

Independent Reporting Mechanism

Action Plan Review:
Kenya 2020-2022

Open
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Partnership



Independent
Reporting
Mechanism

Introduction

Starting in January 2021 the IRM began rolling out the new products that resulted from the IRM Refresh process.¹ The new approach builds on the lessons after more than 350 independent, evidence-based and robust assessments conducted by the IRM and the inputs from the OGP community. The IRM seeks to put forth simple, timely, fit for purpose and results-oriented products that contribute to learning and accountability in key moments of the OGP action plan cycle.

The new IRM products are:

1. **Co-creation brief** - brings in lessons from previous action plans, serves a learning purpose, and informs co-creation planning and design. This product is scheduled to roll out in late 2021, beginning with countries co-creating 2022-2024 action plans.
2. **Action Plan Review** - an independent, quick, technical review of the characteristics of the action plan and the strengths and challenges the IRM identifies to inform a stronger implementation process. This product is scheduled to roll out in early 2021 beginning with 2020-2022 action plans. Action Plan Reviews are delivered 3-4 months after the action plan is submitted.
3. **Results report** - an overall implementation assessment that focuses on policy-level results and how changes happen. It also checks compliance with OGP rules and informs accountability and longer-term learning. This product is scheduled to roll out in a transition phase in early 2022, beginning with 2019-2021 Action Plans ending implementation on August 31, 2021. Results Report are delivered up to four months after the end of the implementation cycle.

This product consists of an IRM review of Kenya's 2020-2022 action plan. The action plan is made up of eight commitments. This review emphasizes its analysis on the strength of the action plan to contribute to implementation and results. For the commitment-by-commitment data see Annex 1. For details regarding the methodology and indicators used by the IRM for this Action Plan Review, see section IV. Methodology and IRM Indicators.

¹ For more details regarding the IRM Refresh visit <https://www.opengovpartnership.org/process/accountability/about-the-irm/irm-refresh/>

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Section I: Overview of the 2020-2022 Action Plan

Kenya's fourth action plan continues ambitious reforms not previously completed, including the adoption of the open contracting data standards, the implementation of the Access to Information Act and the promotion of meaningful participation in the legislative processes. It also introduces new promising policy areas such as improving access to justice. Commitments primarily focus on increasing transparency and civic participation and could include stronger actions to enhance accountability through feedback and redress mechanisms. Moving forward, the Kenyan OGP Steering Committee should strengthen its oversight role, coordinating with implementing agencies to ensure that milestones have the adequate resources and are met in time and to their full extent.

Kenya plays a global leadership role as a member of the OGP Steering Committee, which has increased their drive to become a role model Country in OGP. The introduction of the plan describes four key leadership objectives at a local, national, regional and global level. This creates an opportunity for Kenya to bridge strong domestic reforms and initiatives to their global leadership efforts by demonstrating results and supporting other countries in their efforts to improve in open government. Moving forward, Kenya needs to prioritize addressing implementation gaps from past action plans by pulling together its resources and actors to push for strong implementation of this plan, and achieve the ambition to become a country role model.

Kenya submitted its fourth action plan 2020-2022, with eight commitments. Six of them were carried over from previous action plans, building on the achievements and lessons learnt from the previous plan and to advance the completion of activities, while redefining and introducing new milestones to improve the ambition of the commitments and promote effectiveness of reforms. For the first time, Kenya addresses access to justice as a policy area in an OGP action plan.

Multistakeholder engagement during the development of the action plan improved significantly compared to previous co-creation processes.² Various forums were set in motion for government-CSO conversations. In the Open dialogue forum, the government presented an opportunity for all interested actors from government and civil society to jointly make and prioritize proposals; for example, whereas there was a strong push for a stand-alone commitment on gender, the open dialogue forum agreed to integrate gender related activities

AT A GLANCE

Participating since: 2011
Action plan under review: 2020-2022
IRM product: Action Plan Review
Number of commitments: 8

Overview of commitments:

- Commitments with an open gov lens: 8
- Commitments with substantial potential for results: 4
- Promising commitments: 4

Policy areas

Carried over from previous action plans:

- Beneficial Ownership
- Open Contracting
- Legislative Openness
- Open Data
- Public Service Delivery

Emerging in this action plan:

- Access to Justice

Compliance with OGP minimum requirements for Co-creation:

- Acted according to OGP process: Yes

into the milestones. Cluster working groups comprised of government and CSO actors in their respective fields of interest then documented the policy problems and designed the specific commitments and milestones. The multistakeholder forum, made up of representatives of the different cluster groups, considered and endorsed the draft commitments for inclusion in the action plan.

This action plan has several important features that could be a catalyst to generate strong results. The plan engages the three arms of government involving those with Executive, Legislative and Judicial powers (the first two having representation in the National Steering Committee). If commitments are fully implemented, Kenya could prove how the coordination between the three powers of the state under the OGP action plan could contribute to achieving better results. Moreover, there is an alignment of government and CSO perspectives resulting from the strong multistakeholder engagement and the involvement of the different arms of government creates buy in and unity of purpose that could promote collaborative efforts in implementation. For example, involvement of CSOs could yield positive returns in resource mobilization and community engagement, while involvement of Parliament may create familiarity and ownership of proposed bills, which in turn may translate to speed in enactment. Finally, during the development of this plan, the MSF considered reforms that already had the approval and good will of government leadership, so that the initiatives would be prioritized for legacy and implementation would be less affected by political transitions. This is particularly important since implementation of this action plan will happen during a politically dynamic and unpredictable period when constitutional amendments and elections are slated to occur. During implementation, all actors from government and civil societies should work very closely to maintain this momentum and guard the ambition of the plan. The plan therefore aims to push forward implementation and institutionalization of these reforms to ensure continuity beyond political transitions.

This review focuses on the four most promising commitments. Whereas all eight commitments cover core policy areas that have had a long-standing priority, both at national and county (sub-national) level, the following four commitments were selected as “promising commitments”, based on their ambition, verifiability and relevance to OGP values:

- Commitment two on open contracting aims to adopt the open contracting data standard to cover all stages of public procurement in Kenya and secure legislative frameworks for whistleblower protection.
- Commitment four on public participation and legislative openness seeks to open up parliament by providing access to, and publication of parliamentary proceedings, and tracking of bills and petitions, while entrenching public participation and civic education through establishment of legal and guiding frameworks and adopting use of technology for participation.
- Commitment six aims to put in place structures for effective implementation of the Access to Information Act and provide an open and accessible public debt register.
- Commitment seven proposes measures to enhance access to justice through implementation of Alternative Justice Mechanisms.

² In developing the third national action plan 2018-2020, Kenya did not meet the OGP minimum requirement for public influence during co-creation - known as "Involve". The details of the stakeholder engagement are provided in the IRM design report here <https://www.opengovpartnership.org/documents/kenya-design-report-2018-2020/>

Section II: Promising Commitments in Kenya's 2020-2022 Action Plan

The following review looks at the four commitments that the IRM identified as having the potential to realize the most promising results. This review will inform the IRM's research approach to assess implementation in the Results Report. The IRM Results Report will build on the early identification of potential results from this review to contrast with the outcomes at the end of the implementation period of the action plan. This review also provides an analysis of challenges, opportunities and recommendations to contribute to the learning and implementation process of this action plan.

Four of the eight commitments from the action plan (1, 3, 5 and 8) were assessed by the IRM to have modest potential for results. These commitments are a positive step forward but have moderate ambition. However, this classification is based on the commitment language as written, and it is possible, during implementation, for the commitment actors to design and carry out implementation in a way as to yield transformative results and significantly impact the policy areas.

Commitment 1 on beneficial ownership proposes initiatives to advance Kenya's efforts to fight corruption and comply with international standards. It continues incomplete activities of the previous action plans and other ongoing commitments of government, but faces significant commitment design problems obstacles that could adversely influence its ambition and outcome. First, the commitment does not offer to make the e-register public. The Companies (Beneficial Ownership Information) Regulation 2020³ provides for access only by competent authorities. As a result, a public notice by the Business Registration Services⁴, while communicating to the public on the use of the e-register, specifically indicate the inaccessibility of the register to the public. In the 2016 London Anticorruption Summit, Transparency International coded as ambitious the commitment to establish a central public register on companies BO information⁵, and thus lack of public access curtails the ambition of this commitment. However, as explained by Stephanie Muchai⁶, making public the BO register would require an amendment of the Companies Act (2019) and the consequent 2020 regulations. This amendment may not be practical in terms of time, resources and mobilization within the NAP implementation window. Secondly, the high court nullification of some laws of Kenya⁷, (including the Miscellaneous Amendment Act 2019 that gave effect to Beneficial Ownership) could put on hold efforts on beneficial ownership. While the High court suspended its ruling for a period of 9 months to allow the respondents comply with constitutional requirement⁸ in effect, the ruling of this case will determine the application and validity of the legislations, and by extension, the implementation of beneficial ownership. Lastly, as explained in the 2018-2020 IRM design report⁹, the realization of milestone 2 is contingent on significant external factors outside the mandate of the Business Registration Service (BRS). The activities therein rely on actions by the Ethics and Anticorruption Commission, Public Procurement Regulatory Authority and the courts of law to be able to generate list of companies convicted of bribery and corruption, and performance of these institutions is beyond the scope of the BRS. Further, the design report also highlighted the concern on verification of beneficial ownership information submitted by companies. The action plan does not indicate whether there will be any specific steps to verify such information. Therefore, although advancing beneficial ownership

transparency is a priority among country stakeholders, this commitment continues ongoing activities from previous action plans that do not address concerns raised during their implementation.

