



Mutual Evaluation Report

Anti-Money Laundering and Combating the Financing of Terrorism

September 2011

Republic of Kenya

The Republic of Kenya is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). This evaluation was conducted by the ESAAMLG and was approved as a 1st mutual evaluation by its Council of Ministers on 08 September 2011.

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ACRONYMS

AGO	ATTORNEY GENERAL'S OFFICE
AMFI	ASSOCIATION OF MICROFINANCE INSTITUTIONS
AML	ANTI MONEY LAUNDERING
AML/CFT	ANTI MONEY LAUNDERING/COMBATING THE FINANCING OF TERRORISM
CBK	CENTRAL BANK OF KENYA
CCK	COMMUNICATIONS COMMISSION OF KENYA
CDD	CUSTOMER DUE DILIGENCE
CENTRE	FINANCIAL REPORTING CENTRE
CFT	COMBATING THE FINANCING OF TERRORISM
CMA	CAPITAL MARKETS AUTHORITY
CM ACT	CAPITAL MARKETS ACT
DFID	UK'S DEPARTMENT FOR INTERNATIONAL DEVELOPMENT
DNFBP	DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS
EAC	EAST AFRICAN COMMUNITY
EAPCCO	EASTERN AFRICA POLICE CHIEFS COOPERATION ORGANISATIONS
EASRA	EAST AFRICAN SECURITIES REGULATORY AUTHORITIES
ESAAMLG	EASTERN AND SOUTHERN AFRICA ANTI-MONEY LAUNDERING GROUP
ESOP	EMPLOYEE SHARE OWNERSHIP PLAN
FATF	FINANCIAL ACTION TASK FORCE
FIU	FINANCIAL INTELLIGENCE UNIT
FT	FINANCING OF TERRORISM
FRC	FINANCIAL REPORTING CENTRE

IAIS	INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS
ICPAK	INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA
IGAD	INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT
IOSCO	INTERNATIONAL ORGANISATION OF SECURITIES COMMISSIONS
IOPS	INTERNATIONAL ORGANISATION OF PENSION SUPERVISORS
IRA	INSURANCE REGULATORY AUTHORITY
KPOSB	KENYA POST OFFICE SAVINGS BANK
KSh.	KENYA SHILLING
LEAs	LAW ENFORCEMENT
MERIDA CONVENTION	UN CONVENTION AGAINST CORRUPTION, 2003
ML	MONEY LAUNDERING
MLA	MUTUAL LEGAL ASSISTANCE
MOU	MEMORANDUM OF UNDERSTANDING
NCTC	NATIONAL COUNTER TERRORISM CENTRE
NPO	NON-PROFIT ORGANISATION
NSE	NAIROBI STOCK EXCHANGE
NSSF	NATIONAL SOCIAL SECURITY FUND
PALERMO CONVENTION	UN CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME, 2000
PEP	POLITICALLY EXPOSED PERSON
POCAMLA	PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING ACT 2009
RBA	RETIREMENT BENEFITS AUTHORITY
RILO	WORLD CUSTOMS ORGANISATION REGIONAL INTELLIGENCE LIAISON OFFICES
ROC	REGISTRAR OF COMPANIES

ROSCA	ROTATING CREDIT AND SAVINGS ASSOCIATION
SASRA	SACCO SOCIETIES REGULATORY AUTHORITY
STR	SUSPICIOUS TRANSACTION REPORT
TF	TERRORIST FINANCING
TF CONVENTION	INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM, 1999
UN	UNITED NATIONS
UNSCR	UNITED NATIONS SECURITY COUNCIL RESOLUTION
VIENNA CONVENTION	UN CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES, 1988
WCO	WORLD CUSTOMS ORGANISATION

PREFACE
Information and Methodology Used
For The Evaluation of the Republic of Kenya

The evaluation of the anti-money laundering (AML) and combating the financing of terrorism (CFT) regime of the Republic of Kenya was based on the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF), and was prepared using the AML/CFT Methodology 2004¹. The evaluation was based on the laws, regulations and other materials supplied by the Republic of Kenya, and information obtained by the evaluation team during its on-site visit to the Republic of Kenya from 24 May to 04 June 2010, and subsequently². During the on-site the evaluation team met with officials and representatives of all relevant Kenyan government agencies and the private sector. A list of the bodies met is set out in Annex 1 to the mutual evaluation report.

The evaluation was conducted by an assessment team, which consisted of members of the ESAAMLG Secretariat and ESAAMLG experts in criminal law, law enforcement and regulatory issues: Mrs. Yotsna Lalji-Venketasawmy (Legal Adviser), Mr. Phineas Moloto (Financial Expert) and Mr. Joseph Jagada (Law Enforcement Expert) from the ESAAMLG Secretariat, Mr. Bheki Khumalo, Central Bank, Swaziland-Financial Expert, Mr. Joseph Munyoro, Senior Inspector, Bank of Zambia, Zambia-Financial Expert, Christopher Mutangadura, DPP's Office Zimbabwe- Legal Expert and Ms. Jean Phillippo, Senior State Advocate, Ministry of Justice, Malawi- Law Enforcement Expert. The experts reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (FT) through financial institutions and Designated Non-Financial Businesses and Professions (DNFBP), as well as examining the capacity, the implementation and the effectiveness of all these systems.

This report provides a summary of the AML/CFT measures in place in the Republic of Kenya as at the date of the on-site visit or immediately thereafter. It describes and analyses those measures, sets out Kenya's levels of compliance with the FATF 40+9 Recommendations (see Table 1), and provides recommendations on how certain aspects of the system could be strengthened (see Table 2).

The ESAAMLG Secretariat and the evaluation team would like to express their gratitude to the authorities in the Republic of Kenya for their cooperation and hospitality throughout the evaluation mission.

¹ As updated in February 2009

² In this respect paragraph 56 of the ESAAMLG Mutual Evaluation Procedures provides: *"In preparing the report and in giving ratings, evaluators should only take into account relevant laws, regulations or other AML/CFT measures that are in force and effect at the time of the on-site visit to the evaluated country or in a period of two months immediately following the on-site mission, and before the finalisation of the report."*

Executive Summary

A. Background Information

1. This report provides a summary of the AML/CFT measures in place in the Republic of Kenya as at the date of the on-site visit (24 May to 04 June 2010) and immediately thereafter³. It describes and analyses those measures, and provides recommendations on how certain aspects of the system could be strengthened. It also sets out Kenya's levels of compliance with the FATF 40+9 Recommendations (see the attached table on the Ratings of Compliance with the FATF Recommendations).
2. The AML system in the Republic of Kenya is still in an early stage of development and much work needs to be done with regard to the implementation of the AML measures, capacity building and awareness-raising within the reporting community and the general public.
3. The Proceeds of Crime and Anti-Money Laundering Act 2009 (the POCAMLA) is the primary enactment which supports the AML legal framework in Kenya. The POCAMLA which was enacted in December 2009 became effective immediately after the onsite visit on 28 June 2010. Terrorist financing is not criminalised in Kenya.
4. The major profit generating crimes in Kenya include robbery and thefts, economic crimes, corruption, and drug offences. The Kenyan authorities are not aware of proceeds being laundered in any particular sector. However there is a general perception in the press that proceeds are being laundered in Kenya but this is not supported by any evidence or statistics. The threat from international terrorism is a serious concern for Kenya. As a country, Kenya has suffered the direct impact of terrorism having been a victim of the 1998 Al Qaida attack of the US Embassy in Nairobi and the 2002 Al Qaida attack in a tourist resort in Mombasa. Kenya is also under terrorist attack threat from the Somalia's insurgent group *Al-Shabaab*. The risk of domestic terrorism is perceived to be very low.

B. Legal Systems and Related Institutional Measures

5. The ML offence is criminalised under the POCAMLA in a manner that is broadly consistent with the Vienna Convention and the Palermo Convention. The POCAMLA defines the term "property" in wide terms consistent with the standards and when proving that property is the proceeds of crime an underlying conviction for the predicate offence is not necessary. Kenya determines the

³ In this respect paragraph 56 of the ESAAMLG Mutual Evaluation Procedures provides: *"In preparing the report and in giving ratings, evaluators should only take into account relevant laws, regulations or other AML/CFT measures that are in force and effect at the time of the on-site visit to the evaluated country or in a period of two months immediately following the on-site mission, and before the finalisation of the report."*

underlying predicate offences for money laundering by reference to all offences. However, participation in an organised criminal group⁴ and racketeering, terrorist financing, trafficking in human beings⁵ and migrant smuggling, are the categories of the designated predicate offences that are not criminalised in Kenya. Predicate offences for money laundering under the POCAMLA extend to conduct that occurred in another country. The offence of money laundering also applies to persons who commit the predicate offence. Ancillary offences to the money laundering offence are broadly covered under the Kenyan Penal Code. Liability for money laundering applies to both natural and legal persons.

6. The provisions for criminalising ML have not yet been implemented effectively. No ML investigation or prosecution has been undertaken under the POCAMLA.
7. At the time of the onsite visit, TF was not criminalised in Kenya and there was also no freezing mechanism in place for the purposes of the UNSCR 1267 and 1373.
8. The POCAMLA provides for both criminal and civil forfeiture. The proceedings relating to forfeiture are civil, with rules of evidence applicable in civil proceedings applying. Criminal forfeiture only applies upon conviction whilst civil forfeiture is not dependent upon a conviction. Currently the procedures only apply to money laundering offences as terrorist financing has not yet been criminalised in Kenya.
9. In terms of the POCAMLA, forfeiture proceedings can include any property that is realizable. The definition of the term “realizable property” is broad and includes any property which is held by a criminal defendant or by a third party. It is however, not clear whether property of corresponding value is captured under the forfeiture provisions under the POCAMLA.
10. Provisional measures to prevent dealing in property pending an investigation or court proceedings are available. The POCAMLA allows the initial application to freeze or seize property subject to confiscation to be made *ex-parte*. Police officers and other law enforcement officers have adequate powers to access information that may assist in the tracing of property that may be subject to forfeiture. The forfeiture regime recognises the rights of bona fide third parties. It was not possible to obtain an accurate picture of the effectiveness of these measures as the forfeiture provisions have not been applied in practice.
11. Kenya does not have an operational FIU yet. The POCAMLA provides for establishment of the Financial Reporting Centre (FRC) as a national centre to

⁴ It is to be noted that the offence of participation in an organised criminal group was criminalised after the onsite visit through the enactment of the Prevention of Organised Crimes Act 2010 which became effective on 23 September 2010.

⁵ It is to be noted that trafficking in human beings was criminalised after the onsite visit through the enactment of the Counter Trafficking in Person Act, 2010 which became effective on 23 September 2010.

receive, analyse and disseminate financial intelligence and information. The FRC is the custodian of the implementation of AML programmes in the country under the Act. Presently, the Central Bank of Kenya receives suspicious transaction reports from banks and other financial institutions falling under its supervisory mandate.

12. The Kenya Police Force is the main agency that has the responsibility to investigate criminal matters, including money laundering offences. In terms of section 14 of the Police Act, it is mandated to maintain law and order, preserve peace, protect life and property, prevent and detect crime, apprehend offenders and enforce all laws and regulations with which it is charged. Investigations relating to economic crimes fall under the Criminal Investigation Department (CID). The Police in the Kenya have a broad range of investigative powers and may compel the production of documents, search persons or premises and seize and obtain relevant documents or information held by financial institutions or other persons. However, the effectiveness of these powers in relation to money laundering investigations could not be assessed as no money laundering investigation had been initiated at the time of the onsite visit.
13. The requirements relating to SR IX under the POCAMLA were not operative as there was no implementing regulation to give effect to the currency reporting mechanism. The existing declaration of currency requirements under the Central Bank of Kenya (Declaration of Currency) Regulations, 1998 and the EACCMA Regulations 2006 have not been effectively implemented and enforced.

C. Preventative Measures – Financial Institutions

14. Kenya has implemented AML preventive measures through the application of the POCAMLA. AML obligations under the POCAMLA are mandatory as failure to comply with any of these obligations is an offence. All the categories of financial institutions as defined under the standards are covered under the POCAMLA. The effectiveness of the preventative measures under the POCAMLA could not be assessed as the POCAMLA became effective immediately after the onsite visit.
15. To the extent that TF is not criminalised in Kenya, the preventative measures that are in place are not designed to combat TF.
16. Prior to the enactment of the POCAMLA, the Central Bank of Kenya (CBK) had issued the Guideline on Proceeds of Crime and Money Laundering (Prevention) – (AML Guideline) under its powers to issue directions under section 33(4) of the Banking Act. The AML Guideline applies to all institutions licensed under the Banking Act. These institutions comprise: commercial banks, mortgage finance companies and financial institutions. For the purposes of the standards, the AML Guideline constitutes other enforceable means. The Capital Market (Licensing Requirements) (General) Regulations 2002 (CM Regulations), which applies to all the licensees under the Capital Markets Act, also lays down some AML preventative measures. These requirements under the AML Guideline and the CM Regulations have remained in force after the enactment of the POCAMLA.

17. The regulatory framework in Kenya does not address the risk of money laundering or terrorist financing. Under the provisions of the POCAMLA all financial institutions are required to take reasonable measures to establish and verify the identity of all customers regardless of the level of risk associated with that customer or the transaction. It is to be noted that the POCAMLA provides that the Minister may make regulations providing for high risk customers or clients. However, at the time of the onsite visit, no such regulations had been issued.
18. There is no express prohibition under the POCAMLA against keeping anonymous accounts or accounts in fictitious names. Nonetheless, the effective application of the provisions⁶ of the POCAMLA should prevent the keeping of anonymous accounts or accounts in fictitious names. Numbered accounts are not directly addressed under the POCAMLA. However, in terms of the POCAMLA, reporting institutions are not allowed to keep numbered accounts as financial institutions must ensure that customer accounts are kept in the correct name of the account holder. The POCAMLA requires a financial institution to take reasonable measures to satisfy itself of the true identity of any applicant for business seeking to enter into a business relationship with it or to carry out a transaction or series of transactions, including wire transfers, with it. There are however no requirements to undertake customer due diligence when: a) there is a suspicion of money laundering or terrorist financing or; b) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.
19. Under the POCAMLA, financial institutions are required to identify the customer (whether permanent or occasional and whether natural or legal persons) and verify that customer's identity using the identification data set out under the POCAMLA. This requirement does not cover legal arrangements. The requirement applying to beneficial owners under the POCAMLA falls short of the standards as the law does not adopt the FATF definition of the term "beneficial owners".
20. Further, there are no requirements for all the categories of the financial institutions to obtain information on the purpose and intended nature of the business relationship. The requirements regarding ongoing due diligence; enhanced due diligence measures; and failure to satisfactorily complete CDD are not addressed under the POCAMLA. The POCAMLA expressly requires the application of customer due diligence measures to existing customers, including anonymous accounts. The effectiveness of the CDD measures under the POCAMLA could not be assessed as the legislation became effective immediately after the onsite visit.
21. The preventative measures in place under the POCAMLA do not address PEPs, correspondent banking relationships and misuse of technological developments in ML or TF schemes.

⁶ Sections 45(1) and 46(2) of the POCAMLA

22. Under the financial regulatory framework in Kenya, financial institutions may rely on intermediaries or other third parties to perform some of the elements of the CDD process or to introduced business. In practice, some financial institutions in Kenya do rely on intermediaries or other third parties to perform some of the elements of the CDD process. However, there is no requirement for financial institutions to follow the requirements under Recommendation 9.
23. There are statutory and contractual confidentiality provisions that apply to some categories of financial institutions and financial regulators in Kenya. Information may be disclosed only in terms of the specific circumstances provided under the law. While section 17 of the POCAMLA contains a secrecy overriding provision the scope of this provision is restricted by the operation of a qualification which only allows the disclosure of information that relates to the commission or attempt to commit an offence under the POCAMLA. The restricted scope of the provisions under section 17 of the POCMALA, casts serious doubt on the ability of financial institutions and other competent authorities, which are subject to a statutory or contractual duty of secrecy or confidential obligation, to access or share information for AML purposes.
24. Financial institutions are required to keep records for at least seven years following the completion of a transaction or a business under the POCAMLA. The nature and extent of the information that must be kept and maintained by financial institutions is sufficient to allow for reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal activity. There is no specific requirement either in law or regulation which requires financial institutions 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 (or longer if requested by competent authority in specific cases upon proper authority). With the exception of the licensees of the Capital Market Authority, there is no specific requirement for financial institutions to ensure that all customer and transaction records and information be available on a timely basis to domestic competent authorities upon appropriate authority.
25. Financial institutions in Kenya rely on the SWIFT messaging service to conduct cross-border wire transfers as a matter of standard industry practice. Banks are encouraged to use the SWIFT messaging standards but this is not an enforceable requirement. Wire transfer transactions conducted by financial institutions in Kenya are not subject to the requirements under SR.VII.
26. Reporting institutions are required to monitor on an ongoing basis all complex, unusual, suspicious, large or other transaction as may be specified in regulations, whether completed or not. At the time of the onsite visit, no such regulations had been issued. There is no requirement for financial institutions to examine as far as possible the background and the purpose of such transactions and for financial institutions to keep such findings available for competent authorities and auditor.

27. The authorities in Kenya have not implemented the requirements under Recommendation 21.
28. STR reporting obligations are set out under the POCAMLA; however, no reports have been made to the Centre as it is not yet operational. The AML Guideline sets out a reporting requirement for banks, mortgage finance companies and non-bank financial institutions (licensed under the Banking Act) while the Foreign Exchange Bureau Guidelines sets out a similar requirement for foreign exchange bureaus. Under these Guidelines, the relevant financial institutions must submit STRs to the CBK. Once the FRC is set up, the STR reporting obligations under the respective Guidelines will be repealed and reporting institutions will submit STRs only in accordance with the reporting obligation under the POCAMLA. The reporting obligations under the POCAMLA do not cover all the designated categories of predicate offences as defined by the FATF. The uncovered predicate offences limit the scope for reporting suspicious transactions. There is no obligation for financial institutions to make STRs in relation to funds where there are reasonable grounds to suspect or they are suspected to be linked or related to or to be used for terrorism, terrorist acts or by terrorist organisations or those who finance terrorism. The financing of terrorism is not criminalised in Kenya.
29. There is adequate protection for staff of reporting institutions for making STRs to the Centre under the POCAMLA. The provision under section 19 of the POCAMLA is wide enough to protect those required to make STRs to the Centre irrespective of whether or not the offence took place. Reporting institutions are required to make a thorough assessment of the information before making a report and filing STRs in good faith within the confines of the Act. The tipping off provisions under the POCAMLA, however, fall short of the standards which require the law to prohibit financial institutions and their directors, officers and employees to disclose the fact that an STR or related information is being reported or provided to the FIU. The POCAMLA however, appears to only prohibit the disclosure of information or other matters that might prejudice any investigation of an offence or possible offence of money laundering.
30. The authorities have not issued any guidelines to financial institutions in relation to reporting of STRs under the requirement of the POCAMLA. The AML Guideline and Foreign Exchange Bureau Guidelines create certain obligations for reporting STRs but do not provide guidance on reporting of STRs as required under the standard.
31. The requirement for internal controls under the POCAMLA pertains only to the reporting obligation but does not require financial institutions to establish procedures, policies and controls covering customer due diligence, the detection of unusual and suspicious transactions and record retention. There is also no requirement to develop appropriate compliance management arrangements and to maintain an adequately resourced and independent audit function to test compliance with the internal AML/CFT procedures, policies and controls. The

other requirements under Recommendation 15 have also not been addressed under the POCAMLA.

32. There are no requirements for financial institutions to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with home country requirements and the FATF recommendations and to have in place such other measures as required under Recommendation 22.
33. There is no express prohibition regarding the establishment of shell banks in Kenya. Despite the absence of such a prohibition, the Kenya authorities have indicated that there were no shell banks operating in Kenya and they have no intention of authorising shell banks to operate in Kenya. In addition, the licensing requirements in Kenya are sufficiently robust to prevent the establishment of shell banks. Nevertheless, financial institutions are not prevented from entering into or continuing correspondent banking relationships with shell banks and there are no requirements for financial institutions to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.
34. The financial sector in Kenya is regulated by four different financial regulators: the Central Bank of Kenya, the Capital Markets Authority, the Insurance Regulatory and the Retirement Benefits Authority. The FRC is designated as the competent authority for supervising financial institutions for compliance with the AML obligations. During the onsite visit, the authorities indicated that the onsite inspection of financial institutions for AML purposes will be attributed to the financial regulators. For this purpose, in terms of the provisions of the POCAMLA, the financial regulators will be appointed as inspectors. For the purposes of an inspection, an inspector may, pursuant to the statutory powers under the POCAMLA, require a reporting institution and every officer and employee thereof to produce and make available all the books and other documents of the reporting institution and any correspondence, statements and information relating to the reporting institution, its business and the conduct thereof. The effectiveness of the AML supervisory regime could not be assessed at the time of the onsite visit as the Centre was not operational. Meanwhile, the CBK has been checking compliance with the requirements of the AML Guidelines during its prudential inspections. During the onsite visit, the CBK provided examples of cases where monetary penalties have been levied against institutions for non-compliance with the AML Guideline. The other regulators have not undertaken any onsite inspections for AML purposes.
35. The range of sanctions available under the POCAMLA appears to be broad and proportionate having regard to the severity of a situation. They include, compliance notices issued by the Director of the Centre, compliance orders (accompanied by fines for failure to comply) issued by the Courts and criminal sanctions imposed by the Courts. The effectiveness of these measures could not be assessed as they have not yet been applied in practice.

36. Financial institutions subject to the core principles are licensed and regulated by their respective regulators and are required to satisfy the fit and proper criteria. There is no requirement for the licensing or registration of independent MVT service providers. In practice, the CBK has authorised MVT service operators to provide their services through licensed financial institutions. Informal MVT service operators, which fall under the definition of financial institutions under the POCAMLA, conduct their business without any form of licensing or registration. Financial institutions (other than those subject to the core principles) are subject to the AML requirements under the POCAMLA. There is however, no effective supervision of these financial institutions for compliance with the AML requirements.
37. The Centre may issue guidelines to reporting institution. However, at the time of the on-site visit, the Centre had not yet been established. The Central Bank of Kenya issued a Guideline on Proceeds of Crime and Money Laundering (Prevention) which became effective on 1 January 2006. The Guideline is applicable to all institutions licensed under the Banking Act. The Central Bank of Kenya also issued Foreign Exchange Bureau Guidelines which addresses some anti-money laundering aspects. The Guidelines became effective on 1 January 2007. The two sets of guidelines issued by the Central Bank of Kenya do not cover the micro finance institutions licensed under the Micro Finance Act⁷. Both these guidelines provide licensed institutions with some guidance regarding the prevention, detection and the control of possible money laundering activities by outlining customer due diligence measures, listing activities indicative of money laundering, and providing for a mechanism for reporting suspicious activities and transactions. However, the guidelines do not address aspects relating to combating the financing of terrorism. The guidelines do not give assistance to reporting institutions on ML and FT techniques and methods.
38. Apart from the Central Bank of Kenya, other supervisory authorities have not issued any AML/CFT guidelines⁸ to reporting entities under their supervisory ambit.

D. Preventive Measures Designated Non-Financial Businesses and Professions

39. The following DNFBPs (as defined by the FATF) are reporting institutions for the purposes of the POCAMLA: Casinos (including internet casinos), real estate agencies, dealers in precious stones, dealers in precious metals, accountants who are sole practitioners or are partners in their professional firms. Lawyers, notaries

⁷ Microfinance institutions licensed under the Microfinance Act, 2006 are covered by The Microfinance (Deposit Taking Microfinance Institutions) Regulations, 2008 issued under the Microfinance Act.

⁸ The Insurance Regulatory Authority has pursuant to section 3A of the Insurance Act issued Guidelines to the Insurance Industry on Implementation of the POCAMLA in June 2011. The purpose of the guidelines is to provide guidance on detection, deterrence and reporting incidences of possible crimes related to proceeds of crime and money laundering by the insurance industry.

and other independent legal professionals and Trust and Company Service Providers are not subject to the AML obligations under the POCAMLA.

40. Prior to the enactment of the POCAMLA the DNFBP sector was not subject to AML/CFT obligations. The application of AML requirements to the DNFBP sector is very recent and the level of compliance could not be assessed at the time of the onsite visit as the POCAMLA became operational immediately after the onsite visit. The Centre is the designated authority which has responsibility for the AML regulatory and supervisory regime. The powers of the Centre to monitor and sanction apply to all reporting institutions in the same way, irrespective of whether they are DNFBPs or financial institutions. At the time of the on-site visit, DNFBPs were not being monitored for compliance with AML obligation and no guidelines had been issued for DNFBPs.
41. To the extent that TF is not criminalised in Kenya, the preventative measures that are in place are not designed to combat TF.

E. Legal Persons and Arrangements & Non-Profit Organisations

42. Kenya's approach to preventing the unlawful use of legal persons in relation to ML, relies on an investigative approach supplemented by a company registry and record keeping requirements. The Registrar of Companies is the central registration authority for legal persons in Kenya. As at the onsite visit there were over 250,000 companies registered under the Companies Act in Kenya. Companies are required to disclose information on the shareholders and directors. Information kept by the registrar of companies pertains only to legal ownership and control (as opposed to beneficial ownership). The information available in the company registry is not verified and is therefore not necessarily reliable. Directors and shareholders can be nominees and other legal persons, which can hamper the investigative trail. Share warrants may also be issued to bearer and there are no measures in place to ensure that they are not misused for money laundering and terrorist financing purposes. According to the authorities, most of the applicants use lawyers and certified public secretaries as agents for incorporating their companies. However, lawyers and certified public secretaries are not captured as reporting persons under the POCAMLA.
43. While the investigative powers work well in practice there are no adequate measures in place to ensure that there is 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.
44. Trusts in Kenya may be created by a trust deed or a will under Common law. Trusts that involve immoveable property⁹ must be registered with the Principal

⁹ Section 2 of the Registration of Documents Act defines the term "immovable property" as including land, buildings, hereditary allowances, rights of way, lights, ferries, fisheries and any other benefit to arise out of land, and things attached to the earth or permanently fastened to

Registrar of Documents under the Registration of Documents Act (RDA). The registration of trusts that do not involve immovable property is optional. As at the time of the onsite visit there were 1365 trusts registered under the RDA. From the discussions held during the onsite visit, it would appear that private trusts are commonly used in Kenya. However, there were no official figures on the total number of trusts that exist in Kenya as this information is not captured. Trusteeship services are provided by lawyers and other persons. There is no registration or other requirement which apply to trustees. However, trustees who have been appointed by a body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, or the trustees of a pension fund may apply for a certificate of incorporation of the trustees as a corporate body under the Trustees (Perpetual Succession) Act. The measures in place with respect to trusts are not sufficient to prevent the unlawful use of trusts for money laundering and terrorist financing purposes as there is no transparency regarding the beneficial ownership and control of trusts.

45. There are 6800 NGOs registered in Kenya to provide a variety of social development services such as health, education, water and sanitation, governance and children and women. The registration of NGOs in Kenya is mandatory. The current legal framework covering the licensing and supervision of the NPO sector is governed by the Non-Governmental Organisation Co-ordination Act, 1990. Since Kenya has not yet criminalised terrorist financing in a manner consistent with the standards, the NPO sector is not subject to the requirements set out in Special Recommendation VIII. No risk assessment has been undertaken to determine the nature and extent of the sector's vulnerability to terrorist financing and no outreach has been undertaken to protect the NPO sector from terrorist financing abuse.

F. National and International Co-operation

46. The National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF) was established by the Minister of Finance in April 2003 to facilitate the development of a national policy framework on AML/CFT that is in line with international standards and best practice. The NTF is also responsible for developing a robust and effective AML/CFT regime in Kenya by sensitizing members of the public on the dangers of money laundering and terrorist financing.
47. At the time of the onsite visit the FRC had not been established. There was therefore no mechanism in place to address operational co-operation and, where appropriate, co-ordination between the authorities at the law enforcement/FIU level and between the FIU, law enforcement and supervisors.

anything which is attached to the earth of permanently fastened to anything which is attached to the earth, but not standing timber (except coconut trees), growing crops or grass.

48. The Kenyan Authorities have ratified the Vienna, the Palermo and the TF Conventions. The provisions of the Vienna and Palermo Conventions have been implemented to some extent. The articles to the Vienna Convention are implemented in Kenya under various laws. The articles are mainly provided for under the POCAMLA, the NDPSC Act, the Postal Corporation of Kenya Act and other ancillary legislation such as the Extradition (Contiguous and Foreign Countries) Act, Foreign Judgments (Reciprocal Enforcement) Act, Extradition (Commonwealth Countries) Act and Witness Summonses (Reciprocal Enforcement) Act. Kenya has enacted laws which provide for the implementation of provisions under Articles 6, 7, 10, 11, 12-16 and 18. The articles deal with criminalisation of the laundering of proceeds of crime, establishing an FIU, liability of legal persons, prosecution, adjudication and sanctions, confiscation and seizure of proceeds of crime or property or equipment or other instrumentalities used in the commission of a crime, provision of international cooperation on confiscation, establishing jurisdiction over ML offences, extradition and mutual legal assistance. Kenya has not yet enacted any laws criminalising terrorist financing therefore the implementation of the provisions of the TF Convention could not be determined. As at the date of on-site visit, there was also no mechanism to implement the freezing measures for the purposes of the United Nations Security Council Resolutions 1267 and 1373.
49. Currently Kenya does not have a comprehensive domestic law on mutual legal assistance. In the absence of such a legal framework, the authorities rely on bilateral agreements and executive discretions such as IGAD Mutual Legal Assistance and Extradition Convention and the Harare Scheme, to which Kenya is party to provide mutual legal assistance. The Attorney General is the designated competent authority for MLA matters. The Foreign Judgments (Reciprocal Enforcement) Act provides for the enforcement of foreign judgments on a reciprocal basis. The POCAMLA and the NDPSC Act also contain some provisions relating to mutual legal assistance. The POCAMLA and the NDPSC Act provide for a reasonable range of mutual assistance with the only limiting factor being that the assistance which can be offered or requested is only in terms of an investigation or proceedings relating to offences under these two Acts.
50. Extradition in Kenya is provided for under the Extradition (Contiguous and Foreign Countries Act), Extradition (Commonwealth Countries) Act and the Fugitive Offenders Pursuit Act. The three acts provide for the arresting, detaining, extradition and deportation of suspected criminals. The principle of dual criminality is required under Kenyan laws when considering requests for mutual legal assistance and extradition. ML is an extraditable offence and Kenya can extradite its own nationals.
51. The FRC may exchange information on money laundering and other related offences with counterparts in other countries and may enter into other forms of cooperation such as MoU with similar bodies for purposes of carrying out his functions provided conditions of protection and usage of information are sought by the Centre and met by the counterpart. This provision has not been

implemented since the Centre is not yet operational. Law enforcement agencies and supervisors are able to provide international co-operation to foreign counterparts but no statistics were provided to make an assessment of the overall effectiveness of such co-operation.

G. Other Issues

52. Some government agencies have expressed concern regarding the lack of qualified and skilled human resources, funding and other technical resources to meet their obligations under the POCAMLA.
53. The authorities in the Kenya should develop mechanisms to record and maintain comprehensive statistics on money laundering investigations, prosecutions and convictions, mutual legal assistance and extradition matters so as to be able to assess the effectiveness of the AML/CFT systems and procedures.

H. Priorities for recommended plan of action

54. In the short term, the priority for the authorities should be to-
- expeditiously criminalize terrorist financing in line with the FATF 40+9 Recommendations;
 - adopt preventative measures to combat TF in line with the standards;
 - take steps to expedite the process for the FRC to become operational and to enable it to perform its functions under the POCAMLA without further delay;
 - give priority to the investigation and prosecution of the money laundering offences;
 - build the technical AML/CFT capacity of law enforcement agencies, the regulators, the public prosecutors and the judiciary; and
 - engage aggressively with the financial services and the DNFBP sectors to encourage and assist compliance with AML/CFT requirements.

MUTUAL EVALUATION REPORT

1. GENERAL

1.1 General information on the Republic of Kenya

1. The Republic of Kenya, located in East Africa, is bordered by Ethiopia and Sudan to the north, Somalia to the northeast, Uganda to the west, Tanzania to the south, and the Indian Ocean to the southeast. It has an area of 582,646 sq. km and a population of approximately 38 million. Administratively, Kenya is divided into eight provinces; Eastern, North Eastern, Central, Coast, Western, Nyanza, Rift Valley and the capital city Nairobi which also carries full status as an administrative province.
2. Kenya serves as a regional communications, trade 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.

Economy

3. Since independence, Kenya has promoted rapid economic growth through public investment and encouragement of small scale agricultural production, and incentives for private industrial investment. The Gross Domestic Product (GDP) grew at an annual average of 6.6% from 1963 to 1973. Agricultural production increased over the same period, stimulated by redistributing estates, diffusing new crop strains, and opening new areas to cultivation. Between 1974 and 1990, however, Kenya's economic performance declined. The Government implemented economic reform measures to stabilize the economy and restore sustainable growth by introducing conservative fiscal and monetary policies, privatizing a range of publicly owned companies and removing controls on producer and retail prices, petroleum products, imports and foreign exchange.
4. In the next decade Kenya's economic growth picked up from negative growth in 2002 to a positive progressive growth till 2008 when both internal and external factors slowed down the growth from 7.1 per cent in 2007 to 1.7 per cent in 2008. The poor economic performance reflects the adverse effects of the post election crisis, high input costs especially fertilizer and fuel, the adverse effects of the global financial crisis and high food prices due to widespread crop failure.
5. In 2010 financial intermediation recorded its highest growth for the last decade growing at 8.8 per cent compared to 4.6 per cent in 2009. The increase was due to increased lending as reflected by a rise in domestic credit which grew by 30.4 per cent in 2010 to KSh. 1,275.3M from KSh. 978.3M in 2009. This was backed by significant financial innovation. The table below sets out the contribution made by the different sectors to Kenya's GDP.

