



FIRST ROUND MUTUAL EVALUATIONS - POST EVALUATION PROGRESS  
REPORT OF KENYA

Covering the period August 2017 – July 2018

## REPUBLIC OF KENYA

### I. INTRODUCTION

1. The Mutual Evaluation of Kenya was conducted in June 2010 and the Mutual Evaluation Report (MER) was adopted by the Council of Ministers in September 2011.
2. During the ESAAMLG meeting in Luanda, Angola in 2014, the Task Force noted that Kenya had substantially addressed the entire Core and Key Recommendations rated Partially Compliant (PC) and Non-Compliant (NC). As a result, the country was directed to report progress only on the non-key and non-core Recommendations that were rated PC or NC in the MER.
3. The details of the Non-Core and Non Key Recommendations are set out in the Table 1 below:

*Table 1: Ratings of Compliance with Non- Core and Non-Key Recommendations*

Rec.	2	6	7	8	11	12	14	15	16	17
Rating	PC	NC	NC	NC	NC	NC	PC	NC	NC	NC

Rec.	18	21	22	24	25	27	28	29	30	31
Rating	PC	NC	NC	NC	NC	PC	PC	NC	PC	PC

Rec.	32	33	34	37	38	39	SRVI	SRVII	SRVIII	SRIX
Rating	NC	NC	NC	PC	PC	PC	NC	NC	NC	NC

4. By September 2017, Kenya had adequately addressed most of the outstanding non-key and non-core recommendations with the exception of Recs: 12, 16, 21, 24, 33 and 34.
5. This report, therefore, highlights analysis of progress made by Kenya in respect of the six outstanding non-core and non-key Recommendations since the last Progress Report presented at the Task Force meetings in Zanzibar, Tanzania in September 2017.
6. Since the August 2016 meetings, Kenya has reported progress in the following areas:

- Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) was amended in 2017 to enhance the Financial Reporting Centre (FRC)'s powers to impose civil monetary penalties and to take administrative action for non-compliance with the legislation. The title of the Director was changed from Director to Director General. The Asset Recovery Agency was also strengthened by making it an autonomous institution with powers to recruit its own staff and have its own budget.
- In July 2017, the FRC appointed a substantive Director General, and are in the process of recruiting five directors and fourteen Managers through a competitive process.
- They have also passed an amendment to the Companies Act to provide amongst other things the identification of beneficial owners.
- POCLAMLA Regulations (2013) were amended in 2018 by inserting two sections to allow the preventive measures in the Regulations to apply, not only to anti-money laundering activities, but also to measures for combating terrorism financing; and to obligate reporting institutions to have policies and procedures for non-face-to-face business relationships.

## II. ANALYSIS OF PROGRESS MADE BY KENYA

### Legal persons and beneficial ownership - Rec. 33 (Rated NC)

#### *Deficiency 1*

7. The MER noted that lawyers and certified public secretaries were not captured as reporting persons under the POCAMLA. Therefore, the assessors recommended that authorities should consider amending POCAMLA to include these entities.
8. The authorities are in the process of passing an amendment to section 2 of POCAMLA through the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) which provides for the designation of advocates, notaries and other independent legal professionals including trust or company service providers; as reporting persons under the POCAMLA. The Bill has gone through the Second Reading in the National Assembly. It was also noted that the Bill has no provision for certified public secretaries to be designated as reporting persons.

### *Conclusion*

9. The deficiency has **not been sufficiently addressed** pending passing of the Bill into law and at the same time incorporating certified public secretaries as designated reporting persons.

## **Legal arrangements and beneficial ownership - Rec. 34 (Rated NC)**

### *Deficiency 2*

10. The MER observed that there is no mechanism in place for accessing beneficial ownership information and control of trusts. Based on this, it was recommended that the authorities should consider adopting a mechanism to register trusts and to keep accurate and current information on the settlor, trustee and beneficiaries of trusts. This information should be made available to investigatory and supervisory authorities.
11. The authorities reported that the Trusts and Perpetual Succession Act is due to be repealed and replaced with a new piece of legislation that will take into account the requirement to obtain and maintain accurate and current settlor, trustee and beneficiaries of trusts.

### *Conclusion*

**No Progress.** The authorities are yet to repeal the Trusts and Perpetual Success Act and replace it with a new piece of legislation which will address the deficiency.

### *Deficiency 3*

12. The MER observed that lawyers and other persons who provide trusteeship services are not designated as reporting persons. In this regard, the assessors recommended that POCAMLA be amended to include lawyers and other persons who provide trusteeship services in the definition of reporting entities.
13. The authorities are in the process of passing an amendment to section 2 of POCAMLA through the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) which provides for the designation of advocates, notaries and other independent legal professionals including trust or company service providers as reporting persons under the POCAMLA. The Bill has gone through the Second Reading in the National Assembly. It was however noted that the Bill has no provision for certified public secretaries to be designated as reporting persons.

