnel or against clients or property under their protection pending the handover of such detained persons to the competent authority at the earliest opportunity. Any such apprehension must be consistent with applicable national law and be reported to the organisation without delay.<sup>672</sup>

<sup>665</sup> IFCPSESS standard 4; ICCPSSP paragraphs 2 and 6

<sup>666</sup> Article 20 of the Constitution of Kenya, 2010 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>667</sup> ICCPSSP paragraph 30

<sup>668</sup> Section 68 read together with paragraph e, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>669</sup> ICCPSSP paragraph 31

<sup>670</sup> Section 53(1) of the Private Security Regulation Act No. 13 of 2016

<sup>671</sup> The Standard Newspaper of 19 January 2019, available at the following link:

<https://www.standardmedia.co.ke/article/2001309922/private-security-guards-to-be-issued-with-guns-in-six-months>

<sup>672</sup> ICCPSSP paragraph 34

- A private security service provider, a security guard or a security officer may arrest a person who commits an offence within the premises in which that provider, guard or officer is responsible for and immediately hand over the person to the nearest police station or post. This right to arrest should be responsibly exercised and should not infringe on any right or fundamental freedom of a person.<sup>673</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (h) Personnel will not engage in torture or other cruel, inhuman or degrading treatment or punishment.<sup>674</sup>
- Every person has the right to freedom from torture and cruel, inhuman or degrading treatment or punishment.<sup>675</sup>
  - A registered private security provider should promptly and thoroughly investigate complaints of inappropriate or illegal behaviour by staff, and should inform the police of these actions when appropriate.<sup>676</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (i) Personnel will not engage in sexual exploitation and abuse or gender based violence or crimes. Personnel must remain vigilant for all instances of sexual or gender based violence and where discovered report such instances to competent authorities.<sup>677</sup>
- Any person, who being in a position of authority, or holding a public office, who persistently makes any sexual advances or requests which he or she knows, or has reasonable grounds to know, are unwelcome, is guilty of the offence of sexual harassment and shall be liable to imprisonment for a term of not less than three years or to a fine of not less than one hundred thousand shillings or to both.<sup>678</sup>
  - An employer who employs 20 or more employees should issue a policy statement on sexual harassment after consultation with the employees or their representatives. This policy should be brought to the attention of all employees. The policy should stipulate:
    - (a) That every employee is entitled to employment that is free of sexual harassment;
    - (b) That the employer will take steps to ensure that no employee is subjected to sexual harassment;
    - (c) That the employer will take disciplinary measures against any person who subjects any employee to sexual harassment;
    - (d) How complaints of sexual harassment may be brought to the attention of the employer; and
    - (e) That the employer will not disclose the name of the complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto.<sup>679</sup>

<sup>673</sup> Section 46 of the Private Security Regulation Act No. 13 of 2016

<sup>674</sup> ICCPSSP paragraph 35

<sup>675</sup> Article 25(a) of the Constitution of Kenya 2010

<sup>676</sup> Section 68 read together with paragraph k, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>677</sup> ICCPSSP paragraph 38

<sup>678</sup> Section 23(1) of the Sexual Offences Act No. 3 of 2006 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>679</sup> Section 6(3) of the Employment Act No. 11 of 2007 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

- Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (j) No use of slavery, forced or compulsory labour.<sup>680</sup>
- A person should not be held in slavery or servitude.<sup>681</sup> A person should not be required to perform forced labour.<sup>682</sup> No person shall use or assist any other person in recruiting, trafficking or using forced labour.<sup>683</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (k) No child (anyone under the age of 18) labour.<sup>684</sup>
- Every child (who has not attained the age of 18 years) should be protected from economic exploitation and any work that is likely to interfere with the child's education, or be harmful to the child's physical, mental, spiritual, moral or social development.<sup>685</sup>
  - Employers should not allow a person below the apparent age of 18 years to be employed at any workplace or work process, or perform work, which by its nature or the circumstances, in which it is carried out, is likely to harm the person's safety or health.<sup>686</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (l) No discrimination on grounds of race, colour, sex, religion, social origin, social status disability or sexual orientation, when hiring personnel and will select personnel on the basis of inherent requirements of the contract.<sup>687</sup>
- A registered private security provider should ensure that the staff it engages are recruited according to objective criteria and have no criminal record, not committed past human rights violations and not been dishonourably discharged from state organs that provide security services or similar agencies abroad.<sup>688</sup>
  - No employer should discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or

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<sup>680</sup> ICCPSSP paragraph 40

<sup>681</sup> Article 30(1) of the Constitution of Kenya, 2010 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>682</sup> Article 30(2) of the Constitution of Kenya, 2010 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>683</sup> Section 4 of the Employment Act No. 11 of 2007 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>684</sup> ICCPSSP paragraph 41 and 46

<sup>685</sup> Section 10(1) of the Children Act No. 8 of 2001 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>686</sup> Section 97 of the Occupational Safety and Health Act No 15 of 2007 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>687</sup> ICCPSSP paragraph 42

<sup>688</sup> Section 68 read together with paragraph d, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

HIV status in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or matters arising out of the employment.<sup>689</sup>

- Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (m) All personnel must be individually identifiable whenever they are carrying out activities in the discharge of their contractual responsibilities.<sup>690</sup>
- The Cabinet Secretary in charge of internal security, in consultation with the Private Security Regulatory Authority may make regulations for the purpose of the proper administration of and giving effect to this Act. These regulations would provide for the provision of uniforms and equipment to employees of private security firms.<sup>691</sup>
  - Local laws adequately satisfy the requirements of the international standard in so far as they take into consideration the uniforms that the private security providers would utilise. The Private Security Regulation Act mandates the Cabinet Secretary in charge of internal security to formulate regulations that would expand on the uniforms to be used by the private security providers. At the time of submitting this report, we spoke to the office of the Ministry of Interior, who explained that they are in the process of finalising the regulations, and that they would be published sometime in 2019. We anticipate that these regulations would provide more substance to section 70 of the Private Security Regulations Act, which includes the provision of uniforms to be used by private security providers.
  - In the meantime, companies that wish to comply with ESG requirements should make provision for this international standard.
- (n) Organisations will exercise due diligence in the selection of personnel including verification, vetting and ongoing performance reviews.<sup>692</sup>
- A registered private security provider should ensure that the staff it engages are recruited according to objective criteria and have no criminal record, not committed past human rights violations and not been dishonourably discharged from state organs that provide security services or similar agencies abroad.<sup>693</sup>
  - Local laws adequately satisfy the requirements of the international standard, save for the requirement of the conduct of ongoing performance reviews. Companies that wish to fully comply with ESG requirements should ensure ongoing performance reviews for its employees.
- (o) Organisations will exercise due diligence in the selection, vetting and ongoing performance review of all subcontractors.<sup>694</sup>

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<sup>689</sup> Section 5(3) of the Employment Act No. 11 of 2007 read together with Section 68 and paragraph a, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>690</sup> ICCPSSP paragraph 43

<sup>691</sup> Section 70 of the Private Security Regulation Act No. 13 of 2016

<sup>692</sup> ICCPSSP paragraph 45

<sup>693</sup> Section 68 read together with paragraph d, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>694</sup> ICCPSSP paragraph 50 and 51

- A registered private security provider should ensure that the staff it engages are recruited according to objective criteria and have no criminal record, not committed past human rights violations and not been dishonourably discharged from state organs that provide security services or similar agencies abroad.<sup>695</sup>
  - The Private Security Regulations Act only provides for the vetting of employees of the private security firm, and does not envisage subcontractors. Therefore, companies that wish to fully comply with ESG requirements should make provision for ongoing performance reviews for its subcontractors.
- (p) Organisations will ensure that all personnel performing security services receive initial and recurrent professional training and are also fully aware of this Code.<sup>696</sup>
- A registered private security provider should provide basic training for new employees, where state institutions do not provide it, and internal training systems which cover international and national law, cultural sensitivity, first aid and gender issues and further training on a continuous basis.<sup>697</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (q) Organisations will establish grievance procedures to address claims alleging breach of this Code.<sup>698</sup>
- No local standards as the International Code of Conduct for Private Security Service Providers does not form part of the laws of Kenya.
  - There is a gap with respect to this international standard as the International Code of Conduct for Private Security Service Providers does not form part of Kenyan law. Therefore, in order to fully comply with the Social requirements in terms of ESG compliance, private security firms should ensure compliance of paragraphs 66 – 68 of the International Code of Conduct for Private Security Service Providers.

### 35. Rights of indigenous people (Ogiek and Endorois people)

Generally identified as tribal people in independent countries where social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

#### **GRI Reporting Standard (411)**

- (a) Total number of identified incidents of violations involving the rights of indigenous peoples during the reporting period.
- (b) Status of the incidents and actions taken with reference to the following:
- i. Incident reviewed by the organization;

<sup>695</sup> Section 68 read together with paragraph d, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>696</sup> ICCPSSP paragraphs 55

<sup>697</sup> Section 68 read together with paragraph c, Second Schedule (Code of Conduct for Private Security Providers) of the Private Security Regulation Act No. 13 of 2016

<sup>698</sup> ICCPSSP paragraph 66

- ii. Remediation plans being implemented;
- iii. Remediation plans that have been implemented, with results reviewed through routine internal management review processes;
- iv. Incident no longer subject to action.

### Standards

- (a) To consult the peoples concerned, through appropriate procedures and in particular through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly<sup>699</sup>
  - The right to be consulted through appropriate procedures.<sup>700</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (b) Indigenous people should not be removed from the lands which they occupy.<sup>701</sup>
  - Indigenous people have the right not to be removed from their lands which they occupy.<sup>702</sup>
  - Local laws adequately satisfy the requirements of the international standard, as Kenya has ratified the ILO Indigenous and Tribal Peoples Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
- (c) Indigenous peoples shall have the right to the natural resources pertaining to their land, including the right to participate in the use, management and conservation of these resources.<sup>703</sup>
  - Indigenous people have the right to use of natural resources pertaining to their land.<sup>704</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (d) To adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.<sup>705</sup>
  - Right not to be discriminated against at work places<sup>706</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.

<sup>699</sup> ILO Convention, Indigenous and Tribal Peoples Convention, C169, 1989 Article 6(1); article 18 of the United Nations Declaration on the Rights of Indigenous Peoples

<sup>700</sup> Article 7 of Kenya Constitution; See also Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR

<sup>701</sup> ILO Convention, Indigenous and Tribal Peoples Convention, C169, 1989 Article 16

<sup>702</sup> ILO Convention, Indigenous and Tribal Peoples Convention, C169, 1989 Article 16

<sup>703</sup> ILO Convention, Indigenous and Tribal Peoples Convention, C169, 1989 Article 15 (1) and (2)

<sup>704</sup> William Arap Ng' Asia & 29 others v. Baringo County Council, Koibatek County Council and the Attorney General, High Court of Kenya at Nakuru, Civil suit No.522 of 1998 (unreported)

<sup>705</sup> ILO Convention, Indigenous and Tribal Peoples Convention, C169, 1989 Article 20.

<sup>706</sup> Articles 27 and 41 of the Constitution of Kenya 2010; Articles 5(5 and 6) of the Employment Act 2007.

- (e) Organizations must conduct due diligence to ensure that:<sup>707</sup>
- i. The process used for identifying indigenous and tribal peoples' lands is consistent with the International standards
  - ii. Legal or other procedures for resolving indigenous peoples' land claims and disputes are acceptable and have been subject to consultation
  - iii. The title to land has derived originally from indigenous peoples and whether this title was obtained properly, in accordance with the law, and without taking advantage of lack of understanding of laws in order to secure possession.
  - iv. The relevant government authorities have recognized the indigenous peoples' rights to natural resources.
  - v. Appropriate consultation has taken place prior to the granting of exploration and exploitation licenses.
  - vi. Mechanisms are in place to enable the communities concerned to participate in the benefits of the project and to compensate them fairly
- On the basis that Kenya is a signatory of the ILO Indigenous and Tribal Peoples Convention, and the application of article 2(6) of the Constitution of Kenya, the above international standard is mirrored under Kenyan law.
  - Local laws adequately satisfy the requirements of the international standard, as Kenya is a signatory to the ILO Indigenous and Tribal Peoples Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.

### 36. Human Rights Assessment

The international standard that establishes the expectations of responsible conduct for organisations with respect to human rights is the UN 'Guiding principles on Business and Human rights' as endorsed by UN Human Rights Council in 2011.

#### GRI Reporting Standards (412)

- a. The total number and percentage of operations that have been subject to human rights reviews or human rights impact assessments, by country.
- b. Total Number of hours in the reporting period devoted to training on human rights policies or procedures concerning aspects on human rights that are relevant to operations.
- c. Percentage of employees trained during the reporting period in human rights policies or procedures concerning aspects of human rights that are relevant to operations.

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<sup>707</sup> IFC, 2007: ILO Convention No. 169 and the Private Sector.

- d. Total number and percentage of significant investment agreements and contracts that include human rights clauses or underwent human rights screening.
- e. Definition used for 'significant investment agreements'.

### Standards

- (a) See Standards on Forced or Compulsory Labour.
  - A person should not be held in slavery or servitude.<sup>708</sup> A person should not be required to perform forced labour.<sup>709</sup> No person shall use or assist any other person in recruiting, trafficking or using forced labour.<sup>710</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (b) Workers shall have the right to establish and join federations and confederations of their own choosing.<sup>711</sup>
  - Every worker has the right to form, join or participate in the activities and programmes of a trade union.<sup>712</sup>
  - Every employee has the right to participate in forming a trade union or federation of trade unions, join a trade union or leave a trade union.<sup>713</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (c) Workers shall have the right to draw up their constitutions and rules to elect their representative in full freedom to organise their administration and activities and to formulate their programmes.<sup>714</sup>
  - Every trade union has the right to draw up its own constitution and rules.<sup>715</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (d) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.<sup>716</sup>
  - An employer should not discriminate against an employee or any person seeking employment for exercising his right to join a trade union.<sup>717</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.

<sup>708</sup> Article 30(1) of the Constitution of Kenya, 2010

<sup>709</sup> Article 30(2) of the Constitution of Kenya, 2010

<sup>710</sup> Section 4 of the Employment Act No. 11 of 2007

<sup>711</sup> ILO Convention 87 of 1948 Article 2 and 5

<sup>712</sup> Article 41(2)(c) of the Constitution of Kenya, 2010; section 5(2) of the Labour Relations Act No. 14 of 2007

<sup>713</sup> Section 4(1) of the Labour Relations Act No. 14 of 2007

<sup>714</sup> ILO Convention 87 of 1948 Article 3

<sup>715</sup> Section 8(a) of the Labour Relations Act No. 14 of 2007

<sup>716</sup> ILO Convention 98 of 1949 Article 1

<sup>717</sup> Section 5(1) of the Employment Act No. 14 of 2007

- (e) Organisations, in determining rates of remuneration for their employees shall promote and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.<sup>718</sup>
- An employer should pay his employees equal remuneration for work of equal value.<sup>719</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (f) The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years.<sup>720</sup>
- Employers should not allow a person below the apparent age of 18 years to be employed at any workplace or work process, or perform work, which by its nature or the circumstances, in which it is carried out, is likely to harm the person's safety or health.<sup>721</sup>
  - Each child should be protected from any work that is likely to be hazardous or harmful to the child's health.<sup>722</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (g) The minimum age for admission to employment or work shall be not less than the age of compulsory schooling and, in any case, shall be less than 15 years: save for exceptions contained in Articles 6 and 7 of ILO Convention 138 of 1973.<sup>723</sup>
- No person should employ a child who has not attained the age of 13 years whether gainfully or otherwise in any undertaking.<sup>724</sup>
  - The provision of the Employment Act does not conform to the requirement of the international standard, because, whilst the international standard stipulates that minimum age prescribed by national laws and regulations should not be less than the age of completion of compulsory schooling, and in any event, not less than 15 years, the Employment Act provides for 13 years as the minimum age. There is therefore a discrepancy in terms of the international standards and the Employment Act.
  - However, Kenya is a signatory to the ILO Minimum Age Convention, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.
  - Companies that wish to comply with ESG requirements should therefore make provision for this international standard.

<sup>718</sup> ILO Convention 100 of 1951 Article 2

<sup>719</sup> Section 5(5) of the Employment Act No. 11 of 2007

<sup>720</sup> ILO Convention 138 of 1973 Article 3

<sup>721</sup> Section 97 of the Occupational Safety and Health Act No 15 of 2007

<sup>722</sup> Section 10(1) of the Children Act No. 8 of 2001

<sup>723</sup> ILO Convention 138 of 1973 Article 2

<sup>724</sup> Section 56(1) of the Employment Act No. 11 of 2007

- Every child (who has not attained the age of 18 years) should be protected from economic exploitation and any work that is likely to interfere with the child's education, or be harmful to the child's physical, mental, spiritual, moral or social development.<sup>725</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (h) An employer should have a policy addressing children's rights (other than child labour) through: (a) evidence of support for children's rights in company operations or through programmes; and (b) policy or commitment to the Children's Rights and Business Principles.<sup>726</sup>
- No local standard.
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (i) No discrimination on the basis of disability with regards to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, career advancement and safe and healthy working conditions.<sup>727</sup>
- An employer should not discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of disability,<sup>728</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>729</sup>
  - No person should deny a person with disability access to opportunities for suitable employment.<sup>730</sup>
  - No employer should discriminate against a person with a disability in relation to:
    - (a) The advertisement of employment;
    - (b) The recruitment for employment;
    - (c) The creation, classification or abolition of posts;
    - (d) The determination or allocation of wages, salaries, pensions, accommodation, leave or such other benefits.<sup>731</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (j) To allow persons with disabilities to exercise their labour and trade union rights on an equal basis with others.<sup>732</sup>

<sup>725</sup> Section 10(1) of the Children Act No. 8 of 2001

<sup>726</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR04 at page 79

<sup>727</sup> UN Convention on the Rights of Persons with Disabilities 2006 Article 27 (a) (b)

<sup>728</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>729</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>730</sup> Section 12(1) of the Persons with Disabilities Act No. 14 of 2003

<sup>731</sup> Section 15(1) of the Persons with Disabilities Act No. 14 of 2003

<sup>732</sup> UN Convention on the Rights of Persons with Disabilities 2006 Article 27 (c)

- An employee should promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.<sup>733</sup>
  - An employer should not discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of disability,<sup>734</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>735</sup>
  - No person should require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union.<sup>736</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (k) To ensure that reasonable accommodation is provided to persons with disabilities in the workplace.<sup>737</sup>
- Persons with disabilities are entitled to a barrier-free and disability friendly environment to enable them to have access to buildings, roads and other social amenities and assistive devices and other equipment to promote their mobility.<sup>738</sup>
  - A proprietor of a public building should adapt it to suit persons with disabilities.<sup>739</sup>
  - Whilst the Persons with Disabilities requires an employee to ensure accessibility at the workplace for an employee living with disability, it does not stipulate a requirement for an employer to provide accommodation for its employees who have disabilities. Article 27 of the United Nations Convention on the Rights of Persons with Disabilities requires employers to provide reasonable accommodation, as with a view to facilitating access of persons with disabilities to work on an equal basis with others. A commentary on article 27 explains that state parties must ensure that reasonable accommodation is provided to persons with disabilities who request it, and should take effective steps, including through legislation, to ensure that the denial of reasonable accommodation constitutes discrimination.<sup>740</sup>
  - It should however be noted that Kenya is a signatory of the United Nations Convention on the Rights of Persons with Disabilities, which is the source of this international standard. By virtue of article 2(6) of the Constitution of Kenya, this convention constitutes part of the laws of Kenya; hence there is no gap.

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<sup>733</sup> Section 5(2) of the Employment Act No. 11 of 2017

<sup>734</sup> Section 5(3)(a) of the Employment Act No. 11 of 2007

<sup>735</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>736</sup> Section 5(2)(a) of the Labour Relations Act No. 14 of 2007

<sup>737</sup> UN Convention on the Rights of Persons with Disabilities 2006 Article 27 (i)

<sup>738</sup> Section 21 of the Persons with Disabilities Act No. 14 of 2003

<sup>739</sup> Section 21 of the Persons with Disabilities Act No. 14 of 2003

<sup>740</sup> "Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism", *Protecting the Rights of People with Autism in the Fields of Education and Employment: International, European and National Perspectives*, edited by Valentina Della Fina and Rachele Cera

- (l) The organisation must have full respect for internationally recognised human rights: a minimum requirement being observation of the International Bill of Human Rights and the principles set out in the ILO Declaration on Fundamental Principles and Rights at Work.<sup>741</sup>
- Kenya has ratified various international conventions on human rights which form part of the laws of Kenya by virtue of article 2(6) of the Constitution of Kenya.
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (m) Organisations must have in place:
- i. a policy commitment to meet their responsibility to respect human rights;
  - ii. a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and
  - iii. processes to enable the remediation of any advance human rights impacts they cause or to which they contribute.<sup>742</sup>
- No local standard.
  - The Constitution of Kenya of 2010 requires every person living in Kenya to observe, respect, protect and promote and fulfil the rights and fundamental freedoms in the Bill of Rights. This provision would include employers. However, the Employment Act does not have an express provision requiring employers to have in place policies that provide for (m) above. Therefore, companies that wish to comply with ESG requirements should make provision for (m) above.

### 37. Local Communities

Persons or group of persons living and / or working in any areas that are economically, socially or environmentally impacted (positively or negatively) by an organisation's operations.

#### GRI Reporting Standards (413)

1. Reporting the percentage of operations with implemented local community engagement, impact assessments and / or development programmes including the use of:
  - i. social impact assessments including gender impact assessment, based on participating processes;
  - ii. environmental impact assessments and ongoing monitoring;
  - iii. public disclosure of results of environmental and social impact assessments;
  - iv. local community development programmes based on local community needs;
  - v. stakeholder engagement plans based on stakeholder mapping;

<sup>741</sup> UN Guiding Principles on Business and Human Rights 2011 Principle II; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR02 at page 79

<sup>742</sup> UN Guiding Principles on Business and Human Rights Paragraphs 12 / 13; Principles II paragraphs 15 and 16; OECD Guideline for Multinational Enterprises (2011) Section IV paragraphs 1-6; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR01 at page 79

- vi. broad based local community consultation communities and processes that include vulnerable groups;
  - vii. works Council's occupational health and safety committees and other worker representative bodies to deal with impacts; and
  - viii. formal local community grievances processes.
2. Reporting such operations as have significant actual and potential negative impacts on local communities including:
- i. the location of the operations; and
  - ii. the significant actual and potential negative impacts of operations.

### Standards

(a) Employ local workers.<sup>743</sup>

- The National Employment Authority Act which has the purpose of providing a framework and facilitation of employment of Kenyans in the national government, the private sector and the informal sector in Kenya,<sup>744</sup> defines an employer as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.<sup>745</sup>
- The National Employment Authority of Kenya encourages private and public institutions to employ Kenyans in all positions, including positions of leadership and management.<sup>746</sup> The Government of Kenya shall take affirmative action measures and actions designed to promote the employment of Kenyans in management and other levels of employment regardless of their years of employment.<sup>747</sup>
- The holder of a mineral right should give preference in employment to members of the community and citizens of Kenya.<sup>748</sup>
- Local laws adequately satisfy the requirements of the international standard; hence there is no gap.