Table: Percentage contributions to GDP

Industry	2006	2007	2008	2009	2010
Agriculture and Forestry	23.4	21.7	22.3	23.5	21.5
Fishing	0.4	0.4	0.4	0.4	0.6
Mining and quarrying	0.5	0.7	0.7	0.5	0.7
Manufacturing	10.3	10.4	10.8	9.9	10.0
Electricity and Water supply	1.7	1.5	2.1	2.4	2.4
Construction	3.9	3.8	3.8	4.1	4.3
Wholesale and retail trade	9.3	9.7	10.1	9.8	10.3
Hotels and restaurants	1.5	1.6	1.1	1.7	1.7
Transport and Communication	10.6	10.6	10.2	9.8	9.8
Financial intermediation	4.0	4.8	4.6	5.5	5.6
Real estate, renting and business services	5.4	5.3	5.1	4.9	4.8
Education	6.9	6.7	6.3	5.7	5.7
Health and Social work	2.5	2.5	2.4	2.6	2.6
Public administration and defence	5.4	5.9	5.1	4.4	4.7
Other community, social & personal services	3.6	3.4	3.4	3.4	3.3

6. Under the first Medium Term Plan (2008-2012) of the Vision 2030, there are programmes and projects for the financial sector which will enhance access, efficiency and stability. They include: review of the banking sector legal and regulatory framework (revised Banking Act, Capital Markets Act Development Financial Institutions Act will be enacted) to align it with international best practice and the new constitution; extend credit sharing information to micro-finance institutions.
7. To enhance access, non-bank outlets have been turned into financial services providers, agent banking, through the cooperation of banks and mobile phone service providers. So far 8,809 agents have been approved, leveraging on mobile phone agents also. This does not jeopardize consumers since their protection rights are entrenched in the New Constitution that provides for a legal framework to support development of strong institutions to grow and support the market. To reduce Cash in Transit Costs for banks and their branch networks across counties, the Central Bank of Kenya has established two more currency centres in Nakuru (December 2010) and Meru (February 2011), in addition to the Nyeri Currency Centre that was established in December 2009.
8. Further, the Foreign Exchange Bureau revised guidelines came into effect on 1st April 2011 to streamline and strengthen corporate governance structures and financial position of the bureaus. This enhances competition in the foreign exchange market. In addition, the guidelines have been reviewed to align them to the provisions of the existing laws like the Proceeds of Crime and Anti-Money Laundering Act 2009, which came into operation on 28 June, 2010. To enhance efficiency in cheque clearance, the Central Bank of Kenya in conjunction with the Kenya Bankers Association has implemented the Cheque Truncation System (CTS) in the Automated Clearing House. This will marginally reduce the time taken to clear cheques as they will be transmitted electronically.

9. Kenya obtained independence from the British on December 12, 1963 and has a multiparty system. Under constitutional amendments made in 2008, executive powers are shared between the President who is the Head of State and the Prime Minister who coordinates and supervises the Ministries. Legislative powers are vested in both the government and the legislature. The legislature consists of a 224-seat National Assembly made up of 210 members who are elected from the constituencies to serve five year terms, 12 nominated members who are appointed by the President but selected by the parties in proportion to their parliamentary vote totals, and 2 ex-officio members; the Attorney General and the Speaker of the National Assembly. The President appoints the Vice President and Cabinet members from among those elected to the National Assembly.
10. In 2008, Parliament passed the Constitution of Kenya Review Act, 2008 which lays a road map for a new constitution. In April, 2010, Parliament approved the draft new constitution which was subject to a referendum in August 2010. The referendum voted in favour of the new Constitution¹⁰.

Legal and Court system

11. Kenya's legal system is based on English common law. The Constitution is the supreme law and takes precedence over all other laws. The Kenyan legal system is further composed of Acts of Parliament, principles of Kenyan and English common law and African customary laws. Previous judicial decisions are authoritative and constitute legal precedent.
12. The judiciary is separate and independent from both the executive and legislative branches of the government and headed by a Chief Justice.
13. The Court of Appeal¹¹ is the highest court and its function is to hear appeals from the High Court in certain matters as may be conferred to it by law. The High Court is the second court in the hierarchy. It is responsible for matters concerning the interpretation of the Constitution and has unlimited original jurisdiction in civil and criminal matters. The High Court is the highest court of original jurisdiction in Kenya and is also endowed with appellate jurisdiction. Magistrates Courts are created under the Magistrates Courts Act (Chapter 10 of the Laws of Kenya) and are subordinate to the High Court. They handle civil and criminal matters. There are 105 Magistrates Courts in the country stationed at the district and divisional levels.
14. In addition, there are two specialised courts: the Children's Court and the Anti-Corruption Court. The Children's court deals with matters related to children while the Anti-Corruption Courts deal with matters relating to corruption and economic crimes. The Constitution of Kenya also provides for the establishment of Kadhis Courts which are subordinate to the High Court. Their operations are

¹⁰ The new Constitution became effective on 27 August 2010.

¹¹ As at the time of the onsite visit, the Court of Appeal was the highest court in the land, but with the coming into effect of the new Constitution, the Supreme Court is now the highest court of the land.

regulated under the Kadhis Courts Act and they deal with matters relating to personal status, marriage, divorce in proceedings in which both parties are of the Muslim faith.

15. According to the Kenya Economic Survey¹² 2010, cases filed with the judiciary increased from 347, 169 in 2008 to 401,295 in 2009 and those disposed of rose by 17 per cent from 358,244 to 420,901 in the same period.

Transparency, governance, ethics and corruption

16. Transparency International's Corruption Perception Index, which measures the perceived level of public sector corruption in 180 countries and territories around the world, ranks Kenya 146. This indicates that corruption is an issue of serious concern in Kenya.
17. The Government has initiated various measures to enhance transparency, good governance and combat corruption through various Government departments.
18. In 2003 the Government initiated the Governance, Justice, Law and Order Sector (GJLOS) programme which comprises of eleven sub-sectors: Ministry of State for Provincial Administration and Internal Security, Office of the Vice President and Ministry of Home Affairs, Ministry of Justice, National Cohesion and Constitutional Affairs, Ministry of State for Immigration and Registration of Persons, State Law Office, The Judiciary, National Assembly, Kenya National Audit Office, Kenya Anti-Corruption Commission, the Interim Independent Electoral Commission, and Interim Independent Boundaries Review Commission. The programme aims at ensuring good governance and accountability in the use of public resources amongst others and promoting transparency in the management of public affairs.
19. The Government has also established the Kenya Anti-Corruption Commission (KACC), which is an independent statutory body. The KACC was established in 2003 with the enactment of the Anti- Corruption and Economic Crimes Act. It is the primary authority responsible for combating corruption and economic crimes through law enforcement, prevention and public education. According to the 2008/09 Annual Report of the KACC, the Commission received 4, 335 corruption reports over the period July 2008 to June 2009. Out of these reports, 1,270 were found to be within the Commission's mandate and were taken up for action. 122 investigations were completed and a total of 101 suspects were arrested and charged. During the same period, the KACC traced illegally acquired assets of an estimated amount of KSh. 5.61 billion and recovered corruptly acquired assets valued at KSh. 148.31 million through civil court proceedings and out of court settlements. Despite all these efforts, corruption remains an issue of concern in Kenya.
20. Public officers in Kenya are subject to the Public Officer Ethics Act. The law contains a Code of Conduct and Ethics which applies to all officers, employees or members, including an unpaid, part-time or temporary officer, employee or

¹² Source: Kenya National Bureau of Statistics

member, of, amongst others, the Government or any department, service or undertaking of the Government; the National Assembly or the Parliamentary Service; a local authority and any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law. The Public Officer Ethics Act also requires every public officer to submit a declaration of his income, assets and liabilities and those of his spouse and dependent children under the age of 18.

21. Legal and accounting professionals in the private sector are also subject to a Code of Ethics.

1.2 General Situation of Money Laundering and Financing of Terrorism

22. Based on the figures set out in the table below, major profit generating crimes include robbery and thefts, economic crimes, corruption, and drug offences. The Kenyan authorities are not aware of proceeds being laundered in any particular sector. However there is a general perception in the press that proceeds are being laundered in Kenya but this is not supported by any evidence or statistics.

	OFFENCES	CATEGORIES	YEARS				
			2005	2006	2007	2008	2009
1.	Homicide	Murder	1,260	1,286	1,261	1,394	1,404
		Manslaughter	38	33	47	29	47
		Infanticide	101	48	20	29	36
		Procuring Abortion	96	58	38	23	37
		Concealing Birth	79	114	112	73	77
		Suicide	528	362	235	280	312
		Causing Death by Dangerous Driving	211	189	199	209	301
		Sub-Total	2,313	2,090	1,912	2,037	2,214
2.	Offences against morality	Rape	1,365	1,291	876	735	847
		Defilement	1,067	1,445	1,984	1,849	2,621
		Incest	142	134	181	123	193
		Un-natural sodomy offences	206	170	198	163	162
		Bestiality	63	29	64	26	23
		Indecent assault	158	229	191	135	121
		Abduction	152	220	173	73	95
		Bigamy	0	7	6	12	6
		Sub-total	3,153	3,525	3,673	3,116	4,068
3.	Other offences against persons	Assault	12,715	13,186	12,089	11,479	14,189
		Creating Disturbance	4,062	5,028	5,361	4,693	5,937
		Affray	527	509	381	324	413
		Sub-total	17,304	18,723	17,831	16,496	20,539
4.	Robbery	Robbery	2,511	1,257	759	864	743

	OFFENCES	CATEGORIES	YEARS				
			2005	2006	2007	2008	2009
		Robbery with violence	4,010	3,594	2,643	2,401	2,101
		Carjacking	119	158	47	91	68
		Robbed of motor vehicle	133	79	25	29	18
		Cattle Rustling	163	146	18	16	8
		Sub-total	6,936	5,234	3,492	3,401	2,938
5.	Breakings	House Breaking	3,210	3,080	2,304	2,483	2,638
		Burglary	2,863	2,069	1,767	1,737	1,747
		Other Breaking	2,381	2,271	2,266	2,406	2,668
		Sub-total	8,454	7,420	6,337	6,626	7,053
6.	Theft of stock		2,219	2,209	1,586	2,269	2,876
7.	Stealing	Handling Stolen Property	389	619	345	423	367
		Stealing from Person	1,173	1,591	1,430	1,202	1,078
		Stealing by Tenants/Lodgers	74	141	164	199	144
		Stealing from a building	444	585	423	376	283
		General Stealing	10,509	7,938	8,387	9,235	10,100
		Sub-total	12,589	10,874	10,749	11,435	11,972
8.	Theft by servant	Stealing by Directors	62	33	62	121	57
		Stealing by Agents	372	286	233	294	271
		Stealing by employees/servant	2,440	2,381	1,874	1,972	2,404
		Sub-total	2,874	2,700	2,169	2,387	2,732
9.	Vehicle and other thefts	Theft of Motor vehicle	654	695	557	606	594
		Theft from Motor vehicle	281	313	217	219	221
		Theft of Motor vehicle parts	434	355	284	308	315
		Theft of motor cycle	349	297	163	225	309
		Sub-total	1,718	1,660	1,221	1,358	1,439
10.	Dangerous drugs	Possession	5,244	5,012	4,744	3,969	5,039
		Handling	124	105	69	63	79
		Trafficking	246	298	233	177	303
		Cultivating	204	132	155	67	59
		Usage	538	274	200	131	61
		Sub-total	6,356	5,821	5,401	4,407	5,541
11.	Traffic offences	Taking Vehicle without lawful authority	4	24	40	82	45
		Driving under the influence of alcohol	34	38	6	38	14
		Sub-total	38	62	46	120	59
12.	Criminal damage	Malicious Damage	2,756	2,893	2,235	2,090	2,204
		Arson	358	529	455	1,487	963
		Other Criminal Damage	41	58	55	129	187
		Negligent Acts	81	38	25	54	63
		Sub-total	3,236	3,518	2,770	3,760	3,417

	OFFENCES	CATEGORIES	YEARS				
			2005	2006	2007	2008	2009
13.	Economic crimes	Obtaining by False pretences	960	1,253	1,402	1,151	1,400
		Currency Forgery	119	27	195	398	469
		False Accounting	45	44	49	94	80
		Other Fraud/Forgery Offences	266	279	262	255	375
		Sub-total	1,390	1,873	1,908	1,898	2,324
14.	Corruption	Soliciting for a Bribe	35	75	47	87	102
		Accepting Bribe	23	19	9	8	14
		Accepting Free Gifts	1	9	3	0	5
		Demanding by False pretence	11	12	18	19	14
		Other Corruption offences	37	137	100	19	23
		Sub-total	107	252	177	133	158
15.	Offences involving police officers	Soliciting for a Bribe	20	18	19	14	14
		Accepting Bribe	0	2	1	3	17
		Accepting Free Gifts	0	0	0	1	2
		Demanding by False pretence	0	2	0	5	5
		Other Criminal offences	9	54	12	10	18
		Sub-total	29	76	32	33	56
16.	Offences involving tourists	Bag Snatching	1	21	6	3	1
		Other offences against tourists	7	3	1	2	1
		Other offences involving tourists	24	60	3	1	3
		Sub-total	32	84	10	6	5
17.	Other penal code offences		6,652	6,104	3,732	3,994	4,864
	Total		75,400	72,225	63,028	63,476	72,255

23. The threat from international terrorism is a serious concern for Kenya. As a country Kenya has suffered the direct impact of terrorism having been a victim of the 1998 Al Qaida attack of the US Embassy in Nairobi and the 2002 Al Qaida attack on a tourist resort in Mombasa. Kenya is also under terrorist attack threat from the Somalia's insurgent group *Al-Shabaab*. The risk of domestic terrorism is perceived to be very low. So far no positive match with the 1267 list was identified. The Kenyan authorities have indicated that they do receive requests under UNSCR 1373. The requests that have been received thus far pertain to non-citizens. The authorities watch list these individuals to ensure that they are not allowed in the country. If, they are already in the country they are declared prohibited immigrants before being deported to their respective countries.

1.3 Overview of the Financial and DNFBP Sectors

a. Overview of the Kenyan Financial sector

24. The financial sector in Kenya is diverse and comprises banking, insurance, capital markets, pension funds and quasi-banking institutions which comprise of savings and credit cooperative societies (SACCOs), microfinance institutions and building societies.
25. The following table summarises the structure and size of the financial sector in Kenya.

Structure and size of the financial sector

	Type of Financial Institution	Number of Institutions	Total Assets in USD ¹³ .	Authorised/ registered& supervised by
1	Commercial banks	44	17,812,292 million (as at 31 Dec. 2009)	CBK
2	Mortgage finance companies	2	515,919 million (as at 31 Dec 2009)	CBK
3	Foreign Exchange Bureaus	130	28,884 million (as at 31 December 2009)	CBK
4	Deposit taking Micro Finance Institutions	2	57,596 million (as at 31 Dec. 2009)	CBK
5	Investment Banks	19 ¹⁴	100,443,242 (as at December 2008)	CMA
6	Stockbrokers	10	15,797,586 ¹⁵ (as at December 2008)	CMA
7	Fund managers	16	23,081,607 (as at December 2008)	CMA
8	Authorised depositories	15	Not available	CMA
9	Investment advisers	23	3,419,939 (as at December 2008)	CMA
10	Life Insurance Companies	43	305.9 million (as at 31 Dec 2009)	IRA
11	Insurance	154	Not available	IRA

¹³ One US dollar = Kshs. 75.82

¹⁴One investment bank was licensed in 2009

¹⁵ The total assets exclude 3 stockbrokers which are under statutory management.

	brokers			
12	Insurance agents	3,355	Not available	IRA
13	Registered custodians	9	Not available	RBA
14	Registered pension fund managers	16	Not available	RBA
15	Registered pension fund administrators	26	Not available	RBA
16	Savings and Credit Cooperative Societies (SACCOs)	-	-	SASRA
17	Building societies	-	-	CBK/Registrar of Building Societies

26. The financial services sector contributes about 5 per cent of GDP and provides total assets equivalent to about 46 per cent of GDP. The banking sector alone employs 21, 657 staff and overall the financial sector employs about 1% of formal employment.
27. The FinAccess 2009 survey carried out under the leadership of the CBK and the Financial Sector Deepening Trust indicated that 22.6% of the Kenyan population had access to formal finance (e.g. banks, PostBank or insurance product), 17.9% had access to other formal finance (e.g. SACCOS & MFIs), 26.8% had access to informal finance (Rotating Credit and Savings Associations (ROSCA) and moneylenders) and 32.7% had no access to finance.
28. One of the major innovations brought in the banking sector in Kenya to promote financial inclusion was the use of branchless banking through mobile-phone based payment service. The first mobile phone based payment service was launched in March 2007. At the time of the onsite visit, there were three mobile payments service providers in Kenya. There are over 7.3 million registered customers using the mobile phone based payment service and over 12,000 agents. The CBK issued a Guideline on Agent Banking to regulate agent banking services in Kenya. The Guideline became effective on 01 May 2010.

Banking

29. Kenya has a fairly large banking sector, which is regulated and supervised by the Central Bank of Kenya. As at December 2009, there were 44 commercial banks in

operation with an asset base of Ksh. 1.35 trillion¹⁶ (USD 17.8 billion). The Banking Act establishes the framework for the licensing and regulation of banks in Kenya. In addition to banks, financial institutions¹⁷ and mortgage finance companies are also licensed by the Central Bank under the Banking Act. As at 31 December 2009, there were 2 licensed mortgage finance companies and as at December 2009 there were no licensed financial institutions.

Foreign Exchange bureaus

30. As at 31 December 2009, the CBK had licensed one hundred and thirty (130) foreign exchange bureaus to operate in Kenya. Out of the 130 bureaus 103 operate in Nairobi. Bureaus are licensed and supervised by the CBK under the Central Bank Act and the Central Bank of Kenya (Foreign Exchange Business) Regulations 2007.

Insurance

31. The Insurance Act provides the regulatory framework for insurance business in Kenya. As at 31 December 2009, there were 46 insurance companies, registered to transact insurance business, out of which 10 were long term business insurers while 14 were composite insurers. For the same period, the industry had an asset base of KSh. 176 billion (USD\$ 2.3 billion). Life insurance business accounted for 57.3 per cent of total premium representing Gross Direct Premium amounting to KSh. 23.2 billion (USD\$ 305.9 million). The Insurance sector is regulated by the Insurance Regulatory Authority (IRA).

Capital Markets

32. The Capital Markets sector in Kenya is governed by the Capital Markets Act which establishes the Capital Markets Authority for regulating and monitoring the capital markets. The main players in the capital markets sector include: The Nairobi Stock Exchange, stock brokers, investment banks, investment advisers; fund managers and authorised depositories (securities custodians). As at 30 April 2010, there were 11 approved Unit Trust Schemes and 7 Employee Share Ownership Plans (ESOP) in Kenya. As at December 2008, the Unit Trusts Portfolio was valued at USD 186,700,217.

The Nairobi Stock Exchange (NSE)

¹⁶ Source: Bank Supervision Annual Report 2009, Central Bank of Kenya

¹⁷ Financial Institutions are defined under section 2 of the Banking Act as “a company other than a bank, which carries on, financial business and includes any other company which the Minister may, by notice in the Gazette declare to be a financial institution for the purposes of this Act.

Financial business is defined under section 2 of the Banking Act as “ (a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and (b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and a the risk of the person so employing the money;”

33. The NSE is a licensed exchange under the CM Act. Its principal objectives are to provide a fair, honest and efficient market for public trading of securities and other financial instruments and to effectively regulate its authorized users and markets, in accordance with the CM Act and Regulations and subject to the oversight of the CMA. Shares and bonds are traded on the NSE. NSE membership is made up of the 19 licensed stockbrokers authorised by the CMA to buy and sell securities on the exchange. As at 31 December 2009, market capitalisation was USD\$10.9 billion (KSh. 831.83 billion). According to the NSE analysis in 2009, the value of transactions by domestic investors was KSh. 15.04 billion (USD\$ 198.4 million) 39.42 percent of 2009 turnover while foreign investors made net purchases of KSh. 8.33 billion¹⁸ (USD\$ 109.8 million).

Pensions

34. The pension sub-sector in Kenya consists of the following components:
- The Public Service Pension Scheme, which covers Civil Servants, Teachers, members of the Disciplined Forces, the Judiciary, the National Assembly and the President, is administered by the Pensions Department of the Ministry of Finance and paid from the Consolidated Fund.
 - The National Social Security Fund (NSSF) is a provident fund established in 1965 through an Act of Parliament. Its coverage mainly comprises of private sector companies, parastatals and public employees who are not covered under the civil service pension scheme. There are an estimated 1.3 million workers contributing to the NSSF.
 - Occupational Retirement Benefits Schemes are tax advantaged schemes which are created voluntarily by employers to cater for retirement benefits for their employees. These schemes are required by law to have an independent board of trustees, including member representatives, and independent fund managers and custodians.
 - Individual Retirement Benefits Schemes created by financial institutions and whose membership is open to members of the public interested in saving for retirement. As at 31 December 2006, there were 14 individual schemes in Kenya with assets of KSh. 2 billion.
35. Except for the Public Service Pension Scheme, the other schemes are regulated by the Retirement Benefits Authority under the Retirement Benefits Act. As at 31 December 2009, there were approximately 1,200 registered and 70 unregistered retirement benefit schemes in Kenya which had assets of over KSh. 181 billion¹⁹ (USD\$ 2.4 billion). The pensions sector is an important contributor to the capital

¹⁸ Source NSE Annual Report 2009

¹⁹ Source: Kenya Vision 2030 Sector Plan for Financial Services 2008-2012

markets with pension schemes holding over KSh. 80 billion in government securities and KSh. 96 billion in quoted equity²⁰.

Microfinance

36. Microfinance plays a leading role in providing financial services to low income earners and small scale enterprises. The microfinance industry in Kenya has experienced rapid growth over the years in an attempt to meet the large demand from those lacking access to financial services. The regulatory framework became operational in May 2008. Following the enactment of the Microfinance Act, the CBK approved 33 business names, which is the first step in the licensing process for institutions that propose to conduct deposit taking microfinance business. At the time of the onsite visit, there were two licensed microfinance institutions and, eight licence applications were under consideration. According to the estimates of the Association of Microfinance Institutions (AMFI) in Kenya, its member institutions (AMFI had 41 registered members as at 31 December 2009) serve over 4 million clients with an outstanding loan portfolio of USD 30 million.
37. Non-deposit taking microfinance institutions are not regulated in Kenya. While the Microfinance Act provides that the Minister of Finance may make regulations prescribing the measures for the conduct of non-deposit taking business no such regulations have been issued as yet. According to the CBK²¹, non-deposit taking activities are undertaken by a varied spectrum of financial institutions including those registered as NGOs. For this reason, the exact number of service providers is largely unknown.

Kenya Post Office Savings Bank (KPOSB)

38. KPOSB was established in 1910 as a savings department within the then East African Common Services. In 1978, when the East African Community broke up, KPOSB was incorporated by the Government of Kenya to mobilise savings for national development. As at end of 2008, KPOSB had total assets approaching KSh. 15.4 billion (USD\$ 203.1 million). KPOSB which is governed by the Kenya Post Office Savings Bank Act does not fall under the supervisory purview of the CBK but reports to the Ministry of Finance.

Savings and credit cooperative societies (SACCOS)

39. Kenya has an estimated 5,000 active SACCOS (as at 2009) offering savings and credit services to over 7 million Kenyans. In December 2008, the SACCO Societies Act was enacted to provide for the licensing, regulation and supervision of SACCO societies and for the establishment of the SACCO Societies Regulatory Authority (SASRA). SASRA is responsible for the licensing and supervision of SACCO societies intending to engage in deposit taking business. The SACCO

²⁰ Source: Kenya Vision 2030 Sector Plan for Financial Services 2008-2012

²¹ Bank Supervision Annual Report 2009, Central Bank of Kenya

Societies Act (The Act) came into operation on 26 September 2009²². SASRA is operational and began licensing deposit taking SACCOs after the SACCO Societies (Deposit-Taking Sacco Business) Regulations, 2010 were gazetted on 25 June 2010²³.

40. The following table shows the types of “financial institutions” (as defined by the FATF) that operate in Kenya and indicates if they are subject to the AML/CFT requirements of the POCAMLA, and their AML/CFT regulator where one exists.

Financial Activity by Type of Financial Institution			
Type of Financial institutions (see the glossary of the FATF 40 Rec.)	Type of Financial Institution that performs this activity	AML/CFT Requirement	POCAMLA Designated AML/CFT Supervisor
Acceptance of deposits and other repayable funds from the public	Commercial bank	POCAMLA & CBK AML Guidelines	FRC
	Mortgage finance companies		
	Deposit taking micro-finance institutions	POCAMLA & The Microfinance (Deposit Taking Microfinance Institutions), Regulations 2009	
	SACCOS		
	KPOSB		
	Building societies		
Lending	Commercial banks	POCAMLA & CBK AML Guideline	FRC
	Mortgage finance companies		
	Deposit taking microfinance institutions	POCAMLA	
	SACCOS		
	Non-deposit taking micro-finance institutions		
	Agriculture Finance Company		
	Building societies		
Financial leasing	Commercial banks	POCAMLA CBK AML Guideline	FRC
	Transfer of money or value	Commercial banks	POCAMLA CBK AML Guideline
Money transfer service			

²² Legal notice number L.N 153/2009 Gazette Supplement No. 67 of 2009

²³ At the time of the on-site visit SASRA had not begun licensing deposit taking SACCO but there are 44 licensed deposit taking SACCOS under SASRA as at July 2011.

Financial Activity by Type of Financial Institution			
Type of Financial institutions (see the glossary of the FATF 40 Rec.)	Type of Financial Institution that performs this activity	AML/CFT Requirement	POCAMLA Designated AML/CFT Supervisor
	providers		
	Foreign exchange bureaux de change	POCAMLA CBK Forex Bureau Guidelines	
	Postal Corporation	POCAMLA	
	Mobile phone operators	POCAMLA	
Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller’s cheques, money orders and bankers’ drafts, electronic money)	Commercial Banks	POCAMLA CBK AML Guideline	FRC
		POCAMLA	FRC
	Postal Corporation		
Financial guarantees and commitments	Commercial banks	POCAMLA CBK AML Guidelines	FRC
	Insurance companies	POCAMLA	FRC
Trading in money market instruments (cheques, bills, CDs, derivatives etc.)	Commercial banks	POCAMLA CBK AML Guideline	FRC
	Insurance companies	POCAMLA	FRC
Trading in foreign exchange	Commercial banks	POCAMLA CBK AML Guideline	FRC
Trading in Exchange, interest rate and index instruments	N/A	N/A	N/A
Trading in Transferable securities	Investment banks	POCAMLA	FRC
	Stock brokers		
	Dealers	CM Regulations	
	Fund managers		
Trading in Commodities	N/A	N/A	N/A
Participation in securities issues and the provision of financial services related to such issues	Investment banks	POCAMLA CM Regulations	FRC
	Investment advisers		
	Stock brokers		
	Fund managers		
	Commercial banks	POCAMLA CBK AML Guideline	

Financial Activity by Type of Financial Institution			
Type of Financial institutions (see the glossary of the FATF 40 Rec.)	Type of Financial Institution that performs this activity	AML/CFT Requirement	POCAMLA Designated AML/CFT Supervisor
Individual and collective portfolio management	Investment banks	POCAMLA CM Regulations	FRC
	Fund managers/Pension fund managers		
	Investment adviser		
Safekeeping and administration of cash or liquid securities on behalf of other persons	Commercial banks	POCAMLA CBK AML Guideline	FRC
	Custodians	POCAMLA CM Regulations	FRC
Otherwise investing, administering or managing funds or money on behalf of other persons	Commercial banks	POCAMLA CBK AML Guideline	FRC
Underwriting and placement of life insurance and other investment related insurance	Insurance Companies	POCAMLA	FRC
Money and currency changing	Commercial banks	POCAMLA CBK AML Guideline	FRC
	Foreign exchange bureaus	POCAMLA Foreign Exchange Bureau Regulations	
	Other authorized dealers	POCAMLA	FRC

b. Overview of the Designated Non Financial Businesses and Professions (DNFBPs)

41. The different types of designated non-financial business and professions that operate in Kenya include casinos, real estate agents, accountants, company service providers and dealers in precious stones and metal.

A. Lawyers

42. In Kenya the legal profession consists of advocates. There are over eight thousand advocates in Kenya. A person qualifies to act as an advocate if he satisfies the requirements prescribed under the Advocates Act. These include holding the proper qualification and being a member of the Law Society of Kenya. The Law Society of Kenya is Kenya's Bar Association, established by The Law Society of Kenya Act (Chapter 18 of the Laws of Kenya) which came into effect in 1992. It has the mandate to advise and assist members of the legal profession, the government and the public on all matters relating to the administration of justice in Kenya.

43. Advocates in Kenya are subject to Law Society Digest of Professional Conduct and Etiquette which is intended to give guidance to advocates concerning their professional conduct and the etiquette of the profession. The Advocates Act provides for the establishment of a Disciplinary Committee which hears cases of complaints against an advocate for professional misconduct. The Chief Justice or any other of the judges is also vested with powers to deal with misconduct or offences by an advocate. The Disciplinary Committee received 211 cases during the year 2009 as compared to 175 in 2008²⁴.
44. Ethics Committees have also been set up throughout the Law Society of Kenya branch network, to promote alternative dispute resolution without necessarily resorting to the formal disciplinary process. The mandate of the Ethics Committees extends to minor or other complaints which are inherently unsuitable for the formal disciplinary process.
45. The Law Society of Kenya and its members are also members of the East Africa Law Society, the African Bar Association, the Commonwealth Lawyers Association, the Criminal Bar Association, and the International Bar Association.
46. Apart from providing legal advice, advocates in Kenya are also involved in buying and selling of real estate and in the creation, operation or management of legal persons or arrangements on behalf of clients. Advocates are not reporting persons for the purposes of the POCAMLA.

B. Notary Public

47. Advocates who have practiced in Kenya for a minimum period of five years may also be appointed by the Chief Justice to perform the functions and duties commonly performed by a notary public in the United Kingdom.. The most common tasks of a notary public are: preparing and witnessing powers of attorney for use overseas; dealing with purchase or sale of land and property; providing documents to deal with the administration of the estate of people who are abroad; authenticating personal documents and information and authenticating company and business documents and transactions. Notaries are not reporting persons under the POCAMLA.

C. Accountants

48. As at the date of the onsite visit, there were 1700 audit firms and 3500 accountants employed in public and private sectors. To practise as an accountant a person must hold a practising certificate and a licence to practice issued under the Accountants Act 2008 by the Registration and Quality Assurance Committee of the Institute of Certified Public Accountants of Kenya (ICPAK). Both bodies are established under the Accountants Act. ICPAK was initially established in 1978 by the then Accountants Act. In 2008, a new Accountants Act was enacted to take into account the various developments that had shaped the accounting profession globally and in Kenya. Under the new law, registration with ICPAK is mandatory and it has been estimated that there are around 10,000 unregistered accountants practising in Kenya.

²⁴ Law Society of Kenya Annual Report 2009

49. ICPAK serves as the umbrella body that oversees the activities of qualified and registered Certified Public Accountants (CPAs). It also acts as the profession's mouthpiece in Kenya and in this respect holds membership in international accountancy organisations. The Registration Committee also monitors compliance with professional, quality assurance and other standards that apply to member of ICPAK.
50. To qualify for a practising certificate and a licence, a person must hold the relevant academic qualification and may be required to satisfy the requirement of a fit and proper person. Registered accountants are subject to ICPAK Code of Ethics for Professional Accountants. Failure to follow the guidance given by this code may not in itself constitute misconduct, but means that the member concerned may be at risk of having to justify his or her actions in answer to a complaint. The Act also establishes a Disciplinary Committee to inquire into professional misconduct of members. In 2009, there were about 9 cases under enquiry out of which 1 accountant was deregistered, 4 practising certificates were suspended, 3 were reprimanded and one was acquitted.
51. Accountants in Kenya are also involved in the following activities: acting as company registration agents, acting as company secretary, acting as trustee and buying and selling of properties. Accountants are reporting persons under the POCAMLA.

D. Certified Public Secretaries (CPS)

52. Under the Kenya Companies Act every company must have a secretary who must hold a qualification prescribed under the Certified Public Secretaries Act 1988. These include, persons holding a member of the professional body of the UK Institute of Chartered Secretaries and Administrations, a registered accountant, an advocate of the High Court of Kenya and a person holding a qualification approved by the Registration of Certified Public Secretaries Board. No person can practise as a certified public secretary unless he is the holder of a practising certificate issued by the Registration of Certified Public Secretaries Board established under the Certified Public Secretaries Act.
53. There are approximately 806 practising and 914 non-practising (mainly those who are employed by corporate bodies and other institutions) CPS registered with the Institute of Certified Public Secretaries of Kenya (ICPSK). The ICPSK is established under the Certified Public Secretaries of Kenya Act, and is responsible for enhancing professional competence among its members and advising the Examinations Board on matters relating to examination standards and policies.
54. CPS provide corporate services, including company formation, acting as secretary of a company, and acting as nominee shareholders. CPS are not reporting persons for the purposes of the POCAMLA.

E. Dealers in precious metals and dealers in precious stones

55. Kenya is endowed with the occurrence of various types of minerals. Gold is by far the most important mineral although copper and silver have also been mined. It occurs in quartz veins, alluvial and rubble deposits and as disseminations within

the Nyanzian and Kavirondian rocks. Kenya is also one of the countries with major occurrence of a variety of coloured stones including, tsavorite (emerald green grossularite garnet), amethyst, aquamarine, beryl, peridot, ruby, sapphire, tourmaline, various types of garnets (green, red, rose, almandine), and zircon. Dealers in precious metals and precious stones in Kenya include miners, gemstone traders and jewellers.

56. There are about 60 jewellers, 12 main gemstone mining companies and 77 gemstone dealers in the country. However, for gemstones, there are also over 100 prospectors, some of whom are already undertaking limited mining. Mining companies and gemstone dealers are licensed under the Mining Act while jewellers are licensed under the Trading in Precious Metals Act Cap. 309. A licence is also required for trading in unwrought precious metals²⁵ under the Trading in Unwrought Precious Metals Act.
57. The gemstone miners have a body known as the Kenya Chamber of Mines that articulates the aspirations and problems of its members. There is also the Nairobi Goldsmith Association formed by the Jewellers.
58. Kenya has also enacted the Diamond Industry Protection Act which regulates diamond dealings. In 2010, two companies were licensed as diamond dealers. Kenya has applied to become a member of the Kimberley Process.
59. Dealers in precious stones and dealers in precious metals are reporting persons under the POCAMLA.

F. Real Estate Agents

60. Real Estate Agents must register with the Estate Agents Registration Board (EARB) established under the Estate Agents Act. At the time of the onsite visit there were over 200 registered agents in Kenya. To qualify for registration, a person must hold the relevant academic qualification set out under the Act. A person who does not hold the prescribed academic qualification but is of good character and satisfies the Board that he has not been convicted of an offence involving fraud or dishonesty may also be registered. Practising without registration is an offence under the Act.
61. The Act also provides for the office of a Registrar to keep and maintain a register in which the name of every registered person must be entered. The following particulars must also be recorded:
 - (a) the date of the entry in the register;
 - (b) the address of the person registered;

²⁵ Under section 2 of the Trading in Unwrought Precious Metals Act “unwrought precious metal” means precious metal in any form whatever, which is not manufactured or made up into an article of industry or of the arts, and includes amalgam, slimes, slags, gold-bearing concentrates, pots, battery chips, sweepings from reduction works and scrapings and by-products of unrefined precious metal and precious metal which has been smelted into the form of bullion but does not include ore *in situ*.