*Conclusion*

**Not sufficiently addressed**

*Conclusion on Rec 34*

14. Based on the foregoing analysis, Kenya has **not addressed** the two deficiencies associated with Recommendation 34. In this respect, the country is considered not to have made sufficient progress.

**Preventive Measures - Higher Risk Countries Rec 21 (Rated NC)**

15. The MER observed that there was no requirement for financial institutions to give special attention to business relationship and transactions with persons from or in countries which do not or insufficiently apply the FATF recommendations. Based on this, the assessors recommended that the authorities in Kenya should require financial institutions to give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined and the findings established in writing, and made available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate counter measures.
16. The authorities are in the process of passing the Finance Bill, 2018 which would address the deficiencies under this Recommendation. The Bill was passed by the National Assembly on 28<sup>th</sup> August, 2018 and is now awaiting assent by the President.

**Conclusion**

17. **Not sufficiently addressed.** To be addressed by clause 70 of the Finance Bill, 2018 once it is assented to by the President.

**Preventive Measures – DNFBPs Rec 12 (Rated NC)**

*Deficiency 1*

18. The MER observed that lawyers, notaries and other independent legal professionals as well as Trust and Company Service Providers were not designated as reporting institutions under POCAMLA. For this purpose, the assessors recommended amendment of the legislation to include lawyers, notaries and other independent legal professionals as well as trust and company service providers as reporting institutions.

#### *Conclusion*

19. **No sufficient progress** has been made and therefore this deficiency remains outstanding (*refer to R 33 above*).

#### *Deficiency 2*

20. The MER observed that there were deficiencies in the AML legal framework regarding recommendations 5, 6 and 8 to 11. For this purpose, authorities in Kenya were advised to take appropriate measures to ensure that the deficiencies in the AML legal framework are remedied expeditiously.

21. In the previous Review Group report of August 2015 it was indicated that Kenya had addressed all the deficiencies relating to Rec 5, 6, 8 – 11. In August 2016 the Reviewers however noted the following deficiencies relating to Rec 8 and 9:

- i) There are no enforceable requirements for financial institutions to have policies in place or take such measures as may be needed to prevent the misuse of technological developments in money laundering or terrorist financing schemes. The legal framework had no obligation for TF.*
- ii) There are no requirements for financial institutions to have in place policies and procedures to address any specific risks associated with non-face-to-face business relationships or transactions.*

22. Regarding deficiencies under Rec.8 - the Cabinet Secretary to the National Treasury and Planning has amended the POCAMLA Regulations of 2013 through the Proceeds of Crime and Anti-Money Laundering (Amendment) Regulations, 2018 by introducing a new Regulation 2A, which provides that all preventive measures in the Regulations apply to anti-money laundering measures including measures for combating terrorism financing.

23. Regarding deficiencies under Rec.9 - the Cabinet Secretary for the National Treasury and Planning has issued the Proceeds of Crime and Anti-Money Laundering (Amendment) Regulations, 2018 which have introduced an

amendment to Regulation 7 by inserting the following new Regulation 7A which states that.... (1) *A reporting institution shall have policies and procedures to address any money laundering or terrorism financing risks associated with non-face-to-face business relationships or transactions.* (2) *The policies and procedures referred to in paragraph (1) shall apply when establishing customer relationships and when conducting on-going due diligence.*

24. The two amendments sufficiently address the outstanding deficiencies.

### ***Conclusion***

Based on the information provided by the authorities, Kenya has **sufficiently addressed** the deficiencies highlighted in the MER.

### ***Deficiency 3 on Rec 12 (Reporting obligations of accountants)***

25. The MER observed that reporting obligations of the accountants under the POCAMLA do not apply when organising contributions for the creation, operation or management of legal arrangements. In view of this, assessors recommended that authorities should ensure that reporting obligations should also apply to accountants when they are providing the services to legal arrangements.
26. The authorities are in the process of passing an amendment to section 48 of POCAMLA through the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) which provides that “...*The reporting obligations under this Part shall apply to ...accountants when... (v) creation, operation or management of buying and selling of business entities or legal arrangements; or.....*”

### ***Conclusion***

**Not sufficiently addressed** pending passing of the Bill into law.

### ***Overall conclusion on R12***

27. In view of the deficiencies discussed above, Kenya has only addressed 1 out of 3 remaining deficiencies with respect to Rec 12. This recommendation therefore remains outstanding.