Two commitments, (commitment 3 on open data for development and commitment 5 on public service delivery), address pressing national issues, but their milestones do not offer a clear indication on how their implementation would yield significant results.

Commitment 3 builds on Kenya's previous action plan which aimed to improve access to open geospatial data in four targeted policy priorities: food and nutrition security, disaster management and health. It includes similar milestones continuing steps to increase the publication of GIS data of capital projects in county budgets and promote its use through establishment of policy frameworks. It adds new activities seeking to establish conditional support grant and implementation of disaster early warning systems. However, it does not clearly state how the milestone activities translate to addressing problems faced by citizens (such as food security, housing and infrastructural challenges and climate change, among others), or how citizens can interact with this information to promote solutions. Rather, the commitment's influence is implied. The key output – the data sets - would be relevant for internal use by other government operatives, who will then design product and policies that directly influence/affect citizens.

Commitment 5 presents aspiring activities to strengthen peer review and learning among its county (decentralized) governments; however, going by the commitment language as given, the milestones appear internal facing to government, and do not refer to specific interfaces where citizens and CSOs can engage to promote transparency and/or accountability, as is volunteered in the commitment description. Thus, during implementation, government could move a step further to ensure civic participation and accountability, creating the space for citizens to utilize the data published and provide feedback into governance processes. Moreover, the commitment could promote accountability explicitly guaranteeing that county governments address and act upon feedback received from citizens. Similarly, in effecting the County Peer Review Mechanism, implementers could create active fora for citizen engagement and input.

Commitment 8 mainly constitutes a framework for OGP resilience through institutional support and multistakeholder engagement in the OGP processes. However, since it serves the purpose of institutionalizing OGP processes and facilitating implementation of the action plan, the IRM will assess it as part of Kenya's efforts to meet OGP procedural recommendations and guidelines.

The four promising commitments that follow are all initially assessed to be ambitious, verifiable, and relevant to OGP values. They put forward improvements to government practices that could realize open governance.

Table 1. Promising Commitments

Commitment 2: Open Contracting - Adoption and implementation of the Open Contracting Data Standard on Kenya's e-government procurement system would enable government to progressively publish information, in an open data format; will enable CSO and citizen use of such information to monitor and provide feedback on the project life cycle. Further, passing

on the Whistleblower protection Act will create a safe environment for citizens to flag out incorrupt practices without fear of intimidation.

Commitment 4: Public Participation and Legislative Openness – Opening up of parliament and the buy-in of Senate into the OGP commitment will not only improve the transparency and accountability initiatives, but would also be key in mobilizing other legislative organs- the National assembly and the county assemblies to follow suit. The Public Participation Bill, if enacted, will give effect to, and promote the principles of public participation as provided for in the Constitution of Kenya; use of technology will advance public participation practices, more especially around the restricted movement and assembly as a result of Covid-19. Moreover, legislation on civic education will lay ground for CSO and government alike to proactively run awareness campaigns and engage citizens and the operationalization of the Public Benefits Organization Act will expand spaces for CSOs to be vibrant and carry out their mandate better.

Commitment 6: Access to Information – The access to information regulations will provide frameworks for effective disclosure by public institutions. This will address a key challenge that has hampered the success of other transparency commitments in previous Action Plans

Commitment 7: Access to Justice – Financing and implementation of Alternative Justice Systems, legal aid and provision of technological support could provide critical steps in expanding access to justice in Kenya; Importantly, the citizen-government dialogues offer a platform for awareness creation, dissemination of information as well as feedback mechanisms on Alternative Justice Systems.

Commitment 2: Open contracting

(Public Procurement and Regulatory Authority, PPRA)

For a complete description, see commitment 2 in:

<https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>

Context and Objectives

Kenya has prioritized addressing corruption in contracting in two previous action plans. Both government and civil society stakeholders from the OGP community in Kenya recognize the need to increase transparency and accountability in all public procurement processes to reduce fraud and corruption. Kenya's public procurement is subject to corruption and bribery, with various assessments pointing at high levels of public funds losses. GAN Integrity's Risk & Compliance Portal (formerly The Business Anti-Corruption Portal) noted that tendering fraud was the fastest growing economic crime in Kenya and coded the risk level as high¹⁰. Transparency International ranked Kenya in position 124/180, with a Corruption Perception Index rating of 32/100¹¹. An Evaluation of Corruption in Public Procurement by the Ethics and Anticorruption Commission showed that over 72% of respondents both from government and private suppliers agreed that corruption was widespread in public procurement¹².

The government has had a historical track record of activities towards open contracting, with previous commitments focusing on data standards (promoting the adoption of the open contracting data standards), inclusion (aiming to increase access to contracting opportunities through the AGPO initiative - Access to Government Procurement Opportunities -), access to information (by establishing data portals) and provisions for legislative frameworks. Amendments to the Public Procurement and Asset Disposal (PPAD) Act of 2015 effected the

Access to Government Opportunities (AGPO) that made a significant impact in inclusion of traditionally disadvantaged groups such as youth, women & people living with disabilities (PWD). The Public Finance Management (PFM) Act passed in 2012 further articulated the scope and guidelines on open contracting and stipulated the frameworks for financial oversight, budget planning and public participation, and obligations of state officers among other provisions.

The combination of the PFM Act and the PPAD Act enabled the creation and operationalization of the Integrated Financial Management System (IFMIS). IFMIS fully caters for e-procurement, and importantly, makes accessible open contracting data through its Public Procurement Information Portal (PPIP).

In Kenya's third action plan, the government sought to implement the Open Contracting Data Standards on the PPIP, while expanding opportunities for women, youth and PWDs to participate in public procurement. However, the OCDS standard was not implemented, and though more information was published and made available on the portal, this did not cover all public procurement by all government entities¹³.

Efforts thus far have focused on creating structures for open contracting and publication of information. However, challenges still exist to these processes. The legal provisions for open contracting are limiting in scope, only requiring publication of information on the pre-tender and tender/contract award processes¹⁴. Low understanding and capacity of the implementing officers, as well as low political will had affected the implementation of open contracting in previous initiatives, although there have since been some interventions through trainings and advocacy that has resulted in positive changes; equally, the legacy systems in use are outdated, and not compatible with the OCDS open data formats¹⁵.

The Institute of Economic Affairs (Kenya) noted that while the pre-tendering and tendering stages of public procurement are often exposed to transparency measures, corruption has been reported to occur more during the post-tender award processes, where there is limited publication and disclosure of information^{16 17}. Additionally, the International Commission of Jurists- Kenya reported that most information provided on the PPIP referred to historical data and does not reflect on-going contracts; neither does the portal provide gender disaggregated data¹⁸.

Another challenge to public procurement concerns fears of victimization. Most economic crimes, corruption and malpractices go unreported, with the main reason cited for not reporting is fear of victimization^{19 20}. Kenya does not have a comprehensive and dedicated law on whistleblower protection, although a legislative proposal was submitted to National Assembly subcommittee on August 12, 2020²¹. Currently, legislation and provisions for whistleblower protection are covered in piecemeal under different laws such as the Access to Information Act (2016), the Anti-Corruption and Economic Crimes Act (2003), the Witness Protection Act (2012) and the Bribery Act (2016). The lack of a comprehensive legal safeguard for whistleblowers presents a potential weakness in the country's fight against corruption.

This commitment continues the open contracting efforts towards inclusion, access to information, provision of legislative and policy frameworks as well as adoption of data standards and expands the focus to include whistleblower protection. It builds on the existing initiatives to

implement an e-government procurement system that adopts the open contracting standard, is interoperable with existing portals and captures all information from all procuring entities. The commitment further aims to provide legislative, policy and structural frameworks for implementation of the e-government procurement system at national and county levels, and for whistle blowing, while creating mechanisms for public feedback throughout the project life cycle.

Further, in terms of inclusion in public procurement, research by Hivos²², TISA²³ and UN Women²⁴ observed that majority of the AGPO targeted beneficiaries live in the rural areas of the country, with limited internet connectivity. The national treasury on the other hand publishes all information, including tender advertisements and contract publications on-line; this contradiction limits the access of these opportunities by the intended beneficiaries. This prompted the need for low-tech methods of dissemination information and participation/engagement, as proposed in milestone 7 of the overall commitment. Milestone 8 purposes to create spaces for citizens to raise concerns and provide feedback on projects, without necessarily waiting for call for information by the Public Procurement Regulatory Authority or any other aggrieved party to a contract/ tender.

Milestone 1, which proposes to publish beneficial ownership information on foreign and local companies bidding for and winning mining contracts, is specific to open contracting, but also speaks to commitment 1 on beneficial ownership. The activity was included uniquely as it pushes forward implementation of commitment on publishing oil and gas contracts, started under the second National Action Plan II, of 2016-2018²⁵. The IRM's End of Term Report 2016-2018²⁶ indicated that contracts were not published because of legislative gaps that existed and recommended that government moves forward with steps to publish oil and gas contracts. This legislation has since passed as part of Kenya's third action plan and the beneficial ownership registry was set-up by the end of the plan's implementation period.