- (c) the qualifications of the person; and
 - (d) such other particulars as the Board may from time to time direct.
62. The Registrar must also enter all changes in the above particulars in the register. The register is open for public inspection during normal working hours subject to the payment of a nominal fee.
63. The EARB is also charged with the responsibility of ensuring that the competence and conduct of practising estate agents are of a standard sufficiently high to ensure the protection of the public. The EARB may issue a code of conduct for estate agents. As at the time of onsite visit, there was no code of conduct which applied to estate agents. The EARB may also take disciplinary measures (including suspension of the registration, imposing a fine, or the cancellation of the registration) against a registered estate agent who is convicted of an offence under this Act or is after due inquiry found to have been guilty of an act or omission contrary to the public interest or amounting to professional misconduct.
64. The term “practice as an estate agent “ is defined under the Estate Agent Act as *"the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following acts –*
- (a) *bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or*
 - (b) *negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;"*
65. Real estate agents are subject to the AML obligations under the POCAMLA.

G. Casinos

66. Casinos are licensed under section 46 of the Betting, Lotteries and Gaming Act Cap 131, Laws of Kenya. At the time of the onsite visit, there were thirty seven (37) operating casinos distributed in the major towns of Kenya as follows:

Nairobi	20
Mombasa	10
Malindi	2
Nakuru	2
Kisumu	1
Eldoret	1
Thika	1

67. Casinos are licensed and supervised by the Betting Control and Licensing Board established by the Betting Lotteries and Gaming Act Cap 131 Laws of Kenya (1966).

68. The table below summarises the types of DNFBPs operating in Kenya, the AML regime to which they are subject and the regulator responsible for overseeing each type of DNFBP.

Sector	Activity performed by	Size of Sector	AML under POCAMLA	AML Oversight provided by
Casinos (including internet casinos)	Privately owned land based casino operations;	37	Yes	FRC
	internet or ship-based casinos.	none		
Real Estate Agents	Individuals and firms	200	Yes	FRC
Dealers in precious metals	Individuals and firms	41	Yes	FRC
Dealers in precious stones	Individuals and firms	77	Yes	FRC
Legal professionals	Advocates	Over 8,000	No	Not designated
	Notaries Public		No	Not designated
Accountants	CPAs (practicing)	1,700 (<i>audit firms</i>) 3500 (<i>employed</i>)	Yes	FRC
Company Service Providers	Certified public secretaries	806 (<i>practising</i>) 914 (<i>non-practising</i>)	No	Not designated
Other (please specify)	Non-governmental organisations	6,000	Yes	FRC

1.4 Overview of commercial laws and mechanisms governing legal persons and arrangements

Legal persons

69. The following types of legal persons exist in Kenya: (a) companies; (b) partnerships and (c) limited partnerships.

Companies

70. Companies may be formed under the Companies Act for any lawful purpose and may be incorporated with or without liability. The following types of companies may be formed under the Companies Act-
- Private company limited by shares
 - Public company limited by shares
 - An unlimited company
 - Companies limited by guarantee

- Foreign companies

71. Companies must be registered with the Registrar of Companies (ROC) who is required under the Companies Act to keep a register of all registered companies. As at the time of the onsite visit there were over 250,000 companies registered in Kenya. The table below indicates the number of each type of companies registered in Kenya.

Type of Commercial Entity	Number of entities registered annually			
	2007	2008	2009	2010 (as at May 2010)
Private companies Limited by shares and by Guarantee	16,065	17,797	16,181	7,717
Public Companies Limited by shares	56	40	50	20
Unlimited Liability Companies	0	0	0	0
Total	16,121	17,837	16,231	7,737

72. Both natural and legal persons may be the shareholders of a company registered in Kenya. Every company is required to keep a register of its shareholders at its registered office. Private companies are required to have at least one director while other companies must have at least two directors. Company directors in Kenya can be natural or legal persons. All companies must have a registered office which must be in Kenya. The ROC must be given notice of the situation of the registered office and any change thereto.

Partnerships

73. Partnerships are defined under section 3 of the Partnership Act as “the relation which subsists between persons carrying on a business with a view of profit. There is no requirement for partnerships to be registered.

Limited Partnerships (LPs)

74. Limited Partnerships must be registered with the ROC in accordance with the requirements under the Limited Partnership Act. Like partnerships, the LP operates with a profit motive. As at end of May 2010 there were 10 LPs registered in Kenya.

Legal arrangements

75. Trusts in Kenya may be created by a trust deed or a will under Common law. Trusts that involve immoveable property²⁶ must be registered with the Principal

²⁶ Section 2 of the Registration of Documents Act defines the term “immovable property” as including land, buildings, hereditary allowances, rights of way, lights, ferries, fisheries and any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber (except coconut trees), growing crops or grass.

Registrar of Documents under the Registration of Documents Act (RDA). The registration of trusts that do not involve immoveable property is optional. As at 04 June 2010 there were 1365 trusts registered under the RDA. From the discussions held during the onsite visit, it would appear that private trusts are commonly used in Kenya. However, there were no official figures on the total number of trusts that exist in Kenya as this information is not captured. Trusteeship services are provided by lawyers and other persons. There is no registration requirement which applies to trustees.

1.5 Overview of strategy to prevent money laundering and terrorist financing

a. AML/CFT Strategies and Priorities

76. The AML system in Kenya is in its early stages of development. Kenya enacted the Proceeds of Crime and Anti-Money Laundering Act in December 2009. The Act became operational on 28 June 2010.

77. Terrorist financing is not criminalised in Kenya. Kenya administratively established the National Counter Terrorism Centre in 2004 to coordinate all the counter terrorism resources within the country. To be able to come up with a comprehensive legislation on terrorism, NCTC convened a multi-agency Technical Working Committee comprising the Office of the President, Attorney General's Office, Ministry of Justice, National Cohesion and Constitutional Affairs, Kenya Law Reform Commission and Kenya Police to consider the concerns that had been raised on the Suppression of Terrorism Bill, 2006 and the subsequent Draft Anti-Terrorism Bill, 2006. The Technical Committee has refined the draft Prevention of Terrorism Bill which incorporates international counter terrorism practices and takes account of the FATF Nine Special Recommendations. Kenya ratified the Convention for the Suppression of the Financing of Terrorism in June 2003.

b. The institutional framework for combating money laundering and terrorist financing

Ministries

Ministry of Finance

78. The Office of the Deputy Prime Minister and Ministry of Finance coordinates all the AML activities including budgetary support. The Ministry also chairs the National Taskforce on AML/CFT.

Ministry of Justice

79. The Ministry of Justice, National Cohesion and Constitutional Affairs is responsible for a wide range of mandates; which are aimed at achieving a sustainable democratic system of governance that operates in accordance with a clearly defined and predictable legal environment. Towards this goal, the Ministry has been formulating policies on legal issues and administration of justice as well as coordinating reforms in the Governance, Justice, Law and Order Sector. In addition, and as a response to the crisis witnessed after the 2007 general

elections, the Ministry has been spearheading initiatives for the promotion of national cohesion, reconciliation and social justice.

80. The mandate of the Ministry is set out in the Presidential Circular No. 1/2008 dated 30 May 2008 and includes, among others; formulation of legal policy and policy on administration of justice; promotion of national cohesion; fostering constitutional governance, an effective legal and judicial system, democracy and rule of law in Kenya.

Ministry of Interior

81. The Office of the Vice President and Ministry of Home Affairs is responsible for NGO Coordination and Lotteries and Betting Control.

Ministry of Foreign Affairs

82. The Ministry of Foreign Affairs develops and implements Kenya's Foreign Policy. It participates in the United Nations and other international decision making fora and facilitates mutual legal assistance.

Committees or other bodies to coordinate AML/CFT action

The National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF)

83. The NTF was established through a gazette notice in April 2003. It is a multidisciplinary taskforce, whose membership comprises of the following organizations deemed crucial to the implementation of the national AML/CFT regime; Ministry of Finance (Chair of the Taskforce), Central Bank of Kenya (Hosts the Secretariat), Kenya Police, the Criminal Investigation Department (CID), the National Security Intelligence Service (NSIS), Banking Fraud Investigation Department (BFID), Attorney General's Chambers, the Capital Markets Authority, the Kenya Revenue Authority, the Immigration Department, the Insurance Regulatory Authority, the Kenya Bankers Association, the Ministry of Trade & Industry, the Ministry of Foreign Affairs. The National Counter Terrorism Centre and the NGO Coordination Board were later brought on board.
84. The NTF's primary mandate is to facilitate the development of a robust and effective AML/CFT regime in Kenya by sensitizing members of the public on the dangers of money laundering and terrorist financing and developing a national policy framework on AML/CFT that is in line with international standards and best practice.
85. Key achievements of the taskforce to-date include the following:
 - Drafted the Proceeds of Crime and Anti-Money Laundering Act 2009
 - Drafted Anti-Money Laundering Regulations that will take effect after enactment of the POCAMLA.
 - Enhanced institutional capacity of NTF member organizations by exposing members to various international AML/CFT training programs.

National Counter Terrorism Centre (NCTC)

86. In 2004, the NCTC was established with the mandate to coordinate all the counter terrorism resources within the country. The NCTC is also involved in capacity building among the different stakeholders in the country. In the international arena, NCTC works closely with-
- IGAD Capacity Building Programme Against Terrorism
 - The UN Counter Terrorism Executive Directorate in the implementation of the UN Resolution 1373
 - Resolution 1267 Monitoring Team and
 - The UN Monitoring Group on Somalia and Eritrea.

Criminal justice and operational agencies

The Financial Intelligence Unit

87. Kenya does not as yet have a national operational FIU. The POCAMLA provides for the establishment of the Financial Reporting Centre (FRC) as a national centre to receive, analyse and disseminate financial intelligence and information. The FRC is the custodian of the implementation of AML programmes in the country under the Act. Presently, the Central Bank of Kenya receives suspicious transaction reports from commercial banks.

Law enforcement agencies including police and other relevant investigative bodies

Kenya Police

88. The Kenyan Police Force which reports to the Commissioner of Police is a department of Ministry of State for Provincial Administration and Internal Security in the Office of the President. As at the time of the onsite visit, the force fielded about 41,465 officers, who work in divisions in each of the eight provinces. The functions of the Police Force is laid down in Section 14(1) of the Police Force Act which reads as follows:

"The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged."

89. The Kenya Police Force is responsible for investigating ML offences in Kenya.

Kenya Anti-Corruption Commission (KACC)

90. The Kenya Anti-Corruption Commission (KACC) which is an independent statutory body was established in 2003 with the enactment of the Anti-Corruption and Economic Crimes Act. It is the primary authority responsible for combating corruption and economic crimes through investigation, asset tracing, prevention and public education.

Prosecution authorities including specialised confiscation agencies

The Office of the Attorney General

91. The Constitution of Kenya provides for the Office of the Attorney General. In addition to being the principal legal adviser to the Government of Kenya, the Attorney General has responsibility for public prosecutions. The Constitution vests in the Attorney General the autonomy and final discretion in the institution, continuation and discontinuation of criminal prosecutions. The prosecution function is exercised by the Attorney General through the Director of Public Prosecutions, Prosecuting Counsel and police prosecutors. The Attorney General may also direct any advocate to undertake prosecution on his behalf.
92. The office of the Attorney General is also responsible for the provision of registration services in respect of the incorporation of companies. This function is carried out by the Registrar - General's department.

Customs service

93. The Customs Services Department (previously known as Customs and Excise Department) of the Kenya Revenue Authority was established by an Act of Parliament in 1978. The primary function of the Department is to collect and account for import duty and VAT on imports. Apart from its fiscal responsibilities, the Customs Services Department is responsible for facilitation of legitimate trade; and protection of society from illegal entry and exit of prohibited goods.

Financial sector bodies- Financial Regulators

Central Bank of Kenya (CBK)

94. The CBK is established under the Central Bank of Kenya Act. Under Section 4(2) of the Central Bank of Kenya Act, one of the key mandates of the Central Bank of Kenya is to foster the liquidity, solvency and proper functioning of a stable market-based financial system which is carried out by Bank Supervision Department. This mandate is aimed at promoting and maintaining the safety, soundness and integrity of the banking system. This is undertaken through the implementation of policies and standards that are in line with international best practice for bank supervision and regulation. In this regard the Bank has taken a number of key measures to prevent the abuse of the financial system by terrorists, money launderers and other criminals, including:
 - Issuing AML guidelines in 2001 whereby banks, microfinance institutions and foreign exchange bureaux are required to have in place adequate "Know Your Customer" (KYC) policies and procedures that promote high ethical and professional standards that seek to prevent such institutions from being abused by criminal elements. The Bank Supervision Department conducts on-site examinations to ensure compliance with these guidelines.
 - The phasing out of Bearer Certificates of Deposits (BCDs) with effect from December 31, 1999. Prior to that, BCD's were viewed as valid deposit instruments. However, it was noted that they encouraged anonymity of the holders of value deposits and thus could be used for money laundering purposes.

- Instituting AML/CFT training for bank supervisors in conjunction with the various co-operating partners.
95. The CBK Bank Supervision Department hosts the Secretariat of the National Task Force on AML/CFT.

Capital Market Authority (CMA)

96. The Capital Markets Authority is established under section 5 of the Capital Markets Act and it is responsible for the development of orderly, fair and efficient capital markets in Kenya through effective regulation that encourages innovation and safeguards market integrity. In its effort to enhance integrity in the capital markets with regard to AML, the Authority has taken the following measures with regard to AML:
- introducing KYC and CDD requirements and CDD and transaction records keeping requirements under the CM Regulations.
 - preparing draft AML guidelines which were under consultation with the relevant stakeholders at the time on the onsite visit
97. The CMA is in the process of conducting an awareness raising programme for the benefit of the capital market intermediaries to assist them to better understand their AML requirements under the POCAMLA.

Insurance Regulatory Authority (IRA)

98. The Insurance Regulatory Authority (IRA) was created by the Insurance (Amendment) Act of 2006 and came into operation on 01 May 2007. The Authority was established with the mandate of regulating, supervising and developing the insurance industry. Prior to the establishment of the Authority, the functions of regulating and supervising the insurance industry were performed by the defunct Department of Insurance in the Ministry of Finance. In undertaking its statutory functions, the Authority formulates and enforces standards of conduct for insurance and reinsurance business and it licenses all persons involved in or connected with insurance business, including insurance and reinsurance intermediaries, loss adjusters, assessors, risk surveyors and valuers. The IRA is also required to protect the interests of insurance policy holders and insurance beneficiaries in all insurance contracts and ensure fairness for all. It advises the Government on the national policy to ensure adequate insurance protection and security for national assets and national properties.

Retirement Benefits Regulatory Authority (RBA)

99. The RBA is established under the Retirement Benefits Act to regulate and supervise the establishment and management of retirement benefit schemes. It became fully operational in October 2000. Since its inception the Authority has intervened in a number of cases in order to protect the interests of members especially when members' benefits are endangered. Interventions include, issuing directives to scheme trustees, carrying out on-site inspections of schemes and

appointing external independent interim administrators to take over the running of schemes where necessary.

Financial Sector bodies- Associations of Service Providers

Kenya Bankers Association (KBA)

100. The banks have come together under the Kenya Bankers Association (KBA), which serves as a lobby for the banks' interests and also addresses issues affecting member institutions. Its membership comprises 44 commercial banks and the CBK is an ex-officio member. KBA issued a voluntary code, which sets standards of good banking practice for Banks when dealing with customers. The code became effective in October 2001. The Association ensures that member banks comply with the code and may take action where the code has been breached. For this purpose, a compliance committee has been set up within the KBA.
101. The KBA is a member of the National Task Force on AML/CFT. It expressed the view that the implementation of the requirements under the POCAMLA did not pose a major challenge for its members as they were already complying with the CBK AML Guidelines.

The Kenya Association of Stockbrokers and Investment Banks (KASIB)

102. KASIB which represents the interest of Kenyan stockbrokers and investment bankers was established with the goal of upholding good practice and promoting high professional standards in the industry. Membership to the association is voluntary and all its eighteen members have seats at the NSE and are licensed as stockbrokers or investment banks by the CMA. Members are subject to a Code of Ethics and Conduct, which is aimed at promoting good business conduct, ethics, professionalism and discipline at all times. The Code is binding on all members and is enforceable.
103. While developing the draft AML Guidelines, the CMA held consultative meetings with KASIB. As an industry Association, KASIB has included an AML component in its 5 year Strategic Plan which is in the process of being developed. The industry has not identified any implementation issue regarding the AML obligations under the POCAMLA.

The Association of Kenya Insurers (AKI)

104. The Association of Kenya Insurers (AKI) was established in 1987 as a consultative and advisory body for the insurance Industry. The membership of the Association is not compulsory and is open to any Insurance company duly registered under the Insurance Act to transact business in Kenya.
105. The Association's main objective is to promote adherence to prudent business practices by its members and to create awareness among the general public with a view of accelerating the growth of the insurance business in Kenya. Members of the Association are governed by a Code of Practice which aims at (i) promoting underwriting discipline, (ii) protecting and promoting the reputation of insurers, (iii) promoting cooperation among members; and (iv) avoiding unhealthy

competition. The Association may take disciplinary action against its members for breaches of the AKI Constitution or of the Code of Practice.

106. When the POCAMLA was enacted, AKI circulated a summary of the Act and highlighted the expectations that arise under the law for insurers to all its members. The Association expressed the view that further education on AML/CFT was required.

The Association of Insurance Brokers of Kenya (AIBK)

107. The AIBK was established in the pre-colonial days to protect and promote the general welfare and interests of Insurance Brokers carrying on business in Kenya. It is also used as a forum for consultation with the IRA on issues of common interests. Membership of the Association is open to all insurance brokers registered by the IRA under the Insurance Act and as at the onsite visit the AIBK had 150 members. Members of the Association must at all times abide by a Code of Conduct which is enforceable. Complaints arising out or relating to the Constitution of the Association and the Code of Conduct are dealt with by the Disciplinary Committee of the AIBK.
108. According to the AIBK, around 80 per cent of insurance business goes through the insurance brokers. The Association was of the view that AML/CFT issues were relatively new to the industry operators who were therefore in need of being educated on such issues.

The Association of Microfinance Institutions of Kenya (AMFI)

109. AMFI is a member- based institution registered in 1999 by the leading MFIs in Kenya with the aim to build the capacity of the Kenyan microfinance industry. AMFI has 41 members ranging from banks, wholesale microfinance institutions (MFIs), retail MFIs, development institutions and insurance companies. It has been estimated that the membership serves over 4 million clients with an outstanding loan portfolio of over USD 303 million. The other objectives of AMFI include, working with the Government and other stakeholders to improve the regulatory and policy environment, promoting performance standards, norms and ethics for transparency and sound performance and promoting a self-regulatory mechanism for the industry.
110. A voluntary Code of Conduct for the AMFI members was approved in 2009. The Code is intended to guide microfinance institutions under the AMFI in ensuring professionalism, setting ethical standards and practices and fair play. The paramount objective of the Code is to promote and uphold good conduct and discipline amongst its members at all times. AMFI may investigate complaints under the Code and take appropriate steps to ensure that members in breach remedy the breach and comply with the Code. The association may impose sanctions and penalties to any member who fails to comply with the Code.

DNFBPs and other matters

Casino supervisory body

111. The Betting Control and Licensing Board was established by the Betting Lotteries and Gaming Act Cap 131 Laws of Kenya (1966) to license and supervise betting and gaming premises and for authorizing public lotteries.

Registry for companies and other legal persons, and for legal arrangements (if applicable)

112. Companies are registered with the Registrar of Companies (ROC) which falls under the Registrar - General's department in the Office of the Attorney General.

Mechanisms relating to non-profit organisations

113. The NPO sector is regulated and supervised by the NGOs Co-ordination Board (only NGOs) and the Registrar of Societies (only societies). They are both statutory bodies established under their respective Acts of Parliament. The two institutions are also responsible for facilitation of a better understanding on the contribution of the NPO sector activities to the national development agenda in Kenya.

c. Approach concerning risk

114. Kenya has not adopted a risk based approach for combating ML and TF. No risk assessment has been undertaken for AML/CFT purposes.

d. Progress since the last mutual evaluation

115. This is the first AML/CFT mutual evaluation report for the Republic of Kenya.

2. LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

Laws and Regulations

2.1 Criminalisation of Money Laundering (R.1 & 2)

2.1.1 Description and Analysis

Recommendation 1

Legal framework

116. Before the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), money laundering was criminalised under the Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 (NDPSC Act) in Kenya. The criminalisation of ML under the NDPSC Act was only limited to laundering of proceeds generated from narcotic drugs and psychotropic substances. Under the POCAMLA, the criminalisation of ML has been broadened in line with the requirements of both the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) and the 2000 UN Convention against Transnational Organised Crime (Palermo Convention). The coming into operation of the POCAMLA repealed the provision criminalising money laundering offences under the NDPSC Act.
117. Kenya has ratified both the Vienna and Palermo Conventions.
118. The following laws form the legal framework of legislation relevant to the criminalisation of money laundering in Kenya:-
- The Proceeds of Crime and Anti-Money Laundering Act 2009
 - The Narcotic Drugs and Psychotropic Substances (Control) Act of 1994
 - The Penal Code Cap 63
 - The Anti-Corruption and Economic Crimes Act of 2003

Criminalisation of Money laundering (c.1.1)

119. The offence of money laundering is criminalised under sections 3, 4 and 7 of the POCAMLA. Pursuant to section 3 of the POCAMLA, a person becomes guilty of the offence:
- i) if he or she enters into an agreement, engagement, arrangement or transaction with anyone in connection with property which he or she knows or ought reasonably to have known that such property is or forms part of the proceeds of crime, regardless of whether the agreement, arrangement or transaction is enforceable at law or not; or
 - ii) if he or she performs any other act whether independently or with any other person, in connection with such property.

With the resulting effect of:

- concealing or disguising the nature, source, location, disposition or movement of the property or its ownership or any interest which anyone may have in the property; or
 - enabling or assisting anyone who has committed an offence in Kenya or elsewhere to avoid prosecution; or
 - removing or diminishing proceeds acquired as a result of unlawful activities.
120. Section 4 of the POCAMLA makes it an offence for anyone to acquire, use, or possess property which at the time the person knew or ought reasonably to have known that it is or forms part of proceeds of crime committed by another person.
121. Section 7 of the POCAMLA provides that a person is guilty of an offence, if he or she knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person with the intention of committing an offence.
122. Sections 3, 4 and 7 creating the offences of money laundering in the POCAMLA refer to the terms 'property' and 'proceeds of crime'. The two terms are defined in section 2 of the Act.
123. The term 'property' includes monetary instruments, other real or personal property of every description which includes things in action or other incorporeal or heritable property whether in Kenya or elsewhere, whether tangible or intangible including any interest in any such property and any such legal documents or instruments evidencing title to or interest in the property.
124. 'Proceeds of crime' are defined as: *" any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property from the time the offence was committed"*.
125. Under Articles 3(1)(b) & (c) of the Vienna Convention and 6(1) of the Palermo Convention the following acts, when committed intentionally where legislation and other such measures which may be necessary to take, are not contrary to the fundamental principles of the legal system obtaining in the country, are expected to be criminalised:
- the conversion or transfer of proceeds of crime;
 - the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to such proceeds of crime;
 - the acquisition, possession or use of such proceeds; and
 - participation in, association with or conspiracy to commit, attempts to commit; and aiding, abetting, facilitating and counselling the commission of any of the foregoing offences.

126. The Vienna and Palermo Conventions require that the person who converts or transfer the proceeds of crime will be doing it for the specific purpose of disguising or concealing the illicit origin of such proceeds or to help any person who will have committed an offence to avoid the law. For acquisition, using and possession, the conventions do not require that this be done for a specific purpose or for a particular objective.
127. The provisions of section 3(a) and (b) of the POCAMLA which criminalise the act of one entering into any agreement or engaging in any arrangement or transaction involving proceeds of crime or performing any other act in connection with such proceeds, provide a wide interpretation to encompass the acts of 'conversion and transfer of proceeds of crime' referred to in the Conventions. In addition, section 7 of the POCAMLA further criminalises the transportation, transmission, transferring or receiving of a monetary instrument or anything of value to another person with the intention to commit an offence.
128. Section 4 of the POCAMLA criminalises the acquisition, use or possession of proceeds of crime which are or form part of proceeds of a crime committed by another person.

Property (c. 1.2) and conviction for predicate offence (c 1.2.1)

129. The offences of money laundering under the POCAMLA extend to any type of property that is or forms part of the proceeds of crime regardless of the value and whether the offence was committed in Kenya or elsewhere.
130. The definition of property in the POCAMLA covers nearly every type of asset whether within the jurisdiction of Kenya or elsewhere and is consistent with the definition of property in both the Vienna and Palermo Conventions as well as in the FATF Glossary. Under sections 3, 4 and 7 of the POCAMLA, when proving that property is the proceeds of crime it is not necessary or required that a person be convicted of a predicate offence or to prove the offence where the proceeds were derived from but to establish evidence to show that at the time of dealing with the property, the accused or offender knew or circumstantially as a reasonable person ought to have known that the property he or she is dealing with is proceeds of crime.

Scope of Predicate offences (c. 1.3)

131. Although the term predicate offence is not defined or used in the POCAMLA, in terms of the definition of the terms 'offence' and 'proceeds of crime' provided for under section 2 of the POCAMLA, it can safely be said that Kenya has adopted an all crimes approach. "Offence" is defined under the POCAMLA as follows:

"an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya."
132. However, not all the predicate offences are criminalized. The following designated categories of offences for the purposes of the FATF definition are not criminalized in any of the Kenyan laws:

- (a) Participation in an organized criminal group²⁷ and racketeering
- (b) Terrorist financing.
- (c) Trafficking in human beings²⁸ and Migrant Smuggling.

Threshold approach for predicate offences (c 1.4)

133. Not applicable.

Extraterritorially committed predicate offences (c 1.5)

- 134. An offence is defined in section 2 of The Proceeds of Crime and Anti-Money Laundering Act 2009 to include an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya.
- 135. Under section 127 of the POCAMLA, the conduct of a person that takes place outside Kenya would constitute an offence under the POCAMLA if the same conduct at the time of its occurrence would constitute an offence against a provision of any law in Kenya if it had occurred in Kenya.
- 136. Although anyone can be prosecuted in Kenya for money laundering arising out of a predicate offence which will have occurred beyond the borders of Kenya, it is clear from both the definition of 'offence' under section 2 and the extraterritorial jurisdiction created under section 127 of the POCAMLA that the offence of money laundering will only be limited to proceeds generated from predicate offences which are recognised offences under the Kenyan laws. Currently, one cannot be prosecuted for laundering proceeds generated from trafficking in human beings or terrorist financing which would have happened elsewhere as such conduct is not criminalised in Kenya. The dual criminality test therefore applies to the prosecution of money laundering offences in Kenya.

Self laundering (c. 1.6)

- 137. The offences of money laundering created under sections 3 and 7 of the POCAMLA do not distinguish between the person committing the predicate offence and the person who later launders the proceeds from the offence. In the absence of such limitations under the Act, it is thus possible to charge an accused with both the predicate offence and the money laundering offence. The money laundering offence under section 4 of the POCAMLA however, precludes the application of the money laundering offence to the person who commits the predicate offence. In terms of section 4 of the POCAMLA, the offence of money laundering only applies to the acquisition, use or possession of property that is or forms part of the proceeds of a crime committed by another person.

Ancillary offences (c. 1.7)

²⁷ The Prevention of Organised Crimes Act, 2010 was enacted after the onsite visit and became effective on 23 September 2010. The offences relating to racketeering however are not criminalized

²⁸ The Counter Trafficking in Persons Act, 2010 was enacted after the onsite visit and became effective on 23 September 2010.

138. The provisions criminalizing money laundering offences under the POCAMLA do not sufficiently cover the ancillary offences to money laundering offences particularly relating to participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences.
139. The deficiencies identified in the POCAMLA relating to non-criminalisation of certain ancillary offences are fully covered under the Penal Code:
- section 20 criminalises - doing or omitting to do any act for purposes of enabling or aiding another person to commit an offence, aiding and abetting the commission of an offence;
 - section 22 criminalises counselling another to commit an offence;
 - section 389 criminalises attempts to commit offences; and
 - sections 391-394, deal with soliciting or inciting or attempting to procure another to do an act which is an offence in Kenya or in a country where the act would be an offence and would have been an offence if it been committed in Kenya, neglect to prevent the commission of a felony, conspire to commit an offence which is a felony or a misdemeanour.
140. In terms of section 4 of the Penal Code, an offence is defined as an act, attempt or omission punishable by law.
141. Taking the above provisions into consideration the assessors were satisfied that almost all the ancillary offences were covered.

Additional elements (c.1.8)

142. In terms of section 127 of the POCAMLA, proceeds of crime of an unlawful conduct that occurred in another country but such conduct is not an offence in that other country would constitute an offence under the POCAMLA, if that conduct at the time of its occurrence was against the provision of any law in Kenya, if it had occurred in Kenya.

Recommendation 2

Liability of natural and legal persons (c. 2.1& 2.3)

143. Section 3 of the POCAMLA creates criminal liability for “a person” who “knows” or “ought reasonably to have known” that property at the time of dealing with it, is or forms part of proceeds of crime. Under section 2 of the Act the term person is defined to mean “any natural or legal person”. The term person under the POCAMLA therefore applies to both natural and legal persons. It would also follow that the criminal liability created under section 3 of the POCAMLA applies to both the natural and legal persons under the Act, who are liable for money laundering offences provided for in sections 3, 4 and 7 of the Act. The penalty provisions under section 16 of the POCAMLA for contraventions of sections 3, 4 and 7 of the Act distinguishes between a natural person and a body corporate when it comes to sentencing.

The mental element of the ML offence (c.2.2)

144. The offences of money laundering set out in sections 3, 4 and 7 of the POCAMLA require the person committing the offence: (a) to have knowingly dealt with property which is the proceeds of an unlawful activity; or (b) ought to have reasonably known at the time of dealing with the property that it is the proceeds of crime. Whereas the person committing the offence under (a) is doing so with actual knowledge, the person committing the offence under (b) might not necessarily have actual knowledge that he is committing an offence but looking at the factual circumstances of his conduct, it would reasonably have been expected that he should have known that he was committing an offence thus his knowledge is constructive. The person under (a) intentionally commits the offence whereas the person under (b) in committing the offence would have been negligent as not to reasonably care about the source of the property he is dealing with. The same elements were also required when establishing a money laundering offence relating to proceeds from a drug trafficking offence under section 49 of the NDPSC Act before it was repealed.
145. Although the assessors were not provided with any case law where the above provisions had been used, particularly with the NDPSC Act which has been in existence in Kenya since 1994 compared to the POCAMLA which had just come into operation, it is clear that under the Kenyan laws both direct and circumstantial evidence is admissible in courts to prove the intention of an accused person or offender. Evidence sufficient to convict an accused of a money laundering offence under the POCAMLA and the NDPSC Act (before its section 49 was repealed) can be drawn and inferred from the objective factual circumstances of the case.

Liability of Legal Person should not preclude possible parallel criminal, civil or administrative proceedings (c.2.4)

146. The criminal liability created under the POCAMLA does not preclude civil liability but this is only limited to Part VIII of the Act which deals with civil forfeiture. The provisions under this part apply to any person, which would include legal persons in terms of the definition of person in the Act. For purposes of forfeiture, all proceedings under this part are civil proceedings and the same rules of evidence used in a civil matter apply to such proceedings. However, what is not clear from the Act is whether administrative proceedings can be applied parallel to either criminal or civil proceedings.

Sanctions for ML (c.2.5)

147. Sanctions for money laundering offences under the POCAMLA are provided for under section 16(1). Section 16(1) reads as follows:

“16. (1) A person who contravenes any of the provisions of sections 3, 4, or 7 is on conviction liable–

- (a) in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount*

of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and

(b) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.”

148. The penalties provided for money laundering under the POCAMLA are relatively in line with the range of sentences provided for in other countries (Tanzania-maximum of 10 years and not less than 5 years imprisonment, Mauritius-maximum of 10 years under the Financial Intelligence and Anti-Money Laundering Act and a maximum of 20 years under the Dangerous Drugs Act and South Africa although on the high side-maximum of 30 years) within the region.
149. The assessors, at the time of the on-site visit were not able to determine whether the sanctions provided under the POCAMLA were effective, dissuasive and proportionate as the Act had only been promulgated and became operational after the onsite visit.

Statistics (applying recommendation 32)

150. No relevant statistics were made available to the assessment team.

2.1.2 Recommendations and Comments

151. While Kenya has adopted an all crimes approach, the offences criminalised do not meet the minimum range of predicate offences prescribed in each of the designated categories of offences as defined by the FATF. It is recommended therefore that Kenya should consider criminalising the following predicate offences:
- a) Participation in an organised criminal group²⁹ and racketeering;
 - b) Terrorism financing; and
 - c) Trafficking in human beings³⁰ and migrant smuggling.
152. The provisions of section 4 of the POCAMLA should be amended to extend the application of the offence of money laundering to persons who commit the predicate offence.
153. The lack of statistics and data maintained by the relevant authorities should be addressed. Due to the lack of statistics and other supporting data, the assessors were unable to determine the effectiveness of the AML regime in Kenya, particularly, relating to NDPSC Act before the coming into operation of the POCAMLA. It is therefore recommended that the Kenyan authorities should put

²⁹ The Prevention of Organised Crimes Act as enacted after the onsite visit and became effective on 23 September 2010.

³⁰ The Counter Trafficking in Persons Act, 2010 was enacted after the onsite visit and became effective on 23 September 2010.

into place appropriate mechanisms to maintain comprehensive statistics on matters relevant to ML investigations, prosecutions and convictions.

2.1.3 Compliance with Recommendations 1 & 2

	Rating	Summary of factors underlying rating
R.1	PC	<ul style="list-style-type: none"> Not all the designated categories of predicate offences, including racketeering, financing of terrorism and migrant smuggling are criminalised in Kenya. The offence of money laundering under section 4 of the POCAMLA does not apply to persons who commit the predicate offence. The effectiveness of the money laundering regime in Kenya could not be assessed.
R.2	PC	<ul style="list-style-type: none"> The POCAMLA does not provide for administrative liability to run parallel with criminal and civil proceedings. The effectiveness of the regime could not be determined.

2.2 Criminalisation of Terrorist Financing (SR.II)

2.2.1 Description and Analysis

Legal framework

154. In terms of the Kenyan laws, any International Convention which is ratified by Kenya will only have force of law in Kenya after it has been domesticated by an Act of Parliament. Although Kenya has ratified the UN Convention on Terrorist Financing, the Convention has not yet been domesticated in Kenya. At the time of the on-site visit there was no Act of Parliament or Bill before the Kenyan Parliament criminalizing Terrorist Financing. The assessors were however informed of an administrative arrangement which was in place under the National Counter Terrorism Centre to monitor matters related to terrorism including terrorist financing.
155. Kenya has also ratified the following conventions and protocols which are annexes to the Convention for the Suppression of the Financing of Terrorism:
 - Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970;
 - Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971;
 - International Convention against the Taking of Hostages, 17 December 1979;
 - Convention for the Physical Protection of Nuclear Material, Vienna, 3 March 1980;
 - Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 24 February 1988;
 - Protocol for the Suppression of Unlawful Acts against the safety of Fixed Platforms located on the Continental Shelf, Rome, 10 March 1988; and

- International Convention for the Suppression of Terrorist Bombings, 15 December 1997.
156. Currently, there is no specific legislation criminalizing Terrorist Financing. However, a prevention of Terrorism Bill that will address the aspects of Terrorism Financing is being drafted and is in the final drafting stages. As such, it was not possible to carry out any analysis of the criminalization of terrorist financing.