## **Suspicious transaction reporting (DNFBPs - Rec.16 (rated PC))**

*Deficiency 1*

28. The MER observed that lawyers, notaries and other independent legal professionals as well as Trust and Company Service Providers were not subject to AML obligations (including reporting obligations) under POCAMLA. In this regard, assessors advised authorities to bring lawyers, notaries and other independent legal professionals as well as Trust and Company Service Providers within the definition of reporting institutions.

*Conclusion*

29. **No sufficient progress** has been made and therefore this deficiency remains outstanding (*refer to Rec 33 above*).

*Deficiency 2*

30. The MER observed that the AML legal framework for DNFBPs suffers from the same deficiencies as for financial institutions and that there was no effective compliance with AML obligations in the DNFBPs sector. For this reason, the authorities in Kenya were advised to take appropriate measures to ensure that the deficiencies in the AML legal framework regarding recommendations 14, 15 and 21 as discussed in section 3 of the MER are remedied expeditiously.
31. Deficiencies relating to R. 14 were addressed by Section 8 of POCAMLA as amended in 2012.
32. With regards to R.15, the legal framework on internal controls (Regulation 9) was not covering terrorist financing and therefore was considered as inadequate. The Cabinet Secretary to the National Treasury and Planning has now amended the POCAMLA Regulations of 2013 through the Proceeds of Crime and Anti-Money Laundering (Amendment) Regulations, 2018 by introducing a new Regulation 2A, which provide for all preventive measures in the Regulations to apply to anti-money laundering measures including measures for combating terrorism financing.

*Conclusion*

**Sufficiently addressed**

*Overall conclusion on Rec 16*

33. Only one out of two outstanding provisions of R.16 has been sufficiently addressed. Therefore Rec. 16 remains **outstanding**.



## **DNFBPs - regulation, supervision and monitoring - Rec. 24 (rated NC)**

34. The main deficiencies noted under this Recommendation relate to the AML/CFT regulation and supervision of DNFBPs in Kenya. The assessors noted the following deficiencies:

### *Deficiency 2*

35. The MER observed that there were no measures in place to enable the Betting Control and Licensing Board prevent criminals from being beneficial owners of a significant controlling interest in a casino.
36. The authorities are in the process of passing laws to address the deficiencies. Clause 52 of the Finance Bill, 2018 proposes to amend the Betting, Lotteries and Gaming Act by inserting a new section 5A which outlines the fit and proper requirements for owners of casinos including, financial integrity and reliability of the natural persons who owns the casino and in the case of a company, its chairperson, directors, chief executive, management and all other personnel, including all duly appointed agents, and any substantial shareholder of the company, education or other qualifications or experience of the applicant, among others.

### *Conclusion*

**Not sufficiently addressed** pending passing of the Bill.

### *Deficiency 3*

37. The MER observed that the lawyers, notaries and TCSPs are not subjected to AML/CFT measures under POCAMLA.

### *Conclusion*

38. **No sufficient progress** has been made and therefore this deficiency remains outstanding (*refer to Rec 33 above*).

### *Deficiency 4*

39. The MER observed that DNFBPs are not being monitored for compliance with AML measures. In this regard, authorities were advised to ensure that the FIU becomes fully operational.

40. In their current response, the authorities advised that the FRC is fully operational with effect from April 2012.
41. The FRC became fully operational with effect from April 2012. The authorities have advised that FRC has done a sectoral risk assessment of the DNFBP sector and that supervision will be undertaken in light of the identified risks. Further, the FRC is currently working with the IMF to come up with AML/CFT Guidance Notes for the sector. According to the authorities, the Guidance Notes are at an advanced stage of consideration and will be published/ issued as soon as consultations and review is complete. The efforts of the authorities are appreciated but it appears they have not adequately started the process of monitoring for compliance with AML measures.
42. In this regard the deficiency is not sufficiently addressed.

*Conclusion*

**Not sufficiently addressed.**

*Overall conclusion*

43. **Not sufficiently addressed.** Kenya has not addressed all the 3 remaining deficiencies which were highlighted in the MER in relation to requirements of Rec 24.

**III. CONCLUSION**

44. On the basis of analysis provided in the foregoing paragraphs, the country has not made progress in addressing deficiencies in relation to Recs.12, 16, 21, 24, 33 and 34 which were outstanding in the previous reporting period.

**IV. RECOMMENDATIONS**

45. The Reviewers recommend that:
  - i. Kenya considers reporting back on progress in April 2019 should they pass the outstanding laws that significantly address most of the outstanding deficiencies. This will give Kenya an opportunity to exit the follow-up process under the 2004 FATF Methodology. However, if the deficiencies are not addressed by April 2019 then the Task Force should consider taking further steps.