The commitment is relevant to OGP values of transparency, and civic participation. While the commitment text does not expressly demonstrate accountability, it has the potential for enhancing accountability by clearly detailing how citizen feedback will be collected and processed and establishing links between the feedback mechanisms and redress actions in situations where need arises.

Potential for results: Substantial

This commitment addresses different aspects of the policy problem on public procurement- not just the lack of unified data on open contracting²⁷, but also inclusion and participation by marginalized groups as well as whistleblower protection. The commitment further expands the scope of intervention to include national and international contracts as well as publication of beneficial ownership information. The commitment activities respond to the challenges discussed, by generating legal and institutional changes across government practices, that will facilitate implementation of the open contracting data standards and enhancing participation and inclusion while providing protection for witnesses and whistleblowers. Looking at the wider evidence across different countries, it's evident that procurement reforms such as publication of information and use on online platforms have been adopted as best practices to enhance transparency, integrity and efficiency in public procurement²⁸. Furthermore, the United Nations Economic and Social Commission for Asia and the Pacific, in its Social development policy paper

1 of 2019, reviewed the best practices in disability inclusive public procurement in the USA and EU. Some of the lessons learnt mentioned are:

- (i) Initiatives for inclusion are a positive step forward but must have enforcement power; having either stringent enforcement mechanisms or giving incentives to responsible parties seems to be an effective way to enhance implementation of any laws and regulations.
- (ii) Opportunities that support capacity building of all the targeted stakeholders would better support development and implementation of disability inclusive procurement policy.
- (iii) Involvement of civil society organizations and the private sector in developing and implementing disability-inclusive procurement policy is key to success²⁹.

Establishment of the e-government procurement system and making it interoperable with existing platforms should ensure seamless regulation of procurement activities at the national as well as county governments. The e-government system, together with a fully operationalized Public Procurement Information Portal (PPIP) will result in a functional government procurement system that provide unified data for open contracting. Adoption of the Open Contracting Data Standards (OCDS) will advance the system to match international best practices in open contracting. The OCDS will include procurement information in machine-readable format, in real time, and will be inter-operable with existing platforms, thus easing the burden of design and installation. In turn, as described in the IRM 2018-2020 Design Report³⁰, this has the potential to improve access to information and quality of due diligence actions, shorten procurement times, promote participation, and enhance the efficiency of monitoring the contracting process by government, civil societies and the public at large. To further entrench this, the development of open contracting regulatory framework will provide enforceable mechanisms to guide data collection, disclosure and management of e-government procurement system applicable to both national and county levels of government.

Whistleblower protection is of critical essence in combating corruption. By enacting a stand-alone national legislation, amending procurement regulations and providing an enabling framework for comprehensive whistleblower protection, Kenya would demonstrate a commitment to uphold ethical principles in the conduct of all government business. Further, clearly defining the scope of protection will ensure that reporting platforms are robust and reliable, will minimize risk of victimization, and promises whistleblowers that the reported concerns will be dealt with appropriately. The commitment further offers to engage civil societies to create awareness on whistleblower protection, with the aim of encouraging citizens to come out and provide information on corrupt practices.

Finally, the provision of information through adoption of low tech/ rural connectivity dissemination mechanisms is a positive, albeit anecdotal, step to encourage uptake of AGPO opportunities. This, however, would yield higher outcomes if the information provisions could be augmented with other supporting initiatives such as entrepreneurial capacity building for citizens and businesses monitoring, as discussed in the design report.

Opportunities, challenges and recommendations during implementation

Moving forward, the IRM recommends the following:

- Ensure strong collaboration and partnership between the National Treasury and the Public Procurement Regulatory Authority: According to one interview respondent, the National Treasury lacked responsiveness and was not as collaborative as desired. The

2018-2020 design report noted similar sentiments as challenges facing the county government of Makueni, which was also implementing an open contracting commitment. Going forward, the government will need to address this to avoid uncalled for impediments to the commitment.

- Introduce explicit measures to strengthen accountability: The 2018-2020 design report highlighted that direct causality between the application of the OCDS on the portals and reduced corruption cannot be assumed as implied. Therefore, Kenya should consider intentional steps to translate the transparency reforms to corruption reduction. Going forward, government could detail how the PPIP can be linked with the Beneficial Ownership register to enable verification of company details provided in the procurement portal. This could also be linked to oversight and anti-corruption authorities such as the Ethics and Anticorruption Commission, the Anticorruption law courts as well as the prosecution authorities for better access and utilization of information. Additionally, the government could demonstrate how citizen feedback will be collected and processed, and establish links between the feedback mechanisms and redress actions in situations where the need arises.
- Plan for regular training of public officials on the relevant laws and documentation standards: Towards this end, the implementation of this commitment could collaborate with the implementers of commitment six on access to information (also discussed herein as a promising commitment) to develop standards for, and promote digitization of records as a way of enhancing adoption of the open contracting data standards. Equally, the commitment stands to benefit from the curriculum training on access to information if the implementers include procurement officers and related personnel for capacity building.
- Promote citizen use of contracting information and build partnerships between government, CSOs and media to improve dissemination and promote use of data, through trainings and awareness campaigns.
- Encourage peer exchange to learn from past experiences: On the positive side, there is room for the national government to study the lessons and experiences of two of its county governments, Makueni and Elgeyo Marakwet, who have implemented the Open Contracting Data Standards. There is an even greater opportunity to influence peer learning among all other county governments', for instance through implementation of the county peer review mechanisms detailed in commitment five. Flagship initiatives such as this one could be recommended for adoption across all counties, and the Council of Governors tasked to ensure and monitor its implementation.

Commitment 4. Public Participation and Legislative Openness

(The Senate of the Republic of Kenya)

For a complete description, see commitment 4 in:

<https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>

Context and Objectives

One of the major highlights of Kenya's constitutional framework is the requirement for public participation in all governance and administrative activities. More so, public participation is appreciated as the main vehicle for legislative openness. The Kenya Constitution and several other laws³¹ of the country make provisions pertinent to public participation. Whereas the spirit

of participation is deeply entrenched in law, its practice has been hampered by a series of challenges, including lack of interest from government actors in creating meaningful spaces for participation³², lack of standards, inadequate access to information, non-inclusivity and high cost/ inadequate budgeting for PP activities³³. The result has been a tokenistic practice, with insufficient input into governance processes and service delivery³⁴.

Since joining OGP, Kenya has had commitments and milestones speaking to public participation and legislative openness in all its previous action plans and has made incremental steps towards this. Likewise, under the Declaration on Parliamentary Openness³⁵, Kenya further committed to increase openness and citizen engagement in parliament work. This commitment in Kenya's fourth action plan puts forth a blend of themes carried forward from the previous action plans³⁶ and new focal areas. Continued themes are (i) passing of public participation legislation, (ii) development and implementation of tools, technology and alternative media for participation (iii) access to information on government services and performance and (iv) legislative openness (through disclosure of parliamentary information, access to proceedings, and development of trackers for bills and petitions). The new focal areas included are provision of legislation for civic education and public benefits organizations and enhancing inclusivity.

With regard to the continued themes, previous IRM design reports established the implementation levels as varying, from not started/limited in NAP I, to substantial in NAP II. As at the time of research, the Results Report for NAP III had not been published; however, the early research findings indicate that implementation of the commitment is still ongoing. Some of the associated outcomes of these commitments include publishing of county public participation guidelines, public participation bill (and consequential stakeholder consultations on the bill), parliamentary proceedings/ Hansard, live broadcast of parliament sessions, and bill trackers by parliament as well as civil society³⁷.

Previous commitments initiated the drafting and consultations on the public participation guidelines and legislations, but enactment of the law remains incomplete. Similarly, several gaps stand in the way of legislative openness. Proceedings/ Hansards of parliament committees and County Assemblies committees have not been adequately provided, and made accessible. This has limited the ability of citizens and parliamentary monitoring organizations such as Mzalendo Trust to keep track and monitor discussions and contribution in the various committees³⁸. As at the time of research³⁹, there were several trackers available on the National Assembly website⁴⁰. These trackers provided information on status of bills tabled before the House. Similarly, the Senate website provided a list of bills and gave room for citizens to submit comments on the bills. While these initiatives are commendable, the commitment implementers sought to enhance the trackers to provide more information, and expand citizen-legislators interactions on the platforms. Notably, the previous steps implemented have largely been technocratic and formal steps to improve participation. However, the underlying constraints have not been adequately addressed. Access to information has improved over the years, but not yet at best practice level; similarly, none of the commitments and milestones so far has addressed the fridity from government actors in creating meaningful spaces for participation, nor made provisions to cater for the high cost of public participation activities.