2.2.2 Recommendations and Comments

157. The Kenyan authorities should as a matter of priority take the necessary steps to criminalise terrorist financing in accordance with the requirements of SR.II.

2.2.3 Compliance with Special Recommendation II

	Rating	Summary of factors underlying rating
SR.II	NC	Terrorist Financing has not yet been criminalised in Kenya.

2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)

Legal framework

158. Pursuant to Parts VII and VIII of the POCAMLA both criminal and civil forfeiture are provided for, respectively. Although in terms of both parts proceedings relating to forfeiture are civil, with rules of evidence applicable in civil proceedings applying. Criminal forfeiture only applies upon conviction whilst civil forfeiture is not dependent on conviction. The terms “forfeiture” and “confiscation” are used interchangeably in both parts of the POCAMLA. Currently the procedures only apply to money laundering offences as terrorist financing has not yet been criminalised.
159. A broad range of property and proceeds are covered under the confiscation and forfeiture provisions of the POCAMLA. In terms of section 57 of the Act, forfeiture proceedings can include any property that is realizable. In addition to the definitions of “property” and “proceeds of crime” described in Recommendation 1 above, “realizable property” is described under section 57 of the Act to be any property which is held by the accused person or defendant, including any affected gift made directly or indirectly by the accused person or defendant which is held by another person.
160. In addition to the POCAMLA the following laws also have confiscation or forfeiture, freezing and seizure provisions:
- The Narcotic Drugs and Psychotropic Substances (Control) Act of 1994,
 - The Anti-Corruption and Economic Crimes Act of 2003,
 - The East African Community Customs Management Act 2004, and
 - The Penal Code

2.3.1 Description and Analysis

Confiscation of property related to ML, TF or other predicate offences including property of corresponding value (c.3.1 (a), (b) & (c))

161. Part VII of the POCAMLA provides for the confiscation of all proceeds derived from the commission of a crime after conviction of the person. In terms of section 61 of the POCAMLA, such benefits may have been derived directly from the offence, or any other offence of which the person might be convicted with at the same trial or any criminal activity which in the court's view is sufficiently linked to the offence with which the person was charged. Under the same provision, the inquiry into whether the person benefited or not, from the offence is upon application by the Attorney General, Director of the Assets Recovery Agency or at the behest of the court itself. If it is found that the person benefited, the court can make an order for the person to pay to Government an amount it finds appropriate in addition to the penalty it might impose for the criminal offence. To ensure that the confiscation order is effective and fair, the court may issue any further orders as the situation may determine. The term "benefit" used in section 61 of the POCAMLA is not defined to understand the kind of proceeds it is referring to.
162. In the view of the assessment team, the provisions of section 61(1) of the POCAMLA does not seem to provide for forfeiture of the actual benefit but empowers the court to order payment of an amount it might consider appropriate in comparison to the value of the benefit acquired by the defendant (accused). It is not clear whether this provision is intended to determine the benefit by the defendant in terms of corresponding value and if that is the case, whether there is a requirement for an inquiry to be held by the Court to determine what would have happened to the actual benefit realized by the defendant.
163. Civil forfeiture under the POCAMLA is provided for under Part VIII of the Act. The Director of the Asset Forfeiture Agency may, under section 82 of the POCAMLA, make an urgent *ex parte* application to the courts seeking a preservation order prohibiting any person from dealing with property specified in the order subject to the conditions specified by the court when granting the order. In terms of section 90 of the POCAMLA, the Director of the Agency can proceed to apply for a forfeiture order of the property specified in the preservation order. The Agency Director will have to give 14 days' notice to persons who will have expressed interest to oppose the issuing of the forfeiture order or to have their interest excluded from the property subject to the forfeiture proceedings. The notice for an application for a forfeiture order is served following the provisions of the Civil Procedure Act.
164. In considering whether to grant the forfeiture order, the High Court, in terms of section 92 of the POCAMLA, *shall consider on a balance of probabilities whether the property which is subject of the application was used or was intended to be used in the commission of an offence or is proceeds of crime*. At the time of making the forfeiture order or at any time thereafter, the Court may make additional orders it

may consider necessary to facilitate the full implementation of the forfeiture order. In terms of section 92 (4) of the POCAMLA , the forfeiture order cannot be affected by the outcome of criminal proceedings, or an investigation intended to institute criminal proceedings relating to an offence with which the property forfeited is in some way affected.

165. The concept of forfeiture of property of corresponding value is provided for under section 29 of the Penal Code. Although restricted to offences covered only under sections 118 and 119. Section 29 specifically provides for the court in addition to any penalty which may be imposed to order forfeiture and where the property cannot be forfeited or cannot be found to order payment of such sum as it shall assess as the value of the property. This provision would have been adequate to cover the requirements of forfeiture of property of corresponding value but it is deficient in that it does not cover all offences. A similar provision should have been provided for in the POCAMLA or the POCAMLA should have had a provision which makes cross-reference to this section despite its deficiencies as identified above.
166. The civil forfeiture process provided for under the POCAMLA therefore covers **forfeiture or confiscation of property which is proceeds of crime, or instrumentalities used in, or instrumentalities intended to be used in the commission of crime.** This would include the crime of money laundering and any other predicate offences criminalized under the Kenyan laws. However, provisions relating to civil forfeiture under the POCAMLA do not seem to cover forfeiture of property of corresponding value.
167. Section 36 of the Narcotic Drugs and Psychotropic Substances (Control) Act provides for forfeiture of all the property owned by the accused person on the date of committing a specified offence or any property subsequently acquired by the person after the date of committing a specified offence. A specified offence is defined in terms of section 21 of the same Act as an offence including possession of drugs, trafficking in narcotic drugs, narcotic drugs connected to other acts such as smoking, inhaling, sniffing or the use of a narcotic drugs or psychotropic substance or unlawful possession of narcotic drugs or psychotropic substances for any of the above purposes including allowing preparation of opium at one's premises for the above purposes and cultivation of a prohibited plant.
168. The procedure in respect of forfeiture is set out in section 41 of the NDPSC Act. In terms of that section forfeiture applies only upon conviction of the accused person with a specified offence. Subsections (1),(2) and (3) of section 41 of the Act creates the understanding that the forfeiture proceedings are automatically triggered by the conviction of the person for a specified offence, either in the lower court which has to refer the case to the High Court upon conviction of the accused person or in the High Court itself. In terms of these subsections it does not appear necessary that an application for such forfeiture be made. However, subsection (4) of the same section provides for the Attorney General to apply to the High Court to

“recover” a forfeiture order imposed under section 36 described above. The term “recover” used in the section is not defined in the Act.

169. Section 42 of the NDPSC Act provides factors pursuant to proceedings under section 41, which have to guide the High Court in making a forfeiture order. Under section 42(1)(a) of the NDPSC Act, one of the factors which has to be considered by the High Court is, “ *(a) whether the person against whom the application has been made has committed a specified offence;*” . Section 41(3) of the Act provides as follows, “*(3) For the purposes of this Part, the conviction of a person for a specified offence shall be deemed to be conclusive evidence that he has committed the specified offence.*” Then section 36 of the Act provides as follows, “*36. Subject to this Part, where any person has committed a specified offence, all the property owned by him on the date of the commission of the offence or acquired by him after that date shall be forfeited to the Government.*”
170. The assessors observed that there was no consistency in the above cited provisions. Although section 41(3) of the Act provides that the conviction of an accused person for a specified offence shall be deemed to be conclusive evidence that the person committed the specified offence, section 42(1)(a) of the Act still requires the Court to again consider whether the person against whom “the application” has been made in terms of section 41 has committed a specified offence.
171. As discussed above, although section 42 of the Act refers to an application being made, section 41, other than an application being made in terms of subsection (4) of that section, does not seem to specifically provide for the referrals made to the High Court from the lower courts as an application for forfeiture of the property concerned with the specified offence of which the accused person will have been convicted but as a report setting out the particulars of the person convicted, the offence which the person was convicted and other particulars which may be prescribed by regulations.
172. The High Court upon receiving such report or upon convicting the person itself for a specified offence will publish a notice in a newspaper circulating in Kenya and in the Gazette, stating the conviction of the person and the liability for his property to be forfeited and the rights of third parties to the property, if any. This part of the section is silent about any nature of application for forfeiture being made to the High Court, even where it convicts the person itself. Therefore the generalisation of the term ‘application’ in section 42 becomes unclear. Further, although section 41 of the Act provides for forfeiture after conviction for a specified offence, this does not appear to be consistent with the provisions of section 36 of the Act, which provides for forfeiture *upon commission* of a specified offence. The assessors were of the view that it does not automatically follow that the stage of commission of an offence is the same as the stage of conviction for the same offence.
173. Section 20 of the NDPSC Act provides for forfeiture of instrumentalities used in the commission of any crime in terms of the Act. Such instrumentalities cover

machinery, equipment, implements, pipe, utensil or any other article which have been used for the commission of an offence. Although the section does not provide for forfeiture of instrumentalities intended to be used in the commission of crime, these requirements is sufficiently covered under section 92(1) of the POCAMLA.

174. Section 54 of the Anti-Corruption and Economic Crimes Act provides for the accused person upon conviction to pay full compensation for the loss suffered by anyone from the accused person's corrupt activities or commission of an economic crime. It also allows for the property acquired during the course or that was acquired as a result of the corruption or economic crime, upon conviction of the accused person, to be given to the rightful owner. In the event of the rightful owner not being determined, the court may order such property to be forfeited to the Government. The rightful owner under the provisions of this section can enforce an order made by the court as though it was awarded from civil court proceedings.
175. The Anti-Corruption and Economic Crimes Act in terms of its section 55, allows for forfeiture of unexplained assets. The Anti-Corruption Commission may institute an inquiry in the High Court through a summons issued to the person with the unexplained assets. If at the end of the inquiry the Court is not satisfied that the assets were not acquired through corrupt means, it will order the person to pay to the Government an amount equal to the value of the unexplained assets which the Court is not satisfied were acquired through any other means other than corruption.
176. It is not clear however whether the order issued by the Court in terms of the above section is meant to serve as an order enforcing forfeiture of property of corresponding value. From the provisions of section 55, it does not appear that the court can order the forfeiture of the actual unexplained assets which are the proceeds of the corruption but can only ask the person to pay an amount equal to the unexplained assets. It is again not clear whether the court at the time of making such an order would have carried out an inquiry to determine whether the actual unexplained assets cannot be forfeited or are still available for forfeiture. The assessors were not assisted by any court decisions by the Kenyan authorities to help determine this position or to understand why such a position was taken.

Confiscation of property derived from proceeds of crime (c.3.1.1 applying c.3.1)

177. Although the term "benefit" used in section 61 of the POCAMLA is not defined in the Act, the definition given to "proceeds of crime" under section 2 of the same Act is broad enough to include any benefit derived from a commission of crime. Therefore in terms of section 61 of the POCAMLA, confiscation can be applied against any benefit which forms proceeds of crime. This include any economic advantage derived or realized directly or indirectly from the commission of an offence, property to which such proceeds were later converted, transformed,

intermingled and any income or other economic gains derived or realized from such proceeds.

178. In terms of section 61 of the POCAMLA the confiscation of such proceeds also applies to any other offence which the accused person might be convicted of at the same trial or any other criminal activity which the court might find to be sufficiently related to the offence.

Provisional measures to prevent dealing in property subject to confiscation (c.3.2)

179. The laws in Kenya provide for the issuing of provisional orders to prevent dealing, transfer or disposal of property subject to confiscation. Section 69 of the POCAMLA provides for situations when the court may exercise its powers and issue restraint orders. Such situations may include:

- a) when a prosecution has been commenced against an accused person or defendant and either a confiscation order has been made against the person or the court is of the view that there are reasonable grounds that a confiscation order will be issued against the accused person or the defendant and the proceedings against the defendant or accused person are still to be concluded; or
- b) when the court is satisfied that the person will be charged with an offence and the court is of the view that there are reasonable grounds that a confiscation order may be made against that person.

180. The order is only valid within a certain period which the court considers to be reasonable and if the person is not charged within that period the court will rescind the order.

181. In respect of criminal or conviction based forfeiture, section 68 of the POCAMLA allows the Director of the Asset Recovery Agency to make an urgent chamber application seeking for an order prohibiting (restraining) any person dealing with property specified in the application in any manner subject to the conditions which the court may specify in issuing the order. The restraint order may be made against any realizable property specified in the order and any other property which if transferred to the person after making of the order is realizable property.

182. In terms of section 71 of the POCAMLA, where a police officer has reasonable grounds to believe that any realizable property against which a restraint order has been made is about to be disposed of or removed, the police officer may seize such property to prevent it from being disposed of or removed.

183. In respect of civil or non-conviction based forfeiture, section 82 of the POCAMLA allows the Director of the Agency to make an urgent chamber application seeking for a preservation order prohibiting any person, subject to terms and conditions which may be specified in the order, from dealing with any property in any manner. The court can make such an order, if there are reasonable grounds to

believe that the property concerned has been used or is intended to be used in the commission of an offence or is proceeds of crime.

184. Under the above section, the court making the preservation order will at the same time make an order authorising the police to seize the property concerned and any other ancillary orders which in the court's view will enable proper, fair and effective execution of the preservation order.
185. In terms of section 22 of the NDPSC Act, the Attorney General can apply for a restraining order in respect of all or any property of a person, where there are reasonable grounds to suspect that a person has committed a specified offence in terms of the Act and an investigation in relation to that offence has commenced. Included in the grounds for making such an application will be the offence the person is suspected to have committed against which an investigation will have commenced, the grounds for suspecting that the person committed the offence and a description, as much as possible, of the property in respect of which the order is sought.
186. Under section 26 of the same Act, where the court is satisfied that the requirements set out in section 22 above have been met, it may make any of the following orders:
 - a) An order prohibiting the respondent or any other person on his behalf, from disposing of, or otherwise dealing with the property specified in the order or interest there in; or
 - b) An order prohibiting the respondent or the other person from disposing of or otherwise dealing with the property or interest therein otherwise than in such manner as may be specified in the order; or
 - c) An order directing the Official Receiver to take custody and control of the property specified in the order and to manage or otherwise deal with the property in accordance with the directions of the court.
187. The preservation of property of persons suspected to have committed offences related to corruption is provided in terms of section 56 of the Anti-Corruption and Economic Crimes Act. In terms of this section the Anti-Corruption Commission, may make an application to the High Court seeking an order prohibiting the transfer or disposal of or any other dealing with property, where there is evidence that the property was acquired as a result of a corrupt conduct. The order can be made against the person who was involved in the corrupt conduct or a person who later acquired the property.

Ex-parte application for provisional measures (c.3.3)

188. The POCAMLA under its sections 68 and 82 (fully described under c.3.2 above) provides that applications for restraint and preservation orders be done on urgent basis in chambers by means of an *ex-parte* application.

189. Sections 22 and 56 of the NDPSC Act and the Anti-Corruption and Economic Crimes Act (fully described under c. 3.2 above) provide respectively, for restraint and preservation orders to be made as *ex-parte* applications. Such applications are only made in relation to predicate offences criminalised under the two Acts.

Identification and tracing of property subject to confiscation (c.3.4)

190. The law enforcement authorities including the Police, the Financial Reporting Centre and the Anti-Corruption Commission, have adequate powers to identify and trace property that is or may become subject to confiscation or that is suspected to be proceeds of crime.
191. Section 38 of the POCAMLA empowers the Financial Reporting Centre, for purposes of determining the owner of any property or whether the property is in the possession of any person or under the control of any person, to apply for an order to the High Court seeking that:
- a) Any document relevant to identifying, locating or qualifying that property; or any document relevant to identifying or locating a document that is necessary for the transfer of that property belonging to, or in the possession or control of that person be delivered forthwith to the Centre; and further.
 - b) That the reporting institution, immediately produce to the Centre or to any other appropriate law enforcement authority, all information obtained about any transaction conducted by or on behalf of that person during the period before or after the order as the Court may direct.
192. The Centre pursuant to provisions of section 24 of the POCAMLA, also receives financial information through reports made to it by the reporting institutions. Under the same section the Centre is also empowered to carry out an investigation on the reporting institution and the reporting institution has an obligation to provide documents and other information necessary for the investigation.
193. In terms of section 22 of the Police Act, a police officer may in writing compel any person who he has reasonable belief to have information that can assist with an investigation to a criminal offence to attend to a police station for interviewing and if necessary depose to a statement in writing.
194. The Anti-Corruption Commission pursuant to section 27 of the Anti-Corruption and Economic Crimes Act, is empowered to apply to the court seeking an order to have an associate of a suspected person depose to a statement explaining how property cited in the order was acquired (by purchase, gift, inheritance or any other manner) and whether any consideration was given for the property.
195. The Commission in terms of the above section is also empowered through a written notice, to ask any person to provide information or documents in that person's possession that involve a person suspected of a corrupt conduct or economic crime.

196. Section 28 of the Anti-Corruption and Economic Crimes Act, further empowers the Commission to apply for an order from the court seeking a person, whether or not suspected of corruption or economic crime, to produce records specified in the order in the person's possession that may be necessary for an investigation; or require the person or any other person to provide an explanation or information connected to such records regardless of whether the person made available the records or not. Such records might include books, returns, bank accounts, reports, legal or business documents and correspondence with the exception of that which is of a personal nature.

Protection of bona fide third parties (c.3.5)

197. The rights of *bona fide* third parties are protected under section 93 of the POCAMLA. The section provides for any person who has interest in the property against which an application for forfeiture has been made to apply to the High Court before the forfeiture order is made. If the court is satisfied on a balance of probabilities by the circumstances of the person relating to the property, it may make an order declaring the extent of the person's interest in the property.
198. The NDPSC Act under section 36 provides protection of rights of *bona fide* third parties where certain liabilities relating to the property to be forfeited, such as the property being mortgaged, had been created. The person however has to be able to show to the court that the liability created satisfies the circumstances set out under that section in order for the property not to be affected. The exemption only relate to forfeiture of property connected to drug related offences in terms of the Act.

Power to void actions (c.3.6)

199. Section 102 (1) and (2) of the POCAMLA, prevent disposal of jointly owned property where a co-joint owner dies whilst the property is subject to a preservation order.
200. In terms of section 83 (1) of the POCAMLA, the Agency Director has within 21 days of the making of a preservation order by the court to give notice of the order to all persons known to the Agency Director to have an interest in property which is subject to the order, and publish a notice of the order in the Gazette.
201. The assessors were of the view that subsections (3), (4) and (5) of section 83 of the POCAMLA, create the impression that the requirement for any person with an interest in property subject to forfeiture to show cause why his interest in it should be excluded is designed to prevent intentional disposal of property subject to confiscation.
202. However, the general observation of the assessors was that largely, the POCAMLA does not expressly provide for steps to be taken to void actions where persons knew or ought reasonably to have known that as a result of those acts

authorities would be prejudiced in their ability to recover property subject to confiscation.

Additional elements (c.3.7)

203. The laws in Kenya do not allow confiscation of property of organisations that are found to be primarily criminal in nature (that is organisations whose principal function is to perform or assist in the performance of illegal activities).
204. Non-conviction based forfeiture or civil forfeiture is provided for under Part VIII of the POCAMLA.

Statistics (applying recommendation 32)

205. Taking into consideration that the law relating to money laundering came into operation immediately after the on-site visit and that terrorist financing is not criminalised, it would follow that there was no statistics relating to freezing, seizing and confiscation of proceeds from, instrumentalities used in and instrumentalities intended to be used in the commission of the two offences at the time of the on-site visit. However, the assessors expected the authorities to have statistics on freezing, seizing and confiscation of proceeds from, instrumentalities used in and instrumentalities intended to be used in the commission of predicate offences, which at the time of the on-site visit were already criminalised in Kenya but such statistics was not provided. The assessors therefore could not determine the effectiveness of the provisions relating to freezing, seizing and confiscation/forfeiture regime in Kenya.³¹

³¹ During the onsite visit, the Kenyan authorities mentioned a case where properties were forfeited in a drug trafficking case under the Narcotic Drugs and Psychotropic Substances (Control) Act. Unfortunately they did not provide a copy of the judgement. The finer details of the said case as set out below were provided in August 2011. In 2004, one Mr. David Mugo Kiragu (the first accused) and seven others were charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances(Control)Act. NAIROBI CM C No.3165/04. The judgment in the above case was delivered on the 28th of June, 2006 by the Chief Magistrate who presided over the trial. The court found that the prosecution had proved its case beyond reasonable doubt against the first accused DAVID MUGO KIRAGU on two counts of trafficking in narcotic drugs. He was convicted on the two counts and sentenced to thirty (30) years imprisonment and further fined Ksh. 20 billion. The court, however, acquitted the rest under section 215 of the Criminal Procedure Code for lack of sufficient evidence. During the judgment, Mr. Kiragu, a Kenyan national, was still being held in the lawful Authority of the Netherlands, having been accused jointly with five other Dutch nationals of the offence of transportation of controlled substances, in particular cocaine into the Netherlands. The prosecution successfully applied for forfeiture of the following properties to the Kenyan Government under section 36 of the Narcotic Drugs and Psychotropic Substances (Control) Act:-(i) The speedboat in which the drug was found in Malindi; (ii) Two outboard engines of the same boat; and (iii) One Container recovered by the Police at the Godown at No.20 at Embakasi, Nairobi, containing another consignment of cocaine. Before the Nairobi trial commenced, the Kenyan Authorities discussed with the Netherlands Authorities the procedure of the extradition of Mr. Kiragu from the Netherlands to Kenya to answer charges against him in the Nairobi court. The Netherlands Authorities advised the Kenyan Authorities to invoke the Vienna Convention (The 1988 UN

2.3.2 Recommendations and Comments

206. The Kenyan Authorities should consider criminalising predicate offences to include all designated categories of offences as defined under the FATF Glossary. This would enable freezing, seizing and confiscation or forfeiture orders to be issued against all the designated categories of offences.
207. Section 29 of the Penal Code which provides for forfeiture of property of corresponding value should be amended to cover all offences. To clarify the provision of forfeiture of corresponding value in the POCAMLA, it is recommended that it be amended to have a similar provision to section 29 of the Penal Code but covering all offences.
208. In order to avoid any doubt of benefits which are subject to confiscation, it is recommended that the term "*benefits*" used in section 61 of the POCAMLA be defined.
209. Provisions of section 61 of the POCAMLA seem to exclude forfeiture of the actual benefit acquired by the defendant or accused person. Further to that, it is also not clear whether payment of the amount considered appropriate by the court can be interpreted to mean forfeiture of property of corresponding value. It is recommended that the authorities consider amending this section, so that it can provide for an inquiry as to what would have happened to the actual benefit realized by the accused person or defendant and where it is no longer available for purposes of forfeiture then the court can order payment of an appropriate amount in comparison to the value of the benefit to Government.
210. Pursuant to the above recommendation it is not clear whether the POCAMLA currently provides for confiscation or forfeiture of property of corresponding value. It is therefore recommended that the Authorities clearly provide for forfeiture of property of corresponding value both under the conviction based (criminal) forfeiture and non-conviction based (civil) forfeiture.
211. The Authorities should review provisions under sections 36, 41(3) and 42(1) of the NDPSC Act relating to when forfeiture of proceeds from drug related offences can be applied. The provisions are not consistent with each other.
212. The Authorities should consider amending section 55 of the Anti-Corruption and Economic Crimes Act to allow priority to be given to forfeiture of the actual unexplained assets and where that is not possible the courts can then order the person to pay an amount equivalent to the unexplained assets.
213. The laws, specifically the POCAMLA, should be amended to provide for power to void actions where persons involved knew or ought to have known that as a result of their actions the authorities would be prejudiced in their ability to recover property subject to confiscation.

214. The Authorities are encouraged to maintain statistics relating to freezing, seizing and confiscation or forfeiture of proceeds of crime from, instrumentalities used in and instrumentalities intended to be used in the commission of money laundering, other predicate offences and property of corresponding value. This would enable effectiveness and efficiency of systems for combating money laundering and other predicate offences to be assessed.

2.3.3 Compliance with Recommendations 3

	Rating	Summary of factors underlying rating
R.3	NC	<ul style="list-style-type: none"> • Predicate offences that have been criminalised do not cover all the designated categories of offences. This compromises the scope of offences for which provisions relating to confiscation or forfeiture can be used. • Forfeiture of property of corresponding value provided for under section 29 of the Penal Code does not cover all offences. • It is not clear whether forfeiture of property of corresponding value is provided for under the POCAMLA. • The POCAMLA does not provide for steps to prevent or void actions. • The absence of statistics made it impossible to determine effectiveness.

2.4 Freezing of funds used for terrorist financing (SR.III)

2.4.1 Description and Analysis

Legal framework

215. Kenya has not yet introduced measures to implement the freezing of terrorist funds or assets under any of the UNSCRs. Kenya has also not introduced any measures for the confiscation of terrorist funds or assets under the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism ("TF Convention"). Hence, an analysis of measures to freeze and confiscate terrorist funds or assets cannot be undertaken.

2.4.2 Recommendations and Comments

216. The Kenyan authorities should adopt measures in accordance with SR.III for the freezing and seizing of terrorist funds and assets.

2.4.3 Compliance with Special Recommendation III

	Rating	Summary of factors underlying rating
SR.III	NC	There are no measures in place in Kenya to implement the freezing and confiscation of terrorist funds and assets.

Authorities

2.5 The Financial Intelligence Unit and its functions (R.26)

2.5.1 Description and Analysis

Legal framework

217. Section 21 of POCAMLA establishes the Financial Reporting Centre (FRC) as the national centre for STR information. The FRC is however, not operational yet.
218. Prior to the enactment of the POCAMLA, the AML Guideline issued under the Banking Act (Cap 488) provides for a reporting requirement for some categories of financial institutions. Under the AML Guideline, banks, mortgage finance companies and non-bank financial institutions (licensed under the Banking Act) are required to send STRs to the CBK. In terms of the Foreign Exchange Bureau Guidelines, 2007 issued under the Central Bank of Kenya Act (Cap 491), all foreign exchange bureaus must send STR information to the CBK. The CBK has indicated that these provisions will remain in force until the FRC becomes operational.
219. Currently, STR information received by the CBK from reporting entities is sent to the Banking Fraud Investigations Department (BFID) which applies normal police analysis to the STRs to determine possible investigations. The BFID is a unit of Kenya Police Force which is attached to the CBK.
220. The table below indicates the number of STRs received from the CBK from 2007 to 2010.

STRs Received by the Central Bank of Kenya, 2007-2010

Year	STRs Received	STRs Forwarded to BFID	Concluded Investigations	Ongoing Investigations
2007	10	10	10	-
2008	1	1	1	-
2009	2	2	2	-
2010	26	26	9	17

Establishment of FIU as National centre (c.26.1)

221. In terms of section 21 of the POCAMLA a Financial Reporting Centre shall be set up to operate as a national financial intelligence unit. The primary objective of the Centre “is to assist in the identification of the proceeds of crime and the combating of money laundering” under section 23(1) of the POCAMLA.
222. The Centre is empowered in terms of section 24 of the POCAMLA to receive and analyse reports from reporting entities and disseminate reports to law enforcement agencies and supervisory bodies for possible investigation.
223. The powers and functions of the Centre do not extend to STR information related to terrorist financing.

Guidelines to financial institutions on reporting STR (c.26.2)

- 224. No guidelines regarding the manner of reporting, including the specification of reporting forms, and procedures that should be followed when reporting to the FRC have been provided to financial institutions and other reporting entities
- 225. The CBK issued STR forms to reporting entities subject to the AML Guideline and Foreign Exchange Bureau Guidelines for the purposes of submitting STR information to the CBK. All suspicious transactions reports are physically sent to the CBK by an officer of the reporting entity.
- 226. At the time of the onsite visit, the Kenyan authorities indicated that they were in the process of finalising Draft Anti-Money Laundering Regulations which provide for the following:
 - a) Suspicious transaction forms
 - b) Cash transaction forms
 - c) Monetary conveyance forms
- 227. Further, the authorities indicated that cash receipt seizure forms made by incoming travellers currently used by the Kenyan Revenue Authority will form part of the guidelines provided to reporting institutions to file STRs.

Access to information on timely basis by FIU (c.26.3)

- 228. The STR information is subjected to normal police investigation analysis process which includes collection of further information from other law enforcement agencies using existing procedures and channels available to the Police in Kenya.
- 229. The authorities indicated that once it is set up, the Centre will ensure that there are adequate arrangements in place, including Memoranda of Understanding with relevant stakeholders, to facilitate access to information to enable the Centre to properly discharge its functions.

Additional information from reporting parties (c.26.4)

- 230. The powers of the Centre to request additional information on STRs submitted by reporting entities are set out in section 44(5) of the POCAMLA. Section 44(6) of the POCAMLA further states that the reporting entity shall within a reasonable time period of not more than 30 days, or unless an exception is granted by the Director of the Centre, provide the Centre with particulars and all copies of documentation of any matter related to the suspicion raised in the STR.
- 231. The effectiveness of this provision could not be assessed as at the time of the onsite visit the Centre was not yet operational.

Dissemination of information (c.26.5)

- 232. The CBK forwards all STRs in their raw form to the BFID for investigation. The authorities have indicated that all STRs are investigated and in 2010 there were three prosecutions arising from STR information.

233. Pursuant to the provision of section 24 of the POCAMLA, the Centre is required to disseminate information to appropriate law enforcement authorities or any other appropriate supervisory body for further handling where the Director has reasonable grounds to suspect that the transaction is suspicious.

Operational independence (c.26.6)

234. The Centre is a statutory body established under section 21 of the POCAMLA. For administrative purposes, the Centre reports directly to the Minister of Finance. Pursuant to section 49(1) of the POCAMLA the Centre shall be advised by an Anti-Money Laundering Advisory Board³² –which comprises the following members:
- Permanent Secretary in the Ministry for the time being responsible for finance- -currently, the Ministry of Finance.
 - The Attorney General.
 - The Governor of the Central Bank of Kenya.
 - The Commissioner of Police.
 - The Chairman of Kenya Bankers’ Association.
 - The Chief Executive Officer of the Institute of Certified Public Accountants of Kenya.
 - Chairperson appointed by the Minister from members of the Board.
 - Two other persons appointed by the Minister from the private sector who shall have knowledge and expertise in matters relating to money laundering.
 - The Director of the Centre, who shall be the Secretary.
235. The primary function of the Board under section 50 of the POCAMLA is “to advise the Director generally on the performance of his functions and the exercise of his powers under this Act and to perform any other duty as prescribed to be performed by the Board under this Act”. Since the role of the Board is limited only to provision of advice and oversight, it does not appear that this will interfere with operational independence of the Centre.
236. The composition and terms of appointment of management of the Centre, including removal from office, are set out in section 25 of the Act.
237. The Centre shall be run by a Director and Deputy Director who are recommended by the Board to the National Assembly of the Republic of Kenya. Once approved, its decision binds the Minister of Finance to appoint them to assume office of the Centre as directed.
238. The Director and Deputy Director must hold a degree in law, economics or finance from a recognised institution and at least have seven years work experience in the relevant field, including meeting “...other requirements that may be prescribed by the Board” such as achieving performance targets.
239. The Act does not provide for requirements prohibiting appointment of managements (Director and Deputy Director) and other staff of the FRC on

³² The Board was launched on 24 June, 2011

grounds related to lack of integrity and misconduct behaviour before assuming employment. However, appointment of FRC management is subject to Chapter 6 of the Constitution which provides for good leadership and integrity requirements". Individuals appointed under this Chapter are subject to rigorous vetting process by a parliamentary committee responsible for appointments under Chapter 6. The staff of the FRC are classified as public servants and therefore subject to the provisions of the Public Officer Ethics Act. However, after assuming employment, a Director and Deputy can be removed from office by Minister of Finance on the following grounds:

- Gross misconduct;
- Mental or physical incapacity;
- Failure to satisfy terms and conditions of service;
- Where there is proof of a financial conflict of interest with any reporting institution;
- If adjudged bankrupt or enters into a composition or scheme of arrangement with his creditors; or
- If convicted of an offence for which one may be sentenced to imprisonment for a term exceeding six months.

240. The authorities advised the assessors that the management of the FIU will develop human resources guidelines covering issues on recruitment and staff conduct.

241. It would appear that if effectively implemented the provisions of Chapter 6 and the Public Officer Ethics Act would be able to safeguard undue interference in the operations of the FRC.

242. The Centre has powers to appoint its own staff at terms and conditions of service approved by the Minister after consultations with State Corporations Advisory Committee (Section 31 of the POCAMLA). The Centre shall appoint staff, while the Minister and the State Corporations Advisory Committee shall be consulted on terms and conditions.

243. Since at the time of the on site visit the Centre was not yet operational, assessors could not determine in practice whether or not it enjoys sufficient operational independence and autonomy.

Protection of information held by FIU (c.26.7)

244. In terms of section 32 of the POCAMLA all personnel of the Centre shall before assuming employment take an oath of confidentiality and are required to maintain the confidentiality of any matter during and after their tenure of office. The authorities further indicated that once the Centre is operational, mechanisms will be put in place to ensure authorised access to and use of information.

Publication of annual reports (c.26.8)

245. In terms of section 24 (f) of the POCAMLA, the Centre may compile statistics and records, disseminate information within Kenya and make recommendations arising out of any information received, issue guidelines to reporting institution and advise the Minister. BFID circulates monthly and quarterly reports to other

units of the Police, the CBK and commercial banks. The reports broadly touch on the usefulness of STR information on investigations.

Membership of Egmont Group (c.26.9)

246. The authorities have indicated that the Centre will consider membership of the Egmont Group of FIUs once fully operational. Once the Centre becomes a member of the Egmont Group it will have regard to the Egmont Group Statement of Purpose and its Principles for information Exchange between Financial Intelligence Units for Money Laundering Cases.

Egmont principles of exchange of information among FIUs (c.26.10)

247. In the absence of an operational FIU, this criterion could not be assessed.

Recommendation 30

Structure, funding, staffing and other resources (c.30.1)

248. The Minister of Finance has approved a Work Plan for the establishment of the Centre which outlines the structure, funding, staffing and other technical requirements essential for the FIU to become operational. Some members of the National Task Force have been earmarked to be seconded to the Centre until the recruitment of permanent staff is completed.
249. Members of the National Task Force were planning tour visits to operational FIUs within and outside the region to gain practical FIU knowledge.
250. There is a line budget to the value of Ksh. 42 million set aside by the Ministry of Finance to initiate work on making the Centre operational.