(b) To adopt a mitigation hierarchy to anticipate and avoid or where avoidance is not possible, minimalise, and where residual impacts remain, compensate / offset for risks and impacts to workers, affected communities and the environment.<sup>749</sup>

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<sup>743</sup> OECD Guidelines for Multinational Enterprises (2011) Section V paragraph 5; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR05 at page 79; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SLS11 at page 88

<sup>744</sup> Section 3 of the National Employment Authority Act No. 3 of 2016

<sup>745</sup> Section 2 of the National Employment Authority Act No. 3 of 2016

<sup>746</sup> Section 37(1) of the National Employment Authority Act No. 3 of 2016

<sup>747</sup> Section 37(3) of the National Employment Authority Act No. 3 of 2016

<sup>748</sup> Section 47(1) of the Mining Act No. 12 of 2016

<sup>749</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 1; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR10 at page 79

- An agreement relating to investment in community land should be made after a free, open consultative process and should involve continuous monitoring and evaluation of the impact of the investment to the community, and measure to mitigate any negative effects of the investment.<sup>750</sup>
  - In every petroleum agreement, there is an implied obligation of the contractor to indemnify the Government of Kenya against all claims made by third parties, in respect of any injury, damage or loss caused by, or resulting from, the conduct of any operations carried out by the contractor or subcontractors pursuant to the provisions of any petroleum agreement.<sup>751</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (c) To ensure the grievances from affected communities and external communications from other stakeholders are responded to and managed appropriately.<sup>752</sup>
- Where a demand or claim for compensation is disputed, the parties to the dispute shall seek to resolve the dispute amicably by agreement reached through negotiations in good faith. Where a dispute cannot be resolved through negotiations within a reasonable period of time, either party to the dispute may refer the matter to the Cabinet Secretary in charge of mining.<sup>753</sup>
  - Local laws only satisfy the requirements of the international standard, under the Mining Act. Therefore, companies falling outside the scope of the Mining Act that get involved with community stakeholders that wish to comply with ESG requirements should make provision for this international standard.
- (d) To promote and provide means for adequate engagement with affected communities throughout the project cycle on issues that could potentially affect them and ensure that relevant environmental and social information is disclosed and disseminated.<sup>754</sup>
- Investment in community land should be made after a free, open consultative process and should involve stakeholder consultations and involvement of the community.<sup>755</sup>
  - Stakeholder engagement relating to environmental issues in a project cycle are covered in the 'Environment' section above.
  - Certain projects subject to EIA must undergo consultation and public participation of affected persons throughout the project cycle (including social considerations).<sup>756</sup>
  - Local laws adequately satisfies the requirements of the international standard; hence there is no gap.

<sup>750</sup> Section 36(1) of the Community Land Act No. 27 of 2016

<sup>751</sup> Section 9(1)(i) of the Petroleum (Exploration and Production) Act No. 22 of 2012

<sup>752</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 4; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR20 at page 80

<sup>753</sup> Section 153 of the Mining Act No. 12 of 2016

<sup>754</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 – Standard 4

<sup>755</sup> Section 36(1)(b) of the Community Land Act No. 27 of 2016

<sup>756</sup> Regulations 7(1)(h) & (7)1(i) of the Environmental (Impact Assessment and Audit) Regulations 2003, Act No. 8 of 1999

- (e) Establish and maintain an Environmental and Social Assessment and Management System (ESMS).<sup>757</sup>
- Investment in community land should be made after a free, open consultative process and should involve an environmental, social, cultural and economic impact assessment and continuous monitoring and evaluation of the impact of the investment to the community.<sup>758</sup>
  - Certain projects subject to EIA must undergo consultation and public participation of affected persons throughout the project cycle (including social considerations).<sup>759</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (f) Protect the community health and safety by establishing preventive and control measures consistent with good International Industry Practice.<sup>760</sup>
- An agreement relating to investment in community land should be made after a free, open consultative process and should involve continuous monitoring and evaluation of the impact of the investment to the community, and measures to mitigate any negative effects of the investment.<sup>761</sup>
  - The holder of any mineral right in respect of a large scale operation should, update its mine plan with regard to conditions of employment, health and safety, the management of the environment and community social investments.<sup>762</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (g) On projects consider feasible alternate project designs to avoid or minimise physical and / or economic displacement, while balancing environmental, social and financial costs and benefits.<sup>763</sup>
- Investment in community land should be made after a free, open consultative process and should involve putting measures in place to mitigate any negative effects of the investment.<sup>764</sup>
  - The provisions of the Community Land Act are set within the spirit of international standards; hence there is no gap.
- (h) Where displacement cannot be avoided offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods.<sup>765</sup>

<sup>757</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 - Standard 1

<sup>758</sup> Section 36(1)(a) & (c) of the Community Land Act No. 27 of 2016

<sup>759</sup> Regulations 7(1)(h) & (7)1(i) of the Environmental (Impact Assessment and Audit) Regulations 2003, Act No. 8 of 1999

<sup>760</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 - Standard 4

<sup>761</sup> Section 36(1) of the Community Land Act No. 27 of 2016

<sup>762</sup> Section 225(5) of the Mining Act No. 12 of 2016

<sup>763</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 - Standard 5

<sup>764</sup> Section 36(1)(f) of the Community Land Act No. 27 of 2016

<sup>765</sup> IFC Performance Standards on Environmental and Social Sustainability 2012 - Standard 5

- Investment in community land should be made after a free, open consultative process and should involve payment of compensation where necessary.<sup>766</sup>
  - The provisions of the Community Land Act are set within the spirit of international standards; hence there is no gap.
- (i) Carry out stakeholder analysis before the commencement of any project and engage with the stakeholders in their own communities.<sup>767</sup>
- Investment in community land should be made after a free, open consultative process and should involve stakeholder consultations and involvement of the community.<sup>768</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (j) Obtain feedback from local workforce and communications on a regular and consistent basis.<sup>769</sup>
- Investment in community should be made after a free, open, consultative process and should involve stakeholder consultations and involvement of the community, and continuous monitoring and evaluation of the impact of the investment to the community.<sup>770</sup>
  - Certain projects subject to EIA must undergo consultation and public participation of affected persons throughout the project cycle (including social considerations).<sup>771</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (k) Give local communities the information they need to participate in an informal manner.<sup>772</sup>
- Investment in community should be made after a free, open, consultative process and should involve stakeholder consultations and involvement of the community.<sup>773</sup>
  - The provisions of the Community Land Act are set within the spirit of international standards; hence there is no gap.
- (l) Document all consultation with local communities and the outcome.<sup>774</sup>
- No local standard.

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<sup>766</sup> Section 36(1)(d) of the Community Land Act No. 27 of 2016

<sup>767</sup> IFC Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007) - pages 28 - 34

<sup>768</sup> Section 36(1)(b) of the Community Land Act No. 27 of 2016

<sup>769</sup> IFC Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007) - page 38

<sup>770</sup> Section 36(1) of the Community Land Act No. 27 of 2016

<sup>771</sup> Regulations 7(1)(h) & (7)1(i) of the Environmental (Impact Assessment and Audit) Regulations 2003, Act No. 8 of 1999

<sup>772</sup> IFC Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007) - page 42

<sup>773</sup> Section 36(1) of the Community Land Act No. 27 of 2016

<sup>774</sup> IFC Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets (2007) - page 56; FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR11 at page 80

- While the Community Land Act requires investors to undertake stakeholder engagement and consultation, there is no express requirement for the investors to document these consultations. Therefore, companies that wish to comply the ESG requirements should make provision for this international standard in its policies.
- (m) Employers should have in place a statement of principles or process by which community investments are made.<sup>775</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (n) Employers should have a record of human rights violations, and should disclose the number of incidents, and actions taken regarding incidents of violations.<sup>776</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (o) Employers should participate in a recognised human rights related initiative or collaboration, which would include, participating in workshops on relevant human rights issues or being a formal member in an industry or topic specific human rights related initiative.<sup>777</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (p) Employers should keep a record of, and if required disclose, the output/outcome of specific results, achievements or benefits of community investments.<sup>778</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies

<sup>775</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR03 at page 79

<sup>776</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR13 at page 90

<sup>777</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR14 at page 80

<sup>778</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR15 at page 80

that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.

- (q) Employers should establish mechanisms to facilitate employee engagement and involvement with charitable partners and this will include evidence of recognising volunteering and specific foundations, targets and structures set up.<sup>779</sup>

- **No local standard**

- It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.

- (r) Employers should keep a record of the total amount of corporate or group donations / community investments made to registered not-for-profit organisations.<sup>780</sup>

- **No local standard**

- It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.

## CUSTOMER RESPONSIBILITY TOPICS AND STANDARDS

### 38. Supplier Social Assessment

Due Diligence is expected of an organisation in order to prevent and mitigate negative social impacts in the supply chain.

#### GRI Reporting Standards (414)

- Percentage of new supplier that were screened using social criteria.
- Number of suppliers assessed for social impacts.
- Number of suppliers identified as having significant actual and potential negative social impacts identified in the supply chain.
- Significant actual and potential negative social impacts identified in the supply chain.
- Percentage of suppliers identified as having significant actual or potential negative social impacts with which improvements were agreed upon as a result of assessment.

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<sup>779</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR16 at page 80

<sup>780</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SHR17 at page 80

- f. As in (a) above but supplies with which relationships were terminated as a result of assessment and why.

### Standards

- (a) Seek to prevent or mitigate human rights impacts that are directly linked to their operations, products or service by their business relationships, even if they have not contributed to those impacts.<sup>781</sup>In this regard, companies should ensure that they have in place policies that address:
- i. Prevention of child labour;
  - ii. Prevention of forced labour;
  - iii. Non-discrimination / equal opportunities;
  - iv. The right of freedom of association;
  - v. The right to collective bargaining;
  - vi. The elimination of excessive working hours;
  - vii. The right to a minimum or living wage; and
  - viii. Health and safety standards.<sup>782</sup>
- Investment in community land should be made after a free, open consultative process and should involve putting measures in place to mitigate any negative effects of the investment.<sup>783</sup>
  - The provision of the Community Land Act satisfies the international requirement as it sets down a marker to put measures that would mitigate *any negative effects*. This statement adequately covers the requirement set out in the international standard. This provision however only covers community land. Therefore, companies carrying out their operations in areas that do not fall within the scope of community land, and wish to comply with ESG requirements should make provision for this international standard.
- (b) Statement of policy... 'stipulating the enterprise's human rights expectations of ..... its business partners.... is publicly available'.<sup>784</sup>
- No local standard.
  - There are no local laws that require companies to make available for the general public a statement of policy stipulating its human rights expectations of its business partners. Therefore, companies that wish to comply with ESG requirements should make provision for this international standard.
- (c) Carry human rights due diligence which should cover human rights impacts directly linked to its operations, products or services by its business relationships.<sup>785</sup>

<sup>781</sup> UN Guiding Principles on Business and Human Rights (2011) page 13; John Ruggie II paragraph 13

<sup>782</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SSC01, SSC02, SSC03, SSC04, SSC05, SSC06, SSC07 and SSC08 at pages 95 & 96

<sup>783</sup> Section 36(1)(f) of the Community Land No. 27 of 2016

<sup>784</sup> UN Guiding Principles on Business and Human Rights (2011) page 16; John Ruggie II paragraph 16

<sup>785</sup> John Ruggie II paragraph 17

- Investment in community land should be made after a free, open consultative process and should involve an environmental, social, cultural and economic impact assessment and continuous monitoring and evaluation of the impact of the investment to the community.<sup>786</sup>
  - The provision of the Community Land Act satisfies the international requirement. This provision however only covers community land. Therefore, companies carrying out their operations in areas that do not fall within the scope of community land, and wish to comply with ESG requirements should make provision for this international standard.
- (d) In terms of supply chain, a company should ensure that it has a social policy or code in place which is communicated globally to all suppliers and translated into relevant languages.<sup>787</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (e) A company should carry out a risk assessment regarding social issues for potential new suppliers (due diligence) and existing suppliers in order to identify those that are high risk.<sup>788</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.
- (f) Companies should monitor suppliers for social issues,<sup>789</sup> and any findings should be disclosed together with the specific actions that should be taken on non-compliance issues.<sup>790</sup>
- **No local standard**
  - It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.

<sup>786</sup> Section 36(1)(a) & (c) of the Community Land Act No. 27 of 2016

<sup>787</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SSC09 at page 96

<sup>788</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SSC10 at page 96

<sup>789</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SSC12 at page 96

<sup>790</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SSC18 at page 96

(g) Companies should provide for capacity building for suppliers which would include supplier training on social issues, supplier mentoring, secondments or supporting suppliers through sharing best practice.<sup>791</sup>

- **No local standard**

- It should be noted that this international standard is derived from the FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19), which sets out international reporting obligations for companies that wish to meet the ESG requirements. The report is sector – specific, and therefore its standards are formulated to meet the reporting obligations for specific sectors. In this regard, companies looking to comply with ESG requirements should make provision for this reporting standard.

### 39. Public Policy

Organisation's participation in the development of public policy, through activities such as lobbying and making financial or in kind contributions to political parties, politicians or causes.

#### GRI Reporting Standards (415)

- a. Total monetary value of financial and in kind political contributions made directly and in directly and in directly by the organisation by country and recipient / beneficiary.
- b. If applicable how the monetary value in kind contribution was estimated.

#### Standards

- (a) Not offer (or use third parties to offer) promise or give undue pecuniary or other advantage to public officials nor accept the same.<sup>792</sup>
  - 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.<sup>793</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (b) Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.<sup>794</sup>
  - Except 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 party's or referendum committee's campaign financing account, no contribution from a single source shall exceed 20% of the total contributions received by that candidate, political party or referendum committee.<sup>795</sup>

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<sup>791</sup> FTSE Russell ESG Data Model – 5<sup>th</sup> Research Recycle (2018/19) SSC17 at page 97

<sup>792</sup> OECD Guidelines for Multinational Enterprises (2011) VII Paragraph 1

<sup>793</sup> Section 5(1) of the Bribery Act No. 47 of 2016

<sup>794</sup> OECD Guidelines for Multinational Enterprises (2011) part 1 section VII paragraph 1-7

<sup>795</sup> Section 12(2) of the Election Campaign Financing Act No. 42 of 2013

- A candidate, a political party or a referendum committee should not receive and keep anonymous contributions or support whether in cash or in kind, or contributions from an illegal source as specified by any law.<sup>796</sup>
  - A candidate who, or a political party or a referendum committee which, receives contributions under the Election Campaign Financing Act should issue a receipt for any contribution exceeding twenty thousand shillings.<sup>797</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (c) All lobbying activities should be disclosed and provide sufficient, pertinent information on those activities.<sup>798</sup>
- No local standard
  - We are not aware of any Kenyan legislation that makes provision for lobbying activities. On the basis that there is no requirement, companies are not likely to adhere to this international standard. However, companies that wish to comply with ESG requirements should make provision for this international standard.
- (d) All lobbying activities shall be carried out with integrity and honesty, providing reliable and accurate information and avoiding conflict of interest.<sup>799</sup>
- No local standard
  - We are not aware of any Kenyan legislation that makes provision for lobbying activities. On the basis that there is no requirement, companies are not likely to adhere to this international standard. However, companies that wish to comply with ESG requirements should make provision for this international standard.

#### 40. Customer health and safety

Systematic efforts to address health and safety across the life cycle of a product or service and its adherence to customer health and safety regulations and voluntary codes.

##### GRI Reporting Standard (416)

- a. Percentage of significant product and service categories for which health and safety impacts are assessed for improvement.
- b. Total number of incidents of non-compliance with regulations and / or voluntary codes concerning the health and safety impacts of products and services within the reporting period by:
  - i. incidents of non-compliance with regulations resulting in fine or penalty;
  - ii. incidents of non-compliance with regulations resulting in a warning; and
  - iii. incidents of non-compliance with voluntary codes.

<sup>796</sup> Section 13(1) of the Election Campaign Financing Act No. 42 of 2013

<sup>797</sup> Section 16(1) of the Election Campaign Financing Act No. 42 of 2013

<sup>798</sup> OECD Recommendation of the Council on Principles for Transparency and Lobbying (2010) Principle 5

<sup>799</sup> OECD Recommendation of the Council on Principles for Transparency and Lobbying (2010) Principle 8

## Standards

- (a) Ensure that goods and services provided meet all agreed or legally required standards for consumer health and safety, including those pertaining to health warnings and safety information.<sup>800</sup>
- Consumers have the right to the protection of their health, safety and economic interests.<sup>801</sup>
  - A supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.<sup>802</sup>
  - The Constitution of Kenya and the Consumer Protection Act are set within the spirit of international standards; hence there is no gap.
- (b) Provide accurate verifiable and clear information that is sufficient to enable consumers make informed decisions on safe use, environmental attributes, maintenance, storage and disposal of goods.<sup>803</sup>
- Consumer have the right to the information necessary for them to gain full benefit from goods and services.<sup>804</sup>
  - It is an unfair practice for a person to make a false, misleading or deceptive representation on goods and services.<sup>805</sup> Section 12(2) of the Consumer Protection Act sets out what constitutes a false, misleading or deceptive representation.
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (c) Ensure a safe and healthy premises for visiting customers.
- Every occupier should conduct his undertaking in such a manner as to ensure that a person who is not his employee who may be affected thereby is not exposed to risks to safety of health.<sup>806</sup>
  - Consumer have the right to the protection of their health, safety, and economic interests.<sup>807</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (d) Marketing Communications should not contain any description of potentially dangerous practices or disregard for health and safety and instructions for use should include appropriate safety warnings and where necessary disclaimers.<sup>808</sup>

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<sup>800</sup> OECD Guidelines for Multinational Enterprises (2011) part 1 Section VIII paragraph 1

<sup>801</sup> Section 46(1)(c) of the Constitution of Kenya 2010

<sup>802</sup> Section 5(1) of the Consumer Protection Act No. 46 of 2012; Article 46(1) of the Constitution of Kenya 2010

<sup>803</sup> OECD Guidelines for Multinational Enterprises (2011) part 1 section VIII paragraph 2

<sup>804</sup> Section 46(1)(b) of the Constitution of Kenya 2010

<sup>805</sup> Section 12(1) of the Consumer Protection Act No. 46 of 2012

<sup>806</sup> Section 17(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>807</sup> Article 46(1)(c) of the Constitution of Kenya 2010

<sup>808</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 1

- Any person who, in the course of any trade applies a false trade description to any goods; or supplies or offers to supply or has in his possession for supply, any goods to which a false trade description is applied, shall be guilty of an offence.<sup>809</sup>
- The Trade Description Act is set within the spirit of international standards; hence there is no gap.

#### 41. Marketing and labelling

Customer access to accurate and adequate information on the positive and negative economic, environmental and social impacts of the products and services they consume both from a product and service labelling and a marketing communications perspective.

##### GRI Reporting Standard (417)

- Whether each of the following types of information is required by the organisation's procedures for product and service information and labelling:
  - the sourcing of components of the product and service;
  - content particularly with regard to substances that produce an environmental or social impact;
  - safe use of a product or service; and
  - disposal of the product and environmental and / or social impacts.
- Percentage of significant product or service categories covered by and assessed for compliance with such procedures.
- The total number of incidents of non-compliance with regulations and / or voluntary codes concerning product and service information and labelling by:
  - incidents of non-compliance with regulations resulting in a fine or a penalty;
  - incidents of non-compliance with regulations in a warning;
  - incidents of non-compliance with voluntary codes.
- Total number of incidents of non-compliance with regulations and / or voluntary codes concerning marketing communications including advertising, promotion and sponsorship by:
  - incidents of non-compliance with regulations resulting in a fine or penalty;
  - incidents of non-compliance with regulations resulting in a warning;
  - incidents of non-compliance with voluntary codes.

##### Standards

- As per OECD 2011 Section VIII paragraphs 1 & 2: ensuring that the goods and services they provide meet all agreed / legally required standards for consumer health and safety with accurate, verifiable and clear information.
- A supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.<sup>810</sup>

<sup>809</sup> Section 3 of the Trade Description Act 505 Laws of Kenya

<sup>810</sup> Section 5(1) of the Consumer Protection Act No. 46 of 2012

- It is an unfair practice for a person to make a false, misleading or deceptive representation.<sup>811</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (b) All marketing communications should be legal, decent, honest and truthful.<sup>812</sup>
- It is an unfair practice for a person to make a false, misleading or deceptive representation.<sup>813</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (c) All marketing communications should respect human dignity and should not incite or condone any form of discrimination, including that based upon ethnic or national origin, religion, gender, age, disability or sexual orientation.<sup>814</sup>
- All licensed broadcasters should ensure that advertisements, either in terms of content, tone or treatment, are not deceptive or are not repugnant to good taste.<sup>815</sup>
  - The provisions of the Kenya Information and Communications Act are set within the spirit of international standards; hence there is no gap.
- (d) Marketing communications should not contain any statement which is likely to mislead a customer with regards to characteristics of the product such as nature, composition, date of manufacture, range of use, commercial or geographic origin or environmental impact.<sup>816</sup>
- Any person who, in the course of any trade applies a false trade description to any goods; or supplies or offers to supply or has in his possession for supply, any goods to which a false trade description is applied, shall be guilty of an offence.<sup>817</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.

#### **42. Customer Privacy (including losses of customer data and breaches of customer privacy)**

##### GRI Reporting Standards (418)

- a. Total number of substantiated complaints received concerning breaches of customer privacy categorised by:
- i. complaints received from outside parties and substantiated by the organisation; and
  - ii. complaints from regulatory bodies
- b. Total number of identified leaks, thefts or losses of customer data.

##### Standards

<sup>811</sup> Section 12(1) & (2) of the Consumer Protection Act No. 46 of 2012

<sup>812</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 1

<sup>813</sup> Section 12(1) & (2) of the Consumer Protection Act No. 46 of 2012

<sup>814</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 2

<sup>815</sup> Section 46I(i) of the Kenya Information and Communications Act Chapter 411A Laws of Kenya

<sup>816</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 5

<sup>817</sup> Section 3 of the Trade Description Act 505 Laws of Kenya

- (a) Respect consumer privacy and take reasonable measures to ensure the security of personal data that they collect, store, process or disseminate.<sup>818</sup>
- Every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed, or the privacy of their communications infringed.<sup>819</sup>
  - A telecommunications operator should ensure that the registration details of a subscriber are kept in a secure and confidential manner, and shall not be disclosed without the written consent of the subscriber.<sup>820</sup>
  - A registration agent should ensure that the registration details of a subscriber are kept in a secure and confidential manner and are not disclosed to any other person.<sup>821</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (b) When collecting personal data from consumers ensure that the individuals concerned are aware of the purpose of the collection and any intention to transfer the data to a third party.<sup>822</sup>
- No local standard
  - Currently, there is no Kenyan legislation addressing this international standard. There is therefore a gap in this respect. However, it is important to note that at the time of drafting this report, there is in place the Data Protection Bill, which was introduced in the Kenyan Parliament on 3<sup>rd</sup> July 2018. This Bill seeks to establish a comprehensive data protection regime in Kenya. The principal object of the Bill is to protect personal data collected, used or stored by both private and public entities. The Bill recognizes that data protection forms part and parcel of the expectation of the right to privacy as stipulated in article 31 of the Constitution of Kenya. It provides for the legal framework for protection of a person's privacy in instances where personal information is collected, stored, used or processed by another person. The Bill is currently awaiting the third reading in Parliament, before going before the presidency for assent, before it forms part of the laws of Kenya.
  - In the meantime, companies looking to comply with the Social requirements of ESG standards should ensure compliance of this international standard.
- (c) Adequate security measures should be in place in order to prevent unauthorised access to or disclosure of the personal data.<sup>823</sup>
- No local standard
  - See the analysis at (b) above

<sup>818</sup> OECD Guidelines for Multinational Enterprises 2011 Section VIII paragraph 6

<sup>819</sup> Article 31 of the Constitution of Kenya 2010

<sup>820</sup> Section 27A(2)(c) of the Kenya Information and Communications Act No. 2 of 1998

<sup>821</sup> Section 27B(2)(c) of the Kenya Information and Communications Act No. 2 of 1998

<sup>822</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 19

<sup>823</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 19.3

(d) There should be a privacy policy where personal data is collected, which is available to consumers.<sup>824</sup>

- No local standard
- See the analysis at (b) above

(e) Consumers should be advised of their rights to opt out of receiving marketing communications.<sup>825</sup>

- No local standard
- See the analysis at (b) above

### 43. Socioeconomic Compliance

Organisation's overall compliance record as well as compliance with specific laws and regulations in the social and economic area: accounting and tax fraud, corruption, bribery, competition, the provision of products and services or labour issues such as workplace discrimination.

