



Anti-money laundering and counter-terrorist financing measures Kenya

Mutual Evaluation Report

September 2022





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MUTUAL EVALUATION REPORT

OF

REPUBLIC OF KENYA

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Executive Summary

1. This report summarises the AML/CFT measures in place in the Republic of Kenya as at the date of the on-site visit which took place from 31st January to 11th February 2022. It analyses the level of compliance with the FATF 40 Recommendations and the level of effectiveness of Kenya's AML/CFT system, and provides recommendations on how the system could be strengthened.

Key Findings

- a) Kenya has made improvements to its AML/CFT legal and institutional frameworks since the 2011 MER such as establishment of the Asset Recovery Agency (ARA), enhancing the human and technical resources of the Financial Reporting Centre (FRC), conducting a national ML/TF risk assessment (NRA) and introduction of beneficial ownership (BO) information requirements to comply with international standards on AML/CFT/PF and address deficiencies identified in its 2011 MER. However, there are outstanding strategic gaps in its technical compliance and effectiveness which need to be addressed.
- b) Kenya carried out an NRA exercise from 2019 to 2021. In addition, the FRC and financial sector supervisory bodies also conducted sectoral risk assessments. However, the findings of this NRA highlight key weaknesses in Kenya's understanding of risk, related but not limited to different types of ML, cash and cross-border risks, types of legal persons, TF, PEPs, NPOs, and VASPs. Additionally, there is insufficient evidence to conclude that understandings of risk adequately inform Kenya's national AML/CFT strategy and whether findings of the NRA have been effectively cascaded to FIs and DNFBBs. Furthermore, Kenya did not demonstrate that the national AML/CFT Strategy adequately addresses the identified risks.
- c) While Kenya has powers in place, it does not have a demonstrable strategic policy to prioritize investigation/ prosecution of ML. The Authorities prioritize predicate offences such as corruption over ML and do not carry out to a wider extent parallel investigations alongside predicate offence investigations, resulting in few ML investigations and no successful prosecutions. A poor understanding of ML risks, lack of collecting statistics on different ML types and the prioritisation of the prosecution of predicate offences, especially corruption, over ML has limited Kenya's ability to effectively investigate and prosecute ML cases in line with its risk profile. It was not possible to determine the type of ML which is most prevalent as Kenya does not categorise ML into different types. It was also not possible to determine whether the sanctions being applied were proportionate and dissuasive due to the lack of ML prosecutions as none had happened on ML.
- d) Kenya has not investigated, or prosecuted, legal or natural persons for terrorist financing offences in line with its risk profile. The lack of convictions resulting from a large number of parallel TF investigations suggests that improvements are required in the ability to investigate and prosecute TF. Terrorist financing is not integrated as a component of the wide-ranging efforts to tackle the severe and fatal terrorist risk suffered by Kenya. There are no strategic CFT policies or strategies to counter the threat.
- e) Kenya has legislative gaps preventing it from providing domestic effect to UNSCRs 1267/1989/1988 as they were not issued consistent with the statutory requirements of POTA. Current mechanisms do not enable effective implementation of TFS without delay as implementation takes on average four days.
- f) Kenya has a large NPO sector. With the exception of some initial actions by the NGO Board,

the sector is largely unsupervised and unregulated. The NPO sector has not been adequately assessed for TF risk and the high-risk subset of organisations likely to be at risk of TF abuse has not been identified.

- g) The number of detected cases pertaining to non-declaration of cross-border movement of currency and BNIs (only two in the five-year review period) is not consistent with the risk profile of the country, being an economic, financial and transport hub in the eastern Africa region.
- h) Commercial banks and MFBs have a more developed understanding of ML risks, compared to NBFIs and DNFBPs, and are implementing mitigation measures commensurate with those risks. Basic customer due diligence is applied by many reporting institutions, but beneficial ownership requirements are adhered to only to some extent and a major impediment exists in verifying BO information and measures to determine whether a customer or BO is a PEP are less effective especially for domestic PEPs. Consequently, application of EDD measures on them is limited. Across the board, TF risk is only understood to a limited extent.
- i) Risk-based AML/CFT supervision is relatively underdeveloped. Most supervisory activities occur for banks and microfinance banks. However, supervisions of other FIs or DNFBPs is not carried out on a risk sensitive basis. Inspections in other sectors are too infrequent and focus on the presence of basic controls rather than the soundness of AML/CFT programs.
- j) Kenya Authorities have registered some success with regard to recovery of proceeds of crime, but this has been largely in cases related to corruption and theft or misuse of public resources which is not entirely consistent with the identified risk profile of the country, as the NRA Report concluded that it was fraud and forgery and drug related offences that form the greatest risk to the country. Recovery of instrumentalities of crime has been mainly limited to cases of trafficking in drugs, humans and wildlife trophies. Overall, the recoveries made are a small percentage of the recorded assets subject to recovery, mainly because of the lengthy processes of recovery.
- k) Information on creation, types and other relevant basic information on legal persons is publicly available in Kenya. However, the ML/TF risk associated with the different types of legal persons has not been assessed. Although there are indications that private limited liability companies are being used to launder proceeds of crimes, this was not based on any type of risk assessment to enable implementation of a RBA. Companies have been recently required to keep BO register and file a copy of it with the Registrar. However, not all companies have filed such copies.
- l) Kenya has fairly comprehensive legislation for Mutual Legal Assistance (MLA) and extradition, and has provided both in the past. Kenya has sought and rendered other forms of international cooperation in criminal matters, but this was mainly for predicate offences and not ML/TF offences. Additionally, Kenya does not categorize the kind of cooperation sought or rendered, making it impossible to assess risk levels of predicate offences, modus operandi and jurisdictions.
- m) Kenya has not carried out a risk assessment to identify and understand ML/ TF risks associated with or emerging from virtual assets (VAs) and virtual asset service providers (VASPs). VAs and VASPs are not prohibited and the country has not put in place relevant regulatory frameworks.

Risks and General Situation

2. Kenya is exposed to ML threats from proceeds of crime emanating from within and outside the country through its financial system, legal sector, real estate sector and cross-border trade. In view of its geographical position and economic development as a region hub, the country is also a transit route for drug and illegal wildlife trafficking. Based on the NRA report and the risk profile of the country, Kenya faces TF risk arising from the neighbouring countries with active terrorist groups. The vulnerabilities associated with hawala activities, cross border currency movements, weak NPO risk-based regulation and inadequate analysis of cross-border remittances heighten the TF risks.

Overall Level of Compliance and Effectiveness

3. Kenya has made strides in strengthening its AML/CFT system. It has registered good results in the confiscation of proceeds of crime, access and use of financial intelligence, designation of persons or entities suspected to be involved in terrorism. However, fundamental improvements are needed in relation to understanding of TF risks, risk-based supervision and implementation of preventive measures (especially for DNFBPs), ML and TF investigations and prosecution, preventing PF etc.

4. In relation to technical compliance, Kenya has made various improvements to its AML/CFT legal framework since its first-round evaluation. Some of them are: establishment of the Asset Recovery Agency, introduction of BO requirements, criminalisation of TF, extending the scope of STR requirements to TF (however, the scope of the provision is inadequate. For instance, the obligations cover FIs only and apply in relation to a terrorist act only), introducing requirements for MVTS operators and implementation of cross-border currency requirements. However, there are still moderate and major shortcomings in relation to enhanced measures for correspondent banking relationships, new technologies, powers of supervisors, due diligence for DNFBPs, targeted financial sanctions related to TF and PF, and requirements in relation to NPOs at TF risk.

Assessment of risk, coordination and policy setting (Chapter 2; IO.1, R.1, 2, 33 & 34)

5. Kenya has an understanding of ML threats and associated ML vulnerability of various sectors to some extent. The understanding is based on the NRA that was carried out from 2019 to 2021 as well as sectoral risk assessments which FRC and financial sector supervisors conducted before the NRA. Lack of consideration of the values of proceeds of crime undermines the relative scale of the proceeds generating predicate offences. Understanding of TF risks was limited as TF is often confused with terrorism and there was no evidence that channels which can be exploited for TF purpose were adequately considered during the NRA. Kenya did not demonstrate the effectiveness of national AML/CFT Strategy in addressing identified ML/TF risks. Furthermore, the country did not demonstrate the consistency between objectives/ activities of competent authorities and national AML/CFT policies and ML/TF risks. However, there is some degree of coordination of activities to combat ML and TF, but coordination in relation to PF could not be determined. Kenya has not introduced enhanced measures to address high risk scenarios identified in the NRA report and designation of NPO sector as reporting entities is not supported by the results of the NRA. Due to the fact that the NRA report was

shared with the private sector a few days before the onsite, the awareness of the results of the NRA was limited.

[Financial intelligence, ML investigations, prosecutions and confiscation \(Chapter 3; IO.6, 7, 8; R.1, 3, 4, 29–32\)](#)

6. FRC produces and disseminates financial intelligence to LEAs, spontaneously and upon request. However, the FRC does not benefit from information held by most DNFBPs as the sector has low levels of STRs and lawyers had not yet started implementing their reporting obligations. In addition, FRC does not adequately analyse CTRs and cross-border currency reports to identify suspicious transactions or obtain supplementary information to enrich its intelligence packages. Relative to the number of predicate investigations, LEAs do not make good use of information held by the FRC. The FRC financial intelligence triggered very few ML investigations and zero TF investigations.

7. **ML investigations and prosecutions:** Kenya does not prioritise the identification and investigation of ML as identification and investigation of predicate offences take priority or precedence. Prosecution of ML in Kenya is very limited, compared to that of associated proceeds generating offences that have been assessed to pose the highest threat, such as drug trafficking, fraud and forgery, corruption and trafficking in humans and wildlife trophies. Consequently, in the period under review, Kenya did not have any successful prosecutions (convictions) for ML. Additionally, the Authorities did not seem to appreciate the different types of ML, and so do not categorise the ML cases accordingly. This makes it impossible to assess which type of ML is most prevalent and which RBA to apply in mitigating it. This is compounded by the fact that the national risk profile of Kenya, in relation to the ML threat, as portrayed in the NRA report is not supported by the records and statistics presented by the Authorities. Whereas the NRA report presents fraud and forgery and drug-related offences as posing the highest threat, the records and statistics provided show that the most proceeds identified, investigated and prosecuted come from corruption and theft of public funds and property. The records the Authorities shared had no ML cases involving a foreign predicate offence, which is surprising given Kenya's geopolitical situation and economic profile in the Eastern Africa region, meaning that either there was no detection of and action on such cases, or records have not been kept and availed. Either way, it makes it impossible to assess the risks posed to or that Kenya poses to foreign jurisdictions. Kenya has pursued a limited number of cases, where the predicate offence was domestic, but the proceeds taken to a foreign jurisdiction, and the cases submitted all related to corruption or theft of public funds. These cases pre-dated the review period, but were at various stages of conclusion at the time of the onsite. During the review period, there were no ML convictions, and therefore, no sanctions for ML against any legal or natural person. As such, it is not possible to assess whether Kenya issues effective, proportionate and dissuasive sanctions for conviction of ML. Kenya has employed other forms of criminal justice measures where conviction for ML was not possible; mainly by way of recovery of proceeds of crime. On the technical side, the offence of ML is appropriately criminalized, and competent authorities have ample responsibilities and powers to effectively combat ML by way of identifying, investigating and prosecuting it.

8. **Confiscation:** Kenya pursues confiscation of criminal proceeds and, to some extent, instrumentalities of crime; but has not pursued confiscation of property of equivalent value. It has recorded some success in pursuing proceeds of domestic predicate offences, but had no record of pursuit or recovery of proceeds of foreign predicate offences. There have been two successful cases of repatriation of proceeds of predicate offences, where the proceeds had been moved to a foreign jurisdiction. Most proceeds of crime identified and pursued relate to domestic predicate offences, with the proceeds, benefits and instrumentalities also located within the jurisdiction. Furthermore, the confiscation results are not reflective of the reported risk profile of the country, as per their NRA report. In the NRA report, drug trafficking offences and forgery and fraud are reported as posing the

biggest ML threat to Kenya, while most of the recoveries made or the highest value of recoveries made are from cases of corruption and theft of public funds and property. Confiscation related to drug trafficking offences has mainly been of instrumentalities of the offences. Kenya has put in place measures to curb cross-border movement of cash and BNIs, but during the period under review, had only two seizures or interceptions of mis-declared or undeclared currency or BNIs above the threshold. Given the geopolitical position and economic profile of the country, either the measures put in place are not effective or that the records kept and submitted do not reflect the actual situation on the ground.

Terrorist and proliferation financing (Chapter 4; IO.9, 10, 11; R. 1, 4, 5–8, 30, 31 & 39.)

9. Kenya conducts TF investigations alongside terrorism related investigations. However, there are limited case studies and statistics to demonstrate that a range of TF activity is pursued, and that TF is prosecuted as a distinct criminal activity. Kenya has not demonstrated a broader range of investigations into different terrorist groups operating in Kenya or in neighbouring countries. TF investigations are not integrated into broader counter-terrorism strategies, and agencies do not coordinate or cooperate in a coordinated manner, this is commented upon in the NRA. Counter-terrorism financing authorities have a varied relationship with financial institutions and relationships with the non-profit organisation (NPO) sector are limited. Whilst all TF convictions are subject to an expectation of imprisonment, Kenya has failed to secure a conviction at this time. Kenya has not demonstrated its sustained ability to use available measures to disrupt TF, such as targeted financial sanctions, asset freezing, seizure, and confiscation, or the removal of legitimate benefits or using orders to restrict activity and movement of funds. There are legislative gaps preventing Kenya from providing domestic effect to UNSCRs 1267/1989/ 1988. They do not have mechanisms to effectively implement sanctions without delay. Kenya has proposed the listing of Al Shabaab to the UN on several occasions.

10. The NRA also established that Kenyan investigative agencies do not establish proper records on financing of terrorism or for money laundering activities from the predicate offences relating to terrorist cases. Accordingly, the data presented for analysis focused on criminal investigations and prosecution of terrorist offences rather than TF.

11. Kenya has a poor understanding of the TF risks associated with NPOs and does not apply a targeted risk-based approach. NPOs are supervised by the FRC as DNFBPs and regulated by the NGO Board, both of whom have not been carrying out their respective responsibilities. The NGO Board states they are understaffed. The competent authorities do not have coordinated engagement with the sector or conduct extensive outreach, or issue useful guidance.

12. NPOs in Kenya are registered under different laws and other NPOs are created as informal associations (registered under the Department of Gender and Social Services). The non-unified and uncoordinated registration regime negatively impacts on the ability of the NGOs Coordination Board to effectively monitor, supervise and perform other regulatory obligations with reporting requirements under POCAMLA. The NRA notes that this enhances the TF risk factor for the activities conducted by the NPOs in the country.

13. There is no evidence to show how the FRC or NGO Board facilitate the ability of LEAs to investigate NPOs suspected of being abused by terrorist financiers. There is no evidence to demonstrate international cooperation relating to NPOs and TF activity. Additionally, there is no information to show how Kenya protects the sector from abuse of TF. Overall, Kenya's measures are not consistent with its risk profile.

14. The Counter Financing of Terrorism Inter-Ministerial Committee (CFTIMC) has been given the mandate to implement TFS related to TF and PF. However, there is no legal framework enabling

the Committee to implement the measures. There is also a low understanding among the FIs and DNFBPs of their obligations to comply with the TFS related to PF. There is no monitoring of compliance of reporting entities by the Supervisors.

Preventive measures (Chapter 5; IO.4; R.9–23)

15. The legal framework with respect to AML/CFT preventive measures in Kenya consists of two key pieces of legislation, namely the POCAMLA, and POCAMLA Regulations. The contents are relatively consistent with the FATF Standards. However, most of the requirements relating to TF preventive measures are not provided for in law. The legal requirements only provide for risk assessment of ML and not for TF risk assessment. Participation of reporting institutions (RIs) in the recent NRA exercise, to some extent, aided their understanding of ML risks between sectors and at a national level. The commercial banks and microfinance banks (MFBs) show a good understanding of ML risks and seem better at implementing mitigating measures commensurate with their risks. Activities relating to corruption, abuse of public resources, fraud and forgery are of significant risk in Kenya. Lawyers were identified by FIs as posing significantly high ML/TF risk. However; they are not designated as reporting institutions in Kenya, thereby not under obligation to implement AML/CFT preventive measures. Large NBFIs [including the materially important mobile money service providers (MMSPs)], show a moderate understanding of ML risk, predominantly implementing rule-based compliance measures. Understanding of ML risks and AML/CFT obligations is minimal and mitigating measures are not risk-based amongst those FIs recently designated as RIs (insurance brokers), those not yet subject to AML supervision (SACCOs) and smaller NBFIs, who demonstrated a lack of adequate resources, knowledge and skills to implement AML/CFT requirements.

16. Overall, preventive measures are applied by the commercial banks and MFBs in a risk-based manner to a large extent, but the majority of other FIs do not, as they fail to adequately assess their ML/TF risks. Requirements relating to BO and TF are commonly misunderstood by FIs (banks and NBFIs), while obligations relating to TFS were not clearly understood amongst NBFIs. There is a general misunderstanding of the meaning of a beneficial owner, often confused with a shareholder. A major hurdle for implementation of BO requirements is the absence of reliable independent sources where FIs can obtain and verify BO information. The majority of FIs apply basic CDD measures satisfactorily, while the commercial banks and MFBs seem to apply a broader range of CDD measures, including risk based ongoing due diligence, and specific measures towards correspondent banking relationships (CBRs), new technologies, wire transfers, and high-risk jurisdictions. However, politically exposed persons (PEPs) - especially domestic PEPs and foreign Heads of State - are insufficiently identified mostly due to lack of effective systems for PEP identification and a deficient legal definition. Notwithstanding this, where PEP-status is determined, most FIs take enhanced measures. A limitation was also found on the factors considered when assessing ML/TF risks that may arise due to the development of new products and new business practices (including new delivery mechanisms, and the use of new or developing technologies) in relation to both new and pre-existing products.

17. The commercial banks and MFBs dominate the filing of STRs and gave indications that such STRs related to offenses such as corruption and bribery involving PEPs, and a smaller proportion of reports relating to tax evasion. There was negligible to no reporting by other high-risk or materially important sectors, with the MMSPs being a positive outlier although their levels of reporting were still low. Through discussions held, most FIs (outside banks) could not demonstrate that their STRs were linked to proceeds generating offences. While all RIs are required to register on go-AML in order to submit their STRs electronically to FRC, at the time of the onsite, only FIs had registered and the majority of other RIs were yet to be registered. In view of the risk and context of Kenya, the STRs

statistics are low and not consistent with the country's profile and more reporting would be expected on high proceeds generating crimes such as procurement fraud, drug-related offences, illegal trade in wildlife, and cybercrime.

Supervision (Chapter 6; IO.3; R.14, R.26–28, 34, 35)

18. Supervisors demonstrated diverse levels of understanding of ML risks for their respective sectors with the Central Bank of Kenya (CBK) and the Insurance Regulatory Authority (IRA) having a relatively good understanding with respect to banks, Microfinance and Life insurance at the sector level. The CMA's understanding of ML/TF risks in the sector may not be up-to-date since the risk assessment was conducted in 2016 and the scope was limited to ML. All supervisors understand AML/CFT controls better than inherent and residual ML/TF risks. The CBK's supervision of the banking sector checks compliance with AML/CFT requirements and is yet to use a proper RBA. The CBK's inspections are based on risks only to a limited extent. In relation to all other supervisors, inspections are too sporadic to be effective. All inspections conducted primarily focused on existence of basic AML/CFT controls rather than soundness of the AML/CFT program.

19. CBK has applied a range of remedial actions and sanctions against banks for AML/CFT breaches, but the sanctions are not always proportionate or dissuasive. Most of the other supervisors, except those for Retirement Benefits Authority (RBA) and Insurance Regulatory Authority (IRA), apply remedial actions, but the sanctions imposed are not commensurate with the violations and are too infrequent to be dissuasive or effective. Financial sector supervisors demonstrated some impact in improving FIs' compliance with basic obligations. The supervisors have provided a wide range of AML/CFT guidance and conduct outreach nationally to promote a consistent understanding of AML/CFT obligations in the POCAMLA.

20. DNFBP supervisors have different market entry requirements for individuals and legal entities. The ML/TF understanding of DNFBP supervisors is low. DNFBP supervisors have not implemented supervisory activities resulting in the absence of monitoring or supervision for compliance with AML/CFT requirements. There is no regulatory framework for VAs and VASPs, therefore, they are not supervised for AML/CFT compliance. The CBK issued a public notice warning members of the public of the risks of engaging in virtual assets trading.

Transparency and beneficial ownership (Chapter 7; IO.5; R.24, 25)

21. There are two main types of legal persons in Kenya, being companies and limited liability partnerships, both registered and regulated by the Business Registration Services, a semi-autonomous body under the Office of the Attorney General. In terms of prevalence, the majority of legal persons are companies. Information about the types, formation and basic regulation (including basic laws, regulations and processes for compliance) is available to the public at the BRS offices and on their website. Kenya has developed legislation to collect, keep and make available to competent authorities BO information, though this doesn't extend to limited liability partnerships. The availability of BO information is limited to competent authorities and reporting entities are not permitted to access this information to enable them to independently verify CDD information submitted by clients and potential clients. Though there are records and experiences to show that companies have been used as vehicles to launder proceeds, Kenya is yet to undertake a targeted sectoral risk assessment for companies to determine the risk associated with each type. Furthermore, unlike the case with companies, there are no measures in place for the legal arrangement's regulator (Ministry of Lands) to obtain, record and keep details of BOs and other required information, for purposes of transparency and timely access by competent authorities. For legal arrangements (trusts) only the scanty information collected can be obtained from the regulator, and may not be current, as they are under no

obligation to keep updated records. No legal entity in Kenya has been sanctioned for non-compliance with information requirements, therefore it is not possible to assess the effectiveness, proportionality and dissuasiveness of their sanctions.

International cooperation (Chapter 8; IO.2; R.36–40)

22. Kenya has provided constructive and timely MLA and extradition in a few cases, but the assistance rendered has been largely helpful in the few cases provided. Kenya demonstrated that they provided other forms of international cooperation in an appropriate and timely manner, through the statistics and sample case studies provided. However, the records and information provided indicate that cases with a transnational or cross-jurisdictional element are relatively few, compared to those of a purely domestic nature. Apart from KRA, no other competent authority had a record of having requested for and obtained basic and/or BO information from the BRS. For KRA, the records did not indicate whether the information retrieved was for purposes of assisting foreign counterparts for AML/CFT purposes, or for their own internal tax investigation purposes. There was no record that basic or BO and other relevant information for LLPs and trusts was requested for and obtained from the BRS and Ministry of Lands, for AML/CFT purposes in general, and to assist foreign counterparts in particular.

Priority Actions

- a) Authorities should continue to build on their understanding of ML/TF risks by carrying out a more thorough assessment of ML risks informed by more in-depth analysis of the activities generating highest value proceeds of crime and specific to Kenya's changing economic context (prevalence of cash-based transactions, evolving risks presented by VASPs, PEPs, international illicit finance threats). Assessment of TF risk should be broadened beyond looking at TF as a predicate offence of ML and consider all possible channels which can be abused for TF purposes. Ensure that all relevant stakeholders are made aware of these risks and assessments and that the national AML/CFT Strategy and Action Plan, including activities of competent authorities are informed by the identified ML/TF risks.
- b) Review the legal framework in relation to preventive measures applicable to targeted financial sanctions in relation to TF and PF and ensure that subsidiary instruments are based on the primary legislation and that they are issued in accordance with the required procedures.
- c) Prioritize ML investigation and prosecution alongside associated predicate offences, and maintain comprehensive statistics, categorizing the cases in accordance with the different types (stand-alone, third party and self-laundering) and jurisdiction (foreign or domestic predicate); and where there are convictions, apply dissuasive, effective and proportionate sanctions.
- d) Pursue confiscation of property of equivalent value, where the tainted property cannot be traced, but there is evidence of proceeds having been generated; and the recoveries of proceeds, instrumentalities and property of equivalent value should be broad and reflective of the scope of the highest proceeds generating offences, not only corruption and trafficking offences (drugs, human and wildlife trophies).
- e) Actively investigate and prosecute TF as a standalone offence. Identify the terrorist financier and sources and movement of funds.
- f) Supervisors should consider the NRA, and further assessments carried out by authorities to inform their sectoral risk assessments and risk-based approach to supervision.
- g) The implementation of the measures in place to curb cross-border transportation of cash and BNIs above the threshold without declaring or mis-declaring should be strengthened to match the geopolitical and economic profile of the jurisdiction, which should then be reflected in the recorded seizures and subsequent confiscations and other sanctions.
- h) Authorities should conduct a risk assessment of all types of legal persons and arrangements in Kenya and take appropriate action to mitigate ML/TF/PF risks identified. Furthermore, authorities should extend obligations to collect and maintain BO information to all legal persons. Ensure the Ministry of Lands has appropriate powers and resources to monitor compliance of legal arrangements with obligations.
- i) Take a policy decision as to whether to prohibit or allow VASPs in Kenya. Where a position is taken to allow VASPs, licensing/ registration requirements should be implemented, and a risk assessment relative to ML/TF risks with regards to their operations should be conducted. Additionally, a framework for supervision of VASPs for AML/CFT should be set up.
- j) The authorities should keep comprehensive statistics and records for international assistance rendered and/or received, and categorise it according to whether it is related to ML, associated predicate offences or TF, to facilitate analysis or assessment of risk, which will also assist in

prioritising such requests and ensure that they are attended to in a timely and constructive manner.

Effectiveness & Technical Compliance Ratings

Table 1. Effectiveness Ratings

IO.1	IO.2	IO.3	IO.4	IO.5	IO.6	IO.7	IO.8	IO.9	IO.10	IO.11
Low	Moderate	Low	Low	Low	Low	Low	Moderate	Low	Low	Low

Note: Effectiveness ratings can be either a High- HE, Substantial- SE, Moderate- ME, or Low – LE, level of effectiveness.

Table 2. Technical Compliance Ratings

R.1	R.2	R.3	R.4	R.5	R.6	R.7	R.8	R.9	R.10
PC	NC	C	PC	PC	NC	NC	NC	PC	PC
R.11	R.12	R.13	R.14	R.15	R.16	R.17	R.18	R.19	R.20
PC	PC	PC	NC	NC	NC	PC	PC	PC	NC
R.21	R.22	R.23	R.24	R.25	R.26	R.27	R.28	R.29	R.30
PC	NC	NC	PC	PC	PC	NC	PC	PC	PC
R.31	R.32	R.33	R.34	R.35	R.36	R.37	R.38	R.39	R.40
PC	PC	PC	PC	PC	PC	LC	C	PC	PC

Note: Technical compliance ratings can be either a C – compliant, LC – largely compliant, PC – partially compliant or NC – non compliant.

MUTUAL EVALUATION REPORT

Preface

23. This report summarises the AML/CFT measures in place as at the date of the on-site visit. It analyses the level of compliance with the FATF 40 Recommendations and the level of effectiveness of the AML/CFT system, and recommends how the system could be strengthened.

24. This evaluation was based on the 2012 FATF Recommendations, and was prepared using the 2013 Methodology. The evaluation was based on information provided by the country, and information obtained by the evaluation team during its on-site visit to the country from 31st January to 11th February 2022.

25. The evaluation was conducted by an assessment team consisting of:

- Ian Collins, HM Treasury, UK (Law Enforcement Expert),
- Julia Tloubatla, Financial Intelligence Centre, South Africa (FIU Expert),
- Nyaradzo Chiwewe, Financial Intelligence Unit, Zimbabwe (Financial Sector Expert),
- Samanta Esparon, Central Bank of Seychelles (Financial Sector Expert-),
- Simon Kajura, Inspectorate of Government, Uganda (Legal Expert),
- Velika Mpundu, Bank of Zambia, Zambia (Financial Sector Expert), and
- Noel Zeeman, Observer, FIC-South Africa

with the support from the ESAAMLG Secretariat of Messrs Joseph Jagada (Principal Expert), Tom Malikebu (Team Leader), John Muvavarirwa, Christopher Likomwa (Assistant Team Leader) and Valdane Joao. The report was reviewed by Ms Didmalang Segaiso (Botswana), Dr Jean Phillip-Priminta (Malawi), Mokgadi Bokaba (South Africa), APG Secretariat and FATF Secretariat.

26. Kenya previously underwent an ESAAMLG Mutual Evaluation in 2010, conducted according to the 2004 FATF Methodology. The 2010 evaluation was published and is available at: [https://www.esaamlg.org/reports/Kenya_Mutual_Evaluation_Detail_Report\(2\).pdf](https://www.esaamlg.org/reports/Kenya_Mutual_Evaluation_Detail_Report(2).pdf).

27. That Mutual Evaluation concluded that the country was compliant with 1 Recommendation; largely compliant with 1; partially compliant with 15; and non-compliant with 32. Kenya was rated compliant or largely compliant with none of the 16 Core and Key Recommendations.

28. Kenya entered the follow-up process soon after the adoption of its MER in 2010 and exited follow-up in September 2021 since it had started its mutual evaluation process under the ESAAMLG 2nd Round of Mutual Evaluations. By August 2014, Kenya had addressed all the core or key Recommendations which were rated PC and NC.

Chapter 1. ML/TF RISKS AND CONTEXT

29. Kenya is located in East Africa covering an area of 582,646 sq km and has a population of 53.7 m (2020)¹. It shares borders with South Sudan to the Northwest, Ethiopia to the North, Somalia to the East, Uganda to the West, Tanzania to the South, and the Indian Ocean to the Southeast. The capital city of Kenya is Nairobi. Kenya serves as a regional trade, communications and financial centre for Eastern, Central, and Southern Africa. Through the port of Mombasa, Kenya is a major gateway to the Northern Corridor and provides the transportation network linking the port city of Mombasa to several landlocked countries in the Great Lakes region including Uganda, Rwanda, Burundi, the Democratic Republic of Congo, as well as Northern Tanzania and Southern Sudan. In addition, the international airport provides an active connection for most international flights into and out of the region.

30. Kenya adopted a new political and economic governance system with the introduction of a new constitution in 2010, which introduced a bicameral legislature, devolved county government and an independent Judiciary. There is separation of powers amongst the executive, legislature and judiciary. There is one national government and 47 county governments. It is a presidential democracy, in which elected officials represent the people and the President is the head of State and Government². The judiciary is composed of the Supreme Court, Court of Appeal, the High Court and the Subordinate Courts composed of the Magistrate Court and Kadhi Court. The Supreme Court has seven judges, the Court of Appeal has thirty judges and the High Court has eighty-two judges. There are one hundred and twenty-seven Magistrate Court stations with five hundred and forty-two Magistrates. Judgements made by the Supreme Court are considered as legally binding on the lower courts.

1.1. ML/TF Risks and Scoping of Higher Risk Issues

1.1.1. Overview of ML/TF Risks

31. Kenya faces ML threats from proceeds of crime generated from within and outside the country, mostly through the financial, real estate and legal sectors. Based on the NRA findings, the main domestic proceeds-generating predicate crimes posing a higher level of ML threat to Kenya are fraud and forgery, drug related offences, corruption and economic crimes, environmental and wildlife crime, and cybercrime offences. In terms of magnitude, corruption could possibly be on top of the list given the sentiments of some top government officials. For instance, in 2016, the head of the anti-graft body reported that Kenya was losing a third of its national budget -around

¹ <https://donnees.banquemondiale.org/indicateur/SP.POP.TOTL?locations=KE>

² NRA Report, 2021

USD6 billion- to corruption³. In addition, later in 2021, the President was quoted as having said that Kenya loses more than Ksh 2 billion (USD 18 million) every day⁴ due to corruption.

32. The geographic and economic position of Kenya increases its exposure to the threat of foreign proceeds of crime from the region (mainly foreign corruption but also other crimes such as wildlife trafficking). Kenya is reported to be the East African hub for illicit gold trade (and other minerals such as diamonds) from neighbouring countries⁵. The gold is consolidated and shipped to China, India and UAE. The country is also believed to be a market and transit point for the region and for international drug traffickers⁶ as well as wildlife traffickers.

33. Kenya is reported to be a global leader in mobile phone financial services. According to the November 2020 Kenya country data, 72% of the population had a mobile money account and the value of transactions had increased to 4.3 trillion (USD 41.8 billion)⁷. Mobile money has contributed tremendously in promoting access to finance and Government's efforts to promote financial inclusion. Subscribers are able to send or receive money from abroad. Mobile money transactions are fast and can be funded using cash deposit at a registered mobile money agent (by the subscriber or third party); (ii) transfer from bank account to a mobile wallet, and (iii) receipt from another wallet (a person to person transfer from another sender/customer). The third-party making cash deposits is not required to provide ID, making transactions difficult to monitor and vulnerable to abuse. The international money transfer capabilities also make mobile phone financial services vulnerable to money laundering⁸.

34. Although Kenya has significantly improved financial inclusion through mobile money operators, there is still widespread use of cash as in some cases, people withdraw cash from the mobile wallets to undertake a financial transaction in cash. In addition to this, there is a large informal economy, providing avenues for ML/TF activities and facilitating untraceable

³ Duncan Miriri, "Third of Kenyan Budget Lost to Corruption: Anti-Graft Chief," Reuters, March 20, 2016, available at: <https://www.reuters.com/article/us-kenya-corruption/third-of-kenyan-budget-lost-to-corruption-anti-graft-chief-idUSKCN0WC1H8>

⁴ Joseph Muraya, "Billions on BBI? Govt Is Losing Sh2bn Daily to Graft: Kenyatta," Capital News, January 18, 2021, available at: <https://www.capitalfm.co.ke/news/2021/01/billions-on-bbi-govt-is-losing-sh2bn-daily-to-graft-kenyatta/>

⁵ Illicit Gold Markets in East and Southern Africa (2021) by Global Initiative against Transnational Organised Crime

⁶ International Narcotics Control Strategy Report, US Department of State, Bureau of International Narcotics and Law Enforcement Affairs, 2018.

⁷ Financial Inclusion Insights, Kenya Country data, available at: <http://finclusion.org/country/africa/kenya.html#dataAtAGlance> (last accessed November 2020).

Alex Rolfe, "Mobile Money Accounts Now Higher Than Total Kenyan Population," Payments Cards & Mobile, March 4, 2020, available at: <https://www.paymentscardsandmobile.com/mobile-money-accounts-now-higher-than-total-kenyan-population/>

⁸ Joshua Masinde, "US State Dept Thinks Africa's Leading Mobile Money Platform is Vulnerable to Money Laundering," Quartz Africa, March 6, 2017, available at: <https://qz.com/africa/924977/us-state-dept-thinks-africas-leading-mobile-money-platform-is-vulnerable-to-money-laundering/>

transactions. According to the World Bank, the size of Kenya's informal economy was 26.0% of GDP in 2021⁹ which is relatively significant.

35. Cryptocurrency activities are reported to exist in Kenya. Virtual assets (VAs) and Virtual Assets Service Providers (VASPs) are not prohibited in Kenya. However, VAs and VASPs are not regulated. The lack of regulatory oversight makes the services attractive to criminals who may want to abuse VAs for ML or TF purposes. Cryptocurrency remains appealing for criminals, primarily due to its pseudonymous nature and the ease with which it allows users to instantly send funds anywhere in the world.

36. Kenya is described in its NRA Report as a major business and travel hub, and a gateway to the neighbouring East African economies. There is a lot of cross-border trade, including informal trade; borders that allow free movement of people (both legally and illegally); the predominant use of cash; and the familial, tribal and heritage linkages and relations among border communities have resulted in Kenya becoming a destination, origin or transit jurisdiction for ML/TF purposes, for countries in the region (Burundi, DRC, Ethiopia, Somalia, South Sudan, Tanzania and Uganda). The NRA report stated that in the period it reviewed (2016 – 2020), at least Ksh 1,456,000,000 (approximately USD 12,772,000) was seized or confiscated, being proceeds of foreign predicate offences brought into and laundered in Kenya.

37. Kenya's geographical proximity to jurisdictions with political instability and which hosts known terrorist organisations exposes Kenya to an increased vulnerability to TF. The country has witnessed terrorist attacks in the past which were linked to Al-Qaeda Somali affiliate group Al-Shabaab. It has been found that this group had been raising funds and committing acts of terrorism in Kenya. In 2013, militants launched an attack at Westgate Mall that resulted the death of people and later on in 2015 another terrorist incident happened at Garissa University. Subsequent to these incidents, Al-Shabaab militants carried out a terrorist attack at a luxury hotel in Nairobi. In one case, it was reported that the funds were suspected to have originated from outside the country and transferred through banks and mobile money operators¹⁰. Some cases revealed that the funds were raised through charcoal and sugar smuggled into Kenya.

38. On site interviews also revealed that smuggling of maize and cattle was also prevalent. Terrorist attacks continue to occur in Kenya on a regular basis. The NRA focused on TF as a proceed generating offence and identified this as low risk. The assessment did not include sectoral risk or consider a range of features relevant to the Country risk profile. The NRA focused on the overall assessment of TF in relation to threat and vulnerability, rating threat at medium and vulnerability as medium low respectively.

1.1.2. Country's Risk Assessment & Scoping of Higher Risk Issues

39. In March 2019, Kenya established a Task Force on the National Risk Assessment on Money Laundering and Terrorism Financing (NRA Task Force) chaired by the National Treasury and Planning. The FRC was appointed as the Coordinator. The NRA Task Force was composed of 30 public sector organizations involved in national efforts to combat ML and TF which included the relevant line ministries, financial sector supervisors, law enforcement, prosecutorial and

⁹ The World Bank (IBRD,IDA) Brief, September 8, 2021: Informal Economy Database, <https://www.worldbank.org/en/research/brief/informal-economy-database>

¹⁰ 2 Xinhua, "News Analysis: Mobile Money on Spot as Kenya Links Service to Terrorism Funding," Xinhuanet, January 30, 2019, available at: http://www.xinhuanet.com/english/africa/2019-01/30/c_137787614.ht

investigative agencies. In addition to this, the Task Force incorporated additional select organizations drawn from both the public and private sectors. In total, 98 public and private sector nominees participated in the NRA exercise, out of which 44 participants represented the private sector. The members and the liaison officers were grouped into 11 working groups corresponding to the 11 modules assessed i.e., key institutions and persons identified for specific working groups. All working groups were composed of at least 10 members drawn from both the public and private sectors. The NRA exercise was completed in October 2021 and the report published in January 2022.

40. The NRA involved reviewing and making judgements about ML and TF threats, vulnerabilities and consequences using data and information provided by various relevant government agencies such as the Police, FRC, KRA, NIS, supervisory authorities, etc. Using the World Bank tool, the NRA analysed risks associated with products and services, transactions, customers, regions etc and measures taken to mitigate those risks, number of STRs, number of investigations, prosecutions and concluded cases. The main proceeds generating predicate crimes were identified as fraud and forgery, drug related offences, corruption and economic crimes, environmental and wildlife crime, and cybercrime offences. In relation to TF risk, the main risks identified related to the activities of Al-Shabaab in Somalia.

41. The identification of high proceeds generating predicate offences used the number of cases and not values generated from those crimes¹¹. This was considered inadequate. Similarly, the assessment of TF risks didn't include in-depth analysis of the channels or sectors at the risk of abuse and the possibility of Kenya being used to finance terrorist activities in other countries. The NRA only considered and rated risk in relation to terrorist financing as a predicate offence of ML.

42. In order to identify areas of higher focus during the onsite, the Assessment Team reviewed TC and Effectiveness information/ reports provided by the Authorities and information from reliable third-party sources (e.g., reports by governments or other international organisations). Based on this, the Assessors looked at the following issues:

- a) *Understanding of ML/TF risks*: Considering that countries are required to adopt risk-based implementation of the FATF Standards, the Team sought to establish the authorities' understanding of the main ML and TF threats and vulnerabilities, and which activities, sectors, type of FIs/DNFBPs presented higher ML or TF risks. The Team also explored the understanding of risks posed by lawyers and the implications of the sector not implementing AML/CFT measures considering the nature of services they provide and their potential abuse for ML/TF purposes.
- b) *Terrorist financing*: Given the terrorist incidents in the country, the Team explored the extent to which the authorities considered the following in their assessment of TF risks: migrants from the conflict zones in neighbouring countries, mobile money providers and prevalence of unlicensed hawalas, NPO vulnerabilities, cross-border currency and contraband movement, and domestic and foreign terrorist group fundraising within Kenya and raising funds outside of the Country. The Team also considered the understanding of TF risk by NPOs, the banking, dealers in precious metals and stones and MVTS sectors as well as TF investigation and prosecution.
- c) *Regional financial hub*: The AT focussed on the ML/TF risks emanating from cross-border financial flows (e.g., proceeds of corruption) and smuggling (including of cash,

¹¹ Section 2.1.4 of the NRA report

illicit drugs, precious metals and stones, and other goods) and how well Kenya cooperates with foreign counterparts. This focus also included branches and subsidiaries of Kenyan banks operating in regional jurisdictions considered to be of high ML/TF risks or those with relatively weaker AML/CFT measures, and how well risk-based and group-wide controls and supervision was being applied. In addition, the Team also examined the extent to which the different capital market licensees were applying AML/CFT measures to mitigate risks arising from foreign-based participants in the capital market.

- d) *DNFBPs, particularly Lawyers and Real estate sectors:* The AT reviewed the scope and effectiveness of preventive measures and supervision across all DNFBP sectors to mitigate ML/TF risks. The Team looked at the specific vulnerabilities of Kenya's real estate sector to misuse for laundering domestic and foreign proceeds. In particular, the AT sought to find out how the real estate market players were registered and supervised for AML/CFT purposes and the effectiveness in investigating and prosecuting ML through the real estate sector and recovery of proceeds of crime. In relation to lawyers, given that the Court had suspended implementation of POCAMLA provisions relating to lawyers, the AT sought to know the measures Kenya has taken to mitigate risks in this sector.
- e) *MVTS and alternative remittance sector:* Given the increase in the use of mobile phone financial services and the suspected abuse for TF purposes, the AT looked at how effectively CDD, transaction monitoring, suspicious transaction reporting requirements are being implemented by market players. The Team also explored what the authorities are doing to identify and sanction unlicensed MVTS providers (including Hawala type activity) and how ML/TF risks are mitigated.
- f) *Use of cash, informality and border controls:* The AT looked at measures to combat ML/TF in the informal sector and the prevalent use of cash in financial transactions despite the remarkable popularity of mobile money which has increased access to financial services. There was also an increased focus on implementing of cross-border currency requirements considering that Kenya is believed to be a regional hub for illegal wildlife trafficking for Tanzania (ivory), Mozambique (ivory and rhino horn), DRC (ivory, pangolin scales gold, diamonds), Zambia (ivory) and South Sudan (ivory). The AT examined the customs and border controls in place to curb smuggling of these products.
- g) *Transparency of ownership in legal entities:* The AT noted that Kenya's legal framework accepts nominee directors and nominee shareholding and that the private sector had no access to beneficial ownership information at the company registry. In light of this and open sources indicating misuse of companies/joint ventures by foreign and domestic PEPs, the Team focused on how well accurate beneficial ownership information is obtained and accessed by competent authorities in a timely manner, especially when investigating ML/TF and responding to international requests for information.
- h) *Virtual Assets:* Kenya is aware of the existence of VAs and VASPs. These are not explicitly prohibited. However, Kenya has not developed any regulatory and supervisory measures for VAs related activities and VASPs for AML/CFT purposes. Instead, CBK issued an advisory warning FIs and the public against use of VAs. In this regard, the AT explored Kenya's understanding of vulnerabilities and the threats associated with its regional financial sector and how it intends to mitigate those risks.

43. The AT identified pension schemes as areas of lower risk not warranting significant focus in the course of the assessment. This was mainly based on the nature of its products and services in relation to ML/ TF risks. A significant number of pension schemes are institutional based-

Pensions Managers deal with funds from institutions which arrange retirement benefits on behalf of their employees.

1.2. Materiality

44. Kenya has the largest economy in East Africa with a GDP of USD 109.4 billion¹² and it is a regional centre for travel, trade and financial services. The country has one of the largest and most sophisticated financial sectors in Africa. Nearly half of the banks are subsidiaries of regional Pan African banks and almost 5 are subsidiaries of global banks which are players in the global capital markets. In addition, some Kenyan banks have subsidiaries in Burundi, DRC, Rwanda, South Sudan, Tanzania and Uganda. These banks facilitate cross border trade payments. In addition, some banks have stake in banks in Botswana, Malawi and Mauritius.

45. More than 80 percent of the total assets of the financial sector are held by commercial banks. Banks play a pivotal role in financial intermediation. In addition to banks, Kenya is regional leader in mobile phone financial services. As at December 2020¹³, it had total registered mobile money subscribers of 66 million, 282, 929 mobile money agents with the total value of transactions (cash-in/ cash-out) amounting to Ksh 605.7 billion from 181.37 million transactions. These mobile money operators are also allowed to undertake cross-border payments. In terms of DNFbps, the real estate sector and lawyers play a significant role in the economy and therefore considered to be material for the purposes of this assessment. The real estate sector is one of the largest contributors to GDP. As at December 2021, the real estate sector contributed 8.8 percent to the GDP¹⁴, higher than the financial and insurance sector at 7.1 percent. Lawyers undertake the following services: real estate transactions, provision of trust and company services, management of funds, bank and securities accounts on behalf of clients. The NRA found that the real estate sector and lawyers are highly vulnerable to ML risks.

1.3. Structural Elements

46. Kenya has the main structural elements required for an effective AML/CFT system. There is political and institutional stability, high level commitment to comply with the FATF Standards, accountability, rule of law and an independent judiciary.

1.4. Background and Other Contextual Factors

47. Kenya is a regional economic and financial hub connecting its neighbouring countries to the international trade and financial markets. The financial sector is well-developed. The country faces significant issues with corruption and some high-ranking government officials have been named in Pandora's Papers.

1.4.1. AML/CFT strategy

48. According to s. 49 of POCAMLA, the Anti-Money Laundering Advisory Board is the national entity responsible for advising the Cabinet Secretary on policies, best practices and any

¹² [Economic Survey 2022 - Kenya National Bureau of Statistics \(knbs.or.ke\)](https://www.knbs.or.ke/economic-survey-2022)

¹³ Bank Supervision Annual Report 2020 (Table 8 on Page 23)

¹⁴ [Economic Survey 2022 - Kenya National Bureau of Statistics \(knbs.or.ke\)](https://www.knbs.or.ke/economic-survey-2022)

other related activities aimed at identifying proceeds of crime or proceeds of unlawful activities and to combat ML activities. The CFTIMC is required to formulate and supervise the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism.

49. Kenya provided its National AML/CFT Strategy after the end of the onsite visit. The document shows that it was issued in October 2021. It is not possible for the AT to confirm whether the document was in existence at the time of the onsite visit because the authorities only shared it with the AT later after the onsite visit. During the onsite interviews, the authorities did not make reference to this document to outline how the contents of the document will address the identified ML/TF risks and how the objectives and activities of competent authorities were aligned to the National AML/CFT strategy. Furthermore, the AT did not have an opportunity to discuss the Strategy with the authorities. Therefore, the AT could not highlight anything related to the contents of the document.

1.4.2. Legal & institutional framework

51. Kenya has taken major steps in strengthening both its legal and institutional frameworks on AML/CFT since its mutual evaluation in 2010. It has two pieces of legislations to prevent and fight ML and TF. The Proceeds of Crime and Anti Money Laundering Act, 2009 (POCAMLA) is the primary legislation that criminalises Money Laundering and the Prevention of Terrorism Act, 2012 (POTA) is the leading legislation for counter-terrorism and terrorism financing. POCAMLA has sections which provide preventive measures and institutional arrangements to facilitate the fight against ML. In addition to this, Kenya revised its POCAMLA Regulations in 2019 to address some gaps that were identified in the previous MER which were based on the 2004 FATF Methodology. However, both POCAMLA and POTA do not have adequate provisions covering preventive measures in relation to CFT. Kenya has also taken major steps in strengthening other related laws. This includes passing and revising the following laws and regulations: Prevention of Organised Crimes Act No. 6 of 2010 (Revised Edition 2010); Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994 (Revised Edition 2017); Bribery Act No. 47 of 2016 (Revised 2018 Edition); Anti-Corruption; Economic Crimes Act No. 3 of 2003 (Revised Edition 2016) (ACECA); and Wildlife Conservation and Management Act (Act No.47 of 2013) (Revised 2018).

52. Kenya's institutional framework for AML/CFT encompasses the following institutions:

Relevant ministries and co-ordinating bodies

- a) **The National Treasury and Planning of Kenya**- is responsible for coordination and implementation of AML/CFT matters, including approving AML/CFT regulations.
- b) **Ministry of Foreign Affairs**- is responsible for the state's diplomacy, bilateral, and multilateral relations as well as channel which requests are sent directly.
- c) **The Ministry of Lands**- is responsible for registering and keeping records of trusts in Kenya for AML/CFT purposes.
- d) **The Ministry of Petroleum and Mines**- is responsible for licensing dealers in precious metals and dealers in precious stones.
- e) **The National Council on the Administration of Justice (NCAJ)**- is a high-level policymaking, implementation and oversight coordinating mechanism to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.

- f) **The National Task Force on Anti-Money Laundering and Combating the Financing of Terrorism (NTF)**- is a multi-agency Task Force whose membership comprises organizations that are deemed to be crucial in the implementation of the national AML/CFT regime.
- g) **The Anti-Money Laundering Advisory Board (AMLAB)** - is a multi-disciplinary body responsible for formulating policies, best practices and related activities to identify proceeds of crime or proceeds of unlawful activities and to combat ML activities.
- h) **The Attorney-General**- is the Central Authority in matters relating to Mutual Legal assistance to support the response to international MLAs for all crimes, including ML/TF.
- i) **The Office of the Director of Public Prosecution (ODPP)**- is an independent body established under the Constitution with a mandate to prosecute all criminal cases in the country. It operates under the guidance of the Director of Public Prosecutions.
- j) **National Police Service** - is the main law enforcement authority responsible for investigating all type of offences, including ML and TF.
- k) **Directorate of Criminal Investigations (DCI)**- is Kenya's principal criminal investigative agency. Its main function is to undertake investigations on serious crimes including homicide, narcotics crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crimes, and cybercrime among others.
- l) **Ethics and Anti-Corruption Commission (EACC)**- is mandated to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption.
- m) **Kenya Revenue Authority (KRA)**- is established by an Act of Parliament, Chapter 469 of the laws of Kenya, charged with the responsibility of assessing, collecting and accounting for all revenue on behalf of the Government of Kenya.
- n) **National Intelligence Service (NIS)** – is responsible for collection and analysis of intelligence and providing appropriate advice to the government.
- o) **Financial Reporting Center (FRC)**- The national centre responsible for assisting in the identification of the proceeds of crime and the combating of ML and TF. It is also the overall AML/CFT supervisory authority.
- p) **Business Registration Service (BRS)**- is responsible for registering legal entities.
- q) **Asset Recovery Agency (ARA)**- which was established under POCAMLA, is responsible for identifying, tracing freezing, seizure, confiscation and recovery of proceeds of crime.
- r) **Non-Governmental Organization Co-ordination Board**-is responsible for licensing, supervision and regulation of activities undertaken by NGOs.

Financial sector supervisors

- a) **Central Bank of Kenya**- is responsible for licensing, supervising and regulating AML/CFT and prudential activities undertaken by banks and other financial institutions.
- b) **Insurance Regulatory Authority**- is responsible for licensing, supervising and regulating AML/CFT and prudential activities undertaken by insurance institutions.
- c) **Capital Markets Authority**- is responsible for licensing, supervising and regulating AML/CFT and prudential activities undertaken by capital markets institutions.
- d) **Retirement Benefits Authority**- is responsible for protecting the interest of members and sponsors of retirement Benefits schemes.

DNFBP sector supervisor and self-regulatory bodies

- a) **Institute of Certified Public Accountants of Kenya**- is responsible for the registration of accountants and accounting firms, as well as regulating the activities carried out by the practice of certified accountants in Kenya. It is a SRB and is designated as a supervisory body under POCAMLA.
- b) **Betting and Licensing Control Board**- is responsible for regulates and supervises the casinos and other gaming institutions and is designated as a supervisory body under POCAMLA.
- c) **Estate Agents Registration Board**: is the regulatory body responsible for registering and regulating real estate agents and is designated as a supervisory body under POCAMLA.
- d) **Law Society of Kenya**- is responsible for regulating and supervising the activities undertaken by legal practitioners. It also provides advice and assist members of the legal profession, government and the public in all matters relating to the administration of justice in Kenya. It is an SRB.
- e) **Institute of Certified Public Secretaries (ICPS)**: – Responsible for registration and regulating the practice of certified public secretaries in Kenya.
- f) **Ministry of Petroleum and Mining, State Department of Mining**-is responsible for supervising activities undertaken by dealers of precious stones and metals.

1.4.3. Financial sector, DNFBPs and VASPs

53. The following paragraphs present important information in relation to the size and composition of the FI and DNFBP sectors. In view of the size, type of services they provide and their different levels of exposure to ML/TF risks, FIs and DNFBPs are of different importance. The AT has therefore considered these factors and ranked the sectors based on the relative importance, materiality and the level of risk. In arriving at conclusions under IO.3, IO.4 and other relevant parts of the report, these rankings have been used to weight positive and negative implementation issues. Table 1.3 below shows the size and structure of the financial sector while Table 1.4 shows the size and structure of the DNFBPs sector.

54. **Banking Sector- Considering the risk and context of Kenya, the banking sector is weighted most heavily.** Kenya is a regional economic and financial hub, facilitating huge volumes of financial transactions across the globe. In addition, the banking sector provides financial services to the private sector, some of which have significant ML/TF vulnerability. This increases the sector's vulnerability to abuse for ML and TF purposes. The sector is regulated by the Central Bank

of Kenya (CBK) which is responsible for licensing and regulating/supervising commercial banks and microfinance banks. As at December 2020, the sector comprised of 39 banks, 9 representative offices of foreign banks, 14 microfinance banks, 3 Credit Reference Bureaus, 17 Money Remittance Providers, 8 non-operating bank holding companies, 8 Payment Service Providers (which include mobile money providers and payment switches), 1 mortgage Refinance Company and 68 foreign exchange bureaus (FXBs). Of the 39 banks, there are 9 large banks representing 74.55 percent of the market share, 9 medium banks with 17.21 percent of the market share and 21 small banks with a combined market share of 8.24 percent. In addition to this, there are 22 locally controlled banks with total assets of Ksh 3.64 trillion (approximately USD 34 billion) representing 67.4 percent while foreign controlled banks were 17, holding total assets amounting to Ksh 1.76 trillion (approximately USD 16 billion) which accounted for 32.6 percent of total banking assets. The banking sector is relatively larger than other financial sectors in Kenya in terms of capital base, deposits, assets, number of customers and contribution to the GDP, with a total net asset of Ksh 5.4 trillion (approximately USD 49.5 billion) by December 2020¹⁵. The Table 1.2 below shows a breakdown of licensed foreign commercial banks in Kenya and the jurisdictions in which the home regulator is located.

Table 1.2: Licensed Foreign Commercial Banks in Kenya as at December, 2020

Total number of Foreign Banks	Home Regulator	Jurisdictions
2	Prudential Authority of the Reserve Bank of South Africa	South Africa
1	Financial Conduct Authority (FCA)	United Kingdom
1	Office of the Comptroller of the Currency (OCC)	USA
2	Reserve Bank of India	India
2	The Central Bank of West African States (BCEAO)	Burkina Faso, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, Togo
1	Bank of Mauritius	Mauritius
1	Swiss Financial Market Supervisory Authority (FINMA)	Switzerland
1	Central Bank of United Arab Emirates (CUBAE)	United Arab Emirates
3	Central Bank of Nigeria (CBN)	Nigeria
1	Central Bank of Egypt (CBE)	Egypt
1*	Central Bank of Kenya (CBK)	Kenya

Source: CBK

* This is a standalone bank that is not a subsidiary or branch of a foreign bank but has majority foreign ownership in excess of 50 percent.

55. **Mobile Money Service Providers-** The sector is also **most heavily weighted** in the context of Kenya in view of the size of the sector, volume of transactions, scope and channel of service delivery, which exposes the sector to increased ML/TF risks. It is high risk because of the

¹⁵ Figures and information on the banking sector have been derived from the Bank Supervision Annual Report 2020 issued by the Central Bank of Kenya.

agent structure, the high use of cash and ability to make cross-border transactions. The third-party making cash deposits or receiving money are not required to provide ID, thereby making transactions difficult to monitor and vulnerable to abuse for ML/TF purposes. The sector is significant and has 4 players, all of them locally owned. The sector is dominated by one player with over 99% market share while the rest share the remaining 1%. The largest player has operations in ten countries which include Kenya, Tanzania, South Africa, Afghanistan, Lesotho, DRC, Ghana, Mozambique, Egypt and Ethiopia. There was a 58 percent increase in the value of transactions from Ksh.382.9 billion (approx. US\$3.2 billion) in 2019 to Ksh.605.7 billion (approx. US\$5 billion) in 2020. See para 33 for details of subscribers and agents. The sector is regulated by CBK.

56. As at December 31, 2020, there were a total of seventeen (17) licensed MRPs with a total of 41 outlets, out of which 33 are located in Nairobi and 4 each in Mombasa and Garissa. Also, the MRPs have engaged 47 agents that are distributed across the country, as well as 13 forex bureaus appointed as agents by MRPs in 2021. Remittance inflows processed through MRPs during the year 2020 amounted to Ksh.149 billion, having increased by 77 percent from Ksh.84 billion in the year 2019 despite the adverse economic impact of the COVID-19 pandemic. The significant growth in remittances during the COVID-19 pandemic period is mainly attributed to the fact that most of the MRPs in the country have adopted digital remittance platforms that enable individuals to send and receive remittances through their mobile phones¹⁶.

Table: 1.3: Size and Structure of the Financial Sector as at December 2020

Type of institution	Number operating	Total Net Assets, Ksh (Million) ¹⁷
Local Public Commercial Banks	2	30,108
Local Private Commercial Banks*	20	3,613,451
Foreign Commercial Banks	17	1,762,188
Large Microfinance Banks	3	63,322
Medium Microfinance Banks	5	13,510
Small Microfinance Banks	6	1,046
Money Remittance Providers	17	56
Payment Service Providers	8	3,029
Foreign Exchange Bureaus	68	19
Life insurance Companies	24	500,526
Pension Schemes (no of schemes)	1,272	

¹⁶ Bank Supervision Annual Report 2020

¹⁷ USD was equivalent to Kshs 109 in 2020

Pension assets under management		1,398.95
Individual & Collective Investment Schemes	29	104,714
Investment banks	15	
Security dealers	2	
Stockbrokers	9	
Funds managers	25	
Investment advisors	20	

** Charterhouse Bank Limited and Chase Bank (k) Limited are in liquidation and Imperial Bank Ltd is in Receivership have thus been excluded*

Source: Kenyan Authorities

57. **The securities sector- is heavily weighted** in the context of Kenya in view of the size of the sector, products and diversity of its customers. The securities sector is regulated by the Capital Markets Authority (CMA). CMA has strengthened the capital market by developing regulatory frameworks that facilitate the development of new financial products and institutions. The capital market includes debt and equity markets; debt securities (or “bonds”) issued by governments, counties and companies; equity securities (or shares); and securities offered in public markets (such as stock exchanges) or in private professional markets. As at end of 2020, the market capitalisation was Ksh 2.3 trillion (approximately USD 21.1 billion).

58. **The insurance industry is moderately weighted.** The industry is regulated by the Insurance Regulatory Authority (IRA) which has the mandate to regulate, supervise and develop the insurance industry in Kenya. Of note, the insurance industry is heavily intermediated, where agents act on behalf of the insurance companies while the brokers act as agents of the clients. Insurance intermediaries are the primary point of contact with the clients and have access to client information. At the time of this assessment, there were 33 insurance companies offering general (short term) insurance business only, 20 insurers offering long-term (life) insurance business only and 4 composite companies offering both general and life insurance. Additionally, there were 5 reinsurers, 193 insurance brokers, 19 reinsurance brokers, 11,801 agents and 27 banc-assurance agents. There are other insurance service providers who assist in the insurance value chain. These are 19 medical insurance providers, 142 insurance investigators, 146 motor assessors, 32 insurance surveyors, 131 claims settling agents. Other service providers such as medical doctors, lawyers, hospitals and garages are a part of the insurance value chain but are not regulated under the Insurance Act.

59. Within the retirement benefit industry, there are 31 Administrators, 11 Custodians and 24 Fund Managers registered by the Retirement Benefit Authority (RBA) to provide their respective services to pension schemes. The retirement benefits schemes are classified either by scheme design, scheme type, fund type or the nature of investment of scheme funds. Currently, there are 1,258 registered schemes in Kenya which include 1,101 occupational schemes, 40 individual pension schemes, and 31 umbrella schemes.

60. **The SACCOs sector is less weighted** mostly because this is a member-based sector. All SACCOs are registered and incorporated under the Cooperative Societies Act as legal entities.

Thereafter, the Deposit Taking SACCOs are licensed under SACCO Societies Act, and supervised by SASRA. They are permitted to take deposits, and thus offer withdrawable savings accounts services similar to those offered by banks. The Non-deposit taking SACCOs, on the other hand, are authorized under the SACCO Societies Act, and supervised by SASRA if the non-withdrawable deposits are above Ksh 100 million; digital and diaspora based SACCOs; and by Commissioner for Cooperatives in cases of the non-withdrawable deposits are below Ksh 100 million. They are not authorized to take withdrawable deposits or present themselves to the public as deposit-taking entities. They mobilize savings from their members which are strictly used as collateral for credit facilities advanced to members. These deposits are not withdrawable by the member, but can only be refunded when the member leaves the Sacco.

Structure and Size of the DNFBP Sector

61. The Designated Non-Financial Businesses and Professions (DNFBPs) include casinos (including internet casinos), real estate agents, dealers in precious stones and metals, lawyers, accountants and trust & company service providers. As at the onsite date, all except lawyers are subject to AML/CFT supervision and monitoring as prescribed under the POCAMLA. They are licensed or registered by their respective supervisory authorities. Where there is no direct supervisory authority for a particular sector, they fall under the supervision of the FRC.

Table: 1.4 Structure and size of the DNFBPs

Type of DNFBP	Number	Law under which Registered	Licensing /Registering Authority	AML/CFT Supervisor
Casinos	32 Land base casinos 23 Online casinos	Betting, Lotteries and Gaming Act	Betting and Licensing Control Board (BCLB)	FRC and (BCLB)
Real Estate Agents	411	Estate Agents Registration Act (CAP. 533)	Estate Registration Board (EARB)	FRC and (EARB)
Precious Metals & Stones Dealers	50	The Mining Act, 2016	Ministry of Petroleum and Mining	FRC
Lawyers	19,293	Law Society of Kenya (LSK) Act (CAP. 18) and the Advocates Act (CAP. 16).	Law Society of Kenya (LSK) as SRB	None <i>(Advocates/ Lawyers are currently not Reporting Persons under POCAMLA)</i>

Accountants	23,000 Accountants 800 Audit firms	Accountants Act CAP 531	Institute of Certified Public Accountants of Kenya (ICPAK)	FRC and (ICPAK)
Trust & Company Service Providers	1,500 (Active) Certified Secretaries	Certified Public Secretaries of Kenya Act Cap 534	Institute of Certified Public Secretaries of Kenya (ICS)	FRC

62. **Casinos and Gaming activities: The sector is moderately weighted.** Casinos are licenced by the Betting Control and Licensing Board (BCLB) established under S.3 of the Betting, Lotteries and Gaming Act. The BCLB is the AML/CFT supervisor for both casinos and gaming activities. The functions of the Board are to regulate, supervise and inquire into complaint against licensees. There are several categories of licenses issued under the Act which include Public Gaming (Casinos), Bookmakers, Public Lotteries, Totalisators, Short term Lotteries and Prize Competitions. The sector comprises 49 Casinos and several online betting establishments. The authorities generally consider casinos as vulnerable to abuse by criminals.

63. **Dealers in Precious Metals and Precious Stones: The sector is moderately weighted.** The licensing of the players in the sector is centralized at the Ministry of Petroleum and Mining, State Department of Mining. There are 50 license holders registered with the Ministry. Although, Kenya does not have large deposits of precious metals, it was indicated by the Authorities that there have been incidences of transit of gold or theft of gold from other jurisdictions passing through the country to more lucrative jurisdictions. The authorities also indicated that high number of illegal dealers in precious stones and precious metals, is attributed to the lack of licensed artisanal miners in extraction and trading. The Authorities stated that the sector is highly cash intensive as a result of the types of products which are low in volume but high in value thus making the sector highly vulnerable to ML/TF risks.

64. **Legal Practitioners – The sector is heavily weighted in view of the services it provides and the fact that it is not subject to AML/CFT requirements and not being supervised for compliance with AML/CFT requirements.** The legal profession consists of admitted attorneys, notaries and lawyers. The sector is supervised by the Law Society of Kenya, regulated by the Law Society of Kenya (LSK) Act and the Advocates Act. Kenya currently has 19,293 practicing advocates from both the private and public sector. Lawyers in Kenya provide services in relation to purchase/ sale of real estate, asset/ funds management, trust and company services. However, lawyers are not designated as reporting entities for AML/CFT purposes and therefore, not subject to AML/CFT supervision.¹⁸ The fact that lawyers are not being supervised or monitored for compliance with their AML/CFT obligations, their vulnerability to ML/TF risks is material.

65. **Real Estate Sector- The sector is heavily weighted** in view of the fact that it is rated in the NRA as being highly vulnerable to ML risk, is not being supervised form AML/CFT purposes and cash is acceptable in a sale/ purchase transaction. The real estate agents are licenced by the Estate Agents Registration Board (EARB) established under the Estate Agents Registration Act (CAP.

¹⁸ At time of the onsite visit, Lawyers are designated as reporting entities by virtue of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021. However, a court order suspended implementation of Amended Act.

533). EARB is also designated as an AML supervisory body under POCAMLA. There are 411 registered real estate agents. The sector is considered high risk mainly due to high participation of unregistered players that are not regulated and the use of cash. The acceptance of cash in purchase/sale transactions takes away the opportunity of having a paper trail of the transactions. Real estate agents are involved in frequent liaison with banks, Saccos, mortgage brokers, surveyors, solicitors and other estate agencies during transactions.

66. **Accountants- The sector is moderately weighted.** The Institute of Certified Public Accountants of Kenya (ICPAK) is a self-regulatory body (SRB) which regulates the activities of all certified public accountants in the country ensure that members uphold credibility, professionalism and accountability. ICPAK is designated as an AML supervisory body under POCAMLA. The ICPAK has over 23,000 individual members with 800 fully paid-up audit firms. ICPAK is also responsible for supervision and enforcement of compliance by all the accountants and accounting firms.

67. **Trusts and Company Services Providers (TCSPs) – The sector is moderately weighted.** The TCSPs are supervised by the Institute of Certified Public Secretaries of Kenya (ICPSK) and most of them are lawyers. Members of the Institute referred to as Certified Secretaries and they use designator letters ‘CS’ before their names. The ICPSK has over 1500 members. However, provision of trust and company services is not restricted to CS. POCAMLA has not designated the ICPSK as a supervisory body in the First Schedule and therefore TCSPs are supervised by the FRC for AML/CFT purposes.

68. Kenya does not have a legal or regulatory framework for VAs and VASPs, therefore, these are not supervised for AML/CFT compliance. However, the CBK issued a public notice warning members of the public of the risks associated with engaging in virtual assets trading.

1.4.4. Preventive measures

69. Kenya’s regime of AML/CFT preventive measures is founded on the POCAMLA of 2009 (revised in 2021) and its Regulations, which set out the basic AML/CFT obligations and provide the legal basis for regulation and supervision of RIs. The Act provides for undertaking of risk assessments by RIs, a full range of CDD and EDD measures including understanding and obtaining information about the client, ongoing due diligence, and obligations relating to PEPs. Other preventive measures include, but are not limited to, independent audit, tipping off, record retention, correspondent banking relationships and reporting obligations. While the AML laws are relatively consistent with the FATF Standards, a review of the laws exposes the technical deficiencies that still exist (see TC Annex Recs 10 – 23). In addition, the primary legislation (POCAMLA) does not contain adequate provisions preventive measures in relation to TF.

70. Supervisory bodies such as the CBK, CMA, IRA, and RBA have issued guidelines that are largely prudential but incorporate AML/CFT elements to assist FIs under their purview with the implementation of preventive measures. Guidelines include CBK Prudential Guideline No. 8 on Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) (CBK/PG/08); Forex Bureaus Guidelines; Insurance AML/CFT Guidelines; Guidelines on the Prevention of Money Laundering and Combating Financing of Terrorism in the Capital Markets; and ICPAK AML Guidelines for Accountants in Kenya. The Guidelines issued do not meet the criteria of an ‘Other Enforceable Means’ set out in the FATF Standards.

71. While the Guidelines are intended to assist in carrying out the functions of CBK under the Banking Act, the functions of CBK under this Act do not include AML/CFT. In line with the principle set out in Section 31(b) of the Interpretation and General Provisions Act, subsidiary

instruments have to remain within the scope of the parent Act under which they were issued. Based on this principle, supervisory bodies do not have the legal basis for issuing AML/CFT Guidelines under their sectoral laws (e.g. Banking Act, Insurance Act, Capital Markets Act, the Accountants Act etc.) on AML/CFT matters. POCAMLA is clear as to which competent authorities has the powers to issue them. S.24A of POCAMLA states that FRC may issue instructions, directions, guidelines or rules to reporting institutions as it may consider necessary for the better carrying out of its functions under this Act or regarding the application of this Act. POCAMLA does not give automatic powers to supervisory bodies to issue guidelines. According to s.24A(3) of POCAMLA, the FRC has to delegate such powers to the supervisors. The Section states that *the Centre may, where it deems appropriate, delegate powers to a supervisory body to issue instructions, directions, guidelines or rules regarding the application of this Act to reporting institutions regulated or supervised by the supervisory body.* CBK and all supervisory bodies have not provided evidence that they received such delegated powers.

72. The legal status of the Guidance Notes has therefore affected the analysis of R. 1 and all Recommendations dealing with preventive measures in the TC Annex. The AML legal framework in relation to FIs and DNFBPs that exist in Kenya, largely reflects those designated under the FATF Glossary, however VASPs and lawyers are still outside the scope of the regime.

1.4.5. Legal persons and arrangements

73. There are two types of legal persons that can be established in Kenya, which are companies registered and regulated under the Companies Act, and the limited liability partnerships, registered and regulated under the Limited Liabilities Partnerships Act. Both types of legal persons are regulated by the Business Registration Service, which was established by the Business Registration Service Act, 2015, to effectively administer the laws relating to the incorporation, registration, operation and management of companies, partnerships, inter alia, and for connected purposes. The types of companies that can be incorporated are public companies or private companies that are limited by shares; or private companies that are limited by guarantee. Private companies limited by guarantee are first registered by BRS then apply for registration under NGO Act. and can only be registered after vetting of the promoters by the National Intelligence Service (NIS). Their operations are regulated by the NGO Board under the provisions of the NGOs Coordination Act. Foreign companies can also register with the BRS in Kenya and then conduct business. Promoters of companies are not vetted, unless the objectives for which they register are subject to vetting, e.g., to conduct NGO work. The nature and process of registration of a limited liability partnership is like that of a limited liability company, except that instead of registering a memorandum and articles of association, the partners only file an agreement or a partnership deed. The most prevalent type of legal person is the private limited liability company (see Table 1.5 for details)

74. Trusts are the only legal arrangements registrable in Kenya. The statutory basis for formation of a trust is the Trustees Act. A Trust Deed is executed and registered with the Ministry of Lands and Physical Planning as a document under the Registration of Documents Act, CAP 285. This creates an unincorporated trust, which can attain corporate status upon registration under the Trustees (Perpetual Succession) Act. They are registered and regulated by the Ministry of Lands and Physical Planning, through its Conveyancing Unit, exercising its powers under the Trustees (Perpetual Succession) Act, which had just been amended (December 2021). There were about 3,000 registered trusts at the time of the onsite, all of which had been registered under the old law.

Table 1.5: Types of Legal Persons

Type of Legal	2018	2019	2020

Person			
Private Limited Company	46,256	40,677	44,128
Public Limited Company	70	82	74
Foreign Companies (branches)	182	171	145
Limited Liability Partnerships	380	382	424
Companies Limited by Guarantee	184	227	536

75. The significance of legal persons and arrangements in the Financial and DNFBP sectors is reflective of the prevalence of the types of legal persons and relative minimal numbers of the legal arrangements. Private limited liability companies have a significant footprint, while the limited liability partnerships have a small presence, and the trusts have an insignificant one. Though Kenya is not known as a centre for the creation and or administration of legal persons and arrangements, it has a significant presence of foreign companies operating in the country. However, the extent to which foreign legal persons and arrangements may be holding assets in Kenya was not demonstrated by the Authorities. During the onsite, the Authorities submitted that the type of legal person abused most for ML purposes is the private limited liability company, but a comprehensive assessment of this particular sector is required to ascertain the specific type at risk or abused for both ML and TF purposes.

1.4.6. Supervisory arrangements¹⁹

76. In terms of POCAMLA, there are five AML supervisors for the financial sector: the CBK, the CMA, the IRA, Retirement Benefits Authority (RBA) and SACCO Societies Regulatory Authority (SASRA) as set out in Table 1.6. Currently, VASPs are not designated as reporting entities and do not have a designated supervisor.

Table 1.6: FI Supervisors

Type of institution	AML Supervisor
Banks, including microfinance banks	Central Bank of Kenya
Money Remittance Providers	Central Bank of Kenya
Payment Service Providers	Central Bank of Kenya

¹⁹ Assessors should describe the supervisory arrangements in place for financial institutions, DNFBPs and VASPs.

Foreign Exchange Bureaus	Central Bank of Kenya
Life insurance Companies	Insurance Regulatory Authority
Pension Schemes	Retirements Benefits Authority
Individual & Collective Investment Schemes	Capital Markets Authority
Investment banks	Capital Markets Authority
Stockbrokers	Capital Markets Authority
Funds managers	Capital Markets Authority
Investment advisors	Capital Markets Authority
SACCOs	SACCOs Societies Regulatory Authority

77. For the DNFBP sectors, the designated AML supervisors are: The ICPAK, the EARB and the BLCB). The POCAMLA (Amendment) Act, 2021 has designated lawyers as reporting entities and the Law Society of Kenya as the AML/CFT supervisor. However, the implementation of this law has been stayed by the High Court pending full hearing of a petition challenging legality of the said law. In effect, lawyers are not yet designated as reporting entities, do not have a designated supervisor for AML/CFT purposes (see Table 1.4 for details on DNFBP supervisors). The FRC is the AML supervisor of last resort where no supervisory body for AML is indicated in POCAMLA. As noted in this report, the designated supervisors do not have mandate to conduct supervision for CTF purposes.

1.4.7. International cooperation

78. There were two cases submitted, where proceeds of a predicate offence in Kenya (procurement fraud and corruption) were stashed in bank accounts in Europe, but the money has since been recovered. Regarding TF, Kenya's neighbour to the Northeast is Somalia, a high-risk jurisdiction for TF purposes, as swathes of territory bordering Kenya are under the command and control of Al Shabaab, a designated terrorist organisation in Kenya, that has even carried out acts of terrorism in Kenya. Therefore, Kenya's most significant partners for ML/TF purposes are the regional countries identified herein above for the cited reasons. Additionally, trade and development partners (SA, UK, US, EU, China, India, UAE, etc) also play a significant role in Kenya's AML/CFT activity through public and private sector engagements and finance and trade relations. To facilitate international cooperation, Kenya enacted a Mutual Legal Assistance law and laws on Extradition. The Office of the Attorney General has been designated as the Central Authority for MLA. The Act encourages competent authorities to engage in other forms of international cooperation, and Kenya has duly executed, signed and /or ratified bilateral, multilateral agreements, UN Conventions, MoUs, etc., under which it renders and receives other forms of international cooperation.

Chapter 2. NATIONAL AML/CFT POLICIES AND COORDINATION

2.1. Key Findings and Recommended Actions

Key findings

- a) Kenya has taken steps to assess its ML/TF risk, including through a recent NRA and sectoral risk assessments. The NRA identified fraud and forgery, drug related offences, corruption and economic offences as the highest proceeds generating crimes while environmental and wildlife crimes, cybercrime offences, human trafficking and smuggling of persons, and tax offences were rated medium. ML vulnerability of the banking sector and the real estate sector, lawyers, dealers in second-hand motor vehicles were found to be high. However, the report does not indicate the most significant TF threats and sectors which are highly vulnerable to TF risk. The NRA did not cover virtual assets and virtual asset service providers.
- b) While the authorities have a clear understanding of the key ML threats, the understanding of the relative scale of such threats, and the vulnerabilities that criminals are exploiting to launder proceeds appeared to be limited. Similarly, the threats emanating from proceeds of foreign predicate offences are understood only to a very limited extent. The understanding of TF risks amongst key stakeholders is also limited and uneven.
- c) Kenya did not demonstrate that the National AML/CFT Strategy addresses identified ML/TF risks. However, the AT noted that some ML risks are mitigated by existing policies or measures. Efforts are directed towards combating predicate offences and little efforts directed to ML related to such offences.
- d) Kenya has a limited understanding of TF risks. The NRA focused on TF only insofar as it being a proceed generating crime. The efforts at the policy level have focused mainly on countering terrorism attacks and attack planning. Kenya's TF actions are not consistent with overall TF risks and, critically, the competent authorities responsible for the various National CT strategies do not coordinate activity and have not embed CFT as a component of the wider fight against terrorism. Kenya is yet to target TF risks and successfully and routinely prosecute the TF offence.
- e) Although the NRA identified some sectors to be of high ML risk, Kenya has not yet started applying enhanced measures in relation to these sectors. Application of simplified measures is allowed in relation to areas determined to be of lower ML/TF risks but does not explicitly exclude scenarios where there is suspicion of those risks.
- f) The competent authorities did not demonstrate alignment of their priorities and objectives with ML/TF risks and the national AML/CFT Strategy. The LEAs and the ODPP focus more on predicate crimes than on ML and supervisors have not yet started applying a RBA to AML/CFT supervision. In relation to TF, the competent authorities' objectives and activities are aligned more with the substantive terrorist act than TF risks.
- g) There is generally good interagency co-operation and coordination amongst most law enforcement agencies (LEAs) on AML operational matters such as in carrying out NRA. However, Kenya has not demonstrated this level of coordination and cooperation on CFT matters. Assessors could not determine co-operation and coordination between agencies on the development and implementation of AML/CFT policies and activities to combat

ML/TF/PF.

- h) Awareness of the results of the NRA is yet to be extended to all key AML/CFT stakeholders since the public version of the NRA report had been approved a few days before the onsite. There has not been an outreach by the authorities.