Integrity and confidentiality standards (c.30.2)

251. The Director, Deputy Director and staff of the Centre are required to take an oath before a Magistrate or Commissioner for Oaths to maintain confidentiality of any information before, during and after their tenure of office as required by section 32 of the POCAMLA. The lack of specific provision in the Act or other enforceable means that prohibits persons whose character and criminal record is not in good standing from being hired has potential to compromise the integrity of the Centre.

Training (c.30.3)

252. Although the staff members to be seconded by the National Task Force possess relevant exposure on AML/CFT, they lack adequate and relevant training in relation to the functions of an FIU. They expressed the need to receive technical assistance in this regard as soon as possible.

Recommendation 32

Statistics and effectiveness

253. Effectiveness could not be determined in the absence of an operational FIU.

2.5.2 Recommendations and Comments

254. The POCAMLA provides for the establishment of a Financial Reporting Centre as a national centre to receive, analyse and disseminate financial intelligence information to authorised agencies in Kenya. Given that currently there is no operational FIU, the authorities in Kenya should move with speed to establish the FRC in a manner that is consistent with the FATF Recommendation 26.
255. It is further recommended that the authorities in Kenya should consider the following:-
- provide effective guidance to reporting entities in consultation with designated supervisory/regulatory bodies under the Act. The guidance should also include the manner of reporting taking into account the diversity of reporting entities under the Act, specification of reporting forms, and the procedures that should be followed when filing a report.
 - develop effective mechanism to enable the Centre to have access, directly or indirectly, on a timely basis to the financial, law enforcement and administrative information to properly perform its functions. The authorities should consider arrangements such as MoU and designation of authorised officers to facilitate effective access to such information. Where online databases exist, the authorities should consider having processes that provide secured direct online-access to such databases for efficient analysis.
 - develop and implement enforceable policies and procedures in line with the provisions of i) Chapter 6 of the Constitution, ii) POCAMLA, and iii) Public Officers Ethics Act to cover matters related to integrity and conduct of the management and general staff of the FRC before, during and after employment.
 - put in place measures to ensure that there is effective dissemination of financial information to authorised domestic authorities for possible investigation and/or prosecution when there is suspicion for ML.
 - ensure that in practice, the Centre enjoys sufficient operational independence and autonomy to make sure that it is free from undue influence or interference.
 - put in place effective measures to ensure that information held by the Centre is protected and disseminated in accordance with the provisions of this Act.
 - once operational, the Centre should publicly release periodic reports, and such reports should include statistics, typologies and trends as well as information regarding its activities.
 - applying for membership in the Egmont Group including having regard to the Egmont Group Statement of Purpose and its Principles for Information Exchange Between Financial Intelligence Units for ML cases.
 - The Centre should keep comprehensive statistics to enable it to assess effectiveness of its functions.
 - undertake effective awareness raising programmes involving supervisory bodies, law enforcement authorities, reporting entities and other relevant stakeholders in the AML framework to popularise its existence.

2.5.3 Compliance with Recommendation 26

	Rating	Summary of factors relevant to s.2.5 underlying overall rating
R.26	NC	<ul style="list-style-type: none">• There is no operational FIU in Kenya.• The effectiveness of the provisions of the POCAMLA relating to the FRC could not be assessed as they have not been implemented.• The powers and functions of the Centre do not extend to combating of the financing of terrorism.

2.6 Law enforcement, prosecution and other competent authorities – the framework for the investigation and prosecution of offences, and for confiscation and freezing (R.27 & 28)

2.6.1 Description and Analysis

Recommendation 27

- i) The Proceeds of Crime and Anti-Money Laundering Act 2009.
- ii) The Narcotic Drugs and Psychotropic Substance Control Act of 1994
- iii) The Penal Code Cap 63
- iv) The Anti-Corruption and Economic Crimes Act of 2003.
- v) The Immigration Act
- vi) The Aliens Restriction Act
- vii) The Visa Regulations
- viii) Income Tax Act
- ix) The Value Added Tax Act,
- x) East African Community Customs Management Act, -
- xi) The Customs & Excise Act,
- xii) The Traffic Act.

Designation of authorities ML/FT Investigations (c.27.1)

256. **Attorney General's office (AG):** The Attorney General's Office is a public office established in terms of section 26 of the Constitution of Kenya. The Attorney General is mandated to conduct all criminal prosecutions. In addition to being empowered to prosecute all criminal matters, the Attorney General may request the police to investigate any matter in his opinion relates to any offence, alleged offence or suspected offence. The police, after completion of the investigation, is expected to report back to the Attorney General on the result of the investigation. In terms of the same section the Attorney General may delegate his powers to officers subordinate to him. The Attorney General has therefore delegated the responsibility of criminal prosecutions to the State Law Office/Director of Public Prosecutions Office.

257. Kenya Police Force (KPF): The Police Force in Kenya is established under Section 108 of the Constitution³³. The KPF is the main agency that has the mandate to investigate criminal matters. In terms of section 14 of the Police Act it is mandated to maintain law and order, preserve peace, protect life and property, prevent and detect crime, apprehend offenders and enforce all laws and regulations with which it is charged. Investigations relating to economic crimes fall under the Criminal Investigation Department (CID).
258. The CID has specialised units dealing with the investigation of specific crimes. The Banking Fraud Investigation Unit (BFIU), Anti-Narcotics Unit (ANU), Economic and Commercial Crime Unit (ECU) and Anti-Terrorism Police Unit (ATPU) are the units that are responsible for the investigation of economic crimes. The BFIU and the ECU are responsible for investigating ML. The ATPU is responsible for investigating activities related to terrorism. At the time of the on-site visit, financing of terrorism had not yet been criminalised in Kenya. The authorities were of the view that criminals committing such offences could be charged with other offences not necessarily financing of terrorism. However the authorities did not provide any cases in terms of precedent, to show how this was possible.
259. The Kenya Revenue Authority (KRA): The Investigation and Enforcement Department within the KRA is designated to investigate all tax evasion matters. The department is headed by a Commissioner. The investigators in this department include police officers who are seconded to the department from the Police. The Customs Department deals with all customs related cases.
260. Kenya **Anti-corruption Commission (KACC)**: KACC was established under section 6 of the Anti-Corruption and Economic Crimes Act in 2003. The main function of the KACC is to educate the public on fighting of, prevention of, and investigation of corruption and economic crimes. It has an intelligence department which is responsible for gathering crime intelligence which is later used in investigating corruption cases.

Ability to postpone/waive arrest of suspects or seizure of property (c.27.2)

261. The domestic laws of Kenya do not have specific provisions on the timing of an arrest by law enforcement authorities. The law enforcement authorities therefore use their own discretion on the timing of an arrest or seizure of property as long as the arrest or seizure is in line with the powers prescribed to them under the law. The waiver or postponement of an arrest of suspects or seizure of property is not specifically provided for by the law but is based on the administrative powers which the law enforcement authorities have to investigate. The investigator has the discretion to postpone or waive arrest of suspects or seizure of property depending on the circumstances of each case.

Additional element-Ability to use special investigative techniques (c.27.3 & 27.4)

³³ In terms of the new Constitution the Kenya Police Force is set up under Article 243.

262. Investigators from the police in terms of section 9(i) of the Police Standing Orders can use traps as a special investigative technique during investigations. Investigators from one of the police units, the Anti-Narcotics Unit informed the assessors that although there were no special provisions to use some of the techniques under the Narcotics Drugs and Psychotropic Substances (Control) Act, they had successfully used controlled delivery techniques following the administrative powers they have to carry out investigations. The authorities also indicated surveillance, undercover operations and the use of informers as the other special investigative techniques are used. The authorities highlighted that some of the special techniques were only used at the stages of gathering crime intelligence depending on the circumstances of the case.
263. The Kenya Revenue Authority, although it did not give a specific number of cases, it indicated that its investigators have often applied the controlled delivery technique especially in customs related offences where goods are smuggled through the borders. This at times had led to the arrest of the main culprits behind the smuggling offences. The investigators have also used undercover operations and informers to get information on tax offenders but again no specific numbers of cases were given by the authorities.

Additional element- Specialised investigation groups and conducting multi-national cooperative investigations (c.27.5)

264. The authorities conduct joint investigations with their foreign law enforcement counterparts. An example of a bank fraud where a joint investigation was conducted successfully was cited, although it did not eventually result in a conviction. At the domestic level, the Inter Agency Forum Board which comprises of most of the law enforcement agencies provides a framework through which government agencies can cooperate in the investigation of certain cases. The Inter Agency Forum Board provides the opportunity for investigators to form part time investigating teams to investigate cases of national interest. The Masai Mara case was given as a case in point where a multi-agency team was put together to investigate the operations of unauthorised tourist service providers in the area. In 2002 a multi-agency team had also been put together to investigate the terrorist bombing of the American Embassy in Nairobi.
265. The law enforcement agencies at times cooperate on their own to facilitate investigations. The Immigration and CID cooperated in a case leading to the arrest of a drug offence convict who had been deported from Kenya but managed to return to Kenya under a different name.
266. At the time of the on site visit ML was not yet an offence in Kenya as the Proceeds of Crime and Money Laundering Act although promulgated was not yet operational, therefore the focus of investigative cooperation did not cover ML. However, the authorities were of the view that given the Inter Agency Forum Board which was already in existence to enable multi-agency cooperation, once the Act was operational the Board would also facilitate cooperation in ML matters.

Additional element- review of ML and FT trends by law enforcement authorities (c. 27.6)

267. At the time of the on site visit there had not been any review of ML and FT methods, techniques and trends by the Kenyan law enforcement authorities as the offences had not been criminalised.

Recommendation 28

Ability to compel production of and searches for documents and information (c.28.1)

268. The provisions enabling the police to compel production of and search for documents and information are set out under the Police Act, Narcotic Drugs and Psychotropic Substances (Control) Act, Evidence Act, Anti-Corruption and Economic Crimes Act and the Criminal Procedure Code.

Power to compel production

269. Under section 9 of NDPSC Act, investigators have the power to among other things compel production of documents or other material for purposes of investigating the commission or preventing the commission of any offence under the Act.
270. The police have the power to compel production of banker's books under section 180 of the Evidence Act. This is done through a court warrant. The provision, however only deals with banker's books and does not apply to records of other financial institutions specified under the FATF glossary.
271. Under section 28 of the Anti Corruption and Economic Crimes Act, the KACC may compel production of records and property required for an investigation from any person regardless of whether or not the person is suspected of corruption or economic crime. The term "records" is defined to include books, reports, returns, bank accounts or other accounts, legal or business documents and correspondence other than correspondence strictly of a personal nature. The production can be compelled through a court order.
272. Pursuant to section 103 of the POCAMLA, where a person has been charged or convicted of any offence and a police officer has reasonable grounds to suspect that any person is in possession or control of documents or property relevant to an investigation, he can make an urgent chamber application to a court for a production order to compel production of the property or documents.
273. Under section 38(a) of the POCAMLA, the FRC may, in order to determine whether any property belongs to or is in the possession or under the control of any person, apply to the High Court for production of any document relevant to the identity, location or qualification of that property or a document relevant to the transfer of that property belonging to, or in the possession or control of that person to the Centre. If such information is in the possession of a reporting institution, in terms of section 38 (b) of the same Act, the reporting institution will have to produce to the Centre or the appropriate law enforcement agency, without delay all information obtained about any transaction conducted by or for that person during the period before or after the order as the High Court may direct.

Power to search and seize

274. The powers for the police to enter any premises, search and seize any article are provided for under the Criminal Procedure Code. Section 118 of the Criminal Procedure Code allows the police, where it is conducting an investigation into an offence or reasonably suspects an offence to have been committed to apply to a court by placing before it information under oath to support the issuing of a search warrant. The search warrant issued will allow the authority to enter and search the place named and described in the warrant and seize the articles specified in the warrant. Section 20 of the Police Act, however provides for exceptional circumstances when the police can enter any premises, search and seize articles relevant to the commission of an offence or suspected commission of an offence without a warrant. One of the exceptional circumstances is when the police officer is of the opinion that any delays in carrying out the search might result with the exhibit being tampered with or destroyed, prejudicing the investigation.
275. The Kenya Anti-Corruption Commission is provided with powers to search and seize articles with a warrant in terms of section 29 of the Anti-Corruption and Economic Crimes Act. Pursuant to section 23 of the same Act, the KACC has the same powers of search and seizure as those ascribed to the police, which will include searching any premises without a warrant in exceptional circumstances.
276. In terms of section 73 of the NDPSC Act, a police officer in possession of a court warrant may search and seize any document directly or indirectly relating to or connected with, any transaction or dealing which if carried out would be an offence under the Act.
277. Section 106 of the POCAMLA provides for an officer, in possession of a warrant to enter into any premises, search and seize any document described in the warrant or any other document found in the course of that search, that the police officer believe on reasonable grounds to be of relevance to the commission of an offence. It is important to note that sections 106(2) and 108 of the Act makes it an offence for any authority exercising the powers provided for under the Act or its regulations to search or to cause a search of any building or place or any person without reasons recorded in writing. However, what is not clear under these provisions is whether the reasons recorded in writing for the search would also include scenarios where a warrant would have been issued.
278. Pursuant to section 37 of the POCAMLA, the Centre or any appropriate law enforcement authority under a court warrant can search the premises of any reporting institution, or any of its employees, officer or partner in order to obtain and seize information, documents or anything where there is suspicion that the reporting institution, its employee, officer or partner failed to keep or produce any document or record or to report an STR or is committing, has committed or is about to commit an offence under the Act.

Power to take witnesses' statement (c.28.2)

279. The power of the police to take witnesses' statements is provided for under section 22 of the Police Act. Pursuant to this section the police are empowered to request any person it believes to have information which will assist in an

investigation of an alleged offence to give his personal details and answer all questions lawfully put to him. The police may reduce the statement made by the person into writing upon which the person, after it has been read to him and has made the necessary corrections is invited to sign it. However, this excludes offences relating to financing of terrorism and human trafficking which are not criminalised.

Recommendation 30

Structure, funding, staffing and other resources of law enforcement and other AML/CFT investigative and prosecutorial agencies (c.30.1)

Kenya Police Force

Structure

280. The Kenyan Police Force derives its powers from the Police Act. The Police Act empowers the police to among other things prevent and detect crime in Kenya, to apprehend offenders and enforce the laws and regulations of Kenya.
281. The Kenyan Police Force is divided into three categories with the first category being composed of gazetted officers. Officers in this category include the Commissioner of Police, who is the head of the Kenyan Police Force, Deputy Commissioner, Senior Assistant Commissioner, Assistant Commissioner, Senior Superintendent and Superintendent. The second category is of the Inspectorate which is composed of Chief Inspectors, Inspectors and Cadet Inspectors. The last category is of Subordinate Officers which is composed of Senior Sergeants, Sergeants, Corporals and Constables. The whole Force has 41 465 officers who serve the 8 provinces of Kenya. The police force has police stations spread throughout Kenya. The police/population ratio is about 1:950 which the authorities said was not sufficient to efficiently deal with crime. The authorities for security reasons could not disclose some of the information required on the police force such as the budget, number of officers in each of the gazetted ranks and their deployment in terms of the provinces and the general distribution of the police force in Kenya.
282. The operations of the Kenyan Police Force are divided into several departments and one of the main departments is the Criminal Investigations Department (CID). The CID is headed by a Director, who is deputized by a Deputy Director. Under the Deputy Director there are Provincial CID Officers followed by District/Divisional CID Officers. Within CID there are specialised units dealing with different categories of crimes. The specialised units are headed by officers-in-charge. The specialised units are as follows:
 - The Serious Crimes Unit
 - Anti-Terrorism Police Unit
 - Economic and Commercial Crimes Unit
 - Anti-Narcotics Unit
 - Banking Fraud Investigations Unit

- Kenya Revenue Police Unit
 - Capital Markets Fraud Investigations Unit
 - Ballistic Unit
 - Criminal Intelligence Unit
 - CID Training School
 - Interpol
283. During the on-site visit, the assessors were informed that with the coming into operation of the POCAMLA, the activities of the Banking Fraud Investigations Unit and the Economic and Commercial Crimes Unit would be enhanced in order for the two units to also investigate ML.

Staffing, funding and other technical resources

284. The Banking Fraud Investigations Unit has 63 members of staff. The Anti-Terrorism Unit has about 200 officers and has 18 Units including the Nairobi headquarters unit. The Capital Markets Fraud Investigations Unit has 7 officers who are stationed in Nairobi. The Anti-Narcotics Unit has about 100 personnel and they are stationed at border points and airports. The authorities were of the view that the police force was not adequately staffed since the police-population ratio was at 1:950. The authorities indicated that the United Nations ratio of 1:450 would be preferable hence there were efforts in place to recruit more officers.
285. The police get funding from treasury under the Ministry of State for Provincial Administration and Internal Security's budget. The police also get self generated funds through fees for issuing certificates of good conduct and other services. The authorities hinted that although funding was adequate an increase of the budget would improve on their operations.
286. As the law relating to ML only came into operation during the end of June 2010, after the on-site visit carried out beginning of that month, on that basis it was difficult for the assessors to determine whether the Kenyan Police was adequately resourced to combat money laundering and financing of terrorism. However, the authorities indicated that the police units had different capacity levels when it came to the investigation of the other crimes but in general the police was adequately resourced.

Training

287. The police officers are trained at the CID training school on various modules relating to basic skills on conducting investigations but not necessarily focusing on ML and FT. Some of the police officers were said to have undergone anti-money laundering and combating of financing of terrorism training at the Botswana School of Monetary Studies but statistics as to the number of officers trained was not provided. The UNODC has facilitated training for 72 police officers. The authorities were of the view that there is great need for specialised training on ML and FT in order to effectively enhance the capacity of the police.

Professional, confidentiality and Integrity standards

288. The specialised units of the CID recruit officers from serving members within the police force as this gives them an opportunity to recruit the best of the officers in terms of academic qualifications and performance.
289. For the Banking Fraud Unit, a police officer should have a banking background apart from undergoing a CID course in fraud and investigation. Vetting and interviews are done by the Selection Board chaired by the Director of CID.
290. Vetting to join the police force across the board is based on the person's background and service file. Further checks are done on the criminal record of the person through the CID Crime Record's Office.
291. Integrity issues are regulated through a Code of Conduct. The authorities indicated that there had been cases of indiscipline within the police force resulting with disciplinary action and sanctions being taken. The sanctions taken against the police officers included reduction in rank, dismissal and extra duties. However the authorities could not provide the actual statistics other than the cases of two officers who had been dismissed from the Anti-Terrorism Unit of the CID.
292. The authorities were of the view that there was a high perception within members of the public that the incidences of corruption were high within the police force. It was indicated that the problem of corruption was being dealt with both internally within the police force and through the courts. The authorities however could not give statistics of such cases.

Kenya Anti-Corruption Commission

Structure, funding, staffing and other technical resources

293. The Kenya Anti-Corruption Commission (the Commission) was established in terms of section 6 of the Anti-Corruption and Economic Crimes Act. The main mandate of the Commission is to investigate cases relating to corruption or economic crime, to prevent and educate the public about corruption and economic crime. The Commission is headed by a Director, who serves as its Chief Executive Officer and is accountable only to Parliament. The Director is assisted by four Assistant Directors with one of them serving as the Deputy Director.
294. The Commission has four directorates: Legal Services Directorate, Directorate of Preventive Services, Investigations Directorate and the Asset Tracing and Recovery Directorate. Each one of the directorates is headed by an Assistant Director. The Commission has its headquarters in Nairobi and a sub-regional office in Mombasa. There are plans by the Commission to open offices in all the eight regions of Kenya.
295. The Commission operates on a budget of 1.2 billion Kenyan Shillings which is largely from Treasury with very little coming from donors. The authorities however indicated that a budget of about 4 billion shillings would be ideal for their operations. The Commission raised concerns with the lack of sufficient technical resources which has adversely handicapped its operations. Examples it cited were lack of modern equipment to detect crime and inadequate office space, although there were indications that there are plans to build new offices.

296. The Commission has a staff establishment of 270 but at the time of the on site visit only had 260 employees. The authorities were of the view that the current staff establishment was inadequate, and in their view a staff establishment of 1000 would be ideal. The assessors were informed that a proposal to expand the Commission had been submitted to Treasury.
297. The authorities also highlighted that staff retention was generally poor as staff to the Commission was employed on contracts renewable after every four years. This did not give the staff a sense of belonging and long term employment.

Training

298. Training of the Commission's staff was limited due to lack of resources. The Commission however indicated that for certain specialised training courses, it seeks funding from donors. An example cited was of a training done in collaboration with the American Federal Bureau of Investigations and the West Yorkshire Police of United Kingdom which benefited 50 officers. Most of the training on money laundering is done in-house by the Commission's own experts. The authorities indicated that it was difficult to invest in long term training of the employees as it was expensive and the employees were on contracts which did not provide a guarantee of continuity. Various agencies were also said to provide short term training on money laundering and financing of terrorism. The assessment team was however not provided with the names of the agencies and the number of staff trained by such agencies.

Professional, integrity and confidentiality standards

299. The staff members of the Commission are generally highly skilled. The staff's high performance is checked through periodic assessments. The integrity test program, which is a continuous program from time of recruitment of the employee, is used by the authorities to monitor on the integrity of the employees. The program was said to be effective as one officer had already been dismissed for failing the test and another one was dismissed for being involved in corrupt activities. The human resources department of the Commission also investigates every complaint made against any of the employees or against the Commission itself.
300. During the recruitment process, vetting is done by checking the background of the employee including through the previous employers and professional institutions which the employee might be a member. However, not all the members of staff's criminal records were checked with the police records office as with the other public offices.
301. Confidentiality is governed by the Official Secrets Act and under the Public Officer Ethics Act. The staff members are also required to adhere to the Commission's Code of Conduct and Governance Manual.

Immigration Department

Structure, funding, staffing and other resources

302. The Department of Immigration Services is headed by a Director, deputized by a Deputy Director of Immigration Services. The coastal region has 10 control points composed of an airport, land and sea points. Nairobi region consist of an airport,

Namanga Border with Tanzania and the border with Sudan and other stations. Kenya has a total of 29 border posts country wide.

303. The department has 1200 officers. On average each border is manned by about six officers, although the number on each post depends on the demands of the border based on its size and location. There was an indication from the authorities that the staff level is adequate and that they continue to recruit about 200 members every year.
304. The Department generates fees through its services although it is funded through a budget allocation from the Treasury. It has adequate technical resources which include a PISCES border control system, digital photography equipment and a biometric fingerprint reader. There was an indication that the department would operate better with more motor vehicles, speedboats and a helicopter.

Training

305. The staff members in the department have not yet undergone any ML/FT training. However, they are trained generally on terrorism related issues.

Professional, confidentiality and integrity standards

306. The Department only recruits university graduates. Recruitment is done through the Public Service Commission of Kenya. Issues relating to the integrity of the officers are governed under the Official Secrets Act and the Public Officers Ethics Act.

Kenya Revenue Authority

Structure, staffing, funding and technical resources

Structure

307. The Kenya Revenue Authority (KRA) was established by an Act of Parliament, Chapter 469 of the laws of Kenya, which became effective on 01 July, 1995. The Authority is charged with the responsibility of collecting revenue on behalf of the Government of Kenya.
308. A Board of Directors, consisting of both public and private sector experts, makes policy decisions to be implemented by KRA Management. The Chairman of the Board is appointed by the President of the Republic of Kenya.
309. The Chief Executive of the Authority is the Commissioner General who is appointed by the Minister for Finance.
310. In terms of revenue collection and other support functions, the Authority is divided into the following Departments:-
 - Customs Services Department
 - Domestic Taxes Department-Domestic Revenue
 - Domestic Taxes Department- Large Taxpayers Office
 - Road Transport Department

- Investigations & Enforcement Department
- Support Services Department - which consists of the following
 - Human Resources
 - Finance
 - Board Corporate Services & Administration
 - Internal Audit
 - Information & Communication Technology
 - Research & Corporate Planning
 - Marketing & Communication
 - Legal Services

311. Each Department is headed by a Commissioner.

Staffing

312. To date KRA had a staff establishment of 4372 deployed as follows:-

Customs Services Dept.	1,397
Domestic Taxes – Domestic Revenue	1,090
Domestic Taxes – Large Taxpayers	250
Road Transport Dept.	197
Headquarters (Including Investigations and Support Services etc)	<u>1,436</u>
	4,372

Funding

Agency Income

313. In accordance with the Kenya Revenue Authority Act CAP 469, income to the Authority is “such amounts not exceeding 2% as may be determined by the Minister each financial year” of the total estimated revenue to be collected by the Authority on behalf of the Exchequer. In addition, the Authority is entitled to a Bonus of 3% of the surplus revenue collected above the estimates and also earns income from other activities.

Development funding and asset Contributions by the Treasury

314. Contributions by the Treasury in form of assets or funding for acquisition of major assets or development projects are recognized as a financing reserve when received. No repayment of the financing is expected by the Authority.

Training

315. A total of 147 officers in KRA have been trained on Anti-Money Laundering using the computer based Training Module given by UNODC, which is based at the KRA Training school.
316. Recruitment of officers employed by the KRA is done through external agencies. Vetting is only done for top officials as the junior officers upon recruitment will be coming straight from college.

317. The officers after recruitment are trained at Kenya Revenue Authority Training Institute (KRATI) for two years. After the training they take exams and those that fail will not secure employment with KRA. The training covers all tax related issues which prepares the officers to work in any department of the KRA.

Professional, confidentiality and integrity standards

318. Confidentiality is checked through the KRA Code of Conduct which is enforced by the internal affairs office, headed by a Deputy Commissioner. The officers soon after recruitment take an oath of secrecy under the Income Tax Act. The officers are also bound by the Public Officers Ethics Act.
319. The representatives of the KRA who met the assessment team indicated that over the past 2 years, about 200 officers underwent disciplinary measures. The disciplinary actions were related to integrity and corruption issues. The authorities indicated that as a measure of minimising the risk of corruption and general integrity, officers are rotated around the different departments of the KRA on a regular basis.

Office of the Director of Public Prosecutions

Structure, staffing, funding and other technical resources

320. In terms of section 26 of the Constitution of Kenya, the Attorney General is the authority which is empowered to institute criminal proceedings against any person but can delegate such powers to subordinates in his Office. The Attorney General thus delegated the powers to prosecute to the Director of Public Prosecutions (DPP). The Ministry of Justice, National Cohesion and Constitutional Affairs gives policy direction to the Attorney General's Office.
321. The DPP's office is headed by the Director of Public Prosecutions. Although its head office is in Nairobi, the DPP's Office is represented throughout the eight provinces of Kenya. The Office has about 15 regional offices. The DPP's Office has 75 professional staff in total, against an establishment of 150. It also has an equal number (75) of support staff. In the Magistrates Courts, about 330 police officers assist with the prosecution of cases. At head office the DPP's Office is divided into five areas: the General Prosecution Department, Judicial and Reviews Department, Serious Fraud and Asset Forfeiture Department, Gender and Sexual Offences Department and the International Cooperation Department.
322. The authorities indicated that they did not have adequate professional staff, even if 150 professionals, which is the official number of the establishment were employed, this number would still fall short. The view expressed was that a professional staff of about 300 would suffice to meet the current requirements. The engagement of police as prosecutors was said to be causing problems as there was likely conflict of interest when prosecuting cases investigated by their counterparts. However, the DPP's Office indicated that efforts were underway to have some of the police prosecutors absorbed full time into the prosecution department which is expected to eventually phase off police prosecutors being part of the prosecution.

323. The Office of the DPP does not have its own budget but is funded from Treasury through the AG's Office. In most cases the Office does not get funding according to its projections. The funds therefore become inadequate to meet the requirements of the Office. The authorities also indicated that poor remuneration of the professional staff has made it difficult for the Office to attract and retain qualified personnel. The Office has received funding from donors for special projects. An example of such a project was training on corruption which was funded by the USAID. However, the authorities were concerned that such funds could not be relied on due to lack of sustainability and at times the conditions which come with such funding.

Training

324. The American Embassy has provided training to the DPP's Office on money laundering, terrorist financing and cyber crime. Training in the areas of drug trafficking, money laundering and mutual legal assistance has also been provided by the UNODC to some of the professional staff in the DPP's Office. The authorities also indicated that a few of the prosecutors had received training on international cooperation from the Commonwealth Secretariat. The authorities were of the view that with the coming into operation of the Proceeds of Crime and Anti-Money Laundering Act, the DPP's office needed more training on money laundering to prepare it to prosecute and assist other law enforcement agencies with the investigation of such cases. The actual figures of those trained were not provided by the authorities.
325. The authorities indicated that based on a needs assessment analysis report which had been done by a consultant they had come up with a training projection programme which covered all the departments in the DPP's office.

Professional, confidentiality and integrity standards

326. The minimum qualification for the professional staff in the DPP's office is a law degree and that one should have been admitted to the Kenyan Bar Association and be an advocate of the High Court. Recruitment is done by the Public Service Commission, which advertises the posts and interview the prospective candidates. The conduct of members of staff is governed under the Prosecutor's Code of Ethics, Official Secrets Act, Public Officer Ethics Act and Public Officers Code of Regulations. The authorities indicated that there had not been any cases of indiscipline in the DPP's office.

Additional element –Special training for judges (c.30.4)

327. There has not been any special training for Judges on ML and TF. There was however an indication that the National Task Force is working on a training program for all the stakeholders to be based on the World Bank training modules.

Statistics (applying R.32)

328. No statistics were provided by the Kenyan authorities.

2.6.2 Recommendations and Comments

329. It is recommended that the Kenyan authorities should expedite the process for criminalising TF.
330. LEA should be adequately funded in order to effectively carry out their mandates
331. *Problems in the judiciary which lead to extreme delays in dealing* with cases should be immediately addressed as this could negatively affect the ML/TF regime in Kenya. Two authorities who met the assessment team complained of unreasonable delays in case handling by the judiciary.
332. The structure in the AG's chambers should be reviewed in order to ensure effective operation and expansion of the DPP's chambers³⁴.
333. There should be enhanced specialised training of all law enforcement agencies on ML and FT.
334. All in all, it would appear that the investigative units have wide powers to conduct investigations. Their only limitation would be capacity which has a huge bearing on such powers being used effectively.
335. The police and other law enforcement agencies should consider keeping statistics on cases where special investigative techniques are used. Such statistics would enable to determine the effectiveness of the use of the techniques. Statistics on ML and TF investigations and prosecutions should also be maintained.

2.6.3 Compliance with Recommendations 27 & 28

	Rating	Summary of factors relevant to s.2.6 underlying overall rating
R.27	PC	<ul style="list-style-type: none">• The overall effectiveness for ML could not be assessed.• Some of the designated categories of predicate offences, including TF, are not criminalised in Kenya.
R.28	PC	<ul style="list-style-type: none">• The overall effectiveness for ML and TF could not be assessed.• Some of the designated categories of predicate offences, including TF, are not criminalised in Kenya.

2.7 Cross Border Declaration or Disclosure (SR.IX)

2.7.1 Description and Analysis

Legal Framework

- i) The Immigration Act Cap 172
- ii) The East Africa Community Customs Management Act (EACCM Act)
- iii) Customs and Excise Act
- iv) Proceeds of Crime and Anti-Money Laundering Act-2009

³⁴ The Kenyan authorities have indicated that this recommendation has been implemented under the new Constitution.

v) Central Bank of Kenya Act (Cap 491)

General overview

336. To implement SR IX. Kenya uses a declaration system as set out under the POCAMLA which came into operation on 28 June 2010.
337. Prior to the enactment of the POCAMLA, any person leaving or entering Kenya was required to declare any amount in excess of KSh. 500,000.00 or US\$5,000 to the customs officer at the point of entry or departure under Regulation 2 of the Central Bank of Kenya (Declaration of Currency) Regulations, 1998. This requirement was put into place after the repeal of the Exchange Control Act to monitor large movement of cash out or into the country. Form CBK/C.D./1, as prescribed under the schedule under these Regulations, is used for this purpose and was obtainable at the customs entry or exit points. The Customs Department was then required to forward the completed Forms or their summaries to the External Payments Division of the Central Bank of Kenya on a monthly basis. The requirements under the CBK Regulations will be repealed once the Regulations under POCAMLA are issued.
338. The Authorities indicated that there was no effective enforcement of this regulation because of the liberalisation by the Kenyan authorities of foreign currency movement
339. The Republic of Kenya has the following number of airports, seaports and land border control posts:
- Number of airports - 8
- Number of seaports - 9
- Number of land border posts - 18
340. The above controls are used for the movement of goods and passengers. However the border controls are not adequate. Several other border control points have been gazetted and are waiting to become operational.

Transportation of goods

341. Issues of cross border transportation or movement of goods in Kenya are primarily regulated under the East African Community Customs Management Act. The Act is binding on all East African Community member states. The definition of goods under section 2 of the Act includes currency among other items. However, the term currency is not defined either in the Act or the Interpretation and General Provisions Act in the absence of which the term currency will be given its ordinary meaning which refers to the money in general use in Kenya. This would exclude bearer negotiable instruments. Such a definition would be consistent with the definition given in section 2 of the Central Bank of Kenya Act which defines currency as the, "currency of Kenya or foreign currency". The currency of Kenya is defined under the same section to mean, "bank notes and coins issued by the Bank and any right to receive such bank notes or coins in respect of credit or balance as a bank or financial institution located within or outside Kenya". It follows from the above therefore that the current

definition of currency in Kenya does not include bearer negotiable instruments for cross-border transportation purposes.

342. In terms of section 7 of the East African Community Customs Management Act, customs officers operating in terms of the Act in each of the member countries have all the powers, rights, privileges and protection similar to those ascribed to a police officer of the member state in which the customs officer will be performing his duties.
343. Every incoming person carrying any dutiable or restricted good as defined under the Act is required under section 45(1) (b) of the EACCM Act to make a declaration by using the red channel at the place of arrival. ³⁵Under EACCMA Regulations 2006 persons are required to declare currency in their possession in accordance with Regulation 45(1) and (2) of the said regulations. The declarations are made using Form F88 prescribed under the Regulations. This is however, not being fully enforced in practice. There is no requirement to declare bearer negotiable instruments.

Mechanisms to monitor cross border physical transportation of currency (c.IX.1)

344. Section 12 of the POCAMLA, establishes the requirement for reporting the conveyance of monetary instruments inside and outside of Kenya. The second schedule of the POCAMLA sets out the threshold for declaration. Any amount in excess of US\$10,000 must be declared on the prescribed form, which will be issued under regulations. The regulations will also specify the person authorised to receive the reports at the point of entry and exit.
345. As at the date of on-site visit, there was no implementing regulation to give effect to the currency reporting mechanism. In addition, the declaration system in place under the POCAMLA does not cover bearer negotiable instruments. Section 2 of the POCAMLA defines the term “monetary instruments” as follows:
- “monetary instruments” means coins and paper currency of Kenya or of a foreign country designated as legal tender and which is customarily used and accepted as a medium of exchange in the country of issue;”*
346. The Kenya Postal Services in terms of the Postal Corporation of Kenya Act has issued regulations which list restricted goods which cannot be accepted by the Post Office for transmission. These include cash, bullion and negotiable financial instruments. Outgoing parcels are examined by a customs officer and sealed in the presence of post office personnel, which ensures that whatever is being sent is not prohibited. Only then can the parcel accompanied by a declaration form be accepted. The parcels are further scanned at the airport for any prohibited items. Incoming parcels which are suspected to have prohibited items can be detained in terms of the East African Community Customs Management Act and are inspected in the presence of customs authorities. The post office also has sniffer dogs brought in to check on the content of the parcels. The authorities could however not give specific examples of where goods have been detained on suspicion of being prohibited. The authorities indicated that there were very few

³⁵ Part B of the Second Schedule to the EACCM Act sets out a list of restricted goods.

incidences when people would send money or other bearer negotiable instruments unlawfully through the post office and if that happened, the amounts would be so insignificant. Again no specific examples of such incidences were given by the authorities.