#### GRI Reporting Standards (419)

- a. Significant fines and non-monetary sanctions for non-compliance with laws and / or regulations in the social and economic area in terms of:
- total monetary value of significant fines;
  - total number of non-monetary sanctions; and
  - cases brought through dispute resolution mechanisms.

#### Standards

- (a) Comply with Article V on Employment and Industrial Relations of OECD guidelines for Multinational Enterprises (2011): concerning the establishment or membership of trade unions, abolition of child labour and compulsory labour, principles of non-discrimination and strong employer / worker relationships.
- Every worker has the right to form, join or participate in the activities and programmes of a trade union.<sup>826</sup>
  - Every employee has the right to participate in forming a trade union or federation of trade unions, join a trade union or leave a trade union.<sup>827</sup>
  - An employee's refusal or proposed refusal to join or withdraw from a trade union shall not constitute a fair reason for dismissal or the imposition of a disciplinary penalty.<sup>828</sup>

<sup>824</sup> ICC Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 19.5

<sup>825</sup> Consolidated Code of Advertising and Marketing Communication Practice (2011) Article 19.6

<sup>826</sup> Article 41(2)(c) of the Constitution of Kenya, 2010; section 5(2) of the Labour Relations Act No. 14 of 2007

<sup>827</sup> Section 4(1) of the Labour Relations Act No. 14 of 2007

<sup>828</sup> Section 46(f) of the Employment Act No. 11 of 2007

- Every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>829</sup> An employer should not discriminate directly or indirectly against an employee on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability religion, political or other opinion, nationality, conscience, belief, culture, dress, language, HIV status or birth,<sup>830</sup> in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>831</sup>
  - A collective agreement binds the parties to the agreement, all unionisable employees employed by the employer, or the employers who are, or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.<sup>832</sup> The terms of the collective agreement should be incorporated into the contract of employment of every employee covered by the collective agreement.<sup>833</sup>
  - Employers are required to observe the terms set out by the Employment Act of Kenya.<sup>834</sup>
  - Every employer should ensure the safety, health and welfare at work of all persons working in his workplace.<sup>835</sup>
  - If an employer wishes to terminate an employment contract on account of redundancy, the employer has to notify the trade union to which the employee is a member (if the employee is a member of a trade union), and the labour officer in charge of the area where the employee is employed, of the reasons for, and the extent of the intended redundancy not less than 1 month prior to the date of the intended date of termination on account of redundancy.<sup>836</sup> Where the employee is not a member of a trade union, the employer should notify the employee personally in writing, and the labour office.<sup>837</sup>
  - Every child (who has not attained the age of 18 years) should be protected from economic exploitation and any work that is likely to interfere with the child's education, or be harmful to the child's physical, mental, spiritual, moral or social development.<sup>838</sup>
  - A person should not be required to perform forced labour.<sup>839</sup>
  - No person shall use or assist any other person in recruiting, trafficking or using forced labour.<sup>840</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (b) Comply with Article VII on Combating Bribery, Bribe Solicitation and Extortion in OECD guidelines for Multinational Enterprises (2011) relating to the offer and acceptance of bribes, development of adequate controls, promoting awareness and illegal contributions to political entities.

<sup>829</sup> Article 27(1) of the Constitution of Kenya 2010

<sup>830</sup> Article 27(4) & (5) of the Constitution of Kenya 2010; section 5(3) of the Employment Act No. 11 of 2007

<sup>831</sup> Section 5(3)(b) of the Employment Act No. 11 of 2007

<sup>832</sup> Section 59(1) of the Labour Relations Act No. 14 of 2007

<sup>833</sup> Section 59(3) of the Labour Relations Act No. 14 of 2007

<sup>834</sup> No. 11 of 2007

<sup>835</sup> Section 6(1) of the Occupational Safety and Health Act No. 15 of 2007

<sup>836</sup> Section 40(1)(a) of the Employment Act No. 11 of 2007

<sup>837</sup> Section 40(1)(b) of the Employment Act No. 11 of 2007

<sup>838</sup> Section 10(1) of the Children Act No. 8 of 2001

<sup>839</sup> Article 30(2) of the Constitution of Kenya, 2010

<sup>840</sup> Section 4 of the Employment Act No. 11 of 2007

- 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.<sup>841</sup>
  - Except 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 party's or referendum committee's campaign financing account, no contribution from a single source shall exceed 20% of the total contributions received by that candidate, political party or referendum committee.<sup>842</sup>
  - A candidate, a political party or a referendum committee should not receive and keep anonymous contributions or support whether in cash or in kind, or contributions from an illegal source as specified by any law.<sup>843</sup>
  - A candidate who, or a political party or a referendum committee which, receives contributions under the Election Campaign Financing Act should issue a receipt for any contribution exceeding twenty thousand shillings.<sup>844</sup>
  - A private entity should 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.<sup>845</sup>
  - The Cabinet Secretary responsible for matters relating to justice should, in consultation with the Ethics and Anti-Corruption Commission, publish guidelines to assist private entities in the preparation of internal procedures in relation to bribery.<sup>846</sup>
  - Any facilitation payment made to expedite or secure performance by another person constitutes bribery.<sup>847</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.
- (c) Comply with Article VIII on Consumer Intentions of OECD guidelines for Multinational Enterprises (2011) concerning competition law, anti-competitive behaviour and co-operation with competition authorities.
- A supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.<sup>848</sup>
  - It is an unfair practice for a person to make a false, misleading or deceptive representation.<sup>849</sup>
  - Local laws adequately satisfy the requirements of the international standard; hence there is no gap.

<sup>841</sup> Section 5(1) of the Bribery Act No. 47 of 2016

<sup>842</sup> Section 12(2) of the Election Campaign Financing Act No. 42 of 2013

<sup>843</sup> Section 13(1) of the Election Campaign Financing Act No. 42 of 2013

<sup>844</sup> Section 16(1) of the Election Campaign Financing Act No. 42 of 2013

<sup>845</sup> Section 9(1) of the Bribery Act No. 47 of 2016

<sup>846</sup> Section 12(1) of the Bribery Act No. 47 of 2016

<sup>847</sup> Section 5(1) read together with section 2 of the Bribery Act No. 47 of 2016

<sup>848</sup> Section 5(1) of the Consumer Protection Act No. 46 of 2012; Article 46(1) of the Constitution of Kenya 2010

<sup>849</sup> Section 12(1) & (2) of the Consumer Protection Act No. 46 of 2012

(d) Comply with Article X on Competition of OECD guidelines for Multinational Enterprises (2011) concerning competition law, anti-competitive behaviour and co-operation with competition authorities.

- 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, are prohibited.<sup>850</sup>
- The Competition Authority may on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of prohibitions relating to restrictive trade practices, or prohibitions relating to abuse of dominance.<sup>851</sup>
- The Competition Authority may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or other person believed to be in possession of relevant information and documents and inspect the premises and any goods, documents and records situated thereon for purposes of its investigations.<sup>852</sup>
- Local laws adequately satisfy the requirements of the international standard, as they are set within the same spirit of the international standard; hence there is no gap.

(e) Comply with Article XI on Taxation of OECD guidelines for Multinational Enterprises (2011), concerning compliance with tax laws and regulations.

- The national government has the power to impose income tax, value added tax, customs duties and other duties on import and export goods, and excise tax. A county government may impose property rates and entertainment tax.<sup>853</sup>
- Local laws adequately satisfy the requirements of the international standard as they are set within the same spirit of the international standard; hence there is no gap.

(f) Comply with the principles enunciated under the UN Entity for gender equality and empowerment of women and UN Global Compact "Women's Empowerment principles namely gender equality, equal treatment at work, health and safety, education and training, enterprise development, equality through communities and reporting on the issues.

- Not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.<sup>854</sup>
- No employer should discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of sex in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.<sup>855</sup>

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<sup>850</sup> Section 21(1) of the Competition Act No. 12 of 2010

<sup>851</sup> Section 31(1) of the Competition Act No. 12 of 2010

<sup>852</sup> Section 32(1) of the Competition Act No. 12 of 2010

<sup>853</sup> Article 209 of the Constitution of Kenya 2010

<sup>854</sup> Article 27(8) of the Constitution of Kenya 2010

<sup>855</sup> Section 5(3) of the Employment Act No. 11 of 2007

- Employers should ensure that all employees participate in the application and review of safety and health measures.<sup>856</sup>
- As far as we are aware, Kenyan legislation does not entirely provide for the specific principles set out in the United Nations Entity for Gender Equality and Empowerment of Women and the United Nations Global Compact 'Women's Empowerment Principles', although it is important to note that section 5(2) & (3) of the Employment Act requires employers to treat all their employees equally, and not to discriminate against a particular class of employees, and this includes women. However, for good measure, companies need to comply with the following principles in addition to those provided under Kenyan law as set out above, in order to meet the Social requirements under ESG:
  - i. Companies should promote education, training and professional development for women;
  - ii. Companies should implement enterprise development, supply chain and marketing practices that empower women;
  - iii. Companies should promote equality through community initiatives and advocacy; and
  - iv. Companies should measure and publicly report on progress to achieve gender equality.

## GOVERNANCE

### CURRENT INTERNATIONAL AND LOCAL TOPICS AND STANDARDS

The standards prepared in respect of Governance are based on the requirements set out by FTSE Russell.<sup>857</sup> The key areas of focus are:

1. Anti-Corruption;
2. Corporate Governance;
3. Risk Management; and
4. Tax Transparency.

The GRI provides for a number of general disclosures relevant to general corporate governance, risk management and anti-corruption, applicable for every organisation preparing a sustainability report. As far as the current GRI framework is concerned, there are no specific reporting requirements for tax. However, the GRI published a draft standard on tax and payments to governments in December 2018. This is reported to be the first global standard designed to help organisations understand and communicate the impact of their tax strategies on the economies and societies they operate in using country by country reporting techniques.<sup>858</sup> The draft GRI Standard was open for public comment until 15 March 2019, and the final version of the Standard is expected to be released in the last quarter of 2019.<sup>859</sup>

In summary, the GRI tax reporting requirements are likely to address:

<sup>856</sup> Section 6(2)(g) of the Occupational Safety and Health Act No. 15 of 2007

<sup>857</sup> FTSE Russell ESG Ratings and Data Model 2018

<sup>858</sup> <https://www.taxjustice.net/2018/12/13/gri-invites-feedback-on-its-first-global-tax-transparency-standard/>

<sup>859</sup> <https://www.taxjustice.net/2018/12/13/gri-invites-feedback-on-its-first-global-tax-transparency-standard/>

1. Approach to tax and payments to governments;
2. Tax governance, control, and risk management;
3. Stakeholder engagement and management of concerns related to tax and payments;
4. Entities and activities by tax jurisdiction; and
5. Country-by-country reporting.<sup>860</sup>

Such requirements will no doubt require organisations to record its approach to tax transparency, including (i) use of tax strategy, linked to business operations for each tax jurisdiction in which the organisation has resident entities; (ii) board oversight of the management of tax risks; (iii) disclosure of corporation tax paid globally, with country to country reporting; and (iv) reduce or refrain from the use of offshore secrecy jurisdictions for the purpose of tax planning.<sup>861</sup>

The FTSE Russell ESG Ratings Methodology Document 2018 offers some guidance on the international standards likely to apply to Tax Transparency:

1. GTX01: There should be a policy or commitment to: (a) tax transparency or tax responsibility; (b) align tax payments with revenue generating activity, or reduce or refrain from the use of offshore secrecy jurisdictions for the purposes of tax planning.
2. GTX02: Organisations should commit to comply with and follow the spirit of the law or engage in tax fairness in all operating countries.
3. GTX04: The board should have oversight of the tax policy. There should be evidence of the board oversight of the management of tax risks, and there should be a named position responsible for the aforementioned at board level.
4. GTX05: The Audit Committee should be responsible for oversight of implementation of the company's Corporate Tax Policy, and they should report on its oversight activities. The responsibility for oversight of the implementation of the tax policy should be in the Audit Committee's Terms of Reference.
5. GTX06: The organisation's CEO, CFO or other executives should make a public statement explicitly covering corporate tax transparency.
6. GTX10: There should be external verification of tax data for global operations: (a) with limited breakdown (as a minimum domestic and international breakdown); and (b) with country by country breakdown.
7. GTX12: There should be disclosure of corporation tax paid globally: (a) with at least domestic and international breakdown; and (b) with country by country breakdown.

## **OBSERVATIONS ON STANDARDS IN KENYA**

During our research into local standards we identified the following issues relevant to the extent of the implementation of international compliance and reporting standards for ESG in Kenya:

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<sup>860</sup> <https://www.globalreporting.org/standards/media/2082/public-comment-form-exposure-draft-standard-for-tax-and-payments-to-governments.pdf>

<sup>861</sup> LSEG ESG Report: "Your Guide to ESG Reporting", January 2018

- i. Kenya hosts a local network of the United Nation's Global Compact: Global Compact Network Kenya (GCNK). This network was set up in 2004, and relaunched in 2007 to "*spearhead and catalyse actions aimed at promoting good business practices by building capacity and awareness of ethics, integrity and Corporate Social Responsibility in furtherance of the UN Global Compact's 10 principles*".<sup>862</sup> It is reported to have 145 participants.<sup>863</sup> In 2012 the GCNK launched a UNGC Codes of Ethics for business in Kenya ("UNGC Codes of Ethics") to provide a local guiding framework for ethical business practice, to complement individual company's governance policies and practices: it has 575 signatories.<sup>864</sup> This includes the Nairobi Securities Exchange (NSE), who became a signatory in May 2016. Lancet Kenya is reported to be among one of the first signatories to the UNGC Codes of Ethics. It adopted the Code voluntarily in 2017, and, in doing so, issued a revised anti-corruption policy & anti-bribery code of conduct for the company.<sup>865</sup>
- ii. Kenya has ratified the UN Convention of Corruption of 2005 ("UNCAC"), which is the underlying legal instrument for The 10th Principle Against Corruption. The 10th Principle Against Corruption has been quoted extensively in our international standards.
- iii. There are extensive corporate governance guidelines set out in the Mwongozo Report of 2015, (a code of governance for government owned entities),<sup>866</sup> which adopts many of the OECD guidelines, (together with corporate governance standards of South Africa and Malaysia). However, the guidelines only apply to state corporations. Furthermore some parts of the Constitution of Kenya, which are relevant to governance, are also only applicable to state officers: Article 73 concerning leadership and integrity is an obvious example.
- iv. Finally, as far as the local standards for publically listed companies in Kenya are concerned, most governance standards are derived from the Kenyan Capital Markets Authority ("CMA") Code of Corporate Governance Practices for Issuers of Securities to the Public in 2015 ("the Code"). The Code applies to all entities who have received approvals from the CMA to issue securities to the public whether those issuers have been listed or not. The Code came into effect on 4 March 2017, along with a suite of corporate governance reference materials including a reporting template, scorecard, and scorecard methodology. These documents were intended to promote continuous improvement of governance practices in Kenya.<sup>867</sup> We make the following observations in relation to the practical implementation of the Code:
  - the Code was intended to benchmark international best practice, but to also take into account the local environment. The steering committee responsible for the development of the code took into account relevant legislation from the following jurisdictions: UK, South Africa, Malaysia, Brazil and Australia, as well as research conducted by the IFC and the World Bank;
  - the Code is principle based rather than rule based, and contains a mixture of both mandatory requirements<sup>868</sup>, and voluntary requirements. The voluntary requirements are subject to a 'apply

<sup>862</sup> <http://www.globalcompactkenya.org/index.php/en/about/global-compact-network-kenya>

<sup>863</sup> <https://www.unglobalcompact.org/engage-locally/africa/kenya>

<sup>864</sup> <http://www.globalcompactkenya.org/index.php/en/about/code-of-ethics/code-of-ethics-signatories>

<sup>865</sup> <https://lancet.co.ke/wp-content/uploads/2017/04/Revised-Anti-Corruption-and-Anti-Bribery-Code-of-Conduct.pdf>

<sup>866</sup> <http://www.scac.go.ke/2015-02-16-09-34-58/mwongozo>

<sup>867</sup> *Report on the State of Corporate Governance for Issuers of Securities to the Public in Kenya 2018:* ([https://www.cma.or.ke/index.php?option=com\\_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207](https://www.cma.or.ke/index.php?option=com_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207))

<sup>868</sup> The mandatory requirements were initially stipulated in the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002

or explain' standard. Therefore there is some flexibility as to the extent in which each issuer adopts and implements all provisions of the Code;

- all issuers are required to complete the reporting template and its annual report within four months of the end of the financial year. The same should then be uploaded onto the issuer's website;
- in 2018, the CMA undertook an analysis of the information available to the public (and therefore available to shareholders and potential investors) in respect of 56 issuers of securities to the public in Kenya (out of a total of 67) for the financial year 2017/2018 ("the CMA 2018 Governance Report"). The Code's scorecard assessed issuer's performance in the following areas (i) commitment to good corporate governance, (ii) board operations and control, (iii) rights of shareholders, (iv) stakeholder relations, (v) ethics and social responsibility, (vi) accountability, risk management and internal control, and (vii) transparency and disclosure;
- the findings of the CMA 2018 Governance Report suggest a 55% overall score (fair status) in the application of corporate governance practices by Kenyan issuers of securities to the public, and 30% require improvement. However, it is notable that 10 issuers were excluded from the assessment as these issuers failed to submit either the reporting template or a full set of annual reports, which were required for the CMA to properly assess compliance with the Code; and
- a total of 19 key challenges were identified in the CMA 2018 Governance Report. We have reference these challenges (where relevant) within our gap analysis. One of the overall recommendations identified by the CMA was for issuers to work towards integrated reporting. The CMA has identified that it will (in 2019) assess and adjust its reporting template and scorecard to reflect current global practices whilst also taking into account the Kenyan context.<sup>869</sup>

It will be interesting to see how the CMA addresses the issues identified in the CMA 2018 Governance Report, and any new regulatory requirements will no doubt enhance the overall compliance landscape in Kenya as far as good governance practices are concerned. Some of the 'next steps' identified in the CMA 2018 Governance Report include (i) for the CMA, "*in consultation with the Nairobi Securities Exchange and the issuers, will develop a corporate governance index to give issuers an opportunity to differentiate themselves in the market and tap into a growing pool of money committed to good governance and sustainability*"; and (ii) for the CMA to, "*take appropriate enforcement action on violations of the mandatory provisions and continues reporting obligations which will be published as appropriate.*"

## **C. GOVERNANCE STANDARDS (INTERNATIONAL AND LOCAL) WITH COMPARISON ANALYSIS**

### **44. Governance Structure**

#### GRI Reporting Standards (102-18)

- a. Governance structure of the organisation, including committees of the highest governance body.
- b. Committee responsible for decision making on economic, environmental and social topics.

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<sup>869</sup> *Report on the State of Corporate Governance for Issuers of Securities to the Public in Kenya 2018:* ([https://www.cma.or.ke/index.php?option=com\\_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207](https://www.cma.or.ke/index.php?option=com_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207))

## Standards

- (a) A board, comprising of executive and non-executive directors, should be appointed to act on an informed basis and in the best long-term interests of the organisation with good faith, care and diligence, for the benefit of shareholders, while having regard to relevant stakeholders.<sup>870</sup>
- Every company shall be headed by an effective board, which shall offer strategic guidance, lead and control the company, and is accountable to its shareholders.<sup>871</sup>
  - Also see Standard 48(b) below on the composition of the highest governance committee.
  - The provisions of the Code matches the requirements set by international standards.
- (b) Board members should disclose their levels of expertise<sup>872</sup> and know the business of the organisation, its operations and senior management well enough to contribute effectively to board discussions and decisions.<sup>873</sup>
- The board shall establish clear roles and responsibilities in discharging its fiduciary and leadership functions, and the board shall be structured in a way that it has different skills and expertise within itself.<sup>874</sup>
  - In exercising fiduciary duties, each board member must:
    - (a) exercise reasonable degree of care, skill and diligence; and
    - (b) act in the best interests of the company and not for any other purpose.<sup>875</sup>
  - A director of a company shall act in the way which the director considers, in good faith, would members as a whole, and in so doing the director shall have regard to:
    - (a) the long term consequences of any decision of the directors;
    - (b) the interests of the employees of the company;
    - (c) the need to foster the company's business relationships with suppliers, customers and others;
    - (d) the impact of the operations of the company on the community and the environment;
    - (e) the desirability of the company to maintain a reputation for high standards of business conduct; and
    - (f) the need to act fairly as between the directors and the members of the company.<sup>876</sup>

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<sup>870</sup> ICGN Global Governance Principles (GGP): 1

<sup>871</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3

<sup>872</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG02

<sup>873</sup> ICGN Global Governance Principles (GGP): 1.3

<sup>874</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.1

<sup>875</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guidance to Recommendation 2.3.1

<sup>876</sup> Companies Act 2015: Section 143(1)

- A director of a company shall exercise independent judgment.<sup>877</sup>
  - The provisions of the Code and the Companies Act 2015 match the requirements set by international standards, save for there is no requirement in Kenya for board members to disclose their level of expertise to investors/the public. However, in reality, many organisations may do so.
- (c) The board should ensure that the necessary resources are in place for the organisation to meet its objectives, and measure performance against them.<sup>878</sup>
- The board shall establish procedures to allow its members access to relevant, accurate and complete information and professional advice in order to discharge its duties effectively. In the course of seeking accurate information in order to discharge its duties and responsibilities properly, the board shall seek legal, financial, governance or any other expert advice necessary.<sup>879</sup>
  - The provisions of the Code match the requirements set by international standards.
- (d) The board should be chaired by an independent non-executive director. The chair should be independent on the date of appointment. He/she should lead the board, and be responsible for the boards overall effectiveness in directing the organisation's strategy.<sup>880</sup>
- The chairperson of an issuer shall be a non-executive board member. The chairperson shall not be involved in the day-to-day running of the business. The responsibilities of the chairperson shall include leading the board in oversight of management.<sup>881</sup>
  - Every person who is a chairperson of a listed company shall not hold such position in more than two listed companies at any one time, in order to ensure effective participation in the board.<sup>882</sup>
  - The provisions of both the Code and the NSE Listing manual match the requirements set by international standards, and provide clear guidance as to the restrictions placed on a chairperson holding a similar position in other listed companies.
- (e) The chair should ensure that the board as a whole has a clear understanding of the views of the shareholders. He/she should, in addition to formal general meetings, seek regular engagement with shareholders in order to understand the views on governance and the performance of the organisation.<sup>883</sup>
- See Standard 47(a) in relation to consulting stakeholders on economic, environment and social topics, and Standard 68(a) on confirmed incidents of corruption and actions taken.
  - The provisions of the Code match the requirements set by international standards.