Recommended Actions

- a) Authorities should ensure that ML risk assessment takes into account a broader range of considerations. For example, identification and assessment of risk should involve a consideration of foreign predicate threats, including corruption, and the relative value of proceeds generating predicate offences and not only prevalence of the cases. Other areas which require consideration are: quality of information sources inputting into the NRA process; coverage of ML/TF vulnerabilities of legal persons/ legal arrangements, vulnerabilities of the cash economy; ML/TF risks associated with illicit inflow and outflow of funds and ML/TF risks associated with VASPs and the impact of new technologies and payment systems.
- b) Similarly, the assessment of TF should be broadened beyond looking at TF as a predicate offence of ML and consider all possible channels which can be abused for TF purposes such as mobile money operators, cross-border currency transactions, hawala, international funds transfers through the banking in the guise of import payments, etc.
- c) Kenya should develop a CFT strategy describing the approach to TF investigation, as integrated across competent authorities in the fight against the various terrorist groups active in the country. This should also reflect on cross agency measures to counter transnational terrorist activity involving FTF from Kenya. The authorities should also ensure that the strategy is consistent with, and takes into account, evolving or emerging TF risks, such as TF risk posed by Al Shabaab or other groups that authorities view as posing terrorist risks.
- d) Kenya should review the existing inter-agency mechanisms in place to (i) address specific information-sharing issues identified as problematic in the NRA, (ii) remedy issues that impede operational effectiveness, and (iii) improve collection of statistics. Kenya should use the NTF to improve inter-agency understanding of the TF risk and incorporate it across all CT functions such as NCTC and NSCVE.
- e) Kenya should develop a comprehensive national AML/CFT strategy and Action Plan informed by risks identified in a strengthened NRA. The strategy should set out the roles and responsibilities of various competent authorities, supervisors and the private sector as well as how resources should be distributed across the AML/CTF landscape.
- f) Based on the results of the ML/TF risk assessment, authorities should apply enhanced measures for higher risk scenarios or simplified measures for lower risk scenarios. Consider designating entities which were identified as posing high ML risk in the NRA report as reporting entities for AML/CFT purposes or designate them as high risk and require FIs to apply EDD measures on them. Consider reviewing the efficacy of maintaining designation of some sectors/ entities as reporting entities which have not been identified in the NRA as posing ML/TF risk.
- g) Undertake outreach activities to disseminate the results of the NRA exercise to all FIs, DNFBPs and other relevant stakeholders.

79. The relevant Immediate Outcome considered and assessed in this chapter is IO.1. The Recommendations relevant for the assessment of effectiveness under this section are R.1, 2, 33 and 34, and elements of R.15.

2.2. Immediate Outcome 1 (Risk, Policy and Coordination)

2.2.1 Country's understanding of its ML/TF risks

80. **Kenya has a fair understanding of the ML risks to which it is exposed. The overall ML threat and national vulnerability were rated in the NRA as medium and medium high respectively and the terrorism financing (TF) threat was assessed as medium, and the vulnerability for TF was assessed as medium low. Kenya has a limited understanding of its TF risk due to the methodology used in the NRA (focusing on TF as a proceed generating offence).**

81. The understanding of ML/TF risks is based on the national ML/TF risk assessment which it conducted from 2019 to 2021 and sectoral risk assessments carried out by the Central Bank of Kenya, Capital Markets Authorities (2016), Insurance Regulatory Authority (2020) and the Financial Reporting Centre (2017). At the bottom level, reporting institutions also carry out their own assessments in accordance with the POCAMLA which are also submitted to the supervisory bodies. The main objectives of the NRA exercise were to enable the country to identify and understand its national ML/TF vulnerabilities, identify sectors which have higher or lower risks and guide the government's response in mitigating the risks. The NRA exercise was carried out by the NRA National Task Force chaired by the National Treasury and Planning, with the Financial Reporting Centre as the Coordinator. The Task Force composed of 98 officials drawn from the public sector (made up of 30 public sector organisations) and private sector (represented by 44 officials, which included 50% of banks). The private sector participation was considered adequate. The sectoral risk assessment reports were used as source of information for the NRA exercise and the NRA was in turn used to update the authorities' understanding of ML risks at sectoral levels. The NRA considered both quantitative data (statistics) and qualitative information. However, the scope of the NRA did not extend to virtual assets (VAs) and virtual assets service providers (VASPs) although the country is aware of the existence of VAs and VASPs²⁰.

82. TF was only considered as a proceed generating offence and the report notes that proper analysis of the TF risk was hampered due to poor record keeping across the relevant stakeholders. Kenya did not consider a wide range of risk factors relating to TF commensurate with its risk profile. The Ministry of Mining had no concept of the risk of extortion faced by companies operating in high-risk regions of Kenya, a potentially high TF yield opportunity for terrorist groups in the form of protection rackets and extortion. Moreover, Kenya demonstrated no analysis of TF typologies, or TF in relation to domestic terrorism-related events, and links with other terrorism events in the region/ globally. There is also no evidence of analysis of Kenyan links with transnational flow of funds for TF.

83. **The main domestic ML threats are understood by the main AML/CFT authorities and some private sector members, but the understanding is not consistent across all the authorities and the understanding of the relative scale of ML threats is based on number of cases rather than the values involved.** The NRA exercise identified fraud and forgery, drug related offences, corruption and economic offences as the highest proceeds generating crimes. This is followed by environmental and wildlife crimes, cybercrime offences, human trafficking and smuggling of persons, and tax offences which were considered as posing medium risk for ML. Human trafficking was rated as low proceeds generating crime in Kenya. However, this understanding varies amongst competent authorities as well as private sector. Furthermore, the AT noted that the assessment of predicate offences was based on the number of cases (most common offences) without adequately considering the value of the proceeds of crime.²¹ In addition, the NRA report noted that, in some cases, LEAs were not keeping comprehensive/

²⁰ Brief on Cryptocurrency: Legal and Regulatory Aspects. A report by the Central Bank of Kenya, 2018

²¹ see Section 2.1.4 of the NRA report

reliable statistics to adequately inform the assessment. In view of this, there was a varying understanding among the AML/CFT stakeholders of the relative scale of the proceeds generating crimes.

84. **The authorities are aware of some vulnerabilities or channels used to launder proceeds of domestic predicate offences.** The NRA exercise found the banking sector and the real estate sector, lawyers and dealers in second-hand motor vehicles as having high ML vulnerability. However, the likelihood of being used for ML purposes was determined to be low for the securities sector and MVTS providers. The NRA exercise did not cover ML/TF risks associated with all type of persons and legal arrangements (see IO.5 for details). During the onsite meetings, there was general consensus amongst public and private sector representatives that the banking sector was the most highly exposed to ML risks due to the volume of financial transactions that go through it, including international financial transactions. All 20 cases analysed during the NRA showed that they were facilitated through the banking sector and that all mega corruption cases involved the use of the banking sector. This is also consistent with the fact that over 90% of STRs filed with the FRC were submitted by the banking sector. Discussions with the public and private sector representatives also confirmed that most proceeds of crime are also laundered through lawyers and real estate agents. As at the end of the onsite, lawyers had not yet started implementing POCAMLA requirements and not subject to supervision for AML/CFT purposes whereas the licensing regime and regulation of real estate sector was noted to be weak. Money launderers could find these sectors attractive for hiding proceeds of crime. In particular, ‘client accounts’ maintained by lawyers on behalf of their clients are highly guarded and not subject to any regulatory scrutiny.

85. **The authorities could not demonstrate a comprehensive understanding of threats from foreign predicates or vulnerabilities exploited to launder the proceeds, and domestic proceeds of crime being laundered outside Kenya.** Kenya is a regional financial hub and Kenyan banks have subsidiaries and branches in the neighbouring countries, some of which are politically unstable and do not have strong AML/CFT regimes. Kenyan financial sector is therefore a gateway for funds flowing from (and into) the rest of the East African region as well as part of the South African region. Customers of the foreign based subsidiaries and branches may also open bank accounts in Kenya and channel foreign proceeds of crimes through related party transactions within the banking group. In addition, foreign based entities are permitted to invest in the Kenyan securities market. Some of the entities may channel their investments through sectors which are not supervised for AML/CFT purposes such as lawyers. Foreign proceeds of crime can also be brought into the country physically. Similarly, domestic proceeds of crime can be laundered cross-border through cash smuggling, trade-based schemes (e.g., mis-invoicing) and wire transfers through the banking sector and mobile phone operators. Table 2.1 below gives a snapshot of cross-border cash declarations. As shown in the table, USD 816.9 million and USD322.9 million was taken out of Kenya in the last 6 months of 2019 and during the first quarter of 2020 respectively. KRA did not provide statistics beyond the period indicated in the Table below²². However, it is evident that the amounts are relatively huge to have been taken out within that short period and were significant enough to have triggered some kind of in-depth analysis.

²² However, FRC provided statistics which appear in Table 3.8. Assessors observe that the statistics provided by KRA and FRC are different materially.

Table 2.1. Inward & Outward Currency Declarations

	2019 (July- Dec)		2020 (Jan-April)	
	Inflow	Outflow	Inflow	Outflow
(USD)	102,029,687	816,942,619	65,341,745	322,920,273
EUR	16,592,393	369,913	4,186,500	992,000
KSH	228,609,940	13,662,250	45,514,000	15,588,425

Source: Authorities: - KRA- batch 3- currency summary

86. The authorities explained that many FIs across the region channel their currency through the Kenyan FIs and Kenyan banks move currency to their branches in the region through cash couriers. In addition, several international humanitarian agencies, NGOs and Embassies based in Kenya move currency within the region. However, the explanation addresses only the movement of foreign currency outside Kenya and does not provide reasons for inflow of foreign currency and reasons for movement of Kenya Shillings in both directions. In the absence of contrary information, some of these funds could potentially be proceeds of crime.

87. **The authorities have not demonstrated that they adequately understand TF risks, TF threats and channels which terrorism financiers use.** The NRA report describes terrorist groups operating in the region and terror attacks which had occurred in the country. In relation to TF, the report indicated that Kenyan investigative agencies do not keep proper records on TF. It further observed that the data which was presented for analysis focused on criminal investigations and prosecutions of terrorist offences rather than TF investigations. Briefly, the report indicated that the assessment also considered the ‘direction, sources and channels of funds’²³ Given the lack of in-depth analysis of the TF threats and channels which are exploited to fund terrorists, terrorist organisations and terror attacks, the finding of the threat of TF being ‘medium’, and the vulnerability of TF being ‘medium low’, does not appear to be well grounded.

88. During the onsite, Authorities indicated that they used data, intelligence and post terrorist attack interviews around the affected communities to get information about how the incidents could have been funded. They further indicated that they looked at potential channels such as banks, MVTs providers, NGOs and cross-border cash smuggling. However, they could not explain whether, or to what extent, these are exploited for TF purposes. The authorities did not share with the AT any insights into how these vulnerabilities may be exploited to fund foreign based terrorists, terrorist organisations and terrorist activities. Authorities’ understanding of sector threats and vulnerabilities related to TF is therefore considered to be limited. The sectoral risk assessments which supervisory authorities carried out do not differentiate between ML and TF vulnerabilities. These were combined together, without considering their unique characteristics. In relation to the risk assessment of DNFBPs carried out by FRC, it does not have details and overall findings on TF risk²⁴. This shows a very limited understanding of TF risks, if any. TF risks have not been considered in relation to legal persons and legal arrangements. Some

²³ See page 152 of NRA report.

²⁴ See The Preliminary ML Sectoral Risk Analysis for DNFBPs, May 2017, report issued by FRC.

authorities and private sector representatives viewed TF issues almost only in the context of ensuring compliance with TFS obligations. **On this basis, the authorities did not demonstrate a good understanding of Kenya's TF risks.**

2.2.2 National policies to address identified ML/TF risks

89. **Kenya did not demonstrate how the national AML/CFT policies address the identified ML/TF risks.** The authorities provided to the assessors a National AML/CFT Strategy after the end of the onsite as such the AT did not have time to scrutinize the strategy for purposes of discussions with the Authorities. During the onsite interviews, the authorities did not refer to the National AML/CFT Strategy.

90. The AT noted that Kenya implemented some activities and adopted legislative measures which addressed the deficiencies highlighted in the 2010 MER and to implement the revised FATF requirements adopted in 2012. These initiatives contributed in strengthening the AML/CFT regime although the activities were not fully informed by identified risks and not addressing the risks holistically as there are gaps in the implementation and some work remains ongoing. Some of these activities are described below:

- Enhancing the National Task Force on AML/CTF whose objectives include developing a national policy framework on AML/CFT and revise existing legislation and making appropriate recommendations to the Attorney General for strengthening it.
- Kenya amended the POCAMLA and introduced POCAMLA Regulations to address most of the weaknesses identified in the 2010 MER and also to take into account the requirements of the revised FATF Standards which were introduced in 2012. The most recent amendment was done in December 2021 to designate lawyers and insurance intermediaries as reporting institutions. However, as at the end of the onsite visit, implementation of the amended POCAMLA provisions in relation to lawyers as REs and Law Society of Kenya as a supervisory authority had been suspended pending High Court determination²⁵.
- Enactment of Prevention of Terrorism Act (POTA) in 2012 which criminalises TF and POTA Regulations in 2013 which provide for implementation of TFS- to implement the freezing and confiscation of terrorist funds and assets.
- Establishment of the Asset Recovery Agency to implement provisional measures and confiscation of proceeds of crime.
- Establishment of the Multi-Agency Team to fight corruption and other serious crimes. Related to this, Kenya also developed National Anti-Corruption Plan 2015-2019 and launched the National Ethics and Anti-Corruption Policy Sessional Paper No.2 of 2018 that provides a comprehensive framework for the design and development of an effective legal and institutional framework for fighting corruption and promoting ethics and integrity. Corruption is one of the high proceeds generating predicate crimes identified in the NRA.
- Demonetization of the old Ksh. 1,000 notes in 2019 whose objective was to amongst others deal conclusively with the emerging concerns about illicit financial flows and counterfeits.
- Creation of specialized divisions in the ODPP intended to identify risks associated with ML and

²⁵ A lawyer went to court challenging the designation of lawyers as reporting entities arguing that it is unconstitutional. Since the court has not yet made a ruling on this, assessors could not consider lawyers as reporting entities.

TF. The divisions are: The Anti-Corruption Division, the Transnational and Organized Crime Division, the Counter Terrorism Division and the Proceeds of Crime Recovery Unit.

91. However, some significant ML/TF risks remain largely unaddressed as outlined below:

- Despite the large number of investigations and prosecutions of corruption and other serious crimes, there are low number of ML investigations and prosecutions. There are no visible corresponding efforts being directed towards effectively pursuing ML related to these serious crimes (see IO.7).
- Kenya is not proactively targeting proceeds of foreign predicate crimes being laundered in the country.
- Kenya have not demonstrated an understanding of TF risks, and investigation and prosecution of TF is not given proportionate or commensurate attention considering the country's TF risk profile.
- Measures to monitor and control cross-border movement of currency and bearable negotiable instruments (BNIs) to or from other countries have been focused mainly on airports. In addition, the reports are not analysed critically to establish links to ML or TF.
- Access to BO information at the company registry is not accessible to reporting entities which undermines their ability to verify identity of BOs.
- Kenya is yet to implement measures related to some sectors which were identified as having high ML vulnerability such as dealers in second-hand motor vehicles and real estate agents. Reporting entities are not required to apply EDD measures when dealing with entities which were found to be of high ML risk. Risk-based supervision of real estate agents (including other sectors with high ML vulnerability) is yet to be implemented.

2.2.3 Exemptions, enhanced and simplified measures

92. **Kenya does not have low risk situations which are exempted from AML/CFT obligations. The legal and regulatory requirements provide for enhanced and simplified measures but such measures are not determined based on the results of the NRA exercise as discussed below:**

- While the NRA identified lawyers and dealers in second hand motor vehicles as higher risk for ML misuse, both sectors are not subject to AML/CFT requirements at the time of the on-site. Kenya is making efforts to introduce measures for lawyers through the POCAMLA (passed in December 2021). However, the implementation of the POCAMLA provisions were suspended by the High Court pending a full hearing.
- **Enhanced or simplified measures:** The NRA and Sectoral Risk Assessment results have not been used to inform the application of enhanced or simplified measures. The existing AML Regulations require reporting entities to apply enhanced due diligence measures to persons and entities which present higher risks without prescribing or providing examples/ guidance (except the Insurance (Anti-Money Laundering and Combating Financing of Terrorism) Guidelines, 2020 which provides examples of high-risk customers) on persons or entities which would be regarded as high risk. In this case, the reporting entities have discretion to define high- and low-risk scenarios. In addition, under the CBK Guidelines and CMA Guidelines, reporting entities are permitted to apply simplified measures when risks are assessed as lower, but the Guidelines do not prohibit application of such measures when there is a suspicion of ML/TF.

- **Designation of NPOs as reporting entities:** The POCAMLA has designated NPOs as reporting entities. During the onsite, authorities could not explain the basis of such an action considering that the FATF Standards do not require NPOs to be designated as reporting entities. According to the NRA report, the overall vulnerability of NPO sector for TF abuse was considered to be Medium. Post the NRA, it is not clear whether the authorities reviewed the current status of NPOs as reporting entities- whether or not NPOs should remain as reporting entities and if yes, the basis of such a decision. The conclusion of the Assessors is that the designation of NPOs under POCAMLA is not based on risk assessment.

2.2.4 Objectives and activities of competent authorities

93. **Kenya did not demonstrate that the objectives/ activities of the competent authorities are aligned with evolving AML/CFT policies and ML/TF risks identified in the NRA.** However, there are a number of areas where national competent authorities focus on addressing key risks (e.g., corruption), but these activities lack sufficiently targeted AML-focus. Overall, objectives and activities of competent authorities are not yet sufficiently consistent with the areas of identified higher ML/TF risk. This finding is based on the NRA report, documents provided by competent authorities and interviews carried out during onsite.

94. The FRC indicated that it pays attention to certain predicate crimes in their operations. For instance, the Financial Intelligence Analysis Department has the following dedicated sections: 1. A Section responsible for AML & Taxation (which also deals with drug-related STRs); 2. A Section responsible for potential offences involving public funds such as suspected procurement offences, bribery, abuse of office, public theft; 3. A Section responsible for Wildlife and 4. A Section responsible for TF. This allocation ensures that STRs related to these predicate offences are given priority. Financial intelligence disclosures made by FRC constituted corruption (34%), terrorist financing (20%), fraud (18%) and wildlife related crimes (1%). There were no disclosures in relation to drug-related crimes, which is one of the top proceeds generating crimes. However, the authorities explained that most of the suspects and their associates investigated were involved in commission of multiple predicate offences, all of which may not be highlighted during dissemination of such reports. In that case, when disseminating financial intelligence reports they only indicate a prominent offence such as TF.

95. Supervisors (CBK, CMA and IRA) have carried out ML/TF risk assessments on some institutions under their purview and ranked them based on the identified risk ratings. The FRC carried out ML risk assessment on DNFBP sectors in 2017. However, institutional risk assessments for DNFBPs have not been carried out. In relation to the risk assessments, the understanding of ML & TF risks is highly questionable considering that the methodology combined ML and TF and gave one result, despite the fact that these risks are different in nature and that the factors which influence ML risk and TF risk are also different. In addition, the supervisory authorities have not demonstrated that their objectives and activities are guided or informed by the identified risk profile of the institutions. Based on the statistics provided to the Assessors, there is no evidence that the risk ratings inform selection of entities to be inspected and the scope of those inspections (see IO. 3).

2.2.5 National coordination and cooperation

96. **There is good interagency co-operation and coordination amongst most LEAs and FRC on AML/CFT operational matters such as in the preparation of the NRA. However, coordination in relation to development of AML/CFT policies could not be determined. Furthermore, the assessors could not establish existence of coordination to combat PF of weapons of mass**

destruction as the Counter Financing of Terrorism Inter-Ministerial Committee Inter-Ministerial Committee was not available for a meeting with the assessors.

97. In relation to cooperation in the NRA, Kenya established the NRA National Task Force through a Gazette Notice in March 2019 with a responsibility to coordinate and undertake a national risk assessment (NRA) exercise. The NRA exercise was successfully concluded. The Task Force was also required to prepare a National Strategy on Combating Money Laundering/Terrorism Financing. Membership of the Task Force included National Treasury, FRC, financial sector regulators, LEAs, prosecutors, KRA, Bankers Association, Kenya National Bureau of Statistics (KNBS); NGO Coordination Board, Business Registration Service, National Crime Research Centre; and National Counter Terrorism Centre (NCTC). At the policy level, Kenya established the Anti-Money Laundering Advisory Board (AMLAB) in terms of Section 49 of POCAMLA with a responsibility to advise the Cabinet Secretary on policies, best practices and related activities to combat ML. The Board meets regularly to deliberate on policy and operational matters necessary for the strengthening of the AML regime in the country.

98. In relation to AML/CFT cooperation and coordination at the operational levels, there are both formal (i.e., based on a Memorandum of Understanding – MOU) and informal mechanisms in place. These mechanisms appear to be working very well.

- **With regard to ML investigations and prosecutions**, Kenya established a multi-Agency Team in 2015 originally to develop synergy in the fight against corruption. This was borne out of a Presidential Directive which was operationalised through meetings involving the FRC, investigative and prosecutorial agencies. Its work has been expanded to include other big crimes which are chosen based on the following criteria: crimes involving funds in excess of Ksh 50m (county level) or Ksh 100m (national level); complex cases which cut across many agencies; cases which involve state officials or high networth individuals and cases which affect lives of the society.
- **With regard to TF investigations, prosecutions, and prevention**, the National Task Force on AML/CFT is a multi-agency taskforce, whose membership comprises organizations deemed crucial to the implementation of the national AML and CFT regime. The Anti-Terrorist Police Unit (ATPU) is a permanent member and the FRC performs the role of Secretariat. The ToRs of the taskforce include formulation of policies on AML/CFT. The Counter Financing of Terrorism Inter-Ministerial Committee is mandated to formulate and supervise the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism. Kenya has also developed the National Strategy to Counter Violent Extremism (NSCVE) and the National Counter Terrorism Strategy (NCTS) informed by the national terrorism risks that Kenya faces. Whilst Kenya claims the NSCVE has consistent reviews to incorporate emerging terrorism and TF threats, interviews during the on-site visit revealed that TF is not considered by the NSCVE.
- **With regard to supervision**, FRC and CBK entered into an MOU in 2013 to facilitate mutual assistance, cooperation through exchange of information and supervision of FIs. Through this framework, CBK and FRC carried out a joint inspection in 2015/16. In addition, CBK communicates its supervisory plan and FRC provides information about an institution which is scheduled for an inspection by CBK. FRC is yet to establish similar cooperation mechanisms with other financial sector and DNFBP supervisors.

2.2.6 *Private sector's awareness of risks*

99. There is some awareness of the results of the NRA by FIs, DNFBPs and other sectors affected by the application of the FATF Standards. Competent authorities have not yet carried out awareness raising outreaches since the NRA exercise was completed. Kenya has a lot to do in order to enhance this awareness.

100. Kenya completed the NRA in October 2021 and later prepared a public version of the report for sharing with wider stakeholders. The report has not yet been published but was shared with some private sector institutions a week before the onsite visit. Some private sector institutions (majority of the DNFBPs) still had not yet received the report at the time of the onsite and therefore were not aware of the results of the NRA. In addition, Assessors were not able to meet the real estate agents and dealers in precious metals and stones, and therefore could not assess their awareness of the results of the NRA. However, since nearly 45% of the NRA Team were private sector representatives, they were privy to the NRA results. Despite this, it was evident during the onsite interviews that majority of the private sector representatives were yet to familiarize themselves with the NRA findings. On this basis, except for the banking, insurance and capital market sectors, most of the private sector institutions were not aware of the results of the NRA.

Overall Conclusion on IO.1

101. Kenya has demonstrated understanding of ML threats and associated ML vulnerability of various sectors to some extent. Lack of consideration of the values of proceeds of crime undermines the relative scale of the proceeds generating predicate offences. Understanding of TF risks appeared to be limited as TF assessment focused more on terrorism than TF and there was inadequate consideration of channels which can be exploited for TF purpose. The authorities did not demonstrate that national AML/CFT Strategy are effectively addressing identified ML/TF risks and that there was alignment of the objectives/ activities of competent authorities with the national AML/CFT Strategy and the identified ML/TF risks. While there is coordination of activities to combat ML and TF, coordination in relation to PF could not be determined. No enhanced measures have been introduced to address high risk scenarios and designation of NPO sector as reporting entities is not supported by the results of the NRA. Due to the fact that the NRA report was shared with the private sector a few days before the onsite, the awareness of the results of the NRA was limited. In view of the TF risk profile of Kenya, the deficiencies in relation to TF were given more weight in the overall rating.

102. **Kenya is rated as having a low level of effectiveness for IO.1.**

Chapter 3. LEGAL SYSTEM AND OPERATIONAL ISSUES

3.1 Key Findings and Recommended Actions

Key Findings

Immediate Outcome 6

- a) Competent authorities have access to some financial intelligence and information. The ARA and KRA have used financial intelligence to identify and confiscate criminal assets, and recover tax. However, majority of the competent authorities make limited use of financial intelligence from FRC and other sources to initiate new cases or support existing investigations of ML/TF and on various predicate offenses such as corruption, drug trafficking and wildlife crimes.
- b) The FRC has, to some extent, demonstrated the ability to produce financial intelligence reports of good quality with useful information to the LEAs. However, the low level of STRs from high-risk sectors such as real estate sectors, lack of analysis of CTRs and cross-border currency/BNIs potentially limits the contents, effective analysis and quality of financial intelligence. The contents of the Border Currency Declaration and Cash Transaction Reports submitted by Customs and reporting entities respectively, have not been effectively analysed by the FRC to develop patterns or linkages to any possible predicate offences, ML or TF for use by the LEAs.
- c) Kenya established an independent FRC under POCAMLA, as the central agency charged with the responsibility for receipt and analysis of suspicious transaction reports and dissemination of financial intelligence and other information to LEAs for identification and investigation of potential ML, TF and associated predicate crimes.
- d) The FRC actively collects information on persons and entities that are suspected to be involved in terrorism activities including terrorism financing. However, despite having submitted many financial intelligence reports to LEAs, none of those reports have led to TF prosecutions. Hence, the FRC analysis and disseminations support operational needs of competent authorities to a limited extent.
- e) The limited use of FRC's financial intelligence and other information by LEAs to identify and investigate potential ML, TF is of concern. Both the FRC as well as LEAs have not fully realised the potential of the POCAMLA. The FRC has not utilised its powers to freeze any accounts to prevent dissipation of funds in respect of ML/TF. On the other hand, the AT established that the reports provided by the FRC spontaneously or upon request have primarily been used for investigation of predicate offences and tracing of proceeds of crimes only.
- f) There are inter-agency platforms which facilitate coordination and exchange of information in Kenya. The FRC participates in different multi-agency Task Forces (MAT, NTF, NCTC, etc) to support investigations in relation to financial crimes.
- g) The FRC offices have adequate measures for physical, personnel and information security. The FRC requires more human resources to assist in the optimal performance of its core functions, especially to develop financial intelligence into either tactical or strategic reports. AT has noted the positive steps made by the FRC on the ongoing recruitment processes for additional human resources.

Immediate Outcome 7

- a) Kenya has demonstrated the ability to identify and investigate ML. However, this is not done as a policy objective, but as a consequence of identification of potential ML activity while investigating predicate offences. Authorities have not demonstrated a proactive approach to ML and have not conducted a stand-alone ML investigation, as all ML investigations have been initiated within the framework of existing investigations into predicate offences.
- b) Kenya prioritizes predicate offences over ML. Consequently, number of investigations and prosecutions of proceeds-generating predicate offences are significantly higher than those of associated ML.
- c) Kenya prioritises recovery of proceeds or benefits of proceeds of crime and prosecution of associated predicate offences, but not ML, as in some cases where there could have been successful investigation and prosecution of ML based on circumstances provided to support recovery cases, only recoveries or other alternative measures were pursued instead of the ML activity.
- d) For the few ML cases pursued, investigations have been well conducted, but have not resulted in successful prosecutions mainly because recovery of proceeds is prioritised over ML prosecution.
- e) The capacity of the courts in Kenya to adjudicate ML cases has not been fully tested or explored owing to the limited number of ML prosecutions, compared to prosecution of associated predicate offences and recoveries.
- f) For the limited number of ML cases pursued, Kenya does not categorize the different types of ML, making it difficult to apply a RBA and prioritise identification, investigation and prosecution of high-risk types of ML.
- g) Kenya did not have a conviction on ML in the review period. In view of this, it is not possible to assess whether sanctions are dissuasive, proportionate and effective.

Immediate Outcome 8

- a) Kenya pursues confiscation as a policy objective, as evidenced by the establishment and empowerment of the Assets Recovery Agency (ARA) under the POCAMLA and subsequent amendments to the POCAMLA to make it independent and only report to the AG on matters of Policy. However, there is still need to develop a standalone policy objective on confiscation to ensure that competent authorities, like LEAs and ODPP also adopt the same policy objective.
- b) Kenya prioritises financial investigations mainly in cases of corruption, economic crimes, fraud and forgery, for purposes of recovery of proceeds of crime. It has had some success in the recovery of proceeds of crime and instrumentalities of crime predominantly relating to the predicate offences of corruption and theft or misuse of public funds and resources, tax offences, drugs and narcotics trafficking, fraud and forgery where proceeds of crime are concerned, and trafficking in drugs, trafficking in persons and in wildlife trophies, where instrumentalities are concerned.
- c) Kenya has good domestic coordination between ARA and LEAs for recovery purposes, but there has been limited pursuit of criminal proceeds located abroad.
- d) Kenya does not have a system in place to manage seized assets in a manner designed to

maintain value pending confiscation.

- e) Kenya has not effectively detected and curtailed cross-border movement of cash and BNIs, consistent with its geographical and economic position and importance to the region.
- f) Kenya has achieved results in recoveries of the proceeds of crime from predicate offences of corruption and theft of public funds and tax evasion, while they have a limited level of achievement in other high-proceeds generating predicate offences like drug trafficking, human trafficking, wildlife crime and forgery and fraud (for which majority of cited cases were in actual fact corruption cases).

Recommended Actions

Immediate Outcome 6

- a) Competent authorities should develop mechanisms and capacity to enhance access and use of the financial intelligence to identify and develop evidence, and trace criminal assets linked to ML, associated crimes and TF.
- b) FRC should make full exploitation of the Border Currency Declaration and Cash Transaction Reports submitted to produce financial intelligence reports for ML, predicate offence and TF investigations.
- c) FRC should track the extent of the use of its disseminations and other financial intelligence reports in ML, TF and predicate offence investigations and prosecutions, and seek feedback to improve its analytical products to meet the operational needs of LEAs.
- d) FRC should consider registration on the goAML platform of high-risk sectors such as real estate as also a priority in order to expand the source of information to enrich its financial intelligence packages.
- e) Competent authorities should enhance inter-agency cooperation and exchange information so that it translates into successful investigation of ML, predicate offences and TF.

Immediate Outcome 7

- a) Kenya should prioritize and pursue the identification and investigation of possible ML activity in its different types as a policy objective.
- b) Kenya should conduct more training for stakeholders in the criminal justice system to enable them to build expertise in detecting, identifying, investigating, prosecuting and adjudicating the different types of ML adequately.
- c) ML activities/types identified to be high risk should be prioritised for both investigation and prosecution, meaning there would be a more RBA by the authorities to ML interventions.
- d) Concrete steps should be taken by the Kenyan authorities to ensure that there is consistent consideration of ML investigation, including through parallel financial investigations with all predicate offences where, during an investigation, there is evidence of laundering of the proceeds or connection to a financial benefit. LEAs should fully utilise the powers provided to them to investigate cases of laundering of proceeds beyond the predicate offence.
- e) Kenya should facilitate the Judiciary to ensure that there is effective adjudication of ML and associated predicate offences through effective, proportionate and dissuasive sanctions of all cases which meet the criminal standards for prosecution.
- f) Kenya should build on its understanding of the different types of ML offences and avoid opting for alternative measures where there is clear evidence of ML activity.

Immediate Outcome 8

- a) Kenya should put in place a standalone policy and strategy to broaden the recovery of proceeds of crime objectives beyond the ARA to all LEAs and ODPP. Such a strategy should also broaden the scope for recovery of proceeds of crime beyond corruption, drug trafficking and wildlife or environmental crimes to all predicate offences. In addition, it should provide for adequate resourcing of all relevant competent authorities or LEAs to implement the

strategic plan and continue to improve recovery of proceeds of crime, including instrumentalities.

- b) Kenya should enhance its financial investigations to prioritise tracing of proceeds and conduct parallel financial investigations for associated predicate offences to widen the scope of recovery of proceeds or benefits from a crime.
- c) Kenya should pursue identification and tracing of proceeds, instrumentalities and property of equivalent value located abroad, and have it confiscated, and repatriated, or shared.
- d) Kenya should pursue recovery of property of equivalent value, where direct recovery of tainted property is not possible or realisable.
- e) Kenya should put in place a system/mechanism to manage seized assets, with a view to maintaining value until confiscation.
- f) Kenya should broaden its scope of confiscation of recovery of instrumentalities of crime beyond drug and human trafficking.
- g) Kenya should continue to improve the effectiveness of its system of detection, prevention and recording of cross-border movement of cash and BNIs, including where there is suspicion of ML/TF on legitimately declared funds.
- h) There should be mechanisms between LEAs and the ARA to coordinate prioritising of asset recovery in the widest range of cases.

103. The relevant Immediate Outcomes considered and assessed in this chapter are IO.6-8. The Recommendations relevant for the assessment of effectiveness under this section are R.1, R. 3, R.4 and R.29-32 and elements of R.2, 8, 9, 15, 30, 31, 34, 37, 38, 39 and 40.

3.2 Immediate Outcome 6 (Financial Intelligence ML/TF)

3.2.1 Use of financial intelligence and other information

104. **Competent authorities in Kenya (DIC, KRA, EACC, NIS and FRC) access and use financial intelligence to help investigate predicate crimes, ML and TF and the identification of criminal assets to a limited extent. LEAs make limited use of financial intelligence reports from FRC and other sources to initiate new cases or support existing investigations of ML, TF and various predicate offenses such as corruption, drug trafficking, wildlife crimes among others. The financial intelligence from the FRC is primarily used by ARA, DCI, NIS, EACC and KRA. The ARA and KRA have registered some benefits from the use financial intelligence to identify and trace criminal assets, and recover tax. Also, to a large extent, competent authorities access financial intelligence and relevant information under the MAT framework which is a coordination and information exchange platform.**

Access and Use of Financial Intelligence by the FRC

105. FIs and DNFBPs are required to file STRs immediately and/or within seven working days of becoming aware of suspicious activities or transactions which indicate possible money laundering. In addition, they are also required to submit reports of all cash transactions exceeding US\$ 10,000 or its equivalent in any other currency to the FRC on a weekly basis. STRs are the main source of financial intelligence, majority of which come from the banking sector. The Cash Transaction Reports (CTRs) enable FRC to capture information of individuals and entities transacting in large amounts of cash.

However, lawyers have not yet started implementing the requirement to submit STRs and hence FRC's access to financial intelligence does not extend to this sector. This is a concern considering the findings in the NRA report about the high vulnerability of lawyers to ML. In addition to this, FRC also receives cross-border currency declaration reports in excess of USD10,000 or its equivalent. In order to enrich the financial intelligence, FRC also seeks financial information from other competent authorities as detailed in Table 3.1 below.

Table 3.1. Other Sources of Information Accessed by FRC

Source/ Institution	Type of Information	Mode of Access
Business Registration Services	Basic and BO information	Online
Department of Immigration	Travel history	Manual
Kenya Revenue Authority	Customs records and tax related information	Manual
National Transport and Safety Authority	Vehicle Ownership records	Online
Lands Ministry	Land ownership records	Manual
Directorate of Criminal Investigations	Criminal records	Manual
Integrated Population Registration Service	Citizenry registration records	online

106. Kenya has an online e-citizen service portal that allows citizens to register and access government services. The FRC uses this portal to access and verify information such as national identities and/or passports. FRC has also access to companies' basic and beneficial ownership information from the Business Registration Services (BRS), Customs records and related tax status information from the Kenyan Revenue Authority (KRA), vehicle ownership records from National Transport and Safety Authority (NTSA) and deeds records from the Lands Ministry.

107. FRC also receives information either on request or spontaneously from foreign counterparts to support its financial intelligence work. Between 2017 and 2020, the FRC made 13 requests for information to foreign FIUs and it received 41 requests from foreign FIUs. The FRC received feedback from counterpart FIUs, acknowledging information shared. For example, the UK provided feedback indicating how useful the financial intelligence was. However, the feedback did not provide detailed information indicating the value or how the financial intelligence was used, for example to trace assets or confirm transactions or even prosecute criminals.

108. After analysis of the reports and information received, the FRC develops financial intelligence packages and disseminates these reports to LEAs for further consideration. The reports provide an indication of suspected predicate offences. The total number of disseminations for the period 2017-2020 amounted to 609 and more than half of them were sent to DCI (30%) and NIS (28%) (see Table 3.3). The higher percentage of disseminations to NIS and low percentage of disseminations to EACC is not consistent with the findings of the NRA report. The NRA report found corruption as one of the top proceeds generating predicate offences and the TF overall vulnerability was rated as medium low. However, the authorities explained that FRC disseminates financial intelligence information to multiple LEAs. In addition, the FRC indicated that EACC receives reports relating to public revenue only and have identified low number of STRs that are related to corruption whereas DCI & NIS get all kinds of information concerning all other types of crimes. However, the financial intelligence reports did not trigger any TF prosecutions as all the reports were eventually found out to be ML related (and not TF related).

Table 3.3: FRC Disseminations to LEAs- 2017-2020

Dissemination per Agency 2017-2020					
	2017	2018	2019	2020	Total
DCI	17	13	87	66	183
EACC	15	2	45	28	90
NIS	1	13	82	75	171
KRA	0	0	41	38	79
ARA	0	0	45	41	86

109. The FRC receives feedback on financial disclosures from LEAs which gives it an idea of the usefulness of the reports. The AT were provided with statistics on the status- how many investigations on predicate offences, ML or TF had been initiated or proceeds of crime traced and seized by the DCI, EACC, KRA, ARA, as a result of the reports received from the FRC. Overall, the feedback indicated that KRA and ARA make good use of the intelligence received from FRC.

Access and use of financial Intelligence by LEAs

110. Competent authorities in Kenya (DIC, KRA, EACC and NIS) access and use financial intelligence to help investigate predicate crimes, ML and TF and the identification of criminal assets to a limited extent. In relation to financial intelligence, the FRC has a focal contact provided by each agency to which it submits its financial intelligence. For some agencies like the DCI, the dedicated focal contact is based at the Headquarters. The duty of the focal contact is to circulate to relevant desk officers (whether stationed at the headquarters or in the field) all disseminated intelligence from the FRC for their action.

Table 3.4: Number of requests made by LEAs to FRC: 2017-2020

	2017	2018	2019	2020	Total
ARA	0	0	2	29	31
DCI	0	2	17	28	47
EACC	0	4	2	0	6
KRA	0	0	14	46	60
NIS	104	90	154	186	534
TOTAL	104	96	189	289	678

111. Competent authorities in Kenya receive proactive financial disclosures (spontaneous reports) and reactive financial disclosures (in response to request for information) from the FRC. Tables 3.3 and

3.4 provide summaries of the spontaneous and reactive reports respectively. Furthermore, the Multi-Agency Team (MAT) framework is one of the multi-lateral avenues that the FRC uses to collaborate and provide information to other competent authorities and vice versa. Through enhanced collaboration and coordination, the members of MAT share intelligence and information on a real time basis, reducing the time and bureaucracies that often constrain effective investigation and action. MAT undertakes joint investigations and operations enabling the pooling of resources, synergy and avoiding duplication of work (see IO.7).

112. Based on the statistics provided in these Tables, it is evident that LEAs do not regularly request and use financial intelligence from the FRC to initiate new cases or support existing investigations in relation to ML, TF, associated predicate offences or to trace criminal assets consistent with the risk profile of the country. During the period 2017-2020, the FRC disseminated 609 to LEAs and NIS. In addition, over the same period, LEAs and NIS made 678 requests to the FRC (see Tables 3.3 and 3.4). Majority of the requests came from NIS (78%) out of which 14% related to TF while KRA made 8% tax related requests and less than 1% of the request were submitted by EACC. It is a bit surprising that majority of the requests relating to ML emanated from NIS and not LEAs. While 14% of the requests were in relation to TF, the actual TF investigations were relatively low (see IO.9). Furthermore, with reference to the findings of the NRA (see chapter 1), the top four predicate offenses for which LEAs are requesting financial intelligence from the FRC seem to be generally not in line with the proceeds generating crimes that cause the most significant risk to the Kenyan economy [see Table 3.4(a)] below.

Table 3.4a. Requests from Competent Authorities to FRC

	2017	2018		2019	2020	Total requests	As a % of Total
ARA	0	0		2	29	31	4.6
DCI	0	2		17	28	47	6.9
EACC	0	4		2	0	6	0.9
KRA	0	0		14	46	60	8.8
NIS	104	90		154	186	534	78.8
Total	104	96		189	289	678	100

113. Table 3.4(b) provides comparative data on number of requests against number of investigations of predicate offences. It is evident from this information that LEAs do not routinely request for information to support their ongoing investigations.

Table 3.4(b): Comparative Data on Requests and Investigations (2017-2020)

	No of Requests	No of Investigations of Predicate Offences	Requests as a Percentage of Investigations
EACC	6	948	0.68%
KWS	0	1,357	0%
KRA	60	424	14%

114. Competent authorities provide feedback on financial intelligence received from the FRC. During the period under review, the EACC received 100 disseminations from the FRC (2017 up to 2021) with a conversation rate as per Table 3.5 below. The EACC provides feedback through official

letters to FRC on the progress of the disseminations. The KRA indicated that tax recoveries increased and were able to recover Kshs. 240,695,670 by using financial intelligence received from the FRC under the review period. However, the feedback shared with the assessors in relation to the years 2019 and 2020 when they started receiving and utilizing financial intelligence from FRC, does not provide clarity on the usefulness of the information with respect to investigating ML/TF and predicate offences or even trace assets.

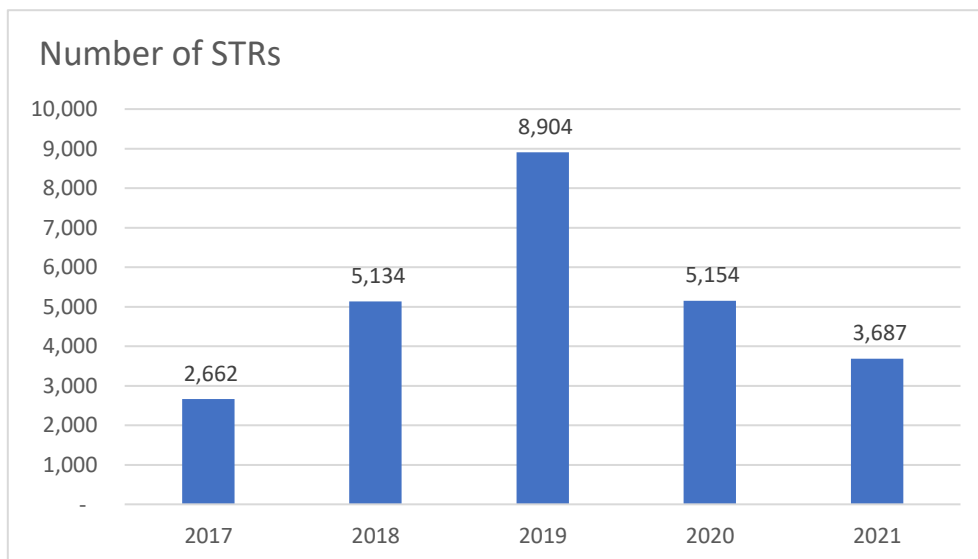
Table 3.5: Results of Disseminations to EACC

Category	Number	Amount where available
Investigated files opened	81	
Not yet commenced	7	
Cases prosecuted	7	
Cases prosecuted with ML count	4	
Civil matters filed	7	Kshs 400 million
Cases concluded in court	2	Kshs 175 million
Cases taken by DCI	11	

3.2.2 STRs received and requested by competent authorities

115. FRC introduced goAML system in 2019 and registration of reporting institutions is being implemented in phases. All FIs have been registered, however, majority of DNFBPs are yet to be connected. The FRC indicated that since the implementation of the goAML system and feedback sessions to reporting entities, the quality of reports, particularly from banks, has improved. There is also a reduction in defensive reporting during this period of reporting. FRC received a total of 25,541 STRs over the period 2017-2021. From 2017 there had been a steady increase in the number of STRs submitted annually but the number dropped significantly in 2020 and 2021 by 42% and 28% respectively. The drop is attributed to the reduction in defensive reporting prior to implementation of the go-AML system.

Chart 3.1: Number of STRs- 2017-2021



116. Over 95% of the STRs were filed by financial institutions, with nearly 90% coming from banks only. In addition, out of the DNFBBs, only 2 real estate agents and 1 casino submitted 2 STRs and 1 STR respectively over the 4-year period (see Table 5.1). This is not consistent with the risk profile of the DNFBBs and Kenya in general. Furthermore, lawyers which were identified to be highly vulnerable to ML in the NRA report are currently not designated as reporting persons given that the Courts had suspended implementation of POCAMLA provisions relating to lawyers at the time of the onsite.

Table 3.6: STRs, Disseminations and Investigations related to TF

	2017	2018	2019	2020	Total
No. of STRs	234	103	283	68	688
Terrorism Financing Disseminations	8	4	20	11	43
Terrorism Financing and Human Smuggling Disseminations	0	0	0	1	1
Terrorism Financing and Money Laundering Disseminations	0	0	0	1	1
TOTALS Disseminations	8	4	20	13	45
TF investigations from FRC reports	0	0	0	0	0

117. Although FRC indicated that the quality of STRs has improved, the results of disseminations do not support this view point. For instance, the FRC received 688 STRs relating to TF during the period 2017 to 2020 (see Table 3.6 below). Some of the indicators forming the basis of suspicion included; receiving money from high-risk countries, funding of accounts by unrelated third parties followed by immediate transfer of funds to unrelated accounts followed by subsequent cash withdrawals, unexplained donations to young people from disadvantaged communities to facilitate their travel to jurisdictions known to be sympathetic to terrorists. Out of these STRs, FRC submitted 45 disseminations out of which 19 investigations were initiated. However, ODPP determined that these were ML cases rather than TF. This essentially means that none of the FRC disseminations resulted into TF prosecutions.

118. FRC held a workshop on STR reporting in 2016 (prior to introduction of goAML) whose objectives included ‘improving the quality of reports by reporting institutions and building capacity to detect suspicious transactions’. Subsequent to this, FRC issued ‘*Guidance to Reporting Institutions on Suspicious Transaction and Activity Reporting*’ in 2017. The Guidance included sector specific indicators or red flags to assist reporting institutions detect suspicious transactions. These efforts have been instrumental in enhancing the quality of the reports. However, the document has not been updated since then to take into account emerging indicators and typologies. In addition, the guidance for STR reporting does not include specific TF related typologies. Separate indicators could support the work in FIs and DNFBBs to better identify possible TF related activities in transactions carried out by their customers. Overall, the low number of STRs from DNFBBs, some of which were identified as being highly vulnerable to ML raises concerns on whether the reporting entities do make use of these guidelines.

119. When the goAML system was introduced, the FRC hosted training sessions for reporting entities on the registration and submission of reports. Also, the FRC hosts periodic feedback sessions as well with reporting entities on reports submitted. One of the issues covered in the sessions is incorrect reporting. The FRC indicated, however, that incomplete STRs are automatically returned to the REs and do not form part of FRC’s financial intelligence holdings until and unless they are returned completed (automatic process on goAML). The CDD and bank statements are received at submission of the STR on goAML. In addition, s24 (e) (i) provides for the FRC to instruct any

reporting institution to provide it with such other or additional information or documents to enable the centre to properly undertake its functions under this Act.

120. In addition to STRs, FRC receives cross border currency declaration reports from the KRA for conveyance of currency in and out of Kenya in excess of USD 10,000 or its equivalent in line with the requirements of POCAMLA. The currency declaration reports contain information on the travellers, means of transport, destination of travel and amount in various currencies. Table 3.7 below shows the number of cross border currency declaration reports received by the FRC.

Table 3.7: Number of Cross-Border Currency Declarations: 2017-2021

Year	2016	2017	2018	2019	2020	2021
Total	61	177	209	310	480	98 (Jan- Mar)

121. The analysis of the cross-border currency conveyance revealed that between 2017 and 2021, a total of USD 1.85 billion, Euro 6.97 million, GBP 7.80 million and Ksh. 482,84 million was conveyed outward. For the same period, total inflows were USD 455.35 mil, EURO 34.34 mil, GBP 11.69 mil and Ksh 482.84 mil. The main port of entry was JKIA. The authorities explained that the huge cross-border physical movement of cash is attributed to the robustness of Kenya's financial system as many financial institutions across the region channel their financial needs through the Kenyan financial institutions within the region. For example, Kenyan banks engage cash in-transit courier companies to move physical cash to their foreign branches. Also, several international humanitarian agencies, NGOs, Agencies and Embassies based in Kenya move physical currency within the region. Cash is preferred to electronic transfer to address liquidity challenges in those jurisdictions. While this may be a legitimate purpose of the USD outflow, the same reason cannot apply in relation to USD inflow and movement of Kenyan Shillings in both directions. In view of this, the AT is of the view that the FRC should still analyse the data for strategic purposes to confirm the validity of the source and destination as well as purpose of the funds. As noted in IO.1, the AT have concerns that these reports are not sufficiently analysed to develop patterns or linkages to any possible predicate offences, ML or TF. Table 3.8 shows the USD to be the major currency conveyed in and outside the country by travellers as tabulated below:

Table 3.8: Values of Cross-Border Currency Declarations: 2017-2021

Cross Border Currency Declarations										
	2017		2018		2019		2020		2021	
	In (ml)	Out (ml)	In (ml)	Out (ml)	In (ml)	Out (ml)	In (ml)	Out (ml)	In (ml)	Out (ml)
USD	51.42	0.036	175.69	42.41	135.5	582.51	66.24	438.92	26.49	790.98
EURO	8.98		5.14	0.85	15.49	3.02	2.46		2.37	3.09
GBP	0.2		0.019		1.14	-	0.031	1.9	10.3	5.9
KES	56.9		74.,44	37.,95	297.36	13.68	54.15		0.03	0.38

122. Furthermore, reporting institutions file reports of all cash transactions exceeding US\$ 10,000 or its equivalent in any other currency to the FRC on a weekly basis. The Cash Transaction Reports (CTRs) enable FRC to capture information of individuals and entities transacting in large amounts of cash. Reporting institutions are required to capture details of transaction dates, identification of clients, whether

debits or credits, account holders, amounts transacted and currency. Even though the FRC has indicated that the CTRs are incorporated in the analysis process and form part of the financial intelligence products shared with competent authorities, assessors are of the view that the FRC is not fully exploiting CTRs for tactical analysis to proactively detect ML, predicate crimes and TF. Table below shows the CTRs received by the Centre since 2017.

Table 3.9: Number of CTRs: 2017-2020

Year	2017	2018	2019	2020	Total
CTRs received	3,335	3,895	3,995	3,596	14,821
No. of transaction	627,563	706,808	748,572	718,001	2,800,944

123. While the FRC has a rich source of obligatory reports to draw from for its analysis, there are some notable and important gaps. The number of STRs filed by some sectors including risky DNFBPs is negligible. In addition, the FRC receives the cross-border currency declaration reports on a monthly basis via email and are not automatically transmitted on goAML by KRA. Timelines for both these processes for submission might cause delays in relaying the two types of reports and thus have an impact on timeous analysis and dissemination of relevant financial intelligence to LEAs.

3.2.3 Operational needs supported by FIU analysis and dissemination

124. **The FRC produces financial intelligence products which are disseminated to competent authorities to support their operational needs, which include the investigation and prosecution of ML/TF and predicate offences, as well as asset tracing/forfeiture, to a limited extent.**

125. As highlighted above, the FRC has implemented the goAML system to receive STRs, communicate with reporting entities and to assist with analysis of submitted reports as they are centrally stored in the goAML database. The STRs are accessed by the FRC's Analysis and Reporting Department, which is delegated with the analysis function. Currently, the Analysis Department is under resourced with the Intelligence and Research section having no capacity. However, the AT recognises the ongoing recruitment process undertaken by the FRC to capacitate the Analysis Department, including the research team. The Analysts utilise the analytical systems and manual interventions to ensure that all STRs are processed.

126. The FRC offices have adequate measures for physical, personnel and information security. The FRC implements the ISO 27001 and the ICTA-3.002:2019 information security standards to improve its information security. The standards provide for the best-practices in information security looking at confidentiality, integrity and availability. The standards also ensure that only authorized persons have access to the information and authorized persons or systems can change information. The Analysis Department of the FRC is segregated from the other Business Units and access to the operational space is restricted to those tasked with analysis work. For exchange of information, the FRC has implemented the goAML system and, in addition, utilises encrypted email channel with a dedicated email address to handle requests and share information and where necessary Intelligence Reports are sealed and disseminated physically and only **authorized/designated** persons are permitted to deliver and receive them based on the Information Security Policy and Analysis Manual.

127. FRC prioritizes STRs for analysis and the analysis process uses available and obtainable information to identify specific targets, to follow the trail of particular activities or transactions, and to determine links between those targets and possible proceeds of crime in ML, predicate offences and TF. In addition, a risk matrix is used to prioritise cases once an STR is assigned to the relevant Analyst. The analysis function, under S.24 (r) & (s) of POCAMLA has indirect access to databases maintained by

supervisory bodies, monetary authorities, financial regulatory authorities, fiscal or tax agency or fraud investigation agencies to enrich the STR received. In addition, the FRC signed MOUs with other relevant competent authorities in Kenya to facilitate access to the widest possible range of information. FRC decides which LEAs receive particular operational analysis reports, with DCI (police) being the more regular recipient of operational intelligence disseminations. The second largest recipient is NIS. The same report may also be disseminated to several authorities if the case is relevant and is within their scope of competence. The number of disseminations shows a significant rise from 28 in 2018 to 300 in 2019 and a drop to 248 in 2020 (see Tables 3.3 and 3.10). The growth in 2019 could be attributed to a 73% increase in the number of STRs received in that year.

128. LEAs seek financial intelligence through requests to the FRC to assist them perform their duties in development of evidence and tracing of criminal proceeds related to ML, associated predicate offences and TF to support their investigations. Table 3.4 above shows the number of requests made by LEAs to FRC. The financial information requested includes bank account details, financial transactions etc. Generally, all the requests are responded to within an average time of 5 to 10 days depending on the nature and complexity of the request. As noted above, NIS is the highest requestor, with a slow increase each year by ARA, DCI and KRA. The EACC has only sent 6 requests to the FRC under the period of review.

129. FRC continuously holds meeting with LEAs to discuss operational matters and in particular complex and high priority matters and/or to offer clarifications on disseminations. This is also conducted through joint operations meetings carried out between the FRC and other law enforcement agencies to enhance access to financial intelligence which assists in investigations and tracing of criminal proceeds related to ML and associated predicate offences and TF. This has assisted in providing clarity on reports before dissemination to enable LEAs to effectively use the financial intelligence in their investigations.

Table 3. 10: Dissemination to LEAs 2017-2020

	2017	2018	2019	2020	Total
Total reports	33	28	300	248	609

130. Competent Authorities use the information disseminated by the FRC to execute their respective mandates. For example, during the period under review, the EACC indicated that of 100 reports disseminated by FRC, the Commission had acted on the reports as per Table 3.5 above. Once investigation file has been opened, several elements might be exhibited where a case might be pursued as a Criminal or Civil matter or both or be split into several files. The total tax assessments raised by KRA upon utilization of financial intelligence from FRC in investigation/tax audit amounted to Kshs.29,002,700,000 including what is pending in the legal processes, while the revenue collected was Kshs. 240,695,670 (see Table 3.12). Most of the cases are still in progress but at the end of the investigations and audit processes, the Authority expects to collect an estimated amount of Kshs 211,055,276,704. These statistics relate to the years 2019 and 2020 when KRA started receiving and utilizing financial intelligence from FRC. The low amount of collection is attributable to delay due to the legal processes where 98% of the assessed tax is held.

131. ARA has provided feedback that they were able to recover Kshs 111 million and several properties suspected to be purchased with tainted funds.

Table 3.11: ASSET CONFISCATED BY ARA- 2018 to 2020

Summary Recoveries by Assets Recovery Agency Resulting from FRC Disseminations from January 2018					
	Property	Vehicles	Restricted (Kshs)	Preserved (Kshs)	Forfeited (Kshs)
2018	23 properties	4	200,000	66,000,000	32,000,000
2019	42 properties	3 1	4,100,000	2,139,000,000	79,000,000
2020	13 Properties	2 8	5,900,000	4,795,000,000	
Total	78 Properties	63	20,200,000	7,000,000,000	111,000,000

Table 3.12: TAX RECOVERIES BY KRA- 2019- 2020

Summary Estimates by Kenya Revenue Authority Resulting from FRC Disseminations- January 2019 to December 2020			
Period	Description	Total assessments	Tax recoveries
Jan 2019 - Dec 2019	Revenue Estimated	23,000,000,000.00	240,695,670
Jan 2020-Dec	Revenue Estimated	6,000,000,000.00	
MAT 1 - 28/4/2021	Multi-Agency Task Force Review of Targeted Large Taxpayers	1,500,000.00 and	
MAT 2	Multi-Agency Task Force Review of Targeted Large Taxpayers	1,200,000.00 Bank Guarantee	
Total		29,002,700,000.00	240,695,670.

132. FRC conducts strategic analysis which uses available and obtainable information, including data provided by other competent authorities, to identify ML and TF trends and emerging risks. Some of the strategic reports are shared with the NIS, DPCI, KRA and DCI. In one instance, the report was shared with the relevant Ministry to provide recommendations into a policy document on cash transactions in Kenya. Strategic reports produced are for a targeted audience, however, the authorities indicated that these reports are also generally shared with reporting entities during trainings, awareness raising and one-on-one sessions, including the engagement with the media.

133. Under POCAMLA, the FRC has powers to request additional information from reporting institutions, freeze funds, get monitoring and tracking orders in order to get additional information on financial transactions which can be shared with competent authorities. However, it was noted that the FRC and LEAs have not exploited the sections that deal with the freezing and monitoring of accounts in any investigations related to ML/TF and related predicate offences. However, the authorities indicated that the FRC and LEAs are currently able to get the information required without the need to resort to S. 125 of POCAMLA with regard to obtaining monetary orders.

134. Financial sector supervisors (CBK, CMA and IRA) indicated that they use financial intelligence information to support preparations for onsite inspections of reporting entities. Prior to an onsite visit, the

sector supervisors request relevant information from the FRC regarding the reporting entity., which helps them to understand the type, volume, and quality of STRs submitted, the extent to which the entity is aware of its reporting obligations, and to assess its level of compliance and detect potential misuse. The information is used to plan and scope inspections, undertake targeted inspections, understand and update AML/CFT profiles of institutions. For example, in 2017 when CMA was assessing the level of AML/CFT compliance of its licensee, it requested FRC on information amongst others, number of market intermediaries that had registered with it. The information requested by CMA from FRC and vice versa is kept confidential in line with confidentiality undertaking outlined in the MoU between FRC and the CMA.

135. Overall, the use of FRC information to initiate new cases or support on-going investigations has been relatively low despite the increase in disseminations and requests for information from FRC (see IO.7, IO.8 and IO.9.). There are opportunities for FRC and LEAs to further consider how the disseminations could be even better developed in order to effectively increase the benefits in terms of number of investigations of predicate offences, ML and TF as well as tracing and recovering proceeds of crime. There is scope to increase utility of financial intelligence products through comprehensive analysis of international funds transfers, large cash transactions and cross-border currency declarations which can be used for detection and investigation of ML, predicate offences and TF.

3.2.4 Cooperation and exchange of information/financial intelligence

136. **The FRC and the LEAs cooperate and exchange financial intelligence and other relevant information effectively to identify investigative leads, develop evidence in support of investigations, and trace criminal proceeds related to ML/TF and associated predicate offenses.** Joint task teams, to which FRC is a member, are created to address specific types of cases. These committees or teams are operational in nature. FRC is a member of the Multi-Agency Team (MAT) established to combat high level corruption and economic crimes and includes several other LEAs.

137. Meetings of joint operations are carried out between the FRC and other LEAs to enhance access to financial intelligence which assists in investigations, development of evidence and tracing of criminal proceeds related to ML, associated predicate offences and TF.

138. The FRC has also entered into a number of bilateral arrangements with competent authorities for exchange of information to facilitate access to the widest possible range of information. This includes MOUs with Supervisors such as the Central Bank of Kenya, Capital Markets Authority, Insurance Regulatory Authority and LEAs such as the EACC and KRA. In addition, the FRC has entered into arrangements with other agencies to facilitate access of databases that assist with profiling during analysis, namely BSRs, Immigration, Lands registry and Criminal records and the National Transport and Safety Authority.

139. **Cooperation between FRC and LEAs along with the secure exchange of financial intelligence is effective.** Operational intelligence is shared securely between the FRC and LEAs through the encrypted email application and where necessary, physical delivery of the reports via a dedicated resource. All information is approved before dissemination and dedicated resources utilize a secure mechanism to disseminate information to competent authorities upon request and spontaneously. The FRC is still to on-board LEAs and Supervisory Bodies on goAML to extend this secure mechanism for exchange of information.

140. The FRC has submitted an unconditional application for membership to the Egmont Group and is fully engaged in the application process. In addition, the FRC is a member of the Heads of Analysis Forum (HoAF) for ESAAMLG members, where exchange of information is also facilitated. The Forum was approved by the Heads of FIUs during the ESAAMLG Senior Official Task Force Meetings.

Exchange of information with other FIUs upon request and spontaneously is through the same mechanism of encrypted emails. The table below shows the response time taken to respond to incoming foreign requests. However, the AT noted the low numbers in information exchange between Kenya and its neighbouring countries and/or ESAAMLG member countries.

Overall conclusion on IO.6

141. The FRC obtains a variety of obligatory reports and possesses the tools and has access to additional information that allows it to analyse such reports and effectively produce operational financial intelligence as well as strategic reports. However, there are significant gaps in the financial intelligence produced by FRC. There are low levels of suspicious transaction reporting by some of the DNFBNs, some of which were identified as highly exposed to ML risks. KRA and ARA have used FRC' financial intelligence to recover tax and confiscate properties, vehicles and funds respectively. However, the rest of competent authorities do not routinely use financial intelligence to support their ongoing investigations, or proactively identify ML and TF offences. There have not been successful ML prosecutions, TF investigations and prosecutions arising from financial intelligence from FRC which could be indicative of the need to improve financial intelligence products.

142. **Kenya is rated as having a low level of effectiveness for IO.6.**

3.3 Immediate Outcome 7 (ML investigation and prosecution)

Background

143. In Kenya, the main law enforcement authority responsible for the investigations of criminal offences is the Kenya National Police Service (NPS) established under Article 243 of the Constitution of the Republic of Kenya and operationalised by the National Police Service Act, CAP 84. The NPS has three main service pillars, being: Kenya Police Service (KPS) (public safety and security), Administration Police Service (APS) (protective and border security) and Directorate of Criminal Investigations (DCI) (criminal investigations). KPS and APS are headed by Deputy Inspector Generals of Police, while the DCI is headed by a Director. DCI was established under S. 28 of the NPS Act. It has the general mandate to investigate ML in Kenya under the provisions of S. 35 (b) of the NPS Act. The DCI is headed by the Director- DCI, deputised by Deputy Directors- DCI and has seven (7) Sections headed by Directors, being: Complaints; Legal and Crime Affairs; Operations; Investigations Bureau; Anti-Narcotics; Anti-Terrorism Police; and the Forensic Services. The DCI also houses the National Central Bureau of INTERPOL Kenya, headed by an Officer in Charge. DCI staff are drawn from the KPS and APS, and given further specialized training, as may be required, before deployment. ML investigations in the DCI are undertaken by the Financial Investigations Unit (FIU), a specialised investigations unit under the Investigations Bureau Section. It investigates ML as a crime in itself from complaints or referrals, or as a support service for other specialized units such as the Anti-Narcotics Unit or DCI officers that have been attached to KRA, Asset Recovery Agency (ARA) or deployed at regional and county level. DCI maintains an officer in charge at every county and region across the country to investigate ML cases, but complex cases are referred to the Headquarters and handled by the 28 highly trained and skilled officers in the FIU.

144. In addition to the DCI, the ARA and the EACC also investigate ML cases, as their officers are granted powers of a police officer under their respective founding laws (POCAMLA and EACC Act). The DCI has also seconded officers on deployment to the ARA, for purposes of investigating ML.

3.3.1 *ML identification and investigation*

145. Kenya authorities identify and investigate ML to some extent. The main sources of identification of potential ML activity in Kenya, in order of prevalence, are walk-in public complaints, disseminations from the FRC and anonymous complaints lodged in the complaints' boxes. Other sources are intelligence, whistle-blowers (see Box 3.1, below, social and mainstream media, Auditor General Reports, Parliamentary Committee Reports, Reporting Hotline (DCI Fichua) and Task Forces. The sources of identification of ML activity are similar to those of the EACC, but the ARA mainly utilizes referrals, FRC disseminations and its own intelligence, to a lesser extent. As reported in Paragraph 118 above, disseminations from FRC and responses to requests from the FRC only form a part, and are not the predominant source of information for identification and investigation of ML activity (609 disseminations from 2017 – 2020, inclusive – see Table 3.3 above). However, though the prevalence is low, in instances where disseminations have been made or financial intelligence sought and received, the quality of the information has been good and commendable (for instance, of the 100 disseminations to the EACC during the review period, none was rejected and at least 93 are under civil or criminal action, while 7 are still under review).

146. Other competent authorities that suspect ML activity refer such reports to the DCI, as a matter of practice, or to the EACC, if the matter relates to corruption. None of the LEAs demonstrated a concerted effort to identify ML activity, but in most cases, such ML activity is discovered as a consequence of evidence established in the investigation of a predicate offence, especially where parallel financial investigations are conducted. Though the EACC has a Case Prioritization and Allocation Committee, from its terms of reference, potential ML activity is not one of the criteria for prioritization of a case for investigation.

147. The DCI is the main agency for ML investigations, and has the capacity to investigate ML. It has an established specialized Unit called the Financial Investigations Unit responsible for investigation of ML. The Unit has 28 members of well-trained staff, who are all certified fraud examiners. The FIU requires a minimum of 5 years' experience in active economic crimes and fraud investigations to qualify for deployment therein. The officers must also have a recognised degree in a relevant field (as of the time of the on-site 85% of the officers were degree holders) such as law, finance, procurement and others; together with membership of a professional body like LSK or ICPAK. In addition, during the review period, FIU officers underwent various types of relevant trainings in investigating fraud and organised crime; ML; asset tracing, preservation and recovery; intelligence and data analysis; financial investigations; human and narcotics trafficking; and forensic accounting and auditing. In 2014, a guideline on conducting investigations was issued to the Unit. The Unit is based at the DCI Headquarters and handles cases referred to it from the FRC, NIS, individual reports and Crime Research Investigations Bureau. The DCI also has officers attached to different departments of the National Police Service throughout the country who have the capacity to investigate ML, and ML investigations are decentralised throughout the country. However, if a case is deemed complex or of national interest, the FIU at DCI Headquarters can call for the file, and the lower unit (sub-county, county or regional) is obliged to submit it.

148. All cases received by the DCI are directed to the Directorate of Investigations Bureau where the Director allocates the cases to the relevant Unit of the DCI. Complex financial crimes are referred to the FIU to initiate investigation. According to DCI, it is during the course of investigation of these cases that ML can be identified. Therefore, when the investigation commences at the FIU it is not initiated as a ML investigation regardless of the circumstances of the case, but such decision is only made later during the course of the investigation. It would also follow that the FIU does not prioritise identification of ML offences right from the on-set of an investigation which might explain why some of the cases involving elements of ML are never pursued. As also explained under IO 8, the weakness this approach creates in

addition to failure to identify and investigate most of the ML cases is that it poses challenges in securing assets involved with the ML offence right from the on-set of the investigation. According to the DCI, the FIU also initiates parallel financial investigation with every investigation of a predicate offence. From FRC disseminations, DCI reported that during the review period (2017 – 2021) they identified and initiated a total of 20 ML investigations, but it was not clear from the submissions how many had resulted in ML charges. The ODPP has the power to direct the IGP to investigate ML for purposes of prosecution, if they deem it appropriate (Article 157 (6) of the Constitution and Section 5 (4) (c) of the ODPP Act). Such directives were issued in the NYS Cases (1&2) owing to whistle-blower and public information, which resulted in ML charges being preferred. In cases involving two banks, the ODPP directed that charges of ML be added to the charge sheet after further investigations had been conducted. Though the DCI reported that some of the cases of ML were identified when files were referred to the ODPP’s office for consideration and advice, they did not specify how many of the 20 identified cases fell in this category. This demonstrates the capacity of the ODPP to identify ML in serious financial crimes referred to it for consideration by the DCI, but does not explain the low number of ML cases investigated and prosecuted (see Table 3.14, below).

149. Apart from DCI, the EACC and ARA are other competent authorities that conduct parallel financial investigations as a matter of course. EACC conducts ML investigations arising from investigated corruption and related economic crime cases, and has the capacity to do so. The EACC is administered by a 5-member commission headed by a Chairperson and a Deputy Chairperson, with 3 other members, supported by a Secretariat headed by the Secretary to the Commission, who is also the CEO of the Commission. There is a Deputy CEO, and operationally, the Commission is organized into 5 thematic areas, being Enforcement, Prevention, Corporate Services, Field Services and Other Statutory Services. Investigation of ML is conducted under the Enforcement Thematic Area, which has two Directorates, being the Directorate of Investigations and the Directorate of Legal and Asset Recovery. The Directorates are well-staffed with 139 investigators and 21 legal officers; while Legal and Asset Recovery has 33 investigators and 25 legal officers. The investigators in the Legal and Asset Recovery Directorate conduct asset tracing and ML investigations, while those in investigations conduct corruption and economic crime and ML investigations. It is through the Legal and Asset Recovery Directorate that cases of ML are identified and investigated. Such identification might arise from corruption cases under investigation or other economic crimes investigated under the Directorate. The Commission has trained 7 Trainers that conduct on-going training for EACC staff using a tailored financial investigations course, whose main theme is “Follow the Money”. The EACC also has a Corruption Investigations Practitioners’ Guide/Manual, which was revised and improved in 2019 to include reference material for financial investigations. The Manual provides guidance on how to conduct investigation making the approach to investigations standard for EACC officers throughout Kenya. Also, with the EACC, regardless of the circumstances of the case, ML investigations are not initiated at the onset of the investigation but during the course of an investigation when the case is realised to have components of ML. Although the EACC provided figures of ML cases identified and investigated which were a little higher than the other LEAs, increasing the scope of identification of such cases to include scrutinising initial reports filed to determine whether there are aspects of ML would go a long way in ensuring no such would fall on the wayside.

150. ARA conducts parallel financial investigations to trace, seize and preserve potential proceeds of crime involving any kind of proceeds-generating offence, and, consequentially, investigates any related ML activity. The ARA is a semi-autonomous state corporation (s.53 of POCAMLA) headed by a Director who reports to the Attorney General, but enjoys operational independence. The Director supervises the Departments of Intelligence and Investigations; Corporation Secretary and Legal Services; Assets Management; Criminal Assets Recovery Fund; and Corporate Services. For ML, the Intelligence and Investigation Department handles the detection and investigation, respectively (refer to para 74 for detection analysis). The ARA has officers seconded from the DCI, complimented with newly recruited specialists like actuaries, lawyers, procurement experts and accountants. From 2017 to date, the officers

had been trained through workshops and seminars in the areas of enhancing recovery of proceeds of crime; forensic and electronic evidence and cybercrime; investigating complex tax fraud; extraditions and mutual legal assistance; prevention, detection and analysis of corporate fraud; financial risk management; use of open-source intelligence; procurement fraud; and anti-narcotics, ML and asset recovery. ARA has also procured software to assist the officers in analysis of data. However, the staff compliment and funding of the ARA is still relatively low, compared with their mandate, which is not restricted to any category, but covers the entire spectrum of predicate offences.

151. The number of ML cases under prosecution (reported as 42) is low compared to the number of cases of associated predicate offences like corruption, obtaining by false pretence, tax evasion, drug trafficking and trafficking in wildlife trophies reported, investigated and prosecuted (or other action taken such as recovery). The Authorities prioritise the investigation and prosecution of predicate offences over ML, as evidenced by the fact that of the 14 high-impact anti-corruption cases under prosecution as at 3rd November 2021, only 2 had ML charges.

152. Kenya LEAs have also engaged in joint investigations under the Multi-Agency Team arrangement, which started off as a high-level anti-corruption strategy in 2015, but is now includes other predicate offences and ML/TF. The MAT is chaired by the Attorney General, and its membership includes NIS, KRA, DCI, ARA, EACC, FRC, ODPP and CBK, though the membership is not ringfenced and other members can be co-opted as the need arises. In cross cutting cases, each member cooperates and collaborates, while focusing on their specific mandate. For instance, ARA will handle seizure of any suspected proceeds; KRA any tax issues; DCI any criminal conduct; while EACC will look into any corruption allegations. MAT is a fluid arrangement, but divided into two levels: policy (heads of institutions that meet once a month or on an ad hoc basis) and technical (officers handling matters and briefing the principals, but also cascading issues to institutions – they meet every two weeks or on an ad hoc basis). The MAT is key for purposes of information sharing, synergies amongst LEAs and joint operations. An example of a case handled under the MAT arrangement specifically bringing together the joint participation of DCI, KRA, ARA, EACC, ODPP is laid out below in Box No. 3.1.

Box No 3.1: University Case

A UNIVERSITY CASE – 2019: In the year 2019 the DCI received an **intelligence report** from a **whistleblower** that some top officials in management of the University were stealing money from the institution by conspiring with officers from the finance Department through writing and cashing of cheques with total disregard to the normal due process, and also raising fictitious expenditures. Investigations were commenced by the F.I.U officers and 5 suspects were arrested and charged in Anti-corruption court for various offences of Economic crimes and money laundering. The amount involved in this fraud was **Ksh. 177,007,754/- (approximately USD 1,535,427 as at March 2022)**. A duplicate file was forwarded to ARA to trace the proceeds of crime and subsequently institute a civil process of preservation and forfeiture of the assets/proceeds. The case was pending before court.

3.3.2 Consistency of ML investigations and prosecutions with threats and risk profile, and national AML policies

153. According to the NRA, the highest proceeds generating predicate offences in order of merit are fraud and forgery; drug-related crime; corruption and economic crime; environmental and wildlife crime;

and cybercrime. This is predominantly based on prevalence of or number of reported incidents of a particular offence, and not necessarily the value of the proceeds generated. The statistics provided by the authorities indicate the proceeds generated by corruption being the highest, for instance, the 14 high-impact anti-corruption cases presented as ongoing prosecutions have a combined value of Ksh. 50,575,431,235/= (approximately USD 438,708,992) as at the time of onsite, while the 13 cases of recoveries from drug trafficking offences submitted by the ARA amount to approximately Ksh. 79.8m (approximately USD 692,213), as at the time of the onsite, 15 vehicles and 3 properties. Additionally, the figures of recoveries from fraud and forgery quoted by ARA mostly relate to theft of public funds and property, which is basically corruption. The MAT's approach to investigation of crime was also introduced to combat corruption in the first place, and the NRA recommends its adoption for investigation of other crimes as well. Since 2018 alone, from the submissions of the authorities, two individuals defrauded the country of 7 billion Ksh (USD 60.7m) and the reports of corruption scandals (NHS²⁶, NYS²⁷, Dam²⁸, etc.) quote figures well into hundreds of millions of dollars. Also see **Table 3.14b** below, where the ML cases under prosecution by the ODPP predominantly have the predicate offence of or related to corruption.

154. During the period under review, Kenya investigated 180 cases of predicate offences with a ML element, and the ODPP prosecuted 20 of those, and secured 9 convictions for other charges but none of them were for the offence of ML (S. 3, POCAMLA). There was no conviction for the offence of ML in the review period (see **Table 3.14** below, where the 6 convictions were for offences on the charge sheet other than ML, and **Table 3.14a**, which shows the number of cases submitted by the DCI and EACC to ODPP for consideration of ML charges). With EACC reporting that they prosecuted 11 ML cases for the period but with no convictions, it is clear that the investigations and prosecutions are not consistent with Kenya's ML threat and risk profile, as reported in the NRA Report. All information provided by the authorities pointed at corruption being the most proceeds generating offence. The relatively limited investigation and prosecution of ML in Kenya is largely because the authorities prioritise investigation and prosecution of associated predicate offences and recovery of proceeds, or benefits of crime over ML (see **Table 3.15** below for the number of predicate offences investigated and prosecuted, for comparison purposes). The limited cases investigated are done well, but the result in most cases is prosecution for ancillary offences, or associated predicate offences or recovery of proceeds at the expense of ML. There is less enthusiasm on the prosecution side to pursue ML prosecutions. A case in point is where prosecution entered into a plea bargain with Financial Institutions and officials for lesser charges than the ML offence, when, the facts of the cases appeared to disclose overwhelming evidence of possible ML activity on the part of some of the suspects, presenting a great probability of success, had the offence of ML been pursued. See also **Box No. 3.2** below for a tax evasion case where no ML charges were preferred.

Table 3.14 CONVICTIONS AND ONGOING CASES WITH A ML CHARGE

YEAR	CONVICTIONS	ONGOING CASES	ACQUITTAL
2017	0	1	0
2018	0	1	0
2019	0	8	0
2020	6	6	1

²⁶ <https://www.reuters.com/article/us-kenya-corruption-idUSKCN26F3CC>

²⁷ <https://www.bbc.com/news/world-africa-44280453>

²⁸ <https://www.reuters.com/article/us-kenya-corruption-idUSKCN1UIORO>

2021	0	4	
TOTAL	6	18	1

155. Kenya does not have a national AML policy or strategy, and both at the national and institutional level, authorities' efforts have focused more on countering corruption. For instance, there are national and institutional policies to combat corruption or graft and a National Ethics and Anti-Corruption Strategy is publicly available on the website of the EACC. In the absence of a clear national policy and strategy, it is not possible to state that the investigations and prosecutions of ML in Kenya are consistent with such policy.

156. The authorities could not demonstrate that ML investigations and prosecutions are guided by the threat or risk profile of Kenya. Although there is the FIU consisting of specialised officers responsible for investigating ML in the police, their expertise in investigating ML is not reflected in the results of the cases both taken to the ODPP and those eventually prosecuted. **Table 3.14a**, below shows a clear picture of this. Of the relatively moderate number of ML cases investigated and submitted for prosecution, very few cases were ultimately prosecuted (25), and out of those there were no convictions for the offence of ML. The limited number of the ML cases eventually prosecuted is a reflection of the Authorities perceived preference of pursuing a predicate offence or recovery of proceeds over ML prosecution. Also contributing to the low prosecutions of ML could be the inability of FIU to present good persuading ML cases to the ODPP for prosecution. The statistics contained in Table 3.14, above, appear inconsistent with the high standard recruitments and training provided to the FIU officers described in para 147, above. At the same time, it portrays a gap in the ODPP, as it appears not to be properly guiding the investigations of such cases to ensure that they end up being of such good enough quality to be successfully prosecuted (as they reported that Kenya employs prosecution-guided investigations). During the on-site both the FIU and the ODPP did not demonstrate that they have got systems in place to determine which cases of ML to prioritise in terms of risk during investigations and prosecution. The lack of such systems also affected the identification of the types of ML activities which are high risk and should be prioritised.