The commitment advances the policy areas by providing mechanism for better-structured frameworks for participation, inclusivity and engraved transparency in legislative processes. It is anticipated that the proposed legislation will provide guiding standards for participation and will address inclusivity. The commitment also embraces use of technology to enhance participation

more so, in light of the covid-19 pandemic. Additionally, the two new focal areas of the commitment, namely, drafting of the national civic education law, and operationalization of the Public Benefits Organization Act, are geared towards expanding spaces for civic engagement, aiming to, in the long run, counter the frigidity of government officials by driving higher demands from citizens for meaningful participation. The Public Benefit Organization Act was enacted in 2013 (but commenced in 2016) to provide a legislative framework for the registration, regulation, and oversight of public benefit organizations such as non-governmental and civil society organizations. Although this legislation is already in place, the rules and regulations that will guide the implementation of the Act are not yet finalized, hence the aim of the milestone⁴¹.

Milestone 8 contributes to the broader reforms listed under milestone 6 of commitment 8. The aim of the speaker's round table is to widen conversation on OGP beyond the few selected legislators, to increase uptake of initiatives through awareness creation and advocate for establishments of technical teams on OGP at both Senate and National Assembly.

These reforms are relevant to the OGP values of access to information and civic participation.

Potential for results: Substantial

The milestones in this commitment are broad in scope and put forward different activities not necessarily linked to each other, but independently valuable. Individually, the milestones have varying potential for results, but cumulatively, they have the potential to generate important changes across government.

The Constitution of Kenya requires Parliament and County Assemblies to involve the public in its legislative processes. With regard to public service delivery, the constitution requires transparency and public provision of timely, accurate information, as well as involvement of the people in the process of decision-making. The African Center for Open Governance, in its policy brief on Public Participation and Parliamentary Oversight⁴², discussed factors hindering meaningful engagement of the public by parliamentary committees, and made recommendations, some of which speak to this commitment. These include: (i) making online resources interactive to improve interface between legislators and committees, on one hand, and public and Parliament on the other; (ii) promoting user-friendly technological access through better navigation aids and easier to digest presentation style, and (iii) applying reforms on parliamentary openness to county assemblies, with appropriate modifications. This commitment sets out to create new and enhance existing opportunities for the public to learn about, track and influence parliamentary activities. The proposed trackers will improve on the initiatives of NAP III, to make the government trackers more interactive and more informative. The service charters will be developed to provide necessary information on government services and hopefully foster informed decision making by citizens.

Providing access to information through disclosure of committee proceedings (parliament and county assemblies) is pertinent to informed participation and monitoring by citizens and CSOs. The commitment undertakes to make accessible, proceedings of parliamentary committees. Bulk of the technical work by parliament is handled at committee level, and thus it is imperative that the Hansard form these committees are made equally accessible. Devolving transparency initiatives of the Senate and National Assembly to county assemblies while expanding access to

information and citizen engagement at all levels contributes to widening access to information and spaces for citizen participation.

With regard to public participation guidelines, several versions of guidelines are pre-existing, such as the guidelines for public participation in the legislative processes and the county public participation guidelines⁴³; however, these provide general overarching direction for participation- stating the key areas for participation and the general right to participation. Additionally, they do not spell out specific steps to ensure inclusivity, nor do they provide clear redress mechanisms where citizens can give feedback or raise concerns about public participation activities in the areas of concern. Milestone 7 borrows from lessons learnt and experience of Elgeyo Marakwet⁴⁴, on inclusivity in public participation and tracking inputs from citizens proposals to final decision making. This puts forth a noble case in point of peer learning, from which government could exploit for effective implementation. While guidelines anchored in legislation tend to entrench and institutionalize public participation, guidelines alone are insufficient to ensure meaningful participation. Successful participation requires commitment and initiative by government as well as citizens and CSOs, together with adequate funding for the conduct of participation activities.

Operationalization of the Public Benefits organization Act will enhance the relationship between CSOs and government, and will regulate the sector in itself - setting standards of governance within the sector, mechanisms for self-regulation, protective rights, and enhancing cooperation between government, development actors, stakeholders and citizens. More importantly, as explained by Pamela Ager (Oraro and Company Advocates), operationalization and full implementation of the Act will impose an obligation on Government to respect freedom of association and assembly and to provide an enabling environment in which public benefit organizations can be established and perform their functions. Further, The Government will be enjoined to involve PBOs in policy decision making on issues affecting them, particularly at the local level⁴⁵.

Bearing in mind the transitional nature of this action plan, the speaker's round tables will contribute to building resilience by establishing a practice that will influence the next House after elections to uphold and promote OGP initiatives. It also builds into commitment 8, which proposes round tables with the three arms of government. The anticipated outcome of roundtables include: (i) briefings and engagements between legislators and implementers to break ice in terms of advocacy for legislative and resource support (ii) support for donors' round table since the parliamentarians are expected to participate in the donors meetings and (iii) promoting government and CSOs to co-create solutions together.

Opportunities, challenges and recommendations during implementation

Moving forward, the IRM suggests:

- **Ensure adequate financing:** Improving public participation has been a core component of all of Kenya's National Action Plans. However, as reported in the IRM's 2018-20 design report⁴⁶, initiatives on public participation are have not been completed in the past, with inadequate financing being a key challenge. The commitment implementers could capitalize on the strong CSO engagement to collaboratively advocate for financial allocation for public participation by national as well as county governments.

- The 2018-2020 National action plan had undertaken to ensure passing of a national Public Participation law. However as alluded to earlier as in the case of beneficial ownership, the court ordered the immediate cessation of consideration of all bills that were pending before the Senate and National Assembly, among them the Public Participation bill, to allow for both Houses to meet the requirements of Article 110 (3) of the Constitution⁴⁷. While the consequent actions of the Parliamentary Houses is beyond the scope of this action plan, the actors herein could leverage on the participation of both Houses in the commitment, to lobby for prioritization of the Public Participation Bill when consensus is met, and discussion of the bills resume.
- The proposed Civic Education legislation could be a powerful mechanism to promote civic participation and reasoned commitment to the values and principles of democracy, especially as the constitutional amendments and general elections loom over the political landscape of the country. Such a regulation would be very useful tool for CSOs advocacy work. To achieve this, implementation could advance beyond drafting of the laws and target its enactment.
- Devolve legislation trackers to county assemblies: Implementers could develop trackers for county assemblies to allow for replicated transparency and interaction at the local level. The devolved trackers will equally be helpful for Senate's monitoring of county activities.
- Strengthen CSO participation in implementation of the commitment: A number of the milestones are very general in nature, both in terms of content, and how they will be implemented. This poses a challenge in implementation and monitoring, but also presents a potential opportunity for meaningful and continued participation by CSOs in advancing participation activities. Going forth, Mzalendo, as the lead CSO implementer identified in the plan, could take the convening role to bring together other civic actors to engage throughout the implementation of the NAP to advocate for, and support strong implementation of the commitment.

Commitment 6: Access to Information

(Commission on Administrative Justice, CAJ; Ministry of ICT; Kenya National Archives & Documentation Service, KNADS; Public Debt Management Office; National Treasury)

For a complete description, see commitment 6 in:

<https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>

Context and Objectives

The access to information space in Kenya has witnessed proactive participation and advocacy by civil society organizations, such as Article 19, International Commission of Jurists-Kenya Section, Transparency International and the Katiba Institute, among others. Over the years, the push for access to information came largely from CSOs, and was given a major boost with the promulgation of the Kenya Constitution 2010. Government's drive towards access to information took a notch higher with the establishment of the Commission on Administrative Justice (CAJ)⁴⁸ in 2011. During co-creation, this commitment was considered a priority area by both government and CSOs.

The Access to Information (ATI) law grants citizens access to information held by both public and private entities. ATI is a constitutional right in Kenya, and is a citizen driven law. This implies that citizens must know and exercise their right for the Act to be effective and yield solid outcomes in transparency and the fight against corruption. Several case laws⁴⁹ have demonstrated challenges Kenyans face in accessing information, despite existence of the law. Similarly, the International Commission of Jurists (Kenya Section) has previously decried limited and inconsistent publication of information by Public health institutions⁵⁰, and highlighted the right of citizens to access information in extractive sector, noting that consequences were already being witnessed where there was an impasse in Turkana County regarding the Early Oil Pilot Scheme (EOPS)⁵¹.

In the 2016-2018 national action plan, Kenya committed to enhancing right to information by strengthening records management and access to information. Through implementation of this commitment, the Access to Information Act was passed in September 2016, which provides citizens' right to access information, and establishes link between access to information and records management. Further, the IRM's 2016-2018 End-of –Term report noted that the CAJ mainstreamed access to information training for public officials through the performance contracting system, and sensitized a number of public bodies on their duties and obligations. Further, the government established an online centralized mechanism through the CAJ for the submission of access to information requests. Equally, the ICT Authority's Electronic Records and Data Management Standard was approved in August 2016, and came into effect in January 2017. However, the ATI regulations were not put in place, nor a central digital registry for government records and data established.⁵²

As detailed in the current plan, effective implementation of the Access to Information Act has been troubled by various challenges such as lack of frameworks and guidelines on how public institutions should disclose information, poor monitoring frameworks as well as non-digitization of records. According to the Commission on Administrative Justice⁵³ tools such as regulations and guidelines necessary to facilitate information disclosure are not in place, and this has resulted in opacity in the disclosure by institutions and citizen access to information. However, the plan does not continue with the establishment of a central digital registry for government records and data established.