<sup>877</sup> Companies Act 2015: Section 144(1)

<sup>878</sup> UK Corporate Governance Code 2018: Principle 1C

<sup>879</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.5

<sup>880</sup> ICGN Global Governance Principles (GGP): 2.1; UK Corporate Governance Code 2018: Principle F

<sup>881</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.3 and 2.3.4

<sup>882</sup> NSE Listing Manual 2002: CO.F.00: F.04

<sup>883</sup> UK Corporate Governance Code 2018: Provision 3

- (f) The division of responsibilities of the chair, and any other person of the board should be clearly established, and set out in writing, and agreed by the highest governance body, and there should be a formal schedule of matters specifically reserved for the board's decision.<sup>884</sup>
- The board shall establish clear functions reserved for the board and those to be delegated to the management.<sup>885</sup>
  - The functions of the board shall be separate from those of the Management.
  - The board shall establish, periodically review and make public a board charter. The charter shall set out the strategic intent and outline the board's roles and responsibilities. The charter shall be a source reference and primary induction literature for incoming board members and, provide insights to prospective board members and senior management. It should also assist the board in the assessment of its own performance and that of its individual directors. The charter shall be made public by being published on the company's website.<sup>886</sup>
  - The provisions of the Code match the requirements set by international standards.
- (g) The board should also establish committees with responsibility for addressing specific topics. Specialised topics include nomination, audit, remuneration, sustainability, risk management, and specific economic, environmental and social topics. The duties and membership of such committees should be fully disclosed.<sup>887</sup> The board shall also ensure that each committee has its own charter or terms of reference, and that this charter or terms of reference is disclosed.<sup>888</sup>
- The board shall establish relevant committees with their own charter or written terms of reference, which set out their authority and duties. Such committees shall include topics concerns with the broad functions of the company such as: audit, board nominations, risk management, remuneration, finance, investment and governance.<sup>889</sup>
  - The committees shall be appropriately constituted with members who have the necessary skills and expertise to handle the responsibilities allocated to them. Where some skills are not available, the board may co-opt independent and external professionals to that committee.
  - The board shall review the mandate of the committees periodically to ensure that they remain relevant.
  - The board shall:
    - (a) establish audit and nomination committees;
    - (b) appoint chairpersons of committees;

<sup>884</sup> UK Corporate Governance Code 2016: A.A.1

<sup>885</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.2

<sup>886</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.6.2;

<sup>887</sup> IFC Corporate Governance Progression Matrix 2017; ICGN Global Governance Principles (GGP): 1.6; UK Corporate Governance Code 2016: A.2.1; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG09

<sup>888</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG09

<sup>889</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.2.2

- (c) determine the procedure and process within which the committee may be allowed to engage independent professional advice at the company's expense; and
  - (d) review the effectiveness and performance of committees annually.<sup>890</sup>
- The Code requirements match international standards, however the formation and composition of both a nomination committee and a remuneration committee were identified as key area of development in the CMA 2018 Governance Report.
- (h) Where the board chooses not to establish such committees, the board should disclose this, and the procedures it employs to discharge its responsibilities effectively in an independent manner.<sup>891</sup>
- No local standard identified.
  - There is no provision for organisations in Kenya to disclose its reasons for why it chooses not to establish committees. There should be guidance on this.
- (i) In the organisation's annual report, the board should:
- i. set out the number of meetings of the board and any committees;
  - ii. disclose the average attendance rates for some individual board/committee members;
  - iii. disclose the attendance rates of all individual directors at both board and committee level; and
  - iv. provide a summary of the outcomes relevant to economic, environmental and social topics.<sup>892</sup>
- No local standard identified.
  - However, boards of publically listed companies are required to disclose, in an informative way, details of the activities of Audit Committee, the number of Audit Committee meetings held in a year and details of attendance of each Audit Committee member at such meetings.<sup>893</sup> This requirement should be extended to all committees.

## 45. Delegating Authority

### GRI Reporting Standards (102-19)

- a. Process for delegating authority for economic, environmental and social topics from the highest governance body to senior executives and other employees.

### Standards

- (a) The board should be trained on ESG risk issues. At least one director should have experience in analysing and interpreting ESG risks. In sensitive industries, one director or more should have in-depth knowledge of ESG risks.<sup>894</sup>

<sup>890</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.2.2

<sup>891</sup> ICGN Global Governance Principles (GGP): 1.6

<sup>892</sup> UK Corporate Governance Code 2016: A.1.2; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG10 and GCG11

<sup>893</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 6.5.2

<sup>894</sup> Beyond the Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

- The board and its committees shall have the appropriate balance of skills, experience, independence and knowledge of the company and its business, to enable them discharge their respective duties and responsibilities effectively.<sup>895</sup>
  - The local requirement for public listed companies goes some way to meet the requirements by the international standards, in terms of requiring a balance of skills, knowledge and experience. Notably the there is no specific requirement for the board to be trained, or have experience in analysing and/or interpreting ESG risks.
- (b) ESG issues should be a recurring board agenda item. The board should approve ESG strategy and policies, routinely review ESG performance, ensure there is appropriate dialogue between the company and key stakeholders and ensure that management systems are in place to identify and manage ESG risks and impacts.<sup>896</sup>
- The board shall promote timely and balanced disclosure of all material information.<sup>897</sup>
  - The board shall ensure the company discloses its environmental, social and governance policies and implementation thereof in its annual report and website.<sup>898</sup>
  - Also see Standard 58(a) on the highest governance body's role in sustainability reporting.
  - The provisions of the Code are set within the spirit of international standards.
- (c) The board should establish a special board-level committee to review ESG issues.<sup>899</sup>
- No local standard identified.
  - Kenyan companies should have a board level committee to specifically address ESG issues.
- (d) The board should delegate the day to day functions to senior management with appropriate levels of expertise. There should be a clear division of responsibilities between the role of the chair of the board and executive management. This should be communicated in the annual report.<sup>900</sup>
- See Standard 44(f) concerning governance structure and division of responsibilities.
  - As far as we are aware, Kenyan companies are not required to address the division of responsibilities in their annual report.
- (e) The board should have access to the advice of a company secretary, who is responsible for advising the board on all governance matters. Both the appointment and the removal of the company secretary should be a matter for the board.<sup>901</sup>

<sup>895</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.2.1

<sup>896</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>897</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 7.1

<sup>898</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 7.1: Guideline (j)

<sup>899</sup> ICGN Global Governance Principles (GGP): 1.6

<sup>900</sup> ICGN Global Governance Principles (GGP): 2.1;

<sup>901</sup> UK Corporate Governance Code 2018: Provision 16

- A private company is required to have a secretary only if it has a paid up capital of five million shillings or more.<sup>902</sup>
  - Every public company is required to have at least one secretary, and the directors of that public company shall take all reasonable steps to ensure that the secretary is (a) a person who appears to them to have the requisite knowledge and experience to discharge the functions of a secretary of the company; and (b) is the holder of a practising certificate issued under the Certified Public Secretaries of Kenya Act.<sup>903</sup>
  - The Board shall have power to appoint or remove the company secretary.<sup>904</sup>
  - The requirement for public listed companies in Kenya goes some way to meet the requirements by the international standards, by mandating the role of the company secretary. As we are aware, the appointment and the removal of the company secretary is not mandated to be a matter for the board. (However, it is provided for as a guideline to Recommendation 2.3.9 of the Code).
- (f) The day to day compliance function, (ensuring compliance with economic, environmental and social topics, policies and procedures, code of ethics and/or conduct), through a designated fulltime corporate compliance officer and/or company secretary.<sup>905</sup>
- No local standard identified, but the Code suggests that all governance matters should be handled by an organisation's company secretary.<sup>906</sup>
  - Whilst many companies in Kenya may already comply with the international standard, it does not appear to be a mandatory requirement.

#### 46. Executive level responsibility for economic, environment and social topics

##### GRI Reporting Standards (102-20)

- a. Whether the organisation has appointed an executive level position or positions with responsibility for economic, environmental and social topics; and
- b. Whether post holders report directly to the highest governance body.

##### Standards

- (a) The board should assign responsibilities for oversight and implementation of economic, environmental and social topics (including risk management) to senior management within the organisation.<sup>907</sup>

<sup>902</sup> Companies Act 2015: Section 243

<sup>903</sup> Companies Act 2015: Section 244; NSE Listing Manual 2002: CO.F.00: F.07

<sup>904</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline (a) to Recommendation 2.3.9

<sup>905</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>906</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline (d) to Recommendation 2.3.9

<sup>907</sup> Business Principles for Countering Bribery: A Multi-Stakeholder Initiative led by Transparency International 2013: 4

- There should be a clear flow of information between the management and the board in order to facilitate both quantitative and qualitative evaluation and appraisal of the company's performance.<sup>908</sup>
  - The requirement for public listed companies in Kenya goes some way to meet the requirements by the international standards, as it clearly addresses the importance of the exchange of communication and information between the board and senior management. However, there are no standards which specifically require the board to allocate responsibility and oversight of ESG topics to the senior management of the organisation.
- (b) It is recommended that the implementation of environmental and social management systems be placed within strong corporate governance mechanisms, including a designated corporate governance officer or corporate secretary.<sup>909</sup>
- The national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. The national values and principles of governance include: (i) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (ii) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (iii) good governance, integrity, transparency and accountability; and (iv) sustainable development.<sup>910</sup>
  - See Standard 45(f) above on Delegating Authority.
  - The Code provides for ESG policies to be prepared and implementation to be documented in the annual report and website. There is no mandatory requirement as to who should have day to day oversight of such matters, and so governance mechanisms will depend upon an individual organisation's approach and degree of implementation of all standards within this section.

#### 47. Consulting stakeholders on economic, environment and social topics

##### GRI Reporting Standards (102-21)

- a. Process for consultation between stakeholders and the highest governance body on economic, environmental and social topics;
- b. If consultation is delegated, describe to whom it is delegated and how the resulting feedback is provided to the highest governance body.

##### Standards

- (a) The board, (particularly non-executive directors), should implement communication channels for meaningful dialogue on governance matters with shareholders, creditors and other stakeholders as appropriate.<sup>911</sup>
- The board shall ensure effective communication with stakeholders and proactively supply relevant information to stakeholders. In addition, the board shall establish whistle-blowing mechanisms that

<sup>908</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.3

<sup>909</sup> IFC Toolkit for Disclosure and Transparency: 2.1

<sup>910</sup> Article 10 of the Kenyan Constitution 2010

<sup>911</sup> ICGN Global Governance Principles (GGP): 1.2

encourage stakeholders to bring out information helpful in enforcing good corporate governance practices.<sup>912</sup>

- The board shall proactively manage relationships with stakeholders through transparent and effective communication. Constructive engagement with stakeholders shall be deliberate and planned.<sup>913</sup>
  - The Code's requirement for public listed companies in Kenya matches the requirements set by international standards, but the CMA suggests that issuers should develop policies and strategies to manage relations with different/key stakeholders.<sup>914</sup>
- (b) Based on the size and impact of the company, stakeholders typically include:
- i. local communities directly affected by the organisation;
  - ii. customers and regulators;
  - iii. workers, contractors, and primary-supply-chain workers;
  - iv. neighbouring projects; and
  - v. international NGOs and CSOs.<sup>915</sup>
- Stakeholders are considered to be any group who can affect, or be affected by the company, its decision and its reputation. They include shareholders, customers, suppliers, employees, creditors, regulators, lenders, media, auditors and potential investors, but may also include the community, government and other associations.<sup>916</sup>
  - The definition of stakeholders as provided for in the Code matches the requirements set by international standards.
- (c) The board should describe the organisation's policy and strategy for stakeholder engagement, including the following:
- i. stakeholder identification;
  - ii. stakeholder analysis to identify the needs and interests of diverse stakeholders;
  - iii. differentiated approaches for priority groups;
  - iv. disclosure and consultation;
  - v. grievance mechanism and reporting; and
  - vi. management-level mechanisms to raise and resolve consistent stakeholder issues.<sup>917</sup>
- The board shall have a stakeholder-inclusive approach in its practice of corporate governance. It shall identify its various stakeholders and develop strategies and suitable policies to map out areas of interaction with different stakeholder groups.<sup>918</sup>

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<sup>912</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 4.2

<sup>913</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendations 4.2; 4.2.1; 4.1.3

<sup>914</sup> *Report on the State of Corporate Governance for Issuers of Securities to the Public in Kenya 2018*: ([https://www.cma.or.ke/index.php?option=com\\_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207](https://www.cma.or.ke/index.php?option=com_content&view=article&id=527:report-on-the-state-of-corporate-governance-for-issuers-of-securities-to-the-public-in-kenya-2018&catid=12:press-center&Itemid=207))

<sup>915</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>916</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Chapter 4

<sup>917</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>918</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendations 4.1.1 and 4.1.2

- The board shall establish a formal process to resolve both internal and external disputes.
  - The Code's requirements are set within the spirit of international standards.
- (d) Secure and accessible channels should be provided, through which employees and shareholders can raise concerns ("grievance mechanisms"). Such mechanisms should be effective, in confidence and without risk of reprisal and/or retaliation.<sup>919</sup>
- See Standard 68(a) below on communication critical concerns.
  - Standard 68(a) below on communication critical concerns addresses the requirements concerning whistle-blowing procedures. There does not appear to be any requirement for Kenyan companies to implement a procedure to manage grievance mechanisms.
- (e) Grievances and complaints, as well as the company's responses, should be documented to ensure resolution of concerns, and this documentation should be updated at least annually. Reporting should be consistent with international standards (AA 1000 Standards on Stakeholder Engagement and Accountability Principles and ISO 26000). Unresolved stakeholder issues should require a management action plan.<sup>920</sup>
- No local standard identified.
  - Whilst companies in Kenya may already comply with international standards, it does not appear to be a mandatory requirement.
- (f) Grievance mechanisms should be resolved with participation of a shareholder/employee representative and the board should be informed about grievance outcomes, trends and root causes on a regular basis by senior management.<sup>921</sup>
- No local standard identified.
  - Whilst companies in Kenya may already comply with international standards, it does not appear to be a mandatory requirement.
- (g) The board should ensure that shareholders have the right to vote on major decisions which may change the nature of the organisation in which they have invested. Such rights should be described in the organisation's governing documents and include shareholder approval to authorise.<sup>922</sup>
- The board shall take into account the interests of all key stakeholder groups before making its decisions.<sup>923</sup>

<sup>919</sup> Anti-Corruption Ethics And Compliance Handbook For Business 2013; Beyond the Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>920</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>921</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>922</sup> ICGN Global Governance Principles (GGP): 8.2

<sup>923</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 4.1.1

- To the extent that the duty is vested in general meetings, the shareholders should ensure that only credible persons who can add value to the company's business are elected to the board of directors.<sup>924</sup>
  - Whilst companies in Kenya may already comply with international standards, it does not appear to be a mandatory requirement, and is likely to be dictated by an individual company's constitutional documents. However, one of the findings of the CMA 2018 Governance Report is that issuers should ensure that all shareholders (including minority and foreign shareholders) are treated in an equitable manner.
- (h) The selection of the organisation's external auditor should be subject to shareholder approval, and the board should consider and report to shareholders on the independence of the auditor on an annual basis.<sup>925</sup>
- No local standard identified.
  - Whilst companies in Kenya may already comply with the international standards, it does not appear to be a mandatory requirement. Provisions should be made for the international standards to ensure investor confidence in the autonomy and independence of the external auditor.

#### 48. Composition of the highest governance body and its committee

##### GRI Reporting Standards (102-22)

- a. Report on the composition of the board, in respect of the following issues:
- i. executive or non-executive;
  - ii. independence;
  - iii. tenure on the governance body;
  - iv. number of individuals other significant positions and commitments, and the nature of the commitments;
  - v. gender;
  - vi. membership of under-represented social group;
  - vii. competencies relating to economic, environmental and social topics; and
  - viii. stakeholder representation.

##### Standards

- (a) The number of board directors should be disclosed<sup>926</sup>, and the board should be of a sufficient size to meet the requirements of the business and to ensure any changes to the board can be managed without undue disruption.<sup>927</sup>
- The board shall be of sufficient size that enables the requirements of the company's business to be met. It shall not be too large to undermine an interactive discussion during board meetings or too

<sup>924</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.1

<sup>925</sup> ICGN Global Governance Principles (GGP): 7.9

<sup>926</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG03

<sup>927</sup> ICGN Global Governance Principles (GGP): 7.9; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG41

small such that the inclusion of wider expertise and skills to improve the effectiveness of the board and the formation of its committees is compromised.<sup>928</sup>

- The Code's requirement for public listed companies matches the requirements set by international standards.
- (b) At least half of the board (with a minimum of two for smaller companies and excluding the chairman) should comprise non-executive directors, determined by the board to be independent, so that no one individual (or small group of individuals) dominates the board's decision making.<sup>929</sup> The board shall disclose the number of independent directors<sup>930</sup>, and the percentage of independent directors on the board should be compared to international norms and country peers<sup>931</sup>.
- A private company is required to have at least one director. A public company is required to have at least two directors.<sup>932</sup>
  - The board shall comprise 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 board members.<sup>933</sup>
  - The board shall 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.<sup>934</sup>
  - The provisions of the Code and the Companies Act, 2015 matches the requirements set by international standards.
- (c) Members of the board should meet specified independence criteria, which should include whether they:
- i. have been an employee of the organisation (or a subsidiary) within the last five years;
  - ii. have, or had a material business relationship with the organisation (either directly or indirectly) within the past three years;
  - iii. have received fees from the organisation (apart from in their capacity as a member);
  - iv. have close family ties with any of the organisation's advisers, directors and/or senior employees;
  - v. hold, or have held cross directorships or have significant links with other directors through involvement in other companies or bodies;
  - vi. represent a significant shareholder of the organisation, or an officer of, or otherwise associated with, a significant shareholder of the organisation; and

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<sup>928</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.4

<sup>929</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>930</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG04

<sup>931</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG36

<sup>932</sup> Companies Act 2015: Section 129(1)

<sup>933</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.3; NSE Listing Manual 2002: Second Schedule

<sup>934</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 7.1.1

- vii. have been a director of the organisation for such a period that his or her independence may have become compromised.<sup>935</sup>
- An independent board member is one who:
    - (a) has not been employed by the company in an executive capacity within the last three years;
    - (b) is not associated with an adviser or consultant to the company or a member of the company's senior management or a significant customer or supplier of the company or with a not-for-profit entity that receives significant contributions from the company; or within the last three years, has not had any business relationship with the company (other than service as a director) for which the company has been required to make disclosure;
    - (c) has no personal service contract with the company, or a member of the company's senior management;
    - (d) is not employed by a public listed company at which an executive officer of the company serves as a director;
    - (e) is not a member of the immediate family of any person described above, or has not had any of the relationships described above with any affiliate of the company;
    - (f) is not a representative of a shareholder who has the ability to control or significantly influence management;
    - (g) is free from any business or other relationship which could be seen to interfere materially with the individual's capacity to act in an independent manner;
    - (h) does not have a direct or indirect interest in the company (including any parent or subsidiary in a consolidated group with the company) which is either material to the director or to the company. A holding of five percent or more is considered material;
    - (i) does not hold cross-directorships or significant links with other directors through involvement in other companies or bodies; and
    - (j) has not served for more than nine years since they were first elected.<sup>936</sup>
  - Every person save a corporate director who is a director of a listed company shall not hold such position in more than five listed companies at any one time to ensure effective participation in the board.<sup>937</sup>
  - The provisions of the Code and the NSE Listing Manual broadly matches the requirements set by international standards, but could be refined to preserve and maintain board independence. The CMA 2018 Governance Report suggest that issuers should develop and implement policies and procedures to annually assess the independence of independent board members.

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<sup>935</sup> UK Code on Corporate Governance A.3.1; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG02

<sup>936</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 2.4.1

<sup>937</sup> NSE Listing Manual 2002: CO.F.00: F.03

- (d) The board should identify in the annual report the names of the directors considered by the board to be independent, and who are able to exercise independent judgment free from any external influence. The board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its determination, including the information set out in (c) above.<sup>938</sup>
- The board shall have policies and procedures in place to ensure independence of its members. The status of independent board members shall be assessed annually by the entire board, and the board shall determine who the independent members are on an annual basis.<sup>939</sup>
  - The full name, age (or date of birth) home or business address, nationality and function in the group of each of the following persons and an indication of the principal activities performed by them outside the group where these are significant with respect to the group: (a) directors, alternate and proposed directors of the issuer and each of its subsidiaries including details of other directorships; (b) the senior management of the issuer including the chief executive, board secretary and finance director, with details of professional qualifications and period of employment with the issuer for each such person; (c) founders, if the issuer has been established as a family business or in existence for fewer than five years and the nature of family relationship, if any; (d) detailed disclosure of chief executive or other senior management changes planned or expected during twenty four months following the issue and listing of the security or appropriate negative statement. A description of other relevant business interests and activities of every such person as is mentioned.<sup>940</sup>
  - Whilst the requirements for listed companies in Kenya broadly match the requirements set by the international standards, there does not appear to be a requirement for the measures taken to ensure board independence to be disclosed in the annual report. (Although many companies may do so).
- (e) Board diversity should be achieved in all respects.<sup>941</sup> The board should be committed to gender diversity by issuing a statement of support, and having targets in place to improve gender ratio. The number and percentage of women on the board should be disclosed, and these should be compared to international norms and country peers<sup>942</sup>.
- The board shall have a policy to ensure the achievement of diversity in its composition, and shall consider whether its size, diversity and demographics make it effective. The appointment of board members shall be gender sensitive and shall not be perceived to represent a single or narrow constituency interest. Where companies establish a diversity policy, the companies shall introduce appropriate measures to ensure that the policy is implemented. <sup>943</sup>
  - The requirements for public listed companies in Kenya goes some way to meet the set by the relevant international standards on the issue of diversity. However, there is no specific disclosure obligation on companies to publish the gender ratio of boards. (Although many companies may do so).

<sup>938</sup> ICGN Global Governance Principles (GGP): 2.6

<sup>939</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.4, Recommendation 2.4.1

<sup>940</sup> NSE Listing Manual 2002: ID.E.00: E.01 and E.02

<sup>941</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>942</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG05, GCG06, GCG50 and GCG37

<sup>943</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation & Guideline 2.1.5

- (f) The organisation should, as a matter of good practice, disclose when significant shareholders (or beneficial owners, typically those with more than five percent of shares) are management personnel or board members.<sup>944</sup>
- Executive members of the board shall manage the conflict that arises between their management role and their role in the board.<sup>945</sup>
  - Also see Standard 51(d) on conflicts of interest.
  - The provisions of the Code are set within the spirit of international standards.
- (g) Non-executive directors should serve for an appropriate length of time to ensure they bring an objective perspective to the board without compromising the independence of the board. The length of tenure of each director should be reviewed regularly by the nomination committee to allow for board refreshment and diversity and retention of corporate knowledge, including on economic, environmental and social topics.<sup>946</sup>
- The tenure of an independent board member shall not exceed a cumulative term of nine years. Upon completion of the nine years, an independent board member may continue to serve on the board subject to re-designation as a non-independent member.<sup>947</sup>
  - The Board shall disclose resignation of a serving Board member in:
    - (a) two newspapers with national reach immediately it happens;
    - (b) the company's website immediately it happens; and
    - (c) the annual report at the end of the financial year.
  - In addition, Capital Markets Authority shall be notified immediately the resignation takes place and such notification shall include detailed circumstances necessitating the resignation.<sup>948</sup>
  - The Code's requirements for public listed companies broadly matches the requirements set by international standards.
- (h) Organisations should be guided by local norms in respect of tenure for both executives and non-executive board members, and those with longer tenure than normal should not be classified as independent in terms of committee appointments or other board functions requiring independence.<sup>949</sup>
- Tenure of an independent board member is capped at nine years. The nine years can either be a consecutive service of nine years or a service of nine years with intervals.<sup>950</sup>

<sup>944</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>945</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation & Guideline 2.1.3

<sup>946</sup> ICGN Global Governance Principles (GGP): 3.2

<sup>947</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.4.2

<sup>948</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 7.1.1

<sup>949</sup> ICGN Global Governance Principles (GGP): 2.6

<sup>950</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation & Guideline 2.4.2

- The Code's requirement complies with the requirements set by international standards, by specifying the period in which it considers the tenure of non-executive board members for the said board member to be considered independent.
- (i) Board composition should be based on a skills matrix. There should be at least one member on the board with an in-depth knowledge and expertise in the economic, environmental and social sectors.<sup>951</sup>
- See Standard 50(b) below concerning the nomination and selection of the highest governance body.
- In performing the functions of a director, a director of a company shall exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with the general knowledge, skill and experience that (a) may reasonably be expected of a person carrying out the functions performed by the director in relation to the company; and (b) the director has.<sup>952</sup>
- The requirement for public listed companies in Kenya broadly complies with the requirements set by international standards, in that the board is required to review its skills matrix on an annual basis. However, local requirements do not provide specific requirements for at least one member of the board to have an in-depth knowledge and expertise in the economic, environmental and social sectors.