Request information on origin and use of currency (c. IX.2)

347. There is no provision under the POCAMLA, which will enable the designated competent authorities to request and obtain further information from the carrier with the regard to the origin of the currency or bearer negotiable instruments and their intended use upon discovery of a false declaration/disclosure of currency or bearer negotiable instruments or a failure to declare/disclose them.

Restraint of currency (c. IX.3)

348. Pursuant to section 12(4) of the POCAMLA, an authorised officer is empowered to temporarily seize monetary instruments where it is suspected that there is a failure to report or there is a material misrepresentation of the declaration or where an authorised officer has reasonable ground to suspect that the instrument is tainted property. The seizure is temporary but may be extended for longer periods subject to authorities obtaining restraining orders from the courts under sections 68 and 82 of the same Act.
349. The term tainted property is defined under section 2 of the POCAMLA as follows:
“tainted property” in relation to an offence means-
- (a) Any property used in, or in connection with, the commission of the offence;
 - (b) Any proceeds of the offence; or
 - (c) Any property in Kenya which is the proceeds of a foreign offence in respect of which an order may be registered, and when used without reference to a particular offence means tainted property in relation to an arrestable offence.
350. While the term “tainted property” appears to be sufficiently large to cover ML, however TF is not covered as TF is not criminalised in Kenya.
351. The term “authorised officer” is defined under section 2 of the POCAMLA as follows:
“authorised officer” means-
- (a) a police officer;
 - (b) an officer of the department of the Kenya Revenue Authority for the time being responsible for matters relating to customs;
 - (c) Agency Director; or
 - (d) any person or class of persons designated by the Minister as an authorised officer to perform any function under this Act;

Retention of information of currency and identification data by authorities when appropriate (c.IX.4)

352. There is no requirement for information on the amount of currency or bearer negotiable instruments declared under section 12 of the POCAMLA or otherwise detected, and the identification data of the bearer to be retained for use by appropriate authorities in the instances described under the criterion.

Access of information to FIU (c.IX.5)

353. Section 12 (2) of the POCAMLA provides that the person authorised to receive a report made must without delay send a copy of the report to the Centre.
354. At the time of the onsite visit this provision was not effective as the implementing regulations had not been issued and the Centre was not yet operational.

Domestic cooperation between customs, immigration and related authorities (c.IX.6)

355. At the time of the onsite visit the Postal Corporation of Kenya and Kenya Revenue Authority were in the process of signing a MOU for cooperation and exchange of information.
356. There was however no mechanism in place to ensure adequate cooperation among customs, immigration and other related authorities on issues related to the implementation of SR IX.

International cooperation between competent authorities relating to cross border physical transportation of currency (c. IX.7)

357. The Kenya Revenue Authority is a member of the World Customs Organization. It exchanges information and cooperates with all member countries to the organisation. There is also exchange of information through bilateral or joint meetings conducted at border posts.
358. The basis for cooperation among the EAC member states is also provided under section 10 of the EACCM Act. As part of the East African Trade and Transport initiative, Malaba and Busia border stations operate fully functional joint verification of cargo facilities with the Uganda Revenue Authority. The same initiative is being implemented at Namanga, a border town with Tanzania. International cooperation will be enhanced through the implementation of the one stop border post programme that has been launched at some borders like Malaba and Namanga. The one stop border posts have enabled patrols and investigations to be done at a joint level with authorities from the other bordering country.
359. Measures of international cooperation in place in Kenya are further discussed under Recommendations 35 to 40 and SR V in this report.

Sanctions for making false declarations/disclosures (applying 17.1-17.4 in R. 17- c. IX.8)

360. Failure to report the conveyance of monetary instruments into or out of Kenya or the material misrepresentation of the amount of the reported monetary instruments is an offence under section 12(3) of the POCAMLA.
361. A person convicted under section 12(3) of the POCAMLA as read with section 16 (3) of the Act is liable to a fine of not more than ten percent of the monetary instrument involved in the offence. This cannot be said to be sufficient

punishment in relation to criteria 17 to 17.4 and neither has it been tested in order to determine its effectiveness, since the Act recently came into operation.

Sanctions for cross-border physical transportation of currency for purposes of ML or TF (applying c.17.1- 17.4 in R.17, c. IX.9)

362. Under section 7 of the POCAMLA a person who knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person with intent to commit an offence, commits an offence.
363. The term “offence”³⁶ as defined under section 2 of the POCAMLA appears to be wide enough to cover the physical transportation of currency that are related to money laundering. However, TF is not covered as it is not yet criminalised in Kenya.
364. The punishment for such an offence is provided for under section 16 (1) (a) and (b) of the POCAMLA. A natural person is liable to imprisonment with labour for not more than 14 years, or to a fine of not more than five million shillings, or to the value of the property involved in the offence, whichever is higher; or to both such fine and imprisonment. For a legal person, a fine of not more than 25 million shillings or the value of the property involved, whichever is higher is prescribed.
365. Though these seem to be sufficient penalties, they have not been tested yet in order to determine whether they are effective and dissuasive enough.

Confiscation of currency related to ML/FT (applying c. 3.1-3.6 in R3, c. IX.10)

366. Section 12 (4) of the POCAMLA provides for temporary seizure for a maximum period of five days whilst waiting for court orders under sections 68 and 82. Section 68 provides for restraint orders whilst section 82 provides for preservation orders. Both sections allow for such applications to be made ex-parte or as urgent chamber applications. Confiscation is provided for under section 61 and is conviction based.

Confiscation of currency pursuant to UNSCRs (applying c. III.1-III.10 in SR III c. IX. 11)

367. The requirements under SR III have not been implemented in Kenya.

Notification of foreign agency if unusual movement of precious metal and stones (c. IX.12)

368. In terms of the Mining Act, all exports of precious metals and stones in Kenya are required to be done by holders of an export permit. It is an offence to export such metals and stones without an export permit and the same Act provides for sanctions for such conduct. The authorities expressed the view that the sanctions currently provided under the Mining Act were not punitive enough as the law was enacted in 1930 and was old. The authorities however found the withdrawal

³⁶ Under section 2 of the POCAMLA, the term “offence” means an offence against a provision of any law of Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of law in Kenya;

of licenses and confiscation of the minerals from the unlicensed dealers effective. Dealers in precious metals and stones are also required to be licensed by the Mines and Geology Department in terms of the Mining Act.

369. The Mines and Geology Department cooperates with the Kenya Revenue Authority and the Police to control unregulated movement of precious metals and stones. The Department verifies and confirms what is exported and thereafter issue supporting documents to the exporter. Failure to produce export or import documentation raises suspicion of unusual movement of the mineral prompting exchange of information by the authorities and an investigation on the origins of the minerals. The customs authorities reported on probing two cases where timber and manufactured goods from Kenya were being exchanged for minerals from the Democratic Republic of Congo. The investigation was intended to establish where the minerals were coming from and going to when they entered Kenya. No further information was provided by the authorities on this investigation.
370. Regional cooperation amongst the EAC member countries is done in terms of section 10 of the EACCM Act. The authorities have indicated that there is a regional initiative to capture and exchange information data on the movement of precious stones and metals.

Safeguards for proper use of information, Training, data collection, enforcement and targeting programmes; (c.IX.13) & (c.IX.14)

371. Section 13 of the POCAMLA provides some safeguards to ensure the proper use of information or data that is reported or recorded. Section 13 reads as follows:
- “A person who knows or ought reasonably to have known-*
- (a) that information has been disclosed under the provisions of Part II or*
- (b) that an investigation is being, or may be, conducted as a result of that disclosure,*
- and directly or indirectly alerts, or brings information to the attention of another of person who will or is likely to prejudice the investigation, commits an offence.”*
372. Although in terms of the Kenya Revenue Authority Act, customs officers are expected to take an oath of secrecy upon being employed, the authorities could not demonstrate whether this has safeguarded the proper use of information collected during the course of their duties. The customs authorities indicated that some of their officers are trained on money laundering on line through the UNODC money laundering training module. Statistics on those trained through this process were not made available at the time of the onsite visit³⁷. Information on data collection and targeting programmes was not provided. Enforcement by customs of the declaration requirements relating to currency movement as required under the CBK regulations was observed to be unsatisfactory and the authorities confirmed that there was really no enforcement of these requirements. The declaration system under the POCAMLA is not yet in place.

³⁷ After the onsite visit, the authorities indicated that 147 officers had been trained through this program.

2.7.2 Recommendations and Comments

373. It is recommended that the implementing regulations under the POCAMLA should be issued expeditiously.
374. The authorities in Kenya should also consider amending the definition of the term “monetary instrument” under the POCAMLA’s to include bearer negotiable instruments.
375. The POCAMLA should be amended:-
- to introduce a provision to enable the designated competent authorities to request and obtain further information from the carrier with the regard to the origin of the currency or bearer negotiable instruments and their intended use upon discovery of a false declaration/disclosure of currency or bearer negotiable instruments or a failure to declare/disclose them.
 - to introduce a requirement for information on the amount of currency or bearer negotiable instruments declared under section 12 of the POCAMLA or otherwise detected, and the identification data of the bearer to be retained for use by appropriate authorities in the instances described under criterion IX.4.
 - provide for a more severe sanction for the failure to report the conveyance of monetary instruments into or out of Kenya or the material misrepresentation of the amount of the reported monetary instruments.
376. The Centre should be made to become operational as soon as possible.
377. TF should be criminalised as a matter of priority and the freezing mechanism under SR III should be put into place promptly. Authorities should ensure that criteria III.1 to III.10 under SR III should also apply in relation to persons who are carrying out a physical cross-border transportation of currency or BNI that are related to TF.
378. The authorities should put into place adequate measures to ensure that the system for reporting cross border transactions are subject to strict safeguards to ensure proper use of the information or data that is reported or recorded.
379. Authorities should consider having training and awareness programmes for all key stake-holders on cross border movement of currency and other bearer negotiable instruments as not all customs officers other than a few in the investigation department whose number could not be verified as the statistics were not provided, have undergone training on ML and yet they are largely responsible for the implementation of the declaration system on all entry and exit points. A total of 147 officers in KRA have been trained on Anti-Money Laundering using the computer based Training Module given BY UNODC, which is based at the KRA Training school.
380. Customs authorities should speed up the computerisation of their database to ease data collection, data retention and access to information.
381. The Customs authorities should improve on maintaining statistics to enable effectiveness to be determined and distinction of the violations committed, for

example whether it is false declaration or illegal cross border transportation of non-declared cash above the threshold.

2.7.3 Compliance with Special Recommendation IX

	Rating	Summary of factors relevant to s.2.7 underlying overall rating
SR.IX	NC	<ul style="list-style-type: none">• There is no effective declaration system in place since the one anticipated under the POCAMLA has not yet been implemented.• The system in force prior to the POCAMLA was not being fully enforced.

3. PREVENTIVE MEASURES - FINANCIAL INSTITUTIONS

Preamble: Law, regulation and other enforceable means

382. Kenya has implemented AML preventive measures through the application of the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA), which came into operation on 28 June 2010. AML obligations under sections 44, 45 and 46 of the POCAMLA are mandatory as failure to comply with any of these obligations is an offence under section 11 of the Act.
383. Prior to the enactment of the POCAMLA, the Central Bank of Kenya (CBK) had issued the Guideline on Proceeds of Crime and Money Laundering (Prevention) – (AML Guideline) under its powers to issue directions under section 33(4) of the Banking Act. The AML Guideline applies to all institutions licensed under the Banking Act. These institutions comprise: commercial banks, mortgage finance companies and financial institutions. Financial institutions are defined under section 2 of the Banking Act as a company other than a bank, which carries on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of the Banking Act. Financial business is defined under section 2 of the Banking Act as follows:
- (a) *the accepting from members of the public money on deposit repayable on demand or at the expiry of a fixed period or after notice, and*
 - (b) *the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.*
384. In accordance with the provisions of section 33(5) of the Banking Act, failure to comply with a direction is an offence and the offender is liable to a fine as prescribed under the Act. Further, under Regulation 3 of the Banking (Penalties) Regulation 1999, the CBK may levy monetary penalties for non-compliance with directions issued under the Banking Act. The Central Bank provided examples of cases where monetary penalties have been levied against institutions for non-compliance with the AML Guideline.
385. The AML Guideline which has remained in force after the enactment of the POCAMLA meets the FATF definition of other enforceable means.
386. Regulation 80 of the Capital Market (Licensing Requirements) (General) Regulations 2002 (CM Regulations), which applies to all the licensees under the Capital Markets Act, also lays down some AML preventative measures. The following service providers are licensed under the CM Act: stockbrokers, dealers, investment advisers, fund managers, investment banks and authorised securities dealers³⁸.

³⁸ Only financial institutions or banks licensed under the Banking Act can apply for an authorised securities dealer's licence (Regulation 45(2) of the CM Regulations).

387. It is to be noted that pursuant to the provision of section 34(1)(a) of the Capital Markets Act (the CM Act) any person who contravenes any provision of the Act or any requirement imposed under the Act or regulations made under the Act commits an offence. In addition, pursuant to its powers under section 11(3) (cc) of the CM Act the Capital Markets Authority (CMA) may levy financial penalties for breach of the provisions of the CM Act or the regulations made under the Act.
388. The requirements under Regulation 80 of the CM Regulations are mandatory and have remained in force after the enactment of the POCAMLA.
389. CMA had also issued draft AML guidelines which were still under consultation at the time of the onsite visit.
390. The Microfinance (Deposit Taking Microfinance Institutions) Regulations, 2008 which applies to deposit taking microfinance institutions also contains some AML obligations.

Customer due Diligence & Record Keeping

3.1 Risk of money laundering or terrorist financing

391. The regulatory framework in Kenya does not address the risk of money laundering or terrorist financing. Under the provisions of the POCAMLA all financial institutions are required to establish and verify the identity of all customers regardless of the level of risk associated with that customer or the transaction. It is to be noted that Section 134(1) (d) of the POCAMLA provides that the Minister shall make regulations providing for high risk customers or clients. However, at the time of the onsite visit, no such regulations had been issued.
392. To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. This affects the ratings relative to the Recommendations discussed in section 3 of this report.

Scope Issue

393. Section 2 of the POCAMLA which defines the term “financial institutions” captures all financial institutions as defined by the FATF. There is therefore no scope issue that arises.

3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)

3.2.1 Description and Analysis

Recommendation 5

Prohibition of anonymous accounts (c.5.1)

394. There is no express prohibition under the POCAMLA against keeping anonymous accounts or accounts in fictitious names. However, section 45(1) of the POCAMLA requires a reporting institution to satisfy itself as to the true identity

of any applicant for business and section 46(2) of the POCAMLA requires reporting institutions to ensure that their customers' accounts are kept in the correct names of the account holders. The effective application of these two requirements of the POCAMLA should prevent the keeping of anonymous accounts or accounts in fictitious names.

395. Numbered accounts are not directly addressed under the POCAMLA. However, the authorities have indicated that by virtue of the provision of section 46(2) of the POCAMLA, reporting institutions are not allowed to keep numbered accounts as financial institutions must ensure that customer accounts are kept in the correct name of the account holder.
396. It is to be noted that Regulation 37(5) of the Microfinance (Deposit Taking Microfinance Institutions) Regulations 2008 issued under the Microfinance Act 2006, prohibits deposit taking microfinance institutions from carrying out business with any anonymous persons in obvious fictitious names and any numbered accounts.
397. Prior to the enactment of the POCAMLA, banks and the other financial institutions licensed under the Banking Act were required to comply with the requirements under the AML Guideline. Section 4.1 of the Guideline prohibits the opening and maintaining of anonymous accounts or accounts in obvious fictitious names. Any numbered account must be subject to the identification and verification process set out under the Guideline. These requirements however do not satisfy the FATF standard as the requirements under criterion 5.1 must be set out in law or regulations.

When CDD is required (c. 5.2)

398. Section 45 (1) of the POCAMLA requires a financial institution to take reasonable measures to satisfy itself of the true identity of any applicant for business seeking to enter into a business relationship with it or to carry out a transaction or series of transactions with it.
399. There is no express requirement to undertake CDD measures when carrying out wire transfers in the circumstances covered by the Interpretative Note to SR VII. However, the requirements under section 45(1) of the POCAMLA as it applies to financial institutions, which transfer funds or value by any means, including both formal and informal channels, appear to be large enough to comprise occasional transactions that are wire transfers in the circumstances covered under the Interpretative Note to SR VII.
400. There are however no requirements to undertake customer due diligence when:
 - There is a suspicion of money laundering or terrorist financing regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations or
 - The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

401. It is to be noted that banks and other institutions licensed under the Banking Act must, in addition, comply with the AML Guideline. Section 4.2 of the Guidelines provides that the institutions subject to the AML Guideline must identify its customer in the following circumstances:
- When establishing initial business relations
 - When undertaking occasional or one-off transactions
 - When there is cause to be suspicious
 - When there is doubt to the veracity of adequacy of previously obtained customer identification information.
402. These requirements however do not satisfy the FATF standard as the requirements under criterion 5.2 must be set out in law or regulations.

Identification of customers (c.5.3)

403. Section 45 (1) of the POCAMLA requires financial institutions to *'take reasonable measures to satisfy themselves as to the true identity of any applicant seeking to enter into a business relationship with it or to carry out a transaction or series of transactions with it, by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant,'*. Examples of source documents that may be used to verify the identity of the customer whether an individual, body corporate or a government department are clearly set out under section 45(1)(a) to (c).
404. Specific requirements for individual customers are stipulated under Section 45(1)(a) of the POCAMLA:–
- (i) a birth certificate;
 - (ii) a national identity card;
 - (iii) a driver's licence;
 - (iv) a passport; or
 - (v) any other any other official means of identification as may be prescribed.
405. Specific requirements for a body corporate are provided under section 45(1)(b) of the POCAMLA:–
- (i) evidence of registration or incorporation;
 - (ii) the Act establishing the body corporate;
 - (iii) a corporate resolution authorizing a person to act on behalf of the body corporate together with a copy of the latest annual return submitted in respect of the body corporate in accordance with the law under which it is established;
 - (iv) any other item as may be prescribed;
406. In the case of a government department, section 45(1) (c) requires a letter from the Accounting Officer.

407. There is however no requirement for financial institutions to obtain the correct permanent address, other contact details³⁹, and the occupation of the applicant for business who is a natural person.
408. Further, it did not appear that legal arrangements were covered under the provisions of Section 45 of the POCAMLA.

Identification of legal persons and other arrangements (c.5.4)

409. Section 45(1) (b) (iii) of the POCAMLA requires that in the case of a body corporate, the applicant for business must produce a corporate resolution authorizing a person to act on behalf of the body corporate. Under Section 45(4) of the POCAMLA where it appears to a financial institution that a customer entering into any transaction, whether or not in the course of a continuing business relationship, is acting on behalf of another person, the reporting institution is required to 'to take reasonable measures to establish the true identity' of the person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as a trustee, nominee, agent or otherwise.
410. For legal arrangements, there is no requirement to verify that any person purporting to act on behalf of the legal arrangement is so authorized but under the provision of section 45(4) of the POCAMLA the financial institution must take reasonable measures to identify that person.
411. In the case of a body corporate, section 45(1) (b)(i) and (iii) of the POCAMLA requires evidence of incorporation and a copy of the latest annual return submitted in respect of the body corporate in accordance with the law under which it is established. For a company registered under the Companies Act in Kenya, the annual return must include information about the name, registered office and particulars of the directors of the company.
412. Not all the categories of financial institutions are required to verify the legal status of legal arrangements and to obtain information containing the names of the trustees, address and provisions regulating the power to bind the legal arrangement.
413. For banks and other institutions licensed under the Banking Act, Section 4.3 of the AML Guideline also details customer identification and verifications procedures as summarized in the table below:

Section	Category	Requirements
4.3.1.3	For accounts or transactions corporate,	<ul style="list-style-type: none"> • Certified copy of certificate of incorporation and partnership deed, memorandum and articles of association or other similar documentation evidencing

³⁹ Please refer to the General Guide to Account Opening and Customer Identification issued by the Basel Committee's Working Group on Cross Border Banking.

Section	Category	Requirements
	partnerships	legal status <ul style="list-style-type: none"> • Certified copy of board resolution stating authority to open accounts, transact business, and borrow funds, and designating persons having signatory authority thereof, • Verified identity and address of the chairman of the board of directors, the managing director or the general partner and at least one limited partner for partnerships
4.3.1.4	Unincorporated Businesses /Partnerships	<ul style="list-style-type: none"> • Identity of two partners and or signatories to the mandate should be verified as per requirements for personal customers • Visit to place of business • Mandate from partnership authorizing opening of account
4.3.1.5	Trustees of Occupational Pension Schemes	<ul style="list-style-type: none"> • Inspection of formal trust documentation • Confirmation of names of trustees • Names of trustees • Addresses of trustees

414. For institutions licensed under the CM Act, Regulation 80(1)(e)(ii),(iii),(iv) & (v) of the CM Regulations provide as follows:

Regulation 80(1) (e)

- (e) *a licensed person shall maintain at least the following information in respect of their clients and shall ensure that they can link each transaction to the beneficial owner:*
- (ii) *where a client is a limited partnership, the name of the general partner and (where the general partner is a body corporate, the information as prescribed under sub-regulation (iv) shall be maintained);*
 - (iii) *where the client is an unlimited partnership, the names of the other partners;*
 - (iv) *where the client is a body corporate, the name of all individuals who have a direct and indirect interest amounting to thirty per cent or more of the equity;*
 - (v) *where the client is a trust, the name of the settlors, trustees, protectors and principal named beneficiaries.*
 - (vi) *where the client is a legal arrangement other than a trust, the name of the owner or controller.*

Identification of beneficial owners (c. 5.5, 5.5.1& 5.5.2)

415. There is no requirement for financial institutions to identify the beneficial owner (as defined by the FATF), and take reasonable measures to verify the identity of the beneficial owner using relevant information or data obtained from a reliable source such that the financial institution is satisfied that it knows who the beneficial owner is.
416. Section 45(3) of the POCAMLA provides that where an applicant requests a reporting institution to enter into a continuing business relationship or in the absence of any transaction the reporting institution shall take reasonable measures to establish whether the person is acting on behalf of another person.
417. Section 45(4) of the POCAMLA further provides *“if it appears to a reporting institution that an applicant requesting to enter into any transaction, whether or not in the course of a continuing business relationship, is acting on behalf of another person, the reporting institution shall take reasonable measures to establish the true identity of a person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as a trustee, nominee, agent or otherwise.”*
418. For customers who are legal persons or arrangements, there are no requirements under law or regulation or other enforceable means for financial institutions to: understand the ownership and control structure of a company.
419. For customers who are legal persons or arrangements, there are no requirements under law or regulation for financial institutions to determine who are the natural persons that ultimately own or control the customer, including those persons who, exercise ultimate effective control over a legal person or arrangement.

Information on purpose and nature of business relationship (c. 5.6)

420. There are no requirements for all the categories of the financial institutions to obtain information on the purpose and intended nature of the business relationship.
421. Section 37 (3) of the Deposit Taking Microfinance Institutions Regulations 2008 requires every microfinance institution when establishing a business relationship with any persons to ensure that the nature of the business to be conducted is ascertained and well documented so as to determine the terms and conditions as well as the normal activity levels. There is however, no requirement to obtain information on the purpose of the business relationship.

Ongoing due diligence on Business relationship (c. 5.7, 5.7.1 & 5.7.2)

422. There is no requirement for financial institutions to conduct ongoing due diligence on the business relations.

Enhanced due diligence for higher risk customers (c.5.8)

423. There is no requirement for financial institutions to conduct enhanced due diligence for higher risk categories of customer, business relationship or transaction.

Application of simplified/reduced CDD measures (c.5.9-5.12)

424. Not applicable.

Timing of verification of identity (c.5.13)

425. Section 45 (1) of the POCAMLA requires reporting institutions to verify the identity of the customer before establishing a business relationship or conducting transactions for occasional customers.
426. In practice most financial institutions identify customers before establishing a business relationship with them.
427. There is no similar requirement which applies to beneficial owners.

Verification of identity after establishment of business relationship (c. 5.14 & 5.14.1)

428. This is not allowed under the provisions of the POCAMLA.

Failure to complete CDD (c.5.15)

429. Where a financial institution is unable to comply with criteria 5.3 to 5.6, there is no requirement which prohibits the financial institution from opening the account, commencing business relations or performing the transaction.
430. There is also no requirement that the financial institution should consider making a suspicious transaction report.

Termination of business relationship (c.5.16)

431. There is no requirement that apply where the financial institution has already commenced the business relationship in the circumstances described under this criterion to terminate it and to consider making a suspicious transaction report.

CDD requirements for existing customers (c. 5.17)

432. Section 45 (2) of the POCAMLA requires financial institutions to conduct customer due diligence on existing customers on coming into force of the Act.

CDD requirements for existing anonymous customers (c.5.18)

433. There is no express requirement for financial institutions to conduct customer due diligence for existing anonymous accounts. However, the authorities indicated

that section 45(2)⁴⁰ of the POCAMLA contains an implicit requirement for reporting institutions to conduct CDD on existing anonymous accounts.

Recommendation 6

434. There is no enforceable obligation for reporting institutions to identify politically exposed persons (PEPs) or to take other such measures as required under Recommendation 6.

Recommendation 7

435. There are no specific enforceable obligations that apply to cross-border correspondent banking and other similar relationships.
436. During the onsite one of the financial institutions explained that when establishing correspondent banking, they require the correspondent bank to give them their AML policy to assess their controls and they also require senior management approval before establishing that relationship.

Recommendation 8

437. 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.
438. There are no requirements for financial institutions to have in place such other measures as are required under Recommendation 8.
439. Section 4.4 of the AML Guidelines sets out some requirements that apply to postal and telephone banking. Section 4.4.1 requires banks and other institutions licensed under the Banking Act to assess the ML risk posed by the postal and telephone products they offer and devise their verification of identity procedures with due regard to that risk. The Guideline also sets out an indicative list of checks that can be undertaken with respect to postal and telephone banking relationships. However, the checks fall short of the requirements under the FATF standards. The examples of the checks do not include: the certification of documents presented; the requisition of additional documents to complement those which are required for face to face customers, develop independent contact with the customer, rely on third party introduction and require the first payment to be carried out through an account in the customer's name with another bank subject to similar customer due diligence standards.

3.2.2 Recommendations and Comments

General

⁴⁰ Section 45(2) of the POCAMLA reads as follows: "Upon the coming into force of this Act, a reporting institution shall undertake customer due diligence on the existing customers or clients."

440. It is recommended that the Kenyan authorities should adopt preventative measures to combat TF and terrorism financing should be criminalized in line with the FATF 40+9 Recommendations.

Recommendation 5

441. Authorities in Kenya are recommended to take the following measures to enhance the effectiveness of the AML regime:

- Establish an explicit obligation under law or regulation for financial institutions to undertake CDD measures in the following circumstances:
 - When there is a suspicion of money laundering or terrorist financing regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations or
 - When the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.
- Establish an explicit obligation under law or regulation for financial institutions to obtain the correct permanent address, other contact details, and the occupation of the applicant for business who is a natural person⁴¹.
- Establish an obligation under the POCAMLA to ensure that legal arrangements are adequately covered under section 45 (1) of the POCAMLA.
- For legal arrangements, introduce an obligation in law or regulation to ensure that financial institutions verify that any person purporting to act on behalf of the legal arrangement is so authorized.
- Establish an enforceable obligation to ensure that all the categories of the financial institutions verify the legal status of legal arrangements and obtain information containing the names of the trustees, address and provisions regulating the power to bind the legal arrangement.
- Introduce an obligation under law or regulation for financial institutions to identify the beneficial owner (as defined by the FATF), and take reasonable measures to verify the identity of the beneficial owner using relevant information or data obtained from a reliable source such that the financial institution is satisfied that it knows who the beneficial owner is.
- For customers who are legal persons or arrangements, introduce an enforceable requirement for financial institutions to: understand the ownership and control structure of a company.

⁴¹ Authorities may refer to the General Guide to Account Opening and Customer Identification issued by the Basel Committee's Working Group on Cross Border Banking.

- For customers who are legal persons or arrangements, establish an obligation under law or regulation for financial institutions to determine who are the natural persons that ultimately own or control the customer, including those persons who, exercise ultimate effective control over a legal person or arrangement.
- Introduce an enforceable requirement for all financial institutions to obtain information on the purpose and intended nature of the business relationship.
- Establish an obligation under law or regulation for financial institutions to conduct ongoing due diligence on the business relations and an enforceable obligation for financial institutions to take the other such measure as required under criteria 5.7.1 and 5.7.2.
- Establish an enforceable requirement for financial institutions to conduct enhanced due diligence for higher risk categories of customer, business relationship or transaction.
- Establish an enforceable requirement to verify the identity of the beneficial owner before establishing a business relationship or conducting transactions for occasional customers.
- Where a financial institution is unable to comply with criteria 5.3 to 5.6, establish an enforceable requirement which prohibits financial institution from opening the account, commencing business relations or performing the transaction. An enforceable obligation should also be introduced for financial institutions to consider making a suspicious transaction report under such circumstances.
- Establish an enforceable obligation that requires the financial institution where it has already commenced the business relationship in the circumstances described under criterion 5.16 to terminate it and to consider making a suspicious transaction report.

Recommendation 6

442. It is therefore recommended that authorities in Kenya should introduce an enforceable primary obligation for financial institutions to-

- put in place appropriate risk management systems to determine whether a potential customer, a customer or the beneficial owner is a PEP.
- obtain senior management approval when establishing a business relationship with a PEP.
- where a customer has been accepted and the customer or beneficial owner is subsequently found to be or becomes a PEP, obtain senior management approval to continue the relationship.

- take reasonable measures to establish the source of wealth and source of funds of customers and beneficial owners identified as PEPs.

Recommendation 7

443. In addition to the normal CDD measures, Kenyan authorities should establish requirements either in law, regulation or other enforceable means for financial institutions to-

- Gather sufficient information about a respondent institution to understand fully the nature of the respondent's business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action
- Assess the respondent institution's AML/CFT controls, and ascertain that they are adequate and effective
- Obtain approval from senior management before establishing new correspondent relationships
- Document⁴² the respective AML/CFT responsibilities of each institution
- Where a correspondent relationship involves the maintenance of "payable-through accounts", to be satisfied that:
 - (a) their customer (the respondent financial institution) has performed all the normal CDD obligations set out in R.5 on those of its customers that have direct access to the accounts of the correspondent financial institution; and
 - (b) the respondent financial institution is able to provide relevant customer identification data upon request to the correspondent financial institution.

Recommendation 8

444. Mobile telephone banking in Kenya is being increasingly used. It is therefore recommended that authorities establish an enforceable obligation 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;
- policies and procedures in place to address any specific risks associated with non-face to face business relationships or transactions. These policies and procedures should apply when establishing customer relationships and when conducting ongoing due diligence.

⁴² It is not necessary that the two financial institutions always have to reduce the respective responsibilities into a written form provided there is a clear understanding as to which institution will perform the required measures.

3.2.3 Compliance with Recommendations 5 to 8

	Rating	Summary of factors underlying rating
R.5	NC	<ul style="list-style-type: none"> • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. • The overall effectiveness of the POCAMLA could not be ascertained as it became effective immediately after the onsite visit. • There are no requirements for financial institutions to undertake CDD measures when- <ul style="list-style-type: none"> - There is a suspicion of money laundering or terrorist financing regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations or - The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data. • There is no requirement for financial institutions to obtain the correct permanent address, other contact details, and the occupation of the applicant for business who is a natural person. • It did not appear that legal arrangements were covered under the provisions of Section 45(1) of the POCAMLA. • For legal arrangements, there is no requirement to verify that any person purporting to act on behalf of the legal arrangement is so authorized. • Most of the categories of the financial institutions are required not to verify the legal status of legal arrangements and to obtain information containing the names of the trustees, address and provisions regulating the power to bind the legal arrangement. • There is no requirement for financial institutions to identify the beneficial owner (as defined by the FATF), and take reasonable measures to verify the identity of the beneficial owner using relevant information or data obtained from a reliable source such that the financial institution is satisfied that it knows who the beneficial owner is. • For customers who are legal persons or arrangements, there are no requirements under law or regulation or other enforceable means for financial institutions to: understand the ownership and control structure of a company. • For customers who are legal persons or arrangements, there are no requirements under law or regulation for financial institutions to determine who are the natural persons that ultimately own or control the customer, including those persons who, exercise ultimate

		<p>effective control over a legal person or arrangement.</p> <ul style="list-style-type: none"> • Most of the categories of the financial institutions are not required to obtain information on the purpose and intended nature of the business relationship. • There is no requirement for financial institutions to conduct ongoing due diligence on the business relations. • There is no requirement for financial institutions to conduct enhanced due diligence for higher risk categories of customer, business relationship or transaction. • There is no requirement to verify the identity of the beneficial owner before establishing a business relationship or conducting transactions for occasional customers. • Where a financial institution is unable to comply with criteria 5.3 to 5.6, there is no requirement which prohibits the financial institution from opening the account, commencing business relations or performing the transaction. • There is also no requirement that the financial institution should consider making a suspicious transaction report. • There is no requirement that apply where the financial institution has already commenced the business relationship in the circumstances described under criterion 5.16 to terminate it and to consider making a suspicious transaction report.
R.6	NC	There is no enforceable obligation for reporting institutions to identify PEPs or take other such measures as required under the FATF standard.
R.7	NC	There are no specific enforceable obligations that apply to cross-border correspondent banking and other similar relationships.
R.8	NC	<ul style="list-style-type: none"> • 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. • There are also no requirements for financial institutions to have in place such other measures as are required under Recommendation 8.

3.3 Third parties and introduced business (R.9)

3.3.1 Description and Analysis

445. The POCAMLA does not expressly prohibit financial institutions to rely on intermediaries or other third parties to perform some of the elements of the CDD process or to introduce business. It is to be noted that this is a permitted practice amongst some categories of the financial institutions. Under clause 4.4.1.9 on the AML Guideline, the institutions licensed under the Banking Act are permitted to

use their branches, subsidiaries, head offices, correspondent banks or reputable credit or financial institutions to verify the particulars for Non-Kenyan residents applying to open accounts with them. The aforementioned parties should be domiciled in the applicant's home country. The verification is however only limited to checking personal and address details of the applicant but does not extend to a full range of Customer Due Diligence procedures.