Table 3.14(a): Cases of ML from ODPP

	2017	2018	2019	2020	2021	Total
DCI	1	1	1	9	2	14
EACC	0	0	7	4	2	13
Total	1	1	8	13	4	27

Table 3.14(b) CATEGORY OF CASES FOR ML AND PREDICATE OFFENCES

2017				
	CASE	CATEGORIZATION/TYPE	PREDICATE OFFENCE	Amount Involved (Kshs)
1.	Employees of Chase Bank conspired to defraud the Bank by falsely pretending to disburse Kshs. 1, 683,000,000/-	Third-party laundering;	Conspiracy to defraud; stealing by Directors; stealing by servants; Stealing; Failure to comply with POCAMLA; money laundering.	1, 683,000,000/-
2018				
2.	Conspiracy to steal from Chase Bank Ltd a sum of Kshs. 1,159,125,587/-	Third party laundering;	Conspiracy to defraud; stealing; stealing by Directors; Stealing by servants; money	1,159,125,587/-

2019				
3.	Employees of a public Institution namely "ICTA" fraudulent withdrawal of money	Third Party laundering	Stealing by servant; conspiracy to commit an offence of corruption; abuse of office; unlawful acquisition of public property; money laundering.	179,759,484/-
	Officers employed by Kilifi County Government fraudulently made payments	Third Party Laundering	Fraudulently making payment from public revenue; making a document without authority; Fraudulent acquisition of public property; uttering a false document; making a document without authority; Acquisition of proceeds of crime; money laundering.	7,230,940/-
4.	Conspiracy to commit an act of corruption through fraudulent payment of Kshs. 109,769,363/- for purported compulsory acquisition of land	Third Party Laundering	Conspiracy to commit an act of corruption; abuse of office; financial misconduct; unlawful acquisition of property; Dealing with suspect property; money laundering.	109,769,363/-
5.	Conspiracy to commit an act of corruption by fraudulently making frivolous payments of Kshs. 68,000,000/- to a law firm as legal fees.	Third party laundering	Conspiracy to commit an offence of corruption; abuse of office; unlawful acquisition of public property; money laundering.	68,000,000/-
6.	Acquisition of private interest of Kshs. 25, 624,500/- in respect to payments made to a company for contracts awarded by the Kiambu County Government	Third party laundering	Conflict of interest; dealing with suspect property; abuse of office; willful failure to comply with the law relating to procurement; engaging in fraudulent practice in procurement; money laundering.	25, 624,500/-
7.	Officers from the Office of the Auditor General and private entities involved in irregular procurement of an audit vault software where	Third party laundering	Conspiracy to commit an offence of corruption; deceiving a principal; conflict of interest; unlawful acquisition of public property; money	100,000,000/-

	costs were inflated from Kshs. 18,000,000/- to Kshs. 100,000,000/-		laundrying.	
8.	Conspiracy to commit an offence of corruption by embezzling public funds in the Sum of Kshs. 357,390,299.95/- from the Nairobi County Government	Third party laundrying	Conspiracy to commit an offence of corruption; acting without authorization; abuse of office; conflict of interest; willful failure to comply with the law relating to procurement; unlawful acquisition of property; money laundrying.	357,390,299.95/-
2020				
9.	Conspiracy to commit an economic crime, of unlawful acquisition of public funds in the sum of Kshs. 74,474,376/- from Migori County Government	Third party laundrying	Conspiracy to commit an economic crime; conflict of interest; money laundrying	74,474,376/-
10.	Conspiracy to commit an offence of corruption by defrauding the national constituency development fund of Kshs. 19,007,539.60/- allocated to Malindi Constituency for the construction of an education office block.	Third party laundrying	Conspiracy to commit an economic crime; failure to comply with the law relating to procurement; forgery; conflict of interest; money laundrying.	19,007,539.60/-
11.	Conspiracy to commit an act of corruption through a tender by embezzling public funds valued at Kshs. 34,998,500/-	Third party laundrying	Conspiracy to commit an offence of corruption; fraudulent practices in procurement; conflict of interest; abuse of office; willful failure to comply with the laws relating to procurement; acquisition of public property; money laundrying.	34,998,500/-
12.	An officer from the Kenya Revenue Authority improperly conferred a benefit to a company	Third party laundrying	Abuse of office; conspiracy to commit an offence of corruption; willful contravention of tax procedures; money laundrying.	
13.	Connection of suspects to	Self-laundrying	Financial promotion of an	19,332,213/-

	money laundered from South Africa related to suspected Terrorism		offence;	
14.	Being till operators of a mobile company registered several telephone numbers to register mobile money accounts in their names and those of others which received money from South Africa	Self-laundering	Acquisition of proceeds of crime	32,277,058/-
15.	Receiving money through international transfer from South Africa	Self-laundering	Acquisition of proceeds of crime	5,572,843/-
16.	Use of Identity cards belonging to known persons to register mobile money accounts in order to receive money from South Africa	Self-laundering	Acquisition of proceeds of crime	11, 293,474/-
17.	Use of Identity cards belonging to known persons to register mobile money accounts in order to receive money from South Africa	Self-laundering	Acquisition of proceeds of crime	6,828,899/-
18.	Registration of mobile money accounts using identity card documents belonging to unsuspecting individuals to receive funds from South Africa	Self-laundering	Acquisition of proceeds of crime	37,821,548/-
19.	Received money from South Africa using mobile money accounts opened fraudulently	Self-laundering	Acquisition of proceeds of crime	55,949,248/-
20.	Receiving suspect money using mobile money accounts from South Africa	Self-laundering	Acquisition of proceeds of crime	10,256,503/-
21.	Till operators of 28 mobile money accounts under a company received suspect money	Self-laundering	Acquisition of proceeds of crime	128,463,223/-
2021				
22.	Embezzlement of funds through a conspiracy to	Third party Laundering; self-laundering;	Conspiracy to commit an offence of corruption;	7, 475, 909, 836.65/-

	defraud the County Government of Nyeri Kshs. 27,493,860/- ; Fraudulent acquisition of property valued at Kshs. 6,000,000/- being dialysis machines; Received Kshs. 104,821,205/- from Bungoma County Government and concealing the same; Receipt of Kshs. 7,583,505.85 from Kwale County Government and concealing the same;		fraudulent acquisition of public property; acquisition of proceeds of crime; conflict of interest; money laundering.	
23.	Conspiracy to commit embezzlement of public funds of Kshs. 85,177,811.50/- belonging to County Assembly of Homabay	Third party laundering	Conspiracy to commit an offence of corruption; abuse of office; unlawful acquisition of property; stealing; money laundering.	85,177,811.50/-
24.	Conspiracy to commit an act of corruption	Third party laundering	Abuse of office; fraudulent acquisition of public property; conspiracy to commit an economic crime; money laundering	
25.	Received mobile money from South Africa through registration of mobile money accounts using unsuspecting individual names.	Self-laundering	Acquisition of proceeds of crime	42,516,000/-

Table 3.15: Investigations and Prosecution of Predicate Offences

Predicate Offence	Year	Investigated	Prosecuted	Convicted	Total
Fraud and Forgery	2017	782	822	169	1773
	2018	517	1481	251	2249
	2019	549	957	201	1707
	2020	325	1409	269	2003
Corruption and	2017	170	0	0	170

Economic Crimes	2018	240	116	43	399
	2019	295	78	45	418
	2020	243	26	12	281
Drugs and Narcotics Trafficking	2017	357	683	159	1199
	2018	540	849	196	1585
	2019	776	1185	242	2203
	2020	652	806	184	1642
Environmental and Wildlife	2017		547	167	714
	2018		341	209	550
	2019		266	185	451
	2020		203	123	326
Cybercrime	2017		272	30	302
	2018		183	54	237
	2019		289	82	371
	2020		74	65	139
Human Trafficking & Smuggling of Persons	2017	3	148	61	212
	2018	15	142	68	225
	2019	14	112	49	175
	2020	10	174	73	257
Tax offences	2017	83	147		230
	2018	88	190		278
	2019	154	307	48	509
	2020	99	174	62	335
Counterfeiting & Piracy	2017	75			75
	2018	105			105
	2019	144			144
	2020	99			99

157. Box No. 3.2, below, is a sample case of tax evasion in which, from the information availed during the onsite, ML charges could and should have been preferred, but they were not.

Box No. 3.2: Tax Evasion case

In April 2018, KRA charged two suspects in court for tax evasion amounting to Kshs. 7 billion. The two were arrested after it was found out that they had registered more than nine business names and are believed to have made fictitious invoices in excess of Kshs. 15,369,511,856. The two were suspected to have defrauded or aided in defrauding the government approximately Kshs. 2,459,121,896 in VAT and a further Kshs. 4,610,853,556.80 in income taxes. The case is still on-going in court. No ML charges were preferred in this case.

3.3.3. Types of ML cases pursued

158. Kenya pursues all kinds of ML cases, including self-laundering and third-party laundering. The ODPP provided statistics of ML cases showing that out of the 25 ML cases, 10 were of self-laundering, while 15 were of third-party laundering (see Table 3.14(b), above). However, other LEAs lumped money laundering into one category and appeared unaware of the need for categorization, or the different types of ML and keeping statistics. There were no cases reported of standalone laundering, and upon scrutiny, it is evident that though the sections under which the accused persons were charged, (Ss. 4 and 7 of the POCAMLA) are defined under s.2 thereof to constitute money laundering, in the body of the Act, they are ancillary offences and are not part of the offence of ML (S.3). There are no cases of standalone ML in Kenya. Since most of the Authorities do not categorize ML cases into their different types, it was impossible to ascertain whether they are pursuing all kinds of ML. In the absence of such data, the only conclusion is that Kenya has not demonstrated that it pursues all kinds of ML.

159. Kenya reported two cases of pursuing ML where proceeds from foreign predicates were laundered domestically (see **Box No. 3.3**, below for the case briefs). Majority of the ML cases were of domestic predicates resulting in domestic laundering. However, during the period under review, Kenya reported a couple of cases involving corruption as a domestic predicate offence where the funds had been laundered in foreign jurisdictions (please see CI 8.2).

Box 3.3 Sample Cases of Foreign Predicate Proceeds Laundered Domestically

Case 1: Country A:

A couple was suspected of having breached their trust relationship and fiduciary duty in country G and transferred to and laundered the proceeds in Kenya. Country G requested for assistance through the AGO, the central authority for MLA in Kenya, and upon referral the matter was investigated by the DCI. In coordination with the ARA, Ksh 17,099m and two luxury vehicles were subsequently forfeited to the state.

Case 2: Country B:

Unknown persons were suspected of having fraudulently created and credited accounts of a bank in Country U, after which credit cards were issued to the suspects. The suspects travelled to Kenya where they purchased vehicles and withdrew money from ATM machines using the credit cards, all valued at about Ksh 91m (USD 770,000). The prime suspects and properties have been identified and the case is ongoing.

3.3.4 Effectiveness, proportionality and dissuasiveness of sanctions

160. Kenya had no convictions on ML for the period under review. The authorities reported some cases of convictions under the POCAMLA, but these were convictions for ancillary offences, and not the offence of ML. Other cases involving potential ML charges resulted in conviction of lower predicate offences, such as embezzlement and abuse of office, for which the convicts were sentenced to fines, with only one convict serving time in default for failure to pay the fine. The sanctions imposed (fines in lieu of custodial sentences) cannot be adjudged to have been issued for ML purposes and therefore, not effective, proportionate and dissuasive for purposes of the offence of ML. In one particular case of public importance, in a country where all statistics indicate corruption is the biggest threat, and the 6th accused in the case was not a public officer anymore, it is clear that the sentence imposed was neither proportionate nor dissuasive, as the top Government official who occupied a position of trust and responsibility in

Government as Cabinet Secretary and one of the co-accused persons in the case was let off with only a fine, while the private person was given a high fine and a deterrent custodial sentence in default. As there has been no ML conviction, and therefore no sanctions issued for a ML conviction, Kenya has not demonstrated that proportionate and dissuasive sanctions are applied upon conviction for ML offences and at times even for the predicate offences as in the case of the Cabinet Secretary, who being a public servant in a position of trust and responsibility in government got away with a fine. Despite the accused person occupying a very senior position in government and having committed a serious offence, the sanction of a relatively low fine was not appealed.

3.3.5. *Use of alternative measures*

161. Kenya pursues other criminal justice measures where a ML investigation has been pursued, but prosecution and conviction are not viable. Authorities pursue administrative measures, such as deferred prosecution in exchange for payment of a fine by the offender (see the 5 banks that paid Ksh 385m or USD 3.5m for failure to report STRs in the National Youth Service corruption scandal). The ODPP has an Alternative Dispute Resolution Policy, under which accused persons or suspects can return or forfeit proceeds or benefits of crime under certain terms and conditions contained in a Deferred Prosecution Agreement (DPA), and avoid having a record of conviction. The DPA is not intended as an alternative to escape punishment or prosecution, but is supposed to be considered if it is in the best interest of the public to do so having taken all the circumstances of the case into account. Civil court proceedings have also been used by the EACC and the ARA to protect public property and recover proceeds and benefits of crime. Of the 11 EACC cases under prosecution, 5 have parallel ongoing civil processes for recovery of proceeds. Additionally, EACC also employs ADR to recover proceeds or benefits of crime (see IO.8 below for further analysis). ARA has successfully recovered stolen public funds through civil cases, such as *ARA v Pamela Abo* (see case no. 9, Box 3.14, IO 8); *ARA v Lillian Omollo* (see case no. 4, Box 3.14, IO 8); *ARA v James Thuita Nderitu* (see case no. 6, Box 3.14, IO 8). ARA also secured confiscation of property belonging to drug traffickers in the case of *ARA v Joseph Wanjohi* (see case no. 7, Box 3.14, IO 8). It is key to note that the civil proceedings are conducted along and in tandem with the criminal proceedings, and often result in quicker positive asset recovery results.

162. KRA also pursues recovery of taxes and payment of fines by tax evaders, where it's uncertain ML prosecution would be successful (see **Table 3.4**).

163. However, it is also quite clear that if proper investigations had been conducted in some of the cases, (see Box 3.9, page 85 as well as other cases described under CI 8.2), it would have been possible to charge and successfully prosecute some of the accused persons for ML. For example, in the case of the businessman who received funds from the NYS through companies in which he held shares (JN Case (2019 – 2020) it is not clear why he was not charged or prosecuted for 3rd party ML since the source of the funds was established. It is therefore evident that in some cases the Authorities do not pursue a ML investigation or prosecution when there could have been evidence to prove a ML offence.

Overall conclusion on IO.7

164. Kenya does not concertededly identify and investigate ML, but rather takes up ML investigations where evidence of ML activity is discovered during investigations of a predicate offence such as corruption or fraud. As such, investigations and prosecutions of ML cases are very low. This is inconsistent with the high proceed generating predicate offences with potential for generating proceeds which can be laundered (fraud, corruption, trafficking). Investigations and prosecutions are also inconsistent with the reported risk profile and policy, as the NRA Report lists fraud and forgery and drug related offences above corruption as the most proceeds generating offences, and yet all available records, statistics and information point at corruption being the most proceeds generating offence. As a result of not prioritizing ML as an offence, Kenya has not had any successful prosecutions for the offence of ML or any charges of standalone ML. Since Kenya had no conviction for ML in the review period, the effectiveness, proportionality and dissuasiveness of the sanctions applied could not be assessed. Kenya uses alternative measures, including ADR and recovery, where ML charges have been considered but are deemed unviable. However, there are instances where the Authorities appear to have used these measures even in cases where a successful investigation and prosecution of a ML offence could have been pursued.

165. **Kenya is rated as having a low level of effectiveness for IO.7.**

3.4. Immediate Outcome 8 (Confiscation)

3.4.1 Confiscation of proceeds, instrumentalities and property of equivalent value as a policy objective

166. Kenya pursues confiscation of proceeds, benefits and instrumentalities of crime as a policy of governance under the ARA. However, there is need to develop a standalone policy objective of pursuing proceeds of crime which broadens the recovery of proceeds of crime objectives beyond the ARA to the other important AML/CFT stakeholders, like to the LEAs and ODPP. The Authorities did not submit a standalone strategic plan for improving confiscation of proceeds or crime, or one that was incorporated in the general AML/CFT regime. The information provided appears to show that the confiscation regime has grown out of anti-corruption efforts, and is currently under expansion to cover all other predicate offences. Identification of criminal assets is primarily done by the DCI, EACC and the ARA, upon referral from mainly the DCI. Once criminal assets are identified, under the POCAMLA, any authorized officers can apply for seizure or freezing orders. However, in practice, freezing and seizure orders have been obtained by officers from the EACC, ARA and ODPP. KRA has on occasion applied its lawful administrative powers to stop suspected proceeds from being withdrawn and dissipated. The lengthy legal processes involved in realization of proceeds, benefits or instrumentalities in Kenya is a hindrance to improved confiscation, as suspects or persons of interest often take advantage of it to delay or frustrate confiscation efforts for years, using interlocutory applications and appeals, where judgement has been passed, as an appeal operates as a stay of execution of the confiscation or forfeiture orders until its final determination.

167. The basic legislation for recovery of proceeds of crime in Kenya is the POCAMLA, which established the ARA. The ARA is the principal asset recovery institution in Kenya. In 2013, the Attorney General of Kenya set up a Task Force to come up with strategies and structures to operationalise the ARA and appointed its first Director in 2014. In 2015, ARA filed its first cases and froze assets related to the NYS 1 cases. In 2017, the POCAMLA was amended to grant the Agency corporate status, while in 2021,

the POCAMLA was further amended to establish an Assets Recovery Advisory Board to provide oversight, though at the time of the onsite, the Board was yet to be fully constituted. The Agency, though reporting to the Attorney General in terms of policy, is now recognized as a state corporation within the meaning of the State Corporations Act of Kenya, and enjoys operational independence. The Agency is mandated to pursue proceeds, instrumentalities and property of equivalent value from all types of crime. The Agency's stated mission is "*To recover stolen assets and proceeds of crime on behalf of the people of Kenya*".

168. Kenya has recognized corruption as a major problem in the country and one of the highest proceeds generating predicate offences in the jurisdiction. Consequently, among other powers, the EACC was granted powers to pursue recovery of proceeds of corruption and other economic crimes under the EACC Act (s.11 (1) j) and the Anti-Corruption and Economic Crimes Act (s.55). EACC's proceeds recovery function is executed in the Directorate of Legal Services and Asset Recovery, which has a Unit for Asset Tracing that carries out investigations and that of Asset Recovery that prepares the pleadings and prosecutes the applications for seizure, freezing, restraint and ultimately forfeiture in court. The Asset Recovery Unit also executes the administrative recoveries through negotiation, mediation and conciliation, as guided by s. 13 of the EACC Act and s. 56B of the ACECA, and the EACC ADR Policy.

169. Kenya has two regimes established under the POCAMLA for asset recovery, non-conviction-based forfeiture (Part VIII of the POCAMLA) and conviction-based confiscation (Part VII of POCAMLA). Conviction based forfeiture is provided for under Section 61 of POCAMLA where it states that whenever a defendant is convicted of an offence, the court can, on an application by the Attorney-General, the Assets Recovery Agency Director or the court on its own motion can inquire into the benefit the accused may have derived from the offence. If the Court is satisfied, a confiscation order is granted. The main avenue for conviction-based recovery of proceeds of crime appears to be through plea bargain arrangements using the Plea-bargaining provisions under s.137A to 137O of the Criminal Procedure Code as well as ODPP's Plea-Bargaining Guidelines for recovery of property or benefit acquired from the commission of an offence. It also involves some form of penalties and compensation, and can include restitution of property to the public or victims. The Guidelines require the ODPP to consult the victims and investigative agencies in any negotiations. Some recoveries have been realised through this process. ODPP pursues confiscation of instrumentalities of crime on a case-to-case basis, where property is identified as an instrumentality of crime. Wildlife, trafficking of narcotic drugs and persons, and cases involving forest offences form the bulk of cases in which instrumentalities have been confiscated. ARA and the EACC, under Part VIII of the POCAMLA, also pursue non-conviction-based recovery by making civil applications to court, first for seizure (90 days limit) and then ultimately forfeiture by order of court. All the recoveries by ARA and most of those by EACC reported in the statistics and tables below were civil forfeitures or non-conviction-based recoveries.

170. DCI supports the recovery of proceeds of crime in Kenya. One of the three grounds that justified the creation of the FIU (see IO.7 for the structure of the DCI)-in DCI is to pursue the recovery of proceeds of crime, demonstrating the importance accorded to it. In addition, DCI seconded officers to the ARA to assist in investigations aimed at tracing assets subject to forfeiture (realisable property).

171. Realizable property in Kenya is defined to include proceeds, instrumentalities and property of equivalent value. However, despite the provisions for it, Kenya is yet to pursue confiscation of property of equivalent value. The provisions for the confiscation of proceeds and benefits of crime have been implemented to a large extent in regards to corruption related cases compared to the other high-risk crimes. (*See cases under Table 3.16*).

172. Kenya pursues confiscation of proceeds generated by domestic predicates and laundered locally. Confiscation is through both civil, criminal and administrative procedures, where LEAs opt for settlements. The confiscation is mainly carried out by the ARA, EACC (both of which employ civil

processes) and ODPP, which pursues both conviction and non-conviction-based forfeiture, usually by way of plea bargains and administrative forfeiture through alternative dispute resolution measures, such as deferred prosecution agreements. The statistics indicate that the majority of confiscations or recoveries from domestic predicates are cases of or involving the theft of public funds; with a few cases related to smuggling and other tax offences, drug trafficking, wildlife offences, human trafficking and banking and fraud and forgery. The paragraphs below provide details of sample cases of forfeiture of domestic proceeds laundered domestically. DCI and KRA are involved in and supportive of recovery efforts, but for proceedings of forfeiture of proceeds of crime usually refer their cases to the ARA. However, the KRA does pursue and recover unpaid taxes on its own. See sample cases of recoveries by KRA in **Table 3.4**. Kenya has not set up a central authority or agency with the specific mandate to manage seized and confiscated property with the objective of preserving value pending confiscation. Each LEA that seizes or secures a confiscation order manages the property as they deem fit, with most moveable property simply stored, while immovable and incorporeal property is caveated, pending disposal of the respective court case or appeal (seizure) or disposal (confiscation order).

3.4.2 Confiscation of proceeds from foreign and domestic predicates, and proceeds located abroad

173. During the review period, the Assets Recovery Agency registered some success in terms of recovery of proceeds of crime. As already indicated above, the ARA at the time of the on-site visit had investigators seconded to it from the DCI to assist in tracing assets subject to forfeiture. At the time of the onsite, the DCI was supporting the ARA in prosecuting 6 cases for the confiscation of 6 cars and 2 motorcycles that were suspected to have been instrumentalities in cases of drug trafficking, obtaining money by false pretence and trafficking in wildlife trophies. Below are some of the cases pursued by the ARA.

Table 3.16: Details of Non-Conviction Based Forfeitures: 2017-2020

Particulars	Predicate	Order	Date
1. ARA v Quorundum Ltd & Others No. 32/2016	Theft of public funds from National Youth Development Fund (NYDEF)	Forfeited apartment valued at Kes. 48.5m (USD 421,739); and 8.8m loan.	21 st Sept 2019
2. ARA v Felix Obonsi MA 48/2008	Fraud and theft of funds from the ICT Authority.	Forfeited Ksh 6.4m (USD 55,652)	17 th Feb 2020
3. ARA v Charity Wangui Gethi & Others HCMC 78/2017	Theft, fraud and money laundering of funds from the National Youth Service.	Forfeited Ksh. 97,682,424 (USD 849,412)	25 th Feb 2021
4. ARA v Lillian Wanja Muthoni T/A Sahara Consultants & Others Civ App 58/2018	Theft of funds from the NYS and deposit on account of former PS, Ministry of Public Service and Youth, her family members and close associates.	Forfeited Ksh. 22,445,507 (USD 195,178) and USD 105,293.	15 th April 2020

5. ARA v Samuel Wachenje & Others Civ App 13/2016	Fraud and theft of funds from NYS used to procure assets for the respondents.	Forfeited 4 vehicles, 1 maisonette in Kasarani and a plot of land in Ruiru (values unavailable)	23 rd Jul 2020
6. ARA v James Thuita Nderitu Civ App 2/2019	Fraud and theft of funds from NYS.	Forfeited Ksh. 32,065,475 (USD 278,830)	22 nd April 2020
7. ARA v Wanjohi & Others Civ App 7/2019	The respondents acquired assets using suspected proceeds of drug trafficking.	Forfeited Ksh 10,589,069 (USD 92,078); 2 vehicles; 1 house in Muthaiga, 2 commercial properties on Thika Road	21 st Feb 2020
8. ARA v Rose Monayani Musandak & Others Civ App 2/2020	Respondents acquired assets using suspected proceeds of drug trafficking.	Forfeited Ks. 1,788,675 (USD 15,553); 5 buses; and 1 vehicle.	21 st Sept 020
9. ARA v Pamela Aboo Civ App 73/2017	Respondent received cash deposits on her account, suspected to be bribes paid to her husband, an officer of the KRA. She failed to reasonably explain the source and legitimacy of the funds.	Forfeited Ksh. 19,688,152 (USD 171,201).	13 th Nov 2018
10. ARA v Josphat Kamau Civ App 13/2020	Respondent was suspected to be in possession and utilisation of proceeds and instrumentalities for importation of contraband cigarettes from Uganda into Kenya.	Forfeited a total of Ksh. 27,902,023 (USD 242,626).	8 th June 2021

174. In addition to the above cases, the ARA also pursued recoveries in cases where the government had been prejudiced of huge sums of money. The three cases below serve as examples. However, at the time of the on-site, the defendant in the first case had appealed against the forfeiture order. The ARA, to some extent, was recording success in executing its mandate, although in terms of scope coverage proceeds from some of the predicate offences were not adequately pursued and some of the cases were quite recent at the time of the on-site visit.

Box: 3.5 ARA Recoveries

P. A. (2017 – 2018):

Case involved bribery of a spouse that worked with the Kenya Revenue Authority (KRA). The wife of the KRA official suspected of corruption received various cash

deposits into her account whose source she could not reasonably explain. ARA instituted proceedings against her for forfeiture of the money. Judgement was delivered against the defendant on 13th November 2018, ordering for the forfeiture of Ksh 19,688,152.35/= to the Government.²⁹

L. O. Case (2020):

A former Youth Permanent Secretary was accused of having opened numerous bank accounts in her name, her business name and in the names of limited liability companies in which she, her husband and daughters were the shareholders and in the name of two of her underage children. She would deposit funds in the accounts, sometimes in all the accounts on the same day. The bank accounts received cash deposits on a daily basis and investigations revealed that her children's accounts were used as conduits of money laundering. She had no reasonable explanation for the source of the funds. Ksh 22M (approximately USD 192,000 as at March 2022) and USD 105,293 was forfeited to the Government.

J.N. Case (2019 – 2020):

J.N is a businessman that received over Ksh. 1 billion from NYS through companies in which he held shares. He was unable to show why the NYS was transferring funds to him and the money was thus deemed stolen public funds and therefore laundered proceeds of crime. Court ordered forfeiture of Ksh. 32,065,475/- (approximately USD 279,941) to the Government.

175. During the period under review the ARA applied for a total of 76 preservation orders. The preservation orders had a total value of Kshs. 7.6 billion (USD 64.488m). The most common criminal conduct relating to the majority of the orders was fraud which amounted to a total of 57 cases and a total value of 5.2B (USD 44.123m). All the 76 preservation orders were granted. Out of the 76 preservation orders, forfeiture orders were secured in 57 of the cases amounting to a total value of Ksh.5.2illion (USD. 44.123m). There was no case with a preservation order still pending in court. Of the forfeiture orders granted during the period under review, all 57 were appealed against and of those none of the appeals have been finalised. Once ARA obtains preservation orders, they are in force for 90 days within which they must file forfeiture applications. Therefore, there are no pending preservation applications for the period under review. See **Table 3.17** below for sample cases of high value recoveries by the ARA, mostly reflecting recoveries consistent with the identified high-risk predicate crimes.

²⁹ She has appealed against the decision. <http://kenyalaw.org/caselaw/cases/view/164127/>

Table 3.17: Examples of high-value recoveries by ARA- 2017-2021

Year	Criminal conduct involved & References	Type of Asset involved (immovable, movable, funds)	Value of the asset	Stage of the case in January 2022	Total Value
2017	1. ACEC HCMC No. 78 of 2017 Assets Recovery Agency vs Charity Wangui Gethi & others A case involving fraud and theft of public funds	Funds	Ksh.97,682,424.00	Funds forfeited to the Government	Ksh.97,682,424.00
	2. ACEC Civil Appl. No 73 of 2017 Assets Recovery Agency vs Pamela Aboo This was a case of money laundering	Funds	Ksh. 19,688,152.35	Funds forfeited to the Government	Ksh. 19,688,152.35
	3. ACEC Appl. No. 286 of 2017 Assets recovery Agency vs Stephen Vicker Mangira This was a case of trafficking in narcotics	Funds immovable property	Ksh. 51,483,339.00	Funds and properties forfeited to the Government	Ksh. 51,483,339.00
2018	1. ACEC Civil Appl. No. 58 of 2018 2. Assets Recovery Agency vs Lilian Wanja & Others The case involved theft of public funds	Funds	Ksh. 22,445,507.74, USD 195,178 and USD105,293	Funds forfeited to the Government	Ksh. 22,445,507.74 and USD105,293
	3. ACEC Misc Appl. No. 48 of 2018 Assets Recovery Agency vs Felix Obonsi	Funds	Ksh. 6,400,000.00	Funds forfeited to the Government	Ksh. 6,400,000.00

	This is a case of theft of public funds				
	4. ACEC Civil App. No 17 of 2018 Assets Recovery Agency vs Anthony Makara This is a case of theft of public funds	Funds	Ksh. 813,597.00	Funds forfeited to the Government	Ksh. 813,597.00
2019	1. ACEC Civil Suit No. 1 of 2019 Assets Recovery Agency vs Phylis Ngirita & Others This was a case of theft of public funds through procurement process.	Immovable properties	Ksh. 200,500,000.00	Properties forfeited to the Government	Ksh. 200,500,000.00
	2. ACEC Civil Suit No. 7 of 2019 Assets Recovery Agency vs Joseph Wanjohi & Others The case involved trafficking in narcotics and wildlife trophies	Funds and immovable property	Ksh. 10,589,069 in cash and properties worth Ks. 125,000,000.00	Funds and properties forfeited to the Government	Ksh. 10,589,069 in cash and properties worth Ks. 125,000,000.00
	3. ACEC Appl. No.47 of 2019 Assets Recovery vs Hussein Ali Adan & Anor The case involved trafficking in narcotics	Funds	Ksh. 2,500,000.00	Funds forfeited to the Government	Ksh. 35,065,475.00
2020	1. ACEC CIVIL SUIT NO. E019 OF 2020 Assets Recovery Agency vs Abdi Ali Mohamed & Another This was a case of theft of public funds in a county government.	Funds	Ksh. 62,254,632.00	Funds forfeited to the Government	Ksh. 62,254,632.00
	2. ACEC Misc Civil Appl. E034 of 2020 Assets Recovery Agency vs Kimaco Connections Limited This was a case of money laundering	Funds	Ksh. 303,920,650.00	Funds forfeited to the Government	Ksh. 303,920,650.00

	3. ACEC Civil SUIT No. 9 of 2020 Assets Recovery vs Evans Kundu	Immovable property	Ksh. 450,000,000.00	Properties forfeited to the Government	Ksh. 450,000,000.00
2021	1. HCACEC E21 of 2021 Assets Recovery Agency vs Nyambura James & Anor This was a case of money laundering	Funds	Ksh. 88,000,000.00	Funds forfeited to the Government	Ksh. 88,000,000.00
	2. HCAC Misc Appl. No. E021 of 2021 Assets Recovery Agency vs First Line Capital Ltd & 2others	Funds	USD 253,821.44	Forfeiture application pending in court	
	3. HCAC Misc E046 of 2021	Funds and immovable property	USD 2,541,479.27	Forfeiture application pending in court	

176. KRA has also made successful recoveries predicated on tax evasion.

Box 3.6: Tax Recoveries

- Nairobi County Government official:** *was being pursued by the Anti-Corruption Commission for unexplained wealth, the Kenya Revenue Authority was co-opted to seek court orders for the preservation of funds in ten (10) specified bank accounts, on the ground that the County Government Officer had deliberately omitted to declare rental income and other business income, for the purposes of taxation, hence evading tax. The KRA sought to assess his income, with a view to issuing an appropriate Tax Assessment. The court made an order prohibiting the County Government Officer from transferring, withdrawing, disposing of or in any other way dealing with the money in his 10 Bank Accounts until the Kenya Revenue Authority concluded the assessment of the tax payable, and recovered the same.*
- ACEC No. 1 Of 2016 (OS):** *The Commission received a dissemination from the FRC on suspicion of corruption by a senior officer from a County Government. The Commission commenced investigations against the defendant in 2015; and secured an order to preserve Kshs. 14,491,133; but the defendant challenged the preservation order and Court varied it. To avoid withdrawal and dissipation of the monies the Commission requested the Kenya Revenue Authority to take up the tax evasion issue it had identified. KRA took up the issue and froze the funds in the defendant's bank accounts, while running a parallel investigation into tax evasion, and was able to collect assessed tax through the Tax Tribunal. The Commission continued with the investigations, and upon completion, commenced forfeiture proceedings against the defendant and his wife's assets through the Courts. The Court ordered forfeiture to the Government of Kshs. 317,648,604 (\$3,114,202).*

- **ELC NO 955 OF 2016:** *The Commission received information that land belonging to the University of Nairobi had been fraudulently acquired. Investigations commenced and recovery proceedings were instituted against Aberdares Engineering Contractors Ltd and a section 35 report was submitted to the DPP with recommendations to charge Aberdares Engineering Contractors Ltd and its directors with fraudulent acquisition of public property. In an out of court settlement, it was agreed that they would surrender the property on which 5 Government houses had been constructed without preferring any criminal charges against him or the company. A consent order was entered between the Commission and the company and the property was forfeited; it is worth Kshs. 2 billion.*

177. The EACC has made successful recoveries through administrative means; see below **Table 3.18** for total recoveries by EACC in the period July 2016 – June 2020 (USD 139,112,235), and **Box 3.7** for examples of high value administrative recoveries by the EACC.

Table 3.18: Recoveries by EACC for FYs 2016/17 – 2020

Financial Year	2016/17	2017/18	2018/19	2019/20
Cash & Valuable Chattels	N.A, no classification	Ksh. 69,485,804	Ksh. 35,221,839	Ksh. 31,116,588
Immoveable Property	N.A, no classification	Ksh. 3,743,438,828	Ksh. 2,835,600,000	Ksh. 9,038,500,000
TOTAL	256,044,092 (USD 2,226,470)	3,812,924,632 (USD 33,155,866)	2,870,821,839 (USD 24,963,668)	9,069,616,588 (USD 78,866,231)

178. The EACC has made successful recoveries through administrative means as detailed below.

Box: 3.7: Example of Administrative Recoveries by EACC

ELC NO 955 OF 2016, ETHICS AND ANTI-CORRUPTION COMMISSION VS AEC LTD AND ELC NO. 330 OF 2011, AEC VS UNIVERSITY OF X: The Commission investigated allegations that land belonging to the University of X had been fraudulently acquired and, consequentially, instituted civil recovery proceedings against AEC Ltd. A s.35 report was submitted to the DPP with recommendations to charge AEC Ltd and its directors with fraudulent acquisition of public property. Before the DPP instituted charges, one of the directors requested for an out of Court settlement in the civil matter, which court encouraged parties to consider due to the age of the director, his health status and the fact that it would save the Government money and judicial time. The Commission and the DPP held several meetings to consider the proposal and after looking at the director's age and the fact that he was terminally ill, it was agreed that he would surrender the property on which 5 Government houses had been constructed without preferring any criminal charges

against him or the company. A consent order was executed and filed, and the property worth Kshs. 2 billion (USD 17,391,304) was forfeited.

ACEC 63 of 2017 EACC VS JBM: The Commission received a dissemination from the FRC that a Traffic Police Officer based at Thika, was in possession of unexplained wealth. The Commission investigated the case and instituted civil recovery proceedings, while preserving Kshs 26,193,071.7 (approx. USD 261,900) in his personal account. The defendant later proposed an out of court settlement, which was considered by the Commission in accordance with its ADR policy. The Commission and Mr. JBM executed a consent that was filed in court on 15th September 2021, which was adopted as an order of the court on 22nd September, 2021 effectively forfeiting Kshs. 26,193,071.70/- to the Commission in full and final settlement of the suit.

179. An example of a successful plea-bargaining case was that of a financial institution that pleaded guilty and agreed to pay a penalty of Kshs 64.5 million (USD 546,150), Ksh 24 million (USD 203,130) of which was paid to the state agency afflicted by the offence. The EACC, working with the ODPP also recovered land belonging to the University of Nairobi, valued at Ksh. 2,000,000,000/- (USD 17,391,304); and another parcel of land belonging to Racecourse Primary School, valued at Ksh 700,000,000/- (USD 6,086,956). Table 3.19 below shows the high valued immovable properties recovered by the EACC from 2016 – 2020 which show moderate success

Box 3.8 Sample Plea Bargain Case:

Criminal Case no. 2041 of 2016 Peter Munyiri and 7 others: was a criminal case against a financial institution and its employees who failed to file a suspicious transaction report or suspicious activity report on suspected proceeds of crime (stolen public funds) contrary to section 5 as read with section 44 and 16 of POCAMLA. They were charged with abetting money laundering, among other charges. A plea agreement was signed and presented to court on 2nd May 2019 and convicted the accused persons. The financial institution was sentenced to pay a fine of Kshs. 64.5 million.

Box No. 3.9: Deferred Prosecution Sample Cases:

ODPP executed Deferred Prosecution Agreements with 5 commercial banks, under which they agreed to pay penalties amounting to Kshs. 385 million, for failure to report suspicious transactions, failure to maintain effective programmes against money laundering and failing to conduct sufficient due diligence on account holders. This arose from the National Youth Service (NYS) case in which 10.5 Billion was lost through corruption involving individuals (including senior management officials of the NYS) and corporations for payment of goods that were either not supplied or were supplied at grossly inflated prices. The main perpetrators were charged with money laundering, forgery, abuse of office and obtaining by false pretence.

Box No. 3.10: Instrumentalities Sample Case:

Geoffery Mutemi Manzi v Republic, HCCA 39/2020: the appellant was convicted of

human trafficking and ordered to pay Ksh. 10m (USD 86,956) to the National Assistance Trust Fund for Victims of Trafficking. The vehicle the appellant used to transport the victims to Jomo Kenyatta International Airport so they could exit the country and the Ksh. 22,500/- (USD 196) found in his possession was forfeited to the Government as instrumentalities.

Box: 3.11: Examples of Forfeiture pursued by EACC

ACEC Civil Suit No. 4 of 2017: *the case involved loss of funds at the Youth Enterprise Development Fund (YEDF). Company Q Ltd received Ksh 180M from YEDF without providing any services out of which Ksh.48M was used to buy a duplex apartment at Duchess Park. The Apartment was declared to be proceeds of crime and forfeited to the Government.*

ACEC Civil Suit No. 49 of 2018: *a Principal Secretary, in a Ministry had her accounts frozen and later forfeited. Bank accounts in her name, her business entities and 3 of her daughters received suspicious funds in Kshs and USD which were believed to be proceeds of crime arising from the NYS II scandal. The bank accounts could receive cash deposits on a daily basis and investigations revealed that her children's accounts were used as conduits of money laundering. She could not offer a reasonable explanation for the source of the funds. Ksh 22M and USD 105,293 was forfeited to the Government.*

ACEC No. 16 of 2018: *The Commission instituted investigations on allegations of irregular compensation of land, by the Director of Valuation and Taxation-National Land Commission and received further information that the said Director was involved in corrupt conduct, and as a result had amassed wealth beyond her known legitimate sources of income. The commission commenced parallel financial investigations on unexplained wealth. A search at her residence discovered Kshs. 1,000,000/- (USD \$9,803.92) and USD169,000, which was preserved. After investigations, the Commission thus instituted forfeiture proceedings against the defendant, her husband and associates. The matter was heard and Court ordered forfeiture of Kshs. 1,000,000/- (USD \$9,803.92) and USD169,000 to the Government.*

ACEC No. 21 of 2018: *The Commission received a dissemination from the FRC of suspicious transactions involving an employee of the Ministry of Interior and Coordination of National Government –IDPS (Internally displaced Persons) and his wife, who are co-directors in 3 companies, and investigated the transactions that led to the suspicion. The Commission established that value of assets acquired by the suspects during the period of 1st January 2016 to 31st August 2017, was much more than their known legitimate sources of income and was suspected to have been acquired using proceeds of corruption and economic crime. A search conducted at their premises discovered a total of Kshs. 8,223,050 (\$ 80,618.14) and USD 3,500. The Commission preserved Kshs. 16 million (\$ 156,862.75). The suspects satisfactorily explained assets worth Kshs. 32,334,733.45 (\$317,007.19), but could not explain to assets worth Kshs. 64,050,000 (\$ 627,941.18). Forfeiture proceedings were instituted against the official, his wife and the companies and a forfeiture order of Kshs. 113,385,900 (USD 1,111,626.47) was issued against the defendants on 9th April 2020.*

Table 3. 19: Recoveries by EACC for FYs 2016/17 – 2020

Financial	2016/17	2017/18	2018/19	2019/20

Year				
Cash & Valuable Chattels	N.A, no classification	Ksh. 69,485,804	Ksh. 35,221,839	Ksh. 31,116,588
Immoveable Property	N.A, no classification	Ksh. 3,743,438,828	Ksh. 2,835,600,000	Ksh. 9,038,500,000
TOTAL	256,044,092 (USD 2,226,470)	3,812,924,632 (USD 33,155,866)	2,870,821,839 (USD 24,963,668)	9,069,616,588 (USD 78,866,231)

180. **Kenya pursues proceeds, benefits, instrumentalities of domestic predicate offences that have been moved to foreign jurisdictions to a very limited extent.** Kenya signed the Framework for the Return of Assets from Crime and Corruption in Kenya (FRACCK) with the Governments of the United Kingdom, Switzerland and Jersey, to aid repatriation of proceeds of crime and corruption, and as a result, the Government of Kenya and that of Jersey signed a Preliminary Asset Sharing Agreement on 3rd March 2017, to facilitate the repatriation of £3m to Kenya, for the benefit of Kenyans, as decided jointly by the two governments.

Box: 3.12:

W Limited: *the proceeds resulted from inflated tenders and bribes which were generated from Kenya and laundered through W Limited. On 24th February, 2016, W Limited appeared before the Royal Court of Jersey and pleaded guilty to one count of having possession of proceeds of criminal conduct contrary to Article 33 of the Proceeds of Crime (Jersey) Law 1999. The Court found that W Limited had benefited from criminal conduct and made Confiscation Orders against W in the sum of £3,281,897.40 and US\$540,330.69. The Government of Kenya and the Government of Jersey is in the process of finalizing an Asset Sharing Agreement for repatriation of the said funds.*

S and O: *the case involved bribery by British nationals in the procurement of contracts for the supply of ballot papers. The UK through the National Crime Agency conducted investigations resulting in two British nationals and the company being convicted under the English Bribery Act and confiscation orders made. The company was also found guilty and fined 2.2 million pounds. The UK Government agreed to share part of the fines with Kenya amounting to Ksh. 49 million which was used to buy seven ambulances distributed to vulnerable Counties. The ambulances were handed over to the Authorities in March 2017, by then UK Foreign Secretary, Boris Johnson.*

181. Confiscation of proceeds of predicate offences involving or linked to corruption is relatively effective in Kenya. However, confiscation of proceeds linked to other predicates such as trafficking in drugs and humans, wildlife offences, smuggling, and fraud is to a limited extent and usually involves the confiscation of the exhibits as instrumentalities of crime.

182. Kenya authorities submitted three cases of pursuing proceeds generated from a foreign predicate offence and brought/launched in Kenya being a request from Germany, which resulted in ARA lodging Civil Application No. 2 Of 2020, under which Ksh 17m (USD 144,250) was preserved and later forfeited to the state, together with two luxury motor vehicles; while the second one related to withdrawals from ATMs and purchases made by individuals using credit cards that had been fraudulently credited in Uganda – which is still under investigation, and the third one, related to a seizure carried out by the KRA in a case of controlled delivery by UK law enforcement, where luxury vehicles stolen from the UK allegedly destined for Uganda were intercepted in Kenya, seized and returned to the UK as exhibits. Despite the size of the Kenyan economy, its geographical position and being an economic, financial centre and transit hub for East Africa, these are the only two recorded cases of proceeds from foreign jurisdictions brought into the country, either through established financial avenues or physically, owing to the porous borders. When all factors are taken into consideration, Kenya did not demonstrate that it effectively detects, investigates and/or confiscates proceeds of foreign predicate offences. The NRA did not adequately assess this area and the risks associated with it.

3.4.3 Confiscation of falsely or undeclared cross-border transaction of currency/BNI

183. Kenya has adopted a declaration system for all physical cross-border transportation of currency and bearer negotiable instruments (BNI). All currency and BNIs imports and exports through mail and cargo are declared through a Customs computerized declaration system, while individuals importing or exporting in person cash or BNIs in excess of USD 10,000 or the equivalent in any currency are required to declare it. KRA's Customs Department is the lead agency for the enforcement of currency and BNI cross-border transaction and executes this mandate through its Border Control and Enforcement, and the Cargo Scanning and Monitoring Divisions. For this purpose, all courier companies or entities that engage in cross-border transmission of parcels and cargo have to operate from licensed customs areas. All parcels are scanned and checked by a customs official to ensure that undeclared or falsely declared cash or BNIs are seized. Case in Box 3.13 below, demonstrates an interception by Customs at the Kenya Postal Services of cross-border transportation of undeclared currency through mail disguised as books. The case was still on-going so no further information was available

Box: 3.13: Example of Seizure of Undeclared Currency

On 9th November 2021, the Kenya Postal Service intercepted and seized USD 28,000 that had been concealed in a jacket and mailed with the false declaration that the package contained books.

184. Kenya has put in place some measures for the detection and confiscation of currency and BNIs above the reporting threshold of USD 10,000 or equivalent, that are falsely declared or undeclared. The KRA is well resourced to carry out inspections on cross-border transaction of currency. Its major borders, particularly all the major airports and ports are aided by scanners and canine units as well as trained personnel. However, the described mechanisms have not been effectively used by the authorities to detect incidences of unlawful transportation of currency/BNIs. This is the case when one looks at the volumes of traffic at some of the busiest entry and exit points of Kenya. A good example of such points would be the Jomo Kenyatta International Airport (JKIA), with any estimated annual volume of traffic of 38 000 flights and 3.2 million passengers, which accounts for 99% of the declarations, but there has only been 2 incidents of non-declaration or false declaration in the entire review period. All other 27 operational border posts have not reported an incident of cross-border false or non-declaration of currency. Again, there were no cases provided where the KRA pursued legitimate declarations of currency on suspicion of possible intended ML or TF.

Box: 3.14: Example 2 of Currency Seizure

In January 2021, Jomo Kenyatta International Airport Authorities received intelligence from the FRC that a Bahraini national would attempt to leave the country with large sums of cash, the source of which he could not explain. The suspect was intercepted and searched and found with USD997,500, which he was attempting to smuggle out of the country. He was unable to satisfactorily explain its legitimate source, and the cash was seized. Customs referred the matter to the ARA for it to pursue restraint and also investigate possible money laundering activity. The case was ongoing as at the time of the onsite.

185. These are the only reported incidents of false or non-declaration of cross border currency, and the cases, which are very recent (November 2021 and January 2022), are still being pursued in court. With the amount of traffic, both human and cargo, described at the functional land border points, airports and sea ports, the very low number of cases seem to be inconsistent with the huge flow of traffic. Therefore, the conclusion is that the Authorities have not applied the confiscation of falsely declared or undisclosed cross-border movements of currency and bearer negotiable instruments as an effective, proportionate and dissuasive sanction or that the authorities are not keeping accurate records of such interceptions.

3.4.4 Consistency of confiscation results with ML/TF risks and national AML/CFT policies and priorities

186. The Authorities reported that during the review period, the EACC recovered at least Ksh 132.24bn from corruption related offences (*all related to theft of public funds and property*). In contrast, the NRA report referenced in 3.3.2 above, listed the highest proceeds generating predicate offences, in order of prevalence, as being fraud and forgery; drug-related crime; corruption and economic crime; environmental and wildlife crime; and cybercrime. Corruption and economic crimes are 3rd, while tax crimes are not listed among the top 5 proceeds generating offences. From the information provided, it shows that the confiscation results are not consistent with the ML/TF risks identified by the Authorities, as corruption would have been listed as the most proceeds generating offence. Kenya has a clear policy and strategy for prioritizing and combating corruption, and its implementation is visible and dominant in the recovery of proceeds regime. However, though the policy and legislation for overall recovery of proceeds of crime are in place, apart from corruption, not as much strategic action has been taken with regard to ML or other prominent proceeds generating offences identified, such as drug trafficking and trafficking in humans and wildlife trophies, which suggests why the recoveries there are much lower than those from corruption cases. Thus, the results of EACC's work show reasonable success in addressing the risk of corruption, which cannot be said with some of the other high proceed generating offences. The risk associated with foreign proceeds laundered in Kenya has not been adequately assessed and therefore, is not known or understood to enable such proceeds to be sufficiently pursued and confiscated or forfeited (see NRA report page 22). There was no confiscation associated with TF, and the confiscation results are not in line with the TF risk.

Overall conclusion on IO.8

187. Kenya authorities are largely recovering proceeds of crime from cases of or involving corruption, but doing so to a limited extent for the other proceeds-generating offences. They also pursue recovery of instrumentalities of crime, particularly in cases of drug trafficking, human trafficking, obtaining money by false pretence or trafficking in wildlife trophies to some extent. However, the total recoveries made by the authorities are a small percentage of the recoveries due; as in many cases, suspects are taking advantage of the lengthy legal processes to frustrate the recovery process, where a settlement has not been reached. Authorities have not pursued recovery of property of equivalent value, meaning where tainted property cannot be established, there may not be any recovery. The Authorities have, to a limited extent, pursued proceeds located abroad. From the volume of travellers and the position of Kenya as a financial and business hub in East Africa, serving as an import route to five neighbouring countries (Uganda, DRC, South Sudan, Rwanda and Ethiopia), having only two incidents of non-declaration or false declaration of transportation of cash across the border (one was through post) is an indication of an ineffective system. The recoveries made by Kenya are not consistent with its ML/TF risk profile, based on the information provided to the assessors, as most reported recoveries have been from corruption cases which statistics and other information provided by the authorities show to be the highest proceeds-generating offence posing a risk to the country.

88. **Kenya is rated as having a moderate level of effectiveness for IO.8.**

4 TERRORIST FINANCING AND FINANCING OF PROLIFERATION

4.1 Key Findings and Recommended Actions

Key Findings

IO. 9

- a) The NRA did not address and identify the risk of TF. The report also states that poor cross agency processes impede the national effort to develop understanding of TF risk. This contributes to a lack of understanding across the investigative authorities of the key elements of the TF offence and is reflected in the low numbers of prosecutions and convictions.
- b) ATPU has the strategic lead for TF investigations and is also responsible for the national CT Strategy. The CFTIMC and NCTC also have statutory responsibilities in relation to CT and TF policy matters. The assessment team could not establish the purposes of these different Policy requirement and how the mechanisms coordinate to combat TF.
- c) There are a number of other agencies also involved in the fight against terrorism, namely the NTF, NIS and the LECG. Kenya has not demonstrated how CFT has been integrated into their respective responsibilities or how they coordinate their activities with ATPU, CFTIMC and NCTC, or with each other to show how these inter-agency forums support the detection, investigation and prosecution of TF. Moreover, the NRA notes that there are interagency challenges in relation to intelligence sharing and national coordination.
- d) Between 2017 and 2021, there have been 3 TF prosecutions comprising 4 defendants arising out of exiting terrorist investigations. There have not been any autonomous TF investigations instigated by LEA. This is not consistent with the risk profile of the Country and they have not demonstrated a thorough understanding of the value of financial intelligence and evidence or a sustained approach to successfully investigate and prosecute TF offences.
- e) Every terrorist investigation has an embedded TF investigation. However, there is no information to show how this supports the overall investigative strategy. Kenya has not demonstrated how the TF investigation seeks to identify the source, movement and use of funds or identify the terrorist financier.
- f) CFT is a component part of the National Counter Terrorism Strategy held by the ATPU and, notwithstanding the number of terror attacks suffered by Kenya and the evolving global methodology in TF, this has not been reviewed since 2007.

IO. 10

- a) Kenya has a legal framework that has not complied with the requirements of the primary law that created it. Despite this, Kenya has legislative gaps that would prevent it from providing domestic effect to UNSCRs 1267/1989/ 1988. They do not have mechanisms to effectively

implement targeted sanctions without delay. The current time, from UN notification to implementation by the FRC is at a minimum, 4 days.

- b) Kenya implements UNSCR 1373 by designating individuals and entities pursuant to the POTA Regulations. The authority to designate entities rests at the Government level with the CFTIMC.
- c) Kenya did not provide information to demonstrate its consistent, historic and continued actions to deprive terrorists, terrorist organisations and terrorist financiers of assets (and instruments related to TF activities). Efforts taken are not commensurate with the TF risk profile of Kenya. This is highlighted by the lack of risk assessment in relation to cross border illicit activity. Interceptions of contraband made by border customs officers do not include a parallel TF or ML investigation.
- d) Kenya has a large NPO sector. Except for some initial actions by the NGO Board, the regulatory and supervisory regime is inadequate. The sector has not been properly assessed for TF risk or assessed to identify the subset of NPOs who may be vulnerable to TF abuse.
- e) There is confusion across the NPO sector in relation to their obligations due to the numerous national and local regulatory procedures.
- f) The lack of effective monitoring and supervision by the regulator and statutory failings by the FRC enhances the inherent risk factor for the activities conducted by the NPOs. Kenya has not identified the high-risk subset of NPO.
- g) There is little or no outreach to the NPO sector and the sector has, in part, taken to self-regulation. This is reflected in the low level of reporting by NPOs as required under POCAMLA

IO.11

- a) Although there is a Committee responsible for implementation of TFS related to PF, there have been no actions taken to implement the measures.
- b) There is no legal framework or mechanism to enable implementation of TFS relating to financing of proliferation by reporting entities.
- c) There is low level of understanding of TFS related to PF and as a result there is no compliance with the obligations.
- d) Supervisory authorities do not monitor compliance by FIs or DNFBPs on implementation of the financial sanctions relating to PF.
- e) There is little or no voluntary compliance to the TFS related to PF obligations and the supervisors do not encourage reporting entities to implement the measures voluntarily.
- f) There is no awareness on TFS relating to PF by most of the competent authorities and the reporting entities.

Recommended Actions

IO9

- a) Kenya should ensure that investigative and prosecution authorities have a better understanding of the TF risks, as well as the methods and channels used to collect, use and move TF funds.
- b) Develop a CFT Strategy and include reference to the policy, intelligence and operational frameworks and set out the purpose of the terrorist financial investigation. The Strategy should include reference to, and in turn improve the identification of the source, movement and use of funds. It should also set out the benefits of exploiting financial intelligence and evidence.
- c) Kenya should enhance TF investigative competency of the FRC and ATPU for effective identification, investigation of TF cases, and improve on the capacity and skills for the ODPP to prosecute TF cases.
- d) Enhance the integration of TF into Kenya's broader counter terrorism approach particularly at an operational level, including supporting policies and actions that lead to LEAs identifying and investigating the widest range of TF activity consistent with the risk profile.
- e) Kenya should develop mechanisms to improve outreach which will raise awareness of TF behaviours and emerging trends, including with the private sector. This will lead to the identification of sources, movement and use of funds and lead to the prosecution of different types of TF activity and increase chances of identifying the role of the terrorist financier.
- f) ATPU should develop a cohesive CFT operating model working with Customs officials and defence authorities at borders and conduct parallel TF investigations and prosecute different types of TF activity relating to the movement of contraband to finance the terrorist offence, this should include initiating autonomous TF investigations.

IO10

- a) Kenya should establish legislative and institutional frameworks for the implementation of all UNSCRs, whether proposing or designating on the financing of terrorism that is consistent with the requirements of the domestic laws.
- b) Kenya should review and improve mechanisms to ensure that designations and obligations regarding targeted financial sanctions relating to TF are communicated to FIs, DNFBPs, LEAs and other relevant sectors, and apply the same requirements to the general public in a timely manner, that is, for reporting Institutions, within 24 hours. The current average time for implementation is 4 days.
- c) FRC and the NGO Board should convene and set out a clear strategy for effective inter-agency cooperation and to ensure the statutory and regulatory responsibilities of the respective agencies are fully met.
- d) Kenya should conduct a TF risk assessment of the NPO sector, and identify the subset of NPO vulnerable to TF abuse.
- e) Kenya should conduct a thorough review of the approach to NPO regulation and supervision, informed by the results of the NPO TF risk assessment to ensure that

regulatory and supervisory measures are focused and proportionate, and do not disrupt or discourage legitimate NPO activity.

- f) The current approach to outreach should be reviewed and a coordinated and a comprehensive regime should be implemented by the FRC and NGO Board in line with the FATF Standards.
- g) Kenya should improve staffing and funding levels to support the NGO Board and the FRC in carrying out their respective supervisory and regulatory responsibilities.

IO11

- a) Kenya should establish legislative and institutional framework for the implementation of UNSCRs on the financing of proliferation of weapons of mass destruction without delay. In the interim, reporting entities with knowledge of TFS relating to PF should be encouraged to voluntarily implement the UNSCRs on PF.
- b) Kenya should ensure that designations and obligations regarding targeted financial sanctions relating to PF are communicated to FIs, DNFBPs, LEAs and other relevant sectors without delay, that is, for Reporting Institutions, within 24 hours.
- c) Kenya should ascertain that funds or other asset belonging to designated persons and entities are identified and such persons and entities are prevented from operating or from executing financial transactions related to proliferation.
- d) Competent authorities should embark on awareness programs that will ensure that FIs and DNFBPs understand their obligations regarding TFS relating to PF and that they comply with the obligations and should also be monitored for compliance.

189. The relevant Immediate Outcomes considered and assessed in this chapter are IO.9-11. The Recommendations relevant for the assessment of effectiveness under this section are R. 1, 4, 5–8, 30, 31 and 39, and elements of R.2, 14, 15, 16, 32, 37, 38 and 40.

4.2 Immediate Outcome 9 (TF investigation and prosecution)

190. As discussed in IO.1, Kenya’s understanding of TF risk needs fundamental improvement across both government agencies and the private sector. The lack of TF risk understanding adversely affects the ability of Kenya’s operational agencies to target TF for investigation and prosecution.

191. ATPU is the strategic and operational lead for TF investigations. It is responsible for the CT Strategy. This document states that each terrorist investigation will have a parallel TF investigation. The information provided by the authorities did not demonstrate the efficacy of this operational approach. The cases of TF identified where an investigation had been commenced on terrorism or related offences, were not provided. ODPP is the agency responsible for the prosecution of TF offences in Kenya. The agency has specialist CT lawyers who deal with terrorism and TF matters.

4.2.1 *Prosecution/conviction of types of TF activity consistent with the country's risk-profile*

192. Kenya faces significant TF threats from a number of terrorist groups and the investigation, prosecution and conviction of the TF offence is not consistent with the terrorist activity taking place in Kenya. The NRA has a limited assessment of the TF risk. It mainly focused on the TF offence as proceed generating offence rather than a standalone offence. This suggests shortcomings in the understanding of TF, the value of financial intelligence and the value of financial related evidence to support wider terrorist investigation or other counter terrorist functions across Kenya.

193. Due to the limited scope of the assessment of TF risks in the NRA, the assessment team took into account a number of reputable academic papers³⁰ and open-source reports³¹ which raise concerns over TF activity related to Al Shabaab cross border activity³² (sugar/ charcoal³³/ khat smuggling).³⁴ Whilst the assessment team acknowledge this is open-source reporting, the level of alleged financing is significant and worthy of note. These issues were raised during the onsite visit with the key stakeholders. ATPU did not consider that cross border smuggling activity is linked to the financing of terrorism, stating such activity did not take place. There was no broader explanation to show how this area of TF risk had been assessed, understood and mitigated. It is notable that the views of ATPU were contrary to the broader Border enforcement commentary during interviews, where they stated they are actively intercepting contraband along the border. The Kenya/ Somalia border is officially closed, and the border enforcement officials regard all trading activities, whether in illicit goods or not, as illegal. All contraband is seized and destroyed. During interviews, FIs also noted this activity as high risk of TF. The Border agencies do not conduct parallel TF investigations when contraband is intercepted.

194. Whilst the main focus in academic and open-source reporting is on the movement of sugar and charcoal, it became apparent during onsite interviews that investigations should also focus on the cross-border movement of flour and maize and include cattle rustling. Considering the level of terrorist activity along the border, Kenya may wish to review the multi-agency investigative approach when interventions are made and conduct parallel TF investigations. This would involve ATPU working in partnership with Border and Defence agencies by conducting parallel TF investigations alongside the predicate offence of smuggling.

195. Kenya has not demonstrated how they investigate and prosecute the terrorist financier linked to different terrorist groups currently active in the Country. This is reflective of the NRA which focuses on the threat posed by Al Shabaab, Islamic State and Al Qaeda. There is no information available to show consideration to other groups such as the Allied Democratic Forces (ADF) who are operating in Uganda with active members from Kenya. A member of ADF was arrested at the time of the onsite visit. Open-source reporting suggests there are a number of elements of TF in the case to support ADF activities³⁵. The assessment team note there is a high-level commitment to fighting terrorism and a broader consideration of other terrorist groups and funding channels will enhance the detection, investigation and prosecution of the TF offence. The current cases awaiting trial relate to payments to FTF who have travelled to Somalia (see example in Box 4.1 below).

³⁰ https://www.nato.int/cps/en/natohq/topics_176310.htm

³¹ <https://www.brookings.edu/blog/order-from-chaos/2019/08/22/corruption-and-terrorism-the-case-of-kenya/>

³² <https://globalinitiative.net/analysis/world-atlas-of-illicit-flows/>

³³ <https://tikenya.org/wp-content/uploads/2021/03/Illicit-Financial-Flows-IFFs-in-Kenya-fact-sheet.pdf>

³⁴ <https://time.com/3817586/ian-bremmer-facts-explain-shabab-terror-attack-kenya/>

³⁵ <https://www.the-star.co.ke/news/2022-01-30-kenya-to-seek-extradition-of-terror-suspect-nabbed-in-drc/>

Box 4.1: Foreign Terrorist Fighters

Case study - HAA and WAZ were identified amongst others, due to their previous involvement with terrorism offences and the involvement of some of their family members who have travelled to a foreign country as foreign terrorist fighters and facilitators.
Specific details of the terrorist financing charges have not been provided as the case is currently awaiting trial and the authorities wish to avoid compromising the judicial process.

Box 4.2 Rose Ondumbu

Convicted of dealing in terrorist property under Section 8 (1) (c) of POTA and acquitted of terrorist financing offence. Sentenced to 5 years Police supervision. Forfeiture proceedings ongoing.

Collected rent money for a property owned by her son between 2013 and 2017. Her son, who was killed in a security operation, was a FTF and member of Al Shabaab in Somalia.

Table 4.1: TF Prosecutions

YEAR	NO OF CASES	PERSONS INVOLVED	PROSECUTED
2017	1	1	1 - see case study Rose Odumbu
2018	2	2	2 - see case study HAA and WAZ
2019	2	1	2 - see case study MAA
2020	0	0	0
2021	0	0	0

196. Kenya have commenced 3 TF prosecutions in the time period relevant to this assessment comprising 4 defendants (see Table 4.2, above). Two matters await trial. One matter has been concluded and the defendant was convicted of dealing in terrorist property and acquitted of terrorist financing as described in Box 4.2,

197. While ATPU has demonstrated that some TF matters are investigated, authorities were not able to show that LEAs are identifying and investigating the widest range of TF activity such as domestic or trans-national activity, collection, movement or use of funds in keeping with the TF risk profile. This reflects comments in the NRA and states *‘there are challenges to domestic cooperation include, poor coordination at lower levels of administration/ criminal justice system, lack of a comprehensive policy framework to guide on modalities of cooperation and poor management to joint-approaches to investigations. It was also noted that turf wars and apprehensiveness of sharing information posed a threat to the effectiveness of cooperation among agencies and that agencies face challenges in cooperation and intelligence sharing’*³⁶.

³⁶ Page 43 Kenya NRA 2021

198. This finding in the NRA, is reflective of the deficiencies currently facing Kenya in collectively identifying and successfully investigating the offences of TF. As the case in Box 4.3 below illustrates, the actions by the authorities are reactive and not proactive, which highlights the failure to identify the likelihood of TF offences before they occur. Kenya has not demonstrated how key stakeholders coordinate and share intelligence to identify, investigate and prosecute the terrorist financier before the terrorist offence occurs.

Box 4.3: Case Study MAA

Case Study – Defendant charged with facilitation of terrorist Act (Sec 9(1) POTA) In the M and D cases, both charged with terrorist offences. The financier (MAA), disguised as a money changer, was discovered after the occurrence of the terrorist act. MAA sent a substantial amount of money to the two individuals who were involved in two separate cases.

In case M, MAA sent Kshs. 130,700 to a person charged with terrorism (currently facing trial).

In case D, MAA sent Kshs. 907,400 to a lead terrorist who was killed during a terrorist attack. In both cases, these funds were used to rent houses and buy vehicles to be used by terrorists in advancing their criminal activities (acts preparatory). The case awaits trial.

199. Kenya has not demonstrated a shared understanding of both domestic and trans-national TF risks to guide their TF investigations.

200. In light of the few numbers of TF prosecutions, the assessment team also sought information to establish if financial intelligence and/ or financial evidence was used in the prosecution of other terrorist cases such as attack planning cases. Unfortunately, Kenya could not provide any information in this regard.

201. The 2007 CT Strategy does not explain the purpose of what the parallel terrorist financing investigation, conducted in each terrorist investigation, is seeking to achieve. Due to the time that has passed since the Strategy was implemented, the level of terrorist activity in Kenya and the evolving global methodology for TF, Kenya should consider a review of the Strategy (see Recommended action).

4.2.2 TF identification and investigation

202. DCI has dedicated resources employed within ATPU with responsibility for monitoring possible TF. The Unit has a well-staffed counter-terrorism investigation unit with the capability to responding to incidences/situations at any given time. There are financial investigators and analysts dedicated to CT investigations. Whilst the Unit has the capacity to meet the operational demands, it has not demonstrated competency in the effective detection and investigation of the TF offence.

203. As directed by the CT Strategy (all terrorist investigations will have a parallel TF investigation), ATPU has conducted 2530 parallel TF investigations since 2016. This is commensurate with the number of terrorist investigations in the reporting period. There have been no TF prosecutions or other TF related operational outcomes as a result of these parallel investigations. The absence of such cases highlights the need to improve investigative competency/skills and the strategic approach to terrorist investigations. Although ATPU can instigate autonomous TF investigations, this has not been demonstrated.

Table 4.2: Terrorist Investigations in Kenya 2016-2020

Terrorist Investigations	2530
Terrorist Prosecutions	717
Convictions	176

204. ATPU will obtain leads for TF investigations from the FRC and operational partners. During onsite interviews, it was apparent that there was not a full understanding of the value of financial intelligence and evidence to support all CT functions, as well as identification and investigation of the TF offence. This covers a broad-spectrum of activity from the use of financial intelligence (to identify further leads) or the use of evidence in TF investigations and prosecutions to identify the role of, and to convict the terrorist financier. The focus tends to remain on the TF offence as proceeds generating offence. Kenya LEAs and FRC did not demonstrate that they use the account monitoring powers available to them. CT investigations will consider and may include a broad range of covert investigative techniques.

205. ATPU has provided details of the training courses attended by investigators responsible for managing TF investigations. There are 15 officers attached to the Parallel Financial Investigations and undergo training annually to enhance their skills. The officers have attended a number of other different training sessions. No information has been made available to show if competency is monitored and maintained.

Table 4.3: Details of Training Courses

NO	TRAINING/ COURSES FOR ATPU ON TF
1.	COUNTERING THE FINANCIAL OF TERRORISM TRAINING
2.	DISRUPTING CRIMINAL TRAFFICKING AND SMUGGLING NETWORK THROUGH AML AND FINANCIAL TRAINING
3.	NATIONAL COUNTER TERRORISM FINANCING TRAINING
4.	CRIMINAL INTELLIGENCE TRADECRAFT TRAINING ON TF
5.	CRIMINAL PROFILING INTELLIGENCE TRAINING

206. The ODPP have 22 specialist CT lawyers based in different regions across Kenya. These specialist lawyers are also responsible for the prosecution of TF cases. They can also recommend investigation and prosecution of the cases for other charges if there is insufficient evidence to support a charge of TF or terrorism. During the reporting period, FRC disseminated 45 financial intelligence reports to ATPU of which ATPU conducted 16 investigations – none of these related to terrorist financing (see IO6 for further details). Of these 16 cases, nine were referred to the ODPP for advice. ODPP recommended other charges relating to ML rather than terrorism related offences.

207. Between 2017 and 2020, the FRC made 12 requests for information to foreign FIUs while Foreign FIUs made 41 requests to the FRC. The requests made by the FRC relate to information on sources, destination and purpose of TF funds. Feedback from one Country showed the positive impact it had on the case which resulted in the conviction of a terrorist.

208. Kenya did not demonstrate how they conduct outreach and provide support to financial institutions and DNFBP to improve reporting of TF suspicions which will in turn provide leads for investigations.

4.2.3 *TF investigation integrated with and supportive of national strategies*

209. Kenya has not demonstrated how TF investigation is integrated with, or supportive of national strategies. For completeness, the various strategic functions are set out here. All the agencies met during the on-site visit demonstrated a genuine and high-level commitment to fighting terrorism.

210. ATPU has the National strategic lead for CFT in Kenya and is responsible for the National CT Strategy. The Strategy is dated 2017 and has no accompanying action plan. They coordinate and lead on all terrorist investigation activity in Kenya. The Strategy does not include an action plan. Kenya should consider developing an overarching CFT Strategy to set out the policy, intelligence and operational frameworks and how the various CT functions work in collaboration, ensuring CFT is a component part of all functions. The inclusion of an action plan would allow the authorities to recognise, prioritise, monitor and respond to emerging threats and trends.

211. The Law Enforcement Coordination Group is established under POTA Regulations to support the functions of the CFTIMC.

212. The CFTIMC has the responsibility to formulate and supervise the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism. However, the assessment team was not availed with an opportunity to meet with the CFTIMC and no specific information was provided to the assessors on its work. The assessors could not therefore determine in practice, the scope of its work on TF. The NCTC is responsible for the co-ordination of national counterterrorism efforts in order to detect, deter and disrupt terrorism acts, as well as having statutory responsibilities relating to terrorism and raising public awareness.

213. The NCTC also coordinate activity relating to the National Strategy to Counter Violent extremism (NSCVE). CFT is not a consideration across this area of work. There is a lack of understanding of the value of financial intelligence to support the efforts to CVE. The NCTC hold bi weekly multi agency meetings and state that any TF matters would be referred to the FRC. However, CFT is not a standing agenda item and no referrals have been made to the FRC at this stage.

214. Details of these policies, strategies and action plans held by NCTC or CFTIMC have not been shared during the onsite visit and the agencies could not state where they are documented. During onsite interviews, the NCTC stated that TF was not specifically addressed in the course of their activities and recognise that they have not adequately dealt with their responsibilities in this regard.

215. The Joint Terrorism Task Force (JTTF) has been formed to coordinate investigative activity.

216. The Joint Counter Terrorism Assessment Centre (JCTAC) is a multi-agency centre whose main mandate is to carry out analysis on actionable counter-terrorism intelligence.

217. The assessment team did not meet JTTF or JCTAC and analysis could not be conducted to establish the role of the agencies in the wider CFT framework.

218. Kenya did not demonstrate how TF investigations are integrated into the Kenyan counter-terrorism functions or strategies. No information has been provided to show how Counter-terrorism financing authorities coordinate and cooperate in a structured manner, locally and across jurisdictions, regions and sectors. Given the TF vulnerabilities and threats faced by Kenya, a more vibrant integration of TF investigations into the Kenyan counter-terrorism functions and strategies was expected.

4.2.4 Effectiveness, proportionality and dissuasiveness of sanctions

219. POTA provides for effective, proportionate and dissuasive measures against TF offences. A person convicted for TF offences can be sentenced up to 20 years in prison without an option of a fine. There are no sanctions available for legal persons guilty of terrorist offences. None of these sanctions have been applied in practice as there had been no conviction for the offence of TF during the period under review. The sentence for dealing in terrorist property is not dissuasive.

4.2.5 Alternative measures used where TF conviction is not possible (e.g. disruption)

220. When the ATPU and the ODPP find that securing a conviction for TF is not possible, they pursue alternative measures such as preferring alternative criminal charges to disrupt the offender, or pursue civil measures such as confiscation of instrumentalities of crime. Kenya have demonstrated the use of disruptive measures to a limited extent whereby they have charged an offence of ML in 2019 where a TF prosecution was not possible. This matter awaits trial. Kenya has also used deportation powers as a disruptive tool. These measures relate to investigations into terrorist attacks in 2014 and 2015 (see case studies Boxes 4.4 & 4.5 below).

Box 4.4: Case study HAN – disruptive measures

In 2019, following the terrorist attack at 14 Riverside Drive Complex in 2015, HAN was arrested for terror financing. However, upon investigation, it was not possible to sustain a charge of TF due to insufficient evidence. The prosecution preferred Money Laundering Charges under POCAMLA. Other charges related to falsification of identification documents and being unlawfully present in Kenya were also preferred. Kshs. 3,000,000 (E-Money) has been seized pending completion of the proceedings.

Box 4.5: Case study HAN – disruptive measures

Case study - 2014 IED attack at Java Coffee House at Jomo Kenyatta International Airport, Nairobi. The suspects were charged with committing a terrorist act c/s 4 (2) of the Prevention of Terrorism Act (Not TF). In 2018, upon completion of full hearing, the accused persons who were all Somali Nationals were acquitted. In the absence of grounds for appeal by the prosecution, the accused persons were deported to Somalia.

[This is terrorism and not TF]

221. During the onsite, Kenya stated that significant steps have been made through its security forces in protecting the lives and property of its citizens as well as protecting Kenya's critical infrastructure. Unfortunately, no further information has been provided on this approach, or how the Country has set about developing and integrating its CFT policy and investigations into these Police, Border security and military operations.

222. Parallel TF or ML investigations do not take place when smuggling interventions (predicate offence) take place along the border with Somalia as the border is officially closed, and all contraband seized is destroyed. Considering the level of terrorist activity along the border, Kenya did not

demonstrate how they take a multi-agency approach to investigate to prove or disprove the TF offence, or how the agencies cooperate to exploit the use of disruptive measures.

223. Where threats are posed by suspects unlawfully present in the country, and by terrorist suspects entering and leaving the country, the Directorate of Immigration Services implements the extradition and deportation of such persons and/or watch listing through the PISCES and stop orders at the Country's entry and exit points. Kenya did not provide any further information to show how this process has been used.

224. The ODPP has in place a diversion policy and has diverted three (3) TF related cases which involved young suspects to undergo rehabilitation programmes rather than have them taken to Court. No further details have been provided on this matter due to sensitivities of the case.

228. The National Registration Bureau ascertains the validity of identification documents of persons suspected of TF and ultimately recommends the investigation and charging of persons found to have fraudulently acquired identification documents for terrorism purposes by the police. Kenya has not provided any further information to show when these measures have been used.

Overall conclusions on IO.9

225. Kenya has a high-level commitment to fighting terrorism, and while there have been positive efforts to improve the general CT response across many agencies, CFT has not been integrated across the functions and counter-terrorism strategies, TF investigations and prosecutions. The TF risk has not been addressed in the NRA as a stand-alone offence and this is not commensurate with the terrorism activity in Kenya. The broad range of factors available to the terrorist financier have not been considered. These issues affected the authorities, abilities to successfully detect and investigate TF (see IO.1 Ras) There have only been 3 prosecutions instigated for TF comprising 4 defendants and two of these matters await trial. There have been no convictions for TF.

226. Overall, Kenya's TF actions are not consistent with its overall TF risks and the competent authorities responsible for the various National CT strategies do not coordinate activity and embed CFT as a component part of the wider fight against terrorism. As a result, Kenya has not demonstrated how it has identified different types of TF activity, namely the collection, movement and use of assets or how well they identify, investigate and prosecute cases of TF. CFT is one of a number of strands in the National CT Strategy. Kenya has not conducted a review of the strategy since 2007, accordingly it does not take into account the continuing terrorist activity suffered in the Country or the evolving behaviours to finance the terrorist act. There is no National Action Plan relevant to TF. The NRA reflects on poor national coordination, poor record keeping and inter agency challenges to share intelligence which hampers the National CFT approach.

227. **Kenya is rated as having a low level of effectiveness for IO.9.**

4.3 Immediate Outcome 10 (TF preventive measures and financial sanctions)

4.3.1 Implementation of targeted financial sanctions for TF without delay

229. The POTA Regulations are intended to implement TFS in relation to TF. However, section 50(4) of the POTA provides that Regulations issued under the POTA have to be laid before the National Assembly. The authorities could not provide any kind of formal confirmation that this procedural requirement was followed and that the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013 were laid before the National Assembly before being passed. Therefore, there was no legal basis for the assessors to rely on the Regulations for purposes of implementation of targeted financial sanctions for TF without delay.