#### 49. Chair of the highest governance body

##### GRI Reporting Standards (102-23)

- a. Whether the chair is also an executive officer in the organisation; and
- b. If so, describe his/her function within the organisation's management and the reasons for this arrangement.

##### Standards

- (a) The chair should not assume the role of chief executive officer of the organisation<sup>953</sup>. If this does happen, it should be subject to the approval of the majority of shareholders, who, should be consulted prior to any appointment. The board should set out its reasons for the appointment at the time of the appointment, and also publish the decision and reasons on the organisation's website, and in its annual report.<sup>954</sup>
- The functions of the chairperson and the chief executive officer shall not be exercised by the same individual.<sup>955</sup>

<sup>951</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>952</sup> Companies Act 2015: Section 145

<sup>953</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG01

<sup>954</sup> UK Corporate Governance Code 2016: A.3.1; Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018: 2.2; UK Corporate Governance Code 2018: Provision 9

<sup>955</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.3

- The division of responsibilities between the chairperson and the chief executive officer shall be clearly established, set out in writing and agreed by the board and shall be clearly defined in the board's charter.<sup>956</sup>
  - The local requirement for public listed companies complies with the requirements set by the international standards, although there is no provision in Kenya as to what steps should be taken if the Chair does assume the role of the CEO.
- (b) If the company does not have a separate non-executive chairman and chief executive officer, it should appoint a Lead Independent Director.<sup>957</sup> However, as a matter of best practice, even if the company's chair is independent, a Lead Independent Director should still be appointed. The Lead Independent Director provides shareholders and directors with a valuable channel of communication should they wish to discuss any concerns relating to the chair. The board should explain the reasons why its leadership structure is in the best interests of the company in the annual report and keep the structure under review.<sup>958</sup>
- No local standard identified.
  - Provision should be made for an applicable requirement to match international standards.

## 50. Nominating and selecting the highest governance body

### GRI Reporting Standards (102-24)

- a. Nomination and selection process for the highest governance body, and its committees; and
- b. Criteria used, including whether:
  - i. Stakeholders (including shareholders) are involved;
  - ii. Diversity is considered;
  - iii. Independence is considered;
  - iv. Expertise and experience relating to economic, environmental and social topics are considered.

### Standards

- (a) The board should establish a nomination committee, comprised of a majority of independent non-executive directors, to lead the process of appointments and succession planning.<sup>959</sup>
  - The board shall appoint a nomination committee consisting mainly of independent and non-executive board members with the responsibility of proposing new nominees for appointment to the board and for assessing the performance and effectiveness of the directors of the company.<sup>960</sup>
  - The chairperson of the nomination committee shall be an independent director.<sup>961</sup>

<sup>956</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.3

<sup>957</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG43

<sup>958</sup> ICGN Global Governance Principles (GGP): 2.2

<sup>959</sup> IFC Corporate Governance Progression Matrix 2017; UK Corporate Governance Code 2018: Provision 17

<sup>960</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.2

<sup>961</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.2.3

- The Code's requirements complies with the requirements set by international standards. However, the CMA 2018 Governance Report had identified this as a challenge which needs to be addressed, which suggests that organisations are not adopting and implementing these standards.
- (b) The main role and responsibilities of the nomination committee should be described in the committee's terms of reference. This includes:
- i. evaluating the composition of the board taking into account the board diversity policy;
  - ii. developing a skills matrix, by preparing a description of the desired roles, experience and capabilities required for each appointment;
  - iii. leading the process for board appointments and putting forward recommendations to shareholders on directors to be elected and re-elected;
  - iv. upholding the principle of director independence by addressing conflicts of interest (and potential conflicts of interest) among committee members and between the committee and its advisors during the nomination process;
  - v. considering and being responsible for the appointment of independent consultants for recruitment or evaluation including their selection and terms of engagement and publically disclosing their identity and consulting fees;
  - vi. entering into dialogue with shareholders on the subject of board nominations either directly or via the board; and
  - vii. proactively leading and being accountable for the development, implementation and continual review of director succession planning.<sup>962</sup>
- The board, through the nomination committee, shall on an annual basis review the required skills mix and expertise that the executive directors as well as independent and non-executive directors bring to the board and make disclosure of the same in its annual report.<sup>963</sup>
  - The board shall recognise, respect and protect the rights of shareholders. This includes their right to participate and vote at general shareholder meetings including the election of directors. The shareholders are encouraged to participate in the Annual General Meetings and to exercise their votes.<sup>964</sup>
  - The nomination committee shall consider candidates for directorships proposed by all the shareholders including the majority shareholders.<sup>965</sup>
  - The nomination committee shall recommend to the board candidates for directorships to be considered for appointment by the shareholders.<sup>966</sup>

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<sup>962</sup> ICGN Global Governance Principles (GGP): 2.5; UK Corporate Governance Code 2016: B.2.1; ICGN Global Governance Principles (GGP): 3.7

<sup>963</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.2

<sup>964</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 3.1

<sup>965</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.2

<sup>966</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.2

- The nomination committee shall consider only persons of calibre, credibility and who have the necessary skills and expertise to exercise independent judgement on issues that are necessary to promote the company's objectives and performance in its area of business.<sup>967</sup>
  - The Code's requirements for public listed companies broadly complies with the requirements set by international standards.
- (c) The nomination committee should agree upon an effective succession plan for board members and senior management.<sup>968</sup>
- The term of office of the members of the board shall be organised in such a way that ensures that there is a smooth transition and that they end at different times. Where possible, no more than one third of the board members shall retire at the same time.<sup>969</sup>
  - The Code's requirements for public listed companies complies with the requirements set by international standards.
- (d) Appointment to the board should be subject to a formal, rigorous and transparent process, based on merit and objective criteria, including their expertise in economic, environmental and social topics and the contribution they will bring to the organisation.<sup>970</sup>
- Board appointment procedures shall be transparent and clearly documented and approved by the board. The procedures should be formal and a matter for the board as a whole, assisted by the nomination committee, and subject to shareholder approval when necessary.<sup>971</sup>
  - The appointment process should be well managed to ensure that a balanced mix of proficient individuals is attained and that each of those appointed is able to add value and bring independent judgment to bear in the decision-making process.<sup>972</sup>
  - All persons offering themselves for appointment as directors should disclose any potential area of conflict that may undermine their position or service as director.<sup>973</sup>
  - All persons offering themselves for appointment as directors should disclose any potential area of conflict that may undermine their position or service as a director.<sup>974</sup>
  - The Code's requirements are set within the spirit in order to achieve the same results as international standards.
- (e) Open advertising and/or an external search should be undertaken for the appointment of the chair and non-executive board members. If an external search agency is used, it should be identified in

<sup>967</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.2

<sup>968</sup> UK Corporate Governance Code 2018

<sup>969</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guidelines 2.1.2 & 2.1.8

<sup>970</sup> UK Corporate Governance Code 2018

<sup>971</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.1

<sup>972</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.1.1

<sup>973</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.1, Recommendation 2.1.1

<sup>974</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.1

the annual report, together with a statement of independence in respect of any links between the organisation and the external search agency.<sup>975</sup>

- **No local standard identified.**
  - Whilst companies in Kenya may use open advertising and/or an external search for the appointment of the chair and non-executive board members, there does not appear to be any specific requirement to do so. This should be considered further, in order to ensure transparency and independence of the process, and the board of any organisation.
- (f) All board members should be subject to an annual re-election. Shareholders have the right to vote on this re-election, and their right should be covered in company policy.<sup>976</sup> Board resolutions for re-election should include reasons why individual board members continue to be important to the organisation's long term sustainability.<sup>977</sup> Extending a director's tenure for additional terms should be premised on satisfactory evaluations of his/her contribution.<sup>978</sup>
- **No local standard identified. However, in our experience these should be provided for in an individual company's constitutional documents.**
  - Provision for the process of re-election should be specified in order to give investors' confidence in board operations, independence and transparency.

## 51. Conflicts of interest

### GRI Reporting Standards (102-25)

- a. Processes for the highest governance body to ensure conflicts of interest are avoided and managed; and
- b. Whether conflicts of interests are disclosed to stakeholders, including, as a minimum:
- i. Cross-board membership;
  - ii. Cross shareholding with suppliers and other stakeholders;
  - iii. Existence of controlling shareholders;
  - iv. Related party disclosures.

### Standards

- (a) The board should ensure that policies and procedures on conflicts of interest are established, understood and implemented by directors, management and employees.<sup>979</sup>
- **The board shall put in place a policy to manage conflict of interest.<sup>980</sup>**

<sup>975</sup> UK Corporate Code 2018: Provision 20

<sup>976</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG22

<sup>977</sup> UK Corporate Governance Code 2018: Provision 18

<sup>978</sup> ICGN Global Governance Principles (GGP): 3.6

<sup>979</sup> ICGN Global Governance Principles (GGP): 8.3; FTSE Russell ESG Methodology Document 2018: Indicator legend GCG07

<sup>980</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.8. In the Code "Conflict of interest" means 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.

- In exercising fiduciary duties, each board member must act honestly at all times and must not place themselves in a situation where personal interests conflict with those of the company.<sup>981</sup>
  - The Code's requirement for public listed companies complies with the requirements set by international standards.
- (b) If a board member has an interest in a matter under consideration by the board, they should promptly declare such an interest and be precluded from voting on the subject or exerting influence.<sup>982</sup>
- Executive members of the board shall manage the conflict that arises between their management role and their role in the board. Directors shall not take part in any discussions or decision-making regarding any subject or transactions in which they have a conflict of interest.<sup>983</sup>
  - 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.<sup>984</sup>
  - Upon appointment to the board and thereafter, where circumstances so demand, directors shall declare any real or perceived conflict of interest with the company. The company shall maintain a register of declared conflict of interests, which applies equally to the board and the company secretary.<sup>985</sup>
  - If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, or in a transaction or arrangement that the company has already entered into, the director shall declare the nature, and extent of that interest (a) to the other directors; and (b) if the company is a public company, to the members of the company.<sup>986</sup>
  - The provisions of the Code and the Companies Act, 2015 comply with the requirements set by international standards.
- (c) The board should disclose the process for approving, reviewing and monitoring related party transactions ("RPTs")<sup>987</sup>. Any inherent conflicts of interest which, for significant transactions, should include establishing a committee of independent directors. This can be a separate committee or an existing committee comprised of independent directors, for example the audit committee. The committee should review significant RPTs to determine whether they are in the best interests of the organisation and, if so, to determine what terms are fair and reasonable. The conclusion of committee deliberations on significant RPTs should be disclosed in the organisation's annual report to shareholders.<sup>988</sup>

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<sup>981</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.1

<sup>982</sup> ICGN Global Governance Principles (GGP): 8.3

<sup>983</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendations 2.3.1 and 2.3.8

<sup>984</sup> Companies Act 2015: Section 146

<sup>985</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.8

<sup>986</sup> Companies Act 2015: Section 151

<sup>987</sup> According to IAS 24, a related-party transaction is "a transfer of resources, services, or obligations between related parties, regardless of whether a price is charged." A related party is a person or an entity that is related to the reporting entity; FTSE Russell ESG Methodology Document 2018: Indicator legend GCG07

<sup>988</sup> ICGN Global Governance Principles (GGP): 8.4

- The board shall put in place a policy on related party transactions, and all related party transactions shall meet the requirements of the law and be approved by the board before being executed.<sup>989</sup>
  - The board shall disclose all related party transactions.<sup>990</sup>
  - There shall be public disclosure in respect of any management or business agreements entered into between the issuer and its related companies, which may result in a conflict of interest situation.<sup>991</sup>
  - The provisions of the Code and the NSE Listing Manual comply with the requirements set by international standards.
- (d) The board should disclose the identity of controlling shareholders (individual, family, or group), how much of the company's shares they ultimately control, how control is held, and whether such shareholders are in a position to effectively dominate the company. This means that any material risks to minority shareholders associated with controlling shareholders, ownership concentration, cross holdings, and voting-power imbalances should be disclosed.<sup>992</sup>
- A number of provisions, including the following details, should be provided to the NSE regarding an issuer's major shareholders, (which means shareholders as the beneficial owners of at least 3% or more of each class of the issuer's voting rights); (a) names of shareholders, number of shares and outstanding shares of each class owned by each of them, (b) disclose any significant change in the percentage ownership held by any major shareholders during the past three years; and (c) indicate whether the issuer's major shareholders have difference voting rights.<sup>993</sup>
  - NSE requirements are within the spirit of international standards.
- (e) Shareholders should have the right to approve significant RPTs above an appropriate materiality threshold, and this should be based on the approval of a majority of disinterested shareholders.<sup>994</sup>
- Authorisation, may, in the case of a private company, be given by the directors by the matter concerned being proposed to and authorised by them, so long as nothing in the company's constitution invalidates the giving of such an authorisation.<sup>995</sup>
  - Authorisation, may, in the case of a public company, be given by the directors of the company by the matter concerned being proposed to and authorised by them, but only if the company's constitution includes a provision enabling the directors to give such an authorisation and the directors comply with the requirements of the provision.<sup>996</sup>

<sup>989</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.7. *In the code, "related party transaction" means a business deal or arrangement between two or more parties who are joined by a special relationship prior to the deal and includes, a business transaction between a major shareholder, or any company in which he holds shareholding, and the company.*

<sup>990</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 7.1.1

<sup>991</sup> Nairobi Stock Exchange Limited: Listing Manual 2002: CO.F.00: F.02

<sup>992</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018

<sup>993</sup> NSE Listing Manual 2002: ID.F.OO: F.01

<sup>994</sup> ICGN Global Governance Principles (GGP): 8.5

<sup>995</sup> Companies Act 2015: Section 146(4)

<sup>996</sup> Companies Act 2015: Section 146(5)

- There is no specific mandatory requirement applicable to companies in Kenya. This should be documented in order to give investors' confidence in company operations, its independence and transparency.

## 52. Role of highest governance body in setting purpose, values and strategy

### GRI Reporting Standard (102-26)

- a. Highest governance body and senior executives roles in the development, approval and updating of the organisation's purpose, value or mission statements, strategies, policies and goals related to economic, environmental and social topics.

### Standard

- (a) The board is accountable to shareholders and relevant stakeholders and responsible for preserving and enhancing sustainable value over the long-term. In fulfilling their role effectively, board members should monitor the effectiveness of the organisation's governance, environmental policies and social practices and adhere to all applicable laws.<sup>997</sup>
  - The functions of the board shall be separate from those of the management team. The board shall define the company's mission, vision, its strategy, goals, risk policy plans and objectives, including approval of its annual budgets.<sup>998</sup>
  - The Code's requirements are set within the spirit in order to achieve the same results as international standards.
- (b) The board should have oversight of environmental and social matters as part of the regular agenda of board meetings and it should approve environment and social policies and routinely and review performance.<sup>999</sup>
  - The board shall consider not only the financial performance but also the impact of the company's operations on society and the environment. This includes economic, social and environmental performance.<sup>1000</sup>
  - The Code's requirements are set within the spirit in order to achieve the same results as international standards.
- (c) The board should assess the basis on which the organisation generates and preserves value over the long term. It should describe, in the annual report, the sustainability of the organisation's business model, taking into account the future opportunities for the organisation, and how its governance contributes towards the deliverance of this strategy.<sup>1001</sup>

<sup>997</sup> ICGN Global Governance Principles

<sup>998</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation Guideline 2.3.2

<sup>999</sup> Beyond the Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1000</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 5.3.2

<sup>1001</sup> UK Corporate Governance Code 2018: Provision 2

- The board shall ensure that all deliberations, decisions and actions are founded on the core values underpinning good governance. The board must be able to justify its decisions and actions to shareholders and other stakeholders who require it to do so.<sup>1002</sup>
- The company shall have internal corporate disclosure policies and procedures, which are practical and include feedback from stakeholders. These policies and procedures shall ensure compliance with the disclosure requirements set out in the listing requirements. In formulating these policies and procedures, the board shall be guided by best practices.<sup>1003</sup>
- Key areas requiring disclosure and the recommended disclosure practices include company vision, mission, values and strategic objectives. The board shall ensure that the annual report includes a statement on the company's vision, mission values and strategic objectives and how these influence board and management's behaviour towards maximisation of shareholder value.<sup>1004</sup>
- The Code's requirements are set within the spirit in order to achieve the same results as international standards.

### 53. Collective knowledge of highest governing body

#### GRI Reporting Standard (102-27)

- a. Measures taken to develop and enhance the highest governance body's collective knowledge of economic, environmental and social topics.

#### Standards

- (a) The board should ensure that written policies are prepared and issued by the organisation to address, at a minimum, compliance with economic, environmental and social issues, and the laws applicable to the organisation in all jurisdictions in which it operates.<sup>1005</sup>
  - The board shall develop and implement a strategy to ensure the company complies with the Constitution, all applicable laws and regulations, national and international standards, as well as its internal policies. This includes national and county legislation, supporting rules and regulations, relevant circulars and guidelines issued by the Capital Markets Authority and other government entities, applicable regional regulations and international treaties and standards.<sup>1006</sup>
  - The board shall ensure that all deliberations, decisions and actions are founded on the core values underpinning good governance, with the core values being (a) responsibility, (b) accountability (c) fairness, and (d) transparency.<sup>1007</sup>
  - The Code's requirements match international standards.

<sup>1002</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 5.1.1

<sup>1003</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation Guideline 7.1.1

<sup>1004</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation Guideline 7.1.1

<sup>1005</sup> Beyond the Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1006</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.10, Recommendation 2.10.1 and 2.10.2

<sup>1007</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 5.1.1

(b) Board members should be trained on economic, environmental and social risk issues, and, as mentioned above, board composition and composition of the specialist committees should be based on a skills matrix relevant to economic, environmental and social risk issues.<sup>1008</sup>

- See Standards 44(b) and 44(g) in relation to governance structure.
- The Code's requirements are set within the spirit of international standards in order to achieve the same results as the international standards in terms of the board and its committees comprising of a mixed and relevant skills matrix. However, there is no specific mandatory requirement for board members to be trained on economic, environmental and social risk issues.

## 54. Evaluating the highest governance body's performance

### GRI Reporting Standards (102-28)

- Process for evaluating the highest governance body's performance with respect to governance of economic, environmental and social topics;
- Whether such evaluation is independent or not, and its frequency;
- Whether such evaluation is a self-assessment; and
- Actions taken in response to evaluation of the highest governance body's performance with respect to governance of economic, environmental and social topics, including as minimum, changes in membership and organisational practice.

### Standards

- The board should, at least every three years, rigorously evaluate the performance of itself (as a collective body), the company secretary, the board's committees and individual directors prior to being proposed for re-election.<sup>1009</sup>
- The board shall develop an annual work-plan to guide its activities, which shall, as a minimum, focus on:
    - strategic plan development and review;
    - assessment of management's implementation of strategies, policies and plans;
    - risk assessment and management;
    - budgeting and financial management;
    - quality assurance processes; and
    - board evaluation.<sup>1010</sup>
  - The board shall determine and agree on its annual evaluation toolkit. The board shall work with independent governance specialists to develop the parameters to be included in the evaluation

<sup>1008</sup> Beyond the Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1009</sup> UK Corporate Governance Code 2018: Provision 21; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG08

<sup>1010</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.6.3

toolkit. The parameters, to be contained in an evaluation tool shall be reviewed when necessary so as to keep up with new developments in corporate governance.<sup>1011</sup>

- The board shall also review the mandate of all committees periodically to ensure that they remain relevant. The board shall specifically review the effectiveness and performance of committees annually.<sup>1012</sup>
  - The Code's requirements are set within the spirit of the international standards in order to achieve the same results as the international standards, however there is no direction as to how often board evaluations should be conducted, as compared with the international standards which require evaluations to be conducted every three years. Contrast this with the requirement that the boards of companies in Kenya should review the performance of committees annually, with a legal and compliance audit every two years and an annual governance audit.
- (b) The board should also periodically engage an independent outside consultant to undertake such evaluations.<sup>1013</sup>
- The board shall disclose whether evaluation of the board, the chairperson, the chief executive officer and company secretary has been undertaken in the annual report and financial statements of the company.<sup>1014</sup>
  - There is no requirement that a board in a Kenyan company should be evaluated by an external consultant. This should be made a requirement, and the process for appointing the said consultant should be documented in order to ensure consistency. This is recommended to promote investor confidence in board competency, independence and transparency.
- (c) The non-executive directors, led by the Lead Independent Director, should be responsible for performance evaluation of the chair, taking into account the views of executive officers.<sup>1015</sup>
- See Standard 44(g) above on governance structure and 54(a) above on evaluating the highest governance body's performance.
  - There are no specific requirements and procedures concerning the evaluation of the Chair in Kenya. This is recommended to promote investor confidence in board competency, independence and transparency.
- (d) The board should disclose the process for evaluation and, as far as reasonably possible, any material issues of relevance arising from the conclusions and any action taken as a consequence.<sup>1016</sup>
- See Standard 54(b) above on board evaluations.

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<sup>1011</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.6.3

<sup>1012</sup> Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.10, Recommendation 2.2.2

<sup>1013</sup> ICGN Global Governance Principles (GGP): 3.6; Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018; UK Corporate Governance Code 2018: Principle L

<sup>1014</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 7.1.1

<sup>1015</sup> ICGN Global Governance Principles (GGP): 3.6

<sup>1016</sup> ICGN Global Governance Principles (GGP): 3.6

- The company shall have internal corporate disclosure policies and procedures, which are practical and include feedback from stakeholders. These policies and procedures shall ensure compliance with the disclosure requirements set out in the listing requirements. In formulating these policies and procedures, the Board shall be guided by best practices<sup>1017</sup>.
- The Board shall disclose in its annual report whether it has an audit committee, the members, their qualifications, independence and the mandate of such committee<sup>1018</sup>.
- The Code's requirements for public listed companies are set within the spirit of international standards in order to achieve the same results as international standards.

## 55. Identifying and managing economic, environmental, and social topics

### GRI Reporting Standards (102-29)

- Highest governance body's role in identifying and managing economic, environmental and social topics and their impacts, risks, and opportunities, including its role in the implantation of due diligence processes; and
- Whether stakeholder consultation is used to support the highest governance body's identification and management of economic, environmental and social topics, and their impacts, risks and opportunities.