The aim of this commitment is to set the Act rolling so that Kenyans at large can benefit from access to information. The commitment focuses on institutionalization of ATI through passing regulations, and creating frameworks for enforceable implementation by state organs. This is to be achieved through:

- i. passing of regulations that will unpack and operationalize the main ATI law
- ii. rolling out of a training program on access to information - primarily targeting public officers but also open to clients from the private sector
- iii. setting up mechanisms for domestication and adoption of ATI laws by local governments
- iv. enforcing disclosure by public institutions through a reporting framework and,
- v. digitization of records.

Implementation of this commitment could potentially influence the success of other commitments such as open contracting, where it is noted that there is non-disclosure by some procuring entities, and that the information published in the procurement portal does not conform to the OCDS, due to non-digitization of records⁵⁴. If fully implemented, the

commitment will address barriers to accessing information highlighted in the 2018-20 IRM Design Report⁵⁵.

The commitment not only reflects on OGP value on transparency, but also offers relevance to civic participation (through public participation in developing the regulations) and accountability (where redress mechanisms are implied for government agents who do not comply with the digitization and publication requirements).

Potential for results: Substantial

Access to Information is a fundamental right enshrined under Article 35 of the Constitution of Kenya, 2010, and further provided for in the Access to Information Act of 2016. Access to information is the key foundation for civic participation and accountability; hence, failure to provide access to information prevents citizens from making informed decisions or even holding various actors accountable. The IMF through its publication, Kenya Country Report No. 21/72⁵⁶, emphasizes the importance of the Access to Information Act noting that full implementation through the enactment of the regulations and proactive disclosure across ministries are vital to enhancing transparency and accountability.

In implementing this commitment, the government promises to move a step forward to institutionalize and address the major hindrances that have limited access to information. The commitment pledges to pass the ATI regulations, an action that will involve public participation to give inputs. If successfully passed, the regulations would reinforce and allow full implementation of the ATI law. Digitization of records will aid organizations to meet to the standards for publishing information; this will in turn, facilitate smooth implementation of other initiatives such as the open contracting, as well as compliance with minimum access to information requirements as intended under the Memorandum of Economic and Financial policies provided to the IMF.

The curriculum on ATI will build capacity of state officers to publish all necessary information in appropriate formats, and will promote effective response to citizen requests for information. The Kenya School of Government⁵⁷ is a state agency mandated to build capacity of human resources to offer public services efficiently and has the requisite structures in place to carry out continued education/ training of public officers. Rolling out an ATI curriculum with the Kenya School of Government is crucial for resilience, because they can run the course every year, with different public officers from different organizations attending. According to the Commission on Administrative Justice⁵⁸, the training will also target the members of the county assemblies; these are the equivalent legislators at the local government, mandated to pass legislations specific to the local governments. Therefore, training the county legislators will enable them be aware of, and understand the importance of ATI law, and hopefully ease the process of translating the national law to county level as well.

Equally, the model law will facilitate counties to develop their local ATI laws, without losing the spirit of the national law, while the reporting framework will allow the Commission on Administrative justice to monitor compliance by public institutions.

Specific to milestone 6, information regarding public debt in Kenya has been extensively provided on the websites of the Central Bank⁵⁹ and National Treasury⁶⁰. These include the

public debt registers, debt sustainability analysis and annual debt management reports, among others. However, this information is not presented in machine-readable format, and is not real time. While the Central Bank data is machine readable, it does not contain underlying information as is provided by national treasury. Although the milestone text does not detail the activities to be undertaken, the government Point of Contact, Mr. Phillip Thigo⁶¹, explained that the commitment sets to upgrade the registers available, to provide real time, machine-readable data. Once the register is upgraded and made open and accessible, it will follow suit in terms of disclosure as other information the treasury and other public institutions holds, in compliance with ATI law, which will be monitored through milestone 4 and 5.

Opportunities, challenges and recommendations during implementation

Enacting laws and regulations on access to information is not an end to itself but the beginning of a wider scope of activities. Even with the significant steps promised in this commitment, there is room to advance access to information in Kenya.

The IRM suggests the following:

- **Harmonize regulations:** The government and its co-implementers should consider the harmonization of the different regulations in the policy area. The potential conflicts between the Access to Information Act, the Data Protection Act and the Official Secrets Act have been discussed widely, including by Article 19⁶² and renowned Constitutional Lawyer, Yash Pal Ghai⁶³. While the process of harmonization may not be effected within this plan's commitment, it is recommended that the government work collaboratively with its stakeholders to carry out harmonization of the laws, so that all interests can co-exist in the space.
- **Develop a systemic and sustainable approach to supporting citizen engagement with the data published:** The public debt register comes amidst public outcry on the debt situation in the country. Kenyans have in the recent past voiced their dissatisfaction regarding the rising debt⁶⁴ and expressed concerns that the debt could be higher than reported⁶⁵. Critically examining these apprehensions shows that citizens do not have adequate information regarding public debt, yet government has provided the information. The extent to which information is machine-readable is critical to meeting priorities of open government and open data, and directly influences the uses citizens and other interested parties can make of that information. While the open and accessible register could increase the usability of the data provided, the milestone could advance further to ensure that citizens can adequately use the information published to meet their needs. For example, the government should create spaces for citizens to interact with the register, make inquiries or provide feedback; CSOs could be engaged to create awareness and promote use of the public debt register to influence of decision making by citizens.

Commitment 7: Access to Justice

(AJS Implementation Committee (Judiciary), the Employment, Labour and Relations Court (Judiciary) and the National Legal Aid Service)

For a complete description, see commitment 7 in:

<https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>

Context and Objectives

The Kenya Constitution (2010) provides overarching guarantee on access to justice for all persons. However, studies have shown that access to justice has been hampered by difficulties such as high court fees, geographical access, understaffing of judiciary and backlog of cases that delay justice^{66 67 68}. The constitution further provides for the use of alternative forms of dispute resolution to enhance delivery of justice to all citizens. The Afrobarometer Round 8 Survey⁶⁹ showed that Kenyans generally embraced out of court settlements in seeking justice, as compared to courts of law and tribunals. The Justice Needs and Satisfaction in Kenya Survey⁷⁰ indicated that only 10% of Kenyans use the formal justice systems to resolve their disputes, implying that majority of Kenyans took to informal mechanisms for dispute resolution. Even with this, the existing informal systems have been marred with challenges such as lack of formal recognition, gender injustices, exclusion of marginalized and vulnerable groups and lack of proper regulation, thus limited accountability. The Alternative Justice Systems (AJS) policy⁷¹ was launched in August 2020, as a culmination of the work of a government taskforce established to examine the framework on AJS. The policy specifies guidelines for the operationalization of Alternative Justice Systems, not only for the Judiciary but also for all institutions in the justice sector. Equally, the Legal Aid Act (2016) was enacted to give effect to constitutional stipulations on facilitation of access to justice and social justice; establishment of the National Legal Aid Service; and provision of, and funding for legal aid. However, implementation of the legal and policy frameworks has been slow. The Act makes provisions for the establishment of the Legal Aid Fund; this, however, has not been operationalized primarily due to funding constraints. While AJS in practice is not a new concept, the policy framework was recently launched and the implementation process just begun. Moreover, the Covid pandemic has rendered the courts increasingly more difficult to access because of use of technology and so alternative justice systems that are community-based are providing a better platform for justice administration.

In the 2012-2013 action plan, Kenya's commitment on access to justice focused on promoting transparency in justice administration through vetting of judicial officers and integrating of new technologies to improve expediency in judgement.

This commitment covers 2 broad objectives with regard to access to justice, that is: (i) to increase the capacity of the state to provide legal aid for indigent clients and (ii) to provide a strong lead for implementation of the Alternative Justice System Policy. The commitment proposes activities to speed up implementation of the legal and policy frameworks, and ultimately, enhance access to justice in the country. Through the citizen-government dialogues, the commitment undertakes to not only create awareness of, but also offers citizens an opportunity to present their feedback on AJS mechanisms and the policy. Milestone 3 seeks to bring together different actors dealing with government budgeting to set aside the much-needed funds. With this, legal aid providers, whether state or non-state, would be able to access financing and consequently, expand legal aid capacity access to justice. The commitment further seeks to have model programs to address two key challenges- in milestone 2, government intends to pilot implementation of AJS in Mombasa county, through which it will train the Mombasa Legal Aid Unit (MLAU) on AJS and link them with the judiciary so that they can begin to refer cases that qualify for AJS. Milestone 4 proposes a prototype to offer support to self-representing indigents, who are faced with technological challenges.

Regarding the commitment's open government lens, it is relevant to OGP values of Access to Information, civic participation, and public accountability, and further promotes use of technology and innovation to enhance accountability. Primarily, it fosters public accountability by taking steps to deliver on the right to legal aid, which among other things is critical to serve as a check on government overreach especially in criminal proceedings where loss of liberty is at stake. The commitment also strives to make justice mechanisms cheaper, faster, and easier to use, and adopts technology and innovation to increase the reach of justice mechanisms, more so during the pandemic where physical and in-person interactions are limited. Overall, this commitment aims to enable citizens to exercise their right to information on their own proceedings as well as their right to hold the justice system accountable in resolving disputes in a timely and efficient manner and accessing remedies for their disputes when warranted. Additionally, milestone 1 proposes to engage citizens in citizen-government dialogues to for purposes of creating awareness, and promoting citizen input in the implementation AJS. The dialogue forums will also serve as a platform to enhance access to information through publicizing of the AJS policy.