446. Moreover, Regulation 80(1)(f) of the CM Regulations provides:

"Where the customer is a financial institution, such as a bank, insurance company, pension fund or collective investment fund and is conducting business collectively on behalf of a large number of underlying customers, and where the institution is subject to rules or regulations that require the financial institution to conduct customer due diligence, the licensee is permitted to rely on the financial institution to hold beneficial ownership information and need not hold that information itself."

447. Notwithstanding, that financial institutions are permitted to rely on third parties or introducers there is no requirement for financial institutions relying upon the third parties or introducers to immediately obtain from the third parties or introducers the necessary information concerning certain elements of the CDD process and to follow the other requirements under Recommendation 9.

3.3.2 Recommendations and Comments

448. It is recommended that the authorities should introduce an enforceable obligation for financial institutions that rely on third parties or introducers to perform some of the elements of the CDD process, 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.

3.3.3 Compliance with Recommendation 9

	Rating	Summary of factors underlying rating
R.9	NC	There is 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.

3.4 Financial institution secrecy or confidentiality (R.4)

3.4.1 Description and Analysis

Inhibition of implementation of FATF Recommendations (c. 4.1)

Restrictions on disclosure of information

449. The following restrictions regarding the disclosure of information as they apply to the various competent authorities and financial institutions in Kenya are set out below.

Preservation of Secrecy under the POCAMLA

450. Section 130 of the POCAMLA provides:

(1) *Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court or under the provisions of any written law, no person shall disclose any information or matter which has been obtained by him in the performance of his duties or the exercise of his functions under this Act.*

(2) *A person who has any information or matter which to his knowledge has been disclosed in contravention of subsection (1) shall not disclose that information or matter to any other person.*

(3) *A person who contravenes subsection (1) or (2) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding one year or a fine not exceeding one million shillings or to both.*

451. Under section 32 of the POCAMLA, the Director, Deputy Director and staff of the Financial Reporting Centre must before they begin to perform any duties under the POCAMLA, take and subscribe before a Magistrate or Commissioner for Oaths, the oath of confidentiality prescribed in the Third Schedule to the 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.

Central Bank of Kenya

452. The Central Bank of Kenya is subject to a duty for the preservation of secrecy under Section 17 of the Central Bank of Kenya Act which provides:

(1) *Except for the purpose of the performance of his duties or the exercise of his powers, the Governor, the Deputy Governor, any director or any other officer or employee of the Bank shall not disclose any information which he has acquired in the performance of his duties or the exercise of his powers.*

(2) *Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding one year, or to both, in addition to any disciplinary action which may be taken by the Board.*

453. The Central Bank of Kenya is also subject to further restrictions pertaining to the disclosure of information under section 30 of the Banking Act. Please see discussion below on banks and other institutions licensed under the Banking Act.

Capital Markets Authority

454. The Capital Markets Authority may not disclose information that it receives pursuant to a request made under section 13(1) of the CM Act. The information may be used or disclosed only for the purposes of achieving the objectives of the Authority and where it is required to do so by a court of law.

455. Section 13 of the CM Act reads as follows:

(1) *The Authority or any person officially authorized in that behalf by the Authority may by notice in writing, require any person to furnish to the Authority or to the authorized person, within such period as is specified in the notice, all such returns or information as specified in such notice.*

(2) *The Authority or any member thereof, or any officer or servant of the Authority, shall not disclose to any person or use any return or information acquired under subsection (1) except for the purpose of achieving the objectives of the Authority unless required to do so by a court of law.*⁴³

Retirement Benefits Authority

456. The Retirement Benefits Authority is not subject to a duty of confidentiality and there is therefore no restriction on its ability to exchange information

Insurance Regulatory Authority

457. Section 18 of the Insurance Act set out a duty of secrecy which applies to every person who is or has been the Commissioner of Insurance or a member of the staff assisting the Commissioner or an investigator or any other person appointed by or assisting the Commissioner. Information may only be disclosed in accordance with the exceptions provided under subsections (3) and (4) of section 18.

458. The relevant extract of section 18 of the Insurance Act reads as follows:

“(2) Subject to this section, a person to whom this section applies shall not, either directly or indirectly, except in the performance of a duty under or in connection with this Act, make a record of or divulge or communicate to any person, any information concerning the affairs of any other person acquired by him by reason of his office or employment under or for purposes of this Act.

(3) Nothing in this section shall prevent the communication of information or the production of a document, by the Commissioner or by a member of the staff or other person assisting the Commissioner or by an investigator authorized by the Commissioner in that behalf, to a person to whom, in the opinion of the Minister, it is in the public interest that the information be communicated or the document produced.

(4) The Commissioner or a member of the staff or other person assisting the Commissioner and authorized by him in that behalf may furnish to the Director of Statistics or the Advisory Board information obtained from a member of the insurance industry or policy holder:

⁴³ Section 13 of the Capital Market Act was amended by section 46 of the Finance Act 2010. New section 13(3) which provides: “Notwithstanding subsection (2), the Authority may share information with other regulatory authorities.” came into force on 01 January 2011.

Provided that any information furnished to the Director of Statistics or the Advisory Board under this subsection shall be treated as confidential and used solely for the purposes of this Act.

(5) A person who contravenes the provisions of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or imprisonment for a term not exceeding twelve months or to both."

Financial Institutions

Banks and other institutions licensed under the Banking Act

459. Section 31 of the Banking Act imposes restrictions on the disclosure of information held by the Central Bank and the institutions licensed under the Banking Act. Information may only be disclosed in the circumstances provided in the law. The relevant extract of section 31 of the Banking Act is set out below.

Section 31 Publication of Information

(2) Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under this Act and, if he does so, he shall, for the purposes of section 49, be deemed to have contravened the provisions of this Act.

(3) Notwithstanding the provisions of this section-

(a) the Central Bank may disclose any information referred to in subsection (2) to any monetary authority or financial regulatory authority, fiscal or tax agency or fraud investigations agency within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority, fiscal or tax agency or fraud investigations agency;

Provided that the sharing of information with institutions outside Kenya shall only apply where there is a reciprocal arrangement.

(b) the Deposit Protection Fund Board and institutions licensed under this Act shall, in the ordinary course of business and in such manner and to such extent as the Minister may, in regulations, prescribe, exchange such information on non-performing loans as may, from time to time, be specified by the Central Bank in guidelines under section 33(4);

(c) the Central Bank and institutions licensed under this Act may, in the ordinary course of business, in such manner and to such extent as the Minister may, in regulations prescribe, exchange such other information as is reasonably required for the proper discharge of their functions.

(4) Without prejudice to the generality of subsection (3) (b) or (c), regulations under that subsection may provide for the establishment and operation of credit reference bureaus, for

the purpose of collecting prescribed credit information on clients of institutions licensed under this Act, and disseminating it amongst such institutions for use in the ordinary course of business, subject to such conditions or limitations as may be prescribed.

- (5) *No duty, to which an institution or its officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), to:-*

(a) the Central Bank or to another institution; or

(b) a credit reference bureau established under subsection (4),

in the course of the performance of their duties and no action shall lie against the institution or any of its officers on account of such disclosure.

Other financial institutions

460. There is no statutory duty of confidentiality that applies to the other categories of financial institutions. However, it would appear from the discussions held during the onsite visits, insurance companies and capital market intermediaries are bound by a contractual duty of confidentiality.

Overriding the secrecy obligations

461. Section 17(1) of the POCAMLA provides that “The provisions of this Act shall override *any obligation as to secrecy or other restriction on disclosure of information imposed by any other law or otherwise.*”

462. However, by providing for a qualification, section 17(2) of the POCAMLA restricts the scope of Section 17(1) of the POCAMLA to the disclosure of information that relates to the commission or attempt to commit an offence under the POCAMLA.

463. Section 17(2) of the Act reads as follows:

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:

Provided that the information being sought under subsection (1) relates to commission of or attempt to commit an offence under this Act.

464. The restricted scope of the provisions under section 17 of the POCAMLA, casts serious doubt on 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.

3.4.2 Recommendations and Comments

465. It is recommended that the authorities in Kenya should amend section 17 of the POCAMLA by repealing the qualification under section 17(2) of the POCAMLA.

3.4.3 Compliance with Recommendation 4

	Rating	Summary of factors underlying rating
R.4	NC	<ul style="list-style-type: none">• The restricted scope of the provisions under section 17 of the POCAMLA, casts serious doubt on 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 overall effectiveness could not be assessed.

3.5 Record keeping and wire transfer rules (R.10 & SR.VII)

3.5.1 Description and Analysis

Legal framework

Proceeds of Crime and Anti-Money Laundering Act, 2009

Capital Market Authority Licensing Regulations, 2002

Proceeds of Crime and Money Laundering (Prevention) Guidelines, 2006

Recommendation 10

Record keeping and reconstruction of transaction records (c. 10.1 & 10.1.1)

466. Financial institutions are required to keep records for at least seven years following the completion of a transaction or a business in terms of section 46(4) of the POCAMLA. Failure to keep records is an offence under section 11(1) of the POCAMLA.

467. The following records must be kept and maintained:

- Records of all transactions which shall contain particulars sufficient to identify (i) the name, physical and postal address and occupation (or where appropriate business or principal activity) of each person conducting the transaction; or on whose behalf the transaction is being conducted as well as the method used by the reporting institution to verify the identity of that person.
- The nature, time and date of transaction.
- The type and the amount of currency involved.
- The type and identifying number of any account with the financial institution involved in the transaction.
- If the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the

instrument, the number (if any) of the instrument and details of any endorsements appearing in the instrument.

- The name and address of the financial institution and of officer, employee or agent of the financial institution who prepared the record.
468. The nature and extent of the information that must be kept and maintained by financial institutions is sufficient to allow for reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal activity.
469. Section 46(4) of the POCAMLA requires for all reporting institutions to maintain all necessary records for at least 7 years from the date the relevant business or transaction was completed.
470. Regulation 77 of the Capital Markets Authority Licensing Regulations 2002 requires licensees and approved financial institutions to preserve all financial and other records whether such records are maintained in an electronic or manual form, relating to transactions conducted by the licensee or to the offer of securities by an issuer, including daily, weekly, monthly, quarterly and annual transactions and other relevant records including minutes of all meetings on account of such transactions and registers of securities, for a period of seven years.
471. Section 37(1) (b) of the Deposit Taking Microfinance Institutions Regulations 2008 requires for the management of deposit taking microfinance institutions to maintain adequate and accurate records regarding its customers' sources of funds and transactions for a period of seven years.

Record keeping for identification data (c. 10.2)

472. There is no specific requirement either in law or regulation which requires financial institutions to maintain records for identification data, account files and business correspondence for at least five years following the termination of an account or business relationship (or longer if requested by competent authority in specific cases upon proper authority).

Availability of records to competent authorities (c. 10.3)

473. With the exception of the licensees of the Capital Market Authority, there is no specific requirement for financial institutions to ensure that all customer and transaction records and information be available on a timely basis to domestic competent authorities upon appropriate authority. Regulation 80(3A) of the CMA Regulations, provides that clients and transaction records should be available to the Authority on request. It does not however provide for similar access to information held by its regulated entities by other domestic competent authorities nor does it stipulate how the CMA can access the same on behalf of a requesting competent authority.

474. The authorities indicated that the Central Bank has customer transaction records generated by the financial institutions regulated by it available physically and in electronic formats for the relevant competent authorities to access upon request whenever they are needed. This is still short of the requirement on availability of records to competent authority as the criterion addresses directly the financial institutions and not the regulator, i.e. CBK.

Special recommendation VII

475. Financial institutions in Kenya rely on the SWIFT messaging service to conduct cross-border wire transfers as a matter of standard industry practice. During the onsite visit the authorities informed the assessment team that banks are encouraged to use SWIFT messaging standards but this is not an enforceable requirement. The challenge with the SWIFT messaging system is that as long the mandatory fields are filled, the transaction can go through. There is no requirement to verify the accuracy of the information.
476. At the Central Bank of Kenya SWIFT has a different category of messages for transactions between two financial institutions where the originator and beneficiary are both banks i.e. transactions between CBK and the Federal Reserve Bank.

Originator information for wire transfers (c. VII.1)

477. There is no such requirement either in law, regulation or other enforceable means for ordering financial institutions to obtain and maintain originator's name or account number for wire transfers of EUR/USD 1000.

Inclusion of originator information in cross border wire transfers (c. VII.2)

478. There is no such requirement for ordering financial institutions to include the full originator information in the message or payment for cross-border wire transfers of EUR/USD 1000.

Domestic wire transfers (c.VIII.3)

479. There is no requirement for ordering financial institution to comply with criterion VII.2 or include only the originators account number or unique identifier within the message or payment form.

Originator information through payment chain (c. VII.4 & VII.4.1)

480. There is no requirement for intermediary and beneficial financial institution to ensure that all originator information that accompanies wire transfers is transmitted with the transfer.

Risk based procedures for wire transfers that do not contain originator information (c. VII.5)

481. There is no requirement for financial institutions to adopt effective risk based procedures for identifying and handling wire transfers that are not accompanied by complete originator information.

Monitoring of compliance with SR VII (c. VII.6)

482. In terms of section 24(c) of the POCAMLA, the FRC is designated to ensure compliance with the provisions of this Act. However, since there are no obligations for wire transfers under the Act, there can be no monitoring of compliance with the criteria under SR.VII by financial institutions.

Sanctions (c. VII.7)

483. Since there are no obligations for financial institutions conducting wire transfers to comply with the criteria under the SR.VII, there can be no sanctions for non-compliance.

Incoming cross border wire transfers (c. VII.8)

484. There are no requirements in Kenya for financial institutions that are conducting wire transfers in general to obtain full and accurate originator information.

Outgoing wire transfers of less than EUR/USD 1,000 (c. VII.9)

485. There is no requirement for all outgoing cross-border wire transfers below EUR/USD 1000 to contain full and accurate originator information.
486. In practise financial institutions indicated that for all incoming and outgoing they undertake the verification of identification.

3.5.2 Recommendations and Comments

487. It is recommended that the authorities in Kenya should ensure that:

Recommendation 10

- financial institutions are required to maintain records of the identification data, account files and business correspondence for at least five years following the termination of an account or business relationship (or longer if requested by a competent authority in specific cases upon proper authority).
- Financial institutions are required to ensure that all customer and transaction records and information are available on a timely basis to domestic competent authorities upon appropriate authority.

Special Recommendation VII

- Rules and regulations implementing the requirements for financial institutions under SRVII are issued;

- measures are put into place to effectively monitor the compliance of financial institutions with rules and regulations implementing SR.VII
- Criteria 17.1 – 17.4 (in R.17) also apply in relation to the obligations under SR.VII

3.5.3 Compliance with Recommendation 10 and Special Recommendation VII

	Rating	Summary of factors underlying rating
R.10	PC	<ul style="list-style-type: none"> • There is no specific requirement either in law or regulation which requires financial institutions to maintain records for identification data, account files and business correspondence for at least five years following the termination of an account or business relationship (or longer if requested by competent authority in specific cases upon proper authority). • No requirement for financial institutions to ensure that all customer and transaction records and information are available on a timely basis to domestic competent authorities upon appropriate authority. • To the extent that TF is not criminalised in Kenya the preventative measures are not designed to combat TF. • The overall effectiveness of the record retention provisions of the POCAMLA could not be assessed.
SR.VII	NC	Wire transfer transactions conducted by financial institutions are not subject to the requirements set out in SR.VII.

Unusual and Suspicious Transactions

3.6 Monitoring of transactions and relationships (R.11 & 21)

3.6.1 Description and Analysis

Legal framework

The Proceeds of Crime and Anti-Money Laundering Act 2009

Recommendation 11

Special attention to complex, unusual large transactions (c. 11.1)

488. Section 44(1) of the POCAMLA requires reporting institutions to monitor on an ongoing basis all complex, unusual, suspicious, large or other transaction as may be specified in the regulations, whether completed or not, shall pay attention to all unusual patterns of transactions to insignificant but periodic patterns of transactions that have no apparent economic or lawful purpose as stipulated in the regulations. At the time of the onsite visit, no such regulations had been issued.

Examination of complex & unusual transactions (c.11.2)

489. There is no such requirement for financial institutions to examine as far as possible the background and the purpose of such transactions.

Record keeping of findings of examination (c.11.3)

490. There is no requirement for financial institutions to keep such findings available for competent authorities and auditor.

Statistics (applying R.32)

491. There were no statistics available.

Recommendation 21

Special attention to countries not sufficiently applying FATF Recommendations (c.21.1 & 21.1.1)

492. There is 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 recommendation.

Examination of transactions with no apparent economic or visible lawful purpose (c. 21.2)

493. There is no such requirement for financial institution keeping written findings to assist competent authorities and auditors of examined transactions that have no apparent economic or visible lawful purpose, the background and purpose of transaction or business relations in jurisdictions that do not have adequate systems in place to prevent or deter AML/CFT.

Ability to apply counter measures with regard to countries that insufficiently apply FATF Recommendations (c. 21.3)

494. There is no obligation under the AML Act for financial institutions to apply counter-measures where other countries continue not to apply or insufficiently apply the FATF recommendation.

3.6.2 Recommendations and Comments

495. The authorities should implement enforceable obligations in order to comply with the criteria under the FATF Recommendations 11 and 21. These are:

Recommendation 11

- Regulations must be issued for the purposes of section 44(1) of the POCAMLA.
- Financial institutions should be required to examine as far as possible the background and the purpose of such transactions and set for their findings in writing.

- Financial institutions should be required to keep such findings available for competent authorities and auditors for at least five years.

Recommendation 21

496. 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 countermeasures.

3.6.3 Compliance with Recommendations 11 & 21

	Rating	Summary of factors underlying rating
R.11	NC	<ul style="list-style-type: none"> • No requirement for financial institutions to examine as far as possible the background and the purpose of such transactions. • No requirement for financial institutions to keep such findings available for competent authorities and auditors.
R.21	NC	The authorities in Kenya have not implemented the requirements under Recommendation 21.

3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)

3.7.1 Description and Analysis

Legal framework

497. STR reporting obligations are set out under POCAMLA, covering all financial institutions as defined by the FATF. The Act broadens the current reporting requirements under the AML Guideline for banks, mortgage finance companies and non-bank financial institutions (licensed under the Banking Act) and Forex Bureau Guidelines issued under the Banking Act and Central Bank of Kenya Act, respectively. Once the FRC is set up, the STR reporting obligations under the respective Guidelines will be repealed and reporting institutions will submit STRs only in accordance with the reporting obligation under the POCAMLA.

Recommendation 13

498. The reporting obligations under the POCAMLA do not cover all the designated categories of predicate offences as defined by the FATF. This is discussed under section 2.1 of this report. The uncovered predicate offences limit the scope for reporting suspicious transactions.

Requirement to make STRs on ML & TF to FIU (c.13.1 & IV.1)

499. Reporting obligations for financial institutions to file STRs on ML to the Centre are set out in section 44(2) of the POCAMLA. It provides that “...a reporting institution shall report the suspicion or unusual transaction or activity to the Centre in the prescribed form immediately and, in any event, within seven days of the date the transaction or activity that is considered to be suspicious occurred.”
500. Failure to file STRs with the Centre is an offence under section 5 of the POCAMLA. Upon conviction, a natural person is liable to imprisonment for a term not exceeding seven years, or a fine not exceeding two million, five hundred shillings, or both. In the case of a legal person, a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher.
501. No reports have been made to the Centre as it was not operational.
502. At present, the AML Guideline (section 4.7) and the Forex Bureau Guidelines (section 11.4) require a limited number of financial institutions to submit STR information to the Central Bank. The authorities indicated that by and large, only banks submitted STRs to the CBK.

STRs related to Terrorism and its financing (c. 13.2)

503. There is no obligation for financial institutions to make a STR in relation to funds where there are reasonable grounds to suspect or they are suspected to be linked or related to or to be used for terrorism, terrorist acts or by terrorist organisations or those who finance terrorism. The financing of terrorism is not criminalised in Kenya.

No reporting threshold for STRs (c. 13.3)

504. In terms of section 44 of the POCAMLA any transaction, including attempted transaction, which could constitute or be related to money laundering or the proceeds of crime must be reported to the Centre regardless of the monetary value.

Making of ML& TF STRs regardless of possible involvement in tax matters (c.13.4 & IV.2)

505. The Act does not contain any specific provision that prohibits the reporting of ML STRs on the ground that there is possible involvement in tax matters. In fact, section 44 of the POCAMLA requires financial institutions to report all transactions that could constitute or be related to money laundering or the proceeds of crime to the Centre.

Additional element –reporting of all criminal acts (c. 13.5)

506. All proceeds of crime must be reported to the Centre in terms of the section 44(2) of the POCAMLA regardless of the nature of criminality suspected.

Statistics (applying R.32)

507. There were no statistics available as the law had just been passed.

Recommendation 14

Protection for making STRs (c. 14.1)

508. There is adequate protection for staff of reporting institutions for making STRs to the Centre as per section 19 of the POCAMLA. It provides that: *“A suit, prosecution or other legal proceedings shall not be made against any reporting institution or Government entity, or any officer, partner or employee thereof, or any other person in respect of anything done by or on behalf of that person with due diligence and in good faith, in the exercise of any power or the performance of any function or the exercise of any obligation under this Act”*

509. The immunity provided under section 19 of the POCAMLA is wide enough to protect those required to make STRs to the Centre irrespective of whether or not the offence took place. Reporting institutions are required to make thorough assessment of the information before making a report and file STRs in good faith within the confines of the Act.

Prohibition against tipping-off (c. 14.2)

510. Tipping-off appears to be prohibited under section 8 of the POCAMLA, which provides as follows:

“A person who-

- (i) knows or ought reasonably to have known that a report under section 44 is being prepared or has been or is about to be sent to the Centre; and
- (ii) discloses to another person information or other matters which are likely to prejudice any investigation of an offence or possible offence of money laundering,

commits an offence.”

511. However, these provisions fall short of the standards which require the law to prohibit financial institutions and their directors, officers and employees to disclose *the fact that an STR or related information is being reported or provided to the FIU*. Section 8(2) of the POCAMLA however, appears to prohibit the disclosure of information or other matters that might prejudice any investigation of an offence or possible offence of money laundering.

Additional element –confidentiality of reporting staff (c. 14.3)

512. In terms of section 20(1) of the POCAMLA revealing the identity of the person providing information to the Centre or authorised officer is not allowed. However, section 20(2) of the POCAMLA creates three exceptions, namely:
- where revealing of identity of a reporting staff is for the purposes of this Act under section 20(2)(a) of the POCAMLA; or
 - where a reporting staff becomes a witness in any civil or criminal court proceedings for the purposes of this Act pursuant to section 20(2)(a)(i) of the POCAMLA; or
 - where the court during any criminal or civil proceedings is of the opinion that it is in the interest of justice to reveal the identity of a witness as per section 20(2)(b)(ii) of the POCAMLA which states that “with regard to a witness in any civil or criminal proceedings where the court is of the opinion that justice cannot fully be served between the parties without revealing the disclosure or identity of any person as the person making the disclosure”.
513. The assessors are of the view that the exception created under section 20(2)(b) of the POCAMLA compromises the effectiveness of the confidentiality of reporting staff provision as it inadvertently reveals the identity of the reporting staff as a witness in court proceedings. Since this law has not been tested, the assessors could not infer how the court proceedings would be undertaken in a manner consistent with the provisions of section 20(1) of the POCAMLA. Further, there is no definition of a “witness” for the purposes of this Act.

Recommendation 19

Consideration of reporting of currency transactions above a threshold (c. 19.1)

514. Reporting institutions are required under section 44(3) of the POCAMLA to report all cash transactions above the value of USD10, 000 or its equivalent value in any other currency as stated in the Fourth Schedule to the Act irrespective of whether the transaction is suspicious or not. At the time of the onsite visit, no currency transaction reports were reported by reporting institutions to the FRC.

Additional element – computerised data base for currency transactions above a threshold and access by competent authorities (c. 19.2)

515. The authorities indicated that the Centre will have a computerised database containing information generated through reporting of currency transaction above USD 10,000.00 and that such information will be properly utilised by other competent authorities, especially supervisory bodies and law enforcement agencies.

Additional element- proper use of reports of currency transactions above a threshold

516. At the time of the on-site visit the currency transaction system was not yet operational hence it could not be determined whether it was subject to strict

safeguards to ensure proper use of the information or data that would be reported or recorded.

Recommendation 25

Establishment of guidelines for financial institutions (c. 25.1)

517. The authorities have not provided any guidelines to financial institutions in relation to reporting of STRs under the requirement of the POCAMLA. The AML Guideline and Foreign Exchange Bureau Guidelines, 2007 create certain obligations for reporting STRs but does not provide guidance on reporting of STRs as required under the standard.

Feedback to financial institutions (c. 25.2)

518. There was no feedback provided to reporting entities on STRs filed to the Banking Fraud Investigations Unit. Further, no reports have been filed to the Centre under the Act.

3.7.2 Recommendations and Comments

Recommendation 13 & SR IV

519. The fact that the financing of terrorism is not a predicate offence to money laundering and not criminalised in Kenya means that suspicious transactions related terrorist financing are not covered for reporting purposes by financing institutions. The authorities should move with speed and take necessary legislative actions that would comprehensively subject the financing of terrorism activities to reporting requirements consistent with SR IV of the FATF.
520. For avoidance of doubt, the authorities may when amending POCAMLA consider separating the obligations for financial institutions to pay special attention to complex, large unusual transactions (R.11) and report suspicious transactions (R.13) obligations under section 44 of the Act and create a specific section for each since it appeared during the discussions held onsite that both the authorities and reporting institutions consider the two obligations to mean the same thing. This will assist both the authorities and reporting institutions to effectively implement the specific provisions in the Act in a manner consistent with the FATF standards in the early stages of implementation of the POCAMLA.
521. The other designated categories of predicate offences as described under section 2.1 of this report must also be criminalised in Kenya.

Recommendation 14

522. Section 8 of the POCAMLA should be amended to ensure that the tipping-off is prohibited as required under the FATF standard.

523. The legal protection of identity of reporting staff is weakened by the exceptions requiring them to appear as witnesses in court proceedings if the courts consider significant to fully serve justice. This may discourage reporting of suspicious transactions by sowing seeds of fear amongst the reporting entities particularly given the infancy of the comprehensive reporting regime under the new Act. It is therefore recommended that the identity of reporting persons be legally protected without making exceptions that may compromise the effectiveness of the reporting regime. For the avoidance of doubt, the authorities should consider providing a definition of a “witness”.

Recommendation 25

524. The Centre should provide guidelines that will assist financial institutions to report STRs. Such guidelines should take into account the diversity of the reporting institutions under the Act.
525. The Centre should provide financial institutions required to report STRs with adequate and appropriate feedback taking into account the FATF Best Practice Guidelines on Providing Feedback to Reporting Financial Institutions and Other Persons.

3.7.3 Compliance with Recommendations 13, 14, 19 and 25 (criteria 25.2), and Special Recommendation IV

	Rating	Summary of factors underlying rating
R.13	NC	<ul style="list-style-type: none"> • The STR reporting regime under the POCAMLA was not effective as the Centre was not operational at the time of the onsite visit. • The reporting regime is undermined as some of the designated categories of predicate offences are not criminalised in Kenya. • There is no legal obligation for reporting entities to file STRs related to terrorist financing.
R.14	PC	<ul style="list-style-type: none"> • The tipping-off prohibition provision under the POCAMLA does not meet the requirement under the standards. • The effectiveness of the regime in place could not be assessed.
R.19	C	<ul style="list-style-type: none"> • This recommendation is fully met.
R.25	NC	<ul style="list-style-type: none"> • No guidelines were issued to reporting entities under the POCAMLA. • No feedback was provided to reporting entities.
SR.IV	NC	<ul style="list-style-type: none"> • There is no legal obligation for reporting entities to file STRs related to terrorist financing.

Internal controls and other measures

3.8 Internal controls, compliance, audit and foreign branches (R.15 & 22)

3.8.1 Description and Analysis

Recommendation 15

Establish and maintain internal controls to prevent ML& TF (c. 15.1, 15.1.1 & 15.1.2)

526. Section 47 of the POCAMLA which became effective in June 2010 and applies to all reporting institutions is limited in its scope of internal control obligations. It requires financial institutions to establish and maintain internal control and internal reporting procedures to:
- (a) *identify persons to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering;*
 - (b) *enable any person identified with paragraph (a) to have reasonable access to information that may be relevant in determining whether a sufficient basis exists to report the matter under section 44(2); and*
 - (c) *require the identified person in paragraph (a) to directly report the matter under section 44(2) in the event he determines that sufficient basis exists.*
527. The requirement for internal controls under the POCAMLA pertains only to the reporting obligation but does not require financial institutions to establish procedures, policies and controls covering customer due diligence, the detection of unusual and suspicious transactions and record retention.
528. Section 4.1(e) of the AML Guideline imposes a general requirement on institutions licensed under the Banking Act to establish adequate internal control measures to assist in the prevention and detection of money laundering activities. The Guideline however, does not cover TF activities and does not specify the minimum measures that must be implemented by financial institutions.
529. The Guideline on Corporate Governance (Corporate Governance Guidelines) issued under section 33(4) of the Banking Act spells out duties and responsibilities of the institutions licensed under the Banking Act. The Corporate Governance Guidelines have been issued under the same provision of the Banking Act as the AML Guideline and therefore constitute other enforceable means in terms of the FATF definition. Please see section 3 of the report.
530. In particular, section 3.2.1.5 of the Corporate Guidelines requires the board of directors to set up an independent compliance function and approve the institution's compliance policy. Should the head of the compliance leave that position, the board is required to inform the CBK of that fact and the reasons thereof. The guideline further defines the compliance function as a function reporting independently to the Board or committee of the Board, that identifies,

assesses, advises, monitors and reports on the institution's compliance risk, which is the risk of legal or regulatory sanctions, financial loss, or loss of reputation an institution may suffer as a result of its failure to comply with all applicable laws, guidelines, codes of conduct and standards of good practice. The requirements of the guideline provide for adequate compliance arrangements which appear to be sufficiently general to include those relating to AML.

- 531. Pursuant to this requirement, commercial banks have implemented compliance functions which include the appointment of compliance officers who assist the institution in the monitoring and detection of money laundering and terrorist financing activities. One of the commercial banks which the assessors met during the onsite visit had a senior manager in charge of compliance whose responsibilities included ensuring AML compliance. However, the compliance requirements in the Guideline on Corporate Governance do not extend to financial institutions such as bureaux de change and micro finance institutions which are licensed under the Central Bank Act and Micro Finance Act, respectively.
- 532. In the securities sector regulation 53A of CM Regulations requires every licensed person to designate a compliance officer to coordinate all compliance matters with the Authority. However, this requirement does not meet the FATF standard, which at a minimum, requires financial institutions to designate an AML/CFT compliance officer at management level.
- 533. Apart from institutions licensed under the Banking Act, the other categories of financial institutions do not have requirements to develop appropriate compliance management arrangements for AML purposes.
- 534. There is no requirement for financial institutions to communicate their AML/CFT procedures, policies and controls to their employees.
- 535. There is 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.

Independent audit for internal controls to prevent ML & TF (c. 15.2)

- 536. There is no requirement for financial institutions to maintain adequately resourced and independent audit functions to test compliance with internal procedures, policies and controls to prevent ML and FT.
- 537. Section 3.2.1.4 of the Guideline on Corporate Governance requires the Board of Directors of financial institutions to set-up an effective internal audit department staffed with qualified personnel to perform internal audit functions covering the traditional function of financial audit as well as the function of management audit. Whereas the requirement to have an effective internal audit department implies that the function should be adequately resourced and independent, the guideline limits the scope of the internal audit function to financial and management audit.

It does not include responsibility for testing compliance with internal procedures, policies and controls to prevent ML and FT.

Ongoing employee training on AML/CFT matters (c. 15.3)

538. Guideline 4.1(c) of the AML Guideline requires financial institutions licensed under the Banking Act to train their employees on a regular basis in the prevention, detection and control of money laundering and the identification of suspicious transactions. However, the scope of training does not cover new developments, such as current ML and FT techniques, methods and trends and the explanation of all aspects of AML/CFT laws and obligations.
539. The other categories of financial institutions do not have requirements to establish on-going training of employees.

Employee screening procedures (c. 15.4)

540. There is no law, regulation or other enforceable means that requires financial institutions in Kenya to put in place screening procedures to ensure high standards when hiring employees. However, in practice some financial institutions, as part of their standard procedures for hiring employees, subject prospective employees to background checks which are conducted by the Police. They do this in order to eliminate the possibility of hiring people with a criminal background.

Additional element – independence of compliance officer (c. 15.5)

541. Section 3.2.1.5 of the Guideline on Corporate Governance requires that the compliance function should be independent. The definition of the compliance function further clarifies that the head of the compliance function reports directly to the board of directors or a board committee. With this requirement in place, heads of compliance in financial institutions licensed under the Banking Act meet the test of independence. However, as discussed above, apart from financial institutions under the Banking Act, other financial institutions do not have compliance management requirements. As such the independence of compliance officers in these financial institutions could not be assessed.

Recommendation 22

542. Financial institutions in Kenya have subsidiaries and branches in other countries. There are also branches of foreign financial institutions operating in Kenya. The table below summarises the number of foreign branches and subsidiaries of financial institutions.

Branches and Subsidiaries of Financial institutions as at 31 December 2009

Financial institution	Number of branches abroad	Number of subsidiaries abroad	Branches of foreign financial institution in the country	
			Number	Supervisor
Commercial Banks	0	12	4	CBK
Securities firms	3	3	0	CMA
Insurance companies	0	21	0	IRA

Application of AML/CFT measures to foreign branches and subsidiaries

543. There are no requirements for financial institutions to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with home country requirements and the FATF recommendations and to have in place such other measures as required under Recommendation 22.
544. In the context of applying consistent policies across the group, one commercial bank met during the onsite visit indicated that it required its foreign subsidiary to comply, at a minimum, with the AML requirements of the head office. In practice some banks appear to have in place internal requirements to deal with the application of AML measures to their foreign subsidiaries.