230. Implementation of TFS and the competent authorities charged with the responsibility is set out in the POTA Regulations (Refer to R.6 on the assessors view of the validity of the Regulations). Although it was prudent for the assessors to meet with the CFTIMC to confirm its existence, the scope of its work and it how coordinates its work with the other relevant competent authorities, it was not availed to the assessors. The FRC which plays the role of the Secretary to CFTIMC engaged with the assessors on behalf of the CFTIMC. The FRC, the assessors got to understand that the CFTIMC was established to implement UNSCRs and has the responsibility to implement Resolutions 1267, 1373, 1718 and 1988. FRC set out the mechanisms for the purposes of dealing with designations under UNSCRs. Once a designation is made, the Kenyan Mission to the United Nations will submit to the Ministry of Foreign Affairs. The Ministry will submit each designation or sanctions list to the Cabinet Secretary, Ministry of the Interior and National Coordination. The Cabinet Secretary will upon receipt of the designation or sanctions list circulate it to the members of the Committee. The Committee will then circulate the designation or sanctions list to the supervisory bodies specified under POCAMLA, the national security and LEAs and financial institutions to detect, freeze or seize the funds or the property of a designated entity. The current mechanism to implement TF TFS is only limited to reporting institutions and there is no mechanism to extend the obligation to the general public. This becomes a huge vulnerability considering Kenya's situation with terrorist activities and their funding. The CFTIMC designated the FRC to be responsible for the circulation of the UNSCR 1267 updates to Supervisory bodies. When authorised by the CFTIMC, the FRC downloads the 1267 listing from the UN website, forwards the list to regulators who in turn circulate the same to reporting institutions. The list is also uploaded to the Go-AML portal of the FRC.

231. Kenya does not implement TFS without delay as it takes about four days using the current mechanisms. In addition to the delay in implementation, at the time of the on-site, it could not be determined to what extent the TF TFS were being implemented by the other different sectors apart from financial institutions, particularly the DNFBP sectors of real estate and dealers in precious stones, as the players in the two sectors were not met. Lawyers, due to the relief provided by the courts on their AML/CFT obligations, have no obligation to implement TFS until when the matter has been resolved by the courts. These weaknesses create vulnerabilities in the implementation of the UN TF TFS.

232. For the UNSCR 1373 framework, s.3 POTA states the Inspector General of Police may recommend to the Cabinet Secretary of Interior and CFTMIC (competent authority) to designate persons and entities as specified entities. If the designation is approved, on the advice of the Counter Financing Inter-Ministerial Committee, the Cabinet Secretary for the Ministry of Interior and Coordination of National Government will direct the freezing of assets. The FRC is responsible for forwarding the directive to reporting institutions. Kenya has not received any requests from other jurisdictions to implement designations pursuant to UNSCR 1373 but is able to give effect to a request from another country whenever required. Kenya has not made any requests to any other Countries under UNSCR 1373.

233. Kenya have listed individuals and entities under the 1373 regime. Details of the precise numbers of designations have not been provided. Some of the persons listed by Kenya have also been listed by other jurisdictions. The case study below demonstrates how Kenya considers parallel TF investigations to designations. HAA and WAZ are currently awaiting trial in relation to TF offences.

Box 4.6: Case Study HAA and WAZ

Pursuant to the provisions of UNSCR 1373(2001) on 2nd September, 2020, the Cabinet Secretary Ministry of Interior and National Coordination directed that the funds and property of nine individuals and one entity be frozen having been found to be involved in terrorism financing. The individuals are HAA, WAZ, Sheikh GGB, MAA, NMH, AAH, MAA, MAE, MIA and MAE

Box 4.6: Case Study 2016

Pursuant to the provisions of s.3 of POTA, on 14th March 2016, the Cabinet Secretary for Interior and Coordination of National Government vide Gazette Notice number 1618 of 2016 declared a number of entities as specified entities for their involvement in terrorist acts including terrorism financing as a disruptive measure different from a Criminal Justice Measure. The impact of the designation is that the entities are precluded from trading with other organizations and individuals.

234. Under the UNSCR 1267 framework, Kenya has identified, and proposed for designation Al Shabab as a terrorist organization to the UNSC on five different occasions. As a result of opposition from other members, the proposals have been unsuccessful. Kenya has not proposed the designation of terrorist individuals to the 1267 Sanctions Committee.

235. During interviews and meetings with financial institutions and other competent authorities it is apparent that there is a mixed understanding of the obligations to freeze the assets of listed entities. The understanding was very good in the larger institutions but poor in other smaller firms.

4.3.2 Targeted approach, outreach and oversight of at-risk non-profit organisations

236. Overview of the sector- based on the annual NGO report and interviews during the on-site, the NGO Coordination Board (the Board) registered 11,624 organisations of which 9,255 organisations were considered active 2019/ 20. NPOs received and spent in the region of KES160 billion (\$1.3bn) respectively. Most of the organisations reported having implemented health-related projects at 33 per cent, education 14 per cent and Relief/Disaster management at 8 per cent. In the period under review, NPO engaged some 80,299 employees; 70,426 of them stationed in Kenya while 9,873 in other countries. The analysis further revealed that 52.5 per cent were salaried while 47.5 per cent were volunteers/interns.

237. Kenya has not adequately assessed the TF risk pertaining to the subset of NPOs which are vulnerable to TF abuse, accordingly there is no targeted approach to manage the risk. The NRA concluded that NPOs engaged in the relief sector, and those operating in proximity to the Kenya-Somalia border are the most vulnerable for TF risks. The NRA does not articulate how this conclusion was made, and which specific types of NPOs are vulnerable and during the on-site the basis for this finding was not provided.

238. The sector level of TF risk by the NPO sector is assessed as being low. However, the NRA report continues to say that due to shortcomings in the regulation and supervision of NPOs, the vulnerability (not risk) to abuse for TF is rated at medium. Kenya has not demonstrated how it investigates and prosecutes TF offences involving actors in the NPO sector.

239. Work with NPOs to promote measures to prevent abuse and proactively apply targeted and proportionate measures to at-risk NPOs, as appropriate, is negligible. This is based on comments in the NRA, interviews with NPOs during the onsite and comments made by the Board.

240. During the onsite, the Board stated that the regulatory and supervisory regime was inadequate. The meeting established that the Board had little or no knowledge of the TF risk posed by, or to NPOs in Kenya. There is notably a low number of responses by NPOs in response to their regulatory obligations – to file annual returns. The Board stated the return rate across the sector was about 40%. Figures in the 2019/20 annual report show the compliance figure to be around 29%. The Board is unaware of exactly what number of NPOs are currently active in Kenya (See Rec 6).

241. The Board has 3 trained staff to deal with supervisory matters. It is under-staffed and underfunded and this directly impacts on their ability to fulfil their functions. This is evident in the sense that very little has been done in terms of building awareness on TF risk with the NPOs and also the inadequate monitoring in the absence of a risk assessment to assist those that might be exposed to TF risk.

242. The NPOs are the subject of various statutory provisions and supervised by two regulatory regimes which have caused to some extent confusion among competent authorities and across the NPO sector. Firstly, NPOs are regulated and supervised by the NGO Board and secondly by the FRC, as they are defined as DNFBPs by virtue of POCAMLA. This places a requirement on NPOs to file reports with two competent authorities, as well as any other reporting requirements depending on the services provided, and whether they are registered at the national or County level. Due to the size of the sector, the resources available at the NGO Board and FRC are unable to meet the regulatory and supervisory requirements. Kenya recognises the registration challenges.

243. These collective shortcomings contribute to unintended consequences. Financial institutions interviewed stated they make commercial decisions regarding banking services provided to NPOs and may exit relationships in the interests of their business. NPOs met during the onsite took a sector view that de-banking usually followed a failure to provide annual accounts to the bank.

244. Kenya does not conduct outreach with the NPO sector. The NRA states – *‘There is no effective outreach to the sector by the NGO Coordination Board on terrorism financing related issues. All NGOs surveyed identified a lack of outreach on terrorism and terrorism financing measures’*. During the on-site visit the NGO Board and FRC stated they had conducted outreach but they could not provide specific information of the frequency or content of such outreach or with whom they have worked.

245. Lacking guidance from the competent authorities or law enforcement, some NPOs have had to adopt a self-regulatory approach, incorporating undocumented CFT risk assessment procedures (to prevent diversion of funds). Due to the lack of guidance from the competent authorities they still needed a lot of awareness on AML and the POCAMLA as well as build a good understanding of CFT. Additionally, they had not been informed or assisted to understand by both the FRC and NGO Board on their statutory obligations as reporting entities under the POCAMLA and had not appointed Money Laundering Reporting Officers. Interactions with some of the NPOs also indicated that they still needed a lot of awareness on the role/responsibilities AMLROs in their operations as designated DNFBPs. However, it was noted that in an attempt to meaningfully manage TF risk, some of the NPOs had developed risk management procedures based on local knowledge acquired through capacity building and working in high-risk areas. Such NPOs, in order to lower the vulnerability of TF abuse, were

generally dealing only with mobile payment services and were not dealing in cash. The lack of proper awareness on the TF risk being shared with the NPOs had also affected their ability to make TF financial disclosures (STRs) where necessary as at the time of the on-site there had not been any STRs filed by the NPO sector.

246. It was not demonstrated what efforts the NCTC, or any other competent authority have made in line with the functions stipulated under Section 40B (2) of POTA which provides for ‘*raising public awareness on prevention of terrorism and capacity building for counter-terrorism stakeholders.*’

247. Kenya have not demonstrated how ATPU and the NGO Board coordinate to manage the TF risk impacting in the NPO sector. If the Board suspect TF activity, the matter is referred to the ATPU for further action as a criminal investigation. The NGO Board rely on NIS to complete the vetting process for new applicants. The NIS then advises the Board to proceed or not to register the applicant based on its background checks.

4.3.3 Deprivation of TF assets and instrumentalities

248. Kenya is able to deprive terrorist financiers of their assets and instrumentalities through both criminal and civil measures. However, no cases have been provided to demonstrate if this has happened in practice during the assessment period and to what extent it has been effective.

249. Historically, and outside the period for analysis, Kenya took administrative steps in 2015 to deny terrorists the use of instrumentalities suspected to be involved in the commission of the Garissa attack. In the Dusit attack, the instrumentalities included stolen vehicles which were confiscated for purposes of production in court. Instrumentalities were also confiscated in a terrorism related case involving a MVBIED. No further information was provided for analysis.

250. Kenya has not convicted any legal entities of terrorist offences. Accordingly, no sanctions have yet been imposed on legal entities. Also, during the on-site no information was provided on a legal person having been prosecuted for TF or for a terrorist activity, which explains why there have been no convictions or sanctioning of a legal entity for TF.

251. There is no information or case studies available showing Kenya’s use of terrorist cash seizure powers.

4.3.4 Consistency of measures with overall TF risk profile

252. Kenya has not demonstrated that it has an adequate understanding of the country’s TF risk. Accordingly, the assessment team consider that TF preventative measures and targeted financial sanctions are not used effectively to tackle the risk posed by TF, to deprive terrorists of funds and disrupt the activities of terrorist actors.

253. Kenya has legislative gaps preventing it from providing domestic effect to UNSCRs 1267/1989/1988 in that the POTA Regulations are not supported by adequate primary legislation. They do not have mechanisms to effectively implement sanctions without delay. The current time, from UN notification to implementation by FRC is at a minimum 4 days.

Overall conclusions on IO.10

254. Kenya has designated entities pursuant to UNSCR 1267 and made proposals pursuant to 1373. However, considering the lack of a clear demonstration of understanding of TF risk and the level of terrorist activity in the Country, the assessment team consider that Kenya is not consistent or effective in implementing TFS to combat terrorist financing. Despite the legal deficiencies, Kenya has proposed entities to the 1267/ 1989 Committee for designation, Kenya does not consistently prevent terrorist financiers from raising, moving and using funds or deprive them of assets and instrumentalities.

255. The FRC and NGO Coordination Board have not met their statutory obligations in the supervision and regulation of NPOs. There is insufficient information on the extent of TF risk in the sector. Kenya does not take a targeted approach to risks across the NPO sector that is consistent with its TF risk profile.

256. Kenya has not identified the high-risk subset of NPOs, particularly those operating in high-risk areas that might be vulnerable to TF abuse.

257. **Kenya is rated as having a low level of effectiveness for IO.10.**

4.4 Immediate Outcome 11 (PF financial sanctions)

Background

258. As at the end of onsite visit, Kenya had no legal and institutional framework to implement UNSCRs on proliferation of weapons mass destruction (WMD). The authorities relied on the Prevention of Terrorism (Implementation of The United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013 as the law that provides the legal framework. However, the POTA Regulations could not be relied upon, as they were issued under the POTA (*See Recommendation 7*). The POTA itself only relates to terrorism and TF. There is little to no awareness by competent authorities and reporting entities on how to implement their obligations in relation to the financing of proliferation. There is no evidence that the Inter-Ministerial Committee established under POTA Regulations have discussed or issued guidelines on how to implement the UNSCRs on PF. Kenya has Diplomatic relations with DPRK. However, there are no strong indicators of cases of sanction evasion involving Kenya or Kenyan firms or citizens. Kenya has also not been named in the 2020, 2021 and 2022 in 1718 Panel of Experts Report (Except in 2020 as among countries that did not submit a Report).

4.4.1 Implementation of targeted financial sanctions related to proliferation financing without delay

259. Most of the reporting institutions have no framework to allow for the implementation of TFS related to PF. The majority of the reporting institutions interviewed were not aware of PF related sanctions. Often it was being confused with UNSCRs 1267 or 1373. The authorities (assessors did not meet the Inter-Ministerial Committee charged with the responsibility to implement PF TFS), indicated that as at the time of the assessment, they had not taken any steps to ensure that PF TFS are being implemented without delay. As a result, there has not been any investigations conducted or intervention made by the authorities to enforce any sanctions.

4.4.2 Identification of assets and funds held by designated persons/entities and prohibitions

260. Based on the understanding that there is no legal framework or mechanism to implement TFS relating to PF, Kenya's capability to identify assets or funds associated with designated persons/entities and prohibitions under TFS relating to PF could not be determined. The FIs and DNFBPs are mostly concerned with Resolutions related to TF. There has been no report of them holding funds of a designated person or entity as pertaining to TFS relating to PF. Kenya has not identified any person who or entities which match with the UN-designated persons and entities. Therefore, the country has not prevented such persons or entities from operating or executing financial transactions related to proliferation in the country. The absence of a framework to identify assets or funds of designated persons mean that Kenya is vulnerable to PF. Kenya does not regulate or supervise VASPs (the authorities are not aware of the existence of VASPs) therefore there is no information on VASPs.

4.4.3 FIs and DNFBPs' understanding of and compliance with obligations

261. There is low level of PF understanding and compliance with the obligations by FIs and DNFBPs. This is due to the absence of the legal framework or mechanisms to enable compliance with the implementation of TFS relating to PF. Further, it is also a result of the authorities' approach to PF TFS as they have not carried out any activity targeted at FIs and DNFBPs to help them understand their PF TFS obligations. Some of the large FIs, mostly those that are part of international groups have some knowledge of PF and their obligations. However, there has never been any hit that has been reported to FRC. The rest of the reporting institutions do not have mechanisms in place to enable implementation of the required measures. There is nothing on VASPs. One FI, on its website states that it provides maritime insurance (shipping services) to North Korea. The information is available in a dropdown box. However, during the interviews, when asked what measures are in place to comply with TFS and PF obligations, the response was that although the drop down carries the country name, North Korea, in reality they do not actually offer such services to North Korea. The basis of the response was not clear. There was nothing to show that DNFBPs have taken any measures to comply with the UNSCRs relating to the combating of financing of proliferation. Therefore, assessors' view is that reporting institutions are not aware of their PF TFS obligations under the law and this lack of awareness affects their compliance.

4.4.4 Competent authorities ensuring and monitoring compliance

262. The authorities indicated that as at the time of the onsite, they were not ensuring and monitoring compliance with TFS relating to PF. The responsible Inter-Ministerial Committee has never discussed or issued any measures or guidelines in relation to PF. Inspections that were done by all supervisors did not cover PF. Therefore, in the absence of a legal framework or mechanism to implement TFS relating to PF, it is not possible for relevant competent authorities to monitor and ensure compliance by FIs, DNFBPs and VASPs of their obligations.

Overall conclusion on IO.11

263. In the absence of a legal or institutional framework for the implementation of UNSCRs 1718 and its successor resolutions, as well as UNSCRs 1737/2231 on proliferation of weapons of mass destruction, there is no effective implementation related to the Resolutions. Both FI's and DNFBPs do not implement the TFS related to PF. There is no regulation or supervision of VAs and VASPs. Competent authorities do not monitor compliance with the TFS related to PF. Although the available information indicates that PF is a low risk in Kenya, the lack of any mechanisms to detect PF have significant weight on the overall rating.

264. **Kenya is rated as having a low level of effectiveness for IO.11.**

5. PREVENTIVE MEASURES

5.1 Key Findings and Recommended Actions

Key Findings

- a) The POCAMLA covers most of the FIs and DNFBPs as reporting institutions. However, lawyers, notaries and other independent legal professionals and VASPs have not been designated as reporting institutions in Kenya. There are also a range of legislative gaps in the POCAMLA that impact implementation by FIs and DNFBPs. These gaps are in relation to TF, BO, CDD, PEPs and New technologies.

Financial Institutions

- b) Commercial banks and MFBs have a good understanding of ML risks and AML obligations and have applied mitigating measures commensurate with their identified ML risks, except for BOs. The medium to large NBFIs, including MMSPs and MRPs, demonstrated a fair understanding as compared to small NBFIs whose understanding of ML risks and AML obligations is limited. Resultantly, the mitigating measures for medium to large NBFIs are fair and inadequate for small NBFIs. All FIs across the board demonstrated limited understanding of TF risks and CFT obligations and therefore application of mitigating measures for TF was not commensurate with the entities' TF risk exposure.
- c) Most business in the FI sectors in Kenya is highly intermediated with use of third-parties such as agents, sub-agents, brokers and partners, being especially high in the mobile, insurance and securities sectors. Risks of third parties were, however, not adequately assessed, understood nor mitigated by the FIs and the authorities.
- d) Basic CDD and record-keeping measures are generally applied by the majority of FIs to a large extent. FIs demonstrated that they reasonably apply identification and verification measures during customer on-boarding and on occasional transactions, with banks and MFBs doing so, on an ongoing basis. Efforts are being made to identify BOs, however, a major impediment exists in verifying BO information as FIs have no access to reliable independent databases. The BO information resident with the Registrar of Company is only accessed by some competent authorities. Information supporting source of funds and of wealth is not effectively obtained and verified by FIs using reliable independent sources or by any other methods to satisfy themselves as to the authenticity of the documents collected.
- e) Systems and measures to determine whether a customer or BO is a PEP are less effective especially for domestic PEPs. Consequently, application of EDD measures on them is limited. The international databases often fail to capture some domestic PEPs, their family members and associates, and PEPs who may be beneficial owners. In the absence of a comprehensive local database of domestic PEPs, FIs tend to rely on less effective methods. Thus, FIs have unidentified PEPs in their client database that are not subject to EDD measures.
- f) Generally, the level of STR filing by FIs is low. Although banks are reporting more than other FIs, the general reporting is not commensurate with the risk profile of the sector and instances of defensive reporting were noted.
- g) Internal AML/CFT controls and procedures which include appointment of MLROs at management level, training, independent assurance and know your employee processes, are generally better applied by banks than NBFIs who have less effective internal controls in place. However, the

training programmes seem to be limited when it comes to CFT and BO requirements hence limited understanding by FIs in these areas. Further, the audit departments seem to be less effective in ensuring adequacy of AML/CFT programmes.

DNFBPs

- h) All DNFBPs portrayed low understanding of ML/TF risks and AML/CFT obligations applicable to them. Resultantly, they have not implemented mitigating controls commensurate with the risks in the sector.
- i) Application of CDD measures, record keeping requirements and EDD or specific measures by the DNFBPs is generally weak. This is mainly due to weak or lack of AML/CFT supervision.
- j) Reporting of suspicious transactions by DNFBPs is negligible to non-existent and not commensurate with the ML/TF risks in the sector. This may be due to lack of guidance on ML/TF risks and red flags.
- k) DNFBPs have less developed internal AML/CFT controls and procedures which are not commensurate with their ML/TF risks. They have not developed adequate AML/CFT policies and programs to assist in ensuring AML/CFT compliance.

Recommended Actions

Financial Institutions and DNFBPs

- a) Kenya should take steps to rectify the identified technical compliance deficiencies regarding preventive measures to ensure that its AML/CFT framework is in line with the FATF Standards. This should include preventive measures relating to TF.
- b) Informed by analysis of ML/TF risks associated with DNFBPs, Kenya should continue to introduce and implement appropriate legislative measures to ensure that lawyers, notaries, other legal professions and VASPs are designated as reporting entities and are subject to AML/CFT supervision.
- c) Ensure that FIs and DNFBPs have a clear understanding of ML risks and their AML obligations. Authorities should provide adequate guidance to these sectors specifically on CDD and record keeping obligations including, but not limited to, the identification and verification of BO information.
- d) Supervisory authorities should ensure that reporting institutions adequately identify, assess and understand TF risks and apply commensurate mitigating measures. This can be achieved through implementing risk-based supervision and undertaking effective outreaches to all the sectors (FIs and DNFBPs).
- e) Given that numerous PEPs are left unidentified, Kenya should introduce legislative reform that widens the definition of foreign PEPs (i.e. extends to family members and associates of foreign heads of state), extends to BOs who are PEPs, and provides formal criteria for identifying domestic PEPs at regional and county level. Appropriate measures should be taken to encourage reporting institutions and enhance their capacity to carry out adequate EDD and enhanced ongoing monitoring on PEP – this could include encouraging reporting institutions to maintain a comprehensive local database of domestic PEPs. Significant focus should also be placed on ensuring DNFBPs are fulfilling their obligations to apply measures in relation to PEPs and appropriate action is taken where these obligations are not fulfilled. Supervisory authorities should ensure that FIs and DNFBPs obtain information that supports source of funds and of wealth for their customers during on-boarding and on an on-going basis when customer profile changes, satisfying themselves that such information is effectively verified by using reliable independent sources or by any other methods to confirm the authenticity of the documents collected.
- f) Supervisory authorities should develop the understanding of ML/TF risks and AML/CFT obligations by newly supervised FIs such as life insurance brokers.
- g) Supervisory authorities should take steps to ensure that agents of MVTs providers, sub-agents and

brokers are appropriately managed and monitored for compliance with AML/CFT requirements, in accordance with the FATF Standards, including ensuring effective supervision and implementation of AML/CFT obligations in complex MVTS networks. NBFIs should retain the ultimate responsibility for KYC/CDD on all their customers, and take appropriate steps to satisfy themselves that third parties are subject to obligations and adequately supervised for AML/CFT prior to on-boarding, and appropriately mitigate the associated ML/TF risks.

- h) Authorities should ensure under-reporting sectors, particularly NBFIs and DNFBPs improve on their identification and reporting of suspicious transactions. This should include supervisory authorities and the FRC providing education and guidance to the reporting institutions on identifying suspicious activities, including on TF such as sector specific typologies and red flag indicators. Further, ensure that DNFBPs have properly understood the scope of their obligation to submit STRs.
- i) The country should develop legal and institutional frameworks to oversee Virtual Assets (VAs) and activities of Virtual Assets Service Providers (VASPs). A risk assessment should be conducted to assess the impact of VA transactions on the economy and inform these frameworks.
- j) Authorities should require supervisory authorities to implement continuous training programs for their respective sectors on AML/CFT in order to create understanding and effective application of AML/CFT obligations. Such training programmes should cover identified deficient areas such as TF, CDD, BO, PEPs, TFS relating to TF and PF. Additionally; Kenya should take action to ensure that audit programs of various reporting institutions are comprehensive enough to cover key AML/CFT areas.

265. The relevant Immediate Outcome considered and assessed in this chapter is IO.4. The Recommendations relevant for the assessment of effectiveness under this section are R.9-23, and elements of R.1, 6, 15 and 29.

5.2 Immediate Outcome 4 (Preventive Measures)

266. The POCAMLA (and its Regulations) is the main piece of legislation setting out the AML/CFT obligations of reporting entities in Kenya. The Act was enacted in 2009, revised in 2019, and further amended in 2021 to include insurance brokers and agents as reporting institutions. Provisions relating to CFT are not included in the POCAMLA and its Regulations, except where it relates to higher-risk countries. This may have contributed to limited understanding of TF risk and CFT obligations by reporting entities. While the Act covers most of the FIs and DNFBPs as reporting institutions, by the time of the on-site visit, the lawyers and advocates had not been designated as reporting institutions. The law has also not yet included VASPs as reporting institutions. This means the requirements in the Act are not applicable to VASPs (e.g. for CDD or wire transfer rules).

267. Considering the relative materiality and risk in the context of Kenya as explained under chapter 1, the implementation of preventive measures by the relevant sectors was weighted as follows:

- a) **Most heavily weighted** for banks [commercial banks and micro-finance banks (MFBs)], mobile money service providers ((MMSPs) and money remittance providers (MRPs);
- b) **Heavily weighted** for real estate agents, lawyers, and forex bureaus (FXBs);
- c) **Moderately heavily weighted** for life insurance and capital market players, casinos; dealers in precious metals and stones, Accountants and TCSPs, and
- d) **Less heavily weighted** for savings and credit cooperative societies (SACCOs) and non-deposit taking microfinance institutions.

268. The assessment team's findings on IO.4 are based on interviews with private sector representatives, inspection reports, data and statistics from supervisory activities, discussions with supervisors, data on STRs, discussions with the relevant private sector associations like the Bankers Association of Kenya, and information from the NRA. Assessors also carefully considered information from authentic public sources including reports from other international organizations. The assessment team met representatives of reporting institutions from the relevant sectors and some representative industry bodies. The assessors interviewed seven banks, two MFBs, three securities market participants, four insurance participants, two MMSPs, two MRPs, two forex bureaus, one casino, one law firm (although not designated), two accounting firms, one SACCO, and one micro-finance institution. The assessment team could not interview real estate agents and dealers in precious metals and stones as the authorities did not avail them for interviews.

5.2.1 Understanding of ML/TF risks and AML/CFT obligations

269. Understanding of ML/TF risks and of AML/CFT obligations varies between FIs and DNFBPs, and across the FIs (banks and NBFIs). Commercial banks and micro-finance banks (MFBs) demonstrated a good understanding of ML risks and AML obligations applicable to them. Their understanding has, to some extent, been enhanced by AML training initiatives, ML/TF institutional risk assessments conducted periodically, and their participation in the 2021 NRA exercise. Medium to large NBFIs (insurance and securities firms, MMSPs and MRPs) showed a fair understanding of the ML risks and AML obligations relating to their operations, although MMSPs and MRPs demonstrated a better understanding than other NBFIs. Smaller NBFIs, recently designated insurance brokers, SACCOS and DNFBPs had limited understanding of ML risks and AML obligations.

270. All FIs and DNFBPs demonstrated limited understanding of TF risks and obligations under TFS related to TF and PF.

Financial Institutions

271. Commercial banks and MFBs demonstrated a good understanding of their ML risks. This understanding has been attributed mainly to the annual institutional risk assessments which they undertake and internal on-going AML training. They have understood the specific risks to which they are exposed through their activities. Assessors noted that commercial banks and MFBs use their risk assessments to categorize their customers, products/services, delivery channels and geographical locations based on risk (usually low, medium, and high) to enable implementation of commensurate mitigating measures and monitoring procedures. They identified proceeds of corruption from public procurement and various government structures, being channelled through the financial sector or through lawyers as major threats, with most of the proceeds of crime ending up in the real estate sector. Their understanding is consistent with the findings of the NRA however, commercial banks and MFBs underscored corruption as the most proceeds generating offence in Kenya. The banks also highlighted proceeds of fraud and forgery as a major concern linking them to PEPs and other government executives' activities in particular, winning tenders through use of forged documentation. They further demonstrated their understanding by linking certain activities of lawyers to PEPs with the intent to hide proceeds of crime. Specifically, the example of the National Youth Service case was mentioned (see – IO.3 case box 3.9). The banks demonstrated that they understand exposures relating to abuse of credit cards and how proceeds can be generated from the other criminal activities, such as, the chemical washing of money by fraudsters linked to well-known politicians (locally known as “wash-wash” business), drug-related offences, tax offenses, cybercrime, and environmental crimes, especially, illegal wild-life trafficking. They considered border areas as highly vulnerable to ML risks due to their porosity. For example, commercial banks and MFBs indicated that the northern and coastal regions were more vulnerable to risks of drug and human trafficking and smuggling of contraband, while the

southern and western borders were vulnerable to environmental crimes such as illegal wildlife trade and gold smuggling from DRC. Central Nairobi was rated high risk due to prevalence of high cash intensive businesses, volume of wire transfers and proximity to government agencies. Banks identified extensive use of comingling methods by some legal entities, in particular, cash intensive businesses owned by foreigners from high-risk jurisdictions as a major ML threat in Kenya. Nevertheless, limitations were noted in understanding TF risk. While the majority rated it as low, it was clear that all the relevant risk factors were not considered in assessing TF risks. although MMSPs and MRPs better demonstrated their understanding than other NBFIs.

272. Commercial banks and MFBs also have a good understanding of their AML obligations as set in POCAMLA (and its Regulations). Those that are part of international financial groups are able to leverage on the knowledge and compliance infrastructure available from their parent companies and demonstrated that their compliance programs are independent and tailored to the specific requirements of Kenya. However, understanding of CFT obligations is limited. Additionally, assessors were concerned that most of the commercial banks and MFBs showed weaknesses in understanding the concept of BO. While they indicated that they collect BO information, it was clear that some of them could not differentiate between shareholding and BO. This may be attributed to the shortcomings in the law regarding BOs (see TC Annex, R.10 and R. 12), as well as inadequate guidance and supervision on the same.

273. Understanding of ML risks and AML obligations was fair amongst medium to large NBFIs [stand-alone MRPs, MMSPs, insurance companies, capital markets/securities firms and forex bureaus]. The medium to large MRPs and MMSPs had a marginally better grasp of AML issues and were able to demonstrate their understanding more confidently than the other medium to large NBFIs, possibly due to the higher levels of training and capacity building of the compliance functions. Medium to large NBFIs all indicated they had conducted ML risk assessments although assessors gathered that many were outdated mostly due to inconsistent implementation. Additionally, customer risk profiling was not being well implemented leading to an omnibus approach toward mitigating customer risk. For instance, while their platform is patronised by a wide cross-section of the population (including commercial businesses) with approximately 90% market penetration and enhanced functionalities to incorporate integration with banks, commercial transactions, mobile loans, and mobile savings, MMSPs maintained that their platform is a low-risk financial inclusion product dominated by low-income individuals. They implement a rules-based approach to mitigating customer risk. Such a submission by MMSPs cast doubts on whether an updated ML/TF risk assessment was effectively conducted on the mobile platform since its introduction as a new technology, to account for significant changes in the business model. Moreover, MMSPs have not demonstrated that they understand the risk posed by cryptocurrencies/virtual assets on their products and that their channels are not being abused for TF or used to launder illicit proceeds through virtual assets, in particular, P2P transactions. Contrary to NRA findings on reported TF cases in the banking and mobile money sectors, MMSPs maintained that there were no instances of TF on their platform. Publicly available information³⁷ reveals that in 2019, the mobile money platform was abused by terror suspects, who made multiple withdrawals of up to Ksh100million (US\$1million) from different “tills” to facilitate terrorism activity in the country. Most business in Kenya’s financial space is highly intermediated with use of fund managers, agents, sub-agents, brokers and partners being especially high within the mobile money, insurance and securities sectors. Assessors are concerned that while the risk of third parties was noted to be high by FIs, the ML/TF risks were not adequately assessed and understood by the FIs and the authorities.

³⁷ Safaricom had closed Nairobi terror suspect’s M-Pesa <https://www.theeastafrican.co.ke/tea/news/east-africa/safaricom-had-closed-nairobi-terror-suspect-s-m-pesa-1411372>

274. Assessors noted that in 2015, some MRPs and FXBs had their licenses revoked for three months, after a public gazette was issued to the effect that they were suspected to be associated with Al-Shabaab (a terrorist organization) and operating also as hawalas. These were later cleared by the Central Bank of Kenya and the large MRPs portrayed fair understanding of their ML risk but low understanding of their TF risk exposure. Some indicated that about 90% of their business is with high-risk countries such as Somalia, where Al-Shabaab is believed to be headquartered, but the risk of abuse has not been adequately assessed.

275. The majority of the large securities companies identified Collective Investment Schemes (unit trusts) as highly vulnerable to abuse by local PEPs, similarly, insurance companies identified Unit-linked life products as high risk and attractive to PEPs. The investment linked life products and/or unit linked products appear to be more vulnerable to abuse for ML due to absence of limits on premiums paid (which in most cases are high), cash surrender before end of term, and in some cases their cross-border nature. The securities and insurance companies were aware of the associated risks of these products to some extent. Medium to large life insurance companies understand the ML risks at the time of pay-out and have put in place adequate mitigating controls. Both insurance and securities players highlighted instances where lawyers who transact on behalf of their customers (in their personal capacities, or as entities), are often used as trustees of illicit funds whilst hiding behind lawyer-client privilege to conceal client sources of funds and/or wealth. While some of the players advised that most mega financial scandals involved lawyers, they had not adequately assessed the vulnerability. Some securities market players allow business through companies' website portals, and with foreign investors. While by its nature such non-face to face business poses higher risks, the risks have not been properly identified and understood by these players.

276. The small NBFIs (stand-alone MRPs, insurance companies, capital markets/securities firms and forex bureaus), insurance brokers and SACCOs demonstrated low to negligible understanding of their ML/TF risks and AML/CFT obligations. No ML/TF risk assessments had been conducted by the Authorities nor by the sectors themselves in order to assist them to understand ML/TF risks in their sectors. For instance, some small MRPs and FXBs maintained that all customers are considered high risk until proven otherwise (showing adherence to a rules-based approach), and others did not understand the difference between inherent and residual risk. Lack of understanding of AML/CFT obligations is mainly attributed to high staff turnover, low attendance of AML/CFT training by relevant staff, and lower AML/CFT supervisory activities in these sectors. During on-site, assessors noted that insurance brokers had recently been designated as reporting entities and hence their understanding of the AML/CFT obligations was still very limited. Insurance brokers informed assessors that most KYC/CDD measures like checking source of funds and source of wealth went beyond their mandate and they were in the infancy stage of understanding their AML/CFT obligations.

Virtual Assets (VAs) and Virtual Assets Service Providers (VASPs)

277. At the time of the on-site visit there was no AML/CFT legal framework for regulating and supervising VAs and VASPs. The country has not conducted a risk assessment to determine the existence and the risks posed by VAs and VASPs. As a result, there are no known VASPs in Kenya although the financial supervisors and the reporting entities acknowledged the existence of VAs in Kenya. The CBK issued a circular, warning members of the public about the risks of engaging in such transactions.

DNFBPs

278. The DNFBPs met (Casinos, Accountants, lawyers and company secretaries) portrayed low understanding of the ML/TF risks and their AML/CFT obligations. However, the Assessment Team did not meet real estate agents and dealers in precious metals and dealers in precious stones during the onsite visit. Hence, their level of understanding of ML/TF risks and AML/CFT obligations could not be determined. However, based on interviews conducted with FRC (as supervisor) and their regulators

(Estate Agents Registration Board and Ministry of Mining respectively), no AML/CFT intervention, nor supervisory activity has started with these sectors. For example, assessors were advised that the number of unlicensed real estate agents is about four times the number of those that are licensed and all institutions interviewed agreed that most proceeds of corruption and other criminal activities are channelled through the real estate sector (see IO.3 and Chapter 1). This is a concern given lack of understanding of ML/TF risks and AML/CFT obligations, which is compounded by lack of AML/CFT supervision and monitoring by the sector supervisors (see IO.3). Lawyers are not implementing AML/CFT obligations as their designation is being contested in court.

5.2.2 Application of risk mitigating measures

Financial Institutions

279. **Commercial banks and MFBs have assigned resources to implement processes and procedures to pro-actively identify, assess and document the ML risks based on various risk factors. A RBA to mitigating ML/TF risk is implemented to a large extent by commercial banks and MFBs who conduct risk assessments that are regularly updated. The measures applied by commercial banks and MFBs are, to a large extent, commensurate with the risks identified in the sectors. Medium to large NBFIs moderately implement controls although some are not appropriate to entity risks in areas where risks are not properly assessed. Application of risk mitigating measures by small NBFIs, the recently designated insurance brokers and SACCOS is very limited. All FIs fail to appropriately mitigate TF risk mainly due to the common limitation in assessing TF risk. While some commercial banks shared that they have in place sophisticated systems useful for the mitigation of TF, they failed to demonstrate to Assessors how they are able to effectively mitigate TF risk while they have not adequately measured, assessed nor understood it.**

280. Commercial banks and MFBs demonstrate commitment to a strong compliance culture and invest significantly in compliance processes including development of policies and controls that are commensurate with the level of ML risk identified through their institutional risk assessments. Most screen their customers during on-boarding using internal or publicly available databases and draw up a risk profile of their clients in order to determine the level of due diligence measures to be applied, although inspection reports show that this is not consistently done on an on-going basis by some of the banks. Using their internal tools, the majority of the commercial banks and MFBs interviewed confirmed that they assign a risk rating to each client and apply proportionate measures. Some commercial banks and MFBs informed assessors that they take measures to address major threats and vulnerabilities like procurement fraud and corruption by proactively monitoring (on an ongoing basis) - client relationships, particular transactions, client and product/service-related factors (such as transactions related to government procurement contracts), that go beyond the PEP status of the client. Certain transacting patterns linked to branches with high PEP presence, close proximity to government agencies, or high velocity business-to-PEP account transactions, are red flags built into their automated monitoring systems as scenarios that trigger alerts to prompt closer scrutiny. Adverse media screening has, to some extent, been used by commercial banks to assist them in linking certain PEPs to certain transactions and also for profiling customers.

281. Cognisant of risks at border towns including drug trafficking, human trafficking and comingling, commercial banks and MFBs also conduct time series and trend analysis of certain high-risk accounts (such as accounts of employment agencies who are sometimes linked to human trafficking) for unwarranted spikes in activity, or patterns with no justifiable economic explanation using reports generated by their systems. Some of these automated systems offer superior case management and machine learning capabilities. A handful of banks have been able to detect activity linked to drug trafficking, illegal dealing in wildlife and VAs at on-boarding or through ongoing

monitoring of transactions. VAs are often detected when transactions with narrations associated with known cryptocurrency providers are flagged by compliance staff who examine daily reports generated by their systems. Most commercial banks and MFBs indicated that they mitigate the risks associated with the use of cash by filing CTRs, with little demonstration of measures in place for cash below the reporting threshold or split transactions. There are indications that such FIs limit or even exit cash business summarily addressing the cash issue, with MSBs being restricted relationships in some commercial banks. Public reports and interviews with the commercial banks show that some have de-risked (through terminations or restrictions) certain relationships, particularly in relation to business relationships with NGOs, MVTS providers, forex bureaus and VA account holders due to perceived AML/CFT concerns. MMSPs also confirm that they terminate relationships with customers perceived to be dealing in VAs especially on Paybills. This points to these FIs terminating business relationships instead of implementing mitigating measures commensurate with the identified ML/TF risks. While some indicated that they de-risk as a matter of their global policy, some advised that they would like to comply with CBK's public notice on VAs and VASPs. The 2017 ESAAMLG survey report on de-risking and follow up survey in 2021³⁸ identified foreign exchange bureaus (FXBs) as one of the categories of customers most impacted by de-risking in Kenya.

282. Inspection reports by the CBK on some commercial banks during the 2018 NYS case showed weaknesses in the ability of some commercial banks' systems to generate alerts for complex, large and unusual cash transactions outside the profile of customers. This is a concern as it raises questions on the ability of commercial banks to detect suspicious customer activities. Moreover, the reports also indicated some gaps when it comes to on-going monitoring of activities and transactions of family members and business associates of PEPs. These gaps have led to some corrective measures taken by CBK, however, there is no evidence from the CBK that they have been resolved (see IO.3- case box 3.9).

283. Most NBFIs are subject to regulatory transaction limits to control risk, and they implement such thresholds to varying extents with larger NBFIs being more consistent than smaller ones. MMSPs and MRPs have limits per transaction and/or per day, with no monthly or annual limits in place. Medium to large NBFIs incorporate the limits in their systems for ongoing monitoring, with MMSPs leading in incorporating use of automated transactions monitoring tools. Some insurance companies with manual mechanisms in place, informed assessors that they are able to monitor mobile money payments for structuring and micro-structuring below the thresholds of Ksh150, 000.00 (US\$1363.00) per transaction and Ksh300, 000.00 (US\$2,726.00) per day. Medium to large MMSPs indicated they secured systems with Artificial Intelligence/Machine Learning Dashboards. The effectiveness of such solutions may however be impeded by shortcomings in AML/CFT risk assessments and KYC processes as highlighted in this report (especially where they admittedly do not collect source of funds/wealth information), which form the basis of a sound ongoing monitoring regime. For example, while MMSPs emphasised that they regard activities in their ecosystem as secondary since most customers have bank accounts, assessors maintain that this does not exonerate MMSPs from fulfilling their obligations and implementing appropriate ML/TF mitigating controls. Assessors also noted that most of the scenarios applied during ongoing monitoring processes closely fit a rules-based approach, rather than being commensurate with the ML/TF risks posed, for instance by different categories of customers and products offered by the NBFIs, indicating that residual risk would ultimately remain high. To mitigate third-party risk, most large NBFIs (mostly insurance and securities firms) indicated that they sometimes decline business from insurance brokers, fund managers and lawyers, where they fail to obtain the required KYC/CDD information. The NBFIs were not able to demonstrate that they put in place

³⁸ Survey Report on the Status on De-risking in the ESAAMLG Region (September 2017)
https://www.esaamlg.org/reports/ESAAMLG_survey_reports_on_de%20_risking.pdf

adequate control measures to mitigate agent risk, or satisfy themselves that the third parties they rely on are subject to AML/CFT supervision. Moreover, assessors are concerned about the mass termination of agents by MMSPs mainly due to violations in on-boarding customers, and performing transactions without implementing KYC/CDD measures. This demonstrates serious inadequacies in the level of due diligence and vetting applied during the selection process of agents, as well as poor monitoring and management of agents' compliance performance on an ongoing basis. The extent to which agents are captured in the MVTs provider's AML/CFT programme is also inadequate.

284. Application of mitigating measures by small NBFIs, the recently designated insurance brokers and SACCOS was negligible if at all applied. Some smaller FXBs and MRPs do not consistently implement regulatory transaction limits put in place to control risks emanating from use of cash and mobile money platforms. There is a US\$10,000 limit on currency FXBs can sell to customers however, they place no limits on the amount of currency that can be bought from a client and do not perform EDD, making such transactions highly vulnerable to ML/TF. The NRA confirms the fact that customers using MRPs are often one-offs, creating possibilities for moving huge amount of cash through multiple institutions with little detection gives rise to ML risk. The authorities maintain that they cannot be reasonably expected to mitigate this risk as such an expectation is not aligned to FATF Standards. Insurance brokers told assessors that they do not observe any limits on cash and implement no ML/TF controls on transactions. SACCOS employ manual transaction monitoring, however, it is not for AML/CFT purposes.

Virtual Assets (VAs) and Virtual Assets Service Providers (VASPs)

285. At the time of the on-site visit there was no AML/CFT legal framework to regulate and supervise VASPs. The Authorities indicated that VASPs are not allowed in Kenya through a circular issued by CBK in 2015. The country has not conducted a risk assessment to identify, assess, understand and mitigate the risks posed by VAs and VASPs in Kenya.

DNFBPs

286. The DNFBPs have not undertaken institutional ML/TF risk assessments that can be used to identify, assess and apply AML/CFT mitigation measures. DNFBPs interviewed did not demonstrate that they have developed any AML/CTF mitigating measures commensurate with the risks that apply to their sector. While accountants and company secretaries indicated that they use internal databases to screen clients during on-boarding, this was found to be inadequate as it is not done on an on-going basis. Moreover, the clients are not risk-rated and profiled. Similarly, measures implemented by casinos to address their risks are not always commensurate with the specific risks associated with their business.

5.2.3 Application of CDD and record-keeping requirements

Financial Institutions

Customer Due Diligence (CDD)

287. Basic CDD and record-keeping measures are generally applied by majority of FIs to a large extent, whilst BO requirements are not being effectively implemented across the FIs. FIs demonstrated that they reasonably apply identification and verification measures during on-boarding of their customers and on occasional transactions, while commercial banks and MFBs better demonstrated that they also apply such measures on an ongoing basis, in particular, where they encounter a change in customer risk profile. A few commercial banks with international affiliation indicate progress towards implementing biometric verification for remote on-boarding. Systems to verify source of funds and/or wealth were, to a lesser extent, implemented by commercial banks and MFBs, and either not yet in place or not being effectively implemented by the other FIs.

288. During identification of customers, reliable, independent source documents such as the National ID, KRA PIN (a tax identification number), passport-sized photograph and proof of residence are requested across FIs. Such documentation is verified using government databases such as the Integrated Population Registration Service (IPRS), and KRA portal. Non face-to-face on-boarding is available for mobile-based products, and while verification of identification data submitted remotely is possible using the IPRS, identification of the customer is not possible. This is reflective of a loophole in the law on the need to identify customers, whether permanent or occasional. As such, platforms that facilitate virtual on-boarding (mostly mobile and securities products), have been subject to fraud due to forgery of documents and identity theft. This vulnerability is accentuated because MMSPs do not identify the customer and verify that the customer who registered the SIM with the MNO, is the same one seeking to access mobile financial services.

289. Commercial banks and MFBs indicated that even where third parties perform some elements of KYC/CDD (as in the case of one bank-driven mobile product), they retain the prime responsibility for KYC/CDD to mitigate challenges in the past in accessing the KYC/CDD information from the third parties. NBFIs (in insurance, securities, mobile money sectors), do not ordinarily perform KYC/CDD on clients on-boarded using third parties, and in most cases cannot access the CDD information from the third party. They are not aware that though they use third parties, the responsibility for customer due diligence measures remains with them (Regulation 28 (3) of POCAML Regulations). Some insurance firms inspected by the IRA in 2017 (prudential) were found not to be carrying out CDD on broker-driven business. During interviews, it was established that contrary to Regulation 28 (6) of the POCAML Regulations, insurance firms were relying on brokers for third-party KYC, whereas the brokers were not designated as reporting institutions until 22 January 2022 (less than a week before the onsite). In like manner, securities firms indicated that they rely on fund managers (both local and foreign) to perform KYC/CDD and could not demonstrate that they ensure the third party is regulated, supervised or monitored by a competent authority and has measures in place for compliance with, customer due diligence and record-keeping requirements in line with international best practice. Moreover, identification and verification of customers on-boarded online (non-face to face) appears to be a challenge for securities firms.

290. Verification of information supplied by foreigners is mostly challenging for medium to large NBFIs, as they rarely have direct access to independent reliable sources for verification. While commercial banks and MFBs collect information that supports source of funds and source of wealth, they could not demonstrate that they effectively verify such information using any reliable independent source, or employ any other methods to satisfy themselves as to the authenticity of the documents collected. NBFIs interviewed were not aware of the need to obtain source of wealth information.

291. While processes are largely effective regarding basic information, significant limitations exist in BO processes. Implementation of BO identification measures by FIs is fair, however, lack of access to reliable independent sources renders FIs unable to verify the BO information they collect. The BO information resident with the company registry is only accessed by some competent authorities. In taking efforts to identify BOs many FIs place reliance on declarations made by their customers. Most commercial banks and MFBs indicated that they primarily focus on the identification of the direct or indirect holder of 10% (or less in some cases) of share capital or voting rights (based on company's organisational charts provided by the customer); and they do not always consider other forms of ultimate effective control. A few commercial banks and MFBs take extra steps that sometimes yield positive results, to identify BOs such as requesting information on group structure, financial statements, voting rights and attestations from accountants or auditors. Ongoing monitoring of accounts (seeking to understand linkages and financial flows), and checking controllers of accounts (e.g signatories, those who effect transactions, and those with legal power to sign contractual documents), are other indirect avenues used to reveal the true BOs. Regarding trusts, the same processes are applied including requesting for the trust deed, which lists the top ten beneficiaries in terms of value. This, however, does

not always contain all relevant BO information. Many FIs (outside commercial banks) identify directors and shareholders of legal persons, often mistaking this for implementation of obligations relating to BO. These FIs maintain that directors and shareholders are normally the BOs, and in practice, they implement the BO requirements to a limited extent, (possibly reflective of notable gaps on BO in Kenyan law). Moreover, NBFIs interviewed rely on CR12 (list of shareholders) as a source of information for identifying the BO, which may not always be the same as BOs. To a lesser extent, some FIs supplement this by using search engines on the internet or take advantage of group structures, mostly for those that are foreign-owned. Many NBFIs, (especially MMSPs) could not demonstrate that they identify and verify the BO of their agents/third parties. There was a gap concerning KYC/CDD in the insurance industry due to the fact that insurance companies were not performing KYC/CDD on broker-driven clients, and insurance brokers did not implement KYC/CDD measures prior to their designation as reporting entities in January 2022.

292. For occasional transactions, mostly taking place in the forex bureaus and MVTS providers, National ID or valid passport would suffice in the identification of customers prior to execution of a transaction. MMSPs apply simplified CDD to all individual customers without any regard to the varying risks posed (save for PEPs who are escalated for senior management approval). MMSPs detected extensive bad practice by agents where customers were being onboarded with no ID information, this leading to the installation of an automatic ID validation system that verifies information against the IPRS in real time minimising chances for using falsified documents.

293. Only some FIs (predominantly commercial banks and MFBs), met during the interviews were aware of and took appropriate measures to refuse business relationships, or not perform the transaction where CDD information is incomplete. Such FIs also indicated that they consider making a suspicious transaction report in relation to the customer, also performing remediation of customer accounts on an on-going basis.

Record keeping requirements

294. Most FIs (bank and non-bank) are aware of record-keeping requirements in respect of information and data collected at the time of entering into a business relationship with customers. Supervisors in their inspection reports have highlighted some record keeping deficiencies. The CBK fined some commercial banks for not being able to avail certain underlying documentation. Similarly, some FXBs have been fined for not keeping copies of IDs on file. Notwithstanding the cases on failure to adhere to the record keeping requirements, FIs informed that they keep records, including records obtained during CDD like customer mandates or files and financial transactions records, both in electronic and manual formats for up to seven (7) years after occurrence of the transaction or termination of the business relationship. Due to automation most commercial banks and MFBs are able to keep records for much longer periods of time than those stipulated in the POCAMLA. MMSPs have advanced technology to collect, maintain and update CDD information and records. Smaller FIs apply less sophisticated record-keeping processes given their smaller customer base. While some exceptions have been noted leading to fines as indicated above, FIs maintain that records are readily accessible by the FRC and LEAs upon request. While assessors noted that some FIs (mostly banks) keep records for periods exceeding those stipulated by law, the gaps in the type of information collected and instances of failure to provide certain information reveal that record keeping processes are moderately applied by FIs.

DNFBPs

295. The extent of application of CDD measures and record keeping requirements by the DNFBPs varies depending on the sector. Generally, all DNFBPs met (accountants, company secretaries and casinos,) during the on-site interviews apply basic CDD measures to identify their customers at on-boarding level to a lesser extent. The challenge is however, on customer verification including verification of BOs which is not undertaken by most of the DNFBPs, with the exception of large

accounting firms which are foreign-owned. Such accountants do verification using the government portal based on the CR12 provided by their customers. They indicated that this is mostly done on shareholders who are Kenyan citizens. For non-Kenyans, they tend to rely on their group companies abroad. They do not go any further than this. Further, accountants and company secretaries refuse to on-board clients with adverse information or where CDD information is not complete. All DNFBPs do not identify and verify source of funds and wealth, with the exception of lawyers who indicated that they know the sources of funds for their customers but keep it very confidential. While there is no on-going monitoring of customer transactions in the DNFBP sector, there is also no ongoing reviews of customer relationships. Moreover, the record keeping processes are still less developed.

5.2.4 Application of EDD measures

Politically Exposed Persons (PEPs)

296. Systems and measures to determine whether a customer or BO is a PEP are effective to a limited extent. Kenya faces a significant risk of ML in relation to corruption proceeds mainly relating to procurement fraud and embezzlement of public funds. Commercial banks and MFBs displayed a good understanding of these risks and how they manifest in their businesses, but encounter limitations in identifying domestic PEPs, or undertaking EDD measures on them. The majority of FIs (outside commercial banks and MFBs) do not profile higher risk business relationships with domestic PEPs.

297. Commercial banks, MFBs and medium to large NBFIs (insurance, securities, MVTS) have invested in name screening tools such as World Check, Dow Jones, Arachis, Veritas and Lexus Nexus among others, to pro-actively identify PEPs and sanctions designations prior to commencing business relationships. Some have integrated their core systems with such databases to enable ongoing, real-time screening for PEPs, while small NBFIs periodically perform manual screening on their databases making them unable to identify PEPs in real-time. The international databases often fail to capture some domestic PEPs, and in the absence of a comprehensive local database of domestic PEPs, FIs tend to rely on self-declarations, individual knowledge of customers, the local gazette notices issued and/or the Kenya Law Report. The local gazette is useful in identifying PEPs, however, it only lists publicly elected officers, such as members of Parliament, while lacking on PEPs that may not be gazetted and their close associates and family members, or those PEPs who may be beneficial owners. This results in PEPs at regional and county level not being consistently identified and it is almost certain that many FIs have unidentified PEPs in their client databases that are not subject to EDD measures. Further, financial institutions do not take reasonable measures in determining whether the beneficiaries and/or the beneficial owner of the beneficiary, are PEPs in relation to life insurance policies. Small NBFIs do not have adequate screening systems in place, greatly relying on the discretion and local knowledge of their agents, which is not effective. There is limited identification of PEPs that are BOs, and hence application of EDD is less effective in this area. This is exacerbated by the fact that FIs are not authorised to access BO information at the Business Registration Service (BRS) – see IO.5.

298. When a client is determined to be a PEP, commercial banks and MFBs take enhanced measures to a moderate extent, and a lesser extent by the other FIs. Identified PEPs are tagged (either manually or automatically) and escalated through a multi-level approval process (often involving investigation by the compliance department or private investigators and verification by relevant senior staff), with the final approval to on-board resting with senior management. During the escalation process, more information is normally requested such as declaration and proof of source of funds and source of wealth like property titles, vehicle registration books and bank statements endorsed by a bank. Some commercial banks explained that they use specialised PEP assessment forms, or source of funds declaration forms to gather more information. All NBFIs flagged as a challenge, the obtaining of source

of funds and/or wealth information from PEPs, who tend to be secretive and normally elect to use proxies/third-parties/nominee shareholders. For PEPs, commercial banks and MFBs indicated that where they cannot get the information from the customer, they tend to make use of open sources for information on source of funds and/or wealth, although they are often not reliable. During the interviews, majority of FIs indicated that lawyers were being used as trustees for PEPs. However, application of EDD on lawyers was not adequate, mainly hindered by lawyer-client privileges. This is a cause of great concern given the high level of corruption in the public sector.

299. The DNFBPs interviewed, do not take reasonable steps to identify PEPs. For instance, although the accountants indicated that they use an internal tool to scan clients whether they are PEPs during onboarding, there was no evidence that other measures are undertaken to identify PEPs. Further, DNFBPs did not demonstrate that they verify BO and apply EDD measures when dealing with higher risk customers. DNFBPs have limited awareness of their obligation to apply EDD measures. For instance, the casinos indicated that PEPs are treated just like any other client and do not conduct any EDD. On the other hand, the accounting firms apply EDD measures on PEPs before they are on boarded as clients. It was noted that the application of BO requirements is inadequate because BO is mistaken for mere shareholding or legal ownership not the person that exercises ultimate control, over and above the control of capital or voting rights.

Targeted Financial Sanctions (TFS)

300. To a greater extent, most commercial banks, MFBs and medium to large NBFIs (insurance, securities, MVTS) are able to automatically screen customers and transactions against TFS lists (including for PF), for potential hits using commercial screening tools. Those FIs that have integrated their core banking systems with the relevant screening tools, (mostly commercial banks and MFBs) are able to identify hits real-time, while those who have not integrated the databases to their core systems tend to take longer to identify designated persons. Some FIs tend to check their databases only at on-boarding and not on an on-going basis. While there were no recorded incidences at the time of the onsite, this becomes a challenge if a change in customer TFS status occurs soon after the database is checked or before the next scheduled checks, whereby a customer might not be detected. Commercial banks, MFBs and medium to large NBFIs are aware of the need to immediately notify the FRC as soon as they have identified one of their customers on the TFS list and at the same time to freeze the funds pending further guidance from FRC. The ability of small NBFIs to detect designated persons is still limited given that most still rely on manual systems. Some small FXBs only screen when in doubt about certain nationalities that they consider high risk, while others indicated that they only screen against the OFAC list. The small NBFIs have limited understanding of the action to take when a positive match is encountered, with the majority indicating that they escalate within their organizational structures. The UNSCRs lists are disseminated by the FRC either via goAML and are also accessible on the FRC website or directly from the UN website provided by the FRC.

301. The DNFBPs interviewed were, to a lesser extent, familiar with their UNSCRs obligations and implementation against the Sanctions lists disseminated by the FRC. Only accountants indicated that they take advantage of their group-wide databases that are linked to commercial screening tools. However, apart from using it during on-boarding, they do not seem to monitor this on an on-going basis. Like other DNFBPs, the accountants are also not aware of what action to take in case of a positive match.

Wire Transfers

302. Commercial banks, MFBs and MVTS providers apply specific measures regarding wire transfers to a large extent. Wire transfer services are mostly provided by banks and MVTS providers for both domestic and cross-border transactions. The FIs met by Assessors were able to demonstrate a good understanding of the risks involved in such transactions. When a wire transfer reaches regulatory thresholds (e.g. local threshold of US\$7,500.00), they receive an alert in the system prompting

application of EDD and additional controls required to mitigate the relevant risks. Most banks indicated that they use SWIFT for conducting cross-border wire transfers while some act as agents to internationally recognised money remittance companies like Western Union and MoneyGram. MMSPs make use of the mobile money platforms to transfer money across the border. Standalone MRPs have robust software and applications that they use for outbound and inbound transfers. Commercial banks, MFBs and MVTS providers have adequate controls to monitor wire transfers on a continuous basis, and they ensure that such transactions contain the required originator and beneficiary information including names, account number, address, date and the unique transaction reference number in addition to seeking information on purpose of the transfer (for cross-border). Most commercial banks and MFBs have in place automated systems that enable them to check originator and beneficiary information for accuracy and completeness, and that automatically decline transactions where the information is incomplete. Where banks act as intermediaries, they indicated that they ensure that all the information that accompanies a wire transfer is retained with the bank. In cases where information is missing, they search for the information before processing the transfer. The commercial banks, MFBs and MVTS generally have a good understanding of ML risks associated with cross-border wire transfers including those from high-risk jurisdictions although the understanding of TF risks is limited.

High-Risk Countries

303. The majority of commercial banks and MFBs take reasonable measures to identify higher risk jurisdictions when entering into business relationships and conducting occasional transactions by using various sources such as the FATF website, commercial databases and open-source information, while commercial banks with international affiliation effectively use Country Risk Models (CRM). These efforts enable quantification of the nature and extent of risks posed by customers and transactions associated with higher risk jurisdictions, triggering EDD processes and ongoing monitoring measures. Some of the commercial banks informed assessors that such information is uploaded onto their in-house screening tools that raise flags on customers or transactions linked to high-risk jurisdictions. They apply EDD measures that are proportionate to the risks posed by the type of customers and/or products in relation to the countries concerned. Application of EDD measures on higher risk countries by most medium to large NBFIs appears fairly reasonable and is limited in small NBFIs. Some small NBFIs (Saccos, Insurance brokers, MRPs) misunderstood high-risk jurisdictions as only those subject to TFS, thereby not initiating EDD for other high-risk countries. In the few cases where small NBFIs identified higher risk jurisdictions, they had limited knowledge on the proportionate mitigating controls to be taken on the business relationships and transactions, with some indicating that they decline all business from such countries.

304. All DNFBPs interviewed do not appreciate application of EDD on higher risk jurisdictions and as such have either not started doing so or implementation is very low.

Correspondent Banking

305. Only commercial banks with international affiliation indicated that they provide Correspondent Banking Relationships (CBRs). Operation of cross-border correspondent banking in Kenya seems to be generally well managed by these banks and due diligence measure are sound, in spite of the notable technical deficiencies identified under Recommendation 13, where laws overlook information on and responsibilities of respondents, as well as obligations relating to payable-through accounts. These gaps in the requirements could be affecting the ability of FIs to secure and/or maintain CBRs as evidenced by Kenya being amongst countries that report terminations and restrictions³⁹. Kenyan correspondent banks informed assessors that it is only in extreme circumstances, for instance, where undeclared nesting arrangements are detected by their systems that they might resort to termination. In most cases where

³⁹ Survey Report on the Status on De-risking in the ESAAMLG Region (September 2017)
https://www.esaamlg.org/reports/ESAAMLG_survey_reports_on_de%20_risking.pdf

deficiencies are found with the respondent, they review relationship to provide limited functionality. Currently, they restrict flows from MSBs and they do not support payable through accounts. Mitigating the risks stemming from CBRs is a collaborative effort with overseas head office teams, where applicable, and of high priority within their EDD processes. In addition to EDD measures, they shed light on transaction monitoring scenarios, being implemented specifically for monitoring activity in respondent banking accounts. By use of tools such as the Wolfsburg questionnaire (covering areas such as policies and procedures, CDD/EDD, transaction monitoring, suspicious transaction reporting and PEP screening), they satisfy themselves that the respondent banks have appropriate systems in place. Onsite visits are conducted to enable evaluation of the information respondents provide including that on the jurisdiction that they operate in, governance structures, and any nested relationships they may have. Approval or authorization from senior management is obtained prior to establishing CBRs and monitoring of the correspondent bank's AML/CFT system and of transactions is ongoing.

New Technologies

306. Commercial banks, MFBs and MVTS rely extensively on new technologies as a channel of delivery for FinTech. Such products are subject to regulatory conditions and transaction thresholds, while at the same time promoting financial inclusion agenda for the country. Most FIs informed the Assessment Team that they conduct risk assessments prior to launch, however, there was a limitation on the factors considered when assessing ML/TF risks that may arise due to the development of new products and new business practices (including new delivery mechanisms, and the use of new or developing technologies) in relation to both new and pre-existing products. This is especially true of MMSPs who still rate their channel as low risk, even after its significant evolution and growth, resulting in the mobile banking channel being rated as high risk by most of their partners in the financial sector. FIs added that they submit proposals and risk assessments for new products/technologies for approval by their boards, supervisors or the FRC before launch. On this basis, the assessors noted that the regulator declined to approved certain fintech products that were linked to virtual assets. FIs demonstrated that they are aware of the high risks linked to fintech such as identity theft, and indicated that they have implemented specific due diligence measures in this regard, such as the use of biometric measures. DNFBPs have not started applying EDD measures on new technologies.

5.2.5 Reporting obligations and tipping off

307. All reporting institutions are required to register on goAML in order to submit their STRs via goAML to the FRC. At the time of the onsite, the registration process was ongoing and only banks had registered on the portal while the majority of other FIs were yet to be registered. Statistics show that 90% of the total STRs submitted to FRC for the period under review were from banks, distantly followed by MMSPs (5%), money remitters and microfinance institutions at 2% each. (See Table 5.1. below).

308. Banks indicated that between 60% to 80% of their STRs being linked to corruption and bribery involving PEPs, and a smaller proportion of reports relating to the crime of tax evasion. Assessors regard reporting on other high proceeds generating crimes such as procurement fraud, drug-related offences, illegal trade in wildlife, and cybercrime low and not consistent with the risk profile of the country and the financial sector. Similarly, limited understanding of TF risks and CFT obligations may have led to subdued reporting of TF related STRs which is also not consistent with the TF risk profile of the country. Only 688 TF related STRs were submitted over the period under review.

309. Apart from banks and MMSPs, there is poor reporting by FIs. This may be attributed to a general lack of understanding of ML/TF risks and AML/CFT obligations, limited supervisory activities, and lack of appropriate transaction monitoring mechanisms in these FIs and in case of smaller FIs, lack of understanding of ML risks and AML obligations.

310. With regards to tipping off obligations, banks, and large NBFIs interviewed demonstrated that they have implemented adequate measures to prevent tipping off. They are aware that tipping off is an offence and have developed commensurate AML/CFT controls, which include policies and procedures, and on-going training and awareness programmes against tipping off. There were no reported cases of violations of tipping off obligations among banks and large NBFIs at the time of the onsite visit. Smaller FIs, however, portrayed some challenges in developing adequate measures that aim to prevent tipping-off. This was attributed to limited understanding of tipping-off requirements.

DNFBPs

311. During the period under review, only three STRs were reported by the DNFBP sector, one from casino and two from real estate agents. All the other DNFBPs did not report any STRs. The number of STRs reported by the DNFBP sector is not consistent with the risk profile of the sector. Lawyers did not report any STR in the period under review since they are not covered entities in Kenya. The low number of STRs is attributed to lack of or inadequate AML/CFT supervision of the DNFBP sector (see IO.3). Additionally, DNFBPs have no measures in place to prevent tipping-off.

Table 5.1. STRs Filed by Reporting Institutions

	2017	2018	2019	2020	2021	Total
Industry						
Financial Institutions						
Asset Management	1	2	2	4	2	11
Bank	2,154	4,774	8,179	4,549	3,353	23,009
Forex Bureau	3	3	4	6	1	17
Fund Manager	0	1	7	1	2	11
Insurance	4	15	17	11	7	54
Investment Bank	2	1	2	6	4	15
Investment Manager	0	0	1	0	0	1
Microfinance	16	55	245	159	78	553
MRPs	13	157	150	174	47	541
Non-Dealing online foreign exchange broker	0	0	0	0	1	1
Online Forex Broker	0	1	3	0	0	4
SACCOS	0	0	1	0	0	1
Stockbroker	14	3	4	1	0	22
Telco (MMSPs)	455	121	289	242	191	1298
DNFBPs						
Real Estate & Alternative Investments	0	1	0	0	1	2
Casino	0	0	0	1	0	1
Other DNFBPs	0	0	0	0	0	0
Grand Total	2662	5134	8904	5154	3687	25541

5.2.6 *Internal controls and legal/regulatory requirements impending implementation*

Financial institutions

312. Commercial banks and MFBs demonstrated, to a large extent, that they maintain and apply internal AML/CFT controls and procedures, as compared to the medium to large NBFIs which apply internal controls to a moderate extent and to a lesser extent for small NBFIs.

313. The commercial banks and MFBs are sufficiently resourced and have a defined compliance governance with access to a committee of board of directors. The MLRO is at senior management level, and policies, procedures and controls are documented and approved at board level. These FIs have set up a Three Lines of Defence model placing officers in the first line of defence (front office and operations), second line of defence (Compliance and Risk functions), and third line of defence (internal and external audit). The AML/CFT Compliance functions are largely independent and have MLROs who operate independently. Audit functions in place are yet to demonstrate that they perform independent assurance of the AML/CFT compliance program, as most commercial banks and MFBs indicate the audits to be prudential audits with some elements of AML. Implementation of the compliance function is less effective at many of the medium to large NBFIs (MMSPs excluded) due to a variety of factors including an inadequate RBA, understaffing, inadequate budget allocation, and unsophisticated monitoring systems. Most of the compliance functions are under-resourced to be able to effectively meet legal and regulatory obligations, with MLROs doubling up as legal, compliance and risk officers. Internal audit is often outsourced or they benefit from targeted sector-wide audits. Key audit findings on the AML/CFT compliance program are normally lacking as confirmed by these NBFIs, pointing towards a lack of capacity by auditors in this area. In smaller NBFIs and FIs with weak understanding of AML/CFT obligations, as with insurance brokers, instances were found whereby one resource performs second and third-line activities. It was noted that the competency/qualifications of compliance officers in smaller NBFIs are generally low and do not support effective implementation of AML compliance function in the sector. Some of these smaller FIs outsource the MLRO function and others seem to operate with no AML/CFT compliance function. SACCOS have compliance programmes in place for prudential purposes, therefore, these programmes do not include implementation of AML control measures including the appointment of MLROs.

314. FIs with subsidiaries and branches abroad apply stricter AML/CFT standards in home-host countries. Where subsidiaries are within the region like Uganda, South Sudan, Tanzania and Somalia, FIs indicated that they apply the Kenyan requirements through setting up adequate group-wide AML/CFT programs and standards, with the Kenyan MLRO maintaining overall responsibility.

315. Most commercial banks and MFBs adequately train relevant staff at all levels in the organisation (including board members) on an on-going basis, with some of the training efforts being implemented on a RBA depending on the level of risk exposure of products, services, customers, channels and geographic areas to ML/TF threats. Basing on the limited understanding by most of the medium to large NBFIs on certain AML/CFT obligations noted in this report (such as on BO), and low number of STRs filed by them, it is determined that the training programmes for NBFIs in place are not effective in these areas. The large MVTs and insurance companies provide training to agents before recruiting them, and on an on-going basis to cover, amongst other areas, issues on ethics and integrity, and AML related aspects. While assessors have an appreciation that such training is in place, it may not be adequate as the levels of understanding by agents have been noted to be low, and they continue to feature highly where AML/CFT violations are identified. Insurance companies that have an association with major banks leverage on the training programmes developed by the banks. For instance, in one insurance company associated with a major bank, staff are required to undertake a certain number of online training sessions, failure of which leads to being locked out of the system. For small NBFIs, training has either not commenced or is not sufficiently sophisticated to improve the skills of staff with key AML/CFT responsibilities. Across all FIs, training programmes on CTF appear to be inadequate.

316. FIs have generally developed and implemented know your employee procedures that include appropriate screening of potential employees prior to employing them. The screening process involves seeking past employment references, police clearance and searching publicly known databases, as preventive measures against employing criminals among other unsuitable individuals. The screening process in most FIs is, however, a once-off exercise, on recruitment, and is not done on regular intervals for existing employees.

317. Commercial banks, MFBs and medium to large NBFIs indicated that they have internal audit departments or external auditors who provide independent assurances on the adequacy of internal AML/CFT controls on a regular basis. Internal audit is often outsourced from the group for some NBFIs whilst others either operate without internal audit, or combine functions internally as is commensurate to their sizes and operations. The majority of the FIs indicated that there were no major findings on AML/CFT identified through their internal/external audits.

DNFBPs

318. DNFBPs have less developed internal AML/CFT controls and procedures which are not commensurate with their ML/TF risks. They have not developed adequate AML/CFT policies and programs to assist in ensuring AML/CFT compliance. Large accounting firms, casinos and company secretaries met during the interviews have, to a limited extent, designated compliance resources to oversee the entities' effective implementation of AML/CFT controls. These include appointment of a MLRO, vetting and screening of new employees and training of staff. While DNFBPs interviewed confirmed that they conduct vetting of new employees as part of the hiring process, assessors noted that the screening of new staff is only conducted on recruitment and not on an on-going basis. Further, some of the MLROs had not received training on AML/CFT casting doubts on their competency and effectiveness on AML/CFT matters. All DNFBPs indicated that they have not been trained on TF and this is supported by their lack of understanding of TF risk and CFT obligations. Most do not have independent audit functions to review and provide assurance on the adequacy of their AML/CFT systems. Inadequate internal AML/CFT controls and procedures are enhanced by lack of supervision and guidance in the sector.

Overall conclusions on IO.4

319. FIs, predominantly commercial banks and MFBs, demonstrated a good understanding of ML risks and to a large extent have applied mitigating measures commensurate with the identified risks. They conduct risk assessments on an annual basis and apply resources on a RBA to manage ML risks. Additionally, commercial banks and MFBs do risk rate their customers and profile them on an on-going basis, with some leveraging on international group systems. Medium to large NBFIs, including MMSPs and large MRPs, demonstrated a fair understanding of the ML risk and AML obligations that apply to them and fairly implement mitigating measures. Small NBFIs could not effectively demonstrate that they understand their ML risks and AML/CFT obligations. Basic CDD and record-keeping measures are being applied fairly well by most FIs. The implementation shortcomings relating to BO verification and PEPs create significant vulnerabilities that affect all sectors (FIs and DNFBPs). Low understanding of TF risk and CFT obligations, as well as inadequate application of corresponding mitigating measures are major challenges across all FIs and DNFBPs, and are not commensurate with the TF risk in Kenya. Third-party risk - in particular risk of fund managers, agents of MMSPs, partners of MRPs, and insurance brokers - is not being adequately managed by the relevant FIs. Implementation of a rules-based approach was evident amongst most medium to large NBFIs including MMSPs and MRPs. Application of preventive measures by the DNFBP sector, in particular,

the real estate agents and dealers in precious metals and stone are of particular concern given the risks to which this sector is exposed. In addition, non-designation of lawyers as reporting institutions is a major shortcoming given their vulnerabilities. Lastly, reporting of STRs by FIs and DNFBPs is not satisfactory and is not commensurate with the ML/TF risks in Kenya.

320. Kenya is rated as having a low level of effectiveness for IO.4.

6. SUPERVISION

6.1 Key Findings and Recommended Actions

Key Findings

- a) With the exception of high-risk countries and reporting of suspicious transactions on TF matters, supervisors for FIs and DNFBPs do not have a mandate to supervise reporting entities for implementation of preventive measures related to CFT and TFS.
- b) Kenya has no regulatory frameworks for licensing/registration and carrying out AML/CFT supervision or monitoring of VASPs. VASPs are not prohibited and there is no understanding of ML/TF risks relating to their operations.
- c) Supervisory activities do not cover PF and TFS as the activities are more AML oriented. Additionally, there has been no training/inspections with regards to TFS in relation to PF and TF.

Financial Institutions and VASPs

- d) CBK has market entry requirements to prevent criminals and their associates from holding or being a beneficial owner of significant interest or holding a management function in institutions. However, entry requirements applied by CMA and IRA are deficient. CMA and IRA conduct fit and proper assessment of significant shareholders, directors and senior management only. The licensing requirements do not require declaration of beneficial owners and therefore there is no guarantee that BOs are identified and their identity verified in all cases. In addition, there are no licensing/registration requirements for VASPs.
- e) Supervisors (CBK, CMA and IRA) have an understanding of ML risks at the sector levels and varying level of understanding at institutional level. However, understanding of TF risks for all supervisors is limited. Supervisory bodies are yet to use the understanding of ML/TF risks to develop and implement risk-based supervision frameworks.
- f) With a view to mitigate risks, CBK, CMA and IRA have taken steps (such as risk profiling of institutions) towards implementation of AML/CFT risk-based supervision. Currently, the scope and frequency of supervision conducted is not based on the risk profile of institutions. AML/CFT supervision is carried out as a component of prudential supervision, has not been prioritised based on ML/TF risks and is therefore limited in scope. The CBK's supervision of the banking sector is limited to compliance checks with AML/CFT requirements. The thematic and targeted AML supervision which CBK conducted was only in relation to banks which were suspected to have been involved in the NYS corruption scandal.
- g) CMA and IRA do not routinely apply remedial actions and sanctions against breaches of AML/CFT obligations which are proportionate and dissuasive. CBK has applied remedial actions and sanctions to some extent, however, assessors could not determine the extent of proportionality and dissuasiveness because in most cases sanctions and remedial actions relating to prudential and AML/CFT violations were combined.
- h) The supervisory bodies have undertaken numerous outreach and awareness initiatives to promote the understanding of AML obligations and ML/TF risks by reporting entities. However, the impact of the initiatives varies across banks, insurance companies and

capital market players.

- i) Supervisory actions taken by some financial sector supervisory bodies have had some impact on AML/CFT compliance. Whilst the FRC have noted positive change in the quality of STRs, across the spectrum of reporting entities, there has not been any improvement in the number of STRs. Impact of DNFBP supervisors' activities could not be determined since they had not yet carried out any supervision. In addition, there have not been any supervisory activities in relation to VASPs.

DNFBP Sectors

- a) The Licensing and registration controls to prevent criminals and their associates from participating in the ownership, control, or management of DNFBPs are generally inadequate. Market entry controls for most DNFBPs focus on compliance with professional standards and code of conduct.
- b) The country has a high number of unregistered real estate agents, which are thus outside the scope of AML/CFT supervision rendering the sector vulnerable to abuse for ML purposes. Despite the sector being identified as high risk, there has been little enforcement action and insufficient resources are currently allocated to address this issue.
- c) FRC and some supervisors have a sectoral-level understanding of ML risks to some extent. TF risk understanding is relatively underdeveloped across all supervisors. This is attributed to the fact that TF risk has not been given due consideration within the risk assessments. There is also no ML/TF risk understanding at the institutional levels. Lack of institutional risk assessments and AML/CFT supervision have contributed to this lack of understanding.
- d) The supervisory bodies have not yet started AML/CFT supervision, let alone risk-based supervision. However, FRC has developed RBS Manual for all DNFBPs which respective supervisors have to adapt, taking into account sector specific characteristics.
- e) DNFBP supervisors have not applied any remedial actions or sanctions against breaches of AML/CFT requirements. Assessors are therefore not able to assess whether the sanctions are effective, proportionate and dissuasive.
- f) There has been limited engagement of the DNFBP sectors on AML/CFT issues and, in the absence of AML/CFT supervision and sanctions, it is not possible to assess impact of supervisory actions on AML/CFT compliance.

Recommended Actions

Kenya should:

- a) Develop and implement risk-based supervision that includes both off-site and on-site AML/CFT supervision for all regulated FIs, DNFBPs and VASPs (dependant on policy decisions taken about VASPs), with priority implementation in terms of scope, frequency and intensity based on risk and context.
- b) Enhance the risk-based supervision capacity of AML/CFT supervisors to enable effective supervision of regulated entities for compliance.
- c) Supervisors should focus on effectiveness of controls, including on the obligations to obtain and hold accurate and up to date information on beneficial owners of companies and trusts, given the risk and context, rather than solely on the presence of controls.
- d) Broaden the scope of supervision so that the designated supervisors of DNFBP and FIs cover CFT.
- e) Take a policy decision as to whether to prohibit or regulate VASPs. Where a position is taken to allow VASPs, conduct ML/TF risk assessment, develop frameworks for licensing/ registration and AML/CFT supervision.
- f) Extend the scope of licensing and registration requirements to include BO which will facilitate consistent and comprehensive ‘fit and proper’ assessment of FIs and DNFBPs.
- g) Implement a clear enforcement strategy for imposition of effective, proportionate and remedial actions and sanctions to ensure compliance with AML/CFT controls by reporting entities.

Financial institutions

- h) Improve the methodology for sectoral and institutional ML/ TF risk assessment through collecting and analyzing inherent risk information and use the findings of the NRA to enhance understanding of ML/TF risks facing the reporting entities.

DNFBP Sectors

- a) The authorities should set clear supervisory models for supervision of DNFBPs by designated supervisory authorities.
- b) The authorities should consider increasing capacity including supervisory resources of the FRC and other regulators for DNFBPs to enable them monitor AML/CFT compliance of the DNFBPs. This will allow the FRC to focus its resources on the sectors which do not have an assigned supervisory body.
- c) The authorities should put in place mechanisms that will deter the use of unlicensed estate agents and apply sanctions which will be effective, dissuasive and proportionate against unregistered agents.
- d) The authorities should ensure that the level of oversight on DNFBPs are commensurate with their risk profiles.
- e) Supervisory authorities should implement AML/CFT awareness training programs on all aspects relating to the relevant preventive measures and targeted financial sanctions on a continuous basis for all entities under their purview.

321. The relevant Immediate Outcome considered and assessed in this chapter is IO.3. The Recommendations relevant for the assessment of effectiveness under this section are R.14, 15, 26-28, 34, 35 and elements of R.1 and 40.