### Standards

- The board should understand the organisation's key economic, environmental, and social topics and have access to expert points of view on these topics through the specialist committees dealing with these topics.<sup>1019</sup>
  - The chief executive officer is obliged to provide such necessary information to the board in discharge of the board's business.<sup>1020</sup>
  - Also see Standard 44(c) on governance structure.
  - The Code's requirements are set within the spirit of international standards in order to achieve the same results as international standards.
- The board should ensure that management systems are in place to identify and manage economic, environmental and social risks and impacts.<sup>1021</sup>
  - The board shall have an effective risk management framework for the company in place.<sup>1022</sup>

<sup>1017</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 7.1.1

<sup>1018</sup> Ibid

<sup>1019</sup> COSO & WBCSD: Enterprise Risk Management 2018

<sup>1020</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation

<sup>1021</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG05

<sup>1022</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 6.2

- The board shall ensure that the company discloses its environmental, social and governance policies and implementation thereof in its annual report and website.<sup>1023</sup>
  - The Code's requirements match international standards.
- (c) The chair should discuss governance and strategy [relating to economic, environmental and social topics] with major shareholders. The standards or policies under which information is compiled and published should be reported.<sup>1024</sup>
- The board shall identify mechanisms and processes that can support constructive engagement with stakeholders so as to promote enhanced levels of corporate governance.<sup>1025</sup>
  - The board should strive, while acting in the best interests of the company, to achieve an appropriate balance between the interests of its various stakeholders, in order to achieve the long-term objectives of the company. The board, while accountable to the company, should take into account the legitimate expectations of its stakeholders in its decision-making.<sup>1026</sup>
  - The Code's requirements are set within the spirit of the international standards in order to achieve the same results as the international standards.
- (d) The board should also undertake a robust assessment of the organisation's emergency and principal risks, including those relevant to economic, environmental and social issues. The board should document the fact of the assessment in the annual report, setting out the principal risks, what procedures are in place to identify emerging risks, and a summary of how such risks are being managed and mitigated.<sup>1027</sup>
- The board shall confirm the effectiveness of the company's risk management and internal control practices on a regular basis.<sup>1028</sup>
  - Unless the company is subject to the small companies regime, the directors shall prepare a business review to inform members of the company and assist them to assess how the directors have performed their duties. The report should contain (i) a fair review of the company's business; and (ii) a description of the principal risks and uncertainties facing the company. It should contain a balanced and comprehensive analysis of (i) the development and performance of the business of the company during the company's financial year; and (ii) the position of the company's at the end of that year, consistent with size and complexity of the business.<sup>1029</sup>
  - In the case of a quoted company, the directors shall specify in the business review (to the extent necessary for an understanding of the development, performance or position of the company) (a) the main trends and factors likely to affect the future development, performance and position of the business of the company; (b) information about (i) environmental matters (including the impact of the business of the company on the environment); (ii) the employees if the company; and (iii) social

<sup>1023</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 7.1.1

<sup>1024</sup> UK Corporate Governance Code: E.1.1; OECD Guidelines for Multinational Enterprises (2011) (Part III of the Guidelines, page 27)

<sup>1025</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 4.2

<sup>1026</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 4.2

<sup>1027</sup> UK Corporate Governance Code 2018: Provision 28

<sup>1028</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 6.4

<sup>1029</sup> Companies Act 2015: Section 655

and community issues, including information on any policies of the company in relation to those matters and the effectiveness of those policies; and information about persons with whom the company has contractual or other arrangements that are essential to the business of the company.<sup>1030</sup>

- Every issuer shall disclose in its annual reports a statement of the directors as to whether the issuer is complying with the guidelines on corporate governance issued by the Capital Markets Authority.<sup>1031</sup>
  - The requirements as set out in the Code and the Companies Act, 2015 match international standards.
- (e) An annual audit should be conducted by an independent, competent and qualified auditor in order to provide an external and objective assurance to the board and shareholders that the financial statements fairly represent the financial position and performance of the enterprise in all material respects.<sup>1032</sup>
- A private company shall appoint 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.<sup>1033</sup>
  - The audit should be completed by a competent and recognised professional accredited for that purpose by the Institute of Certified Public Secretaries of Kenya (ICPSK), and shall comply with the International Standards of Auditing, in order to ensure that the company is operating in compliance with sound governance practices in the following areas:
    - (a) leadership and strategic management;
    - (b) transparency and disclosure;
    - (c) compliance with laws and regulations;
    - (d) communication with stakeholders;
    - (e) board independence and governance;
    - (f) board systems and procedures;
    - (g) consistent shareholder and stakeholders' value enhancement; and
    - (h) corporate social responsibility and investment.<sup>1034</sup>
  - The Code's requirements match international standards.
- (f) The board should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.<sup>1035</sup>

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<sup>1030</sup> Companies Act 2015: Section 655

<sup>1031</sup> NSE Listing Manual 2002: CO.F.00: F.08

<sup>1032</sup> OECD Guidelines for Multinational Enterprises (2011) (PART III of the Guidelines, page 27)

<sup>1033</sup> Companies Act 2015: Section 717

<sup>1034</sup> NSE Listing Manual 2002: CO.F.00: F.09; Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.11.1

<sup>1035</sup> OECD Guidelines for Multinational Enterprises (2011): Taxation

- Every company liable to tax under , shall also include with the self-assessment and return of income an assessment and return of any compensating tax due with respect to such tax year and the compensating tax so calculated shall be payable at the due date for the self-assessment.<sup>1036</sup>
- Every company shall furnish a return of income a certificate specifying the nature and amounts of all payments of whatever kind made, and the nature of any benefit, advantage, or facility of whatever kind granted, in the case of a company to the directors thereof and to employees whose emoluments are at the rate of eighty thousand shillings a year or more, or, in the case of a partnership, to the partners; and the certificate shall be signed by a majority of the directors or partners (of whom one shall be the partner who signed the return of income of the partnership), as the case may be, or, if there are less than three such directors or partners, by all such directors or partners.<sup>1037</sup>
- The statutory requirements for companies in Kenya match the provisions of international standards, and also note the GRI standards which are due to be introduced later this year (listed at the beginning of the section on Governance).

## 56. Effectiveness of risk management processes

### GRI Reporting Standard (102-30)

- a. Highest governance body's role in reviewing the effectiveness of the organisation's risk management process for economic, environmental and social topics.

### Standards

- (a) The board should proactively oversee, review and approve the approach to risk management regularly or with any significant business change and satisfy itself that the approach is functioning effectively.<sup>1038</sup>
  - The board shall establish an effective risk management framework for the company, in order to determine the company's level of risk tolerance and actively identify, assess and monitor key business risks to safeguard shareholders' investments and the company's assets.<sup>1039</sup>
  - The Code's requirements match international standards. However this topic has been noted as a challenge in the CMA 2018 Governance Report, and in the same report, and the CMA has recommended that issuers should incorporate ethical and sustainability risks and opportunities in their risk management process.
- (b) The board and senior management should ensure allocation of appropriate resources for risk management, which can include, but are not limited to:
  - i. people, skills, experience and competence;
  - ii. the organization's processes, methods and tools to be used for managing risk;
  - iii. documented processes and procedures;

<sup>1036</sup> The Income Tax Act: S. 52 (B) (4)

<sup>1037</sup> Ibid at s. 54 (1) (b)

<sup>1038</sup> ICGN Global Governance Principles (GGP): 5; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM01

<sup>1039</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guidance to Recommendation Principle 6.2, Recommendation 6.2.1 and Guidance

- iv. information and knowledge management systems; and
  - v. professional development and training needs.<sup>1040</sup>
- The board shall establish an internal audit function which reports directly to its audit committee. The board shall also identify a head of internal audit who reports directly to the Audit Committee. The head of internal audit shall have relevant accounting or auditing qualifications and be responsible for providing assurance to the board that internal controls are operating effectively.<sup>1041</sup>
  - The directors of a quoted company shall 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,<sup>1042</sup> and comply with guidelines on corporate governance listed by the Authority.<sup>1043</sup>
  - The Code's requirements, and provisions of the NSE Listing Manual are set within the spirit of international standards in order to achieve the same results as international standards.
- (c) The board should establish an audit committee comprised entirely of independent non-executive directors<sup>1044</sup>. At least one member of the audit committee should have recent and relevant financial expertise. The chair of the board should not be the chair of the audit committee, other than in exceptional circumstances which should be explained in the annual report. The main role and responsibilities of the audit committee should be described in the committee's terms of reference. This includes:
- i. monitoring the integrity of the accounts and any formal announcements relating to the company's financial performance, and reviewing significant financial reporting judgements contained in them;
  - ii. maintaining oversight of key accounting policies and accounting judgements which should be in accordance with generally accepted international accounting standards, and disclosing such policies in the notes to the company's accounts;
  - iii. agreeing the minimum scope of the audit as prescribed by applicable law and any further assurance that the company needs. Shareholders (who satisfy a reasonable threshold of shareholding) should have the opportunity to discuss the results of the completed audit should they wish to;
  - iv. assuring itself of the quality of the audit carried out by the external auditors and assessing the effectiveness and independence of the auditor each year. The company should commit to the regular rotation of auditors/audit partner and should oversee the appointment, reappointment and, if necessary, the removal of the external auditor and the remuneration of the auditor.<sup>1045</sup> Audit and non-audit fees should be separately disclosed, and the company should also disclose whether the amount of audit fees exceeds the amount of non-audit fees in the last fiscal year.<sup>1046</sup> There should be transparency in advance when the audit is to be tendered so that shareholders can engage with the company in relation to the process should they so wish;

<sup>1040</sup> BS ISO 31000:2018

<sup>1041</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 6.5.2

<sup>1042</sup> Companies Act 2015: Section 769

<sup>1043</sup> Nairobi Stock Exchange Limited: Listing Manual 2002: CO.F.00: F.01

<sup>1044</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG46

<sup>1045</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG10

<sup>1046</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG49

- v. ensuring that contracts with the auditors do not contain specific limits to the auditor's liability to the company for consequential damages or require the company to use alternative dispute resolution;
  - vi. assuring that a robust system of internal financial controls is in place to provide for reliable financial and operational information;
  - vii. engaging, when appropriate, new audit firms to improve market competition and broaden the pool of credible audit service providers;
  - viii. having appropriate dialogue with the external auditor without management present and overseeing the interaction between management and the external auditor, including reviewing the management letter provided by the external auditors and overseeing management's response; and
  - ix. reporting on its work and conclusions in the annual report.<sup>1047</sup>
- The board shall establish an audit committee with written terms of reference, with at least three independent directors and non-executive directors.<sup>1048</sup>
  - The audit committee should meet regularly, with adequate notice of the issues to be discussed and should record its conclusions<sup>1049</sup>.
  - Audit committees shall have adequate resources and authority to discharge their responsibilities. The members of the audit committee shall:
    - (a) be informed, vigilant and effective overseers of the financial reporting process and the company's internal controls;
    - (b) review and make recommendations on management programmes established to monitor compliance with the Code of Ethics and Conduct;
    - (c) consider the appointment of the external auditor, the audit fee and the questions of resignation or dismissal of the external auditor;
    - (d) discuss with the external auditor before the audit commences the nature and scope of the audit, and ensure co-ordination where more than one audit firm is involved;
    - (e) review management's evaluation of factors related to the independence of the company's external auditor.;
    - (f) in liaison with management, assist the external auditor in preserving independence;
    - (g) review the quarterly, half-yearly and year-end financial statements of the company, focusing particularly on—

<sup>1047</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018; ICGN Global Governance Principles (GGP): 5 & 7

<sup>1048</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.2.4 & 6.5.1

<sup>1049</sup> CGCP 6.5.2

- (h) any changes in accounting policies and practices;
  - (i) significant adjustments arising from the audit;
  - (j) the going concern assumption; and
  - (k) compliance with International Accounting Standards and other legal requirements.
  - (l) discuss problems and reservations arising from the interim and final audits and any other matter the external auditor may wish to discuss, in the absence of management where necessary;
  - (m) review any communication between external auditor(s) and management;
  - (n) consider any related party transactions that may arise within the company or group;
  - (o) consider the major findings of internal investigations and Management responses;
  - (p) have explicit authority to investigate any matter within its terms of reference, and shall be availed the resources it needs to do so and be accorded full access to information;
  - (q) obtain external professional advice and to invite outsiders with relevant experience to attend its meetings if necessary; and
  - (r) consider other issues as defined by the Board including regular review of the capacity of the internal audit function.<sup>1050</sup>
- The audit committee of quoted company is responsible for:
    - (a) organising the company to promote the effective and prudent management of the company and the directors oversight of that management;
    - (b) 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;
    - (c) overseeing the operations of the company and providing direction to it on a day-to-day basis, subject to the objectives and policies set out by the audit committee and any other written law;
    - (d) providing the directors with recommendations, for their review and approval, on the objectives, (strategy, business plans and major policies) that are to govern the operation of the company; and
    - (e) providing the directors with comprehensive, relevant and timely information that will enable the directors to review the company's business objectives, business strategy and policies, and to hold senior management accountable for the company's performance.<sup>1051</sup>
  - The audit committee of a quoted company shall:

<sup>1050</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 6.5.1

<sup>1051</sup> Companies Act 2015: Section 770

- (a) set out the corporate governance principles that are appropriate for the nature and scope of the company's business;
  - (b) establish policies and strategies for achieving them; and
  - (c) annually assess the extent to which the company has observed those policies and strategies.<sup>1052</sup>
- The board should disclose, in an informative way, details of the activities of audit committee, the number of audit committee meetings held in a year and details of attendance of each audit committee member at such meetings<sup>1053</sup>.
  - The chairperson of the board, chief executive officer and the finance director may attend meetings of the audit committee upon invitation by the audit committee<sup>1054</sup>.
  - The board shall disclose in its annual report whether it has an audit committee, the members, their qualifications, independence and the mandate of such committee<sup>1055</sup>.
  - The Code's requirements are set within the spirit of international standards in order to achieve the same results as international standards.
- (d) The organisation should define the scope of its Risk Management Programme and its processes. The Risk Management Programme should be measured against internationally accepted standards of internal audit<sup>1056</sup> but should be tailored to reflect (a) the organisation's business risks (material financial, strategic, operational, environmental, governance and social risks (including political and legal ramifications of such risks); (b) reputational consequences<sup>1057</sup>; (c) circumstances and culture; (d) inherent risks such as locations of the business, the business sector and organisational risks such as size of the business and the use of channels such as intermediaries.<sup>1058</sup> The Risk Management Programme and its processes should be documented and reported through appropriate mechanisms such as the company's codes, charters or policy documents.<sup>1059</sup>
- The board shall set out its responsibility for internal control in its charter and shall delegate to the management the responsibility of designing, implementing and monitoring effectiveness of internal control systems. The board shall set out in its charter the role to be played by management in enhancing a good system on internal controls.<sup>1060</sup>

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<sup>1052</sup> Companies Act 2015: Section 770

<sup>1053</sup> CGCP 6.5.2

<sup>1054</sup> CGCP 2015 6.5.2

<sup>1055</sup> CGCP 2015 6.5.2

<sup>1056</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM04

<sup>1057</sup> ICGN Global Governance Principles (GGP): 5

<sup>1058</sup> BS ISO 31000:2018; Business Principles for Countering Bribery: A Multi-Stakeholder Initiative led by Transparency International (2013): 4; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM07

<sup>1059</sup> BS ISO 31000:2018; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM07

<sup>1060</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendations 6.3.2 and 6.3.3

- Internal auditors shall carry out their functions in accordance with the International Standards in Auditing (ISA), any standards promulgated by the Institute of Internal Auditors (IIA) and the Code of Ethics and Conduct<sup>1061</sup>.
  - The Code's requirements are set within the spirit of international standards in order to achieve the same results as international standards.
- (e) The board should ensure that authorities, responsibilities and accountabilities for relevant roles with respect to risk management are assigned to a senior executive. The senior executive would be responsible for risk reporting to the chief executive officer or a board risk committee. This senior executive should be separate from the Head of Audit, or the board risk committee should be separate from the audit committee<sup>1062</sup>. The board should ensure they communicate the identity of those individuals who have the accountability and authority to manage risk to all levels of the organisation.<sup>1063</sup>
- See Standard 44(f).
  - Whilst companies in Kenya may already comply with the international standards, there are no specific provisions concerning allocation of responsibilities and accountabilities to senior management with regard to risk management (other than the division of responsibility between the board and management). This, together with clear guidelines of separation of roles and powers should be provided for to increase investor confidence in independence and transparency.
- (f) The board should carry out an annual reviews of the effectiveness of the organisation's Risk Management Programme, and tested periodically for its adequacy, to address external and internal changes. It should report on its reviews in the annual report. It should measure the organisation's risk management framework performance against its purpose, implementation plans, indicators and expected behaviour.<sup>1064</sup> If gaps or improvement opportunities are identified, the organisation should develop plans and tasks and assign them to those accountable for implementation.<sup>1065</sup>
- The board shall, at least annually, ensure that a review of the effectiveness of the company's risk management practices and internal control systems is conducted and report to shareholders that they have done so. The review shall cover all material controls including financial, strategic, operational and compliance.<sup>1066</sup>
  - The Code' requirements match international standards.
- (g) The organisation should ensure that an internal audit of its functions, (including the implementation of economic, environmental and social topics), policies and procedures is undertaken on a periodic basis.<sup>1067</sup>

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<sup>1061</sup> Ibid

<sup>1062</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM02

<sup>1063</sup> BS ISO 31000:2018

<sup>1064</sup> UK Corporate Governance Code C.2.3; BS ISO 31000:2018

<sup>1065</sup> ICGN Global Governance Principles (GGP): 7.6; BS ISO 31000:2018

<sup>1066</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 6.4, Recommendation 6.3.1 and Guidance

<sup>1067</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

- The board shall put in place an effective system of internal control, and review on a regular basis the adequacy and integrity of the company's internal control systems and the management of information systems, including compliance with applicable laws, regulations, rules and guidelines. Periodic testing of the effectiveness and efficiency of the internal control procedures and processes must be conducted to ensure that the system is viable and robust.<sup>1068</sup>
  - The board shall organise for a legal and compliance audit to be carried out periodically, (at least on an annual basis), with the objective of establishing the level of adherence to applicable laws, regulations and standards, and the findings from the audit are acted upon and any non-compliance issues arising corrected as necessary.<sup>1069</sup>
  - A comprehensive independent legal audit shall be carried out at least once every two years by a legal professional in good standing with the Law Society of Kenya, and the findings from the audit are acted upon and any non-compliance issues arising corrected as necessary.<sup>1070</sup>
  - The Code's requirements match international standards.
- (h) Where an internal audit function has not been established, full reasons for this should be disclosed in the annual report, as well as an explanation of how adequate assurance of the effectiveness of the system of the Risk Management Programme has been obtained.<sup>1071</sup>
- No local standard identified.
  - There is no specific provision for companies in Kenya to report on the reasons for not establishing an internal audit function. This should be provided for to increase investor confidence in the transparency of the organisation, and its ability to identify/monitor/address risks within the organisation.
- (i) The board should publish the report from the external auditor which should provide an independent and objective opinion whether the accounts give a true and fair view of the financial position and performance of the organisation.<sup>1072</sup>
- The board shall subject the company to an annual governance audit, as a minimum requirements. After completion of the audit, the board shall provide an explicit statement on the level of compliance.<sup>1073</sup>
  - At least once a year, the audit committee shall meet with the external auditors without members of management being present<sup>1074</sup>.
  - The Code's requirements are set within the spirit of the international standards in order to achieve the same results as the international standards.

<sup>1068</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 6.3, Recommendation 6.4.1 and Guidance

<sup>1069</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.10.3

<sup>1070</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.10.3

<sup>1071</sup> ICGN Global Governance Principles (GGP): 7.6

<sup>1072</sup> ICGN Global Governance Principles (GGP): 7.7

<sup>1073</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.11

<sup>1074</sup> GCP 6.5.2

- (j) Organisations should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed, and, where appropriate, along business lines or geographic areas. Disclosure of policies should be tailored to the nature, size and location of the organisation, with due regard taken of costs, business confidentiality and other competitive concerns.<sup>1075</sup>
- The Board shall promote timely and balanced disclosure of all material information concerning the company.<sup>1076</sup>
- The Code's requirements are set within the spirit of the international standards in order to achieve the same results as the international standards.

## 57. Review of economic, environmental and social topics

### GRI Reporting Standard (102-31)

- a. Frequency of the highest governance body's review of economic, environmental and social topics and their impacts, risks and opportunities.

### Standards

- (a) The board should agree with senior management, (including the officer who has responsibility for corporate compliance), on the process adopted by the organisation to undertake monitoring and continuous improvement of economic, environmental and social topics, which should include:
  - i. who is responsible for the process;
  - ii. how often it takes place;
  - iii. how results are taken into account including review and oversight by senior management and/or the board or appropriate board committees; and
  - iv. the procedures for internal and external communication of the monitoring and improvement process and the results.<sup>1077</sup>
- See Standard 44(f) above on governance structure.
- Whilst the Code requires a board to establish and state the functions of the board and the officers managing company operations, there does not appear to be a specific requirement in respect of the monitoring and evaluation process to be adopted with regard to ESG topics. Companies may already comply with this requirement, but, for consistency, and confidence in company operations, it is recommended that the international standards be adopted as requirements.
- (b) The board should meet regularly to discharge its duties, and directors should allocate adequate time to board meeting preparation and attendance.<sup>1078</sup>
- See Standard 44(f) above on governance structure.

<sup>1075</sup> OECD Guidelines for Multinational Enterprises 2011 (Part III of the Guidelines, Page 27)

<sup>1076</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 7.1

<sup>1077</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1078</sup> ICGN Global Governance Principles (GGP): 1.3; UK Corporate Governance Code: A.A.1

- The Code requires companies to establish its own charter, which, should include the above details. On this basis, the Code's requirements match international standards.
- (c) Independent directors should meet separately from other board members at least once a year.<sup>1079</sup>
- No local standard identified.
  - For confidence in board independence and transparency in company operations, it is recommended that the international standard be adopted.
- (d) There should be periodic economic, environmental and social internal audits, and the company should ensure there are provisions for fines and settlements specified for ESG issues in audited accounts.<sup>1080</sup>
- See Standards 55(e), 56(b), 56(i) and 56(j) above on identifying and managing economic, environmental, and social topics, and the effectiveness of risk management processes.
  - The Code requires issuers to complete various audits (annual financial audit, annual governance audit, legal and compliance audit every two years), there is no mandatory requirement for periodic audits to specifically target economic, environmental and social issues.

## 58. Highest governance body's role in sustainability reporting

### GRI Reporting Standard (102-32)

- a. The highest committee or position that formally reviews and approves the organisation's sustainability report and ensures that all material topics are covered.

### Standards

- (a) The organisation should set up a policy for review of sustainability issues. It should include:
- i. economic, environmental and social topics are recurring items on the board agenda;
  - ii. board approval of sustainability strategy and policies;
  - iii. board oversight of economic, environmental and social issues, and the formation of any specific committee to review sustainability issues; and
  - iv. the review process for the effectiveness of economic, environmental and social management processes, including a grievance reporting mechanism.<sup>1081</sup>
- The board shall ensure that the company's strategies promote the sustainability of the company. The board shall have formal strategies to promote sustainability. Attention shall be given to environmental, social and governance aspects of the business which underpin sustainability.<sup>1082</sup>
  - The Code's requirements match international standards.