Potential for results: Substantial

By targeting the alternative justice mechanisms mostly used by Kenyans, this commitment promises significant change on citizens' access to justice. One of the AJS operational Policy intervention areas is co-referencing, i.e. Formulation of a system to facilitate appropriate cooperation between the Courts and AJS Mechanisms to enable linking of cases between them. This commitment offers a practical opportunity for implementation of this, and provides a learning experience for the involved actors. If fully implemented, the commitment will support the actors such as the Mombasa Legal Aid Unit, the Judicial Officers and CSOs to apply AJS in processing cases received. This in turn, is expected to translate in a greater number of cases diverted to AJS mechanisms, decreased backlog in MLAU cases and more resolved cases overall across both justice mechanisms. Successful lobbying for funding for legal aid is expected to translate to better access to justice by strengthening legal aid services. The commitment further addresses technological challenges faced by citizens in accessing justice.

Nairobi is the capital city of Kenya, has the highest proportion of Kenya's employed population, and receives the largest number of labour related cases. Bearing in mind the implementation period, milestone four sets out to address the technological barrier that self-representing indigent face in accessing justice. Because of the COVID 19 pandemic, there has been a notable increase in number of labour relations cases. Equally, since pandemic started, the judiciary introduced to an online platform, for e-filing systems and court online proceedings. With these changes, some self-representing litigants who were not knowledgeable on how to navigate the online system faced difficulties and lost track of their cases. If the Virtual Court Center is fully operationalized, judiciary would be able to refer self-representing litigants who need technological support to the center, from where they would be assisted to process their applications, and filings, and attend virtual court sessions.

Finally, bearing in mind the Country's anticipated general elections in 2022, the action plan implementation covers pre and post-election period for Kenya, and implementation of this commitment is crucial for promoting equal access to justice. Prior to the development of the AJS policy, organizations such as Kituo cha Sheria used AJS to provide a platform for communities' accountability for the post-election violence (PEV) that occurred back in 2007/08. Kituo adopted AJS so that communities members who had faced injustice and those who

perpetrated injustice were able to come together to resolve issues, and have an opportunity to experience reconciliation. Kituo cha Sheria thus find it strategic as well, for the policy to be implemented during the forthcoming election period.

Opportunities, challenges and recommendations during implementation

- Leverage external support to enhance outcome of the activities: This commitment aligns with EU & UNODC Programm for Legal Empowerment and Aid Delivery in Kenya (PLEAD)^{72 73}; it also has attracted support by other organizations such as International Development Law Organization⁷⁴, in addition to the state and non-state actors listed in the action plan. This presents an opportunity for multistakeholder approach to bolster implementation. Commitment implementers could therefore leverage on this support to enhance execution of the activities and promote realization of desired impact.
- Ensure availability of resources for the implementation of the commitment: Resource mobilization and funding of the initiatives lays as a challenge in the horizon; over the past four financial years, Kenya's Judiciary has received declining, inadequate funding from the national treasurer for its programs⁷⁵, which may in turn affect the success of the commitment. During implementation, the commitment actors could develop and implement a detailed roadmap with specific targets, detailing the various activities to be undertaken to achieve each milestone's objective. For example, Kituo cha Sheria⁷⁶ reported that the commitment cluster members had been individually tasked to fundraise, and at the same time, they were working collectively to lobby government, and source for partners to finance the processes.
- Enhance the scope of milestones two and four: The initiatives of milestone 2 and 4 are limited to pilot activities in Mombasa and Nairobi respectively. While these initiatives promise substantial changes, they are limited in geographical scope. Government together with its co-implementers could consider putting in place roadmaps, backed with adequate resources, for rolling out the programs across the country in order to yield transformative impact.
- Consider making public, all relevant information, not only for the commitment, but also other judicial processes and transformations as a way of enhancing transparency, as well as promoting citizen awareness and engagement

³ The Companies Act (Beneficial Ownership Information) Regulations, 2020, Kenya, available at <http://kenyalaw.org/kl/index.php?id=10221>

⁴ Business Registration Services (2021): Press Release for Beneficial Ownership Information Submission- Deadline Extension for a period of Six months with effect from 1st February 2021, available at https://brs.go.ke/assets/downloads/Press_Release_Extension_BO.pdf

⁵ '43 Countries, 600 Commitments: Was the London Anti-Corruption Summit a Success?' Transparency International, 12 September, 2016, <https://www.transparency.org/en/news/43-countries-600-commitments-was-the-london-anti-corruption-summit-a-success>

⁶ Stephanie Muchai, East Africa lead for Open Contracting at Hivos/Open Contracting, Country Engagement Developer/ CSO OGP SC member. Interview with IRM researcher on 04/05/2021

⁷ Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR, <http://kenyalaw.org/caselaw/cases/view/202549/>

⁸ 'Disclosure of Beneficial Ownership of Companies In Kenya,' Oraro and Company Advocates, 2021, <https://www.oraro.co.ke/2020/11/02/disclosure-of-beneficial-ownership-of-companies-in-kenya/>

⁹ Lindah Oduor-Noah, (2021) Independent Reporting Mechanism (IRM): Kenya Design Report 2018 - 2020, Independent Researcher, Open Government Partnerships. Available at: <https://www.opengovpartnership.org/documents/kenya-design-report-2018-2020/>

¹⁰ 'Kenya Corruption Report,' Gan Integrity, August 2020, <https://www.ganintegrity.com/portal/country-profiles/kenya/>

- ¹¹ 'Our Work In Kenya, Country Data" Transparency International <https://www.transparency.org/en/countries/kenya>
- ¹² Ethics and Anti-Corruption Commission (2015). An Evaluation of Corruption in Public Procurement; A Kenyan Experience.
- ¹³ Ibid, Stephanie Muchai
- ¹⁴ The Public Procurement and Asset Disposal Act (No. 33 of 2015): The Public Procurement and Asset Disposal Regulations, 2020, Kenya, Available at [file:///C:/Users/hp/Downloads/L.%20N.%20No.%2069%20\(PUBLIC%20PROCUREMENT%20AND%20ASSET%20DISPOSAL\)%20REGULATIONS%202020..pdf](file:///C:/Users/hp/Downloads/L.%20N.%20No.%2069%20(PUBLIC%20PROCUREMENT%20AND%20ASSET%20DISPOSAL)%20REGULATIONS%202020..pdf)
- ¹⁵ Ibid, Stephanie Muchai
- ¹⁶ 'More than Scandals: What Kenya's Audit Reports Reveals About Risks in Public Procurement,' Open Contracting Partnership, 21 May 2019, <https://www.open-contracting.org/2019/05/21/more-than-scandals-what-kenyas-audit-reports-reveal-about-risks-in-public-procurement/>
- ¹⁷ Jackline Kagume and Noah Wamalwa (2018). Public Procurement in Kenya: Analysis of Auditor General's Reports. Institute of Economic Affairs, Nairobi. Available at [file:///C:/Users/hp/Downloads/1536006455%20\(3\).pdf](file:///C:/Users/hp/Downloads/1536006455%20(3).pdf)
- ¹⁸ Second OCDS Mapping Report Factsheet, International Commission of Jurists Kenya Section, March 2020, <https://icj-kenya.org/wp-content/uploads/2021/04/ICJ-Kenya-Factsheet-OCDS-1.10.2020-1.pdf>
- ¹⁹ Ibid, Ethics and Anti-Corruption Commission (2015)
- ²⁰ Shakeel Shabbir, "Promoting Whistleblower Protection in Kenya: Role of GOPAC" (presentation, 18th International Anti-Corruption Conference, Copenhagen, Denmark 22–24 October, 2018), available at http://gopacnetwork.org/wp-content/uploads/2018/11/Hon.-Shakeel-Shabbir_18th-IACC.pdf
- ²¹ The National Assembly, Legislative Proposal Tracker 2020. Government of Kenya, available at <http://www.parliament.go.ke/sites/default/files/2020-10/DLS%20COMBINED%20LEGISLATIVE%20PROPOSAL%20TRACKER%20-%20OCTOBER%202020.pdf>
- ²² Kenya's Effort to Empower Women, Youth and People Living With Disabilities Through Public Procurement, Hivos, February 2018, available at <https://east-africa.hivos.org/assets/2018/02/Agpo-Full-Report-Web-version.pdf>
- ²³ 'Assessment of Implementation of Access to Government Public Procurement (AGPO) on Promotion of Preference and Reservation Schemes for Disadvantaged Groups in Elgeyo Marakwet County,' The Institute Social Accountability, January 2020, available at https://www.tisa.or.ke/images/uploads/TISA_AGPO_Assessment_Report_in_Elgeyo_Marakwet_County_2020.pdf
- ²⁴ Luke Obiri (2016). Consultancy Report on the Assessment of the Uptake of the 30% Public Procurement Business Opportunities for Women, Youth and Persons With Disability at the County Level and Availability of Business Development Services, Available at <http://genderinkenya.org/wp-content/uploads/2017/12/UN-Women-Report-on-AGPO.pdf>
- ²⁵ For more information, see commitment 4 in the 2016-2018 Kenya National Action Plan, available here <https://www.opengovpartnership.org/documents/kenya-national-action-plan-2016-2018/>
- ²⁶ The full Kenya End of Term Report can be viewed here https://www.opengovpartnership.org/wp-content/uploads/2020/08/Kenya_End-of-Term_Report_2016-2018.pdf
- ²⁷ 'Open Contracting Lessons from 15 Countries,' Open Contracting Partnership, 2016, <https://www.open-contracting.org/wp-content/uploads/2016/12/OC-HivosArticle19-synthesisreport.pdf>
- ²⁸ Organization for Co-operation and Economic Development (OECD) (2014). Compendium for good practices for integrity in Public Procurement. <https://www.oecd.org/gov/public-procurement/compendium-for-good-practices-for-integrity-in-public-procurement.pdf>
- ²⁹ United Nations Economic and Social Commission for Asia and the Pacific (2019). Disability-Inclusive Public Procurement: Promoting Universal Design and Accessibility. https://www.unescap.org/sites/default/files/PP%202019-01_Disability%20Inclusive%20Procurement_rev.pdf
- ³⁰ Ibid, Linda Oduor-Noah
- ³¹ The Public Finance Management Act, 2012, County Governments Act, 2012, Urban Areas and Cities Act, 2012 and the Intergovernmental Relations Act, 2012.
- ³² Halloran, Brendan. "Without a Will, Is There a Way? Kenya's Uneven Journey to Budget Accountability". International Budget Partnership. October 2017, <https://www.internationalbudget.org/wp-content/uploads/kenyas-uneven-journey-to-budget-accountability-ibp-case-study-2017.pdf>
- ³³ Ministry of Devolution and Planning, (2020) County Governance Tool Kit, challenges of Public Participation, Government of Kenya, <http://countytoolkit.devolution.go.ke/challenges-of-public-participation>
- ³⁴ Caroline Gaita, Executive Director, Mzalendo Trust. Interview with IRM researcher on 10/05/2021
- ³⁵ For more information on the open parliament declaration, please see <https://openingparliament.org/declaration/>
- ³⁶ The previous action plans can be found here: [2012-2013 National Action Plan](#), [2016-2018 National Action plan](#) and [2018-2020 National Action Plan](#)
- ³⁷ The detailed activities and results from the different action plan commitments can be found here: [Kenya Progress Report 2012-2013](#) and [Kenya End of Term Report 2016-2018](#)
- ³⁸ Caroline Gaita, Executive Director, Mzalendo Trust. Interview with IRM researcher, 27/05/2021
- ³⁹ Research was undertaken during the month of May, 2021
- ⁴⁰ The trackers and public comments portal can be viewed here <http://www.parliament.go.ke/the-national-assembly/house-business/bills> and <http://www.parliament.go.ke/the-senate/senate-bills>