6.2 Immediate Outcome 3 (Supervision)

322. When assessing the effectiveness of Kenya's supervision system, positive and negative aspects were weighted most heavily for banks, mobile money service providers ((MMSPs) and money remittance providers (MRPs); real estate agents, lawyers, forex bureaus, and capital market players were heavily weighted; life insurance, casinos, dealers in precious metals and stones, accountants and TCSPs were moderately weighted and less heavily weighted were savings and credit cooperative societies (SACCOs) and non-deposit taking microfinance institutions. Non-existence of AML/CFT supervision of lawyers was also assigned high importance in view of the risks this sector faces.

323. The DNFBP sectors are subject to varying market entry controls but most of them are inadequate. Market entry controls for most DNFBPs are concentrated on compliance with professional standards and code of conduct. Their risk exposure is understood at a sectoral level, however, the mitigation measures by supervisors need to be strengthened. The supervisory authorities have not yet started supervising them for compliance with AML/CFT obligations.

6.2.1 Licensing, registration and controls preventing criminals and associates from entering the market

324. Kenya has a framework for licensing and registering new market players for most FIs and DNFBPs⁴⁰. However, the robustness of the systems varies across the sectors. The financial sector supervisory bodies perform fit and proper assessments of shareholders, directors and senior management of FIs at entry and on an ongoing basis, to a great extent. The fit and proper assessment includes the evaluation of the integrity of shareholders, directors and senior management with particular regard to criminal proceedings or convictions. However, for most of the sectors there is no legal requirements to include beneficial owners. Additionally, none of the supervisors seek information from FRC when processing an application. In the financial sector, unauthorised and unlicensed activities are detected using intelligence from the market, via whistle blowing and complaints from clients. Mitigating actions are then undertaken to stop the activities and recover any funds involved. Thus, breaches of licensing or registration requests are not proactively detected or are detected to a limited extent.

AML/CFT Supervisors for Financial Institutions

325. **CBK.** The CBK licenses banks, deposit taking Microfinance Banks, Foreign Exchange Bureaus, Money Remittance Services Providers and Payment Systems Providers. The licensing requirements used are similar for the different types of institutions, requiring applicants to submit various documentation such as business plan, financial projections, details of risk management, details of shareholders, directors, senior management and beneficial owners, up to date curriculum vitae, credit reference certificate, contact details, Personal Identification Number and tax compliance certificate, certificate of good standing from the Director of Criminal Investigations, corporate documents of

⁴⁰ At the time of the onsite, Non-deposit taking microfinance banks do not have licensing and market entry requirements. Henceforth, Kenya has amended the Central Bank Act to include the powers to license the non-deposit taking microfinance. This has been supported by secondary legislations relative to Digital credit providers in 2022.

incorporation in the case of a legal entity (Memorandum and Articles of Association) and audited accounts for the past 3 years. The information received is verified against independent sources including the Kenya Deposit Insurance Corporation, the Business Registration Services, former employers, referees provided by the applicant, open sources and National Intelligence Services. Additionally, the certificates provided are required to be notarised. Applicants are also required to provide source and evidence of availability of capital contributed by all proposed significant individual and institutional shareholders (who own 5% or more). Proposed individual and institutional shareholders are required to submit, as part of the sworn declaration in the fit and proper form, a statement to the effect that the proposed capital is not from proceeds of crime or illicit activities. Where the shareholder and director of an applicant is foreign based, the applicant is required to submit a character certificate from the foreign regulatory body as well as from law enforcement stating that the person has no criminal records. The CBK further writes to the home country regulatory body in order to seek information about the individual to independently verify the information provided by the applicant. Furthermore, CBK has a pre-licensing requirement for inspection of an applicant's physical place of business. And whilst the law does not explicitly prohibit the licensing of shell banks, this pre-licensing requirement ensures that CBK does not license a shell bank.

326. However, the market entry requirements do not always lead to full identification of BOs. Whilst in practice, some elements of BO are identified, there is scope for improvements. For example, in the case of an acquisition for a 100 per cent shares of a FI, the CBK conducted fit and proper and identified the natural persons behind the main shareholder which as per the proposal for acquisition, would own 14.57 per cent of the shareholdings. The remaining 85.43 per cent would be owned by various individuals and corporate shareholders, none of whom would own more than 5 per cent in the FI. However, there is no evidence that shows that the CBK reviewed the individuals behind the corporate entities to ensure that no one person was directly behind the companies and would indirectly own more than 5 per cent of the institution or exercise control. Furthermore, there is no evidence of reviews performed in order to ascertain that no criminals own shares in the FI. Furthermore, assessors could not evaluate how the authorities verify, at market entry, that funds to be used for acquisition of shares are not proceeds of crime

327. **CMA.** The CMA's licensing requirements apply to only the market players which are categorised as reporting institutions under the POCAMLA which are investment banks, stock brokerage, fund managers, real estate trust managers, online forex trading brokers, and coffee brokers. The licensing requirements are prescribed within the Capital Markets (Licensing Requirements) (General) Regulations 2002. Applicants for a licence are required to submit documentation which includes details of shareholders, directors, chief executive officers and senior management, police clearance form or the equivalent for a foreigner, identification documentation, credit reference certificate, references, curriculum vitae, business plans, organogram and documentation of incorporation in the case of a legal entity. Such documentation is then verified through open sources and correspondences with Business Registration Services and past employers. The CMA places reliance on the banking sector in order to ensure that source of funds is legitimate. Fit and proper tests are conducted on shareholders owning more than 15 percent of the companies as well as on all key personnel. Relatively, reliance is placed on the police clearance certificate submitted by the applicant in order to determine that the persons are not criminals. These processes are followed for mergers and acquisitions as well. However, the licensing requirements do not require declaration of a beneficial owner.

328. **IRA and RBA.** The licensing process involves consideration of legal or natural persons that propose to own or control more than 25 per cent of an insurer's shares, or hold directorship or senior management position. The IRA applies a 2-phase licensing process, whereby in the first phase applicants are required to submit a feasibility study prepared by an actuary, details of shareholders, sources of funds, curriculum vitae of directors and senior management and communication from regulators. If the applicant has passed the due diligence, IRA grants an approval in-principle and

escalates the application to the second phase of assessment. This involves obtaining financial statements, tax certificate, credit reference bureau certificates, a clearance from EACC, and a certificate issued by the Director of Criminal Investigations. The IRA further liaises with primary regulator, registrar of companies, the internal criminal investigations unit as well as open sources to verify information submitted. Consideration is given to the criminal records, in particular the nature and seriousness of the offence, the fit and proper information and prior business experience in the case of a legal person. Furthermore, assessment of the feasibility of the place of business is then considered prior to the applicant starting operations. Pensions and retirement schemes are required to be registered and the RBA conducts fit and proper tests on shareholders and management.

329. **SASRA.** Deposit taking Saving and Credit Cooperative Organisations (SACCOs) are licensed by the SACCO Societies Regulatory Authority (SASRA) whilst non-withdrawable deposit taking SACCOs that are above Ksh 100 million are issued an authorisation certificate. SASRA requests the applicant to submit the following documents: educational background, past employment, tax certificate, passports, identification documents, good standing certificates from DCI and credit reference bureaus in relation to directors and senior management of the SACCOs. Significant shareholdings of SACCOs are dependent on Section 15 of the Cooperative Societies Act (Cap 490) which restricts membership to all Cooperatives including SACCOs to more than one-fifth of the issued and paid-up share capital as well as the bylaws. Therefore, reliance is placed on the institution performing KYC at on-boarding to ensure that criminals do not own shareholdings into a SACCOs.

330. Financial sector supervisors did not submit evidence to show that Beneficial Owners are always identified and that the verification is done to ensure that criminals or their associates are not beneficial owners of significant or controlling interest or holding a management function in a FI.

AML/CFT Supervisors for DNFBP Sectors

331. **Market entry controls to prevent criminals from operating in some covered DNFBP sectors are inadequate.** While there are some requirements that consider the integrity and probity of Real Estate Agents, Certified Public Secretaries and Accountants, regulators focus on compliance with the academic and professional requirements and rarely consider criminal background of the applicant. There is no evidence that verification of disclosures is performed and that efforts are made to identify a beneficial owner. In relation to suspicions of unlicensed/unregistered DNFbps, most supervisors do not take proactive action. Some cases are investigated by the Police, usually based on complaints from abused customers.

Law Society of Kenya

332. The licensing process starts with undergraduates undergoing training at the Kenya School of Law. After completion of the bar examinations, the newly qualified advocates then apply to the court for admission to the bar. The Registrar conducts an evaluation of the applications which involves the review of the applicant's professional legal qualification, testimonials regarding the applicant's character and general suitability. Following admission to the bar, an application for a practicing license will be made by the new advocate to the Law Society Kenya. Practising certificates are only issued to new advocates after they are admitted to the bar. The advocates have to apply for renewal of their certificates annually and the application is supported by audited accounts, clearance certificate of clients' accounts and indemnity insurance certificate/ policy.

Institute of Certified Secretaries of Kenya

333. The Registration of Certified Public Secretaries Board (RCPSB) conducts the registration of qualified secretaries and issues practicing certificates to already registered secretaries who are eligible to offer services to the public. Only individual members are registered by the Board and not firms which employ them. The Institute of Certified Secretaries has no role in the registration of members. Membership is renewable annually. Company secretaries provide services in relation to creation/

incorporation of companies. However, these services can also be performed by any individual apart from a company secretary. It is therefore possible to have individuals who do not fall under any supervision/ regulation to provide such services.

Betting Control and Licensing Board of Kenya

334. The licensing process begins with a proposal made by an applicant to the Board requesting to be issued with a public gaming license. In considering a licence application for a casino (including an internet casino), the Board conducts background screening for past criminal conduct of shareholders, the proposed directors and senior management of a casino. As casino licences are renewed every 12 months on 30th June each year, the fit and proper tests are also conducted at the time of considering an application for renewal of a license or whenever there is a change in the senior management, board or shareholding structure of a casino.

Institute of Certified Public Accountants of Kenya

335. The Institute is a professional body which licences qualified accountants and auditors. The Institute conducts fit and proper assessment, and requires a criminal clearance of prospective members. The Institute assesses the professional qualifications and personal integrity through a certificate of good conduct and thereafter makes a recommendation to the board for registration. In addition to traditional auditing/ accounting services, accounting firms also provide the following services: management of clients' funds; buying and selling of real estate and creation/ formation of companies.

Estate Agents Registration Board

336. The Estate Agents Registration Board is the licensing authority of real estate agents. The licensing process starts with an application to the Board by qualified estate agents. Shortlisted applicants are invited for physical interviews to test competence. Following the interviews, the applicants are subjected to fit and proper tests to assess personal and financial integrity. Only Kenyan citizens allowed to practice and the certificate of registration is renewable in January of each year. The sector has many real estate agents that operate without any licence. The unlicensed players could possibly be more than the licensed ones and the authorities do not think that it would be feasible to prosecute them. This is of particular concern in view of their high ML/TF risk.

Ministry of Petroleum and Mines

337. The Ministry of Petroleum and Mines is responsible for licensing dealers in precious metals and dealers in precious stones. The licenses are issued to Kenyan nationals or to companies established in Kenya. Licenses expire in December and are renewed yearly. Applicants are required to apply through the Mining Candastar Portal using an account created for the individual or firm. The applicants are subjected to background checks for purposes of ensuring that only fit and proper individuals obtain licences. Where the applicant is a company wishing to obtain a dealer's licence, the fit and proper tests are extended to the directors and shareholders of the company.

6.2.2 Supervisors' understanding and identification of ML/TF risks

338. **The level of identification and understanding of ML/TF risks varies across different supervisors. The CBK, CMA and IRA have an understanding of sector-level risks relative to ML, followed by FRC, while other supervisors understand the risks in the high-risk DNFBP sectors (estate agents, attorneys, and TCSPs) to a limited or negligible extent.** Most of the risk assessments treated ML and TF as one risk despite the unique differences between the two whilst the NRA did not consider TF threats and vulnerabilities of these sectors. This resulted in a compromised understanding of risks, with TF often considered as ML and therefore not assessed and understood on its own. All financial sector supervisors and FRC participated in the 2019/2021 NRA exercise, having evaluated the

risks in their respective sectors as well as the risks arising from other sectors to the overall national ML/TF threats and vulnerabilities. Supervisors for real estate agents, casinos and accountants participated in the NRA. Furthermore, only ICPAK and LSK participated in the sectoral risk assessment which FRC carried out for DNFBPs, whereas the EARB and BCLB were engaged during the NRA and no industry representative for the supervisor for dealers in precious metals and stones sector took part in the assessment. Whilst the NRA was an important step towards understanding of ML/TF risks, other information including STRs, ML/TF cases and other intelligence such as typologies and strategic analysis are not being considered by supervisors to better understand sectoral or institutional ML/TF risks and support risk-based supervision. Additionally, there is no clear indication as to how supervisors maintain the understanding of risk across different sectors, type of institutions and of individual institutions.

Financial Institutions

339. The CBK, CMA and IRA have some understanding of the inherent ML/TF risks faced by sectors and institutions within their supervisory purview. The supervisory bodies build their understanding of ML/TF risks through supervisory activities, data collection from returns, sectoral risk assessments and financial institutions' risk assessments.

340. CBK indicated that it conducted a risk assessment on banks, microfinance banks, foreign exchange bureaus and money remittances in 2017 to 2018 to understand the ML/TF risks faced by the sectors and subsequently assigned risk ratings to these institutions. However, the assessors were not provided with the assessment report and therefore could not determine the methodology used, what was considered within the risk assessment and the basis for the ratings. The CBK further explained that it receives quarterly returns from banks which contain quantitative elements such as activity risks, types of customers, beneficial owners, geographic areas and activities of customers as well as qualitative elements such as structural risks, institutional structures and size of institution. For non-banks, a wider range of information is collected from offsite as well as onsite inspections to support the understanding of risks. The assessments revealed that for the sector as a whole, emerging technology is the highest source of risks. Relative to payment services providers, it was established that third party and partner risks are the highest risks faced by the industry. Forex bureaus face high risks from customers in the locations close to the border with neighbouring countries where there is instability. CBK maintains its understanding of risks through onsite examinations, annual risk assessments carried out by FIs, quarterly returns and via a third-party mandatory audit assessment in 2019 of which findings was submitted directly to CBK.

341. In 2016, the CMA conducted an ML/TF risk assessment on a sample of 12 market intermediaries out of 54 (which represented approximately 22% of number of licensed institutions) based on size, assets under management, cross jurisdictional activities and interconnectedness. Assessors noted that ML and TF risks were assessed together despite the fact that these risks have distinct nature in terms of threat and vulnerabilities. This assessment provided the CMA with an overview of how risky these institutions were relative to their size and number of transactions. However, taking into consideration the number of institutions and the different sector covered by the CMA, the assessment is not deemed adequate enough to provide a reliable picture on the nature and level of ML/TF risks in the sector as a whole and segregated to different sectors and institutions. Through the NRA, the CMA identified the equity sector as medium, with the Hedge funds, private equity funds, venture capital funds, commodity pools, private wealth and online foreign exchange trading and CFDs as having medium high ML risk. The CMA maintains its understanding of risks through onsite inspections for those assigned as high risks. However, the AML/CFT inspections (between 2017 and 2021, CMA carried 25 prudential onsite inspections in 2019 which included AML/CFT) are irregular and too few in number to fully help in maintaining the understanding of risks in the sector. On this basis, CMA understanding of ML/TF risks of the sector and individual institutions needs to be strengthened.

342. The IRA conducted a risk assessment of life insurance companies (insurance brokers were not included because they were not covered by POCAMLA at that time) in 2019. From the risk assessment, it was determined that unit linked and linked investments, life assurance and annuities were high risk, whilst group life, deposit and administration and group credit were rated as low. Risk identified for the sector is mainly related to the type of products offered, flexibility in the mode of payment, grace period that allows for cancellation of the policy 14 days after its issuance, early surrender policy, ability to assign benefits to another person and use of premiums as a means of collateral. Just like CMA risk assessment, the exercise did not distinguish between ML and TF risks. The risk assessment further identified a gap in the framework which, following revisions in the law, now encompasses insurance brokers and agents, as reporting entities. The IRA collects data from insurance companies in respect of products provided both within and outside the country. These data serve to inform its risk model.

343. The RBA and SASRA rely on the NRA for an understanding of risks within their sectors. This relates more to the geographical areas in which the SACCOS and pension schemes are distributed, which contributes further to difficulties that the regulators face with supervision.

DNFBP regulators

Law Society of Kenya

344. The Law Society of Kenya was designated AML/CFT supervisor of lawyers under the POCAMLA Amendment Act which was passed in December 2021. However, the implementation of this provision was suspended by the High Court immediately after its introduction. Despite being designated in 2021, the LSK demonstrated a general understanding of the ML/TF risks that lawyers are exposed to. Both the DNFBP risk assessment which FRC carried out in 2017 and the NRA included lawyers. However, there is no understanding of ML/TF risks at individual firm level.

Institute of Certified Secretaries of Kenya

345. Although Trusts and Company Services Providers are designated as reporting entities, the Institute of Certified Secretaries of Kenya (ICSK) is not a designated AML/CFT supervisor under the 1st Schedule of POCAMLA. Therefore, ICSK generally supervises its membership in compliance with its Act and not POCAMLA. In this regard, the FRC as the supervisor of last resort, is yet to conduct a risk assessment to understand and identify the ML/TF risks that TCSPs are exposed to. The DNFBP risk assessment which FRC carried out in 2017 did not cover TCSPs.

Betting Control and Licensing Board of Kenya

346. The Betting Control and Licensing Board of Kenya is designated AML/CFT supervisor of casinos and gaming activities. The Board has not put in place any measures to identify and assess the ML/TF risks in the sector. The DNFBP risk assessment which FRC carried out in 2017 and the NRA which was completed in 2021 covered casinos. While there is a general understanding of ML/TF risks at the sectoral level, the understanding does not extend to ML/TF risks to which individual institutions are exposed.

Institute of Certified Public Accountants of Kenya

347. The Institute of Certified Public Accountants (ICPAK) is the designated supervisor of accountants, accounting and audit firms. The Institute has a good understanding of the ML/TF risks that the members under its purview are exposed to. The Institute's understanding of the sector risks is limited to the sectoral risk assessment conducted in 2017 and their participation in the NRA. The Institute has developed AML/CFT guidelines for Accountants which includes mechanisms to identify and assess risks.

Estate Agents Registration Board

348. The discussions with the EARB indicated that the Board understands that the sector is highly vulnerable to ML risks due to the high number of unregistered estate agents. The Board demonstrated that it has low level understanding of ML/TF risks within its sector as had not yet started conducting risk-based AML/CFT supervision of the sector despite being a designated supervisory body.

Ministry of Petroleum and Mines

349. The State Department of Mines in the Ministry of Petroleum and Mines has very low understanding of the ML/TF risks in the sector. The interviews revealed that the ministry understands that the sector is vulnerable to ML risks due to smuggling of high value minerals and precious stones from foreign countries. The Ministry does not have specific understanding of the ML/TF risks in the sector and has not put in place any control measures.

6.2.3 Risk-based supervision of compliance with AML/CFT requirements

Financial Institutions

350. All financial sector supervisors are yet to start implementing AML/CFT risk-based supervision. There is disparity in the degree of preparation for risk-based supervision among the supervisory bodies. CBK, CMA and IRA conducted institutional risk assessments (albeit with some shortcomings) and determined risk profile of the institutions (for CMA, this was done for 12 institutions out of 54 in 2016). However, based on the information provided, the outcome of these ML/TF risk assessments have not been used to inform frequency and scope supervisory activities. Furthermore, whilst CBK, CMA and the IRA have developed risk-based supervision manuals, these are on prudential supervision. AML/CFT supervision is just a component of prudential supervision.

Table 6.1: AML/CFT Onsite Inspections: 2017-2020

Number of Inspections					Total Number of Entities Inspected	Total Number of Entities in the sector
Type	2017	2018	2019	2020		
Commercial Banks	1	5	6	2	14	39
Microfinance Banks	0	1	1	1	3	17
Foreign Exchange Bureaus	0	0	9	0	9	68
Money Remittance Providers	2	2	8	0	12	17

351. Although CBK has indicated that it has carried out risk assessment of its licencees and determined the risk profile of the institutions, it is yet to start AML/CFT risk-based supervision. Its current supervision model is limited to prudential supervision and only covers a small scope of AML issues as part of its consideration of operational risks during prudential supervision. CBK's model does not include details to describe what aspects of AML issues are covered. Assessors noted that CBK conducted target AML inspections in 2018 on financial institutions which were suspected to have been involved in the National Youth Service fraud case. However, with the exception of the inspection reports related to this exercise, the assessors were not provided with samples of other inspection reports to understand the scope of AML/CFT issues covered during prudential onsite inspections. Table 6.1 above shows the AML/CFT inspections carried by CBK.

352. The inspections resulted from intelligence which indicated that these banks had been used in a corruption case with possible involvement of ML rather than from the result of the risk assessments and

as such focused on the operations of the NYS-related bank accounts and transactions to assess the banks' compliance with the requirements of Kenya's Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) laws and regulations. Supervisory activities, including onsite inspections, are not informed by risk within the sector or institutions. Furthermore, the number of inspections is not commensurate with results of risk profiling undertaken by CBK. For instance, the risk assessment identified 18 banks to be of high risk. However, CBK only conducted 14 inspections (which included 6 targeted onsite inspections referred to above) over a period of 4 years which is not consistent with CBK's policy which states that high risk institutions are subject to at least 1 onsite inspection per year. For institutions not subjected to onsite inspections, the CBK applies offsite monitoring and collects data via returns as well as mandatory annual risk assessments. The assessors were not provided with the offsite monitoring templates/ returns to understand what kind of information is required from each risk profile categories of the FIs. It is also noted that supervision is only conducted at the institution's headquarters leaving a gap in the understanding of the risks faced by the institution in different branches, particularly for those in high-risk counties/ regions.

353. Whilst as a result of the risk assessment undertaken in 2016, the CMA has sought to develop its risk-based supervision model using the sample of 12 institutions as its basis, this model is more of a prudential nature rather than AML/CFT. The CMA conducted 6 stand-alone onsite AML/CFT examinations in 2016 (which falls outside the review period) and 25 prudential onsite inspections in 2019 which included AML. Whereas the CMA has begun the development of its risk-based model, the inspections conducted are not informed by the results of risk assessment and as such, the schedule for inspections are not informed by risks. The IRA, RBA, and the SASRA are yet to undertake any onsite AML/CFT supervision. However, they collect data for offsite monitoring.

DNFBP Supervisors

354. The DNFBP supervisors have not started supervising and monitoring entities under their purview for AML/CFT compliance and had not yet implemented risk-based AML/CFT supervision. The DNFBP supervisors lack the necessary human, financial and technical resources to supervise or monitor their sectors for AML/CFT compliance. With the exception of an inspection conducted by the FRC on a casino in December 2021, there were no on-site inspections conducted on the sectors during the period under review and off-site monitoring is also non-existent. All of the DNFBP supervisors were aware of their AML/CFT responsibilities. ICPAK issued AML Guidelines for Accountants to help accountants deal with AML regulatory requirements and ML/TF risks. LSK also developed draft AML/CFT Guidelines for lawyers with the assistance of the FRC and GIZ. However, these are yet to be tabled before the general assembly of Law Society of Kenya. In line with the above, the Assessment team concluded that risk-based supervision has not been implemented by the DNFBP supervisors.

6.2.4 Remedial actions and effective, proportionate, and dissuasive sanctions

355. Generally, CMA and IRA do not routinely apply remedial actions and sanctions (against AML/CFT violations) which are proportionate and dissuasive. In majority of the cases, CBK only applied limited sanctions for breaches of AML/CFT obligations identified. Overall, the remedial actions and financial sanctions have not been proportionate and dissuasive.

356. CBK sanctioned banks which were linked to the NYS fraud case the total sum of Ksh 392,000,000 (USD 3.6m) in 2018. Monetary sanctions applied for the rest of the period under review were few, and they related to breaches of both AML and prudential obligations. Hence, it was difficult for the assessors to determine the extent to which the size of penalties is proportionate to the nature and severity of the AML/CFT breaches. The analysis of the targeted inspections reports and discussions on AML/CFT compliance issues held with the supervisory bodies and the inspected regulated entities

found the following as the main areas of non-compliance: customer due diligence, reporting and quality of STRs, AML/CFT programs and record keeping. The Table below shows the number of sanctions applied by CBK.

Table 6.2: Sanctions applied from 2017- 2020 by CBK

Type	Year	Amount (000')	Reason
Banks	2017	1,000	Failure to comply with CBK guideline on AML
Micro Finance Bank		3,000	AML/CFT breaches
Foreign Exchange Bureau		6,500	AML/prudential breaches
Money Remittance Provider		3,500	AML/prudential breaches
Banks	2018	392,000	Failure to comply with CBK guideline on AML
Micro Finance Bank		3,000	Failure to comply with CBK guideline on AML
Foreign Exchange Bureau		2,500	AML/prudential breaches
Money Remittance Provider		500	AML/prudential breaches
Banks	2019	7,000	Failure to comply with CBK guideline on AML
Foreign Exchange Bureau		5,000	AML/prudential breaches
Money Remittance Provider		1,500	AML/prudential breaches
Banks	2020	20,000	Failure to comply with CBK guideline on AML
Micro Finance Bank		1,000	Failure to comply with CBK guideline on AML
Mobile Money Services Providers		1,000	AML/Prudential breaches

* Source: CBK

357. In relation to CMA, after an onsite inspection (as a general principle), it issues a 'Deficiency Letter' which outlines the shortcomings which have been identified and requests the institution to indicate the corrective measures and the related timelines it has put in place to prevent recurrence of the shortcomings. CMA does not set out what the institution should do in order to address the deficiencies and the timelines within which to address the deficiencies but rather leaves it to the institution to decide on what course of action it should take to cure the deficiencies. On this basis, assessors do not think this is an appropriate basis to support a conclusion that CMA institute remedial measures. In addition, whereas there have been numerous cases where CMA has applied financial penalties for violation of prudential and market conduct requirements, assessors have not been provided with similar actions in relation to violation of AML/CFT requirements. The authorities indicated that they applied 41 administrative penalties/ fines over the period 2016- 2020. There is no information on the specific violations, amounts charged and the legal basis of the penalties. For this reason, assessors were not able to determine the extent to which the penalties were proportionate and dissuasive. As for IRA, it has not applied remedial measures or sanctions for AML/CFT violations mainly because it has not carried out any AML/CFT inspection.

DNFBP Supervisors

358. All DNFBP supervisors have not yet commenced implementation of AML/CFT Risk Based Supervision of their sectors. Therefore, no deficiencies have been identified and therefore no effective, dissuasive or proportionate enforcement actions have been taken against estate

agents, trust and company service providers, accountants or casinos. At the time of the onsite visit, it was noted that the FRC had also not sanctioned any reporting entity for breaches or failure to comply with AML/CFT requirements since it had not undertaken inspections of the institutions under its purview.

Table 6.3: Summary of Administrative Sanctions by CMA

No of Administrative Sanctions	2016	2017	2018	2019	2020
Insider Trading	0	0	0	1	3
Market Manipulation & Market Abuse	0	0	1	11	0
Corporate Fraud	3	1	6	1	4
AML/CFT Sanctions/Administrative Penalties/Fines	14	7	16	3	1

6.2.5 Impact of supervisory actions on compliance

359. Supervisory actions taken by some financial sector supervisory bodies have had some impact on AML/CFT compliance. However, across the spectrum of reporting entities, there has not been any improvement in the number of STRs although the FRC noted positive change in the quality of STRs. DNFBP supervisors were unable to demonstrate that their supervisory activities impacted compliance since they have not carried out any supervision. In addition, there have not been any supervisory activities in relation to VASPs. The results are that the unsupervised entities are vulnerable to ML/TF risks, as they demonstrate inadequate appreciation of the ML/TF risks and application of AML/CFT obligations. This leads to no feedback to REs on supervision undertaken and no systemic follow-up on actions taken to address the identified deficiencies.

Central Bank Kenya

360. CBK has carried out a number of activities which it believes have made an impact on the compliance culture of its entities. For instance, it issued a ‘*Guidance Note: Conducting ML/TF Risk Assessments*’ in 2018. FIs are required to conduct risk assessments annually. Subsequent review of risk assessment reports by CBK showed an improvement in quality. Furthermore, following an independent audit review of FIs commissioned by CBK, there was notable improvements in AML/CFT compliance based on updates received on implementation of external audit recommendations. However, these improvements have not been verified through onsite inspections to show that there has been an impact on compliance. Another area where impact was noted is the increase in resources available to FIs in terms of human and systems following CBK’s engagements with board of directors of FIs. CBK also believes that administrative penalties applied against violation of AML/CFT requirements have been dissuasive. However, assessment of this is undermined by low number of onsite inspections which means that not all FIs are covered, including those rated as high risk. Therefore, in the absence of onsite inspections, it would be difficult to confirm improvement in compliance.

Capital Markets Authority

361. At the end of an onsite inspection, CMA prepares a report which outlines the deficiencies identified in the AML/CFT systems of the institution. As indicated above, CMA requests the institution to explain the corrective actions it has taken to address the deficiencies. The lack of prescribed actions and deadlines by the supervisory authority does not lead to prompt action and this affects the timeliness of the impact. There is no indication that CMA follows up on the actions which the institution has promised to do. In addition, lack of implementation of sanctions for non-compliance with AML/CFT requirements does not provide an incentive for the supervised institution to address the deficiencies promptly.

DNFBP Supervisors

362. DNFBP supervisors were unable to demonstrate that supervision impacted compliance of the institutions under their purview. Some DNFBP supervisors (e.g. ICPAK, EARB, LSK and BCLB) have conducted outreach activities in conjunction with FRC to raise supervised entities' awareness on their AML/CFT obligations. However, the impact of such activities on compliance could not be determined due to the fact that the supervisors have not been monitoring compliance. The lack of supervision, especially on high risks sectors such as the lawyers and real estate is a matter of concern. The results are that the unsupervised entities are vulnerable to ML/TF risks, as they demonstrate inadequate appreciation of the ML/TF risks and application of AML/CFT obligations.

6.2.6 Promoting a clear understanding of AML/CFT obligations and ML/TF risks

363. The supervisory bodies have undertaken numerous awareness sessions, conducted outreach and engagement with FIs and DNFBPs to promote understanding of AML/CFT obligations. FRC issued a guidance to reporting institutions on suspicious transaction and activity reporting which guides reporting institutions on meeting their responsibilities to report to FRC. Additionally, bilateral engagements have been made with banks and other FIs to rectify issues as identified by supervisory bodies. Moreover, FRC has also developed and published guidance on implementing AML/CFT obligations for DNFBPs. However, there is yet to be any sensitisation on the NRA results, TFS in relation to TF and PF or any developments in the sector that affect compliance with AML/CFT requirements.

364. The IRA, CMA and the RBA indicated that they have held trainings and workshops, as well as issuing guidance notes and circulars. The CBK has also undertaken several initiatives to promote understanding of ML/FT risks including:

- Issuance of guidance notes on conducting risks assessments.
- Regular meetings with FIs to discuss AML/CFT issues as well as the risk assessments arising from new products.
- Press releases on emerging concerns noted by the CBK.
- Banking circular on obligations when processing large cash transactions.
- Engaging financial institution during annual compliance meetings
- Exit meetings and board presentations following AML/CFT inspections
- Follow up on progress on implementation of corrective actions.

365. Despite these initiatives, the supervisory actions did not appear to have any impact in relation to the understanding of risks by reporting entities. In addition to this, with the exception of the IRA, supervisors had not sensitised the reporting entities on the results of the NRA exercise and informed them on the actions which they need to take in order to mitigate risks identified as being relevant to their respective areas. Furthermore, there has not been any coverage of TFS in relation to PF.

366. With the exception of the ICPAK, BCLB and EARB, all other designated AML/CFT supervisory authorities for the DNFBP sector did not conduct any AML/CFT awareness training programs for DNFBPs in the period under review. The DNFBP supervisors (e.g. ICPAK, EARB, LSK and BCLB) have conducted, some AML/CFT awareness training programs for their respective sectors and other outreach activities in conjunction with FRC to raise supervised entities' awareness on their AML/CFT obligations in the period under review. LSK undertook a sensitisation programme between 2018 and 2020 in conjunction with FRC to enlighten its members on their AML/CFT obligations once they were designated as reporting entities through amendments to the POCAMLA. ICPAK conducts periodic trainings for accountants as part of Continuous Development Program. The FRC also holds periodic meetings with some sectors of DNFBPs which are also used to provide awareness of their AML/CFT obligations. Overall, the DNFBP supervisors have conducted limited outreach programs

focused on compliance. The observations made above in relation to TFS on PF and results of NRA also apply to DNFBPs.

Table 6.4: Particulars of training within the sectors: 2017-2021

Provider of training and awareness	Sectors covered	Topic covered	Number of sessions in the last 5 years
FRC	MLRO Conference (banks; microfinance institutions; MRPs; forex bureaus; telcos)	ML/TF risks, outcomes of NRA; typologies; TF; transaction monitoring; procurement fraud; support documentation; reporting challenges; compliance; risk assessment; AML/CFT programme; internal control; preventive measures	Quarterly
CBK	Nationwide AML/CFT Training (banks; microfinance institutions; MRPs; forex bureaus; telcos)	Training on goAML; ML/TF risks, outcomes of NRA; typologies; TF; transaction monitoring; tax evasion; human smuggling and trafficking; risk assessment; risk-based policies, preventive measures, quality of STRs, etc.	Once a year
	DNFBPs supervisors (LSK; EARB; ICPAK); lawyers; casinos	ML/TF risks; detection & disruption; supervision; AML/CFT mandate, reporting obligation; AML/CFT awareness, etc.	7
CMA	Investment banks; Fund managers; Stockbrokers; Investment advisers; REIT managers; NSE; CDSC; KASIB; FMA; ACIS	Sensitization on AML/CFT Guidelines; CMA's risk-based approach to AML/CFT supervision; AML/CFT risks & obligations; AML/CFT compliance program; Indicators of suspicious transactions; emerging trends and new developments.	3
IRA	Insurance companies	AML/CFT intro; risk assessment; legal Framework; IRA's AML/CFT supervision; AML/CFT Guidelines	9

Overall conclusion on IO.3

367. Whilst financial sector supervisors have some market entry requirements, fit and proper requirements often do not apply to BOs and it is unclear to what extent criminal checks and applicants' declaration are verified. Breaches of licensing requirements are detected through intelligence from the market and necessary actions are undertaken by CBK. Some supervisors' understanding of ML risks is not adequate and the understanding of TF risk is subpar. Financial sector supervisors are not implementing risk-based supervision as the supervisory actions are not based on risk profile of the institutions. Onsite inspections have been few relative to the number of entities rated high risk and do not cover TFS and PF. Since supervisors apply rule-based supervision, the main focus seems to be on the existence of controls rather than on the soundness of the AML/CFT framework. Furthermore, Kenya has not identified ML/TF risks associated with VASPs and put in place mitigating measures. Across the DNFBBPs, a significant concern is that AML/CFT supervision is non-existent. It is further noted that not all supervisory bodies apply remedial actions or monetary penalties and therefore assessors could not determine whether they are effective and dissuasive. It is further unclear as to whether supervisory actions have had any impact on the compliance of FIs and the DNFBBPs. In consideration of the overall rating, the banking sector has been given most significant weight on account of its size and materiality.

68. **Kenya is rated as having a low level of effectiveness for IO.3.**

7. LEGAL PERSONS AND ARRANGEMENTS

7.1 Key Findings and Recommended Actions

Key Findings

- a) Information on creation and types of legal persons that can be created in Kenya is publicly available. Two main types of legal persons that can be created are companies and Limited Liability Partnerships (LLPs). Information on creation and types of legal arrangements that can be created in Kenya is not publicly available.
- b) Kenya has not conducted any assessment of ML/ TF risks associated with legal persons. While the NRA found ML risk of legal entities as medium, no analysis was provided in support of this conclusion. Competent authorities' understanding on the extent to which legal persons can be abused for ML purposes is still low, and mainly limited to few cases where companies have been involved in the commission of predicate offences (see some of the case examples provided under IO 7). The TF risks associated with the misuse of legal persons have not been assessed, and are not understood by the authorities.
- c) The regulator for legal arrangements (trusts), based in the Ministry of Lands for historical reasons, has neither the legal mandate nor the capacity to regulate and supervise Trusts for AML/CFT purposes.
- d) Companies are required, by law, to create and keep a register of their BOs and lodge a copy of that register with the Registrar, either at registration or within 30 days of its creation, for existing companies. However, limited liability partnerships and legal arrangements (trusts) are not required to file BO information. The information contained in the BO register is accessible or available to competent authorities, including supervisory and regulatory bodies, free of charge. Reporting entities are also obliged by law to obtain basic and BO information of their clients. Majority of these institutions met during the on-site confirmed getting both basic and BO information from their clients but expressed challenges in verifying the BO information. Therefore, BO information maintained by reporting entities might not always be accurate at all times.
- e) Any person can access basic information on companies and LLPs from the BRS in a timely manner, but only company BO information is available, as the BRS does not collect BO information for LLPs. Neither basic nor BO information is readily available on trusts. The transparency measures in place to prevent the misuse of legal persons and arrangements are only targeted at companies, leaving LLPs and trusts vulnerable to abuse for ML/TF purposes.
- f) BO and basic information filed by companies with the BRS is adequate, accurate and up to date, and is subjected to authentication and verification on the E-Citizen Platform of Government by checking its consistency across various government agencies like KRA, Immigrations. Not all companies have provided such information to the Platform as it is mostly companies that do business with government that provide such information as one of the conditions enabling them to be eligible to securing government business. Also, such measures, do not resolve situations where nominee shareholders and directors are appointed (see next KF). Competent Authorities can also access basic and BO information from reporting entities to the extent that the information is accurate and current as FIs indicated

challenges with always getting accurate BO information.

- g) Appointment of nominee shareholders and directors is allowed in Kenya. When lawyers and notaries, who are not yet regulated for AML/CFT, in their capacity as CSPs, act as nominee shareholders or directors, they are under no obligation to disclose their nominator. This increases the risks associated with the concealment of BO information. Overall, there are no mechanisms ensuring that the nominees disclose their nominators and that there are adequate mechanisms to ensure that such arrangements are not abused for ML.
- h) As at the time of the onsite, no sanctions had been issued to a legal person for breach of its obligations. Denial of services to legal persons that are non-compliant is the strategy that the BRS has employed to encourage compliance. As such, it is not possible to ascertain whether the sanctions are proportionate, effective and dissuasive.

Recommended Actions

- a) Kenya should: (i) conduct an in-depth risk assessment of legal persons created and operating in Kenya to identify, assess and understand their vulnerabilities and potential for ML/TF abuse (ii) communicate the outcomes to competent authorities and the private sector; and (iii) take adequate measures to mitigate the identified risks.
- b) Kenya should ensure the BRS understands the scope for misuse of LLPs in Kenya for ML/TF purposes, and supervises/regulates them to ensure that measures to prevent or mitigate such misuse are being implemented.
- c) Kenya should extend the requirements for filing BO information and making it accessible to competent authorities in a timely manner to LLPs and lawyers currently providing TCSPs services (see paragraph 356 for analysis of the risk factor). There should also be a requirement for trustees to disclose their status to FIs and DNFBPs during occasions set out in c. 25.3. The authorities should ensure that there is publicly available information on the creation of partnerships that are not required to register as companies for purposes of carrying on business as envisaged under s.21 of the Companies Act.
- d) Kenya should grant the regulator for legal arrangements/trusts the legal/institutional mandate to be able to supervise and regulate for ML/TF purposes, and also build its capacity to do so effectively. The same Regulator should also be responsible for making public the information on the creation and types of legal arrangements which can be created.
- e) Kenya should keep information, records and statistics of basic and BO information provided, in order to assess details of requests rendered and received.
- f) Kenya should ensure that there are effective, proportionate and dissuasive sanctions applied against persons who do not comply with the information requirements.
- g) Kenya should put in place mechanisms to mitigate the risks associated with nominee directors and shareholders being allowed in a situation where lawyers and notaries could perform that function, without the satisfying the obligation to disclose their nominators.

369. The relevant Immediate Outcome considered and assessed in this chapter is IO.5. The Recommendations relevant for the assessment of effectiveness under this section are R.24-25, and elements of R.1, 10, 37 and 40.⁴¹

7.2 Immediate Outcome 5 (Legal Persons and Arrangements)

7.2.1 Public availability of information on the creation and types of legal persons and arrangements

370. Information on creation and the types of legal persons that can be created is publicly available at the Business Registration Services (BRS) Head Office and branches in Kenya, and is also listed on the website (<https://brs.go.ke>) of BRS. The BRS is a semi-autonomous body under the Office of the Attorney General, whose mandate includes overseeing all operations of the Companies' Registry and keeping a central register for both companies and limited liability partnerships. Companies and limited liability partnerships are the two main legal persons created in Kenya. The BRS website also lists the relevant legislation such as the Companies Act, and the Limited Liability Partnerships Act. Information on the creation and types of legal arrangements that can be created is not publicly available in Kenya. The Ministry of Lands and Physical Planning which is responsible for legal arrangements particularly express trusts, has not published such information on its website (<https://lands.go.ke>) or in any other form. On legal arrangements, the Authorities stated that any person could retrieve information on creation and types of legal arrangements from the Conveyancing Unit of the Ministry, but it is not clear where a member of the public would access this guidance from, without interaction with the Authorities in charge. Additionally, the Trustees (Perpetual Succession) Act, which is the Act that provides for the registration of Trustees to clothe them with an ability to hold property in their own right in perpetuity was only recently amended (assented to on 7th December 2021 and commenced on 23rd December 2021) and has not been uploaded or listed on the Ministry of Lands and Planning website. Therefore, information on creation of legal arrangements and the types that can be created is not available publicly limiting the public's access to such information.

7.2.2 Identification, assessment and understanding of ML/TF risks and vulnerabilities of legal entities

371. In general, some of the Kenyan Competent Authorities (ODPP, EACC, ARA, CMA, DCI) understand, to a limited extent, the possible ML risks associated with legal persons, which understanding is only restricted to cases encountered during the course of executing their respective mandates, as no risk assessment targeted at identifying, assessing and understanding of ML/TF risks and vulnerabilities relating to legal persons has been done. LEAs, such as the EACC, through investigation of cases of corruption and economic crime had been exposed to the risk of companies being abused in the commission of crimes. To demonstrate this, the EACC had documented cases of legal entities, particularly private limited liability companies, being used to obscure the audit trail or disguise the source and/or application of proceeds of corruption. One such example is the case where the EACC has charged four companies with money laundering arising from procurement fraud. However, BRS officers despite being issued with court bonds (summons) often to testify in court in affirmation of companies that have been charged with or participated in ML or associated predicate offence activities did not

⁴¹ The availability of accurate and up-to-date basic and beneficial ownership information is also assessed by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. In some cases, the findings may differ due to differences in the FATF and Global Forum's respective methodologies, objectives and scope of the standards.

profile such cases in terms of ML risk and could not share information on legal entities which were most vulnerable to ML/TF risk. The CMA reported that in their assessment, private limited companies pose the highest ML risk of all entities, but again this finding is not based on a risk assessment of the sector, but encounters with instances where companies could have been abused for the commission of criminal offences. On-site engagements with the CMA and EACC seem to suggest that the risk posed particularly by private limited liability companies could be high (also see a case example in Box 7.1 below, illustrating how LLC can be abused for criminal purposes).

Box 7.1: Example of Abuse of LLC

KRA Ltd VAT Fraud: a limited liability company paid taxes through an advisor, another limited liability company that abbreviated its name to KRA, to pass off as KRA (Kenya Revenue Authority) for tax evasion and fraud purposes. Together with a second limited liability company, between April 2015 and October 2018, they diverted Ksh. 821,973,607/- (USD 7,147,597) to the account of a third limited liability company, which had the same directors as the advisory limited liability company, while issuing forged receipts, purporting to have paid VAT. The two LLCs have been charged with tax fraud offences, while the case was separately referred to the ARA for investigation of possible money laundering.

372. Although Authorities stated that the NRA established the ML risk posed by legal entities as medium, the NRA Report itself did not have a comprehensive section assessing the ML/TF risk posed by particular legal entities to support the finding. Based on the NRA results there was no adequate information placed before the assessors to demonstrate that the ML/TF risk posed by companies is actually medium or what built on that understanding. The NRA does not describe which legal persons are likely to be at high risk of abuse or are being misused for ML/TF. During the Onsite, the Authorities reported the risk posed by Limited Liability Partnerships as low, though there is no particular reference to an assessment of the ML/TF risk posed by LLPs in the NRA. Given the unverified low number of registered LLPs (approximated at 4,000, as there were no readily available statistics tendered by the Authorities) and the lack of records, statistics, or anecdotal evidence of their use in suspected ML/TF activity, it could be possible that the risk is low, but again in the absence of a specific assessment having been done this could not be demonstrated or properly determined.

373. The BRS did not also adequately demonstrate that it assists in the identifying, assessing and understanding of ML/TF risk posed by the use of legal entities it registers. For example, for foreign companies incorporating in Kenya, at the time of registering the company, the BRS as best practice does not interrogate the information placed before it in terms of whether the company is coming from a high ML/TF jurisdiction and the kind of precautionary measures to take. Further, although there are now requirements for legal entities created in Kenya to provide BO information to BRS at the time of registration, BRS did not demonstrate that in practice it collects the information following a risk-based approach or understanding of the vulnerabilities associated with the collection of BO information at that stage, but was being done as routine and was rule-based.

374. The interview with the Office of the Director of Public Prosecutions (ODPP) did not assist much in determining whether, in the course of guiding the investigators during a ML investigation, they also look at the possibility of charging companies used in the commission of the offences and in doing so give guidance in identifying, assessing and understanding the risks of BO to the investigators, in addition to their own understanding of such risks. It was also clear that the ODPP had not looked much into the risks associated with BO as it had only handled plea bargaining cases on ML concerning banks with no conviction yet on a full trial of a ML case concerning a legal person.

375. The Authorities indicated that the role of a CSP is not restricted in Kenya but however, some of the people registering legal persons normally use lawyers/ company secretaries that are more established. At the time of the on-site, Lawyers providing this service had been designated reporting entities under S. 44A of the POCAMLA (as amended), but the implementation of the amended provision designating them as such had been halted, and therefore they were not obliged to comply with AML/CFT requirements as a reporting entity. Although the assessors had the opportunity to meet with the Law Society of Kenya, during the on-site, the determination of the extent of which they understand the ML risks when they act as TCSPs was not conclusive, but safe to say that one of the lawyers at the time was challenging their designation as reporting entities, which would include when they act as TCSPs. As a result of the challenge the Courts had halted their designation as reporting entities until a full hearing of the matter in Court. As appointment of nominee shareholders and directors is allowed in Kenya, it means lawyers in their capacity as TCSPs and as well as the other entities which can independently provide such service can act as nominee shareholders or directors without necessarily disclosing who the nominator is. This further increases the risks associated with the concealment of BO information.

376. The Authorities confirmed that there has been no assessment of the ML/TF risk associated with trusts in Kenya, but admitted the high vulnerability of trusts to abuse for purposes of ML/TF since, upon registration, they are able to transact as legal entities with minimal supervision or regulation. The Ministry of Lands, which is the Authority in charge of registration and regulation of trusts in Kenya, does not have the mandate to enforce AML/CFT compliance by trustees and obtaining of adequate information required by the Standard (settlor, trustees, beneficiaries, BO, those in control of the trust, etc.) during registration of a trust. The Ministry highlighted that one of the likely vulnerabilities was the possible abuse of trusts to acquire assets as from the moment they are issued with a Certificate of Incorporation they are capable of buying properties without necessarily disclosing who is in control of the property.

377. Overall, the Kenyan Authorities did not demonstrate that they have adequately identified, assessed and understood the risks posed by both abuse of legal persons. Further, the risks pertaining to TF associated with legal entities have not been assessed, therefore they are still not understood.

7.2.3 Mitigating measures to prevent the misuse of legal persons and arrangements

378. Kenya has to some extent put in place measures and obligations for legal entities, aimed at preventing the misuse of legal persons for ML/TF and promote corporate transparency. For instance, bearer shares and warrants have been prohibited in Kenya, and companies that had issued them have had to convert them into registered shares or they are null and void, and subject to penalty fines for non-compliance. A requirement for every company to prepare and keep a register of its BOs and to lodge a copy of the BO register with the Registrar within 30 days of its preparation was introduced in July 2019 (s. 93A of the Companies Act) and took effect after the AG published a Legal Notice on 18th February 2020. BRS's BO e-register became operational on 13th October 2020. The company and its officers are liable to prosecution upon default or failure to provide the Registrar with a copy of the BO register within the prescribed period. To on-board a legal entity, FIs and DNFBPs must conduct CDD and the companies or trusts must provide basic and BO information, although FIs indicated that they still struggle in some cases to get the full BO information or independently verify it.

379. Any person can conduct an official search of the BRS Register of companies, by applying online and paying a fee, which is not prohibitive (Ksh. 650 or USD 5.4), and thereafter receiving Form CR 12, which contains a company's basic information, including: the company name, registration number, date of incorporation, registered place of business, directors and shareholders of the company, creating transparency that is vital to prevent the use of companies to obscure transactions and inhibit audit trails. Results for official searches exclude BO information, as disclosure of BO information by

the BRS is currently limited to Competent Authorities only (Reg. 13 (4) of the BO Regulations). The introduction of the BO register, requirements to file annual returns on BO and threat of sanctions (see para 345 under CI 5.6 (7.2.4)) in the event of non-compliance has improved on the legal regime for the prevention of misuse of legal persons for ML/TF. At the time of onsite, the AT was informed that 159,768 companies had complied and 426917 were yet to comply. BRS uses denial of service as an administrative measure to enforce compliance and so far, (at the time of the F2F) 73,806 more companies have complied. Foreign companies are required, by law, to have both a local representative (resident) and local place of business; while foreign investors have to be vetted by the NIS and supervisory bodies before they are issued with work permits. The foreign companies vetted so far in 2020, 2021 and 2022 are as follows: 2020- 12; 2021- 16; 2022- 6; but the particulars of the vetting were not provided by the authorities, who only reported that some applications had been rejected. Additionally, though the Authorities submitted that LLPs were required to provide information similar to that of companies, in practice, BRS does not enforce the requirement for LLPs to provide BO information, as they are deemed low risk.

380. Registration with the Ministry of Lands is not mandatory, so there are no circumstances where a trust is required to register. Trusts are not required to submit BO information at the time of registering at the Ministry of Lands and the Ministry neither obtains nor maintains such information or records unless such information is contained in the trust deed. The vulnerability is compounded by the fact that in effect lawyers, notaries and other independent legal professionals are not subject to the transparency obligations in Kenya (see paragraphs 339, above and R. 22), because the implementation of the amendment to the POCAMLA that designated them as accountable persons (S44A) has been stayed by court, and is therefore unenforceable. It appears that declaration of basic and BO information of a trust (testator/settlor, trustees, and beneficiaries, etc.) is only a requirement if a trust is transacting with, operating or retaining the services of regulated service providers, such as FIs or DNFbps. Additionally, Kenya does not require trustees to disclose their status to reporting entities or maintain records and information required for transparency purposes, in line with R. 25. Persons acting as professional trustees are not subject to CDD obligations under the POCAMLA, as professional trust services per se do not fall under the categories of FIs or DNFbps, and therefore, persons offering them are not reporting entities (with CDD obligations) under the definition in the POCAMLA.

381. Lack of risk assessment of legal persons and current suspension by the courts of implementation of transparency measures by lawyers and legal professionals when providing Company and Trustee Services presents a grave vulnerability for abuse of legal entities for ML/TF. The lack of a risk assessment of the sector implies that although the Kenyan Authorities might have put some measures in place, the measures might not be addressing the necessary ML/TF risks in the sector. The lack of mitigation measures informed by risk also has an impact on the information retained by the BRS, prioritising updating the information and keeping it reliable for LE purposes. In addition, no mitigating measures are in place for legal arrangements (trusts).

7.2.4 Timely access to adequate, accurate and current basic and beneficial ownership information on legal persons

382. Relevant competent authorities in Kenya can, to a great extent, access basic and beneficial ownership information on legal persons. However, in view of the fact that Kenya still permits nominee shareholders and directors, a high vulnerability is created if such nominees are lawyers or notaries, as they are not, under the current circumstances, be required to disclose their nominators. The BRS has granted the FRC, EACC and KRA read-only access to its database which speeds up sharing of the information, while all other competent authorities can obtain the same information (basic, BO and historic records of the company) within 5 working days of lodging a written request depending on the

complexity of the information required. They can exercise these rights both for their own interests or for purposes of international cooperation. To authenticate each transaction, BRS has integrated its systems with those of the Registrar of Persons, KRA, National Social Security Fund (NSSF) and the National Health Insurance Fund. Information submitted by an entity or individual at the time of creating or incorporating a legal person or any subsequent updates must tally with the information recorded in the databases of the aforementioned institutions. The accuracy of the information held by the BRS has been further enhanced by the E-Citizen Platform of Government which is used by both the Registrar and FIs and DNFBPs to verify basic and BO information. However, the only challenge is that not all companies might have published such information on the Platform as the BRS explained that it is mostly companies that do business with government that provide such information as one of the pre-requisite conditions enabling them to be eligible to securing government business. So, if a company is not doing business with the government, it might not post its BO information on the Platform.

383. The type of information that a competent authority can obtain from the BO register is comprehensive, including BO information (name, birth certificate, national identification or passport number, nationality, tribe, date of birth), business address, residential address, telephone number(s), email address(es), occupation(s), profession(s), value of ownership or control, date of acquisition or disposal, and any other information on record deemed relevant. However, as discussed above (Paragraph 339), these measures do not mitigate the risk of the use of persons that have no legal obligation to disclose (or the legal right to reject disclosure/avoid sanction under the advocate-client privilege) their nominators (lawyers and notaries) as nominee shareholders and or directors. In addition to the BRS, the competent authorities can obtain the information above from the legal person itself or any reporting entity (FI or DNFBP). Submission of false information to BRS is subject to sanctions. With FIs and DNFBPs, information on BO might not always be accurate as a good number of them indicated during the on-site that they face challenges in verifying the information. Further, under the current set-up companies would not have a right to require their shareholders that are lawyers or notaries to confirm whether they are BOs or nominees, or to insist on disclosure of nominators, as this information is currently protected by advocate – client privilege. As such, no sanctions would ensue, if the nominee lawyer declined to disclose. In terms of LLPs, it is not possible to access BO information in the same way as that of companies, as the BRS does not obtain or retain BO information for LLPs.

384. Since the creation of the BO register, BRS has received a total of 5 requests for BO information from KRA only, for tax administration purposes (2 in 2020 and 3 in 2021). However, the EACC, FRC and KRA have “read only” rights when they access the BRS data but have to make formal requests for information when they require certified copies for court or other purposes, as was the case with the 5 requests for BO information submitted by KRA and actioned by BRS. Based on the submissions of the reporting entities, in particular some of the banks that at times it was difficult for them to get adequate information on BO as well as verifying it independently, the compliance of banks with such requirements is something which the supervisor might want to consistently review that it is being implemented so that competent authorities who rely on this information are getting adequate, accurate and current information when they request it. This was further compounded by the confusion created by some of the reporting entities when they obtain information on legal ownership by mistaking it for BO information. Particularly, regarding the directorship and shareholder information which they got from both the E-Citizen platform and BRS to verify information submitted by the client and mistook it for BO information. In most instances, in order for the assessors to clarify the confusion, they had to remind the reporting entities that the BRS had just informed the assessors that it does not share BO information with them but only basic information (including shareholder information) and it would only be then that they would realise their mistake that shareholder information is not always necessarily BO information and backtrack. This could be something the supervisors might want to look into and provide proper guidance/awareness to their reporting entities as it affects both access of BO information by competent authorities and reliability of the information.

7.2.5 Timely access to adequate, accurate and current basic and beneficial ownership information on legal arrangements

385. In Kenya, Competent authorities do not have access to adequate, accurate and current basic and BO information on legal arrangements in a timely manner. The Ministry of Lands is responsible for registering and keeping records of trusts in Kenya, and the authorities stated that competent authorities could access this information and records upon request. However, unlike in the case of companies, there is no requirement for trusts to declare the ultimate beneficial owners or those in control of the trust at the time of registration or any time thereafter. Additionally, though the competent authorities may request for information from the Ministry of Lands, the only available information would be that which is contained in the registered Trust Deed, and it would not have been independently verified. This leads to the uncertainty as to whether the information would be accurate or up to date at the time a competent authority retrieves it. Only trusts with taxable income are required to register with and file annual returns with KRA under s. 6 (1) of the TPA, and under s. 6 (2), the Commissioner General is granted the discretion to disclose information submitted thereunder to other LEAs and CAs, as an exception to the confidentiality required under s. 6 (1). As such, the authorities could not demonstrate that competent authorities do have access to adequate, accurate and current basic and BO information for all legal arrangements.

7.2.6 Effectiveness, proportionality and dissuasiveness of sanctions

386. The authorities submitted that the BRS applies effective sanctions against legal persons for non-compliance with their obligations to submit information in a timely manner. However, BRS has not taken any other serious disciplinary action for non-compliance with the information requirements. The only administrative sanction taken against companies is a system generated fine, when they are late and attempt to file annual returns and/or generate CR 12 Reports for their use. The fines are neither dissuasive nor proportionate. The Kenyan Authorities did not submit any case to demonstrate that during the review period, they sanctioned any company for non-compliance with their transparency obligations. Since the e-Register for BO information at the BRS became operational (13th October 2020), less than half of the registered companies have complied, despite the law requiring them to have done so within 14 days of the requirement or issuance of a compliance notice. BRS reported that they had issued general notices of compliance to companies to comply with their BO requirements under s. 873 of the Companies Act, which gives 14 days within which to comply. At the time of onsite, the authorities reported that 159,768 companies had complied, while 426,917 were yet to comply.⁴² BRS has not sanctioned any company for non-compliance, but used denial of service as an administrative measure to enforce compliance, and reported this as the only mitigation measure in place to for ML/TF vulnerabilities associated with nominee shareholders and directors. In the period under review, the BRS did not sanction any LLP for non-compliance with their information requirements under the law. Trusts (legal arrangements) are under the jurisdiction of the Ministry of Lands, which has not sanctioned any trust for non-compliance with its AML/CFT transparency obligations. In view of the above, Kenya has not demonstrated that it implements effective, proportionate and dissuasive sanctions against legal persons and arrangements that fail to comply with information requirements.

⁴² During the Face to Face, BRS updated the information by reporting that a further 73,806 companies had complied.

Overall conclusion on IO.5

387. In Kenya, information on creation and types of legal persons (companies and LLPs) is publicly available, but that on legal arrangements (trusts) is not. Only the professional experience of practitioners (investigators, bankers, law enforcement officials, regulators and supervisors) has to a large extent informed the Authorities' understanding of the ML risk associated with legal entities. There has not been a targeted assessment of ML/TF risks associated with different types of legal persons and arrangements, which has left the Authorities with a limited understanding of the ML/TF risk of the particular types of legal persons created in Kenya. As far as TF is concerned, the TF risk for legal persons is not understood by the authorities. The Authorities' assessment of the ML/TF risk posed by LLPs (low) and trusts (medium) has no basis, as there has been no targeted assessment of the ML/TF risk in the two sectors. The Ministry of Lands does not have the legal mandate and capacity to enforce compliance of trustees with their obligations. Mitigation measures have been put in place for companies, such as creation of a BO register, prohibition of bearer shares, referral for vetting of promoters by NIS, etc, but there are no specified mitigation measures for LLPs or trusts. BO information is only accessible by Competent Authorities and not reporting entities, which therefore often find it difficult to independently verify the accuracy and reliability of the BO information provided by their clients and customers for purposes of sharing it with competent authorities. No effective, proportionate or dissuasive sanctions have been issued against a legal person or arrangement.

388. **Kenya is rated as having a low level of effectiveness for IO.5.**

8. INTERNATIONAL COOPERATION

8.1 Key Findings and Recommended Actions

Key Findings

- a) Kenya has demonstrated that it provides MLA and extradition through statistical data, but assessment of whether its constructive and timely assistance was not possible, as the information did not provide much detail to enable the assessment of the range of assistance; offences involved or whether the assistance reported related to ML/TF or associated predicate offences.
- b) Kenya seeks and renders other forms of international cooperation (demonstrated through statistics). Although the statistics did not necessarily categorise the assistance according to the types of ML/TF risks of the country, through presentation of some of the information provided it was able to demonstrate to a limited extent that the informal assistance requested or received, was in line with the country's risk profile.
- c) Kenya is seeking international cooperation to pursue criminals and assets in cases with transnational elements to a limited extent, except for proceeds and benefits of tax evasion, to which extent it is in line with its risk profile, as tax evasion is one of the most proceeds-generating offence and information provided shows that offenders prefer to illicitly take such proceeds abroad.
- d) Kenyan competent authorities have not obtained and/or provided basic or BO information to foreign counterparts, which somewhat is inconsistent with Kenya's risks being the economic hub of East Africa.
- e) Kenya has demonstrated that formal and informal international assistance rendered or received is, to some extent, in line with its national risk profile.
- f) Kenya has not demonstrated that it has a case management system to monitor and track MLA, extradition or other forms of mutual legal assistance requests to ensure that the assistance is rendered in an appropriate and timely manner and is prioritised according to the risk profile of the country.

Recommended Actions

- a) Kenya should categorize and keep records of the different types and forms of requests it makes and receives from other foreign jurisdictions, to enable the authorities to monitor and attend to such requests in a constructive and timely manner.
- b) Kenya should come up with an effective case management system to assist it with prioritising incoming and outgoing MLA requests according to the risk profile of the country and record full information on the nature of the request, including the crime involved, supporting information to the request, urgency of the case, whether its incoming or outgoing and other relevant information.
- c) Kenya should make more effort to request and share information on BO with other jurisdictions considering that it is the economic hub of East Africa, which makes the country vulnerable to abuse of legal persons for ML/TF.
- d) Kenya should promote the use of formal and informal international cooperation to assist it in its investigation of ML/TF and associated predicate offences, and also in assessing and understanding the ML/TF risk profile of the country vis-à-vis foreign jurisdictions.
- e) Kenya should enhance its MLA and other forms of international cooperation to enable it to use the information to trace, locate and repatriate proceeds that might be laundered outside the country. Kenya should also equally enhance its exchange of information on foreign proceeds laundered in Kenya.
- f) FRC and other Competent Authorities should have more engagements with their international counterparts, in order to facilitate quick exchange of information and strengthen the understanding of Kenya's exposure to specific ML/TF risks.

389. The relevant Immediate Outcome considered and assessed in this chapter is IO.2. The Recommendations relevant for the assessment of effectiveness under this section are R.36-40 and elements of R.9, 15, 24, 25 and 32.

8.2 Immediate Outcome 2 (International Cooperation)

8.2.1 *Providing constructive and timely MLA and extradition*

390. **MLA:** Kenya has demonstrated that it provides MLA through statistical data, but assessment of whether its constructive and timely assistance was difficult to assess, as the information provided was mainly statistical, without further detail to enable the assessment of the range of assistance; offences involved or whether the assistance reported related to ML/TF or associated predicate offences. The Office of the Attorney General is the Central Authority, to which requests are sent directly or through diplomatic channels through the Ministry of Foreign Affairs. Upon receipt of the request, the office of the Attorney General refers it to its International Law Division, which has five State Counsel (out of the 25 member staff compliment) dedicated to handling MLA and extradition requests. The officers have been appropriately trained to handle international cooperation. According to the Department Service Charter, the Division acknowledges receipt, determines if the request meets the criteria, and then transmits it to the relevant competent authority within 6 working days. The Division maintains physical registers in form of file movement registers and delivery books, in which despatch and receipt are

acknowledged by stamp or signature. There is no automated or centralized case management system in place, but the central authority and the different competent authorities each keep their own record of action and transmission for MLA purposes.

391. The ODPP is the main competent authority for MLA in criminal matters. The Authorities informed the Assessment Team that the ODPP is in the process of deploying the Uadilifu Case Management System, which shall track progress of MLA requests, among other functions. The Authorities stated that on average, processing the requests takes about 6 months, including necessary court processes, but where a request is urgent, the requesting authority is required to mark it as such, and state the grounds for the urgency. In the review period, Kenya received and successfully processed 6 cases of urgent requests. Processing an urgent request takes approximately four weeks. From the statistics provided, in the period under review (2017/18 – 2021/22), Kenya received a total of 109 requests; approved and processed 82; and rejected 10 cases for failure to comply with requirements of the Act. For the 17 requests received in the Financial Year 2020/21, there is no indication as to whether they were processed or rejected, and thus remain unaccounted for. **Table 8.1** below shows statistics of inbound MLA requests for the review period, while **Table 8.2** details some sample cases of MLA requests received by Kenya. Analysis of Table 8.2 below shows that no information was provided to the AT to assess the timeliness of processing the requests, status of the request and let alone receiving any feedback to show that the assistance was appropriate and of good quality.

Table 8.1: Inbound requests for the review period: 2017-2021

Year	No. of incoming requests	Request approved	Request Rejected	Reasons for rejection
2017/2018	23	19	4	Failure to comply with the requirements set out in Section 9 of the MLA Act and the MLA Guidelines
2018/2019	25	22	3	Failure to comply with the requirements set out in Section 9 of the MLA Act and the MLA Guidelines
2019/2020	24	23	1	Failure to comply with the requirements set out in Section 9 of the MLA Act and the MLA Guidelines
2020/2021	17	-	-	
2021/2022	20	18	2	Failure to comply with the requirements set out in Section 9 of the MLA Act and the MLA Guidelines

Table 8.2: SAMPLE CASES OF INBOUND REQUESTS FOR MLA IN KENYA

No.	Date when received	Requesting Country	Possible Offences	Case Particulars	Status of the request
1	Feb 2021	Country N	ML & transnational organised crime	Requested for investigations and evidence collection their national believed to be a member of an organised crime syndicate.	No information provided
2	2017	Jurisdiction not disclosed	ML & obtaining money by false pretences	Fraudulent purchase of US securities resulting in loss of USD 1,959,497.91 (Ksh. 201m)	No information provided
3	Feb 2021	Country U	Bribery	Investigation of an individual suspected to have participated in a scheme to bribe foreign officials in return for lucrative contracts.	No information provided
4	Aug 2019	Country U	Bribery	US SEC requested EACC to assist in obtaining witness statements and bank records connecting suspects to a scheme offering or making payments to government officials in return for favorable decisions.	No information provided
5	Aug 2020	Country U	Wire fraud, tax evasion and ML	Requested for assistance in taking witness statements and relevant documentary evidence to prove wire fraud, securities fraud, tax evasion and ML.	No information provided
6	May 2021	Country U	Fraud	Requested for assistance in securing certified copies of bank statements from Cooperative Bank of Kenya.	No information provided
7	Oct 2021	Country T	Illicit wildlife trade	Requested for assistance to take witness statement of the exporter of the ivory and establish the identity of the recorded owner of the “goods”.	No information provided
8	Jan 2019	Country A	Fraud	Requested for assistance to investigate and ascertain that a resident of Kenya had fraudulently solicited for donations from 2003 – 2013 and diverted the money to his own use.	No information provided
9	Sept 2020	Country S	Bank fraud	Requested for assistance in securing evidence of bank fraud that was orchestrated or partly took place in a bank with headquarters in Nairobi, Kenya.	No information provided
10	March 2019	Country D	Fraud	Requested for assistance in investigation of possible fraudulent acquisition of Country D social security benefits.	No information provided

Extradition:

392. Kenya provides extradition in accordance with the provisions of its relevant laws (*Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act*). The requesting jurisdiction sends a written request to the office of the Attorney General via diplomatic channels (usually through the Ministry of Foreign Affairs), which request should have the original warrant to be executed and the authentication certificate. The office of the Attorney General then transmits the request to the office of the DPP, which studies the request and if satisfied that it meets all criteria, then issues the “Authority to Proceed”. An officer of the ODPP then applies for a warrant of arrest to a Chief Magistrate with jurisdiction, by Notice of Motion, supported by an affidavit, attaching the ODPP’s Authority to Proceed and the original request. If satisfied, the Chief Magistrate issues a warrant of arrest to the NPS/DCI, who execute it and bring the fugitive before him/her. At this point, the Chief Magistrate has the discretion to grant bail pending hearing of the matter or commit the fugitive to custody, awaiting the decision and possible surrender to the requesting jurisdiction. After hearing both sides, the Chief Magistrate may grant the extradition and remand the fugitive to custody, awaiting surrender. If the Attorney General then accedes to the surrender, the fugitive is surrendered to the requesting country.

393. Kenya generally provides constructive extradition, as from the statistics provided, 21 out of the 25 extradition requests sent to Kenya have been actioned. The Authorities provided 8 sample cases of extradition requests received from Burundi, Tanzania, Uganda, Ethiopia, Sudan, Qatar, United Arab Emirates (Dubai) and USA. These predominantly related to the offences of fraud including issuing false cheques, obtaining money by false pretence, conspiracy and ML. Unfortunately, the Authorities did not present any feedback to indicate whether the extradition was complete and had resulted in positive criminal justice measures like convictions or recoveries (quality), as only two of the sample cases were cases of persons that had already been convicted and sentenced (Qatar and UAE) –see *Table 8.3 below for the sample extradition cases*. The two sample cases provided as completed extraditions involved offences of wildlife trafficking, ML, conspiracy to distribute controlled substances, and one of child stealing, which are not the highest proceeds generating offences, and therefore rendering not reflective of the national risk profile.

Table 8.3: SAMPLE INBOUND REQUESTS FOR EXTRADITION IN KENYA

No.	Date when received	Requesting Country	Offences	Case Particulars	Status of the request
1	Mar 2020	Country B	Issuing false cheque, fraud	Suspect obtained credit and issued cheques as security but refused to pay back FBU 3,340,000. A warrant for his arrest was issued and country B sought to execute it.	No information provided
2	Nov 2018	Country V	Electronic fraud and obtaining by false pretence	Country U authorities requested for the execution of an arrest warrant and extradition of suspects in a case of electronic fraud.	No information provided
3	2020	Country Q	Issuing a false cheque	Country Q authorities sought the extradition of an individual convicted of issuing a false cheque of 7,000 Riyals to serve a sentence of 7 years issued in absentia.	No information provided
4	October 2018	Country T	Conspiracy, forgery, ML, obtaining value	Tanzania authorities requested for execution of an arrest warrant issued for an individual and consequent extradition to answer the charges.	No information provided

			by false pretence, occasioning loss to a specified authority		
5	February 2020	Country UD	Issuing a false cheque	UAE authorities sought the extradition of an individual to serve a sentence of 3 years, after conviction for issuing a false check in the value of 33.4m Dirhams.	No information provided
6	Jan 2020	Country E	Abuse of office	Ethiopian authorities requested for the extradition of a person that had used his senior position in a company to defraud it.	No information provided
7	No information provided	Country U	Identity theft, wire fraud, conspiracy and ML	Authorities requested for the arrest and extradition of a person using pseudo names to country U to answer the charges.	No information provided
8	No information provided	Country SV	Fraud and obtaining false pretence	Authorities requested for extradition of a person that had defrauded individuals by pretending to be a supplier of goods to the UN.	No information provided

Table 8.4: Incoming extradition requests: 2017-2021

Year	No. of incoming requests	Request approved	Request Rejected	Reasons for rejection
2017/2018	4	4	0	
2018/2019	6	4	2	Failure to provide the particulars for the persons to be extradited
2019/2020	5	5	0	
2020/2021	7	6	1	Failure to provide the particulars for the persons to be extradited
2021/2022	3	2	1	Failure to provide the particulars for the persons to be extradited

Box 8.2 Sample case of a successful extradition out of Kenya:

Misc Application No. E2304 of 2020 Republic v MMS: In August 2020, country X requested for the extradition of MMS who was believed to be within the Republic of Kenya, pursuant to an indictment at the court of country X for conspiracy to Commit Wildlife Trafficking; Wildlife Trafficking in Violation of Lacey Act (two Counts); Conspiracy to commit Money Laundering; Conspiracy to distribute and possess with intent to distribute a controlled substance. The

fugitive was arrested and arraigned in Court on 28th August 2020. Court gave a ruling on 17th December 2020, finding that there was a legal basis for Extradition and the offences were extraditable. It was also noted that none of the offences were committed within the Republic of Kenya and the fugitives' co-conspirators were currently in country X awaiting their trial. Therefore, the appropriate place of trial was in country X. The Court was satisfied that evidence presented before it in support of the Extradition Request was sufficient to connect the fugitive and the charges levelled against him thereby meeting the threshold to warrant extradition. The Court found that there was no malice present in initiating the Extradition proceedings. The Court also concluded that the offences specified on the warrant were not of a political character and there was no evidence presented before it to show that the fugitive would not be accorded a fair trial in country X. The Court allowed the Application and ordered for the extradition and surrender of the fugitive MMS from the Republic of Kenya to country X.

394. Based on the information on incoming MLA requests provided above, it is not possible to assess the adequacy and timeliness of the processed MLA requests, as neither the time taken to process the requests, nor the results of the process were provided. Additionally, there was no feedback provided, to show that the information provided had resulted in positive criminal justice measures in the foreign jurisdiction. There is no system to monitor and track the processing of the MLA requests, as by the Authorities own admission, at least 17 of the MLA requests remained unaccounted for. For extradition, similarly, no information on the time it took to process the extradition or the result of the cases, except one (see **Box 8.2**, above) where a fugitive was extradited to country X. In this case, though the information as to when the request was received was not given, the court process lasted 3 months and 3 weeks, before the extradition order was issued, but the date of actual extradition or surrender was not provided. As such, for both MLA and Extradition requests, the information available is not adequate to determine how timely the country attends to the requests. In the absence of case results or status and feedback from the requesting jurisdiction, it was also impossible to determine the adequacy and constructiveness of the responses provided by the authorities.

8.2.2 Seeking timely legal assistance to pursue domestic ML, associated predicates and TF cases with transnational elements

395. Kenya, to some extent, seeks legal assistance for international cooperation to pursue domestic ML, associated predicate offences and TF, for cases with transnational elements (*S. 7 of the MLA Act*). Competent authorities seeking assistance liaise with the office of the DPP to confirm the form and content (where the request is for evidence or witness testimony) and/or authenticate the warrant(s) before they are submitted to court for signing and sealing. The information provided by the Authorities indicates that the ODPP, EACC and DCI are the main competent authorities seeking legal assistance – see *Table 8.5 below for sample cases of MLA requests made by Kenyan authorities*. The assistance requested for by the Kenyan authorities appears in line with the country's ML risk profile as appreciated by the Assessment team, mostly covering a few cases of foreign proceeds, fraud and corruption related activities and to a very limited extent domestic TF. Among the sample cases provided, there was one case of MLA for TF purposes, which is in line with the TF risk profile that the highest risk is domestic. According to the statistics provided, in the period under review, competent authorities in Kenya made 145 requests to the following jurisdictions: United Kingdoms, U.S.A., China, Hong Kong, Italy, Jersey, Malaysia, Mauritius, Turkey, Poland and Switzerland (in no particular order). In the period under review, Kenya did not make any MLA requests for ML, associated predicate offences or TF to any of its immediate neighbours (Ethiopia, Somalia, Tanzania or Uganda), which is surprising given the economic, financial, geo-political, social, logistical and security ties shared with all of them.

396. From the information availed as shown in **Table 8.5** below, because of the gaps in the information it was not possible to ascertain the time it took the authorities to process a request for

information, whether they received timely and quality responses, or whether they followed up, in the event that they did not. There was no evidence that Kenya gave feedback to jurisdictions that rendered legal assistance. The requests made by Kenya are in line with its risk profile for ML (limited foreign transmission of proceeds), associated predicate offences (corruption, fraud, embezzlement, bribery, etc.) and TF (mainly domestic TF risk).

TABLE 8.5: SAMPLE CASES OF OUTBOUND REQUESTS FOR MLA FROM KENYA

No.	Date dispatched	Requested Country	Possible Offences	Case Particulars	Status of the request
1	Nov 2020 & Jan 2021	U.K	Fraudulent misrepresentation	EACC requested for legal assistance in investigation of a company suspected to have made fraudulent misrepresentations in bidding for the award of a tender for the provision of Pre-Export Verification of Conformity (PVOC) to Kenyan standards for used vehicles, mobile equipment and spare parts for the Kenya Bureau of Standards (KBS).	No information provided
2	Nov 2020	U.S.A	Fraud & corruption	EACC requested for legal assistance to obtain evidence of corrupt diversion of Kes. 213,327,300 from the accounts of a county government, using a fraudulent procurement scheme.	No information provided
3	No information provided	South Africa	Corruption	EACC requested for legal assistance in investigation of suspected corrupt practices in the bid and award of a tender to supply 40,000 metric tones of white maize.	No information provided
4	No information provided	UAE	Corruption	EACC requested for legal assistance to obtain evidence that a public officer imported and registered a private vehicle, but paid for it using diverted county government funds.	No information provided
5	No information provided	Singapore	Corruption	Prosecution authorities requested for legal assistance to enable a resident of the Republic of Singapore to remotely give live witness testimony in a case being heard by the Anti-Corruption Court sitting in Nairobi, Kenya.	No information provided
6	No information provided	Norway	TF	Authorities requested for legal assistance to obtain evidence to show that the suspect had provided funds to a terrorist	No information provided

				group.	
7	Oct 2018	Israel	Bribery, ML & abuse of office	Authorities requested for legal assistance to obtain evidence that public officials in Kenya had received bribes to act favourably.	No information provided
8	May 2020	Australia	Embezzlement, ML	Authorities requested for legal assistance to investigate and obtain evidence that a county official had been siphoning or stealing county funds from 2013 – 2017.	No information provided
9	Sep 2020	U.K	Corruption	Authorities requested for legal assistance to obtain evidence that a subsidiary of an international company had conducted business corruptly by paying influential public officials “commissions” in exchange for less stringent anti-tobacco regulation and enforcement.	No information provided
10	Nov 2020	U.K	Corruption	Authorities requested for legal assistance to obtain evidence that corrupt public officials had taken advantage of the COVID 19 pandemic to inflate the prices of emergency supplies and award the tenders to selected companies of their choice, in total disregard of procurement laws.	No information provided

Box No. 8.3: Sample of successful extradition and MLA request by Kenya:

Pastor Gilbert John Deya (Miracle Babies)

Milimani Criminal Case no. 1388 of 2017 Republic v GJD: On 14th August 2004, a Newspaper published a that a certain couple had born eleven (11) miracle babes through the power of prayer from the GD Ministries between June 1999 – May 2004. GJD a Kenyan national was successfully extradited to the Republic of Kenya from country X to face charges of Child Stealing contrary to section 174 of the Penal Code, Laws of Kenya. The matter is currently pending before Court as the remaining witnesses yet to testify are foreign witnesses who assisted in the investigations and arrest of GJD. The foreign witnesses are all based in country X. **Therefore, the Office of the Director of Public Prosecutions made a Mutual Legal Assistance request to country X seeking for their testimony via video conferencing. The MLA request was acceded to and hearing dates have been set by the trial Court.**

8.2.3 Seeking other forms of international cooperation for AML/CFT purposes

397. Under the POCAMLA, relevant Competent Authorities in Kenya are: EACC, ODPP, KRA, NPS, ARA, KWS, FRC, CMA, CBK, IRA, and RBA. Some of the competent authorities have, to some extent, sought other forms of international cooperation (other than MLA or extradition) to exchange

financial intelligence and supervisory, law enforcement or other information with foreign counterparts for AML/CFT purposes.