<sup>1079</sup> IFC Corporate Governance Progression Matrix 2017

<sup>1080</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM14

<sup>1081</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1082</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.3.6

- (b) The officers responsible for economic, environmental and social matters should report to the board and the sustainability committee.<sup>1083</sup>
- See Standards 46(a), 55(a), 55(b), and 55(d) above on executive level responsibility for economic, environment and social topics, and identifying and managing economic, environmental, and social topics.
  - The Code's requirements match international standards.
- (c) The board should assess the basis on which the organisation generates and preserves value over the long term. It should describe, in the annual report, the sustainability of the organisation's business model, taking into account the future opportunities and risks for the organisation, and how its governance contributes towards the deliverance of this strategy.<sup>1084</sup>
- See Standards 44, 52(c) and 55(b) above on governance structure; the role of the highest governance body in setting purpose, values and strategy; identifying and managing economic, environmental and social topics.
  - The Code's requirements match international standards.

## 59. Communicating critical concerns

### GRI Reporting Standard (102-33)

- a. Process for communicating critical concerns to the highest governance body.

#### Standards

- (a) The organisation should prepare and maintain a formal published Code of Conduct ("Code of Conduct")<sup>1085</sup>, approved by the board, on managing risks posed to the business. This should include:
- i. the organisations commitment to tackle bribery and corruption within the business;
  - ii. conflicts of interest;
  - iii. non-compliance procedures and reporting; and
  - iv. the role and oversight of the board of directors, any appropriate board sub-committee, such as the audit committee.<sup>1086</sup>
- The board shall ensure that a Code of Ethics and Conduct ("Code of Ethics and Conduct") is developed and implemented, stipulating the ethical values, standards as well as specific guidelines that the company shall adhere to, in its interaction with its internal and external stakeholders. The board should ensure that compliance with the Code of Ethics and Conduct is integrated in the operations of the company.<sup>1087</sup>

<sup>1083</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1084</sup> UK Corporate Governance Code 2018: Provision 2

<sup>1085</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM02

<sup>1086</sup> ICGN Statement and Guidance on Anti-Corruption; FTSE Russell ESG Ratings Methodology Document 2018

<sup>1087</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendations 2.6.1, 5.2.2 and 5.2.3

- The Code's requirements match international standards. However, the CMA 2018 Governance Report has noted that issuers should ensure that the Code of Ethics and Conduct is implemented by all directors, management and employees. This suggests that not all issuers are following the Code's requirements.
- (b) The Code of Conduct should be effectively communicated into the company's strategy and operations.<sup>1088</sup>
- The board shall ensure that compliance with the Code of Ethics and Conduct is integrated into the strategies and operations of the company, and the Code of Ethics and Conduct shall be reviewed and updated on a regular basis.<sup>1089</sup>
  - The Code's requirements match international standards.
- (c) The board should foster a corporate culture which ensures that employees understand their responsibility for appropriate behaviour. There should be appropriate board level and staff training in all aspects relating to corporate culture and ethics. Due diligence and monitoring programmes should be in place to enable staff to understand the Code of Conduct and apply it effectively to avoid company involvement in inappropriate behaviour.<sup>1090</sup>
- The board shall disclose the company's Code of Ethics and Conduct on its website.<sup>1091</sup>
  - The Code's requirement provides transparency on the way in which a company conducts its operations, however, in order to comply with international standards, companies should be expected to provide training on its Code of Ethics and Conduct in order to ensure the principles are supported and adopted by all employees. This would improve investor confidence in any organisation. The CMA 2018 Governance Report has noted that all issuers should ensure that all directors, CEO's and management are made fully aware of the requirements of the Code.
- (d) The board should ensure that the company has in place an independent, confidential mechanism whereby an employee, supplier or other stakeholder can (without fear of retribution) raise issues of critical concerns with regards to potential or suspected breaches of a company's Code of Conduct.<sup>1092</sup> The organisation should review this mechanism by the board at each of its meetings.<sup>1093</sup>
- The Code of Ethics and Conduct shall include appropriate communication and feedback mechanisms which facilitate whistle-blowing<sup>1094</sup>.
  - The Code's requirements uphold the principles of international standards.

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<sup>1088</sup> ICGN Global Governance Principles (GGP): Principle 4

<sup>1089</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendations 5.2.2 and 5.2.3

<sup>1090</sup> ICGN Global Governance Principles (GGP): 4.5

<sup>1091</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline (e) to Recommendation 7.1.1

<sup>1092</sup> ICGN Global Governance Principles (GGP): 4.2

<sup>1093</sup> UK Corporate Governance Code 2018: Provision 6

<sup>1094</sup> CGCP 2015 5.2.4

(e) The Code of Conduct should be reviewed by the audit committee annually, including a review of the effectiveness of the mechanisms in place to report wrongdoing.<sup>1095</sup>

- The board shall include in its annual report a statement on compliance with corporate governance principles. The statement shall indicate aspects of this Code which have not been applied, the reasons thereof, indicative timelines and proposed strategies towards application.<sup>1096</sup>
- The Code provides requirements which uphold the principles of the international standards, but any organisations Code of Ethics and Conduct should be reviewed annually to ensure that its provisions remain relevant to the organisation.

## 60. Nature and total number of critical concerns

### GRI Reporting Standards (102-34)

- Total number and nature of critical concerns that were communicated to the highest governance body; and
- Mechanism(s) used to address and resolve critical concerns.

### Standards

- The officer(s) with responsibility for day to day governance and corporate compliance matters should report to the audit committee on all matters reported to him/her/them as violations of the organisation's code of conduct policy.<sup>1097</sup>
  - No specific standard identified.
  - Specific provision should be made for the obligations of the officer who has responsibility for day-to-day governance issues (i.e. company secretary).
- The audit committee should report serious violations to the board, and the board should ensure that proportionate and independent investigation of concerns are undertaken, recorded for follow up action and/or reported to the relevant authorities where appropriate.<sup>1098</sup>
  - See Standard 56(c) above on the effectiveness of risk management processes.
  - Whilst the Code sets out the mandate of an audit committee, specific provision should be made for its obligation to report serious violations to the board, and to ensure that appropriate action is taken by the board.

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<sup>1095</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM12

<sup>1096</sup> Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline (r) to Recommendation 7.1.1

<sup>1097</sup> Beyond The Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM08

<sup>1098</sup> UK Corporate Governance Code 2018: Provision 6; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM08

## 61. Remuneration policies

### GRI Reporting Standards (102-35)

- a. Remuneration policies for the highest governance body and senior executives for the following types of remunerations:
  - i. fixed pay and variable pay, including performance based pay, equity based pay, bonuses and deferred or vested shares;
  - ii. sign-on bonuses or recruitment incentive payments;
  - iii. termination payments;
  - iv. clawbacks; and
  - v. retirement benefits, including the difference between benefit schemes and contribution rates for the highest governance body, senior executives, and all other employees.
- b. How performance criteria in the remuneration policies relate to the highest governance body's and senior executives objectives for economic, environmental and social topics.

### Standards

- (a) The board should oversee the formulation of a formal and transparent policy for determining remuneration for board members and senior management of the organisation. Remuneration policies should be designed to support the organisation's strategy to help ensure long-term performance and sustainable value creation.<sup>1099</sup> Such policies should include:
    - i. reference to how awards were deemed appropriate in the context of the organisation's underlying performance and long term strategic objectives;
    - ii. whether remuneration consultants were involved in the process; and
    - iii. reporting on fixed and variable remuneration<sup>1100</sup> of executive officers, directors and the chief executive officer on an individual basis, whilst also taking into account the organisation's overall approach to human resource strategy. This extends to non-cash items such as director and officer insurance, pension provisions, fringe benefits and terms of severance packages (if any).<sup>1101</sup>
- **The board shall establish and approve formal and transparent remuneration policies and procedures that attract and retain board members, which should include:**
    - (a) **clear stipulation of the elements of such remuneration, including directors' fees, attendance allowances and bonuses;**
    - (b) **that the remuneration policies are aligned with its strategies; and**
    - (c) **the remuneration policies and procedures shall be disclosed in the annual report.**<sup>1102</sup>
  - **Also see Standard 62(b) below on the process for determining remuneration.**

<sup>1099</sup> UK Corporate Governance Code 2018: Principle P

<sup>1100</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG14

<sup>1101</sup> ICGN Global Governance Principles (GGP) 6.4

<sup>1102</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.9.1

- The Code's requirements uphold the principles of international standards.
- (b) The board is responsible for ensuring that remuneration is reasonable and equitable in both structure and quantum, and is determined within the context of an organisation's values, internal reward structures and competitive drivers while being sensitive to the expectations of stakeholders and societal norms.<sup>1103</sup>
- Companies shall remunerate board members fairly and responsibly.<sup>1104</sup>
  - The board shall determine the remuneration of the directors.<sup>1105</sup>
  - The Code's requirements uphold the principles of international standards, but organisations, as a matter of policy, should be required to take into account the factors considered by the international standards (as set out above). Further, issuers should disclose the same. This has been noted in the CMA 2018 Governance Report.
- (c) The board should balance salary levels appropriately in comparison with the level of benefits such as bonuses, deferred stock options or long-term incentive plans (LTIPs). Performance related elements (such as LTIPs) should integrate risk considerations so that there are no rewards for taking inappropriate risks at the expense of the organisation and its shareholders.<sup>1106</sup>
- The Board shall, annually, disclose in its annual report, its policies for remuneration including incentives for the board and senior management particularly quantum and component of remuneration for directors including non-executive directors on a consolidated basis in the following categories:
    - (i) executive directors' fees;
    - (ii) executive directors' emoluments;
    - (iii) non-executive directors' fees; and
    - (iv) non-executive directors' emoluments.
    - (v) share options and other forms of executive compensation that have to be made or have been made during the course of the financial year; and
    - (vi) aggregate directors' loans.<sup>1107</sup>
  - The Code provides requirements which uphold the principles of the international standards, but organisations, as a matter of policy, should be required to take into account the factors considered by the international standards (as set out above).
- (d) Performance related elements should be rigorous and measured over timescales, and with methodologies, which help ensure that performance pay is directly correlated with sustained value creation, including objectives for economic, environmental and social topics for the period under consideration and the future period of review, and to reward longer term performance.<sup>1108</sup>

<sup>1103</sup> ICGN Global Governance Principles (GGP); UK Corporate Governance Code 2018: Principle Q

<sup>1104</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Principle 2.9

<sup>1105</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.9.2

<sup>1106</sup> ICGN Global Governance Principles (GGP) 6.2 & 6.3; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG27

<sup>1107</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 7.1.1

<sup>1108</sup> ICGN Global Governance Principles (GGP) 6.3; GRI 2016 Reporting Recommendation 4.2; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG27

- The remuneration of the executive directors shall include an element that is linked to corporate performance, including a share option scheme, so as to ensure the maximisation of the shareholders' value.<sup>1109</sup>
  - The Code provides requirements which uphold the principles of the international standards, but organisations, as a matter of policy, should be required to take into account the factors considered by the international standards (as set out above).
- (e) The board should also ensure that aggregate remuneration is appropriately balanced with the needs to pay dividends to shareholders and retain capital for future investment.<sup>1110</sup>
- No specific local standard identified, but see Standards 61(b) and 61(d) above on remuneration policies.
  - This should be included as a basis requirement for organisations to take into account when considering remuneration decisions.
- (f) The board should ensure that pay for a non-executive director and/or a nonexecutive chair is structured in a way which ensures independence, objectivity and alignment with shareholders' interests. Remuneration for non-executive directors and non-executive chairs should not include share options or other performance related elements.<sup>1111</sup>
- The remuneration of non-executive directors shall be competitive and in line with remuneration for other non-executive directors in the same industry.<sup>1112</sup>
  - The Code provides requirements which uphold the principles of the international standards, but organisations, as a matter of policy, should be required to take into account the factors which international standards considered should be excluded (as set out above).
- (g) Policies should include provisions that enable the organisation to withhold the payment of any sum ('malus'), or recover sums paid ('clawback'), in the event of serious misconduct or a material misstatement in the organisation's financial statements<sup>1113</sup>.
- No local standard identified.
  - The above matters should be considered by the board and specific policies should be prepared to identify the issues identified as international standards.
- (h) If termination payments are provided, the organisation should explain whether:
- i. notice period for the board and senior management are different from those for other employees;
  - ii. termination payments for the board and senior management are different from those for other employees;
  - iii. any payment other than those related to the notice period are paid to the departing board members and senior management; and

<sup>1109</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 2.9.2

<sup>1110</sup> ICGN Global Governance Principles (GGP) 6

<sup>1111</sup> UK Corporate Governance Code 2016: D.1.3; ICGN Global Governance Principles (GGP) 6.9

<sup>1112</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 2.9.2

<sup>1113</sup> ICGN Global Governance Principles (GGP) 6.3

iv. any mitigation clauses are included in the termination arrangements.<sup>1114</sup>

- No local standard identified.
- The above matters should be considered by the board and specific policies should be prepared to identify the issues identified as international standards.

## 62. Process for determining remuneration

### GRI Reporting Standards (102-36)

- Process for determining remuneration;
- Whether remuneration consultants are involved in determining remuneration and whether they are independent of management; and
- Any other relationship that the remuneration consultants have with the organisation.

### Standards

- The board should establish a remuneration committee of at least two independent non-executive directors.<sup>1115</sup> Terms of reference for the committee should be agreed, setting out the authority delegated to it by the board.<sup>1116</sup>
  - The board of directors shall 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.<sup>1117</sup>
  - The Code's requirements uphold the principles of international standards, but this has been identified as a challenge in the CMA 2018 Governance Report. The existence of an independent remuneration committee is critical to an organisation's compliance with all international standards on remuneration policies and procedures. This is required to instil investor confidence in the same.
- The remuneration committee should have responsibility for setting remuneration for all executive directors and the chairman, and recommend and monitor the structure for senior management, with reference to the standards set in the organisation's remuneration policies.<sup>1118</sup>
  - The directors' remuneration shall be sufficient to attract and retain directors to run the company effectively and shall retroactively be approved by shareholders in an annual general meeting.<sup>1119</sup>

<sup>1114</sup> GRI 2016 Reporting Recommendation 4.3

<sup>1115</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG47

<sup>1116</sup> UK Corporate Governance Code 2016: D.2.1 & UK Corporate Governance Code 2018: Provision 32

<sup>1117</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline to Recommendation 2.9.2

<sup>1118</sup> Beyond the Balance Sheet: The IFC Toolkit for Disclosure and Transparency 2018; ICGN Global Governance Principles (GGP): 6

<sup>1119</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline to Recommendation 2.9.2

- The board shall develop appropriate staffing and remuneration policy including the appointment of the chief executive officer and the senior staff, particularly the finance director, operations director and the company secretary as may be applicable.<sup>1120</sup>
  - The board shall determine the level of remuneration of the directors.<sup>1121</sup>
  - The Code's requirements uphold the principles of international standards.
- (c) The remuneration committee should have a detailed process for setting remuneration<sup>1122</sup>. This should be included in the annual report, and should set out in writing, the following:
- i. the strategic rationale for executive directors' remuneration policies, and the performance metrics;
  - ii. reasons why the remuneration levels provided were appropriate, including pay ratios and pay gaps;
  - iii. what engagement has taken place with shareholders and the impact this had on policy and outcomes;
  - iv. what engagement has taken place with the organisation's employees to explain how executive remuneration aligns with the organisation's generic policy on pay; and
  - v. to what extent discretion has been applied to remuneration outcomes and the reasons why.<sup>1123</sup>
- An executive directors' remuneration shall be structured in line with remuneration for other directors in the same industry and shall be aligned with the business strategy and long-term objectives of the company.<sup>1124</sup>
  - The Code provides requirements which uphold the principles of the international standards, but organisations, as a matter of policy, should be required to take into account the factors considered by the international standards (as set out above).
- (d) No board member and/or senior management should be involved in deciding their own remuneration.<sup>1125</sup>
- No specific local standard identified, but see Standards 61(a) and 61(b) on remuneration policies.
  - The Code's requirements (See Standards 61(a) and 61(b)) uphold the principles of international standards, but organisations, as a matter of policy, should include the above restriction as a matter of policy.
- (e) The remuneration committee should exercise independent judgment and discretion when authorising remuneration outcomes, taking into account the performance of both the organisation and the individual.<sup>1126</sup>

<sup>1120</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline to Recommendation 2.9.2

<sup>1121</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 2.9.2

<sup>1122</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG19

<sup>1123</sup> UK Corporate Governance Code 2018: Provision 41

<sup>1124</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline to Recommendation 2.9.2

<sup>1125</sup> UK Corporate Governance Code 2018: Principle Q

<sup>1126</sup> UK Corporate Governance Code 2018: Principle R

- No specific local standard identified, but see Standards 61(a) and 61(b) on remuneration policies.
  - The Code's requirements (See Standards 61(a) and 61(b)) uphold the principles of international standards.
- (f) The remuneration of non-executive directors should be determined by the organisation's governing documents, or by the board, and should reflect the time, commitment and responsibilities of the role.<sup>1127</sup>
- No specific local standard identified, but see Standard 61(b) on remuneration policies.
  - The Code's requirements (See Standard 61(b)) upholds the principles of international standards.
- (g) Where a remuneration consultant is appointed, it should be a decision of the remuneration committee. The consultant should be identified in the annual report, with a statement as to whether there is any connection between the consultant, the organisation and/or its directors.<sup>1128</sup>
- No specific local standard identified, but see Standards 61(a) and 61(b) on remuneration policies
  - The Code's requirements (See Standards 61(a) and 61(b)) uphold the principles of international standards, but specific provision should be made as to the processes to be adopted if an organisation employs the services of a remuneration consultant.

### 63. Stakeholders involvement in remuneration

#### GRI Reporting Standards (102-37)

- a. How stakeholders views are sought and taken into account regarding remuneration; and
- b. If applicable, the results of votes on remuneration policies and proposals.

#### Standards

- (a) Information on the remuneration of the members of the board and senior management should be disclosed to shareholders.<sup>1129</sup>
- The board remuneration policies and procedures shall be disclosed in the annual report.<sup>1130</sup>
  - The remuneration package to directors shall be appropriately disclosed.<sup>1131</sup>
  - The directors of a quoted company shall prepare a directors' remuneration report for each financial year of the company.<sup>1132</sup> As soon as practicable after the directors have finished preparing the

<sup>1127</sup> UK Corporate Governance Code 2016: D.1.3; UK Corporate Governance Code 2018: Provision 24

<sup>1128</sup> UK Corporate Governance Code 2018: Provision 35

<sup>1129</sup> IFC Corporate Governance Progression Matrix 2017

<sup>1130</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline (c) to Principle 2.9

<sup>1131</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline to Recommendation 2.9.2

<sup>1132</sup> Companies Act 2015: Section 659

directors' remuneration report, the directors shall approve the report and shall arrange for one of them or the secretary of the company to sign it.<sup>1133</sup>

- A quoted company shall ensure that its annual financial statement and directors' report is made available on its website and remains available on the website until the annual financial statement for the next financial year of the company is made available in accordance with the Companies Act.<sup>1134</sup>
  - Statutory provisions uphold the principles of international standards.
- (b) Shareholders should be invited to approve all new long-term incentive schemes, and significant changes to existing schemes.<sup>1135</sup>
- The board shall proactively supply relevant information to stakeholders, and have regard for the best interests of the company in determining what information is to be shared.<sup>1136</sup>
  - There does not appear to be a universal requirement for organisations in Kenya to obtain shareholder approval of significant changes, unless this is provided in an organisation's constitutional documents. Provision of the same should be provided for to comply with international standards.
- (c) The chair should arrange for the chair of the remuneration committee to be available to answer questions at the Annual General Meeting.<sup>1137</sup> The company should disclose the number of days between the date of notice and the date of the Annual General Meeting<sup>1138</sup>, and this should be published relative to international norms and country peers.<sup>1139</sup>
- See Standard 63(c) on stakeholders involvement in remuneration.
  - Every shareholder shall be entitled to ask questions, seek clarification on the company's performance as reflected in the annual reports and accounts or on any matter that may be relevant to the company's performance or promotion of shareholders' interests and to receive explanation from the directors and/or management. This right shall be exercised in such a way as not to disrupt the business of an Annual General Meeting.<sup>1140</sup>
  - All shareholders have a right to receive relevant sufficient and timely information concerning the date, location and agenda of the Annual General Meeting as well as full and timely information regarding issues to be decided during the Annual General Meeting. Such information shall be received at least 21 calendar days before the Annual General Meeting.<sup>1141</sup>
  - The Code's requirements uphold the principles of international standards.
- (d) Shareholders should have an opportunity, where a jurisdiction allows, to a binding vote on executive remuneration policies (annually), particularly where significant change to remuneration structure is

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<sup>1133</sup> Companies Act 2015: Section 661

<sup>1134</sup> Companies Act 2015: Section 670

<sup>1135</sup> UK Corporate Governance Code 2016: D.2.4

<sup>1136</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 4.2.1

<sup>1137</sup> UK Corporate Governance Code 2016: E.2.3

<sup>1138</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG19

<sup>1139</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG38

<sup>1140</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Guideline 3.1.1

<sup>1141</sup> Ibid at 267

proposed.<sup>1142</sup> The shareholders right to vote should be evidenced in the Annual General Meeting, and it should be executively covered in a company policy.<sup>1143</sup>

- The directors of a quoted company shall, before the general meeting at which the financial statement is to be presented, give to the members of the company entitled to be sent notice of the meeting notice of the intention to move at the meeting, as an ordinary resolution, a resolution approving the directors' remuneration report for the financial year.<sup>1144</sup>
  - Statutory provisions uphold the principles of international standards.
- (e) Shareholders should have an advisory vote on the annual remuneration report. In the absence of local legal requirements for a binding vote or equivalent, and in cases where a significant minority of shareholders (e.g. 25%) vote against a report, a binding vote should be triggered the following year.<sup>1145</sup>
- No specific local standard identified, but see Standard 63(d) above on stakeholders' involvement in remuneration.
  - Whilst the Companies Act 2015 provides for members to vote on the directors' remuneration report, there is no specific provision for advisory vote/binding vote.
- (f) Where required by the organisations governing documents, shareholders should determine the remuneration of the non-executive directors.<sup>1146</sup>
- No specific local standard identified, but see Standard 63(d) on stakeholders' involvement in remuneration.
  - This requirement would be dictated by an organisation's governing documents.

#### 64. Annual total compensation ratio

##### GRI Reporting Standard (102-38)

Ratio of the annual total compensation for the organisation's highest-paid individuals in each country of significant operations to the median annual total compensation for all employees (excluding the highest paid individual) in the same country.

##### Standards

- (a) The organisation should, for each country of significant operation,:
- i. identify the highest paid individual for the reporting period, as defined by total compensation;
  - ii. calculate the median annual total compensation for all employees, except the highest paid individual; and

<sup>1142</sup> ICGN Global Governance Principles (GGP) 6.6

<sup>1143</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GCG21

<sup>1144</sup> Companies Act 2015: Section 681

<sup>1145</sup> ICGN Global Governance Principles (GGP) 6.7

<sup>1146</sup> UK Corporate Governance Code 2016: D.2.3

- iii. calculate the ratio of the annual total compensation of the highest paid individuals to the median annual total compensation for all employees.<sup>1147</sup>
  - A listed company should disclose the total aggregate of the remuneration paid and benefits in kind granted to the directors of the issuer by any member of the group during the last two completed financial years under any description whatsoever.<sup>1148</sup>
  - Whilst the NSE provides for some form of disclosure, there is a gap in reporting requirements. Provision of international standards should be made in order to instil investor confidence. Contrast this with the Mwongozo Guidelines applicable to government owned entities which requires the same to disclose the remuneration of directors, individually and collectively, and the salaries and remuneration of the Chief Executive Officer and the senior management.
- (b) The organisation should, for each country of significant operation, define and report of the composition of the annual total compensation for the highest paid individual and for all employees as follows:
- i. list the types of compensation included in the calculation;
  - ii. specify whether full and part time employees are included in this calculation;
  - iii. specify whether full time equivalent pay rates are used for each part time employee in this calculation; and
  - iv. specify which operations or countries are included, if the organisation chooses not to consolidate this ratio for the entire origination.<sup>1149</sup>
- No specific local standard identified, but see Standard 64(a) above on annual total compensation ratio.
  - Whilst the NSE provides for some form of disclosure, there is a gap in reporting requirements. Provision of international standards should be made in order to instil investor confidence.
- (c) The organisation should consider the following components as a basis for its calculation:
- i. base salary, guaranteed, short term, and non-variable cash compensation;
  - ii. cash compensation: sum of base salary + cash allowances + bonuses + commissions + cash profit sharing + other forms of variable cash payments; and
  - iii. direct compensation: sum of total cash compensation + total fair value of all annual long-term incentives, such as stock options awards, restricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and long term cash awards.<sup>1150</sup>
- No specific local standard identified, but see Standard 64(a) above on annual total compensation ratio.
  - Whilst the NSE provides for some form of disclosure, there is a gap in reporting requirements.