- 42 'Public Participation and Parliamentary Oversight - Legal Reforms and Policy Options,' African Center for Open Governance, 24 October 2012, <https://africog.org/public-participation-and-parliamentary-oversight-legal-reforms-and-policy-options/>
- 43 These guidelines can be found here http://www.parliament.go.ke/sites/default/files/2018-04/27_Public_Participation_in_the_Legislative_Process.pdf and <https://countytoolkit.devolution.go.ke/public-participation>
- 44 Elgeyo Marakwet was among the pioneer local governments participating in the OGP Local. The county has had commitments on expanding spaces for civic engagement, yielded some positive results, including the development of participation guidelines. Details of the action plans and results can be found here <https://www.opengovpartnership.org/members/elgeyo-marakwet-kenya/>
- 45 Ibid, Pamela Ager
- 46 Ibid
- 47 The detailed court ruling can be found here [Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another: Attorney General & 7 others \(Interested Parties\) \[2020\] eKLR](#)
- 48 The Commission on Administrative Justice is a government body, tasked with oversight and enforcement powers and functions, which include handling complaints relating to access to information and considering reports from public bodies on the Act's implementation. For more information about the agency, please see <https://www.ombudsman.go.ke/>
- 49 Examples of these case can be found here: [Maureen Kakah, "Access to Public Information an Uphill Struggle in Kenya Despite Law," Business Dail, 27 February 2019, Media Adisory on Access to Information Petition no 218 of 2020, Handbook on Best Practices on Access to Information in Kenya](#)
- 50 'Assessment Report: Status of Implementation of the Regulatory & Policy Framework on Access to Information in the Health Sector in Kenya,' International Commission of Jurists Kenya Section, https://icj-kenya.org/news/sdm_downloads/assessment-report-status-of-implementation-of-the-regulatory-policy-framework-on-access-to-information-in-the-health-sector-in-kenya/
- 51 'Access to Information in Extractives is Crucial,' International Commission of Jurists Kenya Section, 15 October 2018, <https://icj-kenya.org/news/access-to-information-in-extractives-is-critical/> and 'Citizen's Access to Information Guide,' International Commission of Jurists Kenya Section, 2018 https://icj-kenya.org/news/sdm_downloads/citizens-access-to-information-guide/
- 52 Ibid
- 53 Violah Ocholla, Director of Administration, Commission on Administrative Justice. Interview with IRM researcher, 28/05/2021; for more information about the Commission on Administrative Justice please visit the website here <https://www.ombudsman.go.ke/index.php/access-to-information-centre>
- 54 Challenges to open contracting are discussed under the first promising commitment
- 55 Ibid
- 56 International Monetary Fund (2021). Kenya Country Report no. 21/72, <file:///C:/Users/hp/Downloads/dsacr2172.pdf>
- 57 For more information about the Kenya School of Government, see <https://ksg.ac.ke/about-ksg/>
- 58 Ibid, Violah Ocholla
- 59 Information on Kenya's Public Debt can be found here <https://www.centralbank.go.ke/public-debt/>
- 60 Kenya's External Public Debt Register can be found here <https://www.treasury.go.ke/external-public-debt-register/>
- 61 Phillip Thigo, Government Point of Contact. Interview with IRM researcher on 31/05/2021
- 62 'Kenya: Official Secrets Act Incompatible with Freedom of Expression Standard,' Article 19, 14 September 2020, [and https://www.article19.org/resources/kenya-official-secrets-act-incompatible-with-freedom-of-expression-standards/](https://www.article19.org/resources/kenya-official-secrets-act-incompatible-with-freedom-of-expression-standards/) and Kenya: Protect the Data Protection Framework,' Article 19, 25 November 2019, <https://www.article19.org/resources/kenya-protect-the-data-protection-framework/>
- 63 Ibid
- 64 'Letter from Africa: Kenyans Protests Over Growing Debt,' BBC 8 April 2021, <https://www.bbc.com/news/world-africa-56651735> and "The IMF has released a statement following public outcry over the government's growing appetite for debt after it approved a Sh257 billion loan to Kenya, saying its bailout has saved the country from a debt crisis in the mid of the Covid-19 pandemic.," posted by Mzalendo, @mzalendowatch, 8 April, 2021, Tweet, <https://twitter.com/mzalendowatch/status/1380021891105222656>
- 65 'Kenya's Debt bigger than Reported,' Business Daily, 23 February 2021, <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/kenya-s-debt-bigger-than-reported-3300678>
- 66 Kariuki Muigua (2018) 'Improving Access to Justice: Legislative and Administrative Reforms under the Constitution,' Kariuki Muigua and Company Advocates, <http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf>
- 67 International Commission of Jurists Kenya (2002): Strengthening Judicial Reform In Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution, ICJ Kenya, Vol. III
- 68 Jackson B. Ojwang (2007). The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development. Kenya Law Review Journal 19, pp.19-29
- 69 'Summary of Results: Afrobarometer Round 8 Survey in Kenya 2019,' Afrobarometer, 2021, <https://afrobarometer.org/publications/summary-results-afrobarometer-round-8-survey-kenya-2019-0>

70 'Justice Needs and Satisfaction in Kenya,' The Hague Institute for Innovation of Law, 2017, <https://www.hiil.org/projects/justice-needs-and-satisfaction-in-kenya/>

71 The Alternative Justice Systems Baseline Policy and the Alternative Justice Systems Framework Policy can be found here <https://ajskkenya.or.ke/taskforce-papers-and-reports/>

72 'Partners Welcome Move to Mainstream Alternative Justice Systems In Kenya,' United Nations Office on Crime and Drugs, 27 August 2020, <https://www.unodc.org/easternafrika/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html>

73 'Programme launched to Improve Access to Justice through Kenya's Judiciary,' United Nations Office on Crime and Drugs, 9 march, 2018, <https://www.unodc.org/easternafrika/en/programme-launched-to-improve-access-to-justice-through-kenyas-judiciary.html>

74 'Enhancing Access to Justice Through Alternative Dispute Resolution in Kenya,' International Development Law Organization 20 April 2018, <https://www.idlo.int/fr/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya>

75 Presentations made during the Institute of Economic Affairs public forum on Pre Budget Hearing 2020/21 for The Judiciary held on Wednesday, 5th February 2020 can be found here:

[file:///C:/Users/hp/Downloads/1580992662%20\(2\).pdf](file:///C:/Users/hp/Downloads/1580992662%20(2).pdf), <file:///C:/Users/hp/Downloads/1580992980.pdf>,

and <file:///C:/Users/hp/Downloads/1620136340.pdf>

76 Dr. Annette Mbogoh, Executive Director, Kutoi cha Sheria. Interview with IRM researcher, 25/05/2021

Section III. Methodology and IRM Indicators

The purpose of this review is not an evaluation as former IRM reports. It is intended as an independent quick technical review of the characteristics of the action plan and the strengths and challenges the IRM identifies to inform a stronger implementation process. This approach allows the IRM to highlight the strongest and most promising commitments in the action plan based on an assessment of the commitment per the key IRM indicators, particularly commitments with the highest potential for results, the priority of the commitment for country stakeholders and the priorities in the national open government context. To determine which reforms or commitments the IRM identifies as promising the IRM follows a filtering and clustering process:

Step 1: determine what is reviewable and what is not based on the verifiability of the commitment as written in the action plan.