398. **EACC:** has the mandate to seek and render assistance for international cooperation [S. 11 (3) of the EACC Act]. In practice, it has sought and received assistance using agency to agency international cooperation for ML and associated predicate offence purposes. Membership of multi-lateral organisations such as ARINSA, ARINEA, EAAACA, CAACC; bilateral agreements such as the one between Kenya and Botswana; MOUs with foreign counterparts and organizations like World Bank, Serious Fraud Office, National Crime Agency, FBI, HKACC; and conventions such as UNCAC, have all formed a further basis for international cooperation for the EACC. For all these arrangements, the EACC has a focal person that coordinates and communicates, mainly informally, using telephone calls and emails. The focal point also facilitates feedback, as and when the situation requires. During the period under review (2018 – 2021), EACC made 11 requests for assistance, of which 10 have been serviced and 1 is pending, as there was no contact point established. None of EACC's requests was rejected and from the information submitted, all the requests related to requests for information to aid in the investigation and prosecution of corrupt practices and recover proceeds or benefits. The requests appear to be in line with the risk profile of the country as they relate to corruption, fraud and forgery (– see the **Table 8.6.** below for the details of the type and status of the requests.).

Table 8.6: International Cooperation Requests by EACC

Item	Requested Jurisdiction	Offence	Date of Request	Date of Response	Duration	Status of case
1	Mauritius	ML	22/2/2021	11/8/2021	6 Months	Completed
2	Uganda	Forgery	4/11/2020	17/3/2021	5 Months	Completed
3	Uganda	Forgery	17/9/2020	01/4/2021	5 Months	Completed
4	Uganda	Forgery	05/2/2020	31/3/2021	13 Months	Completed
5	Uganda	Forgery	Nov 2019	Unknown	Unknown	Completed
6	Scotland	Property ownership	28/11/2019	Unknown	Unknown	Completed
7	Uganda	Forgery	06/8/2019	Unknown	Unknown	Completed
8	China	Procurement corruption	Feb 2019	17/9/2019	7 Months	Completed
9	Tanzania	Forgery	08/10/2018	Unknown	Unknown	Completed
10	Uganda	Forgery	12/11/2018	Unknown	Unknown	Completed
11	ARINSA	undisclosed	2018	Unknown	N.A.	No contact point

399. **ODPP:** has made international cooperation and exchanged information with foreign counterparts a priority in its strategic plan and excellence charter 2020/2023. When matters are urgent, the DPP sends the request electronically, before submitting the formal request (hard copy) to the office of the Attorney General for formal processing and transmission through diplomatic channels. Any urgent response is also received electronically, while the formal response is sent through the diplomatic channels to the office of the AG. However, no specific examples of such cases were provided by the ODPP.

400. **KRA:** KRA has enabling provisions (s. 6 (2) of the Tax Procedures Act and s. 10 of the EACCM Act) to seek for or request international counterparts to provide or exchange information. KRA has demonstrated that they actively seek and exchange information with foreign counterparts on the basis of membership in the following organizations: Global Forum on Transparency and Exchange of Information for Tax Purposes; WCO; ATAF; MAAC; EARATC and the Africa Academy for Tax. KRA has also executed 10 MOUs with the authorities of Israel, UAE, Jordan, Mozambique, Seychelles, South Sudan, Angola, Germany (GIZ), Ethiopia and Interpol. Kenya also has 15 double taxation agreements with foreign jurisdictions. The laws and agreements above give KRA a solid platform to seek information, which is done through the Intelligence and Strategic Operations Department. The provision of assistance is implemented by the Commissioner heading the Authority's Intelligence and Special Operations Department, guided by the Exchange of Information on Request Manual. A request received by the KRA is logged and marked down to the EOI office, which validates the request and issues a letter of acknowledgement to the requesting jurisdiction within 7 days. Requests with incomplete information are referred back for further and better particulars, failing which they are rejected. Any rejection on account of deficiency of information or any other reason is communicated to the requesting counterpart within 60 days. For a request that has adequate information, the KRA obtains and authenticates the required information either from internal sources or relevant 3rd parties, and provides it to the requesting counterpart within 90 days. In case of a delay, KRA will write to the requesting counterpart, stating the reasons for the delay (beyond 90 days). For successfully provided information, the requesting counterpart is required and expected to provide feedback on how helpful the information provided was. In the period under review (2019 – 2021), KRA made 222 requests, out of which 157 were successfully processed, while 57 are still pending and no request has been rejected. Requests were made to authorities in UAE, UK, Canada, South Africa, France, Germany, Seychelles, Mauritius, Cayman Islands and Zambia. The requests are in line with the country's risk profile, as they are aimed at curbing tax evasion, which was rated as one of the most-proceeds generating offences in Kenya. KRA is, therefore, actively using international cooperation to pursue possible proceeds of tax evasion that have been remitted abroad. The exchange of information for KRA has been rewarding, see case examples provided below in **Box 8.4:**

Box 8.4: Request for Information- KRA Sample Cases

Case 1:

In 2018, KRA investigated a high net worth individual taxpayer's declaration of income for taxation purposes. Analyses of his local bank accounts showed that he had received a substantial amount of money from his foreign bank account. To determine the source of this money, KRA investigators required examining the bank statements of his foreign account and verifying if authenticity of the loan. KRA through the Exchange of Information Office sent a request to a partner jurisdiction to provide; bank account opening records, loan agreement, bank statements. The information was provided by the partner jurisdiction and was processed by the EOI unit and shared with the KRA tax investigators. The information assisted in prosecuting a tax matter leading to a tax assessment of approx. **KES 130M.**

Case 2:

In 2019, Kenya Revenue Authority auditors were conducting an audit on multinational taxpayer in regards to mis-declaration of income by engaging in aggressive tax planning and shifting of profits from Kenya to a lower tax jurisdiction and declaring losses therefore not paying taxes in Kenya. The KRA sent out a request for financial information to the partner jurisdiction requesting for the following information; legal ownership information for the Kenyan subsidiary, beneficial ownership information, list of shareholders and directors, financial statements, bank statements and tax returns for the audit period. The KRA EOI unit obtained the information from the partner jurisdiction which led to the auditors being able to establish a relationship between two entities in different jurisdictions, test the Arm's Length nature of their transactions, and ascertain existence of a permanent establishment and residency of the directors. This enabled the auditors to determine the correct income for the Kenyan entity for tax purposes.

Case 3

In 2019, KRA Investigators were conducting an investigation on a case of a taxpayer who was a returning resident. The taxpayer claimed to be entitled to exemption of duties and taxes for certain items on return to Kenya. As a result of this the taxpayer imported a car, claimed to have been owned for two years before returning to Kenya. This would entitle a returning resident such as the taxpayer to exemption from paying Value Added Tax on the vehicle. The instigators believed that the details of the logbook provided were inaccurate thus enabling the taxpayer to evade paying taxes.

KRA sent out a request for information to the partner jurisdiction where the taxpayer claimed to have been residing. The information requested was; asset ownership for the asset for the period under scope, authentication of the log book presented by the taxpayer and evidence that the taxpayer had been residing in that country for the period under scope. The partner jurisdiction obtained and shared this information with the EOI Unit, which demonstrated that the returning resident did not own the assets as claimed as it was in another person's name. The case was concluded and culminated into a tax assessment of approx. **KES 10.5M** being raised.

401. **NPS:** the NPS is a member of the EAPCCO, AFRIPOL and INTERPOL; but has also entered into international cooperation MOUs with USA, DRC, Botswana, South Africa, India, UK, Denmark, Egypt and Israel. These are avenues the Service has been utilizing to request for police-to-police exchange of information for ML, associated predicate offence and TF purposes. The service primarily relies on Interpol for international cooperation. Interpol operates in 194 countries/jurisdiction and has a National Central Bureau in each jurisdiction, which serves as a contact and coordination point. In Kenya, the NCB is housed in the DCI in Nairobi and headed by a Bureau Chief. Where any officer requires assistance, they write to the Bureau Chief, who in turn transmits the request to his counterpart in the foreign requested jurisdiction. The counterpart then indicates how long they estimate it may take to render the assistance required. In the event that the estimated time lapses before information has been exchanged, it is the duty of the Bureau Chief at DCI to send a reminder. The Bureau Chief communicates, coordinates, follows up and organizes any logistical support in the event that the foreign jurisdiction requests the NPS to go and receive the information, or if there is a need for repatriation of suspects or exhibits. Kenya authorities submitted statistics to show that they had, in practice, sought assistance using Interpol, but out of the 11 cases submitted, only 4 were cases of Kenya requesting for assistance from a foreign jurisdiction. A total of 4 cases in a period of 5 years (2017 – 2021) does not demonstrate effectiveness of the system to seek assistance through police-to-police engagement.

402. **ARA:** The Authority is a competent authority for ML purposes under the provisions of the POCAMLA. It is also a member of ARINEA and ARINSA networks. However, during the review period, the Authority did not seek other forms of international cooperation, to exchange information for purposes of the implementation of its ML mandate.

403. **KWS:** Kenya is a signatory to CITES and designated KWS as the CITES Management Authority. CITES provides a network for information and intelligence sharing on wildlife trade and crime, between and amongst jurisdictions. KWS cited 2 cases to demonstrate that it has successfully sought international cooperation. In both cases that had elements of international cooperation, the KWS supplied information to and cooperated with the NPS and international cooperation under the auspices of INTERPOL. One case resulted in the extradition of the suspect to the USA, while the other one resulted in a conviction in Kenya.

404. **FRC:** FRC using the powers it has under the POCAMLA (see c. 29.7(b)) to exchange information with counterparts. It has entered into MoUs with the FIUs of Seychelles, Tanzania, Uganda, Malawi, Lesotho, South Africa, Namibia, Angola, Ethiopia, Zambia, Zimbabwe and Madagascar. The exchange of information is done through secure channels and in a timely manner. The statistics submitted indicate that 12 requests were made by FRC to foreign counterparts in the year 2020, of which 6 have been responded to, while 6 are still pending response. That the FRC did not make any requests in 2017, 2018 and 2019; coupled with the low number of requests made in 2020 seem indicative of the fact that it is seeking other forms of international cooperation to exchange information for ML/TF purposes to a limited extent.

405. **CBK:** The CBK uses its powers provided under the Banking Act to exchange information with foreign agencies. CBK's membership of the Association of African Central Banks, Monetary Affairs Committee of the EAC, COMESA Committee of Central Bank Governors and ascribing to the Basel Principles of Supervision that promote international cooperation, gives CBK an extra platform to use in seeking to exchange information. To ease the process of cooperation, CBK has executed MOUs with, among others, the Reserve Banks of India, Zimbabwe, Malawi, South Africa; Central Banks of Nigeria and those of all EAC States; Bank of Zambia, Bank of Mauritius, Bank of Uganda and Bank of South Sudan. CBK's requests are mainly used for purposes of vetting FIs potential shareholders, directors and management, as well as entities that seek to establish FIs in Kenya. In the review period, CBK made 25 requests for information to various foreign supervisory authorities, majority of whom were for vetting the fitness and propriety of senior management and board of directors of various financial institutions.

Table 8.7: Outbound requests for information to foreign supervisory authorities (2017-2020)

	Nature of Requests	2017	2018	2019	2020	Total
1.	Vetting - Senior Management	2	2	6	7	17
2.	Vetting - Board of Directors			2	4	6
3.	Other	2				2
4.	Total number of requests	4	2	8	11	25
5.	Average time taken by foreign supervisory authorities to respond to CBK	62 days	27 days	48 days	i. days	

Table 8.8: Foreign supervisory authorities to whom outbound requests were directed (2017-2020)

Supervisory Authority	Jurisdiction	Total No. of Requests
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	Supervisory Authority	Jurisdiction	Total No. of Requests
1.	Bank of Tanzania	Tanzania	5
2.	Bank of Uganda	Uganda	3
3.	Bank of Zambia	Zambia	1
4.	Reserve Bank of South Africa	South Africa	1
5.	Bank of Namibia	Namibia	1
6.	Bank of Nigeria	Nigeria	3
7.	Bank of Ghana	Ghana	1
8.	Central Bank of West African States	Burkina Faso, Guinea-Bissau, Ivory Coast (Côte d'Ivoire), Mali, Niger, Senegal, Togo	2
9.	Bank of Djibouti	Djibouti	1
10.	Central Bank of Egypt	Egypt	3
11.	Bank Al Maghreb	Morocco	2
12.	Reserve Bank of India	India	2
	Total		25

406. **CMA:** Kenya has not demonstrated that the CMA has legal basis to seek other forms of international cooperation for any purpose. Nonetheless, CMA is a member of the East African Association of Securities Regulatory Authority (EASRA) that operates a consultative institutional forum, where regulatory authorities discuss matters of mutual interest, affecting their operations. Its main objective is to share information, mutual assistance, cooperation and advancing the integration of the EA capital market. Further, CMA cooperates with counterparts under the auspices of the International Organization of Securities Commissions' MOUs framework, for licensing and supervision purposes. During the period under review, CMA made 21 requests for information to foreign counterparts, for purposes of fit and proper assessment, but not for no-objections or for vetting proposed senior management, directors or shareholders.

407. **IRA:** the IRA conducts foreign inquiries in exercise of its supervisory role, and for group-wide supervision, respectively. IRA is a member of the International Association of Insurance Supervisors (IAIS) and the East African Insurance Supervisors Association (EAISA). Under the auspices of EAISA, the Authority has executed MOUs with Insurance Regulators in Burundi, Rwanda, Tanzania and Uganda. The Authority has also executed MOUs with supervisory authorities in Namibia, Seychelles, Swaziland, Ghana and Mauritius. IRA also participates in supervisory colleges organized by the South Africa Reserve Bank and the Financial Services Commission of Mauritius. Using the above frameworks and channels of communication and cooperation, the Authority has sought other forms of international cooperation to exchange supervisory information in an appropriate and timely manner. IRA submitted evidence of seeking and receiving information from South Africa, United Kingdoms and Uganda, on the fitness and propriety of persons intending to hold senior positions in insurance companies. The information was given in a timely manner.

8.2.4 *Providing other forms international cooperation for AML/CFT purposes*

408. **ACC:** the mandate of the Commission to provide assistance is as laid out in 2.3 above (S. 11 (3) of the EACC Act). During the review period (2018 – 2021), the Commission received 17 requests for

assistance and provided or processed 9 of the requests. One request was rejected because the Commission failed to establish a contact point, while 7 are still pending over a year after they were received. It is unclear why the process has delayed, and without feedback on whether the assistance provided was helpful to the requesting counterpart, its adequacy and constructiveness cannot be determined.

409. **ODPP:** the ODPP is a gazetted Competent Authority for mutual assistance in criminal matters (Gazette Notice 1847 of 18th February 2013). During the review period, ODPP did not demonstrate that they provided other forms of international assistance to foreign counterparts. During the onsite, there was information that officers of the ODPP do receive informal consultations from international counterparts and share helpful information by electronic means. However, without a record of these consultations, it is impossible to evaluate the effectiveness or adequacy of the assistance the render by sharing that information.

410. **KRA:** the mandate of the Authority to provide assistance is as laid out in 2.3 above. In the period under review (2018 – 2021), the Authority provided tax information, compliance status and other legal or contractual information sought by foreign counterparts. The Authority received 115 requests for information and accepted and successfully processed 107 of them. The Authority rejected 2 for invalidity, and 4 received in 2020 are still pending processing. The requests were received from counterparts in jurisdictions, including Norway, Italy, France, Seychelles, Denmark, UK, India, Uganda, Sweden and Belgium (see Table below for details).

TABLE 8.9: REQUESTS RECEIVED AND PROCESSED BY KRA

2018/2019 – 21	2019/2020 – 48	2020/2021 – 46
Norway (5)	France (1)	UK (2)
UK (5)	UK (47)	France (4)
Italy (1)		Norway (4)
France (6)		India (21)
Denmark (1)		Uganda (15)
Seychelles (2)		
Canada (1)		

411. **NPS:** primarily, they provide information to foreign counterparts through the NCB of INTERPOL located at the DCI in Nairobi. However, there have been occasions when there is direct interaction outside the auspices of the NCB. During the period under review, the NPS received 2 requests for information through the NCB from two foreign counterparts. One of the requests is still pending whilst the other has been successfully processed. NPS also received 3 direct police to police requests. One of the requests has been successfully processed while the other two are still pending.

412. **FRC:** The Centre provides assistance, as mandated by the POCAMLA. The Centre provides information either through spontaneous declarations or responses to requests for information. During the period under review, the Centre made 3 spontaneous declarations relating to ML/TF; and processed 41 requests from foreign counterparts. On average, processing of the requests takes about two weeks.

413. **CBK:** In the CBK, the Director, Bank Supervision Department is in charge of provision and contact person of other forms of international cooperation for AML/CFT purposes. Where there is no arrangement or MOU, the foreign entity or counterpart has to address the request to the Governor, CBK, who would then refer it to the DBS for processing. When the information has been obtained, it is despatched by the contact person or through the Governor, as the case may be. Over the period 2017-2020, CBK received 23 overseas requests for assistance from MOU signatories while one request was from a supervisory authority with which CBK has not entered into an MOU. Majority of the requests for information were with regards to vetting of individuals either as senior management or board directors.

414. **CMA:** The Authority provides assistance for exchange of information under the auspices of the International Organization for Securities Commissions (IOSCO) MOU frameworks Securities Commissions (IOSCO) MOU frameworks and provisions of S. 13 of the CMA Act. During the period under review the Authority received 21 requests. There is no demonstration that they were processed in an appropriate and timely manner. They all related to the process of vetting for fit and proper person of proposed senior management, directors and shareholders of reporting entities.

Table 3.10: Inbound requests for information by foreign supervisory authorities (2017-2020)

	Foreign Supervisory Authority	Jurisdiction	Total No. of Requests
1.	Bank of Tanzania	Tanzania	10
2.	Bank of Uganda	Uganda	7
3.	Bank of Rwanda	Rwanda	2
4.	Reserve Bank of Malawi	Malawi	1
5.	Reserve Bank of Zimbabwe	Zimbabwe	1
6.	Hong Kong Monetary Authority	Hong Kong	1
7.	Reserve Bank of India	India	1
	Total		23

Table 3.11: Nature of inbound requests for information (2017-2020)

Nature of Requests	2017	2018	2019	2020	Total
1 Vetting - Senior management	6	7	2	3	18
2 Vetting - Board of Directors		2	1	1	4
3 Other	1				1
4 Total number of requests	7	9	3	4	23
5 Average time taken by CBK to respond to foreign supervisory authorities	53 days	41 days	80 days	xxvii. ay	

415. **IRA:** requests for information to the Authority are handled and processed by the Director in charge of Supervision. Insurers are grouped according to their respective businesses, and each group is headed by a relationship manager. For AML/CFT related information requests, the Director in charge of supervision would refer the requests to the Manager, Life Insurance (individual entities) or the Manager, Group Insurance (for members of a group), as the case requires. In the period under review, the

Authority received and processed 5 requests, 1 for fit and proper vetting, 1 for shareholding and the other 3 for unspecified information.

8.2.5 International exchange of basic and beneficial ownership information of legal persons and arrangements

416. The Authorities did not submit any information to demonstrate that relevant competent authorities have accessed and exchanged information on basic and BO information from the BRS (for companies and limited liability partnerships) and/or the Ministry of Lands (for legal arrangements) with international counterparts. The Authorities submitted statistics showing that in the period under review (2017 – 2021), BRS processed 231 CR 12 reports requests. A CR 12 Report is an official and legal communication from the Registrar of Companies giving basic information, including: confirming the existence of a company; its name; and records including: the list of shareholders, their respective shareholding and their addresses; list of the company’s Directors and their addresses; the company’s registered place of business; and any charges, debentures or encumbrances registered against the company. It does not include the information contained in the BO Register. Only KRA requested for and received certified copies of the records of BO information from BRS, but this was for purposes of presenting evidence in court and not sharing with their foreign counterparts. No statistics were submitted for any information sought and obtained relating to either limited liability partnerships (the other main legal person registered and regulated by the BRS) or trusts (the legal arrangements registered and regulated by the Ministry of Lands).

Overall conclusions on IO.2

417. Kenya provides constructive mutual legal assistance and extradition to some extent, but for both MLA and extradition requests, the information available was inadequate to determine how timely the country attends to the requests and prioritises them. There were no case results or status and feedback from the requesting jurisdiction to determine the adequacy and constructiveness of the responses provided by the authorities. Kenya also seeks legal assistance in criminal matters for AML/CFT purposes to some extent and its requests are in line with its risk profile for ML (limited foreign transmission of proceeds), associated predicate offences (corruption, fraud, embezzlement, bribery, etc.) and TF (mainly domestic TF risk). Kenya to some extent seeks and provides assistance for international cooperation in criminal matters, and the assistance sought is in line with the country’s risk profile in relation to ML, associated predicate offences or TF, as the offences are mainly corruption, fraud and forgery and tax-related offences. However, it was not possible to assess the quality or constructiveness of the assistance rendered because the Authorities did not receive feedback in any case and were unaware how their information had been utilized by the requesting party. Only KRA indicated having retrieved 231 CR 12 reports from the BRS and 5 reports of BO information, but it was for the purpose of their own investigations and inquiries, and not for the purpose of international cooperation. No basic or BO information relating to LLPs or trusts was retrieved or shared by the Competent Authorities during the period under review.

18. Kenya is rated as having a moderate level of effectiveness for IO.2.

TECHNICAL COMPLIANCE ANNEX

1. This annex provides detailed analysis of the level of compliance with the FATF 40 Recommendations in their numerical order. It does not include descriptive text on the country situation or risks, and is limited to the analysis of technical criteria for each Recommendation. It should be read in conjunction with the Mutual Evaluation Report.
2. Where both the FATF requirements and national laws or regulations remain the same, this report refers to analysis conducted as part of the previous Mutual Evaluation in 2010. This report is available from [https://www.esaamlg.org/reports/Kenya_Mutual_Evaluation_Detail_Report\(2\).pdf](https://www.esaamlg.org/reports/Kenya_Mutual_Evaluation_Detail_Report(2).pdf).

Recommendation 1 – Assessing risks and applying a risk-based approach

This is a new Recommendation which came into force in 2012 after completion of the First Round of MEs and therefore Kenya was not assessed on this in the 2011 MER.

Criterion 1.1 – (Partly Met)- Kenya carried out a national risk assessment which started in 2019 and was finalised in October 2021. Based on the NRA report, the ML threat was determined as Medium and ML Vulnerability as Medium High. The top high proceeds generating predicate offences were found to be fraud and forgery, drug- related offences and corruption. However, the assessors noted that the ranking was based on number of cases without considering values concerned. In terms of sectoral vulnerability, the banking sector, real estate sector and lawyers were assessed as the most vulnerable. With respect to TF risk, it was found to be Medium. However, the assessors noted that the assessment did not consider various relevant variables and vulnerabilities related to TF. The report does not show the relative vulnerability of sectors, products, services etc. Much of it dwelt on terrorism rather than TF (see details under IO.1).

Prior to the national risk assessment, various financial sector supervisory authorities conducted sector risk assessments. The CMA risk assessment report (2016) shows that the risk rating of ML and TF was the same in different capital market sub-sectors which is very unlikely considering that the dynamics of TF and ML are not the same at all, in terms of variables and their influence on ML or TF. The IRA risk assessment report (2020) does not indicate the overall ML and TF risk ratings of the sector, which products are of high or low risk etc. The authorities indicated that risk assessments were updated as part of the NRA. However, as noted above, the TF risk exposure of these sectors was not assessed.

Criterion 1.2 – (Met)- Kenya designated the Task Force on National Risk Assessment on ML and TF through Gazette Notice No. 2577 of 22nd March 2019 to coordinate the NRA exercise in Kenya. The National Treasury was the Chair of the Task Force and the FRC appointed as the NRA Coordinator. The Task Force consists of most of the main government agencies relevant for AML/CFT and Kenya Bankers Association.

Criterion 1.3 – (Not Met)-Kenya finalised its NRA in 2021 and the authorities have indicated that the NRA shall be updated every two years in accordance with the National Strategy and Action Plan. However, this document was not availed to Assessors as at the end of the onsite and therefore they could not verify the assertion.

Criterion 1.4 – (Not Met)- Kenya had not put in place mechanisms to provide information on the results of the risk assessments to relevant competent authorities and SRBs, FIs and DNFBPs at the time of the onsite. In practice, the report was approved for publication a week before the onsite visit and some competent authorities and private sector representatives indicated that they had not received the NRA report.

Criterion 1.5 – (Not Met)

The authorities have not provided National Strategy and Action Plan. Hence, Assessors do not have a basis for determining, whether and to what extent, Kenya has used the understanding of its ML/TF risks to guide allocation of resources and implementation of measures to prevent or mitigate ML/TF risks. There is no evidence that resources are allocated across the AML/CFT authorities based on risks and at an operational level, within individual competent authorities. While it is noted that FRC, IRA and CMA conducted risk assessments, there is no evidence how the results of those assessments informed allocation of resources and supervisory activities- frequency and intensity of supervision (see IO.3)

Criterion 1.6 – (N/A)- Kenya has not waived application of some of the FATF Recommendations to FIs or DNFBPs based on the results of the risk assessment which showed existence of low risk.

Criterion 1.7 – (Partly Met)

- (a) **(Partly Met)**- Regulation 18 of POCAML Regulations requires reporting institutions to apply enhanced measures to persons and entities that present higher risks. However, Kenya does not require FIs and DNFBPs to apply enhanced measures when dealing with specific sectors which were identified as high risk in the NRA such as real estate agents, lawyers and secondhand motor vehicle dealers.
- (b) **(Not Met)** FIs and DNFBPs are not required to ensure that the findings of NRA are incorporated into their risk assessments. While CBK AML/CFT Guidelines on risk assessment provides that institutions should take into consideration the findings of the country's National Money Laundering and Terrorism Risk Assessment, CBK does not have the legal basis to issue guidelines on AML/CFT (see chapter 1 and R.10 for details).

Criterion 1.8 – (N/A) - Kenya does not permit FIs and DNFBPs to apply simplified due diligence to business relationships or transactions that have been identified as low ML/TF risk. Although CBK Guidelines (Clause 5.5), Insurance AML/CFT Guidelines (Paragraph 20(h), and Guidelines on the Prevention of ML and TF in Capital Markets (Clause 4 (1)] permit simplified measures on lower risks, these have not been considered because the supervisory authorities do not have legal basis to issue guidelines on AML/CFT (see chapter 1 and R.10 for details).

Criterion 1.9 – (Not Met)- Implementation of measures contained in c.1.7, c.1.8, c.1.10 and c.1.11 by FIs and DNFBPs are subject to supervision as described under c.26.1, c.26.4, c.28.1(c) and c.28.3. However, the deficiencies noted under these criteria also apply here. In addition, the obligation to conduct risk assessment and develop policies and procedures do not include CFT. Furthermore, in relation to lawyers, implementation of relevant parts of POCAMLA Amendment Act by the Law Society of Kenya (designated supervisory authority) has been suspended pending court hearing. The combined impact of these shortcomings is considered to be major.

Criterion 1.10 – (Partly Met)-FIs and DNFBPs are under obligation to identify, assess, monitor, manage and mitigate risks associated with ML (Regulation 6 of POCAML Regulations). In addition, they are required to document the outcome of the risk assessment exercise [Reg 6(2) of POCAML Regulations]. However, the obligation does not include TF risk assessment. Furthermore, there is no specific requirement (b)) for the risk assessment to consider all relevant factors such as type of customer, geographic areas, products, services, transactions or delivery channels to determine the level of overall risk; (c) to keep the risk assessments up-to-date and (d) to have appropriate mechanisms to provide the risk assessment to competent authorities. The obligations contained in the CBK Guidelines, IRA AML/CFT Guidelines and Guidelines on the Prevention of ML and TF in Capital Markets cannot be considered because the supervisory authorities do not have a legal basis for issuing AML/CFT guidelines (see details under R.10).

Criterion 1.11 – (Partly Met)

FIs and DNFBPs are:

- (a) **(Partly Met)**-Required to develop and implement Board approved policies, controls and procedures to enable them to effectively manage and mitigate ML risks [Regulation 6(3) of POCAML Regulations]. However, this does not include policies and procedures to manage and mitigate TF risks;
- (b) **(Met)**-Required to have procedures for monitoring implementation of the controls and enhance them where necessary [Regulation 6(4) of POCAML Regulations].
- (c) **(Partly Met)**- Regulation 6(3) of POCAML Regulations requires reporting institutions to develop and implement Board approved policies, controls and procedures that will enable it to effectively manage and mitigate the identified risks. This is understood to include the obligation to take enhanced measures. Absence of relevant provisions on TF limits the scope of this requirement.

Criterion 1.12 – (N/A)- Kenya does not permit FIs and DNFBPs to take simplified measures to manage and mitigate risks, if lower risks have been identified (see c.1.8).

Weighting and Conclusion

Kenya has assessed and identified its ML/TF risks. However, assessors were not able to determine whether or not AML/CFT authorities have adopted a risk-based approach to allocation of resources and implementation of the AML/CFT measures. While FIs and DNFBPs are obliged to conduct risk assessment and take measures to mitigate the identified risks, the obligations do not include TF. In addition, Kenya had not put in place mechanisms to communicate the results of the NRA to relevant competent authorities, FIs and DNFBPs.

Kenya is Partially Compliant with Recommendation 1.

Recommendation 2 - National Cooperation and Coordination

In its 1st Round MER, Kenya was rated partially compliant (formerly R31). The main technical deficiencies were that there was no mechanism in place to enable the FIU to cooperate and coordinate domestically with law enforcement and supervisory authorities concerning the development and implementation of policies and activities to combat ML. In addition, there was no effective mechanism in place amongst domestic competent authorities to enable them to cooperate with each other concerning development and implementation of activities to combat TF as TF is not criminalised in Kenya. The new requirements relate to cooperation in the context of proliferation financing and compatibility of AML/CFT requirements and data protection and private rules.

Criterion 2.1 – (Not Met)- Kenyan national AML/CFT policies or strategies were not made available to the assessment team. Therefore, it was not possible to determine the extent to which the National Strategy and Action Plan is informed by the identified risks. The mandate of the FRC to issue policies is only confined to AML and the law is not clear whether the issuing of such policies is at national level or confined to designated reporting entities. The CFTIMC are responsible for formulating and implementing the national Strategy on CFT and action plan.

Criterion 2.2 – (Partly Met)- The National Treasury and Planning (NT and P) has the overall responsibility for AML and CTF matters in Kenya. There are various statutory bodies and forums, namely: National Task Force, the Financial Reporting Centre (FRC), the Anti-Money Laundering Advisory Board (AMLAB), The National Counter Terrorism Centre, the Counter Financing of Terrorism Inter-Ministerial Committee and the Law Enforcement Coordination Working Group. However, the coordination and responsibility for strategic direction and policies appears fragmented. The AMLAB advises the Cabinet Secretary on policies relating to AML [s.50(1) (a) of POCAMLA].

The powers are not extended to CTF. The (ATPU) have the strategic lead for CTF in Kenya and have responsibility for the National Counter Terrorism Strategy. Created in 2007, this closed document includes reference to CTF which forms part of this overarching approach to tackling terrorism. The Counter Financing of Terrorism Inter-Ministerial Committee (CFTIMC) is now responsible for formulating and supervising the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism. As at the time of the assessment, it is the position of the assessors that the Regulations establishing the Committee have not complied with the POTA, therefore Kenya do not have a competent authority to implement CFT National Strategies.

Criterion 2.3 – (Partly Met)- Kenya applies multifaceted coordinated mechanisms across related relevant agencies such as policy makers, the Financial Reporting Centre, law enforcement authorities, supervisors and other relevant competent authorities. While competent authorities co-operate and co-ordinate AML/CFT activities as described below, Kenya has not provided details, statutory or under Policy, of how these various forums coordinate to develop AML and CFT policies.

The Anti-Money Laundering Advisory Board has statutory responsibility to advise the Cabinet Secretary on policies, best practices and related activities to identify proceeds of crime and to combat money laundering activities. This Board is composed of law enforcement, financial regulators, professional bodies and the private sector. This forum has no CFT function. The frequency of the meeting regime is not known. The National Task Force (NTF) is a multi-agency group responsible for the implementation of the national AML/CFT regime, the ATPU and FRC are permanent members- – this mechanism seeks to bridge gap on CFT matters, via the FRC, to the National Treasury and Planning.

The CFTIMC has the mandate to implement the UN Security Council Resolutions relating to suppression of and financing of terrorism and suppression of and financing of proliferation of weapons of mass destruction. The Cabinet Secretary is updated on CFT matters by the NTF, where the ATPU is a permanent member. The FRC provides the mechanism for this (the line of communication) but the assessment team has not been afforded access to the relevant Policy documents or standard operating procedures to demonstrate this how the mechanism functions.

Other bodies include:

Joint Financial Sector Regulators Forum comprising of CBK, CMA, IRA, SASRA and RBA. These regulators signed an MOU in 2009 and updated it in 2013 to share information. In addition to this, the AML/CFT Regulators Roundtable brings together FRC, CBK, CMA and IRA with the aim of coordinating implementation of AML/CFT measures in the financial sector.

The Multi-Agency Task Force (MAT) includes key LEAs with the mandate of coordinating the investigative response to high level corruption, economic crimes and high-end ML Law Enforcement Coordination Working Group whose mandate amongst others is implementation of POTA Regulation in the sector. The meeting regime, whether periodical or on a case-by-case basis is not known.

Criterion 2.4 – (Not Met)- The POTA No. 30 of 2012 (as amended) which is the primary law upon which the mandate to coordinate the implementation of all UN Security Council Resolutions relating to TF and PF is meant to be derived, does not provide for PF. Therefore, Regulation 8 of the POTA Regulations purporting to be providing for implementation of UNSCRs on PF cannot provide such powers as they are not supported by the primary Act. The CFTIMC established pursuant to Regulation 4 of POTA Regulations has the mandate of coordinating the implementation of all UN Security Council resolutions relating to the financing of terrorism and the proliferation of weapons of mass destruction. Kenya have not demonstrated how the CFTIMC contributes to national co-ordination. **This is not met as the Regulations cannot provide the power without primary legislation.**

Criterion 2.5 – (Partly Met)-The Data Protection Act 2019 ensures that all AML/CFT provisions are aligned to the country’s data protection law and privacy rules. Competent authorities have a statutory responsibility under this Act in relation to the protection of privacy and data where appropriate. No information has been made available to show existence of any cooperation and coordination between competent authorities to ensure compatibility of AML/CFT requirements with data protection and privacy rules and other similar provisions.

Weighting and Conclusion

Kenya does not have national AML/CFT Policies which are informed by the risks identified. However, the National Treasury and Planning have overall strategic leadership for AML/ CFT matters in Kenya. While there is coordination in the implementation of AML/CFT policies, it is not clear that the country has mechanisms in relation to coordination in the development of AML/CFT policies. Similarly, there is no cooperation and coordination mechanisms to combat PF. Furthermore, it is not clear that there is cooperation and coordination between competent authorities to ensure compatibility of AML/CFT requirements with data protection and privacy rules and other similar provisions.

Kenya is Non-Compliant with R. 2.

Recommendation 3 - Money laundering offence

In its 1st Round MER, Kenya was rated partially compliant with these requirements (formerly R. 1 and R.2). The main technical deficiencies were: not all the designated categories of predicate offences, including racketeering, financing of terrorism and migrant smuggling were criminalised in Kenya; the offence of ML under section 4 of the POCAMLA did not apply to persons who commit the predicate offence. Since the last evaluation, Kenya has made a number of amendments to the POCAMLA to widen the scope of ML offence.

Criterion 3.1 – (Met)- Kenya has criminalized money laundering in line with the Article 3 (1) (b) and (c) of the Vienna Convention,1988 and Article 6 (1) of the Palermo Convention. The provisions of Sections 3, 4 and Section 7 of the POCAMLA meet the requirements of the respective Vienna and Palermo Conventions Articles.

Criterion 3.2 – (Met)- Kenya adopted an all-crimes approach, therefore any offence that generates proceeds is automatically a predicate offence, owing to the wide scope and definition of the terms “offence”, “proceeds of crime” and “property” under Section 2 of the POCAMLA. Any criminal infraction against any legal provision in Kenya or outside of Kenya (if such infraction would have constituted criminal conduct if committed in Kenya) that results in any property or economic advantage or benefit of any kind is a predicate offence. In 2010, Kenya had deficiencies of lacking some categories of predicate offences being racketeering, financing terrorism and migrant smuggling. Annex C provides the categories of offences and relevant laws criminalising the offences in Kenya.

Criterion 3.3 – (Not Applicable)

Criterion 3.4 – (Met)- The broad definition of “Property” and “realizable property” under Section 2 of the POCAMLA do not give a minimum amount or value to property or proceeds, for them to be considered so for purposes of the ML offence. Additionally, property subject to ML offence can be either direct or indirect proceeds (such as instrumentalities used or intended to be used; property used or allocated for the financing of any offence; benefits derived from proceeds or property of corresponding value). The definition of “property” for ML purposes includes all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal documents or instruments evidencing title to or interest in such property; but does not specifically mention VAs.

Criterion 3.5 – (Met)- When proving that property is the proceeds of crime in Kenya, it is not necessary that it is preceded by a conviction of a person for a predicate offence (see *Republic v DPP & Anor, Ex Parte Ogola Onyango & 8 Others (2016) eKLR*).

Criterion 3.6 – (Met)- Predicate offences for ML extend to conduct that occurred in another country, which would have constituted a predicate offence had it occurred domestically under the provisions of Sections 2 (definition of “offence”); 3 (b) (ii) (perform an act in connection with property knowing or having reason to believe it forms part of proceeds of crime, to enable or assist any person that has committed an offence whether in Kenya or elsewhere to avoid prosecution); and s. 127 (conduct of a person outside Kenya constitutes an offence under the POCAMLA if such conduct would have been an offence if it occurred in Kenya).

Criterion 3.7 – (Met)

The ML offence in Kenya applies to any person that commits a predicate offence and then engages in any of the prohibited conduct under Sections 3, 4 and 7 of the POCAMLA. They can be prosecuted for self-laundering.

Criterion 3.8 – (Met)-Circumstantial evidence is admissible to prove intent and knowledge required for the ML offence. Such intent can be inferred, therefore, from objective factual circumstances – see *Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016] eKLR*.

Criterion 3.9 – (Met)-Proportionate and dissuasive sanctions apply to natural persons convicted of ML in Kenya. Under Section 16 (1) of the POCAMLA, a person convicted of ML (Ss. 3, 4 and 7) is liable to imprisonment for a term not exceeding 14 years or a fine not exceeding Ksh 5m (US\$ 50,000) or the amount of the value of the property involved in the offence, whichever is higher; or both the fine and the imprisonment.

Criterion 3.10 – (Met)-Criminal liability for ML offences applies to legal persons under the provisions of S. 3, 4 and 7, as the definition of “person” under S. 2 of the POCAMLA includes legal persons. Criminal sanctions for ML offences apply to legal persons under the provisions of Section 16 (1) (b) and (2) (b) of the POCAMLA. Under S. 24B and 24C of the POCAMLA and S. 23 of the Penal Code Act, the criminal liability and sanctions applicable to the legal person do not preclude parallel civil or administrative proceedings against the legal person by the FRC for a person or reporting entity’s failure to comply with directions or instructions issued by the FRC under the POCAMLA. Under Section 16 (6) of the POCAMLA, the criminal liability of a legal person does not prejudice that of its officers that consented to or connived in the criminal conduct of the legal person. The criminal sanctions provided for legal persons under S. 16 (1) b (for offences under S. 3, 4 and 7, being a fine of Ksh 25m equivalent to approximately USD 250,000) or the value of the laundered property or both and S. 16 (2) b (for offences under S. 5, 8, 11 (1) and 13, being a fine of Ksh 10m equivalent to approximately USD 100,000 or the value of the laundered property or both, are proportionate and dissuasive.

Criterion 3.11 – (Met)- Under the general provisions, Kenyan criminal law recognizes ancillary offences under the provisions of S.20 (aiding, enabling, abetting, counselling or procuring commission of a felony, in this case ML); 389 (attempting); S. 391 (soliciting or inciting others to commit ML); and S. 393 (conspiracy to commit ML) of the Penal Code Act. Particularly for ML, in addition to the provisions of S. 20 of the Penal Code providing for ancillary offences, the wide scope of the provisions in sections 3, 4, 7 of the POCAMLA could be interpreted to cover instances of ancillary criminal action, such as procuring services of another person to conduct the laundering.

Kenya meets all the applicable criteria.

Recommendation 3 is rated compliant.

Recommendation 4 - Confiscation and provisional measures

In its 1st Round MER, Kenya was rated non-compliant with these requirements. The main technical deficiencies were: limited scope of designated categories of predicate offences also limited confiscation or forfeiture; forfeiture of property of corresponding value provided for under s.29 of the Penal Code did not cover all offences; the POCAMLA did not provide for steps to prevent or void actions. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 4.1 – (Partly met)-

- a) Kenya has legislative provisions for confiscation of property that has been laundered under the POCAMLA. S.2 of the POCAMLA defines laundered property as realizable property. Under the provisions of S. 57 (1) of the POCAMLA, therefore, any laundered property held by the defendant concerned or held by a person to whom the defendant has directly or indirectly made an affected gift is subject to forfeiture or confiscation.
- b) Kenya has legislative measures, under the POCAMLA for confiscation of property that is proceeds, benefits or instrumentalities used or intended to be used in ML or predicate offences. S.2 of the POCAMLA defines such property (proceeds, instrumentalities or benefits) as realizable property. Under the provisions of S.57 (1) of the POCAMLA, therefore, any such property held by the defendant concerned or held by a person to whom the defendant has directly or indirectly made an affected gift is subject to forfeiture or confiscation.
- c) Kenya has legislative measures, under the POTA, for confiscation of property that is owned or controlled by or on behalf of a terrorist group; or used or intended to be used in whole or in part in the commission of or to facilitate a terrorist act (S. 44 (1) of the POTA. S. 2 of the POCAMLA defines laundered property as realizable property. Under the POTA, a terrorist is not defined; and property used or intended for the use of an individual terrorist appears not to be covered by the provisions of S. 44 (1).
- d) Kenya has legislative measures, under the POCAMLA, for confiscation of property of corresponding value. S. 2 of the POCAMLA defines property of corresponding value as realizable property. Under the provisions of S.57 (1) of the POCAMLA, therefore, any property of corresponding value held by the defendant concerned or held by a person to whom the defendant has directly or indirectly made an affected gift is subject to forfeiture or confiscation.

Criterion 4.2 – (Partly met)- Kenya has legislative provisions to enable the EACC under S. 11 (1) (j) and 13 (2) (c) of the EACC Act, to identify, trace and evaluate property subject to confiscation. S. 37 of POTA provides for power to seize property used in commission of terrorist acts. Sec 12. of the POCAMLA authorizes the Customs Officers to temporarily seize, S. 43 of the Tax Procedures Act allows the Commissioner to preserve funds pending investigations, S. 44 provides for Seizure and Forfeiture of goods. Section 105, and 110(d) of the Wildlife Conservation Management Act gives similar provision on seizure and forfeiture. Section 18 of the ODPP Act for forfeiture and recovery of assets. Section 17 of Prevention of Organised Crime Act provides for Seizure and detention of organized criminal group cash, S 22 of NACOTIC Act provides for application for restraint order. The Kenya National Police Service does not have the powers described under this criterion which is a major deficiency as it has a great impact on its capacity to exercise certain powers when conducting investigations.

- a) The ARA and EACC have powers to identify, trace and evaluate property that is subject to confiscation (Part VI of the POCAMLA; Sections 11 (1) (j) and 13 (2) (c) of the EACC Act).

- b) The ARA, EACC, KRA and the IGP/NPS have powers to carry out provisional measures such as freezing or seizure, to prevent dissipation or recover property subject to confiscation (Part VI of the POCAMLA, Section 82 – Preservation Orders; s. 56 of the ACECA; S. 12 (4) of the POCAMLA - which makes KRA officers “authorised officers” for purposes of the Act; S. 213 of the EACCMA; and S. 37 of the POTA).
- c) The Kenya National Police Service and EACC have powers to take appropriate investigative measures to aid seizure, freezing and recovery of property subject to confiscation (Part X of the POCAMLA (see Sections 103 – 107); ACECA ss. 23; 26 – 31).

Criterion 4.3 –(Met) - In Kenya, the rights of bona fide third parties are protected from confiscation or forfeiture under S. 93 of the POCAMLA.

Criterion 4.4 – (Met)- Kenya has mechanisms for managing and, when necessary, disposing of property frozen, seized or confiscated under the POCAMLA (Ss. 72 (provides for appointment of a manager of property subject to a restraint order), 86 (provides for appointment of a manager of property subject to a preservation order) and 111(provides for the establishment of an Agency to manage the Criminal Assets Recovery Fund); ACECA (Ss. 56A (provides for the appointment of a Receiver) & 56C provides for recovery of funds and other assets). Additional mechanisms are provided under the Narcotic Drugs and Psychotropic Substances (Control) Act (Ss. 26 (1) (b); 31, 37, 38 and 39); and the Tax Procedure Act (S. 40).

Weighting and Conclusion

Kenya meets some of the criteria under this Recommendation, but has shortcomings being that not all the competent authorities that were identified as key to the AML/CFT regime, in particular the NPS which is mandated to carry out majority of the criminal investigations have legal provisions empowering them to identify, trace, freeze, seize, preserve and manage property suspected to be proceeds of crime and subject to confiscation,

Recommendation 4 is rated Partially Compliant.

Recommendation 5 - Terrorist financing offence

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly SR II). The main technical deficiency was that TF had not yet been criminalised in Kenya.

Criterion 5.1 – (Met)- Kenya has criminalised TF on the basis of Art.2 of the UN Convention for the Suppression of TF (TF Convention). Kenya criminalises the provision, receipt, and invitation to provide money or other property with the intent or reasonable suspicion that it may be used for the purposes of terrorism [Section 5 of POTA 2012]. It is also an offence to enter into or become concerned in an arrangement which results in money or property being made available to another, where the person knows or suspects that it may be used for the purposes of terrorism as defined within the Act and the funding of these activities can be pursued as a TF offence. The Act also includes a statutory duty to disclose information relating to terrorist activity and this includes TF. Legislation also provides for failing to disclose knowledge of terrorist offences (non-regulated sector) and this includes offences relating to TF and where terrorist property is concerned. S. 41(1)(a)(b) POTA.

Criterion 5.2 – (Met)-The Prevention of Terrorism Act criminalises TF and defines offences relating to collection of money or other property, or involved in an arrangement, with the intent that it will be used for the purposes of terrorism, or there is reasonable suspicion that it may be used, for the purposes of terrorism. This includes fundraising for a terrorist act or for a ‘specified entity’. The offences cover the provision or collection of money or property, directly or indirectly, for use, in full or in part, for a terrorist act, or by an individual terrorist or terrorist group. The offences are committed irrespective of

any occurrence of a terrorist act or other act referred to in the section or whether or not the funds have been used to commit such an offence (Section 5 of POTA).

Criterion 5.2bis – (Not Met)- There is no specific offence of financing the travel of individuals to a State other than their own for the purposes of terrorism or terrorist training.

Criterion 5.3 – (Partly Met)- The definition of “funds” under POTA widely covers funds of every kind regardless of the source of funds. POTA defines funds as: “funds” *mean assets of every kind, whether corporeal or incorporeal, tangible or intangible, movable or immovable and legal documents or instruments evidencing title to, or interest in such assets*. The definition does not include ‘however acquired’ or relate to instruments in any form, including electronic or digital as defined in the FATF Standards.

Criterion 5.4 – (Met)- TF offences under Kenyan law occur regardless of whether or not the funds or assets were actually used to carry out or attempted terrorist act; or linked to a particular terrorist act (s. 5(2) of POTA 2012).

Criterion 5.5 – (Met)- In Kenya, it is possible for the intent and knowledge required to prove the offence to be inferred from objective factual circumstances (S. 5(1) of POTA). Both direct and circumstantial evidence is admissible in courts to prove the intention of an accused person. The Supreme Court of Kenya, in upholding the terrorism convictions of two Iranian nationals, reviewed the settled Kenyan law regarding circumstantial evidence. *Republic vs. Ahmad Abolfathi Mohammed and Sayed Mansour Mousavi*, Petition No. 39 of 2018. The Supreme Court stated:

The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.” It is also said to be “evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”

Criterion 5.6 – (Met)- A natural person convicted of TF can be sentenced to a term of imprisonment of not more than 20 years, which is considered proportionate and dissuasive (S. 5(1) of POCA 2012).

Criterion 5.7 – (Not Met)- Criminal liability and proportionate, dissuasive sanctions do not apply to legal persons. The only provisions available relate to administrative sanctions.

Criterion 5.8 – (Met)- POTA creates criminal offences for TF related activity where a person, directly or indirectly, collects, attempts to collect, provides, attempts to provide or invites a person to provide or make available any property, funds or a service. It is an offence to organise or direct others to commit acts, or participate as an accomplice within the scope of these activities. It is also an offence for contribution to the commission of acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of TF and the preparatory and ancillary acts (s. 5(1)(c) of POTA).

Criterion 5.9 – (Met)- Kenya follows an all-offence approach and any offence under any law of Kenya becomes a predicate offence for ML. TF is an offence in Kenya and therefore a predicate offence for ML.

Criterion 5.10 – (Met)- TF offences apply regardless of whether the defendant was in the same country or a different country from the one in which the terrorist or terrorist organisation is located, or where the terrorist act occurred or will occur (s. 38(2) of POTA).

Weighting and Conclusion

Kenya has criminalised TF on the basis of the TF Convention. However, there are moderate shortcomings in relation to financing of travel of individuals for purposes of the penetration, planning or

preparation of, or participation in, terrorist acts or training. There is a deficiency regarding the definition of funds as this does not meet the definition required by the Standards. Sanctions for legal persons are not dissuasive.

Kenya is rated Partially Compliant with R.5

Recommendation 6 - Targeted financial sanctions related to terrorism and terrorist financing

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly SR III). The main technical deficiency was that there were no measures in place in Kenya to implement the freezing and confiscation of terrorist funds and assets.

Criterion 6.1 –6.6 (Not met)- Kenya issued POTA Regulations intended to implement TFS in relation to TF. Section 50(4) of the POTA provides that Regulations issued under this Act have to be laid before the National Assembly. However, no evidence was provided to show that the the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013 were laid before the National Assembly. Therefore, assessors concluded that there is no legal basis for Kenya to implement Targeted Financial Sanctions under R.6.

Weighting and Conclusion

POTA Regulations were not issued in accordance with s.50 (4) of POTA. Hence, it is concluded that Kenya does not have legal or regulatory provisions for implementation of TFS related to TF.

Kenya is rated Non-Compliant with R.6.

Recommendation 7 – Targeted financial sanctions related to proliferation

This is a new Recommendation that was not assessed in Kenya's 1st Round MER.

Criterion 7.1 –7.5 (Not Met)-The POTA Regulations, 2013 do have the legal basis for implementation of the requirements of Recommendation 7. The POTA Regulations were issued under s. 50 of the POTA. The Short Title of POTA states the purpose of the Act; “*An Act of Parliament to provide measures for the detection and prevention of terrorist activities; to amend the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act; and for connected purposes*”. It is clear that the POTA was not intended to make provisions for PF. There is no section in the POTA, as primary law, that is dealing with PF. The POTA provisions deal with terrorism and TF. Regulation 3 of the POTA Regulations has attempted to extend the application of the Regulations to UNSCR 1718/2006 dealing with PF. However, the Preamble of the Regulations is instructive as PF is not covered. Further, S. 31 (b) of the Interpretation and General Provisions Act provides that no subsidiary legislation shall be inconsistent with the provisions of an Act under which it was issued. Therefore, the POTA Regulations cannot confer powers to implement proliferation and PF provisions.

In addition, Section 50(4) of POTA provides that Regulations made under the Act shall be laid before the National Assembly. The authorities have not provided documentary proof that these Regulations satisfied that requirement. So, even if POTA had provisions in relation to PF, failure to meet the requirement of Section 50(4) of POTA renders the Regulations legally defective.

Weighting and Conclusion

Kenya does not have legal basis for the implementation of requirements of Recommendation 7. The POTA does not cover PF and therefore the POTA Regulations, 2013 cannot provide for proliferation financing as that power is not available to be exercised under S.50 of the POTA.

Kenya is rated Non-Compliant with R.7.

Recommendation 8 – Non-profit organisations

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly SR VIII). The main technical deficiency was the NPO sector in Kenya was not subject to the requirements of SRVIII. Kenya has not previously been assessed according to the most recent requirements of R.8, as the 1st round MER pre-dates the 2012 and 2016 adoption of changes to Recommendation 8 and its Interpretive Note.

Criterion 8.1 – (Not Met)

- a) **Not Met** – Kenya has not identified the subset of organisations which fall within the FATF definition of NPO. Kenya has not identified NPOs which are likely to be at risk of TF abuse. The NRA, to which the NGO Board made contributions, states the level of risk of TF abuse in the NPOs sector in Kenya is considered low. However, it adds that due to the lack of effective monitoring and supervision by the regulator, the risk factor for the activities conducted by the NPOs in Kenya increased. The overall vulnerability of NPO sector for TF abuse is rated as medium but there is no methodology to show how this risk rating is identified.
- b) **Not Met** – The NPO threat was evaluated by the NRA and the threat for TF abuse was initially identified as low. This was based on a low number of statistics (STR) with no wider analysis or consultations. As stated at 8.1a, this was later rated to medium with no apparent methodology explaining what factors were considered.
- c) **Not Met** – Kenya has not reviewed the adequacy of measures as the subset of NPOs that may be abused for TF with the objective of ensuring proportionate and effective actions are taken to mitigate the risks identified.
- d) **Not Met** – There is no periodical reassessment of the sector.

Criterion 8.2 – (Not met)

- a) **Not met**- Kenya has an uncoordinated supervisory, regulatory and reporting regime for the NPO sector which does not promote accountability, public confidence in the administration and management of NPOs.
- b) **Not Met**- There is no effective outreach to the sector by the NGO Coordination Board on TF related issues which is mostly attributed to lack of resources.
- c) **Not Met**- There is no meaningful and collaborative work with NPOs to develop and to address TF risks and vulnerabilities. The sector has moved to a self-regulatory position.
- d) **Not Met**- No information has been made available to show how Kenya works with NGO to encourage the use of regulated financial channels.

Criterion 8.3 – (Not met) The inadequacy of oversight and supervision by the NGO Coordination Board create limitations for it to take a risk-based approach and apply measures to NPOs at risk of TF abuse. The NGO Board in Kenya is under resourced and understaffed.

Criterion 8.4 – (Not met)

- a) **Not Met** - there is no evidence of any specific risk-based monitoring of compliance by NPOs with the requirements of this Recommendation.
- b) **Not Met** – Kenya has not applied any effective dissuasive or proportionate sanctions for violations by NPOs and or persons acting on their behalf of those NPOs.

Criterion 8.5 – (Not met)

- (a) Kenya has no policies in place to ensure effective co-operation, co-ordination and information sharing amongst appropriate authorities holding relevant information on NPOs. There is no

indication of how the relevant authorities cooperate, coordinate or share information on NPOs, although the NIS provide a vetting Service for new applicants.

- (b) There has not been specific examination of NPOs suspected of either being exploited or actively supporting terrorist activity or terrorist organisation as a subset of NPOs posing such risks have not been identified. Any suspicions on NPOs are pursued as criminal matters and investigated by the relevant law enforcement authority.
- (c) There is no clear mechanism to obtain full access to information on the administration and management of particular NPOs. POCAMLA designates NPOs as reporting institutions, supervised by the FRC whereas the NRA states the NGO Board is responsible for supervision and regulation of the NPOs.
- (d) Where matters are identified relating to this criterion (offences under POTA), they will be reported to, and investigated by the relevant law enforcement authority. Beyond that there are no mechanisms provided enabling such information to be promptly shared with other competent authorities.

Criterion 8.6 – (Partly met)-The Office of the Attorney General is the Central Authority in matters relating to mutual legal assistance to support the response to international MLAs for all crimes. Kenya uses this point of access for enquiries relating to crimes committed by NPOs. No other points of contact and procedures to respond to such requests were shared with the assessors, particularly where information might be required to initiate a formal request for information on the NPO.

Weighting and Conclusion

Kenya has not identified the subset of NPOs at risk of TF abuse. There is lack of effective monitoring. There is no risk-based supervision or monitoring by the regulator and the supervisor. No review of the adequacy of measures, laws and regulations to afford proportionate and effective actions has been done. There is an uncoordinated supervisory, regulatory and reporting regime for NPOs which does not promote accountability, and public confidence in the administration and management of NPO. There are no periodical assessments of the sector. There is general inadequacy of oversight and supervision by the NGO Coordination Board and the FRC. No sanctions have been applied to any NPO for violations, as such, effectiveness, proportionality and dissuasiveness of the sanctions could not be determined. No policies in place to ensure effective co-operation, co-ordination and information-sharing amongst appropriate authorities holding relevant information on NPOs. There is lack of indication on how the relevant authorities cooperate, coordinate or share information on NPOs. No clear mechanism to obtain full access to information on the administration and management of particular NPOs.

Kenya is rated Non-Compliant with R.8.

Recommendation 9 – Financial institution secrecy laws

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.4). The main technical deficiency was the restricted scope of s.17 of the POCMALA affected the ability of financial institutions and other competent authorities, which are subject to a statutory or contractual secrecy or confidential obligation, to access or share information for AML purposes. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 9.1 – (Partly met)- Information may only be disclosed in the circumstances provided in the law. S.17(1) of the POCAMLA overrides any obligation to secrecy or any restriction imposed by any other law or otherwise which entails that financial institution secrecy laws do not inhibit the implementation of AML measures. S. 17(2) of POCAMLA indicates that no liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by

any law, the common law or any agreement, shall arise from a disclosure of any information in compliance with any obligation imposed by this Act. However, although, Kenya's financial institution secrecy laws do not inhibit the implementation of AML measures, POCAMLA provisions do not relate to CFT obligations, hence creating a limitation for S.17 in the implementation of CFT measures.

(a) **Access to information by competent authorities**

Financial sector laws prohibit any person from disclosing or making public information which comes into his possession as a result of the performance of his duties or responsibilities under this Act [S. 31(2) Banking Act]. Business and financial information about any customer may be used or made available to third parties only with prior written consent of the customer or in accordance with the arrangements for the proper interchange of information between institutions about credit risks, or when disclosure is required by law [Clause 4.2.5 (a & b) of CBK Prudential Guideline (on Corporate Governance (CBK/PG/02)]. However, these provisions do not inhibit the implementation of any of the FATF requirements imposed to competent authorities, given the broad waivers it contains (Section 17(1) of the POCAMLA). In addition to this, competent authorities have specific powers under POCAMLA to access information [see analysis under 27, 29 and 31 on powers available to competent authorities, albeit with some limitation]. Although, all competent authorities are able to access information from financial institutions and share information amongst themselves, the financial sector supervisors do not have powers to compel production of documents from FIs and this limits their access to information (see R.27 for details). The financial sectoral laws have provisions in relation to access to information. For instance, Section 33 (1) and (2) of the Microfinance Act empowers the CBK to request for any information from a microfinance bank. The IRA has the power to access information that it requires to properly perform its functions in combating ML or TF. Section 7 of the Insurance Act gives IRA power to call for any information for supervisory purposes. Section 13 (1) of Capital Markets Act gives power to CMA to obtain information from any person by notice in writing to furnish to the Authority, within a specified period as is specified in the notice, all such returns or information as specified in such notice. However, these sectoral laws do not have provisions on AML/CFT requirements and therefore the powers to access the information is for prudential purposes and not AML/CFT requirements. Although S17 of POCAMLA also applies to competent authorities for DNFBPs with the exception of Lawyers, their respective laws give power to officers of the Betting Control Board (or police officer above the rank of Assistant Inspector) and the members of the Institute of Certified Public Accountants to access information they require to perform their functions. However, the performance of functions is limited to their professional duties and not AML/CFT (S.64 of the Betting, Lotteries and Gaming Act Control and Licensing and S. 30 (1) (f) of the Accountants Act).

(b) **Sharing of information between competent authorities**

There is a range of mechanisms which facilitate exchange information between agencies at an operational level (see analysis of R.2). There are no financial institution secrecy laws that inhibit this sharing. S.17 (1) of the POCAMLA overrides any obligation to secrecy or any restriction imposed by any other law or otherwise. Information sharing between competent authorities also occurs at an international level (see also analysis of R.40).

(c) **Sharing of information between financial institution**

The Banking Act (S. 31(4)] restricts sharing of information on customers between each other to credit information that is shared with the credit reference bureaus. However, S.17 (1) of the POCAMLA overrides any obligation to secrecy or any restriction imposed by any other law or otherwise. Since the scope of FIs' obligations under POCAMLA does not extend to CTF preventive measures, s.17 of POCAMLA would consequently be limited to ML.

Weighting and Conclusion

FI secrecy laws do not inhibit implementation of the FATF Recommendations. Competent authorities can access information they require to properly perform their AML functions without the POCAMLA being an obstacle. However, the law does not provide for access to information regarding CFT functions. There is a legal basis for information exchange from FIs to authorities and between competent authorities. However, there is a limitation on the sharing of information between FIs in the Insurance and Securities sector.

Kenya is Partially Compliant with Recommendation 9.**Recommendation 10- Customer Due Diligence**

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.5). The main technical deficiencies were: there were no requirements for financial institutions to undertake CDD measures when there was a suspicion of ML or TF; no require for FIs to obtain the correct permanent address, other contact details, and the occupation of a customer who is a natural person; no requirement for FIs to verify that any person purporting to act on behalf of the legal arrangement is so authorized; legal arrangements were not included in POCMALA; no requirement for FIs to identify the beneficial owner, and take reasonable measures to verify the identity of the beneficial owner; no requirements for FIs to understand the ownership and control structure of a company; no requirement for FIs to determine who are the natural persons that ultimately own or control the customer who is a legal person or legal arrangement; no requirement for FIs to conduct ongoing due diligence on the business relations; no requirement for FIs to conduct enhanced due diligence for higher risk categories of customer, business relationship or transaction; no requirement to verify the identity of the beneficial owner before establishing a business relationship or conducting transactions for occasional customers and no requirement for FIs to consider making a suspicious transaction report where it is unable to identify and verify the identity of a customer.

Criterion 10.1 – (Met) - FIs are not allowed to open or maintain anonymous or fictitious accounts in the course conducting their business [Regulation 11(1) of POCAML Regulations].

Criterion 10.2 (Partly Met) - Reporting institutions are required to undertake CDD measures under the following circumstances:

- a) **(Met)** – when entering into a business relationship [S.45(1) of POCAMLA and Regulation 12(2) and (4)(a) of POCAML Regulations].
- b) **(Met)** – when undertaking a transaction or series of transactions with an applicant (and when undertaking occasional or one-off transactions [Regulation 12 (4) (b) of POCAML Regulation]. Kenya does not apply any thresholds; the obligation applies to all transactions.
- c) **(Partly Met)** – on carrying out occasional transactions that are wire transfers, the law requires verification of originator’s identity [Regulation 12 (4)(b) of POCAML Regulations]. Though Regulation (27)(1) of POCAML Regulations lists the required originator information, the obligation to verify the originator information for accuracy is not contained in law.
- d) **(Partly Met)** – when there is cause to be suspicious [Regulation 12(4) of POCAMLR]. However, the law does not specify that such suspicion should also include TF.
- e) **(Met)** - when there is doubt about the veracity or adequacy of previously obtained “customer identification data”, [POCAML 12 (4) (d)].

Criterion 10.3 – (Partly Met) – The law requires FIs to verify the identity of the applicant using reliable, independent source documents, data or information (S.45 (a) to (c) of POCAMLA). However, it does not require FIs to identify the applicant, nor does it provide for permanent or occasional customers.

Regulation 12 (1) (a) of the POCAML Regulations is deficient in that it presents objectives of CDD rather than actual requirements for FIs to identify the customer and verify a customer's identity.

Criterion 10.4 – (Partly Met) - Where a person is purporting to act on behalf of a customer [POCAML S45 (3)], FIs shall take reasonable measures to establish the true identity (identification) of such a person [POCAML S45 (4)]. There is no obligation for FIs to verify the identity of that person, or verify that the person is so authorised to act on behalf of a customer.

Criterion 10.5 – (Not Met) – FIs are required to establish the true identity of a person on whose behalf or for whose ultimate benefit the applicant is acting, only when the applicant seeks to enter into any transaction [S. 45(4) of POCAML]. There is no legal requirement for FIs to identify and verify the identity of a BO and no obligation for the FI to be satisfied that it knows who the BO is.

Criterion 10.6 – (Met) – FIs are required to understand and, as appropriate, obtain information on the purpose and intended nature of the business relationship [Regulation (12) (1) (c)].

Criterion 10.7 – (Not Met) - FIs are required to conduct ongoing monitoring of the business or account activity and transactions of their customers on a continuous basis, and such monitoring may be conducted on a risk-sensitive basis [Regulation 29 of POCAML Regulations]. However:

- a) **(Not Met)** – there is no requirement to scrutinize transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the financial institution's knowledge of the customer, their business and risk profile, including where necessary, the source of funds.
- b) **((Not Met)** – the laws do not provide for ensuring that documents, data or information collected under the CDD process is kept up-to-date and relevant, by undertaking reviews of existing records, particularly for higher risk categories of customers.

Criterion 10.8 – (Met) – FIs are required to understand the nature of business, ownership and control structure when performing CDD measures in relation to customers that are legal persons or legal arrangements. (Regulation 19(2) of POCAML Regulations).

Criterion 10.9 – (Met) - For customers that are legal persons or legal arrangements, FIs are required to identify the customer and verify its identity [S.45 (1)(b) of POCAML; Regulation 14 (1) (a)-(h) and Regulation 16 (a - i) of POCAML Regulations] through the following information:

- (a) **(Met)** - name, legal form and proof of existence [Reg. 14 (1) (a; c); Reg. 15(1) (a; b; d); and Reg. 16 (a -e)];
- (b) **(Met)** - the powers that regulate and bind the legal person or arrangement, as well as the names of the relevant persons having a senior management position in the legal person or arrangement [Reg. 14(1) (b) and 15(1) (b); (f)]; and
- (c) **(Met)** - the address of the registered office and, if different, a principal place of business [Reg. 14 (1) (b); 15(1) (c); and 16(f)].

Criterion 10.10 (a - c) – (Not Met) – For customers that are legal persons, there are no requirements in law for FIs to identify and take reasonable measures to verify the identity of beneficial owners through the information relating to this criterion and its sub-criteria to (c). The POCAML Regulations require some of the information relating to sub-criterion (a) and (b) when establishing the identity of a legal person or other body corporate [Regulation 14 (1)(d), and partnerships [Regulation 15 (1)(f)], but not for BOs.

Criterion 10.11 – (Not Met) – FIs are required to ensure that they are able to identify (rather than explicitly identify), and take reasonable measures to verify the natural persons behind legal persons and arrangements (Reg. 19 (1) POCAML Regulations) through the following information:

- (a) **(Not Met)** - for trusts, the names (rather than identities) of the trustees, beneficiaries or class of beneficiaries and any individual who has control over the trust **and of the founder of the trust** (Regulations 16 and 19 (3) (f) of POCAML Regulations). The requirement to ensure the identification and verification of any other natural person exercising ultimate effective control over the trust (including through a chain of control or ownership) is not required.
- b) **(N/A)** – there are no legal arrangements other than trusts in Kenya.

Criterion 10.12 – (Mostly Met) - In addition to the CDD measures required for the customer and the beneficial owner, FIs are required to conduct the following CDD measures on the beneficiary of life insurance and other investment related insurance policies, as soon as the beneficiary is identified or designated (Regulation (20)(1) of POCAML Regulations):

- (a) **(Met)** - for a beneficiary that is identified as specifically named natural or legal persons or legal arrangements, taking the name of the person (Regulation (20)(1)(a) of POCAML Regulations);
- (b) **(Met)** – for a beneficiary that is a legal arrangement or designated by characteristics or by category such as spouse or children, at the time that the insured event occurs or by other means such as under a will, obtaining sufficient information concerning the beneficiary to satisfy the financial institution that it will be able to establish the identity of the beneficiary at the time of the pay-out [Regulation (20)(1)(b) of POCAML Regulations].
- (c) **(Not Met)** – No legal provisions are in place for the verification of the identity of the beneficiary to occur at the time of the pay-out for both cases above.

Criterion 10.13 – (Not Met) – There is no explicit requirement to include the beneficiary of a life insurance policy as a relevant risk factor, instead, enhanced due diligence is generally applicable to persons and entities that present a higher risk to the institution [Regulation (18) of POCAML Regulations]. Also not provided for is the determination of risk posed by a beneficiary as a basis for implementing enhanced CDD measures, rather requiring the general application of additional CDD on beneficiary or beneficiaries of life insurance and other investment related insurance policies, as soon as they are identified or designated (Regulation (20)(1) of POCAML Regulations).

Criterion 10.14 – (Partly Met) –The POCAML Regulation 21 requires FIs to verify the identity of the “applicant” (rather than the applicant and the BO) before, during and after the course of establishing a business relationship or conducting transactions for occasional customers

- (a) **(Partly Met)** - as soon as reasonably practicable [Regulation 21 (1) of the POCAML Regulations], although the Regulation refers to the applicant (as defined in reg. 2), which does not extend to the BO.

- (b and c) **(Not Met)** – There are no provisions for situations where it is essential not to interrupt the normal conduct of business, and where the ML/TF risks are effectively managed

Criterion 10.15 – (Not Met) – FIs are not obliged by law to adopt risk management procedures concerning the conditions under which a customer may utilise the business relationship prior to verification.

Criterion 10.16 – (Partly Met) - FIs are required to undertake CDD on existing customers or clients (POCAMLA s. 45 (2)), with no obligation to undertake this on the basis of materiality and risk, or to do so at appropriate times, taking into account whether and when CDD measures have previously been undertaken and the adequacy of data obtained.

Criterion 10.17 – (Partly Met) – While Regulation 18 of the POCAMLR Regulations requires FIs to conduct EDD on persons and entities that present higher risk, the application of enhanced due diligence measures is limited specifically to persons and entities that present a higher risk, thereby failing to provide for any other areas where ML/TF risks are found to be higher.

Criterion 10.18 – (Not Met) – Kenyan laws do not have a provision for the application of simplified CDD measures where lower risks have been identified (see also c.1.8).

Criterion 10.19 – (Met) - Where a FI is unable to comply with relevant CDD measures it is be required:

- (a) **(Met)** - not to open the account, commence business relations or perform the transaction. Where it has commenced business relations it will discontinue any transaction and terminate the business relationship,
- (b) **(Met)**- proceed to file an STR [Regulation 21 (2) (a)-(d) of POCAML Regulations].

Criterion 10.20-(Not Met) – Inasmuch as Regulation 21 of the POCAML Regulations requires FIs to file STRs where CDD is incomplete, it overlooks instances where they reasonably believe that performing the CDD process will tip-off the customer. No provisions are in place permitting FIs not to pursue the CDD process, and rather file an STR.

Weighting and Conclusion

Since the MER of 2011, Kenya has made notable progress in implementing CDD requirements as spelt out by R.10. The key deficiencies relate to BO, including specific CDD measures for legal persons and legal arrangements; and missing obligations for CDD processes relating to STRs and tipping off. There also remains an outstanding deficiency from the MER of 2011 on the need to verify the authority of any person purporting to act on behalf of a customer.

Kenya is rated Partially Compliant with Recommendation 10.

Recommendation 11 – Record-keeping

In its 1st Round MER, Kenya was rated partially compliant with these requirements (formerly R.10). The main technical deficiencies were: no requirement for FIs to maintain records of identification data, account files and business correspondence for at least five years following the termination of an account or business relationship; no requirement for FIs to ensure that all customer and transaction records and information are available on a timely basis to domestic competent authorities upon appropriate authority; no requirement to keep TF related records. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 11.1 – (Partly Met) – All necessary records on all transactions are to be maintained by FIs for a period of seven years from the date the relevant business or transaction was completed [S. 46(4) of POCAMLA and Regulation 36(1) of POCAML Regulations]. The law does not specify that the records should be on both international and domestic transactions and the gap on TF may exclude it from the “necessary” records.

Criterion 11.2 – (Partly Met) – FIs are required to keep all records obtained to establish the identity of a customer for a period of at least seven years following the termination of a business relationship or after the date of an occasional transaction [S.46 (1); (3); and (4) of the POCAMLA]. Under Regulation 36 of the POCAML Regulations, financial institutions are obliged to ensure that they keep all records obtained through customer due diligence measures, account files and business correspondence including the results of any analysis undertaken, for a minimum period of seven years following the termination of an account or business relationship. There being no requirements in place for TF, such records are limited to ML.

Criterion 11.3 – (Met) – According to S. 46 (3)(a)-(f) of the POCAMLA, FIs shall maintain details that are sufficient to permit reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal activity. This includes details regarding the person(s) conducting the transaction, the documentation used to verify their identity, their address, principal activity, account number, the type and amount currency involved, and the reporting institution(s) involved in the transaction.

Criterion 11.4 – (Partly Met) –The law provides for CDD information and transaction records to be made available as and when required to competent authorities on a timely basis (Regulation 36(5) of POCAML Regulations). However, it is not specifically required that this be done upon the appropriate authority.

Weighting and Conclusion

Kenya’s legal provisions to implement R.11 cover some important aspects, but is limited due to notable gaps including the record retention provision that does not specify the domestic and international aspect of transactions; the intervening gap in the law on TF; and Regulations overlooking the need for CDD information and transaction records to be made available upon the appropriate authority.

Recommendation 11 is rated Partially Compliant.

Recommendation 12 – Politically exposed persons

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.6). The main technical deficiency was absence of obligations for financial institutions to identify PEPs or take other such measures as required under the FATF Standards. In 2012, the FATF introduced new requirements for domestic PEPs and PEPs from international organisations.

Kenya defines a Politically Exposed Person as a person entrusted with a prominent public function in a country or jurisdiction (Regulation 22 (3) of POCAML Regulations], however the list of examples (reg. 23 (a) – (i)) does not cover Heads of State in foreign jurisdictions, their family and close associates.

Criterion 12.1 – (Mostly Met) - In relation to foreign PEPs (whose analysis is moderated by exclusion of foreign Heads of State, their families and associates), in addition to performing the CDD measures required under Recommendation 10, FIs are required to:

- a) **(Mostly Met)** - put in place risk management systems to determine whether a customer or the beneficial owner is a PEP [reg.22 (1)];
- b) **(Partly Met)** - obtain senior management approval to transact or establish a business relationship with that person [Reg.22 (2) (a)], with no requirement to do the same in order to continue business relationships with existing customers;
- c) **(Mostly Met)** - take adequate measures to establish the source of wealth and the source of funds [Reg.22 (2) (b)], for funds involved in the proposed business relationship or transaction (however excluding foreign Heads of State, their families and associates); and
- d) **(Mostly Met)** - conduct enhanced ongoing monitoring on that relationship [Reg.22 (2) (f)].

Criterion 12.2 - (Partly Met) - In relation to domestic PEPs or persons who have been entrusted with a prominent function by an international organisation, in addition to performing the CDD measures required under Recommendation 10, FIs are required to:

- a) **(Partly Met)** - take reasonable measures to determine whether a customer or the beneficial owner is such a person (POCAML reg.22 (1)), however this is limited by the significant limitations in requirements relating to BO under R.10, including a missing requirement for an FI to be satisfied that it knows who the BO is; and
- (b - c) (Not Met)** – there is no requirement to adopt the measures in sub-criteria c 12.1 (b) to (d). in cases when there is higher risk business relationship with such a domestic PEP.

Criterion 12.3 – (Partly Met) –Kenya’s definition of PEPs and Regulation 22 (3) (i) of the POCAMLR do not cover family members and close business associates of foreign Heads of State.

Criterion 12.4 - (Not Met) - There are no legal provisions in place for FIs to take reasonable measures in determining whether the beneficiaries and/or, where required, the beneficial owner of the beneficiary, are PEPs in relation to life insurance policies.

Weighting and Conclusion

The legal framework in Kenya fairly incorporates requirements relating to PEPs. However, some notable gaps exist, mostly emanating from the definition of PEPs, which does not recognise foreign Heads of State, their family and close associates. The measures in criterion 12.1 (b) to (d) are not required to be applied in cases when there is higher risk business relationship with beneficial owners who are domestic PEPs or persons who have been entrusted with a prominent function by an international organisation. There are no legal provisions requiring FIs to take reasonable measures to determine whether the beneficiaries and/or, where required, the beneficial owner of the beneficiary, are PEPs in relation to life insurance policies.

Recommendation 12 is rated Partially Compliant.

Recommendation 13 – Correspondent banking

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.7). The main technical deficiency was that there were no specific enforceable obligations on cross-border correspondent banking and other similar relationships. The new FATF Recommendation adds a specific requirement concerning the prohibition of correspondent relationships with shell banks.

Criterion 13.1 – (Partly Met) - In relation to cross-border correspondent banking and other similar relationships,

- (a) - (b) **(Not Met)** – there are no requirements in place regarding these sub-criteria for respondent institutions. The POCAML Regulations instead place the obligations of gathering information and assessing AML controls on correspondent instead of respondent institutions (Regulation 24(1) (a); (b); (d) of POCAMLA Regulations);
- (c) **(Met)** – FIs are required to obtain approval from senior management before establishing a new correspondent banking relationship [Regulation 24(1)];
- (d) **(Not Met)** – Kenya has no legal provisions requiring FIs to clearly understand the respective AML/CFT responsibilities of each institution, that is, the correspondent and the respondent institution. Regulation 28 (2) of the POCAML Regulations stipulates the need for FIs relying on a third party to enter into an agreement with the third party outlining the responsibilities of each party. However, this is specific to third-party reliance and not applicable to correspondent banking relationships.

Criterion 13.2 – (a) and (b) - (Not Met) - The laws do not impose any obligations on FIs with respect to “payable-through accounts”.

Criterion 13.3 – (Partly Met) – FIs are prohibited from entering into, or continuing, correspondent banking relationships with shell banks [Regulation 25 (1) (c) (i) of POCAML Regulations] or a respondent FI that permits its account to be used by a shell bank [reg. 25 (1) (ii)]. However, they are not required to satisfy themselves that respondent FIs do not permit their accounts to be used by shell banks.