<sup>1147</sup> GRI Sustainability Reporting Standard 2016: Reporting Recommendation 4.4

<sup>1148</sup> NSE Listing Manual 2002: ID.E.00: E.04

<sup>1149</sup> GRI Sustainability Reporting Standard 2016: Reporting Recommendation 4.5

<sup>1150</sup> GRI Sustainability Reporting Standard 2016: Reporting Recommendation 4.5

## 65. Percentage increase in annual total compensation ratio

### GRI Reporting Standard (102-39)

Ratio of the percentage increase in annual total compensation for the organisation's highest paid individual in each country of significant operations to the median percentage increase in annual total compensation for all employees (excluding the highest paid individual) in the same country.

### Standards

- (a) The organisation should, for each country of significant operation,:
- i. identify the highest paid individual for the reporting period, as defined by total compensation;
  - ii. calculate the percentage increase in the highest paid individual's compensation from the prior reporting period to the current reporting period;
  - iii. calculate the median annual total compensation for all employees except the highest paid individual;
  - iv. calculate the percentage increase of the median annual total compensation from the previous reporting period to the current reporting period; and
  - v. calculate the ratio of the annual total compensation percentage increase of the highest paid individual to the median annual total compensation percentage increase for all employees.<sup>1151</sup>
- **No specific local standard identified.**
  - Whilst the NSE provides for some form of disclosure (see Standard 64(a) above), there is no requirement for organisations in Kenya to disclose detailed information in relation to compensation of its employees. Provision of international standards should be made in order to instil investor confidence.
- (b) The organisation should, for each country of significant operation, define and report of the composition of the annual total compensation for the highest paid individual and for all employees as follows:
- i. list the types of compensation included in the calculation;
  - ii. specify whether full and part time employees are included in this calculation;
  - iii. specify whether full time equivalent pay rates are used for each part time employee in this calculation; and
  - iv. specify which operations or countries are included, if the organisation chooses not to consolidate this ratio for the entire origination.<sup>1152</sup>
- **No specific local standard identified.**
  - Whilst the NSE provides for some form of disclosure (see Standard 64(a) above), there is no requirement for organisations in Kenya to disclose detailed information in relation to compensation

<sup>1151</sup> GRI Sustainability Reporting Standard 2016: Reporting Recommendation 4.6

<sup>1152</sup> GRI Sustainability Reporting Standard 2016: Reporting Recommendation 4.5

of its employees. Provision of international standards should be made in order to instil investor confidence.

- (c) The organisation should consider the following components as a basis for its calculation:
- i. base salary, guaranteed, short term, and non-variable cash compensation;
  - ii. cash compensation: sum of base salary + cash allowances + bonuses + commissions + cash profit sharing + other forms of variable cash payments; and
  - iii. direct compensation: sum of total cash compensation + total fair value of all annual long-term incentives, such as stock options awards, restricted stock shares or units, performance stock shares or units, phantom stock shares, stock appreciation rights, and long term cash awards.<sup>1153</sup>
- **No specific local standard identified.**
  - Whilst the NSE provides for some form of disclosure (see Standard 64(a) above), there is no requirement for organisations in Kenya to disclose detailed information in relation to compensation of its employees. Provision of international standards should be made in order to instil investor confidence.

## 66. Operations assessed for risks related to corruption

### GRI Reporting Standards (205-1)

- a. Total number and percentage of operations assessed for risks related to corruption; and
- b. Significant risks related to corruption identified through risk assessment.

### Standards

- (a) The organisation should have a formal published written policy, approved by the board, on managing risks posed to the business by bribery and corruption – actual, potential or perceived (“Anti-Corruption Policy”).<sup>1154</sup> The policies and procedures should apply to directors, officers, employees and contracted parties such as agents, lobbyists and other intermediaries. The organisation should ensure a corruption risk assessment is carried out. This risk assessment should cover the elements and types of corruption including bribery, and anti-corruption comprehensively.<sup>1155</sup> The Anti-Corruption Policy should set out how often the risk assessment procedure is carried out, who is in charge, which parts of the organisation are covered, and how results are dealt with. The organisation should also describe the business units and subsidiaries for which a risk assessment has been undertaken.<sup>1156</sup>

<sup>1153</sup> GRI Sustainability Reporting Standard 2016: Reporting Recommendation 4.5

<sup>1154</sup> World Bank Group Integrity Compliance Guidelines; ICGN Statement and Guidance on Anti-Corruption Practices, 2009; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC01 and GAC02

<sup>1155</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC09

<sup>1156</sup> Business Principles for Countering Bribery: A Multi-Stakeholder Initiative led by Transparency International (2013): 5.1; Reporting Guidance on the 10<sup>th</sup> Principle Against Corruption

- 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.<sup>1157</sup>
  - See Standard 59(a) above on communicating critical concerns with regard to an issuer developing and implementing a Code of Ethics and Conduct.
  - Also note the UNGC Codes of Ethics 2012, which requires signatories to, “actively develop anticorruption programmes, institute internal control systems, and build a culture of corruption-free business practice.”
  - The Code’s requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (b) The Anti-Corruption Policy should be comprehensive<sup>1158</sup> and reflect the size, business sector, potential risks and locations of operation that clearly and in reasonable detail articulates values, policies and procedures to be used to prevent corruption (including bribery) from occurring in all activities under its effective control.<sup>1159</sup>
- See Standard 66(a) above in relation to operations assessed for risks related to corruption.
  - Also see Standard 59(a) above on communicating critical concerns with regard to an issuer developing and implementing a Code of Ethics and Conduct.
  - The Code’s requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (c) The Anti-Corruption Policy should also:
- i. commit the organisation to eliminating bribery and corruption within the business;
  - ii. come under the oversight of the board of directors<sup>1160</sup> or an appropriate board sub-committee, such as the audit or governance committee;
  - iii. define corruption broadly to include any of the following areas:
    - a. conflicts of interest;
    - b. bribes;
    - c. political contributions;
    - d. charitable contributions and sponsorships;
    - e. facilitation payments;
    - f. gifts, hospitality and expenses;<sup>1161</sup> and

<sup>1157</sup> Bribery Act 2016: Part II Section 9(1). *Under the Anti-Corruption and Economic Crimes Act 2003, corruption means (a) an offence under any of the provisions of sections 39 to 44, 46 and 47; (b) bribery; (c) fraud; (d) embezzlement or misappropriation of public funds; (e) abuse of office; (f) breach of trust; or (g) an offence involving dishonesty (i) in connection with any tax, rate or impost levied under any Act; or (ii) under any written law relating to the elections of persons to public office.*

<sup>1158</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC10

<sup>1159</sup> Business Principles for Countering Bribery: A Multi-Stakeholder Initiative led by Transparency International (2013); FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC10

<sup>1160</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC03

<sup>1161</sup> Business Principles for Countering Bribery: A Multi-Stakeholder Initiative led by Transparency International (2013)

- iv. specify countering relevant forms of corruption, and at least two forms of bribery related activities.<sup>1162</sup>
- See Standard 59(a) above on communicating critical concerns with regard to an issuer developing and implementing a Code of Ethics and Conduct.
  - The Code's requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (d) The Anti-Corruption Policy should be consistent with all laws relevant to countering corruption and bribery in all the jurisdictions in which the organisation operates. It should apply to all directors, officers, employees and third parties and applying to all controlled subsidiaries, foreign and domestic.<sup>1163</sup>
- The Cabinet Secretary shall, in consultation with the Commission, publish guidelines to assist private and public entities in the preparation of procedures to prevent bribery.<sup>1164</sup> (Although we are unaware of the guidelines which were to be published by the Cabinet Secretary).
  - The Code's requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (e) One or more senior officers should be appointed to oversee and co-ordinate the Anti-Corruption Policy with an adequate level of resources, authority, and independence, reporting periodically to the body with ultimate responsibility for the organisation. The appointed senior officers should monitor the anti-corruption programme and periodically review its suitability, adequacy and effectiveness, and implement improvements as appropriate. They should periodically report to the audit committee or the board the results of the review.<sup>1165</sup>
- No specific local standard identified.
  - There is a lack of guidance as to how organisations should implement policies on bribery and corruption.
- (f) The board should demonstrate visible and active commitment to the implementation of the Anti-Corruption Policy<sup>1166</sup>.
- No specific local standard identified, but see Standards 44(c), 44(h), 46(b), 52(a), 52(c), and 54(d) in relation to governance structure, executive level responsibility for economic, environment and social topics, role of the highest governance body in setting purpose, values and strategy, and evaluating the highest governance body's performance.
  - Also see Standard 59(a) above on communicating critical concerns with regard to an issuer developing and implementing a Code of Ethics and Conduct.

<sup>1162</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC01 and GAC02

<sup>1163</sup> Anti-Corruption Ethics And Compliance Handbook For Business 2013

<sup>1164</sup> Bribery Act 2016: Part II Section 12 (1)

<sup>1165</sup> PACI Principles for Countering Bribery ; ICC Rules on Combating Corruption; Business Principles on Countering Bribery

<sup>1166</sup> APEC Anti-Corruption Code of Conduct for Business/World Bank Integrity Compliance Guidelines

- Also see the UNGC Codes of Ethics 2012, which requires its signatories to, “embrace corruption-free practices to ensure that users can trust our products and services.”
  - The Code’s requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (g) The organisation should apply and communicate the Anti-Corruption Policy in its dealings with third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter “business partners”), including, inter alia, the following essential elements:
- i. properly documented risk-based due diligence pertaining to hiring, as well as the appropriate and regular oversight of business partners;
  - ii. informing business partners of the organisation’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the Anti-Corruption Policy or measures for preventing and detecting such bribery; and
  - iii. seeking a reciprocal commitment from business partners.<sup>1167</sup>
- No specific local standard identified, but see UNGC Codes of Ethics 2012, which requires it signatories to, “encourage business partners to share our commitment to responsible business”.
  - Also see Standard 59(a) above on communicating critical concerns with regard to an issuer developing and implementing a Code of Ethics and Conduct.
  - There is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (h) The organisation should monitor the conduct of its business partners and should have a contractual right of termination in case of conduct inconsistent with the Anti-Corruption Policy.<sup>1168</sup>
- The Board should recognise, test, where necessary, and respect the governance practices of stakeholders in an effort to improve the company’s own governance practices.<sup>1169</sup>
  - The Code’s requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (i) The audit committee or the board should make an independent assessment of the adequacy of the Anti-Corruption Policy and disclose its findings in the annual report to shareholders.<sup>1170</sup>

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<sup>1167</sup> OECD Good Practice Guidance on Internal Controls, Ethics and Compliance; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC04 and GAC11

<sup>1168</sup> Anti-Corruption Ethics And Compliance Handbook For Business 2013

<sup>1169</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 4.1.5

<sup>1170</sup> Anti-Corruption Ethics And Compliance Handbook For Business 2013

- The board shall ensure that the company's performance on ethics is assessed, monitored and disclosed.<sup>1171</sup>
- See Standard 60(b) above in relation to nature and total number of critical concerns.
- The Code's requirements uphold the principles of international standards, although there is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.

## 67. Communications and training about anti-corruption policies and procedures

### GRI Reporting Standards (205-2)

- Total number and percentage of governance body members that the organisation's anti-corruption policies and procedures have been communicated to, broken down by region;
- Total number and percentage of employees that the organisation's anti-corruption policies and procedures have been communicated to, broken down by employee category and region;
- Total number and percentage of business partners that the organisation's anti-corruption policies and procedures have been communicated to, broken down by type of business partner and region. Describe if the organisation's anti-corruption policies and procedures have been communicated to any other persons or organisations;
- Total number and percentage of governance body members that have received training on anti-corruption, broken down by region; and
- Total number and percentage of employees that have received training on anti-corruption, broken down by employee category and region.

### Standards

- In addition to the requirement of the Anti-Corruption Policy set out in Standard 66, organisations should also:
  - include a formal public policy of zero tolerance of corruption in all its forms in prominent locations (annual report, website, other appropriate forums), and a commitment to be in compliance with all anti-corruption laws; and
  - communicate to all employees and business partner where the Anti-Corruption Policy can be found and/or how they are made available.<sup>1172</sup>
- No specific local standard identified, but see UNGC Codes of Ethics 2012, which requires signatories to, "avoid corrupt practices that can harm the good reputation of our shareholders and other investors."

<sup>1171</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 5.2.4

<sup>1172</sup> PACI Self-Assessment Template, 2008; FTSE4Good Countering Bribery Criteria, 2005; Reporting Guidance on the 10<sup>th</sup> Principle Against Corruption

- There is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (b) The organisation should provide anti-corruption training programme (Anti-Corruption Training Programme) periodically (at least annually). The Anti-Corruption Training Programme should cover the elements of corruption (including bribery) and anti-corruption comprehensively.<sup>1173</sup> The board, senior management and employees should attend the Anti-Corruption Training Programme. This will help them identify corruption risks in the daily business dealings of the organisation. Where appropriate, business partners should also receive attend the Anti-Corruption Training Programme.<sup>1174</sup>
- No specific local standard identified.
  - There is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (c) The Anti-Corruption Training Programme should be assessed periodically for effectiveness. All relevant personnel with decision making authority or in a position to influence business results should certify, in writing, that they have complied with the Anti-Corruption Training Programme, and have communicated to the designated corporate officer responsible for integrity and compliance matters any information they may have relating to a possible violation of the Anti-Corruption Training Programme by other corporate personnel or business partners.<sup>1175</sup>
- No specific local standard identified.
  - There is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.
- (d) The organisation should establish effective internal and external communication of the Anti-Corruption Training Programme<sup>1176</sup>, and be open to receiving communications from and engaging with stakeholders with respect to the Anti-Corruption Training Programme. This should include:
- i. internal communications concerning the Anti-Corruption Training Programme, such as campaigns, management communications, departmental meetings, publications, business conduct guidelines, internet or intranet resources, and describe the frequency of such communications (e.g., quarterly, annually); and
  - ii. provide monitoring measures such as results of surveys of employee attitudes, publications in local languages, and if the Anti-Corruption Training Programme has been translated into multiple languages, describe the principal languages.<sup>1177</sup>
- No specific local standard identified.
  - There is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption.

<sup>1173</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC08

<sup>1174</sup> ICC Rules on Combating Corruption; Anti-Corruption Ethics And Compliance Handbook For Business 2013

<sup>1175</sup> APEC Anti-Corruption Code of Conduct for Business; World Bank Group Integrity Compliance Guidelines

<sup>1176</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC07

<sup>1177</sup> Reporting Guidance on the 10th Principle Against Corruption

- (e) Organisations should also consider issuing a statement of support for international legal frameworks such as the UN Convention Against Corruption or for a regional convention ratified by the jurisdiction in which it operates, such as the OECD Convention. The organisation could also describe their initiatives, if any, to mark the annual Anti-Corruption Day (9 December).<sup>1178</sup>
- Kenya has ratified the UN Convention Against Corruption and 575 organisations (including the NSE) are signatories to the UNGC Codes of Ethics 2012.
  - Kenya as a country is making a notable effort on the world stage to tackle corruption. The Kenya Association of Manufacturers (“KAM”) who launched the UNGC Codes of Ethics 2012 should be empowered to encourage more organisations to become signatories. By way of example, the Kenya Private Sector Alliance (“KEPSA”) is reported to have over 500,000 members through Business Member Organizations and Companies. Compare this with the reported 575 signatories of the UNGC Codes of Ethics 2012.

## 68. Confirmed incidents of corruption and actions taken

### GRI Reporting Standards (205-3)

- a. Total number and nature of confirmed incidents of corruption;
- b. Total number of confirmed incidents in which employees were dismissed or disciplined for corruption;
- c. Total number of confirmed incidents when contracts with business partners were terminated or not renewed due to violation related to corruption; and
- d. Public legal cases regarding corruption brought against the organisation or its employees, during the reporting period and the outcome of such cases.

### Standards

- (a) The Anti-Corruption Policy should encourage employees and others to raise concerns and report suspicious circumstances as early as possible.<sup>1179</sup>
- The board shall establish and put into effect a whistle blowing policy for the company. The board shall disclose the company’s whistle blowing policy in its annual report and on its website. The aim of the policy shall be to:
    - (a) ensure all employees feel supported in speaking up in confidence and reporting matters they suspect may involve anything improper, unethical or inappropriate;
    - (b) encourage all improper, unethical or inappropriate behaviour to be identified and challenged at all levels in the company;
    - (c) provide clear procedures for reporting of such matters;

<sup>1178</sup> Reporting Guidance on the 10<sup>th</sup> Principle Against Corruption: B2

<sup>1179</sup> APEC Anti-Corruption Code of Conduct for Business

- (d) manage all disclosures in a timely, consistent and professional manner; and
  - (e) provide assurance that all disclosures shall be taken seriously, treated as confidential and managed without fear of retaliation.<sup>1180</sup>
- The Code's provisions comply with the requirements set by international standards. However, the CMA 2018 Governance Report notes this is a challenge for many issuers, and so all should be encouraged to disclose their whistleblowing policy on their website and in the annual report.
- (b) The organisation should make clear that compliance with the Anti-Corruption Policy is mandatory and that no employee will suffer demotion, penalty or other adverse consequences for refusing to pay bribed even if it may result in the enterprise losing business.<sup>1181</sup>
- No action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of:
    - (a) assistance given by the person to the Commission or an investigator; or
    - (b) a disclosure of information made by the person to the Commission or an investigator.<sup>1182</sup>
  - No action or proceeding, including a disciplinary action, may be instituted or maintained against a witness in respect of:
    - (a) any assistance given by the witness to the court or to a law enforcement agency; and/or
    - (b) a disclosure of information made by the witness to the court or to a law enforcement agency.<sup>1183</sup>
  - Statutory protection is offered for whistle-blowers in Kenya, however it remains open to individual organisations as to how they communicate the consequences of compliance (and non-compliance) of their anti-corruption policies to their employees.
- (c) There should be confidential, secure and accessible channels through which staff (including contractors, joint ventures, or other parties working with the company), shareholders, and other stakeholders and members of the public can report suspicious circumstances ('whistleblowing') to notify breaches of the Anti-Corruption Policy.<sup>1184</sup> Such mechanisms should be effective, in confidence and without risk of reprisal and/or retaliation.<sup>1185</sup>
- See Standards 68(a) and 68(b) above in relation to confirmed incidents of corruption and actions taken.
  - A whistle blower or a witness under the Bribery Act shall be entitled to protection of such extent as may be determined by the Witness Protection Agency.<sup>1186</sup>

<sup>1180</sup> The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015: Recommendation 5.2.5

<sup>1181</sup> Business Principles for Countering Bribery: A Multi-Stakeholder Initiative led by Transparency International 2013

<sup>1182</sup> Section 65 of the Anti-Corruption and Economic Crimes Act 2003

<sup>1183</sup> Section 33 of the Witness Protection Act 2006

<sup>1184</sup> FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GRM20 and GAC05

<sup>1185</sup> Anti-Corruption Ethics And Compliance Handbook For Business (2013); Beyond the Balance Sheet: The IFC Toolkit For Disclosure And Transparency 2018

<sup>1186</sup> Bribery Act, 2016: Section 21(3)

- 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.<sup>1187</sup>
  - The Code and Kenyan statutes make provision for whistleblowing processes and protection for those who report suspicious circumstances in accordance with those processes.
- (d) All bona fide reports of corruption should be documented and investigated.<sup>1188</sup>
- Every state officer, public officer or any other person holding a position of authority in a public or private entity shall report to the Ethics & Anti-Corruption Commission within a period of twenty-four hours any knowledge or suspicion of instances of bribery.<sup>1189</sup>
  - 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 Ethics & Anti-Corruption Commission within a period of twenty-four hours any knowledge or suspicion of instances of bribery commits an offence.<sup>1190</sup>
  - Whilst there is provision under the Bribery Act of the obligation to report corruption, companies should also ensure that there are policies and procedures in place to ensure that all complaints are documented and investigated. This is necessary to ensure investor confidence in company operations, its independence and transparency of operations.
- (e) When misconduct is identified, reasonable steps should be taken to respond with appropriate corrective action and to prevent further or similar misconduct and other violations of its programme. Appropriate sanctions for violations of the Anti-Corruption Policy, up to and including termination in appropriate circumstances, should be applied.<sup>1191</sup>
- Where a private entity fails to put in place procedures to prevent bribery, 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. The maximum statutory penalties for offences falling within the ambit of the Bribery Act are imprisonment for a term not exceeding ten years, or to a fine not exceeding five million shillings, or both, and may also be subject to a mandatory fine of five times the amount of the benefit or loss. Additional penalties include disqualification as a director/partner and/or debarment from holding public office/transaction with the Government.<sup>1192</sup>
  - The Bribery Act provides for penalties where organisations fail to adopt and implement procedures to prevent bribery. However, in order to boost investor confidence, organisations should ensure that such procedures are clearly documents, including the corrective action that may be taken where misconduct is identified by the organisation. The UNGC Codes of Ethics 2012 requires its signatories to “actively develop anticorruption programmes, institute internal control systems, and build a culture of corruption-free business practice.”

<sup>1187</sup> Bribery Act, 2016: Section 21(5)

<sup>1188</sup> Anti-Corruption Ethics And Compliance Handbook For Business 2013

<sup>1189</sup> Bribery Act, 2016: Section 14(1)

<sup>1190</sup> Bribery Act, 2016: Section 14(2)

<sup>1191</sup> Anti-Corruption Ethics And Compliance Handbook For Business 2013

<sup>1192</sup> Bribery Act 2016: Sections 18 and 19

- (f) List in a corporate publication: (e.g. annual report, sustainability report and/or website) the total amount of political contributions made; any current public investigations, prosecutions or closed cases arising out of the Anti-Corruption Policy, including the nature and number of incidents dealt with, the number of staff disciplined or dismissed due to non-compliance with anti-corruption policy/policies and the cost of fines, penalties or settlements the organisation faces in relation to corruption<sup>1193</sup>.
- No specific local standard identified, but see UNGC Codes of Ethics 2012, which provides that in a signatory's first year following its commitment to the Code, the signatory is required to, "*make it public that they have committed to the Code (on a website, in an annual report, or through the annual Global Compact Communication on Progress report)*".
  - There is a lack of guidance as to what organisations should include when setting out its approach to policies on bribery and corruption. In order to boost investor confidence in an organisation's transparency and corruption practices, it would be helpful for signatories (and organisations in Kenya generally) to report on adherence to the Code.

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<sup>1193</sup> Reporting Guidance on the 10th Principle Against Corruption: B7; FTSE Russell ESG Ratings Methodology Document 2018: Indicator legend GAC12, GAC13 and GAC14

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