Step 2: determine if the commitment has an open government lens. Is it relevant to OGP values?

Step 3: Commitments that are verifiable and have an open government lens are reviewed to identify if certain commitment needs to be clustered. Commitments that have a common policy objective or commitments that contribute to the same reform or policy issue should be clustered and its “potential for results” should be reviewed as a whole. The clustering process is conducted by IRM staff, following the steps below:

- a. Determine overarching themes. They may be as stated in the action plan or if the action plan is not already grouped by themes, IRM staff may use as reference the thematic tagging done by OGP.
- b. Review objectives of commitments to identify commitments that address the same policy issue or contribute to the same broader policy or government reform.
- c. Organize commitments by clusters as needed. Commitments may already be organized in the Action Plan under specific policy or government reforms or may be standalone and therefore not clustered.

Step 4: assess the potential for results of the cluster or standalone commitment.

The filtering process is an internal process and data for individual commitments is available in Annex I below. In addition, during the internal review process of this product the IRM verifies the accuracy of findings and collects further input through peer review, the OGP Support Unit feedback as needed, interviews and validation with country-stakeholders, and sign-off by the IRM’s International Experts Panel (IEP).

As described in the filtering process above, the IRM relies on **three key indicators** for this review:

I. Verifiability

- “Yes” Specific enough to review. As written in the action plan the objectives stated and actions proposed are sufficiently clear and includes objectively verifiable activities to assess implementation.

- “No”: Not specific enough to review. As written in the action plan the objectives stated and proposed actions lack clarity and do not include explicit verifiable activities to assess implementation.

*Commitments that are not verifiable will be considered “not reviewable”, and further assessment will not be carried out.

II. Does it have an open government lens? (Relevant)

This indicator determines if the commitment relates to open government values of transparency, civic participation or public accountability as defined by the Open Government Declaration, the OGP Articles of Governance and by responding to the guiding questions below. Based on a close reading of the commitment text, the IRM first determines whether the commitment has an open government lens:

- **Yes/No:** Does the commitment set out to make a policy area, institutions or decision-making process more transparent, participatory or accountable to the public?

The IRM uses the OGP Values as defined in the Articles of Governance. In addition, the following questions for each OGP value may be used as a reference to identify the specific open government lens in commitment analysis:

- **Transparency:** Will the government disclose more information, improve the legal or institutional frameworks to guarantee the right to information, improve the quality of the information disclosed to the public, or improve the transparency of government decision-making processes or institutions?
- **Civic Participation:** Will government create or improve opportunities, processes or mechanisms for the public to inform or influence decisions? Will the government create, enable or improve participatory mechanisms for minorities or underrepresented groups? Will the government enable a legal environment to guarantee freedoms of assembly, association and peaceful protest?
- **Public Accountability:** Will the government create or improve opportunities to hold officials answerable for their actions? Will the government enable a legal, policy or institutional frameworks to foster accountability of public officials?

III. Potential for results

Formerly known as the “potential impact” indicator, it was adjusted taking into account the feedback from the IRM Refresh consultation process with the OGP community. With the new results-oriented strategic focus of IRM products, this indicator was modified so that in this first review it laid out the expected results and potential that would later be verified in the IRM Results Report, after implementation. Given the purpose of this Action Plan Review, the assessment of “potential for results” is only an early indication of the possibility the commitment has to yield meaningful results based on its articulation in the action plan in contrast with the state of play in the respective policy area.

The scale of the indicator is defined as:

- **Unclear:** the commitment is aimed at continuing ongoing practices in line with existing legislation, requirements or policies without indication of the added value or enhanced open government approach in contrast with existing practice.

- **Modest:** a positive but standalone initiative or changes to process, practice or policies. Commitments that do not generate binding or institutionalized changes across government or institutions that govern a policy area. For example, tools like websites, or data release, training, pilot projects
- **Substantial:** a possible game changer to the rules of the game (or the creation of new ones), practices, policies or institutions that govern a policy area, public sector and/or relationship between citizens and state. The commitment generates binding and institutionalized changes across government

This review was prepared by the IRM in collaboration with Ruth Kendagor and overseen by the IRM's International Experts Panel (IEP). The current IEP membership includes:

- César Nicandro Cruz-Rubio
- Mary Francoli
- Brendan Halloran
- Jeff Lovitt
- Juanita Olaya

For more information about the IRM refer to the **"About IRM" section of the OGP website** available [here](#).

Annex 1. Commitment by Commitment Data⁷⁷

Commitment 1: Beneficial Ownership
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest
Commitment 2: Open Contracting
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial
Commitment 3: Open Data for Development
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest
Commitment 4: Public Participation and Legislative Openness
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial
Commitment 5: Improving Public Service Delivery
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest
Commitment 6: Access to Information
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial
Commitment 7: Access to Justice
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Substantial
Commitment 8: Building Open Government Resilience
<ul style="list-style-type: none"> • Verifiable: Yes • Does it have an open government lens? Yes • Potential for results: Modest

⁷⁷ Commitment short titles may have been edited for brevity. For the complete text of commitments, please see Kenya's action plan, available at <https://www.opengovpartnership.org/documents/kenya-action-plan-2020-2022/>

Annex 2: Minimum Requirements for Acting According to OGP Process

According to OGP's Procedural Review Policy, during development of an action plan, OGP participating countries must meet the "Involve" level of public influence per the IRM's assessment of the co-creation process.

To determine whether a country falls within the category of "involve" on the spectrum, the IRM assesses different elements from OGP's Participation & Co-creation Standards. The IRM will assess whether the country complied with the following aspects of the standards during the development of the action plan, which constitute the minimum threshold:

1. **A forum exists:** there is a forum to oversee the OGP process.
2. **The forum is multi-stakeholder:** Both government and civil society participate in it.
3. **Reasoned response:** The government or multi-stakeholder forum documents or is able to demonstrate how they provided feedback during the co-creation process. This may include a summary of major categories and/or themes proposed for inclusion, amendment or rejection.

The table below summarizes the IRM assessment of the three standards that apply for purposes of the procedural review. The purpose of this summary is to verify compliance with procedural review minimum requirements, and it is not a full assessment of performance under OGP's Co-creation and Participation Standards. A full assessment of co-creation and participation throughout the OGP cycle will be provided in the Results Report.

Table 2. Summary of minimum requirements to act according to OGP Process

<i>OGP Standard</i>	<i>Was the standard met?</i>
A forum exists. Two key committees spearheaded the design of this action plan- these committees led the implementation of NAP III and were continued for the design of NAP IV. The Steering committee constituted of high-level government and CSO officials who provided strategic direction for the OGP processes. The technical committee constituted the commitment leads and other practitioners/experts, who provide the technical leadership in drafting the commitment and milestones, are leading the implementation process ⁷⁸ .	Green
The forum is multi-stakeholder. Both committees - steering and technical- comprised of government and non-governmental actors. Specifically, each commitment there was equal match for the government and CSO actors ⁷⁹ .	Green

The government provided a reasoned response on how the public's feedback was used to shape the action plan. In all stages of discussion, from proposals, prioritization to final design and commitment drafting, both government and CSOs were involved, and reasoned response was provided during the joint meetings; the commitment clusters- according to thematic areas- comprised of both government and CSO and commitment and milestones were drafted jointly. The drafts were subjected to public review and comments via online platforms⁸⁰, and all feedback was collated and considered by the technical committee, that comprised both government and CSOs alike.⁸¹

Green

⁷⁸ Sharon Chebet, Government Point of Contact Office. Interview with IRM researcher, 25/05/2021

⁷⁹ Sharon Chebet, Government Point of Contact Office. Interview with IRM researcher, 25/05/2021, and Caroline Gaita, Executive Director, Mzalendo Trust, and CSO convener for Kenya's OGP processes for NAP IV. Interview with IRM researcher on 10/05/2021

⁸⁰ Twitter handles, WhatsApp, LinkedIn and websites for government and CSOs like Mzalendo Trust.

⁸¹ Caroline Gaita, Executive Director, Mzalendo Trust, and CSO convener for Kenya's OGP processes for NAP IV. Interview with IRM researcher on 10/05/2021.