Weighting and Conclusion

While FIs are generally obliged to comply with the requirements on correspondent banking, setbacks for Kenya regarding Recommendation 13 arise due to the absence of key obligations relating to respondents, including the need for FIs to assess the respondent institution's AML/CFT controls. In addition, FIs are not required to be satisfied that respondents do not permit their accounts to be used by shell banks. There are also deficiencies with respect to the use of "payable-through accounts". There is no requirement for FIs to clearly understand the respective AML/CFT responsibilities of each institution (correspondent and the respondent).

Recommendation 13 is rated Partially Compliant.

Recommendation 14 – Money or value transfer services

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly SR.VI). The main technical deficiencies were: no licensing or registration requirements for MVT service operators; no AML/CFT compliance monitoring for MVT service operators (except those affiliated to a FI licensed by the Central Bank of Kenya; no requirement for MVT service operators to maintain current list of agents. The FATF introduced new requirements concerning the identification of MVTS providers who are not authorised or registered.

Criterion 14.1 – (Met) – A person (incorporated as a limited liability company under the Companies Act) that offers money or value transfer services as a product or proposing to transact the business of a payment service provider is required to apply to the CBK for authorization before commencing such business so as to ensure that the provider of such services is licensed or registered [Regulation 4(c) of Money Remittance Regulations; Section 13 of the National Payments Systems Act; Regulation 4 and 5 of NPS Regulations; Regulation 26 of POCAML Regulations; Clause 5.12 of CBK's Prudential Guidelines].

Criterion 14.2 – (Not Met) – Kenya has not taken action with a view to identifying natural or legal persons that carry out MVTS without a licence or registration and applying proportionate and dissuasive sanctions to them. The NRA acknowledged informal value transfer services (IVTS) such as hawalas but did not obtain any formal information and statistics on the extent and size of the business. While there are sanctions prescribed in the law [S. 12 (2) of the NPS Act], against any person who carries out MVTS without authorization, the authorities have not demonstrated that any of these actions have resulted in proportionate and dissuasive sanctions being imposed, which is highly irregular given the prevalence of hawala-type activities [refer to Chapter 1 paragraphs 2 and 32 (b)]. Criminal sanctions are applicable against any person who carries out a payment service without a license (a fine not exceeding five hundred thousand shillings and/or imprisonment for up to three years).

Criterion 14.3 - (Partly Met) – The CBK is designated as a supervisory body responsible for the AML supervision of all banks (POCAMLA Schedule 1), including MVTS Providers (POCAMLA s. 2 (d)). However, this does not include supervision in relation to CFT since POCAMLA does not cover TF.

Criterion 14.4 – (Not Met) – There is no requirement in law or regulation for agents of MVTS providers to be licenced and registered by a competent authority, and while MVTS providers are required to maintain a list of their agents accessible by the CBK [Regulation 19(1) and (2) of NPS Regulations], it is not required that the list be current, nor that it be accessible by competent authorities in the countries in which the MVTS provider and its agents operate.

Criterion 14.5 – (Not Met) – MVTS providers that use agents are not obliged to include them in their AML/CFT programmes and monitor them for compliance with such programmes.

Weighting and Conclusion

Kenya has not taken action with a view to identifying natural or legal persons that carry out MVTS without a licence or registration nor imposed any proportionate and dissuasive sanctions. The 2019

NRA points towards prevalence of “informal value transfer services” activity with no formal information nor statistics on the extent and size of the business. Agents of MVTs providers are not required to be licensed/registered by a competent authority and MVTs providers are not required to maintain a current list of agents. In addition, there is no legal framework requiring MVTs providers that use agents, to include them in their AML/CFT programmes and monitor them for compliance with these programmes.

Recommendation 14 is rated Non-Compliant.

Recommendation 15 – New technologies

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.8). The main technical deficiencies were: there are no enforceable requirements for FIs to have policies in place or take such measures as may be needed to prevent the misuse of technological developments in ML or TF schemes; no requirements for FIs to have in place such other measures as are required under Recommendation 8. The new R.15 focuses on assessing risks related to the use of new technologies, in general, and imposes a comprehensive set of requirements in relation to virtual asset service providers (VASPs).

Criterion 15.1 – (Partly Met)– At country-level, the authorities have indicated that the undertaking of a national ML/TF risk assessment in 2020, enabled identification of emerging vulnerabilities linked to new technologies especially payment and on-boarding systems that are non-face-to-face or virtual in nature. While Kenya recognises that these factors are likely to increase the country’s vulnerability in terms of abuse of the financial system for ML activities by both local and transnational criminal networks, assessment of ML/TF risks posed by new technologies (such as mobile lending, digital loans) were not part of the scope of the 2020 ML/TF NRA. The country and almost all FIs could not provide evidence that they assess risks that may arise due to the development of new products and new business practices, including new delivery mechanisms, and the use of new or developing technologies especially in relation to pre-existing products. Most FIs informed assessors that prior to launching a new product or service, they submit a risk assessment to their respective boards, the FRC or CSAs, who issue a letter of no objection if the new technology is approved. The majority of FIs indicated during interviews that no new technologies had yet been declined, however information provided by authorities shows that some new products linked to virtual assets were not authorised. The FIs were not fully conversant with the ML/TF risk factors assessed in relation to new technologies, pointing to a high likelihood that the assessments of risks relating to new technologies are undertaken to fulfil regulatory expectations and prove that consumer rights and interests are protected, rather than for identification and assessment of ML/TF risks.

Criterion 15.2 – (Partly Met) - Financial institutions are:

- (a) **(Partly Met)** – obliged to undertake risk assessments (limited to ML) prior to the launch or use of such products, practices and technologies [POCAML R reg.7 (2) (a)]; and
- (b) **(Not Met)** - not obliged to manage and mitigate the risks.

Criteria 15.3 – 15.10 (Not Met) - While the term "property" as defined in POCAMLA No. 9 is sufficiently adequate to cater for VAs, there are no measures that have been taken, or laws in place to address requirements relating to VAs and activities of VASPs.

Criterion 15.11 – (Partly Met)- The authorities should be able to provide international cooperation through MLA and extradition avenues. However, deficiencies identified under Recommendations 37-39 would also apply here. On the other hand, Kenya does not have a legal basis to provide other forms of cooperation because VASPs are not licensed or regulated by any supervisory authority. In addition,

since VASPs are not designated as reporting entities, the FIU does not have a legal basis to obtain and exchange information with its counterparts in relation to VASPs activities.

Weighting and Conclusion

While Kenya in its 2020 ML/TF NRA report noted that non-face-to-face and third-party risks are on the rise due to new business practices, the assessment of these risks was not part of the scope of the NRA. The country and almost all FIs could not provide evidence that they assess risks that may arise due to the development of new products and new business practices, including new delivery mechanisms, and the use of new or developing technologies in relation to new and pre-existing products. Although Kenya is now ranked as a leading adopter of crypto currency (refer to paragraph 27), there is no legal and institutional framework in Kenya relating to VAs and activities of VASPs. and no measures have been undertaken to address requirements relating to VAs and activities of VASPs.

Recommendation 15 is rated Non-Compliant.

Recommendation 16 – Wire transfers

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly SR.VII). The main technical deficiency was that wire transfer transactions conducted by FIs were not subject to the requirements set out in SR.VII. Significant changes were made to the requirements in this area during the revision of the FATF Standards in 2012.

Criterion 16.1 – (Partly Met) – While POCAMLA Regulations do not require originator information to be accurate [this affecting sub-criteria (a) (i) – (a) (iii)], FIs undertaking a wire transfer (Kenya does not apply any thresholds for cross-border wire transfers), are required to ensure that information accompanying domestic or cross-border wire transfers always have the following information:

- (a) Required originator information:
 - (i) **(Partly Met)** - the name of the originator (Reg. 27 (1) (a));
 - (ii) **(Partly Met)** - the originator account number where such an account is used to process the transaction or, in the absence of an account, a unique transaction reference number which permits traceability of the transaction (Reg. 27 (1) (b and f)); and
 - (iii) **(Partly Met)** - the originator’s address, or national identity number, or customer identification number, or date and place of birth (Reg. 27 (1) (c)).

- (b) Required beneficiary information:
 - (i) **(Met)** - the name of the beneficiary (Reg. 27 (1) (d)); and
 - (ii) **(Met)** - the beneficiary account number where such an account is used to process the transaction or, in the absence of an account, a unique transaction reference number which permits traceability of the transaction (Reg. 27 (1) (e-f)).

Criterion 16.2 – (Not Met) – There are no provisions for instances where cross-border wire transfers are batched.

Criterion 16.3 and 16.4 - (N/A) – Kenya does not apply a de minimis threshold for the requirements of criterion 16.1. Regulation 27 of POCAML Regulations requires FIs to ensure that all cross-border wire transfers, regardless of amount, are “always” accompanied by the required information.

Criterion 16.5 – (Mostly Met) – The requirements for domestic wire transfers are equivalent to those for cross-border wire transfers regarding inclusion originator information, however there is no obligation for such information to be verified for accuracy [reg. 27 (1) and 27 (4)].

Criterion 16.6 – (N/A)– Instances where the information accompanying the domestic wire transfer can be made available to the beneficiary FI and appropriate authorities by other means do not apply in Kenya.

Criterion 16.7 – (Met)–By interpretation, ordering FIs are FIs (POCAMLA Part I s.2 “Interpretations”) and thereby required to maintain all originator and beneficiary information collected, in accordance with Recommendation 11 (Regulation.36 (1) – (5) of POCAML Regulations]. The guide on information to be collected (S.46 of POCAMLA and Regulation 36(2) of POCAML Regulations & POCAMLA s.46) is broad enough to incorporate originator information as specified by c. 16.1(a) (iii).

Criterion 16.8 – (Met) – Regulation 27.1 of POCAMLA Regulations provides a mandatory requirement for ordering FIs to comply with requirements of c.16.1-16.7.

Criterion 16.9 – (Not Met) – There is no obligation for an intermediary FI to ensure that all originator and beneficiary information that accompanies a wire transfer is retained with it (Reg. 27 (2) of POCAML Regulations).

Criterion 16.10 – (Partly Met) - The intermediary FI is required to keep records of all transactions for a period of at least seven years from the date the relevant business or transaction was completed or following the termination of an account or business relationship. The provisions do not consider instances where technical limitations prevent the required originator or beneficiary information accompanying a cross-border wire transfer from remaining with a related domestic wire transfer.

Criterion 16.11 – (Met) - Intermediary FI undertaking a wire transfer are required to ensure that information accompanying domestic or cross-border wire transfers always have the originator and beneficiary information (Reg 27 (1) (a – f of POCAML Regulations).

Criterion 16.12 - (Not Met) - There are no laws in place to consider the information within this criterion. Intermediary FIs are not required to have risk-based policies and procedures for determining: (a) when to execute, reject, or suspend a wire transfer lacking required originator or required beneficiary information; and (b) the appropriate follow-up action. The general requirement to carry out risk assessment and develop Board approved policies and procedures is too broad to cover the requirement of this criterion.

Criterion 16.13 - (Met) –Beneficiary FIs are required to take reasonable measures, which may include post-event monitoring or real-time monitoring where feasible, to identify cross-border wire transfers that lack required originator information or required beneficiary information. As discussed under c.16.1, FIs (which includes Beneficiary FIs) are required to ensure that wire transfers are accompanied by the required originator and beneficiary information (Regulation 27 of POCAML Regulations). Through this process, beneficiary FIs are able to identify cross-border wire transfers which lack required originator information or required beneficiary information.

Criterion 16.14 – (Not Met) – There are no provisions in law to consider the information in this criterion. Regulation 12 (2) of the POCAMLAR requires financial institutions to take measures to satisfy themselves as to the true identity of the applicant and not the beneficiary as detailed by this criterion.

Criterion 16.15 – (a – b) – (Partly Met) – Beneficiary financial institutions being financial institutions are required to have risk-based policies and procedures in place (Reg 6 & 9 of POCAML Regulations). However, there is no requirement that such policies or procedures determine: (a) when to execute, reject, or suspend a wire transfer lacking required originator or required beneficiary information; and (b) the appropriate follow-up action.

Criterion 16.16 – (Not Met) – The provisions of POCAML Regulations are applicable to FIs carrying out wire transfers including the MVTs providers as referred to under c.14.1. MVTs providers fall

within the definition of FIs. Hence, they are subject to all relevant POCAML Regulations as addressed under cc. 16.1 – 16.15. However, it was not established that these FIs are required to apply these requirements in whatever country they operate, directly or through their agents.

Criterion 16.17 - (Not Met) – There is no regulatory requirement for MVTs provider which controls both the ordering and the beneficiary side of a wire transfer to take into account the information in c16.17 (a) and (b).

Criterion 16.18 – (Not Met) - Regulations 27 (2) and (3) of POCAML Regulations provide that wire transfers to and from persons or entities that are designated under the United Nations Security Council Resolution 1267 (1999) and other United Nations resolutions relating to the prevention of terrorism and TF are prohibited and FIs are required to take freezing action (Regulation 12(1) of POTA). However, POCAML under which the POCAML Regulations were issued do not have jurisdiction over implementation of UNSCRs and POTA Regulations were not issued in accordance with the requirements of S.50(4) of POTA.

Weighting and Conclusion

The legal framework in Kenya is still to fully implement requirements of R.16, with most of the laws either missing or not yet incorporating key elements. Missing laws relate to: (a) A requirement for originator information to be verified and accurate; (b) Instances where cross-border wire transfers are batched; (c) Prohibiting ordering FIs from executing the wire transfer if it does not comply with the requirements specified in c.16.1-16.7; (d) Intermediary FIs responsibility to ensure that for cross-border wire transfers, all originator and beneficiary information that accompanies a wire transfer is retained with it; (e) Provisions for beneficiary FIs to have risk-based policies and procedures in place determining when to execute, reject, or suspend a wire transfer lacking required originator or required beneficiary information; and the appropriate follow-up action and (f) Obligations for MVTs providers with regard to c. and 16.17.

Kenya is rated Non-Compliant with Recommendation 16.

Recommendation 17 – Reliance on third parties

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.9). The main technical deficiency was that there was no requirement for reporting persons relying upon a third party to immediately obtain from the third party the necessary information concerning certain elements of the CDD process and to follow the other requirements under Recommendation 9.

Criterion 17.1 – (Partly Met) - FIs may rely on a third party to perform elements of customer due diligence measures (Regulation 28 of POCAML Regulations) upon the following requirements:

- (a) **(Partly Met)** - obtain immediately the necessary information concerning elements (a)-(c) of the CDD measures set out in R. 10 (Reg.28 (1); (4); (8)). The limitations in applicable law on the scope of CDD as highlighted in c.10.2 (a – c) are also applicable for this criterion.
- (b) **(Met)** - take steps to satisfy itself that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay (Reg.28 (5));
- (c) **(Partly Met)** - satisfy itself that the third party is regulated, and supervised or monitored for, and has measures in place for compliance with, CDD and record-keeping requirements in line with international best practice (Reg.28 (6)). The term “international best practice” is too broad in relation to this criterion, which is specific to elements in R. 10 and 11.

Criterion 17.2 – (Mostly Met) – Where a FI intends to rely on a third party that is based in another country, the institution is required to assess risks (limited to ML) that the country poses and the adequacy of CDD measures adopted by FIs in that country. (Reg 28(7) of POCAML Regulations).

Criterion 17.3 (Not Met) – There are no legal provisions requiring FIs relying on a third-party which is part of the same group to consider that the requirements of the criteria 17.1 and 17.2 are met in the following circumstances:

- (a) **(Not Met)** - for the group to apply CDD and record-keeping requirements, in line with R. 10 to 12, and programmes against money laundering and terrorist financing, in accordance with R.18;
- (b) **(Not Met)** - to ensure that implementation of those CDD and record-keeping requirements and AML/CFT programmes is supervised at a group level by a competent authority; and
- (c) **(Not Met)** - to ensure that higher country risk is adequately mitigated by the group's AML/CFT policies.

Weighting and Conclusion

The Kenyan financial sector is heavily intermediated with a lot of NBFIs being on-boarded through third parties (especially in insurance, capital markets, mobile money, and remittance sectors). Third-party reliance is provided for only to some extent by Kenyan laws with some notable gaps regarding FIs that rely on a third party that is part of the same financial group. The limitations in applicable law on TF and the scope of CDD as highlighted in c.10.2 (a – c) are also applied in assessing Recommendation 17.

Recommendation 17 is rated Partially Compliant.

Recommendation 18 – Internal controls and foreign branches and subsidiaries

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R. 15 and R.22). The main technical deficiencies were: no requirement for FIs to establish procedures, policies and controls covering customer due diligence, the detection of unusual and suspicious transactions and record retention; no requirement for compliance arrangements except for institutions licensed under the Banking Act; no requirement for FIs to communicate their AML/CFT procedures, policies and controls to their employees; no requirement for the compliance officer or other appropriate staff to have timely access to customer identification data and other customer due diligence information, transaction records and other relevant information; no requirement to have independent and adequately resourced internal audit function except for institutions under the Banking Act; no requirement to put in place screening procedures to ensure high standards when hiring employees; no requirements for FIs to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with home country requirements. R.18 introduced some new requirements for implementing independent audit functions for internal supervision and AML/CFT programmes for financial groups.

Criterion 18.1 – (Partly Met) – FIs are required to formulate, adopt and implement internal control measures and other procedures to combat ML (Reg 9(1) of POCAML Regulations). However, they are not required to have regard to ML/TF risks and the size of the business. In addition, the scope of this requirement does not extend to TF, this being factored into the analysis of criteria under Rec. 18.

- (a) **(Mostly Met)** – The Regulations provide for the responsibility of the management of the FI in respect of compliance with the applicable AML laws (including the appointment of a compliance officer at the management level) (Regulations 9 (1) (i) and 10 (1 – 2) of POCAML Regulations);
- (b) **(Not Met)** – while MLROs in liaison with the human resource departments are required to screen prospective employees (Regulation 10 (6) (e) of POCAML Regulations) there is no obligation that screening procedures be in place to ensure high standards when hiring employees.

- c) **(Partly Met)** – there is no requirement in place for ongoing training of employees on an ongoing basis. The POCAML Regulations require training from time to time, only on recognition and handling of suspicious transactions (Regulation 9 (1) (e)).
- (d) **(Partly Met)** – There is a requirement for an independent audit function to test the system (Regulation 37 of POCAML Regulations), however, it would be limited to ML.

Criterion 18.2 (Not Met) – The law in place is specific to implementation of AML measures consistent with POCAMLA and POCAML Regulations by foreign branches and subsidiaries and does not incorporate requirements:

- (a) **(Not Met)** - for the FIs to ensure that the financial group has policies and procedures for sharing information required for purposes of CDD and ML/TF risk management;
- (b) **(Not Met)** - to have measures, at group-level compliance, audit, and/or AML/CFT function, which will facilitate the provision of customer, account, and transaction information from branches and subsidiaries when necessary for AML/CFT purposes, analysis of transactions or activities which appear unusual and risk management related information to branches and subsidiaries, and
- (c) **(Not Met)** - for financial groups to have measures to ensure existence of adequate safeguards on the confidentiality and use of information exchanged, including safeguards to prevent tipping-off.

Criterion 18.3 – (Partly Met) – FIs are required to ensure that their foreign branches and subsidiaries observe AML measures consistent with the Kenyan laws, and where the minimum requirements of the host country are less strict than those applicable in Kenya, a FI shall ensure that its branches and subsidiaries apply the requirements of the Kenyan laws to the extent that the laws of the host country permit (Reg 23 (1) – (3) of POCAML Regulations). However, where the host country does not permit the proper implementation of AML/CFT measures, FIs are not required to apply appropriate additional measures to handle the additional ML/TF risks [Regulation 23 of POCAML Regulations].

Weighting and Conclusion

Provisions relating to internal controls, foreign branches and subsidiaries obligations are fairly incorporated into Kenyan laws. Major exceptions are the obligations to implement screening procedures to ensure high standards when hiring employees, and those for implementation group-wide programmes against ML/TF by financial groups, which should be applicable, and appropriate to, all branches and majority-owned subsidiaries.

Recommendation 18 is rated Partially Compliant.

Recommendation 19 – Higher-risk countries

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R.21). The main technical deficiency was that Kenya had not implemented the requirements under Recommendation 21. R.19 has strengthened the requirements to be met by countries and FIs in respect to higher-risk countries.

Criterion 19.1 – (Met) - FIs are required to apply enhanced CDD on business relationships and transactions with any natural and legal persons, legal arrangements or FIs originating from countries identified as posing higher risk of ML, TF or proliferation by the FATF (POCAMLA s.45A (1) (a)). In addition to enhanced CDD measures, a FI shall apply appropriate countermeasures, proportionate to the risk presented by countries (s. 45A (2)).

Criterion 19.2 – (Partly Met) – In addition to enhanced CDD measures, FIs are required to apply appropriate countermeasures, proportionate to the risk presented by countries subject to (a) a FATF public statement or (b) as advised by the Cabinet Secretary (POCAMLA s. 45 A (2)). However,

applying measures based on a FATF public statement is not equivalent to applying such measures when called upon to do so by the FATF.

Criterion 19.3 – (Not Met) – There are no measures put in place by Kenya to advise FIs on weaknesses in the AML/CFT systems of other countries.

Weighting and Conclusion

While some mechanisms relating to higher-risk countries have been put in place, other requirements such as the need to apply countermeasures proportionate to the risks when called upon to do so by the FATF, and measures to ensure that FIs are advised of concerns about weaknesses in the AML/CFT systems of other countries, have not yet been incorporated in Kenyan law.

Recommendation 19 is rated Partially Compliant.

Recommendation 20 – Reporting of suspicious transactions

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R13 & SR.IV). The main technical deficiencies were that: the reporting regime was undermined as some of the designated categories of predicate offences were not criminalised in Kenya and there was no legal obligation for reporting entities to file STRs related to TF. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 20.1 – (Not Met)- If a financial institution becomes aware of suspicious activities or transactions which indicate possible ML (TF not included), it is required to report to the Financial Reporting Centre (FRC) “immediately and in any event within seven days of the date of the transaction or occurrence of the activity that is considered suspicious” (S.44 (2) and (3) of POCAMLA and Regulation 32(1) of POCAMLA Regulations). Reference to date of transaction or activity as a baseline (rather than the date on which suspicion is formed), and lack of clarity on whether the requirement stipulates seven (7) calendar days or business days raises ambiguities that undermine the need to report “promptly”. The term “money laundering” as defined in the POCAMLA Part II sections (3); (4) and (7) is broad enough to cover all criminal acts that would constitute a predicate offence for ML in the country. Furthermore, s.42(3) of POTA requires every FI to submit to the FRC, information in relation to a transaction carried out which it has reasonable grounds to believe is intended to facilitate the commission of a terrorist act. This section restricts the scope of activities to a terrorist act- and not including all TF elements such as providing funds or other assets to a terrorist or terrorist organisation.

Criterion 20.2 – (Partly Met) – FIs are required to report all suspicious transactions, including attempted transactions. (S.44 (1)-(3) of POCAMLA). However, this is limited to ML.

Weighting and Conclusion

Reporting entities are required to file STRs in relation to ML. However, the obligation to submit STRs on TF is limited in scope as it is restricted to a terrorist act only. There are also ambiguities in the law that casts doubt as to whether Kenya meets the need to report suspicious transactions “promptly”. The deficiency in relation to TF related obligation has been given significant weight considering the TF risk profile of the country.

Kenya is rated Non-Compliant with Recommendation 20.

Recommendation 21 – Tipping-off and confidentiality

In its 1st Round MER, Kenya was rated partially compliant with these requirements (formerly R14). The main technical deficiency was that the tipping-off prohibition provision under the POCAMLA did not meet the requirements under the Standards. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 21.1 – (Partly Met)

S. 19 of the POCAMLA provides immunity to the FIs, government entity, or any officer, partner or employee from criminal and civil liability when reporting suspicions in good faith to the FIU. Whilst the POCAMLA does not specifically state protection for directors, the provision is wide enough to protect any person that makes an STRs to the FRC irrespective of whether or not the offence occurred. However, this protection is also in relation to ML.

Criterion 21.2 – (Partly Met)

FIs and their directors, officers and employees are prohibited from disclosing the fact that an STR related to ML is being filed with the FRC [S. 8(1) of the POCAMLA]. The section prohibits any person and this is considered to include both natural and legal persons as per the definition of the word 'person' in POCAMLA. It is an offence to make such disclosure.

Weighting and Conclusion

Kenya has met the requirements of this Recommendation as they relate to ML but not for TF suspicious transactions reports.

Kenya is rated Partially Compliant with Recommendation 21.**Recommendation 22 – DNFBPs: Customer due diligence**

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R12). The main technical deficiencies were: Lawyers, notaries and other independent legal professionals and Trust and Company Service Providers were not subject to the AML obligations under the POCAMLA. The AML legal framework for DNFBPs suffered from the same deficiencies applicable to FIs as set out under former R.5. There was no effective compliance with AML obligations in the DNFBP sector. Non-criminalisation of TF affected implementation of preventative measures to combat TF. Reporting obligations of the accountants under the POCAMLA did not apply when organising contributions for the creation, operation or management of legal arrangements.

Criterion 22.1 – (Partly Met)

All DNFBPs, with the exception of lawyers, are required to comply with the CDD requirements outlined in R. 10 in the following situations:

- (a) **casinos (including internet casinos)-** Casinos are designated as DNFBPs as provided by section 2 of the POCAMLA. The POCAML Regulation 12 requires casinos to comply with the CDD measures. While Kenya has no specific requirement for casinos to conduct CDD when customers engaging in financial transactions above USD/EUR 3000 as required by the FATF Standard, Section 45 of the POCAMLA places an obligation on all reporting entities to comply with CDD measures. This entails that casinos are required to undertake CDD on every transaction, regardless of the amount.
- (b) **real estate agencies-** DNFBPs, including real estate agents, are defined as reporting institutions under Section 2 of POCAMLA. POCAMLA Regulation 12 requires real estate agents to comply with the CDD measures.
- (c) **dealers in precious metals and precious stones:-** Dealers in precious metals and precious stones are designated as DNFBPs as provided by section 2 of the POCAMLA Section 45 of the POCAMLA places an obligation on all reporting entities to comply with CDD measures ,

this entails that dealers in precious metals and precious stones are required to undertake CDD on every transaction.

- (d) **Lawyers, notaries, & other legal professionals and accountants who are sole practitioners-** Lawyers currently are not designated as reporting persons under POCAMLA and therefore not subject to CDD requirements. Accountants are designated as DNFBPs as provided by S.2 of the POCAMLA. Further, S. 48 (a) of the POCAMLA places an obligation on accountants to comply with CDD requirements as set in S.45 when they prepare for or carry out transactions for their clients in the situations outlined in c.22.1 (d):
- (e) **Trust and company service providers** (Trustees Act No. 167 of 2012); Trust and company Service Providers (TCSPs) are designated as DNFBPs as provided by section 2 of the POCAMLA. S. 48 (a) of the POCAMLA places an obligation on TCSPs to comply with CDD requirements as set in S.45 when they provide services to third parties in the circumstances as required in R.22.1(e). The POCAML Regulation 12 requires TCSPs to comply with the CDD measures.

The deficiencies identified under R.10 also apply to DNFBPs (see detailed analysis of R.10).

Criterion 22.2 – Partly Met-The provisions of the POCAMLA under S.46 on record keeping apply to DNFBPs as reporting institutions. Although, the law mandates reporting institutions to establish and maintain customer records, lawyers are not subject to these requirements. Further, Regulation 36 of POCAML Regulations requires reporting institutions to maintain and keep records of all transactions (see R.11-Record keeping, for a full analysis) as the provisions of the POCAMLA on record keeping applies to DNFBPs.

Criterion 22.3 – (Partly Met)

The POCAMLA Regulation 22 provides for DNFBPs to have appropriate risk management systems to determine whether a customer or beneficial owner is a politically exposed person. However, the Regulations do not apply to lawyers who are not designated as DNFBPs. See R.12 (PEPs) for a full analysis of Regulation POCAMLA Regulation 22 in respect of PEPs obligations which also extend to DNFBPs.

Criterion 22.4 – (Partly Met)

DNFBPs are required to comply with the new technologies requirements as provided for under R.15. The provisions outlined in Reg 7 (2) (a) and (b) of POCAML requires reporting institutions with the exception of Lawyers to conduct a ML risk assessment in relation to a new business practice or new technology, including new or developing technologies for both new and pre-existing products for both new and pre-existing products. The legal requirements only provide for risk assessment of ML and not for TF risk assessment.

Criterion 22.5 – (Partly met)

DNFBPs are required to comply with the requirements on third-parties' reliance as mentioned under R.17. Reg 28 of POCAML allows reliance on third parties, this provision also applies to DNFBPs with the exception of lawyers who are not subject to the provisions. See R.17 (Reliance on Third Parties) for full analysis as the requirements set out in POCAML Regulations equally also extend to DNFBPs.

Weighting and Conclusion

There are no provisions in law which require lawyers, notaries or other independent legal professionals to comply with the requirements set out in R.10, R11, R12, R15 and R17.

Kenya is rated Non-Compliant with requirements of Recommendation 22.

Recommendation 23 – DNFBPs: Other measures

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R16). The main technical deficiencies were: Lawyers, notaries and other independent legal professionals and Trust and Company Service Providers were not subject to the AML obligations under the POCAMLA. The AML legal framework for DNFBPs suffered from the same deficiencies applicable to FIs as set out under former R.5. There was no effective compliance with AML obligations in the DNFBP sector. Non-criminalisation of TF affected implementation of preventative measures to combat TF.

Criterion 23.1 – (Not Met)- The requirements to file STRs as set out in R.20 are also applicable to all DNFBPs.

- (a) **Lawyers, notaries, other independent legal professionals and accountants:** - Although lawyers, notaries and other independent legal professionals are not subject to the AML/CFT obligations under the POCAMLA, all other DNFBPs must comply with the reporting requirements of R.20. The reporting obligations with respect to suspicious transactions are set out in S. 44 of POCAMLA and Regulation 32 of POCAML. However, the laws and enforceable means highlighted do not include TF measures. See R.20 (Suspicious Transaction Reporting) for a detailed analysis of these requirements.
- (b) **Dealers in precious metals or stones** Dealers in precious metals and stones are classified as reporting institutions under the definition of DNFBPs in POCAMLA and are required to file suspicious transaction and activity reports as per S. 44 of POCAMLA and Reg 32 of POCAML Regulations.
- (c) **Trust and company service providers** - TCSPs are required to file suspicious transaction and activity reports as per S. 44 of POCAMLA and Reg 22 of POCAML.

Criterion 23.2 – (Partly Met)

All DNFBPs, with the exception of lawyers are required to comply with the internal controls requirements as outlined in R.18 above. See the analysis done on R.18 in respect of FIs (internal controls). The deficiencies highlighted there equally apply to DNFBPs.

Criterion 23.3 – (Partly Met)

All DNFBPs, except lawyers, are required to comply with the same higher-risk countries requirements as FIs under S.45A POCAMLA as read together with Regulation 9 of POCAML Regulation as mentioned under R.19. The deficiencies highlighted under R19.1 also apply to DNFBPs.

Criterion 23.4 – (Partly Met)

DNFBPs are required to comply with the same tipping-off and confidentiality requirements as FIs as set out in R.21. However, the provision does not apply to lawyers, notaries and other independent legal professionals who are not subject to AML/CFT requirements. See the analysis under R.21 (tipping off and confidentiality).

Weighting and Conclusion

Reporting requirements of suspicious transactions by DNFBPs with the exception of lawyers to a large extent are covered by the legal framework. However, DNFBPs are under no obligation to report suspicions in relation to TF. The legal requirements to comply with the internal controls as set out in R18, have been well covered with noted exceptions. In Kenya, the obligation to file STRs and provisions relating to tipping off and legal immunity also applies to DNFBPs, but with deficiencies arising from limited scope of TF related reports. There are also significant deficiencies noted under c.22.1, R 18 and R.19.

Kenya is rated Non-Compliant with of Recommendation 23.

Recommendation 24 – Transparency and beneficial ownership of legal persons

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R33). The main technical deficiencies were: There were limited measures in place to ensure adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities; timely access to information was undermined by the use of the manual system for keeping company records. The use of nominee shareholders and corporate directors obscured beneficial ownership and control information; the information kept by the company registry was not verified and as such not necessarily accurate and up to date; no requirement to obtain and maintain beneficial ownership information and although the use of share warrants was reportedly rare in Kenya, no specific measures were in place to ensure that the share warrants were not misused for ML & TF purposes.

Criterion 24.1 – (Met)

The mechanisms that identify the different types, forms and basic features of legal persons in Kenya are the Companies Act for limited companies (ss. 6 - 10) and the Limited Liability Partnerships Act for limited liability partnerships (s. 6) (also see Legal persons and arrangements in the Executive Summary). Information on the process of creating of companies (including incorporation of a foreign company) is provided in ss. 11 – 19 of the Companies Act and for creation of LLPs in ss. 16 – 23 of the LLP Act. The processes for obtaining and recording of basic information are provided in the Companies Act (ss.12 - 14, 93 – 95) and the LLP Act (ss. 17, 33). Further, information on these processes is available on the following websites:

<https://brs.go.ke/assets/downloads/PN-01-Incorporation-of-Companies.pdf>
and <https://brs.go.ke/foreign-company-registration.php>

Information on the process of obtaining and recording of BO information is provided through a guide which is accessible through a website: <https://brs.go.ke/> This can be downloaded from the public notice: https://brs.go.ke/assets/downloads/Beneficial_Ownership_eRegister_Manual.pdf Through providing the above information at the Companies Registry and through the cited websites, Kenya has made the information publicly available.

Kenya has not demonstrated that it has assessed the ML/TF risks associated with the types of legal persons created in the country. Although Authorities stated that the NRA established the ML risk posed by companies as medium and LLPs as low, the NRA Report itself did not have a comprehensive section assessing the ML/TF risk posed by particular legal persons to support the findings. Cases, records and information received showed abundant use of companies for purposes of corruption, fraud and tax evasion, which are three of the most proceeds generating predicate offences, but not LLPs. Therefore, the risk associated with companies may well be higher than medium and that for LLPs low, but this can only be ascertained if a dedicated assessment is undertaken.

Criterion 24.3 – (Met)- Kenya requires all companies created in the country to be registered at the Companies' Registry, which records the company name; list of members; basic regulating powers; legal form and status, address of the registered office (s. 13(2) of the Companies Act); a list of directors (s. 16(2) of the Companies Act), and a certificate of incorporation is issued as proof of incorporation (s. 18(10) of the Companies Act). This information is publicly available, as any member of the public has the right to inspect the register (S.852 of the Companies Act), and, if they desire, apply for copies of the records in the Register or the Foreign Companies Register in hard or soft copy, which are provided upon payment of a fee prescribed in the Regulations – if any (S. 853 of the Companies Register).

Criterion 24.4 – (Mostly Met)- Kenya has not demonstrated that it requires companies to maintain the information listed under Criterion 24.3. However, under S. 93 of the Companies Act, it does require companies to maintain a register of their members or shareholders, which register must state the number and category of shares held by each member or shareholder, and the amount. In addition, under S. 1006, the company records are to be maintained in hard copy or electronically to ensure that they are

accessible in future; and S. 1007 states that the records must be kept at the company's registered office in Kenya and should be available for inspection, but these are not adequate as the list excludes required records such as the name, proof of incorporation (certificate), form, status and address or place of business.

Criterion 24.5 – (Met)- Kenya has a mechanism to ensure that information referred to in Criteria 24.3 and 24.4 is accurate and updated on a regular basis using an ePlatform feature called LINK A BUSINESS; requiring companies to file annual returns (Ss. 705 & 706 of the Companies Act, 2015). Failure to file annual returns within the prescribed time attracts sanctions in form of a fine of Ksh 500,000 (USD 5,000) for the company and each director that is in default. A company is required to communicate any changes to the membership to the Registrar (S. 93 (9)) within 14 days or face sanctions (S. 93 (10) – fine of up to Ksh 500,000 equivalent to approximately USD 5,000; and a further daily fine of Ksh 50,000 (USD 500) for every day the company continues to be in violation, applicable to both the defaulting officers of the company and the company itself). Link a business also applies to LLPs. Further, any change in the LLP must be reported to the Registrar as per Section 33 of the LLP Act.

Criterion 24.6 – (Met)

- a) Under Ss. 93 and 93A of the Companies Act, and Regulations 6 – 16 of the Companies (Beneficial Ownership) Regulations, 2020, Kenya require companies to obtain, hold and keep updated information of their beneficial owners; and file a copy of the BO register with the Registrar not more than 30 days after its preparation. Any changes must be brought to the attention of the Registrar within 14 days of such changes. The duty to obtain and maintain BO information is on the company.
- b) Kenya mandatorily requires companies to take all reasonable steps to obtain and hold up to date information on the companies' beneficial owners (see S. 93A of the Companies Act, 2015; and Reg. 3 (3) of the Companies (Beneficial Owners) Regulations 2020.
- c) Competent authorities in Kenya have the power to access and can use existing information (*including FIs and DNFBPs records; information held by other competent authorities; information held by the company or that held by listed companies, where disclosure is required*) as set out under c. 31(1) (a).

Criterion 24.7 – (Partly Met)- Under S. 93A of the Companies Act, Kenya requires companies to obtain and keep beneficial ownership information and file it with the Registry within 30 days. Any changes to this information must be communicated to the Registrar within 14 days. Failure to comply with the two requirements results in fines of up to Ksh 500,000 (USD 5,000) for the company and its officers in default. This ensures that BO information is as up to date as possible. Reporting entities in Kenya are required to obtain BO information when conducting CDD (see Reg. 12 (1) (b) and Reg. 19 (1), (2), (3) and (4) of the POCMLA Regulations, but these provisions do not require the reporting entities to keep such information updated.

Criterion 24.8 – (Partly Met)

- a) **Partly Met**- Kenya has not demonstrated that it has a requirement for local companies that at least one person, resident in the country be authorized by the company, and be accountable to competent authorities, for providing all basic and available information on BO, and/or any further assistance. The Section 129 cited requires at least one director of a company to be a natural person, but there is no requirement that such director is resident in Kenya. For foreign companies registering in Kenya, S. 979 of the Companies Act, 2015, requires foreign companies to appoint a local representative, resident in Kenya.
- b) **Not Met**- Kenya has no provisions requiring a DNFBP in Kenya to be authorised by the company, and accountable to competent authorities, for providing all basic information and available beneficial ownership information, and giving further assistance to the authorities. The provision cited (S. 9(b) (ii) of the TPA relates to the duty of a company to report any changes in

shareholding above 10% of the share capital, within 14 days or face sanctions. It does not authorize a DNFBP to disclose or assist competent authorities with BO information.

- c) **Not Met**- No other comparable measures have been identified by the authorities.

Criterion 24.9 – (Not Met)-Kenya has not demonstrated that all the persons, authorities and entities mentioned above (authorized representatives/Directors; company; FI/DNFBP; competent authority) are required to maintain information and records referred to for at least five years after the date on which the company is dissolved or otherwise ceases to exist, or five years after the date on which the company ceases to be a customer of the professional intermediary or the financial institution. The time period for the Registrar to keep information is less than the minimum prescribed. Kenya should also demonstrate, by citing relevant provisions, that records can be kept electronically for the minimum prescribed period.

Criterion 24.10 – (Met)- Kenya competent authorities, and in particular law enforcement authorities, have all the powers necessary to obtain timely access to the basic and beneficial ownership information held by the relevant parties, as demonstrated in the analysis under c. 31.1 (a).

Criterion 24.11 – (Met)- Kenya prohibits issuance of bearer shares or share warrants, and any such issuance is null and void under the provisions of S. 504 of the Companies Act, 2015.

- a) **Met**- Kenya has legal provisions for companies that had already issued bearer shares or share warrants to convert them into registered shares under S. 504 (3) and notify the Registrar within thirty days, but they cannot exercise any rights due to them before such conversion into registered shares.
- b) This criterion is not applicable.
- c) N/A- This sub-criterion is not applicable, as the law does not put a threshold on the beyond or below which disclosure is mandatory. All bearer shares and share warrants, regardless of whether majority, controlling or minority are to be converted to registered shares. This requirement of disclosure of controlling interest is, therefore, inapplicable.
- d) This sub-criterion is N/A.

Criterion 24.12 – (Partly Met)

- a) **Partly Met**- In Kenya, Section 9 (b) (ii) of the Tax Procedure Act requires nominee shareholders to disclose the identity of their nominator and beneficial owner to the Commissioner General. However, no provisions have been cited to show the obligation of such nominee to disclose to other relevant Registries or authorities or the company (and include the information in the company's shareholders' register). Similarly, no provision cited to show the nominee directors are under the same obligation as the nominee shareholders.
- b) This sub-criterion is N/A.
- c) **Partly Met**- Kenya can apply tax procedures and requirements for disclosure under S. 9 (b) (ii) of the TPA to ensure that nominee mechanisms allowing nominee shareholders are not misused. However, there are no similar provisions for prevention of misuse of nominee directors for ML/TF.

Criterion 24.13 – (Met)- Kenya operates a wide range of sanctions that are both dissuasive and proportionate for breaches of or failure to adhere to the duties and obligations laid out in this recommendation. Both the legal person and all natural persons that fail to comply are sanctioned for failure to collect and maintain records of BO; keep and update records when there are changes to beneficial ownership of a legal person; avail the information to LEAs and other relevant entities, when required to; and retain the records for a specified minimum period after a transaction or transactional relationship has come to an end.

Criterion 24.14 – (Met)

- a) **Met-** Kenya has demonstrated that competent authorities have mechanisms to rapidly provide international cooperation (in relation and specific to basic and beneficial ownership information) through MLA or other forms of international cooperation, by facilitating access by foreign competent authorities to basic information held by the Kenya Companies Registry, on the basis set out in Rec 37.
- b) **Met-** Kenya has demonstrated that competent authorities have mechanisms to rapidly provide international cooperation (in relation and specific to basic and beneficial ownership information) through MLA or other forms of international cooperation, by exchanging shareholder information, on the basis set out in Rec 37.
- c) **Met-** Kenya has demonstrated that the FRC can obtain BO information from the Registry under S. 24 (r) and provide it to a foreign FIU or relevant foreign competent authority under S. 24 (k) of the POCAMLA. Kenya has further demonstrated that competent authorities have mechanisms to rapidly provide international cooperation (in relation and specific to basic and beneficial ownership information) through MLA or other forms of international cooperation, by using their investigative powers, in accordance with the domestic law, to obtain BO information on behalf of foreign counterparts, on the basis set out in Rec 37.

Criterion 24.15 – (Not Met)-Kenya has not demonstrated that it has a clear mechanism to monitor the quality of assistance it receives from other countries in response to requests for basic and beneficial ownership information or requests for assistance in locating beneficial owners residing abroad. Though a central authority and procedure for processing requests has been put in place, as required under Rec 37, Kenya did not demonstrate that it has a monitoring and case management system in place for quality assurance of the assistance received; and to render feedback to the counterparts.

Weighting and Conclusion

Kenya meets most of the criteria, but has some shortcomings, to wit: Kenya has not assessed the ML/TF risk associated with all types of legal persons created in the country; companies are not required to maintain all the information listed under 24.3; there is no requirement for local companies to have a resident director or representative; there's no requirement for companies to authorize DNFBPs to provide their basic and beneficial ownership information to competent authorities when required; nominee shareholders are only required to disclose their nominators to the Commissioner, Kenya Revenue Authority and not the Companies Registry or any other authority, while nominee directors do not have to disclose their nominator; and, there is no mechanism to monitor the quality of the international assistance received by.

Recommendation 24 is rated Partially Compliant.

Recommendation 25 – Transparency and beneficial ownership of legal arrangements

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R34). The main technical deficiencies were: the measures in place with respect to trusts were not sufficient to prevent the unlawful use of trusts for ML/TF purposes as there was no transparency regarding the beneficial ownership and control of trusts; competent authorities were not able to obtain or have access to adequate, accurate and current information on the beneficial ownership and control of trusts as such information was not captured in most cases.

Criterion 25.1 – (Not met)-

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- a) Kenya did not demonstrate that under Kenyan law trustees under an express trust are required to obtain and hold adequate, accurate, and current information on the identity of the settlor(s), the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. The Lands Office, the regulatory authority for registered trusts, doesn't require all trustees of express trusts to obtain and hold adequate, accurate, and current information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, so this doesn't meet the sub-criterion. Trustees that opt not to apply for a certificate of incorporation, issued under the Trustees (Perpetual Succession) Act, do not have to furnish the names and addresses of the trustees (let alone the settlor and beneficiaries). There is no law in Kenya, requiring individuals or legal persons that act as trustees by way of business to collect and hold BO information of a trust. The only instance where a legal person is required to collect, hold and submit BO information of a trust (to the RBA) is where that trust deals with pension funds (RBA Act, as amended by the Finance Act, 2021). The legal framework introduced by the Trustees (Perpetual Succession) Act, as amended in 2021 did not provide for or ensure the availability of BO ownership.
- b) Kenya did not demonstrate that trustees of any trust governed under Kenyan law are required to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors. S. 24 of the Trustees Act, which was cited by the authorities, empowers trusts to appoint agents, but does not require trustees to obtain and hold basic information on regulated agents of, or service providers to, the trust. S. 15 (1) (e) of the Tax Procedures Act, which was cited only confirms that a trustee is a tax representative of a trust, for purposes of the TPA. It places no obligations on the trustee(s) to hold basic information on regulated agents and service providers, and therefore has no relevance to the sub-criterion. None of the narrative or provisions cited (S. 11, Income Tax Act; S. 24 (1), Trustees Act) by the Authorities requires trustees of any trust governed under Kenyan law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors.

- c) Under S. 2 of the POCAMLA, Trust and Company Service Providers (TCSPs) are defined as DNFBPs, who in turn are reporting entities, under the same section. Reporting entities are required to keep records for at least 7 years after the relationship ceases (s.24). The weight of the rating under this sub-criterion is significantly reduced by the fact that in the earlier sub-criteria, Kenya has failed to demonstrate that they are obtaining and holding this information. They cannot retain what they have not obtained.

Criterion 25.2 – (Not met)- Kenya has not demonstrated that all information held pursuant to Recommendation 25 is kept accurate and as up to date as possible, and is updated on a timely basis. The cited provision relates to an obligation to update the records of KRA in case of a change in trustees or beneficiaries, where a trust is doing business in Kenya, and not all information obtained and held pursuant to Rec 25 (transparency and beneficial ownership of legal arrangements).

Criterion 25.3 – (Not met)- There are no requirements for trustees to disclose their status to financial institutions and DNFBPs when forming a business relationship or carrying out an occasional transaction above the threshold.

Criterion 25.4 – (Met)- In Kenya, trustees are not prevented by law or enforceable means from providing competent authorities with any information relating to the trust; or from providing financial institutions and DNFBPs, upon request, with information on the beneficial ownership and the assets of the trust to be held or managed under the terms of the business relationship.

Criterion 25.5 – (Met)- Kenya demonstrated that competent authorities, and in particular law enforcement authorities, have all the powers necessary to be able to obtain timely access to information held by trustees, and other parties (in particular information held by financial institutions and DNFBPs), on the beneficial ownership and control of the trust, including: (a) the beneficial ownership; (b) the residence of the trustee; and (c) any assets held or managed by the financial institution or DNFBP, in relation to any trustees with which they have a business relationship, or for which they undertake an occasional transaction (see analysis under c. 31.1 (a)). However, though the CAs technically have the appropriate powers, this strength is tempered by the fact that no such information is required to be kept by trustees or other parties. The problem is compounded by the fact that even FIs and DNFBPs are not required to be informed that they are dealing with a trustee (see c25.3 above).

Criterion 25.6 – (Not met)- Kenya did not demonstrate that it rapidly provides international cooperation in relation to information, including BO information, on trusts and other legal arrangements, on the basis set out in Recommendations 37 and 40, including: a) by facilitating access by foreign competent authorities to basic information held by the Kenya Lands Registry or other domestic authority; b) exchanging domestically available information on trusts and other legal arrangements with foreign counterparts; and c) using their investigative powers, in accordance with domestic law, to obtain beneficial ownership information of trusts and other legal arrangements on behalf of foreign counterparts. This is primarily because the information is not available (see c.25.1 &2).

Criterion 25.7 – (Not met)- Kenya has not demonstrated that measures are in place to ensure that trustees are either (a) legally liable for any failure to perform the duties relevant to meeting their obligations; or (b) that there are proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to comply.

Criterion 25.8 – (Not met)- Kenya has not demonstrated that it has measures in place to ensure that there are proportionate and dissuasive sanctions, whether criminal, civil or administrative, for a trusts and other legal arrangements failing to grant to competent authorities' timely access to information regarding the trust referred to in criterion 25.1.

Weighting and Conclusion

Kenya has met some of the criteria, but has major shortcomings, to wit: trustees are not required to keep current information on the settlor, trustee(s), beneficiary or class of beneficiaries; trusts are not required

to keep basic information on their regulated agents and service providers; trusts have no obligation to keep the information obtained and held under Recommendation 25 up to date; competent authorities are empowered to render rapid international cooperation by facilitating their foreign counterpart's access to information held by the Land Registry and are authorized to exchange domestically available information with their foreign counterparts, and to use their domestic investigative powers to obtain beneficial ownership information of trusts on behalf of their foreign counterparts, but this information is not available; there is no liability or sanctions for failure by trustees to meet their obligations.

Recommendation 25 is rated Partially Compliant.

Recommendation 26 – Regulation and supervision of financial institutions

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R23). The main technical deficiencies were: FIs were not subject to adequate supervision due to deficiencies in the AML measures that FIs were required to implement; except for the CBK, the other financial regulators had not undertaken any onsite inspections for AML purposes; apart from the Banking Act, the other financial laws did not have any measures to prevent criminals or their associates from holding or being the beneficial owners of a significant interest in a FI; in the insurance sector, the integrity requirements did not apply to the directors and the senior officers of the insurers; there was no requirement for the licensing or registration of independent MVT service providers; non-deposit taking micro finance institutions were not licensed. The other deficiencies related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 26.1 – (Partly Met)- S.36A(2) of the POCAMLA, as amended, designates Supervisory Bodies with the responsibility to supervise and enforce compliance with the Act. The supervisory bodies empowered to do so are reflected in the First Schedule as follows:

- The Central Bank of Kenya
- Insurance Regulatory Authority
- Capital Markets Authority
- Retirement Benefits Authority

However, it is noted, that the POCAMLA only covers the AML aspect and this legislation does not include compliance with CFT requirements. As a result, the designated authorities do not have the mandate for supervising FIs' compliance with CFT requirements.

Criterion 26.2 – (Partly Met) Most FIs subject to core principles are required under different legislations to obtain a license from the respective regulatory authorities prior to operating in Kenya as set out below:

- Section 3 and 4 of the Banking Act places a restriction on transacting any banking business or financial business or the business of a mortgage finance company without a valid licence. Section 4 of the Act requires a written application for a license prior to commencing such business.
- The Capital Market Act makes provision for several types of licences. Section 23(1) refers to stockbroker, derivatives broker, REIT manager, trustee, dealer, investment adviser, fund manager, investment bank, central depository, authorised securities dealer, authorised depository, online forex broker, commodity dealer, and commodity broker. Section 23(2) states that the approval of the authority is required in order for a person to carry out the business of a securities exchange, commodities exchange or derivatives exchange, registered venture capital company, and collective investment or credit rating agency.

However, insurance companies which form part of FIs subject to core principles are only required to be registered under S.19 of the Insurance Act. On the other hand, in accordance with S.19A a license is required for persons wishing to undertake takaful insurance (those providing an extensive range of protection plans to suit diverse needs).

Other non-core principle FIs are required to be licensed under the respective legislations as per the below:

- of the Forex Bureau Guidelines makes provision for the licensing of foreign exchange business. Section 3 and 4 of the Money Remittance Regulations makes Section 3 provision for the licensing of money remittance services providers.
- Section 4 of the Microfinance Act states that a license is needed in order for a person to carry out deposit-taking business. However, Non-deposit taking micro finance are not required to be licenced and this activity is not prohibited.
- Section 4 of the National Payment System Regulations makes provision for the payment service provider to seek authorisation from the Central Bank prior to commencing such business.
- Retirement benefits schemes, managers, corporate trustees, custodians and administrators are required to be registered under section 22 of the Retirement Benefit Act.

Whilst it is noted that section 2.4 of the CBK Prudential Guideline prohibits the CBK from licensing shell banks, there are no provisions within the laws that prohibit the continued operations of shell banks, to take care of a situation where shell banks existed prior to the introduction of these Guidelines.

Criterion 26.3 – (Partly met) For certain institutions, financial sector supervisors are required by law to perform fit and proper assessments for substantial shareholders, directors and senior managers of regulated entities to determine their suitability.

Banks, Foreign Bureaus, and Money Remittances

Section 4(5) of the Banking Act empowers the CBK to vet proposed directors and senior officers at licensing stage. The requirements give due consideration to the character, professional and moral suitability of the proposed persons. Accordingly, the First Schedule requires consideration of criminal records for significant shareholders. In addition, Section 9A requires a fit and proper test to be performed for directors, Chief Executive Officers, significant shareholders, and any shareholder who is not a significant shareholder if there are reasonable grounds to believe that the actions of the person exert controls or significantly influences the institution. Section 3 of the CBK Bureau Guidelines, CBK also assesses the competency and integrity of the proposed management of a foreign exchange bureau, taking into consideration the history and character of the applicant's shareholders as well as a declaration that none of its directors and shareholder were convicted of a criminal offence involving fraud, ML, tax evasion or any other acts of dishonesty. Furthermore, CBK has adequate measures to prevent criminals from holding a significant or controlling interest, or holding a management function in an MVTs provider in terms of Regulations 16-19 of Money Remittance Regulations.

However, for these institutions, the requirement does not extend to beneficial owners and the requirements for same are not met under the law. Additionally, the authorities did not provide evidence that they carry out an independent verification to confirm the validity or truthfulness of the declaration.

Capital Markets

Section 24A (1) & (2) of the Capital Market Act provides for the authority to consider the reputation, character, financial integrity and reliability of the chairperson, directors, chief executive officer, management and all other personnel when considering an application for a license. In carrying out the assessment, CMA assesses whether the person has contravened the provision of any law, in Kenya or elsewhere, designed for the protection of members of the public against financial loss due to dishonesty,

incompetence, or malpractice by persons engaged in transacting with marketable securities. However, there is no reference to the criminal record of beneficial owners. As such, the measures prescribed are not adequate enough to prevent criminals or their associates from being beneficial owners in a FI.

Insurance

In line with Section 5.2.1 and 6 of the Insurance Regulatory Authority Guidelines on suitability of persons, the IRA assesses the criminal record of the proposed directors, senior management and key persons in control functions. However, the requirement does not include assessment of beneficial owners. In addition, there is no requirement for IRA to approve any changes to the board of directors, senior management and key persons in control functions. There is only a requirement for the insurer to notify the IRA of any changes within 7 days.

Microfinance

In terms of microfinance institutions, the Board of Directors as well as significant shareholders are required to be subjected to fit and proper test for deposit taking micro finance. Additionally, non-deposit taking micro finance are not required to be licenced and this activity is not prohibited and as such, there is no requirement for fit and proper. To this end, there are no measures which prevent criminals or their associates from holding a significant or controlling interest or being the beneficial owner of non-deposit taking microfinance companies.

Trustees, managers, custodians and administrators of retirement benefits schemes

Section 22A of the Retirement Act requires give regards to the reputation, character, financial integrity and reliability of trustee, manager, custodian or an administrator. In assessing these elements, the Retirement Benefits Authority takes into account whether the person has contravened the provision of any law, in Kenya or elsewhere, designed for the protection of members of the public against financial loss due to dishonesty, incompetence, or malpractice by persons engaged in transacting with marketable securities. However, there is no reference to the criminal record of the person who establishes a retirement benefit or the beneficial owner. As such, the measures prescribed are not adequate enough to prevent criminals or their associates from holding a significant or controlling interest of being beneficial owners in a retirement benefit scheme.

National Payment Systems

In terms of Regulation 4(2) and Second Schedule of the National Payments Systems Regulation, CBK assesses significant shareholders, directors/ trustees and managers of a proposed payment service provider. The law also empowers the relevant authorities or supervisors to prevent such persons performing any such functions in a regulated entity should they fail to satisfy the fit and proper requirement. The provisions of the above laws also allow for the disqualification of a shareholder, director or senior manager who no longer meets the fit and proper test. However, the assessment does not extend to beneficial ownership.

Criterion 26.4 – (Partly met) Whilst the POCAMLA designates the FRC as the supervisory authority and empowers other supervisory bodies under the First schedule of the Act with the responsibility for AML supervision of Core Principle FIs, FIs are not subject to risk-based supervision (see discussion in IO.3).

- (a) Core principles institutions are subjected to AML supervision. However, the AML supervision is *not fully* in line with all core principles. For instance, in relation to Core Principle 3, there are no legal or regulatory measures to facilitate cooperation or coordination between supervisors with their domestic and foreign counterparts for AML/CFT purposes. The requirement to identify, assess, manage and mitigate risks does not extend to TF since the scope of POCAMLA does not extend to TF. In addition, there is no requirement to apply consolidated group supervision for AML/CFT purposes.

- (b) FIs providing money or value transfer service, money or currency changing services are subjected to regulation and supervision. As the Central Bank is a supervisory body designated under the POCAMLA, it is responsible for monitoring and ensuring compliance with national AML requirements but does not include supervising for compliance with CTF requirements since POCAMLA does not include TF. In addition, the supervision or monitoring is not risk based and financial supervisors have not developed the risk-based tools for the AML supervision for other FIs.

However, in view that the POCAMLA only covers the AML aspect and this legislation does not include compliance with CFT requirements there are no framework for risk-based supervision for CFT.

Criterion 26.5 – (Not met) Supervisory authorities have not demonstrated that the frequency and intensity of on-site and off-site AML/CFT supervision of FIs is determined on the basis of:

- a) the supervisors' assessment of an FI's risk profile;
- b) the ML/TF risks present in the country, in so far as these risks must be reflected in risk assessments undertaken by the supervisory authority, and
- c) the characteristics of the FI, including the degree of discretion allowed to the FI under the risk-based approach.

The risk-based supervision manual formulated by the authorities contains AML/CFT as a component of prudential issues. While it is acknowledged that the CBK, CMA and IRA has performed an AML/CFT risk assessment, there is no evidence that supervision is guided by this assessment. Furthermore, the number of inspections conducted by the authorities as compared to the number of institutions rated high risk does not indicate that the authorities are conducting AML/CFT supervision on a risk-based model. Additionally, supervision has not covered TF.

Criterion 26.6 – (Not met) There is no requirement [for supervisors to review the assessment of ML/TF risk profile of a financial institution or group periodically, and when there are major events or developments in the management and operations of the FIs group. Additionally, the authorities have not provided any evidence that review is conducted on the assessment of the ML/TF risk profiles of institutions or groups periodically.

Weighting and Conclusion

Kenya has undergone legislative reforms from the 1st Round MER. Whilst most sectors are subjected to licensing requirements, there are some gaps for market entry of certain non-core principles sectors. Additionally, controls requirement to prevent criminals and their associates from holding substantial interest or being a beneficial owner is missing from most legislative requirements. Moreover, supervision of AML/CFT requirements is not carried out on the basis of the risk profile of institutions, ML/TF risks in respective sectors and in the country as a whole. Additionally, there is not requirements for TF supervision.

Kenya is rated Partially Compliant with R.26.

Recommendation 27 – Powers of supervisors

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R29). The main technical deficiencies were: the assessors could not establish whether the scope of onsite inspections under the POCAMLA would include a review of policies, procedures, books and records, and extend to sample testing; the designated supervisor did not have the power to compel production or to obtain access to all records, documents or information relevant to monitoring compliance except in the context of an inspection. The other deficiencies related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology

Criterion 27.1 – (Partly Met) Section 36A of the POCAMLA empowers the Financial Reporting Centre to supervise or monitor and enforce compliance with AML requirements by FIs. The CBK has the power to supervise banks, deposit taking microfinance banks, FXBs and MVTS providers and their compliance with AML requirements. The IRA has the powers to supervise insurer, insurance brokers and agents whilst the Capital Market Authority has powers to supervise capital market players. However, these powers do not extend to TF requirements.

Criterion 27.2 – (Not Met) Section 24(c) and 33 of the POCAMLA gives the Financial Reporting Centre the power to examine records of the reporting entities for the purpose of carrying out an inspection to monitor compliance with AML requirements by FIs. Whilst 36A(2) of the Act prescribes that each supervisory body shall have the responsibility for supervising and enforcing compliance with the Act or any instructions regulated or supervised by it and section 36A(3) confers that the obligations under subsection (2) shall form part of the legislative mandate of that supervisory body and constitute a core function, the Act does not prescribe that supervisory bodies should use the powers in the sectoral laws for AML/CFT supervision purposes. The Supervisory Bodies have specific powers under their respective legislations to conduct inspections, however, the scope of those laws are limited to prudential supervision and does not include AML/CTF supervision. This is evident in that the sectoral laws do not provide for AML/CFT and do not cross-reference the POCAMLA. Moreover, while supervisors have the power to take any measures, they consider necessary or expedient to meet their obligations as imposed by the POCAMLA, they have no explicit powers to conduct AML/CFT inspections. Additionally, the requirements of the law do not cover CTF inspections.

Criterion 27.3 – (Partly Met) Section 24(e) of POCAMLA gives the Financial Reporting Centre the power to compel FIs to provide any information required by the Centre for purposes of determining compliance with AML obligations by that entity. In addition, Regulation 39(4)(a) of POCAML Regulations give the financial sector supervisors powers to compel production of information/documents. However, those powers are limited by the scope of POCAMLA which does not apply to TF. To note, supervisors have general powers to take any measures they consider necessary or expedient to meet their obligations as imposed by the Act, these general powers may not support compelling production of information for TF purposes.

Criterion 27.4 – (Not Met) Section 24C makes provision for a range of administrative sanction and Section 24C(1)(d) makes provision for the Centre to issue an order to a competent supervisory authority requesting the suspension or revocation of a license, registration, permit or authorisation of a specified reporting institution whether entirely or in a specified capacity or of any director, principal, officer, agent or employee of the reporting institution. However, it is not clear under what circumstances these afore-mentioned measures can be applied. Moreover, there are no specific legal or regulatory powers which authorise supervisors to impose sanctions in line with Rec 35 for failure to comply with the AML/CFT requirements. They do not have the legal basis to withdraw, restrict or suspend an FI's license for violating requirements set out in the POCAMLA and the POCAML Regulations. Whilst section 36A(5)(b) of POCAMLA gives supervisors general powers to take any measures they consider necessary or expedient to meet their obligations as imposed by the Act, such a general provision would not be interpreted to provide a legal basis for applying sanctions.

Additionally, whilst designated supervisors have powers under their respective laws to apply sanctions, the scope of those powers relate to non-compliance with prudential requirements contained in those Acts and not AML/CFT requirements. Hence, those powers do not extend to violation of POCAMLA. Moreover, whilst the FRC has powers to impose monetary under section 24B(a) of the POCAMLA, this applies to breach of, or failure to comply with instructions, directions, or rules issued by the FRC under section 24A of the same law. The powers do not extend to violation of POCAMLA requirements (see also analysis under R.35).

Weighting and Conclusion

FRC and financial sector supervisors have the powers to supervise and enforce compliance with AML obligations as set out in POCAMLA and all instruments issued under POCAMLA. However, while FRC has specific powers to conduct inspections and compel production of records and information, the same are not extended to the financial sector supervisors. Although Supervisors have the powers (to carry out onsite inspections, compel production of documents etc) for prudential supervision under their respective laws, those powers are not extended to AML/CFT supervision. Additionally, supervisors do not have the power to impose sanctions for violation of the POCAMLA.

Kenya is rated Non-Compliant with R.27.

Recommendation 28 – Regulation and supervision of DNFBPs

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R24). The main technical deficiencies were: supervisors could not supervise compliance with preventive measures related to TF because TF was not criminalised; lawyers and TCSPs were not subject to AML/CFT supervision because they were not designated as reporting institutions; there were no measures in place to enable the Betting Control and Licensing Board to prevent criminals or their associates from being the beneficial owner of a significant controlling interest in a casino; the same deficiencies identified under the former Recommendations 17 and 29 applied to the DNFBPs. The other deficiencies related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 28.1 – (Partly Met)-Casinos, including internet casinos, are reporting institutions for the purposes of the POCAMLA. The Financial Reporting Centre established under the POCAMLA is the designated authority which has responsibility for AML regulation and supervision (36A of POCACLA).

- (a) Section 5 of the Betting, Lotteries and Gaming Act states that any person who desires to obtain, renew or vary a licence under the Act must apply to the Betting Control and Licensing Board. The Board is established under section 3 of the Betting, Lotteries and Gaming Act. Although, the POCAMLA provides for the designation of Casinos as a DNFBP, the Betting, Lotteries and Gaming Act has not explicitly provided a definition of Casinos and their operations.
- (b) Section 5(3) of the Betting, Lotteries and Gaming Act requires the Board to issue a licence if it is satisfied that the applicant is a fit and proper person to hold the licence or permit and that the premises, if any, in respect of which the application is made are suitable for the purpose. In addition, Section 5A (1) (e) provides for screening requirements for substantial shareholder, chairperson, directors, management or other shareholders. Further, the law requires the Board to make investigations or require the submission of declarations or further information deemed necessary in order to enable it to examine the application. In doing so, the Board checks whether the person has contravened any law in Kenya or elsewhere designed for the protection of members of the public against financial loss due to dishonesty, incompetence or malpractice by persons *engaged in transacting with marketable securities*. The AT noted deficiencies in this section of the law as follows: (1) the fit and proper test is applied ONLY if the aforementioned officials are shareholders. Otherwise, they are not subject to a fit and proper test; (2) consideration of the contravention of a law is applicable ONLY if the person was involved in transacting with marketable securities. Further, the measures do not include identification and assessment of a beneficial owner. In addition, the law does not provide for screening of beneficial owners. Section 2 (a) (i) to (v), provides for the considerations that the Board may take in checking whether the applicant is fit and proper. Further section 2 (b) (i) and (ii) takes into account information relating to an applicant's employment, associations and for companies, substantial shareholding or key personnel of the company.

Section 46 of the Betting, Lotteries and Gaming Act provides licensing requirements for operating gaming premises.

- (c) Although section 36A of the POCAMLA provides power for AML oversight, the law does not specifically require the supervision of casinos for compliance with CFT requirements. The Betting & Licensing Control Board is the supervisory body for the purposes of the gaming industry, including casinos.

Criterion 28.2 (Partly Met)

POCAMLA designates the following competent authorities as supervisors responsible for ensuring compliance of DNFBPs with AML [sections 2 and 36A (1) and (2) of POCAMLA] [*In additional to the Betting Control and Licensing Board which is a supervisory authority for casinos*]:

- (a) Estate Agents Registration Board for real estate agents;
(b) Institute of Certified Public Accountants of Kenya for accountants;

There is no designated supervisory authority for lawyers and therefore they are not subject to any systems for monitoring compliance with AML requirements. Except for lawyers, the above-mentioned reporting entities are subject to systems for compliance with AML requirements. On the other hand, all the above designated competent authorities are not responsible for supervising DNFBPs for compliance with CFT requirements.

Criterion –28.3 (Partly Met)-Although, Section 36A of POCAMLA provides that the FRC shall have the powers to regulate and supervise all reporting institutions, the Act does not clearly indicate whether other categories of DNFBPs that are not monitored for compliance for AML/CFT requirements by any designated supervisory body are supervised by the FRC. However, the FRC is required to ensure that dealers in precious metals; dealers in precious stones; and trust and company service providers are subject to systems for monitoring compliance with AML/CFT requirements.

Criterion 28.4 – (Partly met)

- (a) The designated supervisory authorities have general powers to perform their functions, including enforcing compliance with the Act (Section 36A (1) & (2) of POCAMLA). Section 36A (1) of POCAMLA that empowers FRC to regulate and supervise all reporting institutions, including the DNFBPs regarding the application of the Act which entails that the Centre has sufficient powers to regulate DNFBPs, including powers to carry inspections and compel production of documents (Sections 24 (c) and 33 of POCAMLA. Furthermore, Section 36A (2) of POCAMLA mandates supervisory bodies to be responsible for supervising and enforcing compliance with AML/CFT. In addition, Section 36A(3) also provides that the obligations will form part of the legislative mandate of any supervisory body and shall constitute a core function of the supervisory body. However, the Estates Agents Registration Board and the Institute of Certified Public Accountants do not have specific powers under their respective legislation to carry out inspections and compel production of documents for AML/CFT purposes.
- (b) As part of their licensing/registration process, some DNFBP supervisors take measures to check that applicants for professional licenses or qualifications have a good reputation or would not damage the credibility of the profession or have not been sentenced to criminal or disciplinary sanctions. Section 13 (1) (e) of the Estate Agents Act provides that Board shall not register a person unless that person are of good character and satisfies the Board that they have not been convicted (whether in Kenya or elsewhere) of an offence involving fraud or dishonesty. Whereas section 26 (3) (c) of the Accountants Act provides that a person applying for registration shall be of acceptable professional conduct and general character which, in the opinion of the Committee, make such a person fit and proper to be registered, and unless the

person so satisfies the Registration committee, he shall not be treated as being qualified to be registered.

- (c) There are no specific legal or regulatory powers which authorise DNFBP supervisors to impose sanctions in line with Recommendation 35 for failure to comply with the AML/CFT requirements. Although FRC has powers to impose monetary penalties in terms of S.24B(a) of POCAMLA, this applies to breach of, or failure to comply with instructions, direction, or rules issues by FRC under Section 24A of POCAMLA. The powers do not extend to violation of POCAMLA.

Criterion 28.5 – (Not Met)- The FRC has developed a DNFBP Supervision Manual developed by the FRC. Since this is a generic document, there is need to customise it to the respective DNFBP sectors considering that the sector is made up of different players carrying out diverse services. However, during the interviews it was established that DNFBP supervisors such as ICPAK undertakes onsite inspections to ensure that accountants comply with accounting standards. The risk-based approach is based on periodic returns and conducted along the annual quality assurance reviews. It was indicated that AML inspections are embedded in on going quality assurance reviews. The Betting, Control and Licensing Board indicated that no AML risk-based inspections are conducted because the Board conducts daily ongoing onsite inspections which focus on ensuring there is compliance with betting, lotteries and gaming act obligations.

Competent authorities do not apply risk-based supervision which includes:

- (a) determining the frequency and intensity of AML/CFT supervision of DNFBPs on the basis of their understanding of the ML/TF risks, taking into consideration the characteristics of the DNFBPs, in particular their diversity and number; and
- (b) taking into account the ML/TF risk profile of those DNFBPs, and the degree of discretion allowed to them under the risk-based approach, when assessing the adequacy of the AML/CFT internal controls, policies and procedures of DNFBPs.

Weighting and Conclusion

The law requires that casinos are only required to operate after they obtain a license from the Board. The law has also included the necessary measures to prevent criminals and their associates from holding significantly controlling interest in a casino. However, casinos are not specifically supervised for AML/CFT but for the purposes of compliance with the requirements of the gaming industry. Although, the registration requirements are provided for under section 24 of the Accountants Act, the provisions are not clear regarding the measures taken to prevent criminals or their associates in the profession or body. However, the law requires that a person applying for registration into the profession should be deemed fit and proper before admission. Requirements for registration of Estate agents are well documented in the law and apply necessary measures to prevent criminals or their associates from holding a significant or controlling interest. However, Lawyers are not subject to AML/CFT requirements. The supervisors of DNFBPs do not perform their AML/CFT supervision on a risk-sensitive basis. The AML/CFT inspections are embedded in the compliance-based inspections and conducted in line with compliance levels as required by the various laws. There are no sanctions provided in line with Rec 35 for failure to comply with AML/CFT requirements.

Kenya is rated Partially Compliant with Recommendation 28.

Recommendation 29 - Financial intelligence units

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R26). The main technical deficiencies were: there FIU was not national centre for receipt, analysis and dissemination of financial disclosures related to TF. The other deficiencies related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 29.1- (Partly Met)- Kenya established the Financial Reporting Centre (FRC) as the national central agency for the receipt and analysis of suspicious transaction reports and other information relevant to money laundering, associated predicate offences and dissemination of the reports received under the Act to the appropriate law enforcement authorities (S.24(a) & (b) of the POCAMLA and S. 42 of POTA). It is noteworthy that S.42 of POTA applies to FIs only and its scope is narrow (see details under R.20). The relevant sections of POCAMLA establishes the FRC, give rise to its objectives and functions as a national central body mandated to receive, analyse and disseminate to law enforcement authorities (LEAs). However, the criterion refers to dissemination of results of analysis of reports received whereas s.24(b) of POCAMLA provides that FRC shall send the reports it has received under the Act to LEAs.

Criterion 29.2

- (a) – **(Partly Met)**-FRC is the central agency for receipt of STRs on ML from reporting persons in terms of sections 24(a) & 44(2) of POCAMLA as well as information filed to it under section 42 of POTA. However, s.42 of POTA is limited in terms of TF-related STR obligations (see R.20 for details).
- (b) – **(Met)**-FRC receives cash transaction reports (CTRs) in terms of S.44(6) of POCAMLA, exceeding USD 10,000 or its equivalent in any currency, whether they appear to be suspicious or not. In addition, the FRC is also designated to receive reports from Kenya Revenue Authority in relation to conveyance of monetary instruments in excess of USD 10,000 or its equivalent in any currency to or from Kenya in terms of S.12 of POCAMLA. The definition of ‘monetary instruments’ includes cash and bearer negotiable instruments.

Criterion 29.3

- (a) – **(Met)**- There are sufficient provisions under POCAMLA that enables the FIU to obtain and use additional information from reporting entities, as needed to perform its analysis properly. For instance, S.24 (e) of POCAMLA empowers the FRC to request for additional information from any reporting institution. This includes the grounds upon which the entity filing the report based its suspicion and copies of the relevant particulars.
- (b) – **(Partly Met)**- The FRC has indirect access under S.24 (r) & (s) of POCAMLA to databases maintained by supervisory bodies, monetary authorities, financial regulatory authorities, fiscal or tax agency or fraud investigation agency and has signed MOUs with relevant competent authorities in Kenya to facilitate access to the widest possible range of information. However, despite not being legislated under s24 of POCAMLA, the FRC has entered into MOUs to access information kept by other important agencies such as deeds/land registration, motor vehicle registry, company registration information, commercial data sources/databases. In addition, information to LEAs is only availed by those responsible for fraud investigation that might assist to properly undertake its functions.

Criterion 29.4

- (a) – **(Mostly Met)**- The FRC has implemented the goAML system to receive STRs, communicate with reporting entities and to assist with analysis of submitted reports as they are centrally stored in the goAML database. The STRs are accessed by the FRC’s Analysis and Reporting Department, which is delegated with the analysis function. The Analysts utilise the analytical systems and manual interventions to ensure that all STRs are processed. FRC prioritizes STRs for analysis and the analysis process uses available and obtainable information to identify specific targets, to follow the trail of particular activities or transactions, and to determine links between those targets and possible proceeds of crime in ML, predicate offences and TF. In addition, a risk matrix is used to prioritise cases once an STR is assigned to the relevant Analyst The analysis function, under S.24 (r) & (s) of POCAMLA has indirect access to databases maintained by supervisory bodies, monetary authorities, financial regulatory authorities, fiscal or tax agency or fraud investigation

agencies to enrich the STR received. FRC decides which LEAs receive particular operational analysis reports and the same report may also be disseminated to more than one competent authority if the case is relevant and is within their scope of competence. However, s.24(b) of POCAMLA provides that FRC shall send the reports it has received under the Act to LEAs and is silent on analysis of reports received.

- (b) – **(Met)**- Currently, the Analysis and Reporting Department of the FRC conducts strategic analysis which uses available and obtainable information, including data that may be provided by other competent authorities, to identify ML and TF related topics. Some of the strategic reports are shared with the NIS, DPCI, KRA and DCI. In one instance, the report was shared with the relevant Ministry to provide recommendations into a policy document on cash transactions in Kenya. The FRC has policies and processes in place which assists in streamlining the key elements in the production of strategic products. Strategic reports produced are for a targeted audience and the authorities have indicated that these reports were share with reporting entities during training interventions.

Criterion 29.5 – Mostly Met- The FRC has statutory powers and processes to disseminate, spontaneously and upon request, information to LEAs, supervisory bodies and other relevant competent authorities on the basis of s. 23(2) of POCAMLA. Additionally, the FRC is mandated to send reports it has received under POCAMLA to appropriate LEAs, intelligence agencies and supervisory bodies when there are reasonable grounds to suspect money laundering, predicate offences or terrorist financing {s.24(b). However, this criterion requires dissemination of results of its analysis and not reports it has received from reporting persons. The criterion refers to dissemination of results of analysis of reports received whereas s.24(b) of POCAMLA provides that FRC shall send the reports (STRs) it has received under the Act to LEAs. In terms of security, the FRC uses the goAML system for dissemination in a secured manner. Further details include the use of encrypted email channel with a dedicated email address to handle requests and share information and where necessary Intelligence Reports are sealed and disseminated physically and only **authorized/designated** persons are permitted to deliver and receive them based on the Information Security Policy and Analysis Manual.

Criterion 29.6

- (a) – **(Met)**-The authorities have provided information/ documents to demonstrate that FRC has rules in place governing the security and confidentiality of information, including procedures for handling, storage, dissemination, and protection of, and access to, information.
- (b) – **(Met)**-Kenya has provided information/ documents showing that FRC staff undergo security clearance. In addition, pursuant to s.32 of POCAMLA, the Director-General, the Deputy Director General and staff of the Centre are required to take and subscribe before a Magistrate or Commissioner for Oaths the oath of confidentiality before they begin to perform any duties under this Act. They are also required to maintain, during and after their employment, the confidentiality of any matter which they came across during their tenure of office. Through this session, FRC staff understand their responsibilities in handling and disseminating sensitive and confidential information. For the rest of the FIU staff, their particulars are sent to the National Intelligence Service which carries out the vetting and communicates the results to the FIU in accordance with Public Service Commission Regulation 2020.
- (c) – **(Met)**- The Analysis Unit of the FRC is segregated from the other Business Units and access to the operational space is restricted to those tasked with analysis work. The FRC implements the ISO 27001 and the ICTA-3.002:2019 information security standards to improve its information security. The standards provide for the best-practices in information security looking at confidentiality, Integrity and availability. The standards ensure only

authorized persons have access to the information and authorized persons or systems can change information. Further, the FRC has implemented the goAML system, a secure UNODC system, for receiving reports, secure communication and information sharing with reporting entities. The system is accessible by authorized and authenticated personnel. In addition, a secure encrypted email channel with a dedicated email address to handle requests and share information has been put in place. Where necessary, financial intelligence reports are sealed and disseminated physically to an authorized/designated persons are permitted to deliver and receive them. All disseminations are made to a designated focal contact at all LEAs.

Criterion 29.7

- (a) – **(Met)**-The FIU is an independent institution, and the Director General has full authority and independence to deploy the resources of the institution and the ability to carry out its functions freely [S.24 POCAMLA]. The Director General is appointed by the Minister of Finance and the grounds for his removal are clearly set out in POCAMLA (s. 25 & 27 of POCAMLA). The FRC has the mandate to appoint its own staff necessary for the proper discharge of its functions under the Act [s.31 of POCAMLA] and may do all that is necessary or expedient to perform its functions effectively including doing anything that is incidental to the exercise of any of its powers without undue influence in the analysis and dissemination of financial disclosures [s. 24 of POCAMLA].
- (b) – **(Mostly Met)**-The Director General of FRC can make information in its custody available to domestic competent authorities in terms of s.23(2)(a) of POCAMLA. In addition, it can exchange information with similar bodies in other countries regarding ML and related offences [s.23(2)(b) of POCAMLA]. However, the noted deficiencies in relation to TF STRs limits sharing of such information.
- (c) – **(Met)**- FRC is not located within an existing structure of another authority.
- (d) – **(Met)**- In terms of S.31 POCAMLA, FRC determines its own staff establishment and appoint staff within general terms and conditions approved by the Minister. The FRC has a budget allocation within the national budget which is approved by Parliament [s.40 of POCAMLA]. The FRC has powers to make independent financial decisions and its Director General is the Accounting Officer, responsible for the direction and control of its funds/accounts as s. 68 of Public Financing Management Act. Thus, s31 and s40 of POCAMLA as well as s68 of Public Financing Management Act enables the FRC to obtain and deploy resources to carry out its functions as required without influence or interference.

Criterion 29.8 – (Met)- The FIU has submitted an unconditional application for membership to the Egmont Group and fully engage itself in the application process.

Weighting and Conclusion

Kenya has established FRC as a national centre for the receipt and analysis of STRs on ML and other information relevant to ML and associated predicate offences. However, POCAMLA does not include TF. Although FRC has access to information in the custody of some agencies, the list does not include other important agencies such as company registry, lands registry etc. The framework under which the FRC operates complies with most requirements. However, operational analysis is adversely affected by gaps in the FIU's intelligence holdings based on some DNFBPs not being covered under the AML/CFT framework. The FRC is still to on-board LEAs and Supervisory Bodies/Regulators on the goAML system to allow for a secure exchange of information.

Kenya is rate Partially Compliant with R.29.

Recommendation 30 – Responsibilities of law enforcement and investigative authorities

In its 1st Round MER, Kenya was rated partially-compliant with these requirements (formerly R27). The main technical deficiency was that some of the designated categories of predicate offences, including TF, were not criminalised in Kenya. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 30.1 – (Met)- The DCI, as one of the three services of the Kenya National Police Service, is the LEA generally mandated to investigate ML, associated predicate offences and TF under S. 35 (b) of the NPS Act. ML and TF are listed as serious offences under the purview of the DCI. DCI has established specialized units to carry out these investigations, being the FIU (ML) and the ATPU (TF). The ARA and the EACC also have the power to investigate ML in their respective areas of operation (assets recovery and corruption and economic crimes, respectively), as their establishing Acts (POCAMLMA and EACC Act/ACECA, respectively) grant their officers all powers and privileges enjoyed by or granted to a police officer under Kenyan law. Under the POCAMLMA (S. 2 – Definitions), an authorized officer is defined to be: a police officer; a KRA officer (Customs); the Agency Director (ARA, which includes any member of the ARA staff or anybody providing services under an arrangement made by the ARA); or any other person or class of persons designated by the Minister (Cabinet Secretary for Finance). The Directorate of Criminal Investigations (DCI) of the National Police Service under the National Police Service Act (all crime); the Ethics and Anti-Corruption Commission under the Ethics and Anti-Corruption Act and the Anti-Corruption and Economic Crimes Act (corruption and related economic crime); the Kenya Revenue Authority under the East African Community Customs Management Act and the Tax Procedures Act (tax evasion crime); and the Assets Recovery Agency under the POCAMLMA (recovery of proceeds of crime) are the law enforcement authorities that have responsibility for ensuring that associated predicate offences are properly investigated, within the framework of national AML/CFT policies. Officers of the DCI, EACC and ARA are authorized to pursue investigation of related ML offences during parallel financial investigations of predicate offences.

Criterion 30.2 – (Met)- Officers of the DCI, EACC and ARA are authorized to pursue investigation of related ML offences during parallel financial investigations of predicate offences.

Criterion 30.3 – (Met)- Kenya has designated the Assets Recovery Agency as the central authority to expeditiously identify, trace, and initiate freezing and seizing of property that is, or may become, subject to confiscation, or is suspected of being proceeds of crime (see Part VII - XII, POCAMLMA). Additionally, Section 213 of EACCMA gives KRA (Customs) powers to identify and seize goods and property subject to forfeiture under the Act. Sec 12 of the POCAMLMA that authorizes the Customs Officers to temporarily seize. S.130 EACCMA- Power to distrain goods, vessels, vehicles, premises etc. to recover taxes even back taxes. Section 43 of the Tax Procedures Act allows the Commissioner to Preserve Funds pending investigations, and Section 44 which provides for Seizure and Forfeiture of goods.

Criterion 30.4 – (Partly met) In Kenya under S. 13B of the CMA Act, Recommendation 30 applies to CMA, a competent authority, which is not a law enforcement authority, per se, but which has the responsibility for pursuing financial investigations of predicate offences under the CMA Act, when exercising functions covered under Recommendation 30. Kenya didn't demonstrate that Recommendation 30 also applies to IRA and RBA and that these entities are mandated to ensure ML/TF and associated predicate offences are investigated; that they can pursue ML/TF discovered during their parallel investigations or refer it to a relevant authority, regardless where the criminal conduct occurred; and that they can identify, trace and seize suspected proceeds of crime.

Criterion 30.5 – (Met)- The EACC is designated to investigate ML offences arising from or related to corruption. Additionally, the EACC has powers to identify, trace and seize (S. 55 and 56 of the ACECA) for the process for forfeiture unexplained wealth, and apply for an order to preserve wealth

suspected to have been acquired as a result of corruption, respectively. ACECA Section 23(4) “The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the National Police Service Act (No. 11A of 2011) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Secretary and an investigator as if reference in those provisions to a police officer included reference to the Secretary or an investigator”. This was confirmed in the case of Citation ACEC MISC 1 of 2019 (para 84 & 85).

Weighting and Conclusion

Kenya has met some of the criteria 30.1, 30.2, 30.3 and 30.5, and partially 30.4, but has some deficiencies, to wit: the standards set under Recommendation 30 do not apply to all non-law enforcement competent authorities.

Kenya is rated Partially Compliant with R.30.

Recommendation 31 - Powers of law enforcement and investigative authorities

In its 1st Round MER, Kenya was rated partially-compliant with these requirements (formerly R28). The main technical deficiency was that some of the designated categories of predicate offences, including TF, were not criminalised and therefore the LEAs did not have powers in relation to those crimes. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 31.1 – (Mostly met)

- a) ***Met-*** The FRC can compel any person, entity or authority to produce records they hold under the provisions of S. 24 (c), (e), (r) and (s) of the POCAMLA. Under S. 37 of the POCAMLA, the FRC can obtain and execute search warrants for the purposes, inter alia, of securing documentary evidence. A police officer may make an ex parte application to a court of competent jurisdiction for a production order for documents held by any person (natural or legal), which are necessary for tracing tainted assets; and inspect, copy or retain such documents for as long as is necessary to execute his duties under the Act. The police officer may apply for a search warrant for purposes of securing documentary evidence that is not voluntarily produced (see S. 103 and 107, POCAMLA). For purposes of compulsory production of documents, the ARA can call on the services of the FRC or police officers, in accordance with the provisions of S. 55 of the POCAMLA. EACC can compel FIs to produce documentary evidence by applying to court for a warrant under the provisions of S. 23 (4) of the ACECA; S. 180 of the Evidence Act. The Commissioner of KRA or any authorized officer has the power to order for the production of records, including records held by FIs and DNFBPs for tax investigation purposes (see S. 59 of the TPA).
- b) ***Met-*** Law enforcement agencies in Kenya have the power to search persons and premises (Ss. 37, 106, 107 of the POCAMLA; S. 23 (4) of the ACECA; S. 60 of the TPA; and S. 57 of the NPSA).
- c) ***Met-*** LEAs in Kenya have the power to compulsorily take witness statements under the provisions of S. 52 of the NPSA; S. 59 of the TPA; and Ss. 26 and 27 of the ACECA.
- d) ***Met-*** Kenya has demonstrated that ARA is empowered to compulsorily seize and obtain evidence under the provisions of S. 118, 118A, 119 and 121 of the Criminal Procedure Code; S. 180 of the Evidence Act and S. 53A of the POCAMLA.

Criterion 31.2 – (Met)

- a) ***Met-*** Kenya has demonstrated that the Police can use undercover operations as an investigation technique for ML/TF and associated predicate offences as guided by the Constitution, the

National Police Service Act and the National Police Service Standing Orders, 2017 (Chapter 42, Article 11), but this can only be used in exceptional circumstances (Art. 11 (3) or when it is impossible to obtain first hand evidence in any other way (Art. 11 (5)). As other LEAs such as EACC, ARA, FRC, KRA, etc. that relevant in the AML/CFT regime are granted the powers of the police, this power extends to them as well.

- b) **Met-** Kenya LEAs have the power to intercept communications and use the evidence in court for purposes of prosecution of offences under the POTA or disruption of terrorism and terrorist acts (Ss. 36 & 36A of the POTA). Furthermore, A police officer or authorised officer (LEA officers or cyber security experts designated by the responsible cabinet secretary) that has reasonable suspicion that the content of specifically identified communication is required in an investigation of a criminal offence, he may apply to court and obtain an order to intercept and record such communication under S. 53 of the Computer Misuse and Cyber Crimes Act, 2018. Additionally, under the provisions of S. 130B of the POCAMLA, a person suspected of having proceeds of crime, ML or TF loses the constitutional right to privacy of his communications, which may then be intercepted and revealed.
- c) **Met-** Kenya has demonstrated that its LEAs have the power to access computer systems for purposes of investigating ML, associated predicate offences and TF. A police officer or an authorised officer can access data stored on a computer system upon obtaining a production order provided for under S. 50 of the Computer Misuse and Cyber Crimes Act, 2018.
- d) **Not Met-** Kenya has not demonstrated that its LEAs are mandated by law to use controlled deliveries as an investigation technique for ML/TF and associated predicate offences.

Criterion 31.3 – (Not met)

- a) **Not Met-** Kenya has not demonstrated that it has mechanisms in place to enable competent authorities to identify, in a timely manner, whether natural or legal persons hold or control accounts.
- b) **Not Met-** Kenya has not demonstrated that its competent authorities have a process(es) to identify assets without prior notification to the owner.

Criterion 31.4 – (Not met)- Kenya has not demonstrated that competent authorities conducting investigations of money laundering, associated predicate offences and terrorist financing are able to ask for all relevant information held by the FIU.

Weighting and Conclusion

Kenya has met a few of the criteria under this recommendation, but has got a major deficiency, to wit: Law Enforcement and Investigative Agencies (LEAs) have no powers or mechanisms to identify assets and property, without prior notice to an owner. In addition, LEAs have no powers to conduct controlled deliveries as an investigative technique. Further, LEAs have no mechanisms to identify assets and property, without prior notice to an owner. Also, LEAs have no legal provision mandating them to request for information from the FRC for investigation purposes.

Kenya is rated Partially Compliant with R. 31.

Recommendation 32 – Cash Couriers

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly SRIX). The main technical deficiencies were: there was no effective declaration system in place since the one anticipated under the POCAMLA had not yet been implemented. In addition, the system in force prior to the POCAMLA was not being enforced.

Criterion 32.1 – (Partly Met)- Kenya has adopted and implements a monetary declaration system for all physical cross-border transportation of currency and BNIs (s. 12(1) of POCAMLA as read with Reg. 8(1) of the POCAMLA Regulations). However, cross-border transportation of currency or BNIs by mail and cargo is not covered. All currency imports and exports through mail and cargo are declared through a Customs computerized declaration system.

Criterion 32.2 – (Met)--Kenya requires a written declaration from all travellers carrying in or out of Kenya monetary instruments equivalent to or exceeding US\$ 10,000 or its equivalent in Kenya shillings or any other currency and shall do so before travelling.

Criterion 32.3 – (N/A)

N/A -Kenya uses a declaration system.

Criterion 32.4 – (Met)-Authorized persons/ Customs Officers have the authority to request and obtain further information from the cash courier with regards to the origin of the currency or BNIs, and their intended use (s. 12(5)(a) of POCAMLA. Regulations provide for the mechanism for Customs Officers to ask the cash carrier to produce and show monetary instruments. Where the customs officer has reason to suspect that the person has not made a true declaration or has failed to declare the monetary instruments, the customs officer shall require that person to produce and show to the customs officer all the monetary instruments in his possession (Reg 8(3) of the POCAMLA Regulations).

Criterion 32.5 – (Not Met)-It is an offence to make a false declaration to the authorised officer and on conviction a person is liable to a fine not exceeding ten per cent of the amount of the monetary instruments involved in the offence (Sections 12(3) and 16(3) of POCAMLA). The sanction is not proportionate and dissuasive.

Criterion 32.6 – (Met)- The information obtained by Customs from the currency declaration are submitted to FRC. S.12 (2) POCAMLA - A person authorised to receive a report made in subsection (1) shall, without delay, send a copy of the report to the Centre. Reg. 8 (2) POCAML Regs - The customs officer shall submit the completed declaration forms to the Director of the Centre in accordance with section 12 (2) of the Act.

Criterion 32.7 – (Met)- The Kenya Citizenship and Immigration Act establishes a committee to be known as the Border Control Operations and Coordination Committee (s.5A(1) of the Kenya Citizenship and Immigration Act). The committee incorporates a wide range of competent authorities and outlines a set of functions including coordination among customs, immigration and other authorities (s. 5B (1) (b) of the Kenya Citizenship and Immigration Act).

Criterion 32.8 – (Met)

- a) Sec 12(4) POCAMLA - an authorised officer may temporarily seize tainted property for as long as necessary to obtain a restraint or preservation order under Sections 68 or 82 respectively and not for more than 5 days. A customs officer is an ‘authorised officer’ under the Act. Tainted property is defined as any property involved in crime or the proceeds of crime, accordingly this includes any property involved in ML/TF or a predicate offence. Section 68(3)(a) allows a court, on a successful application by the Agency Director, to restrain the property if a criminal investigation has been started.
- b) The authorised officer has powers to restrain and stop currency which are suspected to be tainted property where there has been a failure to make the necessary declaration.

Criterion 32.9 – (Met)- The FRC retain information relating to the declaration system in Kenya. This information relates to:

- a) Declarations made in relation to amounts exceeding the prescribed amounts.
- b) Where there is a false declaration

c) When there is suspicion on ML/TF.

S.24(l) POCAMLA provides that the FRC may, on the basis of mutual agreement and reciprocity, enter into any agreement or arrangement, in writing, with a foreign financial intelligence unit which the Director-General considers necessary or desirable for the discharge or performance of the functions of the Centre.

Criterion 32.10 – (Mostly met)- Information collected through the declaration system is strictly for the prevention of ML/TF offences and does in no way restrict trade payments or freedom of capital movement. This can be discerned from the provisions of POCAMLA.

Criterion 32.11 – (Partly met)

- a) The penalties for persons involved are NOT dissuasive and only apply to failing to declare
- b) Measures are not consistent with Rec 4 as currency/ monetary instruments can only be seized for the purposes of restraint and notice of preservation orders relating to failing to declare excess amounts.

Weighting and Conclusion

Cross-border currency declaration requirements do not apply to currency or BNIs transported through mail or cargo. In addition, false declarations are not subject to proportionate and dissuasive sanctions.

Kenya is rated Partially Compliant with R.32.

Recommendation 33 – Statistics

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R32). The main technical deficiencies were: Kenya was not reviewing the effectiveness of its systems for combating ML & TF on a regular basis. In addition, the authorities were not keeping comprehensive annual statistics on matters relevant to the effectiveness and efficiency of systems for combating ML & TF.

Criterion 33.1 – (Partly Met)

- (a) **Mostly Met-** Section 24(f) and (j) POCAMLA requires FRC to compile statistics while subsection (j) specifically states that the FRC shall maintain a database of STRs. There is no specific reference to reports disseminated to LEAs. Statistics on STRs received and disseminated are amongst others maintained in the GoAML system.
- (b) **Not Met-** The authorities reported that the National Crime Research Centre undertakes research, collects crime statistics, analysis and publish data on crime numbers and trends and various LEAs, ODPP and the Judiciary keep statistics on investigations, prosecutions and convictions. The authorities (ATPU and ODPP) provided contradictory statistics on TF investigations, prosecutions and convictions.
- (c) **Mostly Met-** EACC and ARA keep data on assets frozen; seized and confiscated. However, the rest of the LEAs were not able to demonstrate that they keep these statistics.
- (d) **Met-**The Central Authority and various competent authorities keep data on incoming and outgoing MLA requests as well as other forms of cooperation.

Weighting and Conclusion

While the FRC, ARA and EACC keep statistics, for some agencies, it was noted that the statistics being kept are different from one agency to another.

Kenya is rated Partially Compliant with R.33.

Recommendation 34 – Guidance and feedback

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R25). The main technical deficiencies were: no guidelines had been issued to assist financial institutions to comply with their AML obligations under the POCAMLA; no feedback was provided to reporting entities; guidelines issued to institutions licensed by the Central Bank of Kenya did not address aspects relating to combating the financing of terrorism; guidelines did not provide reporting entities with a description of ML and FT techniques and methods and no guidelines had been issued to assist DNFBPs to implement and comply with their respective AML/CFT requirements.

Criterion 34.1 –(Partly Met)

GUIDELINES

The FRC and some Supervisors have established guidelines intended to assist financial institutions and DNFBPs in applying AML/CFT measures in detection and reporting of suspicious transactions. However, these instruments have some deficiencies as set out below.

Central Bank of Kenya (CBK)

CBK issued a 'Prudential guidelines for Institutions licensed under the Banking Act' under S. 33(4) of the Banking Act which empowers CBK to issue guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system. The guidelines incorporate aspects of AML obligations from the POCAMLA which FIs should follow. It covers suspicious transaction reporting, the need for adequate controls for ML/TF risks, record keeping, and other key AML issues. However, it is observed that the Guidelines provide conflicting guidance. For instance, Section 5.1 of the Guidelines states that the Board of Directors expects management of a reporting entity to submit STRs to CBK while Section 5.15 instructs reporting institutions to submit STRs to the FRC. In addition, whilst the Guidelines mention PF, they do not cover measures to mitigate such risks.

Insurance Regulatory Authority (IRA)

The Insurance (AML/CFT) Guidelines were issued under Section 3A(g) of Insurance Act which says that the 'objects and functions of the Insurance Regulatory Authority shall be (g) to issue supervisory guidelines and prudential standards, for the better administration of insurance business of persons licensed under this Act. However, the guidelines only cover the suitability of key persons involved in the ownership, stewardship and management of insurers. The Guidelines do not cover customer due diligence, record keeping, suspicious transaction reporting and other key AML issues. Additionally, the guideline does not cover TFS and PF related issues.

Capital Markets Authority (CMA)

The Guidelines were issued under Section 12A(I) of the Capital Market Act which says that the Authority may issue guidelines and notices necessary for the better carrying out the functions of the Authority under the Act, and in particular (a) for the regulation of capital markets activities and products. The guideline covers customer identification and customer due diligence, record keeping, new technology and non-face to face transactions, suspicious transactions and reporting requirements, continuous monitoring, reliance of third parties amongst others. However, whilst the guidelines cover the combating of the financing of terrorism, this coverage is limited to the maintenance of a database of names and particulars of listed persons in the UN consolidated lists and the report of transactions of any person on this list. It does not cover, the identification of potential suspicious transactions related to TF. Moreover, the Guideline does not cover PF related issues.

Institute of Certified and Public Accountants of Kenya (ICPAK)

The Guidelines were issued under Section 8(f) of the Accountants Act and s.24A(3) of POCAMLA. Section 8(f) of the Accountants Act provides that functions of the Institute shall be to carry out any other functions prescribed for it under any other provisions of this Act or any other written Act. Section 24A(3) of POCAMLA provides that the Centre (FRC) may, where it deems it appropriate, delegate its

powers to a supervisory body to issues instructions, guidelines or rules regarding the application of this Act to reporting institutions regulated or supervised by the supervisory body.

FEEDBACK

FRC provides feedback through Compliance Officers Forums which are held quarterly, AML/CFT Regulators roundtable forum and regular meetings with institutions per sector and individually. CBK, IRA and CMA provide feedback to FIs under their purview following onsite inspections. IRA also holds workshops with the industry and holds prudential meetings and communicates with individual companies.

Weighting and Conclusion

Whilst some guidelines have been issued to FIs and DNFBPs, there are deficiencies noted within the guidelines. This is in view that the guidelines do not cover TF and PF issues. Additionally, the Guideline issued by IRA does not cover AML issues. Furthermore, feedback is provided by most AML supervisors through meetings conducted with the sectors.

Kenya is rated Partially Complaint with R. 34.

Recommendation 35 – Sanctions

In its 1st Round MER, Kenya was rated partially-compliant with these requirements (formerly R17). The main technical deficiency was sanctions could not be applied against non-compliance with preventative measures related to TF since TF was not criminalized. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 35.1 – (Partly Met) Kenya does not have a range of proportionate and dissuasive civil and administrative sanctions for dealing with natural or legal persons that fail to comply with the AML/CFT requirements of Recommendations 6, and 8 to 23.

TFS (R6): Regulation 26 of the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations (2013 states that any person or entity which contravenes the provisions of the Regulations commits an offence and shall be liable, on conviction, to a fine not exceeding three million Shillings (USD 27,500) or to imprisonment for a term not exceeding seven years. Relatively, it is noted that the penalties are the same for a natural person and legal person and there are no administrative sanctions. For this purpose, Kenya does not have a range of sanctions which are proportionate as there is one penalty for non-compliance with all obligations.

NPOs (R8): S.22 of the Non-Governmental Organisation Coordination Act provides that any person who operates an NGO without a certificate commits an offence and shall be liable, on conviction, to a fine not exceeding Ksh 50,000 (USD 458) or to an imprisonment for a term not exceeding eighteen months or to both. Apart from this, the Act does not create an offence for non-compliance with any provisions of the Act. However, Regulation 32 of NGO Coordination Regulations provides that any registered or exempted Organization or any officer thereof guilty of an offence under these Regulations shall be liable to a fine not exceeding Ksh 6,000 (USD 55), or in the case of an officer, to imprisonment for a term not exceeding six months or to both. In addition, Regulation 24 provides that any registered Non-Governmental Organization which fails to submit its annual returns within the prescribed period shall be liable to a fine of Ksh 25,000 (USD 229). There are no provisions for administrative sanctions. Hence, the sanctions are not considered to be proportionate and effective.

Preventative measures and reporting (R9 to R23): Section 39(1) of POCAMLA provides that any person who does not comply with the provisions of this Act commits an offence. In addition, section 11 provides that a reporting institution that fails to comply with any of the requirements of sections 44 (STR reporting), (45 verification of ID), 46 (record keeping) or any regulations commits an offence. If it is determined that there is non-compliance, the FRC applies to the High Court to obtain an order

against all or any officers, employees or partners of the reporting institution in order to enforce compliance. The court may order that, should the reporting entity fail without reasonable excuse to comply with the order, the institution, its officers, employees or partners may be ordered to pay a fine of not more than Ksh 1 million (USD 9,174) for a natural person and not more than Ksh 5 million (USD 45,871) for a legal person. FRC or supervisory bodies do not have powers to impose direct financial sanctions to individuals or FIs against non-compliance. For each and every violation of the requirements under POCAMLA, FRC has to go to court, irrespective of its severity. The process of going to court for each and every non-compliance renders the sanctions regime ineffective in view of the fact that court processes take a lot of time.

Regulation 42 of POCAML Regulations states that *'any person, reporting institution or supervisory body who contravenes the provisions of these Regulations commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings (USD 45, 871) or to imprisonment for a term not exceeding three years or both fine and imprisonment'*. However, it is noted that this Regulation is rendered invalid in view of the fact that the penalties are not consistent with section 39 of POCAMLA as cited above. This is as prescribed by Section 31 (b) of Interpretation and General Provisions Act, which requires that a subsidiary legislation be consistent with the Act under which it has been issued.

In additions to the low sanctions provisioned for, sanctions which can be applied by supervisory bodies under their respective legislations, are related to non-compliance with prudential requirements and not AML/CFT requirements. The supervisory bodies do not have the legal basis under POCAMLA to impose sanctions unless delegated by FRC and as such, those powers do not apply to violation of POCAMLA. In addition, while FRC has powers to impose monetary penalties in terms of S.24B(a) of POCAMLA, this applies to breach of, or failure to comply with instructions, direction, or rules issues by FRC under Section 24A of POCAMLA. The powers do not extend to violation of POCAMLA. Finally, POCAMLA contains AML requirements only. Since there are no CFT requirements, no sanctions exist in relation to CFT requirements except the obligation for FIs to report information about any property or an account that is owned or controlled by or on behalf of a terrorist group or specified entity (s.42 of POTA).

Criterion 35.2 – (Partly Met)- While there is no specific provision on the application of sanctions to directors and senior managers, Sections 16 and 39 of POCAMLA use the term *'a person who contravenes a particular section commits an offence'* it can be said that this includes senior managers. A person is defined under Section 2 of the POCAMLA to include natural persons. However, this could exclude directors unless specifically mentioned in light of the fact that they are not directly involved in the day-to-day operations of an institution. The deficiencies highlighted under c.35.1 also apply to senior managers.

Weighting and Conclusion

Kenya does not meet most elements of this Recommendation. While there are sanctions against non-compliance with obligations, these are limited to AML since POCAMLA does not include CFT obligations. In some cases, the sanctions are limited in scope as the same penalty is applicable for non-compliance with all obligations without considering severity of the violation. In relation to sanctions related to requirements of R 9-23, there is some conflict between provisions of POCAMLA and POCAML Regulations and there are only criminal sanctions available against non-compliance by REs.

Kenya is rated Partially-Compliant with R. 35.

Recommendation 36 – International instruments

In its 1st Round MER, Kenya was rated non-compliant with these requirements (formerly R35 & SRI). The main technical deficiencies were: lack of legislative provisions to fully implement the requirements under the Palermo Convention and the TF Convention; lack of clear extradition provisions relating to TF; non- criminalisation of participation in criminal organised group; lack of legislation providing assistance to and protection of victims; offences relating to TF had not been

criminalised to enable implementation of provisions under the SFT Convention, and lack of laws giving effect to the freezing mechanisms under the UNSCRs 1267 and 1373.

Criterion 36.1 – (Met)-Kenya acceded to the Vienna Convention on 19th October 1992; the Palermo Convention on 16th June 2004; signed and ratified the UNCAC on 9th December 2003; signed (4th December 2001) and ratified the UN International Convention for the Suppression of Terrorist Financing (27th July 2003).

Criterion 36.2 – (Partly Met)- In the previous assessment, Kenya was adjudged to have major deficiencies, being lack of legal provisions to fully implement the Palermo Convention and the Terrorism Financing Convention. Kenya largely addressed this deficiency relating to the Palermo Convention by enacting the Prevention of Organized Crime Act, 2010, while the Prevention of Terrorism Act, 2012 addressed the deficiencies relating to the UN Convention for the Suppression of Terrorist Financing. Kenya addressed some identified deficiencies such as the criminalisation of participation in an organised crime group (s. 3 & 4 of the POCA); provisions for the assistance of victims of terrorism (s. 49, POTA). However, there is no provision which makes TF an extraditable offence as the section that amended this Act to make the offence extraditable (s. 51, POTA) only refers to a terrorist act (an offence under S. 4 of the POTA) and doesn't mention the terrorism financing offences under Ss. 5 – 14 of the POTA. Further, though the POTA Regulations were put in place as the mechanism for freezing under UNSCRs 1267 and 1373, they could not be considered because the Authorities did not provide evidence showing that the Regulations were issued in accordance with S. 50 (4) of the POTA (R. 6) ⁴³

Weighting and Conclusion

Kenya has a major deficiency, in that TF is not an extraditable offence.

Kenya is rated Partially Complaint with R. 36.

Recommendation 37 - Mutual legal assistance

In its 1st Round MER, Kenya was rated partially compliant and non-compliant with these requirements (formerly R36 & SRV respectively). The main technical deficiencies were: non-criminalisation of some of the predicate offences in Kenya provided a ground to refuse a request on the offences due to failure to satisfy the dual criminality requirement. The power of the competent authority to use its discretion in matters where the dual criminality requirement had not been met and that it was a requirement of the law, could not be determined due to absence of comprehensive statistics and decided cases on such requests. TF was not criminalised in Kenya and due to the requirement of dual criminality it would not be possible for formal mutual legal assistance to be given in such offences. Kenya has since criminalised all the recommended categories of predicate offences and TF.

Criterion 37.1 – (Met)- Kenya has a legal basis (Mutual Legal Assistance Act, 2011) that allows it to rapidly provide the widest possible range of mutual legal assistance in relation to money laundering, associated predicate offences and terrorist financing investigations, prosecutions and related proceedings. The Attorney General is the Central authority mandated to receive, transmit, coordinate track, and generally ensure compliance with the provisions of this Act.

Criterion 37.2 – (Mostly Met)- Kenya has designated the Attorney General as the central authority for the transmission and execution of requests (S. 5 (2) of the MLA Act). The Central Authority is required to take practical measures to facilitate orderly and rapid disposition of MLA requests (S. 6 (1) (d) of the MLA Act). There is a clear process for transmission of requests through diplomatic channels (Ministry

⁴³ The Regulations were tabled before the Parliament, in February 2022

of Foreign Affairs) to the Central Authority (OAG) and onwards to competent authorities (ODPP, DCI/NPS, EACC, etc.) which takes an average of two days at every stage. Execution of the requests takes a longer period (about 6 months), but in cases where the requesting jurisdiction indicates urgency, the period is much shorter. Kenya did not demonstrate that they have developed a case management system to monitor and track the progress of requests.

Criterion 37.3 – (Met)- Kenya does not prohibit mutual legal assistance, but subjects it to conditions which are in line with international best practice and are not restrictive (S. 11 of the MLA Act – grounds for refusal).

Criterion 37.4 – (Partly Met)

- a) Kenya doesn't refuse to render legal assistance solely on the grounds that the offence is also considered to involve fiscal matters (S. 43 MLA Act).
- b) Kenya doesn't refuse to render legal assistance on the grounds of bank or other financial institution secrecy rules (S. 43 MLA Act). S. 43 is restricted to banks and other financial institutions secrecy rules, which means that Kenya could refuse a request for mutual legal assistance on the basis of it being prejudicial to DNFBPs secrecy rules.

Criterion 37.5 – (Met)- Kenyan LEAs and CAs are required to maintain the confidentiality of mutual legal assistance requests that they receive and the information contained in them, unless disclosure is required in the criminal matters specified or has been authorized by the requesting state (S. 42, MLA Act).

Criterion 37.6 – (Met)- Though an absence of dual criminality is a ground for refusal (as per (a) in the list in c.37.3), dual criminality is not a mandatory precondition for Kenya to render assistance where mutual legal assistance requests do not involve coercive actions. S. 40 of the MLA Act enjoins Kenya LEAs or CAs to provide legal assistance even in the absence of dual criminality or reciprocity.

Criterion 37.7 – (Not applicable)- Dual criminality is not a mandatory requirement.

Criterion 37.8 – (Partly Met)

- a) **Met-** Kenyan competent authorities can deploy powers and investigative techniques available to them to render legal assistance as expeditiously and practically as possible (S. 8 (2) of the MLA Act). Competent authorities in Kenya have further authority to render specific assistance by service of documents (S. 12); ordering the production of records, documents and information (S. 13); examination of witnesses (S. 14); and search and seizure (S. 18).
- b) **Not Met-** Kenyan has not demonstrated that competent authorities can render assistance using the broad range of powers and investigative techniques available to them under Rec 31, outside of those specified in (a) above (production, search and seizure of information, documents and evidence from financial institutions, natural or legal persons, and taking witness statements).

Weighting and Conclusion

Kenya has a strong framework to provide MLA, which meets most of the requirements of R.37. While Kenya has not demonstrated that it has a case management system in place to monitor and track requests; it can use a broad range of other powers and investigative techniques to provide assistance and has not prohibited rejection of MLA requests on the basis of DNFBPs' secrecy rules, these deficiencies are considered minor because Kenya has used the powers and investigative techniques available to render effective MLA and has not rejected any request on the basis of DNFBPs' secrecy rules.

Kenya is rated Largely Complaint with R. 37.

Recommendation 38 – Mutual legal assistance: freezing and confiscation

In its 1st Round MER, Kenya was rated partially compliant with these requirements (formerly R38). The main technical deficiencies were: lack of mechanisms to ensure that there was timeliness in attending to requests for provisional measures; not possible to take freezing and confiscation actions in relation to offences like corruption, migrant smuggling and racketeering because there were not criminalised; lack of clear provisions providing for forfeiture of property of corresponding value; lack of formal mechanisms to coordinate seizure and confiscation actions with other countries and lack of statistics to determine the timeliness in effectively attending to requests for provisional measures.

Criterion 38.1 – (Met)

- a) Kenya has the legal provisions to take expeditious action in response to requests by foreign countries to identify, freeze, seize, or confiscate laundered property from ML, predicate offences or TF (Ss. 2 & 115 (2) of the POCAMLA and Ss. 23 & 24 of the MLA Act).
- b) Kenya has the legal provisions to take expeditious action in response to requests by foreign countries to identify, freeze, seize, or confiscate proceeds of crime from ML, predicate offences or TF (Ss. 2 and 115 (2) of the POCAMLA and Ss. 23 & 24 of the MLA Act).
- c) Kenya has the legal provisions to take expeditious action in response to requests by foreign countries to identify, freeze, seize, or confiscate instrumentalities used in ML, predicate offences or TF (Ss. 2 and 115 (2) of the POCAMLA and Ss. 23 & 24 of the MLA Act).
- d) Under S. 2 of the POCAMLA, instrumentalities meant to be used in money laundering, associated predicate offences or TF are considered realizable property. Therefore, Kenya has the legal provisions to take expeditious action in response to requests by foreign countries to identify, freeze, seize, or confiscate instrumentalities to be used in money laundering, associated predicate offences or TF (Ss. 2 and 115 (2) of the POCAMLA and Ss. 23 & 24 of the MLA Act).
- e) Under S. 2 of the POCAMLA, property of corresponding value is considered realizable property. Therefore, Kenya has the legal provisions to take expeditious action in response to requests by foreign countries to identify, freeze, seize, or confiscate property of corresponding value (Ss. 2 and 115 (2) of the POCAMLA and Ss. 23 & 24 of the MLA Act).

Criterion 38.2 – (Met)- Under S. 24 (c) of the MLA Act, competent authorities in Kenya have the mandate to provide assistance to requests for co-operation made on the basis of non-conviction based confiscation proceedings and related provisional measures, in circumstances when a perpetrator is unavailable by reason of death, flight, absence, or the perpetrator is unknown.

Criterion 38.3 – (Met)

- a) Under the provisions of Part V (Ss. 23 – 26) of the MLA Act, Kenya has legislative measures for coordination of seizure and confiscation actions for proceeds of crime with other countries.
- b) Kenya has legislative mechanisms for managing, and when necessary, disposing of, property frozen, seized or confiscated. Under Ss. 72 (restrained property), 86 (preserved property) of the POCAMLA, and S. 56A of the ACECA, under which a manager can be appointed to manage the seized property. For purposes of disposal of confiscated property, under S. 112 (b) of the POCAMLA, it is disposed in accordance with the law relating to disposal of public property; while under S. 56B of the ACECA, the property is surrendered to the Permanent Secretary to the Treasury.

Criterion 38.4 – (Met)- Kenya has legal provisions enabling it to share confiscated properties with other countries on terms considered appropriate by the Attorney General, in accordance with the provisions of S. 120 (10) of the POCAMLA and S. 26 of the MLA Act.

Weighting and Conclusion

Kenya has met all the criteria.

Kenya is rated Complaint with R. 38.

Recommendation 39 – Extradition

In its 1st Round MER, Kenya was rated partially compliant with these requirements (formerly R39). The main technical deficiency was that not all the predicate offences had been criminalised which made the offences non-extraditable. The other deficiency related to effectiveness issues which are not assessed as part of technical compliance under the 2013 Methodology.

Criterion 39.1 – (Partly met)

- a) **Partly Met** – In Kenya, ML is an extraditable offence under the Sixth Schedule to the POCAMLA, but TF is not an extraditable offence under the schedules of the Extradition (Contiguous and Foreign Countries) Act, as the section that amended this Act to make the offence extraditable (S. 51, POTA) only refers to a terrorist act (an offence under S. 4 of the POTA) and doesn't mention the terrorism financing offences under Ss. 5 – 14 of the POTA.
- b) **Partly Met**- Under the provisions of Part II (Ss. 7 – 12) of the Extradition (Commonwealth Countries) Act CAP 77 and Part II (Ss. 5 – 10) of the Extradition (Contiguous and Foreign Countries) Act, CAP 76, Kenya has clear processes for the timely execution of extradition requests, including a time limit for surrender after which a fugitive is discharged. However, Kenya did not demonstrate that there are mechanisms for prioritizing requests; and a case management system for monitoring and tracking the timely execution of extradition requests.
- c) **Met**- The restrictions placed on the execution of extradition requests in Kenya under Section 16 of the Extradition (Contiguous and Foreign Countries) Act and section 6 of the Extradition (Commonwealth Countries) Act are reasonable and not unduly restrictive.

Criterion 39.2 – (Met)

- a) Kenya has no legal prohibitions and can extradite its nationals.
- b) This sub-criterion is not applicable to Kenya.

Criterion 39.3 – (Met)- In Kenya, dual criminality is required for extradition. However, under S. 4 (1) (a) of the Extradition (Commonwealth Countries) Act, CAP 77 and S. 2 and the Schedule to the Extradition (Contiguous and Foreign Countries) Act, CAP 76, this requirement is deemed to be satisfied regardless of whether both countries place the offence within the same category of offence, or denominate the offence by the same terminology, provided that both countries criminalise the conduct underlying the offence.

Criterion 39.4 – (Not met)-Kenya has no simplified extradition mechanisms.

Weighting and Conclusion

Kenya meets some of the criteria with some major deficiencies, to wit: TF offences are not extraditable offences; there is no mechanism for prioritisation and a case management system for tracking and monitoring the progress of extradition requests; and a minor deficiency of having no simplified extradition mechanisms.

Kenya is rated Partially Compliant with R. 39.

Recommendation 40 – Other forms of international cooperation

Criterion 40.1 – (Met)-Competent authorities of Kenya can provide the widest range of international cooperation regarding ML, associated predicate offences and TF, rapidly, subject to their process requirements. This information is provided both upon request and spontaneously.

Criterion 40.2 – (Mostly Met)

- a) **Met**- Competent Authorities in Kenya have a lawful basis for providing cooperation under S. 4 of the MLA Act, which provides for application of a wider scope of assistance in international cooperation on the basis of an agreement, arrangement or practice in place with Kenya; or rendering assistance wider than that provided for in an agreement, on the basis of provisions of the Act. Under the provisions of S. 24 (k) and (l) of the POCAMLA, the FRC can provide information relating to commission of an offence to a foreign FIU or LEA, and can, on the basis of mutual agreement or reciprocity, enter into agreements or arrangements in writing with foreign FIUs, if deemed necessary for the discharge of its duties under the Act. Other legal provisions providing a basis for a wide range of international cooperation by competent authorities are: Article 2 (6) of the Constitution; Section 11(3) EACCA; Part XII of POCAMLA; Section 3 AA of Insurance Act; Section 10 of EACCMA; S. 41A of the Income Tax Act; Section 24 of MLA; Sec 31(3) (a) of Banking Act; Sec 6(f) of TPA; and Section 24(k) & (l) POCAMLA.
- b) **Met**-Kenya has demonstrated that the competent authorities mandated to cooperate are authorized to use the most efficient means to cooperate (see the basis for discretion in offering the widest range of international cooperation laid out in c.40.2 (a) above).
- c) **Met**- Competent authorities in Kenya have clear and secure mechanisms or channels to facilitate and allow for the transmission and execution of requests. These include electronic communication channels secured by encryption and authentication protocols (FRC) and designated focal persons and officers (MFA, OAG, EACC, ARA, KRA, IRA) or a combination of both (NPS).
- d) **Met**- Some competent authorities in Kenya have processes for prioritisation and timely execution of requests for international cooperation. For instance, when a request is labelled “Urgent”, the ODPP can use and despatch information electronically to expedite execution, while the formal information is sent later through the diplomatic channels. Other CAs like the FRC, CBK, KRA and NPS also demonstrated that they have mapped processes for the timely execution of requests – see analysis under IO 2.3 & 2.4 for details.
- e) **Met**- Section 20 POCAMLA provides for non-disclosure of all information received by the FRC including disclosure of requests. Sec. 18 of Insurance Act provides for secrecy of information acquired in the course of duty. Tax Procedures Act in section 6 has provisions for confidentiality of requests in the case of KRA. The FRC, IRA and KRA have clear processes for safeguarding information received. Competent Authorities in Kenya have various general and specific provisions to ensure that information received in pursuit of international cooperation is safeguarded. The MLA, which provides a lawful basis for other forms of international cooperation (see c.40.2(a) above) by authorities has a general provision for protection of secrecy of information received from unauthorized disclosure (S. 42, MLA Act); the POCAMLA has a similar provision under Ss. 121 (3) and 130. The Director General of the FRC and all staff of the Centre must swear an oath of secrecy at the commencement of their tenure and undertake to maintain the confidentiality of information received by them during

and after their employment (S. 32, POCAMLA). For the EACC, the provisions for Commissioners and all employees to maintain secrecy and protect the information received are under S. 29 (5) and Clause 9 (b) of the Third Schedule to the EACC Act, read together with S. 33 (1) of the ACECA. For the NPS/DCI, the provisions for IGP and all police officers to maintain secrecy and protect the information received are under S. 19 and 73 of the NPS Act; while for the CBK, the provisions are under S. 17 of the CBK Act, 2015.

Criterion 40.3 – (Met)-Kenya has demonstrated that where its main AML/CFT competent authorities need bilateral or multilateral agreements or arrangements to co-operate, these can be negotiated and signed in a timely way, and with the widest range of foreign counterparts. The legal basis for this is contained in S. 4 of the MLA Act. Further details of the various bilateral and multi-lateral agreements and arrangements executed by the competent authorities in Kenya are laid out in the analysis under IO 2.

Criterion 40.4 – (Not met)-Kenya has not demonstrated that, upon request, where its main AML/CFT competent authorities request for assistance, they provide feedback in a timely manner to competent authorities from which they have received assistance, on the use and usefulness of the information obtained.

Criterion 40.5 – (Mostly Met)

- a) **Met**- The fact that a request is considered to involve a fiscal matter is not a legitimate ground for refusal by a competent authority to render assistance (S. 43, MLA Act).
- b) **Mostly Met**- The main MLA/CFT competent authorities in Kenya are not prohibited by laws requiring financial institutions or DNFBNs to maintain secrecy or confidentiality (except where the relevant information that is sought is held in circumstances where legal professional privilege or legal professional secrecy applies) from rendering assistance (S. 17, POCAMLA). Since police officers, officers of the FRC and officers of the KRA are authorized officers under the POCAMLA, the coverage of Section 17 is considered to be wide enough. Kenya needs to demonstrate, by citing relevant provisions of the law, how other key LEAs or competent authorities like the EACC, ODPP, Office of the Attorney General, etc. are not prohibited from rendering assistance by confidentiality laws.
- c) **Met**- Kenya has demonstrated that a competent authority is required to reject a request for assistance, if the authority has formed the opinion that such assistance would be prejudicial to an investigation or proceedings in relation to a criminal matter in Kenya. However, under S. 49 of the MLA Act, provision of assistance can still be done, as long as it is in the interest of justice, having taken into consideration the conditions under S. 49 (2).
- d) **Met**- Kenya does not have any limitation in its international cooperation legal regime requiring AML/CFT competent authorities to refuse to render assistance if the nature or status (civil, administrative, law enforcement, etc.) of the requesting counterpart authority is different from theirs.

Criterion 40.6 – (Met)- Kenya has demonstrated that the FRC (under S. 24 and 116 of the POCAMLA) has controls and safeguards to ensure that information exchanged with it by competent authorities is used only for the purpose for which the information was sought or provided, unless prior authorization has been given by the requested or requesting competent authority. Additionally, under S. 42 of the MLA Act, any other competent authority must maintain the confidentiality of information and material received through international cooperation and can only disclose under two circumstances: in the scope of the criminal matter that was specified in the request for assistance; or where the requested state authorises any other disclosure.

Criterion 40.7 – (Met)- The need for confidentiality and protection of data in Kenya is grounded in the Constitution of Kenya (Article 31 – right to privacy). The FRC & ARA and all other competent authorities (S. 13 (2), 20 and 130 (1) of the POCAMLA), EACC (S. 29 of the EACCA and S. 33 of the ACECA) and the KRA (S. 6 of the TPA) are Kenyan competent authorities with provisions requiring them to maintain appropriate confidentiality for any request for cooperation and the information exchanged, consistent with both parties’ obligations concerning privacy and data protection. Other LEAs or competent authorities with key roles in AML/CFT have the legal basis to afford the same level of confidentiality and data protection while rendering cooperation under the provisions of S. 42 of the Mutual Legal Assistance Act; S. 40 of the ODPP Act; S. 17 of the CBK Act; and can refuse requests, if they believe the confidentiality or data protection of the requesting counterpart is inadequate. Additionally, the competent authorities have general provisions for strict adherence to confidentiality provisions on pain of criminal prosecution (see analysis of c.40.2 (e) for the details), which aids in maintaining an appropriate level of privacy and data protection.

Criterion 40.8 – (Met)- The FRC and EACC of Kenya are able to conduct inquiries on behalf of foreign counterparts, and exchange with their foreign counterparts all information that would be obtainable by them if such inquiries were being carried out domestically (S. 24 (f) of the POCAMLA and S. 11 (3) of the EACC Act, respectively). CMA can conduct investigations on behalf of foreign counterparts under the provisions of S. 13 (3) and 13B of the CMA Act. Kenya has demonstrated that competent authorities have provisions authorizing them to conduct inquiries on behalf of their foreign counterparts, and exchange information that would be obtainable by them if such inquiries were being carried out domestically – for details of practical cases handled, see the analysis under IO 2.4.

Criterion 40.9 – (Met)- The FRC has legal basis for providing co-operation on ML, TF and associated predicate offences [section 23 (b) and 24(k) of POCAMLA and S. 42 of POTA. However, the deficiencies in relation to the limited scope on TF STRs hampers co-operation.

Criterion 40.10 – (Mostly Met)- Kenya FIU is empowered to exchange information with similar bodies in other countries regarding ML activities and related offences under Section 23(2)(b) of POCAMLA. The authorities have provided evidence that the FRC provides feedback upon request and/or, whenever possible, on the usefulness of the information provided as well as the outcome of an analysis conducted, based on the information provided. However, the evidence did not provide tangible information indicating the value or how the financial intelligence was used, for example to trace assets or confirm transactions or even prosecute criminals.

Criterion 40.11

(a) – (Partly Met)- Section 23 (2) (b) of POCAMLA mandates the FRC to exchange information with similar bodies in other countries regarding money laundering activities and related offences. Although s.24(k) of POCAMLA allows FRC to provide information to its foreign counterparts, the provision is restrictive because it refers to information concerning to a commission of an offence. The criterion refers to ‘ALL information required to be accessed....’

(b) – Not Met-The FRC is empowered under POCAMLA (S.23 (2) (a)) *to make information collected by it available to investigating authorities, supervisory bodies and any other bodies relevant to facilitate the administration and enforcement of the laws of Kenya.* The limitation relates to those agencies that are not listed under C29.3 (b) irt POCAMLA S 24 (r), that indicates that the access is not mandated by POCAMLA. In addition, the exchange is further limited by the deficiency in POCAMLA as TF reports are not covered.

Criterion 40.12– (Not Met)- Section 31 (3) of the Banking Act makes provision for the Central Bank to disclose any information to any monetary authority or financial regulatory authority within or outside of Kenya where such information can reasonably be used for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority fiscal, tax agency and fraud investigations agency. However, the sharing of information with

institutions outside of Kenya is only applicable where there is a reciprocal arrangement. Section 13(3) of the Capital Markets Act also makes provision for the Authority to exchange information with other regulatory body whether established within or outside Kenya. Both the provision within the Banking Act and the Capital Markets Act caters for exchange with foreign counterparts of information domestically available to them including those held by financial institutions. However, it has no legal basis under POCAMLA to share information with foreign counterparts relevant for AML/CFT purposes. Of note, the IRA does not have a legal basis for sharing information with their foreign counterparts.

Criterion 40.13– (Partly Met) CBK is able to exchange with foreign counterparts' information domestically available to them, including information held by financial institutions. The standard MOU Template includes information on the fitness and propriety of proposed directors and/or senior management and shareholders of FIs that fall under the supervisory purview of CBKs. CBK is able to access the information from the FIs it supervises. CMA is also able to share relevant information under the International Organization of Securities Commissions (IOSCO) MoU framework. The IRA does not have a legal basis for sharing information with their foreign counterparts

Criterion 40.14– (Partly Met) Financial sector supervisors are able to exchange the following types of information:

- a) regulatory information, such as information on the domestic regulatory system, and general information on the financial sectors;
- b) prudential information, in particular for Core Principles supervisors, such as information on the financial institution's business activities, beneficial ownership, management, and fit and properness.

However, in the absence of legal basis, supervisors may not be able to exchange AML/CFT information, such as internal AML/CFT procedures and policies of financial institutions, customer due diligence information, customer files, samples of accounts and transaction information.

Criterion 40.15– (Partly Met) Financial sector supervisors are able to conduct inquiries on behalf of foreign counterparts. However, there is no legal basis for them to authorise or facilitate the ability of foreign counterparts to conduct inquiries themselves in the country, in order to facilitate effective group supervision.

Criterion 40.16 – (Not Met) There are no clear legal or regulatory provisions that would ensure that financial supervisors get the prior authorisation of the requested financial supervisor for any dissemination of information exchanged, or use that information for supervisory or non-supervisory purpose.

Criterion 40.17 – (Met)-Kenya law enforcement authorities are able to exchange domestically available information with foreign counterparts for investigative purposes relating to money laundering, associated predicate offences identification and tracing of the proceeds and instrumentalities of crime. Kenya is a signatory to several Bilateral and Multilateral legal assistance, Treaties and Agreements that provide for international cooperation in criminal matters. The domestic law for mutual legal assistance is the Mutual Legal Assistance Act no.36 of 2011 laws of Kenya which anchors itself on the principle of Reciprocity and mutual cooperation.

The DCI being a competent authority under Section 2 of the MLA Act of Kenya is empowered to make and receive any request on criminal investigations informally or through the AG the Central Authority in MLA

Under the National Police Service Act no. 11A of 2011 Section 10(o), the Inspector General of Police is obligated to promote co-operation with international police agencies. In fulfilment of this the police have entered into several mutual understandings with other countries on police cooperation which has

enhanced their investigative capacity. For instance, to enhance international cooperation the government of Kenya has an MOU with the government of USA on joint investigation and operation signed on 29/5/2013.

Further, the NPS is a member of the Eastern African Police Chief Cooperation Organization with its headquarters at the Interpol Regional Bureau Nairobi, AFRIPOL and INTERPOL. Currently the IG is the sitting President of the AFRIPOL being the African Mechanism for police cooperation while the DCI is a member of the Interpol Executive Committee. This fosters and promotes relations with the broader society as mandated by the Constitution of Kenya under Article 244(e).

The Commonwealth Schemes for International Cooperation in Criminal Matters provides a comprehensive regime for cooperation across commonwealth countries. The Commonwealth has adopted several schemes for cooperation among them;

- Scheme Relating to Mutual Legal Assistance (Harare Scheme)
- London Scheme for Extradition
- Scheme for the Transfer of Convicted Offenders
- Framework for the Commonwealth Network of Contact Persons

The Commonwealth Schemes for International Cooperation in Criminal Matters represent non-binding and flexible arrangements which provide constructive and pragmatic approach to mutual co-operation in criminal matters across all commonwealth countries.

The Constitution of the International Criminal Police Organization-INTERPOL stipulates its aims under Article 2 as to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Humans Rights.

Consequently, there are other pertinent legal instruments that lay foundation for international cooperation including;

- The Treaty for the Establishment of the East African Community Agreement under Section 124(5)
- POCAMLA under part XII on International Assistance and Proceedings.
- Kenya Citizenship and Immigration Act no 12 of 2011
- Extradition (Commonwealth Countries) (Cap. 77)
- Extradition (Contiguous and Foreign Countries) (Cap. 76) Protocol on Combating Drug Trafficking in the East African Region

Criterion 40.18 – (Met)-Law enforcement authorities are able to conduct inquiries and use domestically-available, non-coercive powers and investigative techniques to conduct inquiries and obtain information on behalf of foreign counterparts. Where coercive information is required, Kenya law enforcement can open an investigation or a formal MLA request can be made, the conduit being the MOFA. Co-operation occurs through Egmont and Interpol mechanisms and Kenya abides by any restrictions on use imposed by these regimes

Criterion 40.19 – (Met)-Kenya state LEAs are able to and from time to time do form joint investigative teams to conduct investigations as well establish bilateral/ multilateral arrangements when necessary.

Criterion 40.20 – (Mostly Met)-Section 24 (k) of POCAMLA provides for exchange of information relating to the **commission of an offence** to any foreign financial intelligence unit or appropriate foreign law enforcement authority. This seems to be an impediment as the provision states that the exchange of information is on the basis of a commission of an offence and not on ALL information

when it relates to non-counterparts. Section 24 (1) of POCAMLA allows for exchange of information with counterpart foreign financial intelligence unit.

Weighting and Conclusion

Competent authorities have legal basis to provide other forms of cooperation. However, there are some moderate shortcomings. The cooperation provisions are contained in POCAMLA which does not include TF matters. The FRC can provide international cooperation through MOUs with counterpart FIUs and non-counterparts in foreign jurisdictions. However, it is not clear that all authorities can cooperate or that all information can be provided. Furthermore, it is not established that the FRC has been provided with feedback on the usefulness of financial information or assistance when there is an inquiry, investigation or proceeding underway.

Kenya is rated Partially Compliant with R.40.

Summary of Technical Compliance – Key Deficiencies

a) Compliance with FATF Recommendations

Recommendations	Rating	Factor(s) underlying the rating
1. Assessing risks & applying a risk-based approach	PC	<ul style="list-style-type: none"> • The NRA did not consider vulnerability of some important sectors, products, services which could be abused for TF purposes. • NRA relied primarily on number of cases rather than relative scale of proceeds generating crimes which may impact the reasonableness of conclusions on risks. • No mechanisms had not been put in to provide information on the results of the risk assessments to relevant competent authorities and SRBs, FIs and DNFBPs, at the time of the onsite. • No risk-based approach in allocation of resources and in implementing measures to mitigate its identified ML/FT. • Requirements to conduct risk assessment, have policies to mitigate the risks do not include TF. • No specific requirements for risk assessment to consider all relevant factors, keep the risk assessments up-to-date and have appropriate mechanisms to provide the risk assessment to competent authorities. • FIs and DNFBPs are not required to conduct risk assessment and develop policies and procedures to mitigate TF risk.
2. National cooperation and coordination	NC	<ul style="list-style-type: none"> • Absence of national AML/CFT policies informed by identified risks during the on-site. • Mechanism for coordination in the development and implementation of AML/CFT policies could not be determined. • Kenya has not provided details, statutory or under Policy, of how these various forums coordinate to develop AML and CFT policies. • The POTA (as amended) which is the primary law upon which the mandate to coordinate the implementation of all UN Security Council Resolutions relating to TF does not provide for proliferation financing.

Recommendations	Rating	Factor(s) underlying the rating
		<ul style="list-style-type: none"> No information on existence of any cooperation and coordination between competent authorities to ensure compatibility of AML/CFT requirements with data protection and privacy rules and other similar provisions.
3. Money laundering offences	C	<ul style="list-style-type: none"> All criteria are met.
4. Confiscation and provisional measures	PC	<ul style="list-style-type: none"> Absence of legal provisions empowering KRA and NPS/DCI to identify, trace and evaluate property that is subject to confiscation. The provisions of the law empowering other key AML/CFT competent authorities such as NPS, KRA, ODPP were not specifically cited.
5. Terrorist financing offence	PC	<ul style="list-style-type: none"> Scope of TF offence does not include financing the travel of individuals to a State other than their own for the purposes of terrorism or terrorist training. Scope of definition of ‘Funds’ does not include instruments in any form, including electronic or digital. Criminal liability and proportionate, dissuasive sanctions do not apply to legal persons.
6. Targeted financial sanctions related to terrorism & TF	NC	<ul style="list-style-type: none"> There is no legal basis for Kenya to implement Targeted Financial Sanctions under R.6.
7. Targeted financial sanctions related to proliferation	NC	<ul style="list-style-type: none"> There is no legal basis for Kenya to implement Targeted Financial Sanctions under R.7 as POTA does not cover PF.
8. Non-profit organisations	NC	<ul style="list-style-type: none"> Not identified the subset of organisations which fall within the FATF definition of NPO. Not reviewed the adequacy of measures that apply a subset of NPOs that may be abused for TF to facilitate application of proportionate and effective risk mitigation. There is no effective outreach on TF related issues which is mostly attributed to lack of resources. There is no meaningful and collaborative work with NPOs to develop and to address TF risks and vulnerabilities. No information has been made available to show how Kenya works with NGO to encourage the use of regulated financial channels. The NGO Board have no specific measures or procedures to regulate and monitor NPO in Kenya.
9. Financial institution	PC	<ul style="list-style-type: none"> The secrecy overriding provisions do not include TF due to

Recommendations	Rating	Factor(s) underlying the rating
secrecy laws		scope limitations of POCLAMLA.
10. Customer due diligence	PC	<ul style="list-style-type: none"> • No legal or regulatory requirement for FIs to verify the accuracy of originator information. • No requirement to conduct CDD when there is a suspicion of TF. • No legal or regulatory requirement for FIs to identify the applicant, whether permanent or occasional customers. • No legal or regulatory requirement for FIs to verify the identity of a person acting on behalf of a customer and to verify that the person is so authorized to act on behalf of a customer. • There is no requirement for identification and verification of identity of a BO for the purposes of entering into or continuing a business relationship. • FIs are not required to scrutinize transactions undertaken throughout the course of that relationship. • No legal or regulatory requirement for FIs to ensure that documents, data or information collected under the CDD process is kept up-to-date and relevant. • FIs are not under obligation to identify and take reasonable measures to verify the identity of beneficial owners through natural person having controlling interest, exercising control or holding senior management position. • No legal provisions are in place for the verification of the identity of the beneficiary of life insurance at the time of the pay-out. • There is no explicit requirement for FIs to include the beneficiary of a life insurance policy as a relevant risk factor. • FIs are not obliged by law to adopt risk management procedures concerning the conditions under which a customer may utilise the business relationship prior to verification. • FIs are not required to undertake customer due diligence on the basis of materiality and risk, or to do so at appropriate times, taking into account whether and when CDD measures have previously been undertaken and the adequacy of data obtained. • No provisions are in place permitting FIs not to pursue the CDD process where there is a risk of tipping off, and rather file an STR.
11. Record keeping	PC	<ul style="list-style-type: none"> • The law does not specify that the records of all transactions

Recommendations	Rating	Factor(s) underlying the rating
		<p>should be on both international and domestic transactions.</p> <ul style="list-style-type: none"> • No provisions are in place for FIs to keep records for TF, such records are limited to ML. • The obligation to provide CDD information and transaction records to competent authorities does not specifically state that this be done upon the appropriate authority.
12. Politically exposed persons	PC	<ul style="list-style-type: none"> • There is no requirement to adopt the measures in these sub-criteria in cases when there is higher risk business relationship with a domestic PEP. • Kenya's definition of PEPs does not cover family members and close business associates of foreign Heads of State. • There is no legal provisions in place for financial institutions to take reasonable measures in determining whether the beneficiaries and/or, where required, the beneficial owner of the beneficiary, are PEPs in relation to life insurance policies.
13. Correspondent banking	PC	<ul style="list-style-type: none"> • There is no requirement for FIs to gather information and assessing AML controls of respondent institutions. • FIs are not required to clearly understand the respective AML/CFT responsibilities of each institution. • The laws do not impose any obligations on FIs with respect to "payable-through accounts". • FIs are not required to satisfy themselves that respondent FIs do not permit their accounts to be used by shell banks.
14. Money or value transfer services	NC	<ul style="list-style-type: none"> • Kenya has not taken action with a view to identifying natural or legal persons that carry out MVTS without a licence or registration and applying proportionate and dissuasive sanctions to them. • MVTS providers are not subject to monitoring for CFT compliance, since POCAMLA does not cover TF. • MVTS providers that use agents are not obliged to include them in their AML/CFT programmes and monitor them for compliance with such programmes.
15. New technologies	NC	<ul style="list-style-type: none"> • No risk assessment undertaken in relation to VASPs. • There are AML/CFT regulatory frameworks have been developed relating to VAs and activities of VASPs.
16. Wire transfers	NC	<ul style="list-style-type: none"> • There are no provisions for instances where cross-border wire transfers are batched. • There is no obligation for beneficiary information to be verified for accuracy. • There is no obligation for an intermediary to ensure that all originator and beneficiary information that accompanies a

Recommendations	Rating	Factor(s) underlying the rating
		<p>wire transfer is retained with it (POCAMLR reg. 27 (2)).</p> <ul style="list-style-type: none"> • The provisions do not consider instances where technical limitations prevent the required originator or beneficiary information accompanying a cross-border wire transfer from remaining with a related domestic wire transfer. • Intermediary FIs are not required to have risk-based policies and procedures for determining: (a) when to execute, reject, or suspend a wire transfer lacking required originator or required beneficiary information; and (b) the appropriate follow-up action. • There is no provision for beneficiary FIs to take reasonable measures, which may include post-event monitoring or real-time monitoring where feasible, to identify cross-border wire transfers that lack required originator information or required beneficiary information. • There are no provisions in law requiring FIs to identify the beneficiary. • There is no regulatory requirement for MVTs provider which controls both the ordering and the beneficiary side of a wire transfer to (a) take into account the information in c16.17 (a) and (b). • POCAMLA under which the POCAML Regulations were issued do not have jurisdiction over implementation of UNSCRs and POTA Regulations were not issued in accordance with the requirements of S.50(4) of POTA.
<p>17. Reliance on third parties</p>	PC	<ul style="list-style-type: none"> • There are no regulatory requirements for FIs to comply with when they rely on a third party that is part of the same financial group. • For financial groups, there is no requirement for FIs to ensure that higher country risk is adequately mitigated by the group’s AML/CFT policies. • The requirement to assess country risk does not include TF risk.
<p>18. Internal controls and foreign branches and subsidiaries</p>	PC	<ul style="list-style-type: none"> • FIs are not required to have regard to ML/TF risks and the size of the business. • There is no obligation in place to ensure high standards when hiring employees. • There is no requirement in place for ongoing training of employees on an ongoing basis. • The law in place does not require that financial group has policies and procedures for sharing information required for

Recommendations	Rating	Factor(s) underlying the rating
		<p>purposes of CDD and ML/TF risk management.</p> <ul style="list-style-type: none"> • The law in place does not require FIs have measures, at group-level compliance, audit, and/or AML/CFT function, to facilitate the provision of customer, account, and transaction information from branches and subsidiaries when necessary for AML/CFT purposes • The law in place does not require for financial groups to have measures to ensure existence of adequate safeguards on the confidentiality and use of information exchanged, including safeguards to prevent tipping-off. • FIs are not required to apply AML measures where the host country does not permit the proper implementation of AML/CFT measures to apply appropriate additional measures to handle the additional ML/TF
19. Higher-risk countries	PC	<ul style="list-style-type: none"> • No requirement to apply enhanced due diligence measures when called upon to do so by the FATF. • There are no measures put in place by Kenya to advise FIs on weaknesses in the AML/CFT systems of other countries.
20. Reporting of suspicious transaction	NC	<ul style="list-style-type: none"> • The requirement undermines the need to file STRs “promptly”. • The scope of obligation for FIs to report suspicion is limited to transactions or information about a terrorist act.
21. Tipping-off and confidentiality	PC	<ul style="list-style-type: none"> • The obligations of FIs in relation to tip off are limited to ML and do not cover reports on FT • Protection of FIs, directors, officers and employees does not cover reports on suspected TF.
22. DNFBPs: Customer due diligence	NC	<ul style="list-style-type: none"> • Lawyers are not designated as reporting institutions for AML/CFT purposes. • Deficiencies noted under R. 10, 11, 12, 15 and 17 also apply to DNFBPs.
23. DNFBPs: Other measures	NC	<ul style="list-style-type: none"> • All DNFBPs are not under obligation to file STRs on TF. • Deficiencies noted under R. 18, 19 and 21 also apply to DNFBPs.
24. Transparency and beneficial ownership of legal persons	PC	<ul style="list-style-type: none"> • No assessment of ML/TF risks associated with the types of legal persons created in the country. • Nominee shareholders not required to disclose their nominator to the Company registry and nominee directors are not required to disclose their nominator. • No requirement local companies to have at least one person, resident in the country authorized by the company, and be accountable to competent authorities, for providing all basic and available information on BO, and/or any further

Recommendations	Rating	Factor(s) underlying the rating
25. Transparency and beneficial ownership of legal arrangements	PC	<p>assistance.</p> <ul style="list-style-type: none"> • No requirement to maintain information and records referred to for at least five years after the date on which the company is dissolved or otherwise ceases to exist, or five years after the date on which the company ceases to be a customer of the professional intermediary or the financial institution. • No clear mechanism to monitor the quality of assistance it receives from other countries in response to requests for basic and beneficial ownership information or requests for assistance in locating beneficial owners residing abroad. • No requirement for trustees under any express trust to obtain and hold adequate, accurate, and current information on the identity of the settlor(s), the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. • No requirement to keep accurate and as up to date as possible • No requirements for trustees to disclose their status to financial institutions and DNFBPs when forming a business relationship or carrying out an occasional transaction above the threshold. • No measures to ensure that trustees are either (a) legally liable for any failure to perform the duties relevant to meeting their obligations; or (b) that there are proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to comply. • No proportionate and dissuasive sanctions, whether criminal, civil or administrative, for a trusts and other legal arrangements failing to grant to competent authorities' timely access to information regarding the trust referred to in criterion 25.1.
26. Regulation and supervision of financial institutions	PC	<ul style="list-style-type: none"> • No competent authority designated to supervise or monitor compliance with CFT requirements due to limited scope of POCAMLA. • Frequency and intensity of on-site and off-site AML/CFT supervision of FIs is not determined on the basis of:(a) the supervisors' assessment of an FI's risk profile; (b) the ML/TF risks present in the country • No requirement for supervisors to review the assessment of ML/TF risk profile of a FI or group periodically, and when there are major events or developments in the management

Recommendations	Rating	Factor(s) underlying the rating
27. Powers of supervisors	NC	<p>and operations of the FIs group.</p> <ul style="list-style-type: none"> • Powers of supervisors do not include compliance with CFT requirements. • Supervisors do not have specific powers to conduct inspections. • Supervisors do not have specific powers to impose sanctions in line with R.35.
28. Regulation and supervision of DNFBPs	PC	<ul style="list-style-type: none"> • There is no designated supervisory authority for lawyers and therefore they are not subject to any systems for monitoring compliance with AML requirements. • DNFBPs supervisors are not implementing risk-based supervision
29. Financial intelligence units	PC	<ul style="list-style-type: none"> • The criterion refers to dissemination of results of analysis of reports received whereas s.24(b) of POCAMLA provides that FRC shall send the reports it has received under the Act to LEAs. • The s42 of POTA is limited in terms of TF-related STR obligations (see R.20 for details). • This criterion requires dissemination of results of its analysis and not reports it has received from reporting persons. The criterion refers to dissemination of results of analysis of reports received whereas s.24(b) of POCAMLA provides that FRC shall send the reports (STRs) it has received under the Act to LEAs.
30. Responsibilities of law enforcement and investigative authorities	PC	<ul style="list-style-type: none"> • Kenya has not cited provisions to show that a specific law enforcement authority or authorities have been legally given the responsibility or jurisdiction to investigate terrorism financing. • Kenya has not demonstrated that law enforcement investigators of predicate offences are authorized to pursue investigation of related ML/TF offences during parallel financial investigations of predicate offences or refer them to a mandated authority. • Kenya has not demonstrated that the EACC is designated to investigate ML offences arising from or related to corruption.
31. Powers of law enforcement and investigative authorities	PC	<ul style="list-style-type: none"> • Kenya has not demonstrated that its LEAs are empowered to undertake controlled deliveries as an investigation technique. • Kenya has not demonstrated that it can employ the use of undercover operations as an investigation technique for ML/TF and associated predicate offence

Recommendations	Rating	Factor(s) underlying the rating
		<ul style="list-style-type: none"> • Kenya has not demonstrated that its LEAs have the power to access computer systems for purposes of investigating ML, associated predicate offences and TF. • Kenya has not demonstrated that its LEAs are mandated by law to use controlled deliveries as an investigation technique for ML, associated predicate offences and TF. • Kenya has not demonstrated that it has mechanisms in place to enable competent authorities to identify, in a timely manner, whether natural or legal persons hold or control accounts. • Kenya has not demonstrated that its competent authorities have a process(es) to identify assets without prior notification to the owner.
32. Cash couriers	PC	<ul style="list-style-type: none"> • The cross-border transportation of currency or BNIs by mail and cargo is not covered. • Sanctions against failure to declare or false declarations are not proportionate and dissuasive. • No safeguards in place to ensure proper use of the information to avoid restriction trade payments or freedom of capital movement.
33. Statistics	PC	<ul style="list-style-type: none"> • Discrepancies in statistics on TF prosecutions and convictions. • Statistics on incoming and outgoing MLA requests not updated.
34. Guidance and feedback	PC	<ul style="list-style-type: none"> • Lack of guidelines on TF and PF • Guidelines issued by CBK on STR reporting not consistent with POCAMLA.
35. Sanctions	PC	<ul style="list-style-type: none"> • Kenya does not have a range of proportionate and dissuasive civil and administrative sanctions for dealing with natural or legal persons that fail to comply with the AML/CFT requirements of Recommendations 6, and 8 to 23. • There is no specific provision on the application of sanctions to directors and senior managers.
36. International instruments	PC	<ul style="list-style-type: none"> • TF offences are not extraditable offences.
37. Mutual legal assistance	LC	<ul style="list-style-type: none"> • Kenyan has not demonstrated that competent authorities can render assistance using the broad range of powers and investigative techniques available to them under Rec 31, outside of those specified in (a) above (production, search

Recommendations	Rating	Factor(s) underlying the rating
		and seizure of information, documents and evidence from financial institutions, natural or legal persons, and taking witness statements).
38. Mutual legal assistance: freezing and confiscation	C	<ul style="list-style-type: none"> • All criteria are met
39. Extradition	PC	<ul style="list-style-type: none"> • Kenya has no simplified extradition mechanisms. • TF offences are not extraditable offences
40. Other forms of international cooperation	PC	<ul style="list-style-type: none"> • Competent authorities do not have powers to cooperate and exchange information in relation to TF. • Supervisory authorities do not have legal powers to cooperate and exchange information on AML/CFT matters. • Kenya has not demonstrated that its competent authorities have clear processes for the prioritisation and timely execution of requests. • Kenya has not demonstrated that where its main AML/CFT competent authorities request for assistance, they provide feedback in a timely manner to competent authorities from which they have received assistance, on the use and usefulness of the information obtained.

Glossary of Acronyms⁴⁴

AML/CFT	Anti-Money Laundering/Combating the Financing of Terrorism
AML/CFT/CPF	Anti-Money Laundering/Combating the Financing of Terrorism and Countering Proliferation Financing
ACECA	Anti-Corruption and Economic Crimes Act
ADF	Allied Democratic Forces
AML	Anti-Money Laundering
AMLAB	Anti-Money Laundering Advisory Board
APG	Asia/Pacific Group on Money Laundering
ARIN-EA	Assets Recovery Inter-Agency Network for Eastern Africa
ATPU	Anti-Terrorism Police Unit
ARINSA	Assets Recovery Inter-Agency Network for Southern Africa
ARA	Assets Recovery Agency
ATAF	African Tax Administration Forum
APS	Administration Police Service
BCLB	Betting Control and Licensing Board
BNI	Bearer Negotiable Instruments
BRS	Business Registration Service
BO	Beneficial Ownership
CAACC	Commonwealth Africa Anti-Corruption Centre
CMA	Capital Market Authority
CBK	Central Bank of Kenya
CBRs	Correspondent Banking Relationships
CDD	Customer Due Diligence
CMA	Capital Markets Authority
CFT	Combating the Financing of Terrorism
CFTIMC	Counter Financing of Terrorism Inter-Ministerial Committee
COMESA	Common Market for Eastern and Southern Africa
CRMs	Country Risk Models
CT	Counter Terrorism
CTRs	Cash Transaction Reports
DCI	Directorate of Criminal Investigations

⁴⁴ Acronyms already defined in the FATF 40 Recommendations are not included into this Glossary.

DNFBPs	Designated Non-Financial Businesses and Professions
DPA	Deferred Prosecution Agreement
DRC	Democratic Republic of Congo
EAC	East African Community
EACCMA	East African Community Customs Management Act
EACC	Ethics and Anti-Corruption Commission
EAISA	East African Insurance Supervisors Association
EARB	Estate Agents Registration Board
EDD	Enhanced Due Diligence
EAG	Eurasian Group on Combating Money Laundering and Financing of Terrorism
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIU	Financial Intelligence Unit
FIs	Financial Institutions
FRC	Financial Reporting Centre
FRACCK	Framework for the Return of Assets from Corruption and Crime in Kenya
FY	Financial Year
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GDP	Gross Domestic Product
GoK	Government of Kenya
HoAF	Heads of Analysis Forum
IAIS	International Association of Insurance Supervisors
ICPAK	Institute of Certified Public Accountants of Kenya
IDPS	Internally Displaced Persons
ICPSs	Institute of Certified Public Secretaries
IDPs	Internally Displaced Persons
IOSCO	International Organization of Securities
IRA	Insurance Regulatory Authority
JKIA	Jomo Kenyatta International Airport
JIC	Joint Intelligence Centre
KYC	Know Your Customer
KNBS	Kenya National Bureau of Statistics
KWS	Kenya Wildlife Service
KSH	Kenya Shilling
KRA	Kenya Revenue Authority
LEAs	Law Enforcement Agencies
LSK	Law Society of Kenya
LTP	Limited Liability Partnership
MFB	Micro Finance Bank

MOUs	Memorandum of Understanding
MAT	Multi-Agency Team
MLRO	Money Laundering Reporting Officer
MER	Mutual Evaluation Report
MRPs	Money Remittance Providers
ML	Money Laundering
ML/TF	Money Laundering/Terrorism Financing
MLA	Mutual Legal Assistance
MAT	Multi-Agency Team
MVBIED	
MVTS	Money Value Transfer Service
NBFIs	Non-Bank Financial Institutions
N/A	Not Applicable
NCAJ	National Council on the Administration of Justice
NPOs	Non-Profit Organization
NCB	Non-Conviction Base
NCTC	National Counter-Terrorism Centre
NGO	Non-Governmental Organization
NGO Board	Non-Governmental Organization Board
NIS	National Intelligence Service
NPS	National Police Service
NSCVE	National Strategy to Counter Violent Extremism
NTF	National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism
NTSA	National Transport and Safety Authority
NYDF	National Youth Development Fund
NYS	National Youth Service
NSSF	National Social Security Funds
ODPP	Office of the Director of Public Prosecution
PEPs	Politically Exposed Persons
PF	Proliferation Financing
POCAMLA	The Proceeds of Crime and Anti-Money Laundering Act
POTA	Prevention of Terrorism Act
RBAs	Risk-Based Approach
RCPSB	Registration of Certified Public Secretaries Board
SA	South Africa
SACCO	Savings and Credit Cooperatives
SASRA	Sacco Societies Regulatory Authority
SRB	Self-Regulatory Body
STR	Suspicious Transaction Report
TA	Technical Assistance
TC	Technical Compliance
TCSPS	Trust and Company Services Providers

TF	Terrorism Financing
TFS	Targeted Financial Sanctions
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNSCRS	United Nations Security Council resolution
US	United States
USD	United States dollar
VA	Virtual Asset
VASP	Virtual Asset Service Provider
VAT	Value Added Tax
WCO	World Customs Organization

Annex C: Categories of Predicate Offences

No.	Offence	Legal Provision & Statute
1.	Participation in an organised criminal group and racketeering	Sections 3 & 4, Prevention of Organised Crimes Act, 2010
2.	Terrorism, including terrorist financing;	Sections 5, 6, 9 & 9A Prevention of Terrorism Act, 2012
3.	Trafficking in human beings and migrant smuggling	Section 3, Counter-Trafficking in Persons Act, 2010
4.	Sexual exploitation, including sexual exploitation of children	Section 15, Sexual Offences Act, 2006
5.	Illicit trafficking in narcotic drugs and psychotropic substances	Section 4, Narcotic Drugs and Psychotropic Substances (Control) (No. 4 Of 1994)
6.	Illicit arms trafficking	Section 4, Firearms Act
7.	Illicit trafficking in stolen and other goods	Sections 268-294, Penal Code
8.	Corruption and bribery;	Sections 40-48, Anti-Corruption and Economic Crimes Act No.3 of 2003; Sections 5, 6 & 8, Bribery Act;
9.	Fraud	Sections 312-331, Penal Code
10.	Counterfeiting currency	Sections 350, 359, 367-377, Penal Code
11.	Counterfeiting and piracy of products	Section 32, Anti-Counterfeit Act No. 13 of 2008
12.	Environmental crime	Sections 137-146, Environmental Management and Co-ordination Act No. 8 of 1999
13.	Murder, grievous bodily injury	Section 203, Penal Code; Section 234, Penal Code
14.	Kidnapping, illegal restraint and hostage-taking	Section 254-263, Penal Code;
15.	Robbery or theft	Section 295, Penal Code; Section 268, Penal Code
16.	Smuggling; (including in relation to customs and excise duties and taxes)	Section 199, The East African Community Customs Management Act, 2004
17.	Tax crimes (related to direct taxes and indirect taxes)	Sections 80-109, Tax Procedures Act No. 29 of 2015; Section 109, Income Tax Act; Sections 22, 37, 42 & 43 Value Added Tax Act No.35 of 2013
18.	Extortion	Section 300, Penal Code

No.	Offence	Legal Provision & Statute
19.	Forgery	Section 345, Penal Code
20.	Piracy	Section 371, Merchants Shipping Act, 2009
21.	Insider trading and market manipulation	Section 32E-33, Capital Markets Act
22.	Cybercrime	Sections 14-46, Computer Misuse and Cybercrimes Act, 2018