3.8.2 Recommendations and Comments

545. The POCAMLA which applies to all reporting entities has a provision on internal control and internal reporting procedures whose scope is limited to the reporting obligation. The Act does not address all the requirements under Recommendation 15 and application of AML/CFT requirements in respect of foreign subsidiaries of financial institutions. It is therefore recommended that appropriate provision should be made in law, regulation or other enforceable means to require financial institutions to do the following:

Recommendation 15

- Establish and maintain internal AML/CFT procedures, policies and controls covering customer due diligence, record retention, detection of unusual and suspicious transactions;
- Communicate the procedures, policies and controls to employees;
- Develop appropriate AML/CFT compliance arrangements, including the power of a compliance officer or other appropriate staff to have timely access to relevant data, records and information;
- Maintain an adequately resourced and independent audit function to test compliance with AML/CFT procedures, policies and controls;

- Establish ongoing employee training to keep them informed of new developments on ML and FT techniques, methods and trends and to explain to them all aspects of AML/CFT laws and obligations;
- Develop and implement screening procedures to ensure high standards when hiring employees; and

Recommendation 22

- Require their foreign branches and subsidiaries to observe AML/CFT measures in Kenya and FATF Recommendations to the extent allowed by laws in foreign countries; and
- Require financial institutions to inform supervisory authorities in Kenya when their foreign branches or subsidiaries are unable to observe appropriate AML/CFT measures because they are prohibited by laws or regulations in the foreign countries.

3.8.3 Compliance with Recommendations 15 & 22

	Rating	Summary of factors underlying rating
R.15	NC	<ul style="list-style-type: none"> • The requirement for internal controls under the POCAMLA pertains only to the reporting obligation but does not require financial institutions to establish procedures, policies and controls covering customer due diligence, the detection of unusual and suspicious transactions and record retention. • For institutions licensed under the Banking Act, the AML Guideline, does not cover TF activities and does not specify the minimum measures that must be implemented. • No requirement for compliance arrangements except for institutions licensed under the Banking Act. • There is no requirement for financial institutions to communicate their AML/CFT procedures, policies and controls to their employees. • There is 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 for ongoing employee training except for institutions under the Banking Act. • No requirement to put in place screening procedures to ensure high standards when hiring employees. • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF.

R.22	NC	<ul style="list-style-type: none"> There are no requirements for financial institutions to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with home country requirements and the FATF recommendations and to have in place such other measures as required under Recommendation 22.
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3.9 Shell banks (R.18)

3.9.1 Description and Analysis

Prohibition of establishment of shell banks (c. 18.1)

546. There is no express prohibition regarding the establishment of shell banks. Despite the absence of the prohibition, the Kenya authorities indicated that there were no shell banks operating in Kenya and they have no intention of authorising shell banks to operate in Kenya.
547. The licensing requirements in Kenya effectively prevent the establishment of shell banks.
548. An entity which intends to conduct banking business in Kenya must satisfy the licensing requirements under the Banking Act. Further, Part V of the CBK Guideline on the licensing of new institutions which is issued under section 33(4) of the Banking Act sets out the application procedures in further detail. The Guideline is issued under the same provision of the Banking Act as the AML Guideline and therefore constitutes other enforceable means as defined under the FATF. Please see section 3 of the report.
549. A director and person holding, directly or indirectly or otherwise has a beneficial interest in, more than five per cent of the share capital of the applicant must satisfy the fit and proper test as part of the licensing requirements under section 4 of the Banking Act. Further, under the licensing procedures, before an approval is granted, the Central Bank conducts an onsite inspection to determine the adequacy of the premises. An onsite inspection is also conducted by the CBK within the first six to twelve months after commencement of operations to ensure that the institution is on the right track from the start. Pursuant to section 5(2A) of the Banking Act, an institution which fails to commence business in Kenya within twelve months of the grant of a licence must make a fresh application for a licence under the Banking Act if it still proposes to conduct business in Kenya.

Prohibition of correspondent banking with shell banks (c. 18.2)

550. There is no requirement under law, regulation or other enforceable means that prohibits financial institutions from entering into, or continuing, correspondent banking relationships with shell banks.
551. In practice, some commercial banks, as a matter of business imperative, have developed AML policies and procedures for vetting prospective respondent banks because they themselves needed to satisfy their correspondent banks in

jurisdictions that had strict AML requirements of the adequacy of their AML procedures. Some of the procedures commercial banks had adopted included the administration of a standard AML questionnaire to prospective respondent banks whose responses would be assessed in determining whether or not to enter into a correspondent banking relationship with a foreign bank. Banks also consulted the Bankers' Almanac and the internet sites such as the Office of Foreign Assets Control website in order to determine which institutions to establish correspondent relationships with. One bank had also commissioned an AML external audit in respect of correspondent relationships in order to obtain assurances that its correspondent relationships were appropriate.

Requirement to satisfy respondent financial institutions prohibit the use of accounts by shell banks (c. 18.3)

552. Kenya does not have any law, regulation or other enforceable means that requires financial institutions to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks. As indicated above, some commercial banks had adopted AML policies that set out criteria for approving respondent financial institutions.

3.9.2 Recommendations and Comments

553. It is recommended that an obligation must be established through law, regulation or other enforceable means whereby-
- Financial institutions in Kenya should not be permitted to enter into correspondent banking relationships with shell banks; and
 - Financial institutions should be required to satisfy themselves that their respondent financial institutions do not permit their accounts to be used by shell banks.

3.9.3 Compliance with Recommendation 18

	Rating	Summary of factors underlying rating
R.18	PC	<ul style="list-style-type: none"> • No prohibition preventing financial institutions to enter into, or continue, correspondent banking relationships with shell banks. • No requirement for financial institutions to satisfy themselves that their respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

Regulation, supervision, guidance, monitoring and sanctions

3.10 The supervisory and oversight system - competent authorities and SROs
Role, functions, duties and powers (including sanctions) (R.23, 29, 17 & 25)

3.10.1 Description and Analysis

Recommendation 23

Regulation and supervision of financial institutions (c. 23.1)

554. The primary legal AML obligations for financial institutions are set out under the POCAMLA. Part IV of the Act imposes obligations on reporting institutions to implement AML measures. As discussed under Recommendations 5 - 11, 13, 15, 18, 22 and 29 in this report, there are deficiencies in the AML measures that financial institutions are required to implement. To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF.
555. While this is not expressly laid out in the POCAMLA, the Financial Reporting Centre (the Centre), is responsible for ensuring that financial institutions comply with their AML obligations under the POCAMLA. This is discussed in further detail under Recommendation 29 below.
556. It is to be noted that the principal objective of the Centre as provided under section 23(1) of the POCAMLA is to assist in the identification of the proceeds of crime and the combating of money laundering.
557. The POCAMLA became operational immediately after the onsite visit. That being so it was not possible to assess the effectiveness of this new legal framework.
558. Prior to the enactment of the POCAMLA, the Central Bank of Kenya issued the AML Guideline which addressed some of the FATF Recommendations. The AML Guideline does not apply to all the licensees of the Central Bank but only covers institutions licensed under the Banking Act, namely, banks, mortgage finance companies and financial institutions. The term “financial institution” is defined under section 2 of the Banking Act as a company other than a bank, which carries on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of the Banking Act. Financial business is defined as follows:
- (a) the accepting from members of the public money on deposit repayable on demand or at the expiry of a fixed period or after notice, and
 - (b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.

Designation of competent authority (c. 23.2)

559. The Financial Reporting Centre established under section 21 of the POCAMLA is designated as the competent authority for supervising financial institutions for compliance with the POCAMLA.
560. Section 24(c) of the POCAMLA provides that the Centre-

“may, at any time, cause an inspection to be made by an inspector authorised by the Director in writing and the inspector may enter the premises of any reporting institution

during ordinary business hours to inspect any documents kept under the requirements of this Act, and ask any question relating to the documents, make notes and take copies of the whole or any part of the documents;”

- 561. Section 33 of the POCAMLA contains further provisions with respect to onsite inspections, more specifically, section 33(6) of the POCAMLA requires an inspector to submit an inspection report to the Director which draws attention to any breach or non-observance of the requirement of the Act or any regulations made thereunder and any other matter revealed or discovered in the course of the inspection, warranting, in the opinion of the inspector, remedial action or further action by the Director or the appropriate supervisory body.
- 562. The Centre is however not yet operational. During the onsite visit, the authorities indicated that the onsite inspection of financial institutions for AML purposes will be attributed to the financial supervisors. Pursuant to the provisions of section 24(c) of the POCAMLA, the Director of the Centre may authorize an inspector. The financial regulators will be appointed as the inspectors for onsite inspection purposes.
- 563. In the meantime, it is to be noted that the CBK has been checking compliance with the requirements of the AML Guidelines during its prudential inspections. During the onsite visit, the CBK provided examples of cases where monetary penalties have been levied against institutions for non-compliance with the AML Guideline.
- 564. The other regulators have not undertaken any onsite inspections for AML purposes.

Recommendation 30

- 565. Kenya has four financial sector supervisory authorities, namely, the Central Bank of Kenya, the Capital Markets Authority, the Insurance Regulatory Authority and the Retirement Benefits Authority.

Structure, funding, staffing and other resources of AML/CFT supervisors (c. 30.1)

Central Bank of Kenya (CBK)

- 566. The CBK has sufficient operational autonomy. It has an eight-member board which, according to Section 10 of the Central Bank Act, is responsible for formulating the policies of the Bank, determining its objectives and exercising oversight for its financial management and strategy. The Governor and the Deputy Governor, appointed by the President (for a maximum of two four-year terms) are the Chairperson and Deputy Chairperson of the Board. The other board members comprise five non-executive directors and the Permanent Secretary to the Treasury who is an ex-officio.
- 567. According to Section 13 of the Central Bank of Kenya Act, the Governor is the Chief Executive Officer of the Central Bank and is subject to the general policy

decisions of the Board. The Governor is responsible for managing the Bank (including organizing, appointing and dismissing staff in accordance with the general terms and conditions of service established by the Board) and incurring expenditure for the Bank within the administrative budget approved by the Board. The Bank generates adequate revenues to fund its administrative budgets.

568. Section 14(2) of the Central Bank of Kenya Act provides the grounds on which the Governor can be removed from office. In particular, section 14(2)(e) states that the appointment of the Governor shall not be terminated until the question of his removal from office has been referred to a tribunal appointed under the Act and the tribunal has recommended to the President that the Governor ought to be removed for incapability or incompetence. The law therefore provides the Governor with security of tenure during his term of appointment. .
569. The Central Bank of Kenya comprises 11 departments including the Bank Supervision Department which is responsible for exercising supervisory oversight on financial institutions licensed under the Central Bank of Kenya Act, Banking Act and Micro Finance Act. At the time of the onsite visit, the Bank Supervision Department had oversight on 44 commercial banks, 2 mortgage finance companies, 130 foreign exchange bureaus and 2 deposit-taking microfinance institutions. It had a compliment of 55 members of staff of which 48 were technical staff and was in the process of recruiting 15 more technical staff. The Department applies a risk-based approach to supervision with an 18-month inspection cycle for banks with a satisfactory financial condition. The surveillance function of the Department is organised into teams with each team responsible for a portfolio of nine banks. The teams use an automated on-site examination tool. AML/CFT responsibilities are spread among the inspection teams. The teams are assisted by two Information Technology specialists from the Information Technology Department. The Management of the Bank Supervision Department indicated that they had adequate resources to properly perform their duties.

The Capital Markets Authority (CMA)

570. The Board of the CMA, according to Section 5(3) of the CM Act, consists of a chairman appointed by the President on the recommendation of the Minister; six other members appointed by the Minister, the Permanent Secretary to the Treasury, the Governor of the CBK, the Attorney-General and the Chief Executive of the Authority.
571. According to Section 8(1), of the CM Act the chief executive of the Authority is also appointed by the President on the recommendation of the Minister. The Minister makes his recommendation after consulting with the Board. The chief executive holds office on such terms and conditions of service as may be specified in the instrument of his appointment, or otherwise from time to time. The term of office is a period of four years and no person can serve as the chief executive for more than two terms, according to section 8(4) of the CM Act.

572. The chief executive is subject to the general discretion and control of the Authority and is charged with the responsibility of directing the affairs and transactions of the Authority, the exercise, discharge and performance of its objectives, functions and duties, and the administration and control of the servants of the Authority. However, the Act is silent on the grounds for the dismissal of the chief executive. This situation creates a possibility that the tenure office of the chief executive is not secure.
573. The Capital Market Authority is self-funded. The assessment team was informed that the Authority generated adequate funding for its operations. It is organised into nine departments which include licensing, market supervision and enforcement departments. Whereas the CMA conducted market surveillance and investigations into the conduct of market participants, it had not yet developed capacity to monitor compliance of market participants, through on-site inspections with regard to AML/CFT measures⁴⁴. At the time of the on-site visit, the Authority had 61 members of staff out of which about 50 were technical staff. The staffing level had doubled over the previous three years but was still below the target level of 90. The challenge of staff retention was being addressed through upgrading the salary scale of the Authority within the salary framework of statutory bodies. The assessment team was informed that Treasury had granted approval for the upgrading of the salary scale of the Authority.

The Insurance Regulatory Authority (IRA)

574. The IRA was established in 2007. Its Board of Directors comprises the Chairman appointed by the President on the recommendation of the Minister, the Commissioner of Insurance (as a non-voting ex officio member), the Permanent Secretary in the Ministry responsible for finance, the Chief Executive Officer of the Retirement Benefits Authority, the Chief Executive Officer of the Capital Markets Authority, the Governor of the Central Bank of Kenya or his representative, a nominee of the Insurance Institute of Kenya, and four other members, not being public officers, appointed by the Minister.
575. The Board is responsible for controlling, supervising and administering the assets of the Authority in such manner and/or such purposes as best promote the purpose for which the Authority is established. In consultation with the Minister, the Board appoints the Commissioner of Insurance who is the chief executive officer of the Authority. The Commissioner is responsible for the day to day management of the affairs of the Authority and is subject to the directions of the Board.
576. The IRA is self-funded. The assessment team was informed that the Authority generated adequate funding for its operations. It had a Technical Division that among other responsibilities performed compliance checks on licensees.

⁴⁴ In July 2010, CMA conducted the first round of routine inspections which included the monitoring of compliance of market participants with AML/CFT measures.

However, the Authority had not yet developed capacity to monitor licensees with regard to their compliance with AML/CFT requirements. At the time of the on-site visit, the Authority had 65 members of staff (of which 31 were technical staff) out of a staff establishment of 81.

The Retirement Benefits Authority (RBA)

577. The Board of Directors of the Authority comprises the Chairman appointed by the Minister; the Chief Executive Officer (as a non-voting ex officio member), the Permanent Secretary in the Ministry responsible for matters relating to finance, the Commissioner of Insurance, the Chief Executive of the Capital Markets Authority, and five members, not being public officers, appointed by the Minister.
578. The Board is responsible for controlling, supervising and administering the assets of the Authority in such manner and/or such purposes as to best promote the purpose for which the Authority is established. In consultation with the Minister, the Board appoints the Chief Executive Officer of the Authority who is responsible for the day to day management of the affairs of the Authority and is subject to the directions of the Board.
579. The Authority is funded through Parliamentary appropriations as well as industry levies. The assessment team was informed that the Authority had adequate funding for its operations. However, one of its challenges was to be able to attract and retain technical members of staff. At the time of the on-site visit, the supervisory approach of the RBA was limited to conducting off-site surveillance and did not include on-site inspections of institutions it had registered.

Integrity of AML/CFT supervisors (c. 30.2)

580. All the financial sector supervisory authorities subject their employees to security screening during the recruitment process to ensure that only persons without criminal backgrounds are employed. All employees of the financial sector supervisory authorities were subject to the Public Officer Ethics Act which requires them to be of high integrity and to adhere to professional ethics and standards in the discharge of their duties. Supervisory authorities have also developed specific codes of conduct for their employees. Employees of the financial sector supervisory authorities who breach the codes of conduct are subjected to disciplinary action.
581. All the supervisory authorities indicated that the minimum academic entry requirement for technical staff is a university degree. Supervisory authorities also subject their technical staff to on-going technical training to ensure they are appropriately skilled to discharge their responsibilities.

Training for staff of AML/CFT supervisors (c. 30.3)

582. Members of staff of the financial institutions of the supervision department at the CBK and at the CMA have received AML/CFT training through the United

Nations Office of Drugs and Crime e-learning programme. Those at the CBK have also enrolled onto the Financial Stability Institute (FSI) e-learning program known as FSI Connect and have participated in various AML/CFT initiatives conducted by the World Bank, IMF and Joint Africa Institute. One of the members of staff of the BSD of the CBK participated in the mutual evaluation training for assessors and has participated in one ESAAMLG mutual evaluation. One of the members of staff of the CMA has been trained as an assessor for mutual evaluations. One member of IRA staff has participated in various initiatives conducted by IAIS/FSI Joint Africa Institute, IMF and World Bank.

583. However, the IRA and the RBA have not yet started to provide structured AML/CFT training to their members of staff.

Recommendation 29

Power for supervisors to monitor AML/CFT requirement (c. 29.1)

584. Although it is not expressly provided under the POCAMLA, the Centre established under the POCAMLA is responsible for monitoring and ensuring compliance by financial institutions with AML requirements under the POCAMLA. The authority of the Centre may be inferred from the provisions of section 24(c) and the other provisions of the POCAMLA which are discussed below.
585. In addition to the AML requirements under the POCAMLA, AML requirements are also contained under different instruments issued by different authorities prior to the coming into force of the POCAMLA.
586. The CBK issued the AML Guideline which applies to banks and other institutions licensed under the Banking Act. The CBK has the power to conduct onsite inspections of any institution licensed under the Banking Act. An inspection report, under section 32(3) of the Banking Act, must draw attention to any breach or non-observance of the requirements of the Banking Act and regulations made thereunder. The CBK does not have powers to monitor and ensure compliance by financial institutions with AML requirements under the POCAMLA.
587. Regulation 80 of the Capital Market (Licensing Requirements) (General) Regulations 2002 (CM Regulations), which applies to all the licensees under the Capital Markets Act, also lays down some AML preventative measures. Under section 11(3)(j) of the CM Act the CMA may conduct inspection of the activities, books and records of any persons approved or licensed by the Authority. At the time of the onsite visit, the CMA had not undertaken any onsite inspection of its licensees to check compliance with the AML requirements under Regulation 80 of the CM Regulations⁴⁵.

Authority to conduct AML/CFT inspections by supervisors (c. 29.2)

⁴⁵ see footnote 43.

588. Section 24(c) of the POCAMLA gives the Centre power to cause an inspection to be carried out by an inspector on the premises of any reporting institution. For the purposes of an inspection, the inspector may, under section 33(1) of the POCAMLA, require within 7 days or such longer time as he may direct in writing, a reporting institution and every officer and employee thereof to produce and make available all the books and other documents of the reporting institution and any correspondence, statements and information relating to the reporting institution, its business and the conduct thereof. Failure to produce books, accounts, records, documents, correspondence, statements, returns or other information within the period specified in a direction constitutes an offence under section 33(2) of the POCAMLA. The inspector is required to make copies of any books, accounts and other documents required for the purposes of his report under section 33(4) of the POCAMLA.
589. In addition, section 35 of the POCAMLA provides that the Director of the Financial Reporting Centre may, by notice in writing require any person who is or has been at any time been an employee or agent of the reporting institution being inspected, to-
- (a) give to the inspector all reasonable assistance in connection with the inspection; or
 - (b) appear before the inspector for examination concerning matters relevant to the inspection; or
 - (c) produce any books or documents that relate to the affairs of the reporting institution.
590. Section 35(2) further provides that a person who-
- (a) refuses or fails to comply with a requirement of an inspector which is applicable to that person to the extent to which the person is able to comply with it; or
 - (b) obstructs or hinders an inspector in the exercise of the powers under this Act, or
 - (c) furnishes information which the person knows to be false or misleading in any material way; or
 - (d) appears before an inspector for examination pursuant to such requirement and makes a statement which the person knows to be false or misleading in any material way,
- commits an offence.
591. However, at the time of the on-site visit the Centre had not yet been established. The assessors could not establish whether the onsite inspections would include a review of policies, procedures, books and records, and extend to sample testing.

Power for supervisors to compel production of records (c. 29.3 & 29.3.1)

592. Other than its powers to compel the production of documents under section 35 of the POCAMLA for the purposes of an inspection, the Centre does not have the power to compel production or to obtain access to all records, documents or information relevant to monitoring compliance.

Powers of enforcement & sanction (c. 29.4)

593. Under the POCAMLA, the Director of the Centre may, after an onsite inspection has been carried out, require the relevant financial institution to comply with or properly implement requirements to combat money laundering. In this respect, section 34 of the POCAMLA provides as follows:

“The Director may by notice in writing and after giving the reporting institution a reasonable opportunity of being heard, require the reporting institution to comply by the date or within the period as may be specified therein, with such directions as are necessary in connection with any matter arising out of a report made under section 33.”

594. In addition, Section 39 also provides for court orders to enforce compliance with obligations under the POCAMLA. These are discussed further under criterion 17.1 below.

Recommendation 17

Availability of effective, proportionate & dissuasive sanctions (c. 17.1)

595. Part IV of the POCAMLA lays out the obligations of reporting institutions to combat money laundering. These obligations are for reporting institutions to monitor and report suspected money laundering activity (section 44), verify customer identity (section 45), establish and maintain customer records (section 46) and establish and maintain internal reporting procedures (section 47).
596. Section 11(1) of the Act makes it an offence for a reporting institution to fail to comply with any of the requirements of sections 44, 45, and 46. Section 16(5) indicates that a person who contravenes the provisions of sections 44, 45 and 46 is on conviction liable to a fine not exceeding ten percent of the amount of the monetary instruments involved in the offence.
597. It should also be noted that the Act does not create a specific offence for failure by a reporting institution to comply with the obligation to establish and maintain internal reporting procedures as required by section 47 of the Act. This will, however, fall under the general offences provided under section 39(1) of the POCAMLA, which reads: *“A person who fails to comply with any obligation provided for under this Act, commits an offence.”*
598. Section 39 also provides for orders to enforce compliance with obligations under the POCAMLA. Where a reporting institution has refused to comply with any obligation, request or requirements under the POCAMLA, the Centre may,

pursuant to the provisions of section 39(2) of the POCAMLA, upon application to the High Court, obtain an order against all or any officers, employees or partners of the reporting institution in such terms as the High Court may deem necessary, in order to enforce compliance with such obligation. The Court may order that where the reporting institution fails, without reasonable excuse, to comply with all or any provisions of the order, the institution, its officers, employees or partners pay a fine not exceeding one million shillings for an individual and a fine not exceeding five million shillings for a body corporate.

599. Administrative sanctions are also available under the POCAMLA. The Director of the Centre may, after an onsite inspection has been carried out, require the relevant financial institution to comply with or properly implement requirements to combat money laundering. In this respect, section 34 of the POCAMLA provides as follows:

“The Director may by notice in writing and after giving the reporting institution a reasonable opportunity of being heard, require the reporting institution to comply by the date or within the period as may be specified therein, with such directions as are necessary in connection with any matter arising out of a report made under section 33.”

600. Failure to comply with a notice under section 34 of the POCAMLA may be enforced through the procedures set out under section 39 of the POCAMLA.
601. The sanctions provided under the POCAMLA are proportionate and dissuasive. However, at the time of the on-site visit the sanctions had not yet been applied and their effectiveness could not be assessed.
602. Under section 33 of the Banking Act, the Central Bank has administrative sanctions it can apply in order to secure or improve compliance with the requirements of the Banking Act, any regulations made thereunder or any other written law or regulations. Section 25 of the Capital Markets Act provides the Capital Markets Authority with a wide range of administrative sanctions for breaches of any provisions of the Act and the regulations made thereunder. In this regard, the administrative sanctions can be applied in case a licensee or any of its directors or employees contravenes regulation 80 of the CM Regulations that imposes customer due diligence requirements.

Designation of authority to impose sanctions (c. 17.2)

603. Criminal sanctions and sanctions under section 39 of the POCAMLA are applied by the courts. The Director of the Centre may issue a notice to comply with the AML requirements under the POCAMLA under section 34 of the Act.
604. Administrative sanctions on the other hand are available to and can be applied by the CBK and the CMA for failure to comply with the AML Guideline and Regulation 80 of the CM Regulations, respectively.

Ability to sanction directors and senior management of financial institutions (c. 17.3)

605. According to section 16(6) of the POCAMLA, the criminal sanctions for failure by reporting institutions to comply with their obligations under the Act are applicable to both natural and legal persons that fail to comply with the requirements.
606. Under section 39(3) of the POCAMLA, the Court may order that where the reporting institution fails, without reasonable excuse, to comply with all or any provisions of a compliance order issued under section 39(2) of the Act, the institution, its officers, employees or partners pay a fine not exceeding one million shillings for an individual and a fine not exceeding five million shillings for a body corporate.
607. Similarly, the administrative sanctions that the Central Bank of Kenya and the Capital Markets Authority can apply to the financial institution as well as the directors or senior management of the concerned financial institution.

Range of sanctions – broad and proportionate (c. 17.4)

608. The range of sanctions available under the POCAMLA are broad and proportionate having regard to the severity of a situation. They include, compliance notices issued by the Director of the Centre, compliance orders (accompanied by fines for failure to comply) issued by the Courts and criminal sanctions imposed by the Courts.
609. The range of sanctions available to deal with financial institutions falling under the supervision of CBK or the CMA is broad and can be applied in proportion to the severity of the breach. In the case of the CBK, the administrative sanctions include giving advice, issuing directions, revoking a licence and removing or suspending a director, manager or employee of the financial institution.
610. Monetary penalties are also available under the Banking (Penalties) Regulations for an institution or natural person that fails to comply with any directions given by the Central Bank under the Act. Regulation 2 states that any institution or other person who fails or refuses to comply with any directions given by the Central Bank under the Act shall be liable to a penalty not exceeding one million shillings in the case of an institution, or one hundred thousand shillings in the case of a natural person. Section 25A(1)(a) of the Capital Market Act also provides for a similar range of sanctions. However, with respect to AML compliance, the range of sanctions are only applicable to violations of the AML Guideline and the Regulation 80 of the CM Regulation and do not extend to violations of the POCAMLA.

Prevention of criminals from controlling institutions (c. 23.3 & 23.3.1)

611. Section 4 of the Banking Act sets out the licensing requirements for banks and other institutions. Under section 4(5) of the Banking Act, the Central Bank may require to be satisfied of the professional and moral suitability of the persons

proposed to manage or control the institution. Section 4(7) of the Banking Act provides:

“If a person, other than the Government or a public entity, holds, directly or indirectly, or otherwise has a beneficial interest in, more than five per cent of the share capital of an institution or if it is proposed that such a person shall so hold or have such a beneficial interest, that person shall be deemed, for the purposes of this section to be a person proposed to manage or control the institution.”

612. The criteria for determining moral suitability of “the persons proposed to manage or control the institution” are provided in Part B of the First Schedule to the Banking Act. Paragraph (a) of Part B of the First Schedule to the Banking Act provides that in determining the moral suitability of significant shareholders⁴⁶ of an institution, the Central Bank shall have regard to the previous conduct and activities of the significant shareholder concerned in business or financial matters and, in particular, to any evidence that such person; (i) has been convicted of the offence of fraud or any other offence of which dishonesty is an element; (ii) has contravened the provisions of any law designed for the protection of members of the public against financial loss due to the dishonesty or malpractices by persons engaged in the provision of banking, insurance, investment or other financial services.
613. Further, paragraph (b) of Part B of the First Schedule of the Act states that for the purposes of determining the moral suitability of a corporate entity, its directors and senior officers shall satisfy the criterion prescribed in paragraph (a) of Part B of this Schedule. The criterion does not extend to beneficial owners in the case of corporate shareholders of the institutions licensed under the Banking Act.
614. Apart from the Banking Act, the other financial laws do not have any measures to prevent criminals or their associates from holding or being the beneficial owners of a significant interest in a financial institution.
615. With respect to directors and senior management of the financial institutions subject to the core principles, the following applies-

Banks

616. Banking Act- Section 4(4)(b) & (c) provides-

“In considering an application for a licence, the Central Bank may require to be satisfied as to:-

b) the character of its management;

⁴⁶ The term “significant shareholders” is defined under section 2 of the Banking Act as “ a person, other than the Government or a public entity, who holds, directly or indirectly, or otherwise has a beneficial interest in, more than five per cent of the share capital of an institution”

c) the professional and moral suitability of the persons proposed to manage or control the institution;”

617. Part A of the First Schedule to the Banking Act sets out detailed criteria for determining the professional and moral suitability of directors and senior officers proposed to manage or control institutions.

Capital Markets

618. Regulations 15(2) and 29(2) of the CM Regulations provide for the fit and proper test to be satisfied by the director, chief executive or manager of a stockbroker or dealer, an investment adviser or fund manager. Regulation 52(1) of the CM Regulations further provides that in determining whether a person is fit and proper to hold any particular position, regard shall be had to, amongst other criteria, his probity, competence and soundness of judgment in fulfilling the responsibilities of that position.

Insurance

619. Section 27A of the Insurance Act provides that a person shall not be registered unless the Commissioner is satisfied that all members of such board have knowledge and experience in matters relating to insurance, actuarial studies, accounting, finance or banking.
620. Further, the registration requirements under section 31(h) of the Insurance Act, an applicant must have an adequate number of technically qualified and otherwise competent staff, including-
- (i) a fit and proper principal officer who holds a technical or professional qualification in insurance, accounting or banking approved by the Commissioner, and who has more than ten years’ experience in a managerial capacity in the respective sector; and
 - (ii) a management staff comprising persons who hold technical or professional qualifications in insurance, accounting or banking approved by the commissioner and who have more than five years’ experience in the respective sector;
621. Other than the principal officer, the integrity requirement does not seem to apply to the directors and the senior officers of the insurers.

Licensing or registration of Value Transfer Services or money or currency changing service (c. 23.5)

622. As discussed under Special Recommendation VI, there is no requirement for the licensing or registration of independent MVT service providers. In practice, the CBK has authorised MVT service operators to provide their services through licensed financial institutions. Informal MVT service operators conduct their business without any form of licensing or registration.

623. Pursuant to the provisions of Section 33A of the Central Bank Act, no person other than an authorised dealer can transact foreign exchange business in Kenya. Section 33B of the Central Bank Act establishes the requirement for a person proposing to transact foreign exchange business to be licensed.

Licensing and AML/CFT supervision of other financial institutions (c. 23.7)

624. In addition to banks, mortgage finance companies and financial institutions are licensed under the Banking Act. A financial institution is defined under section 2 of the Banking Act as a company other than a bank, which carries on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of the Banking Act. Financial business is defined as follows:
- a) the accepting from members of the public money on deposit repayable on demand or at the expiry of a fixed period or after notice, and
 - b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.
625. Deposit-taking microfinance institutions are also licensed by the CBK under the Microfinance Act. Non-deposit taking micro finance institutions are not licensed in Kenya.
626. Capital market intermediaries are licensed by the CMA. These include: stockbrokers, investment banks, custodians, investment advisers and fund managers.
627. In the pensions sector, section 22 of the Retirement Benefits Act requires administrators, custodians, and fund managers to be registered by the Retirement Benefit Authority. The Act provides for criminal sanctions for any person convicted of operating without registration. Despite, the legal requirement for registration and sanctions for contravening the law, at the time of the on-site visit, there were unlicensed service providers in the retirement benefits sector.⁴⁷
628. By virtue of the definition of financial institutions under section 2 of the POCAMLA financial institutions (other than those subject to the core principles) are subject to the AML requirements under the POCAMLA. There is, however, no effective supervision of these financial institutions for compliance with the AML requirements under the POCAMLA.

Application of prudential regulations to AML/CFT (c. 23.4)

⁴⁷ After the circulation of the report for discussion by the ESAAMLG Task Force of Senior Officials, the authorities indicated that there were no unlicensed service providers at the time of the on-site visit.

629. Kenya hosted a joint IMF/World Bank mission in September 2009 under Financial Sector Assessment Programme. As part of the mission an assessment of the extent of the implementation of the Basel Core Principles of Effective Banking Supervision and the IAIS Core Principles was conducted. According to the CBK Banking Supervision Annual Report 2009, the mission concluded that since the last assessment in 2003, Kenya has improved its banking supervision. However, the legal and regulatory framework for consolidated supervision needed to be strengthened. Kenya is a member of IOSCO and IAIS.
630. According to its Annual Report 2009, the CMA is currently undertaking a self assessment against the IOSCO Objectives and Principles of Securities Regulation. Technical assistance has also been sought for the implementation of the IOSCO Objectives and Principles of Securities Regulation through the East African Securities Regulatory Authorities (EASRA).
631. To the extent that Kenya complies with the Core Principles and as implied in the discussion under criteria 23.1 to 23.3.1 and under Recommendations 17 and 29 it appeared to the assessment team that with respect to financial institutions subject to the core principles the regulatory and supervisory measures that apply for prudential purposes and which are relevant to money laundering apply in a similar manner for AML purposes.

Monitoring and supervision of Value Transfer Services (c. 23.6)

632. As discussed under Special Recommendation VI, the Central Bank of Kenya does not monitor MVT service operators, such as mobile telephone operators, the Postal Corporation and informal MVT service operators for compliance with AML/CFT requirements. However, under section 2 of the POCAMLA a financial institution is defined as any person or entity, which conducts as a business, activities including, transferring of funds or value, by any means, including both formal and informal channels.
633. Foreign exchange bureaus are subject to the AML requirements under the POCAMLA. Prior to the POCAMLA, section 11 of the Foreign Exchange Bureau Guidelines established the requirement for foreign exchange bureaus to implement anti-money laundering measures. Through on-site inspections, the Central Bank checks foreign exchange bureaus for compliance with the anti-money laundering requirements. However, the scope of the preventative measures under the Guidelines does not cover combating the financing of terrorism.
634. The effectiveness of the AML regime under the POCAMLA could not be assessed as the law became operational after the onsite visit.

Guidelines for financial institutions (applying c.25.1)

635. Under section 24(f) of the POCAMLA the Centre may issue guidelines to reporting institution. However, at the time of the on-site visit, the Centre had not yet been established.
636. The Central Bank of Kenya issued a Guideline on Proceeds of Crime and Money Laundering (Prevention) which became effective on 1 January 2006. The Guideline is applicable to all institutions licensed under the Banking Act. The Central Bank of Kenya also issued Foreign Exchange Bureau Guidelines which addresses some anti-money laundering aspects. The Guidelines became effective on 1 January 2007. The two sets of guidelines issued by the Central Bank of Kenya do not cover the micro finance institutions licensed under the Micro Finance Act. The Deposit-Taking Microfinance Institutions are covered by The Microfinance (Deposit Taking Microfinance Institutions) Regulations, 2008.
637. Both the Guideline on Proceeds of Crime and Money Laundering (Prevention) and the Foreign Exchange Bureau Guidelines provided licensed institutions with some guidance regarding the prevention, detection and the control of possible money laundering activities by outlining customer due diligence measures, listing activities indicative of money laundering, and providing for a mechanism for reporting suspicious activities and transactions. However, the guidelines do not address aspects relating to combating the financing of terrorism. The guidelines also do not give assistance to reporting institutions on the description of ML and FT techniques and methods.
638. Apart from the Central Bank of Kenya, other supervisory authorities have not issued any AML/CFT guidelines⁴⁸ to reporting entities under their supervisory ambit. At the time of the on-site visit, the Capital market Authority of Kenya had drafted a set of AML/CFT guidelines for the securities sector.

3.10.2 Recommendations and Comments

639. In order to ensure that financial institutions in Kenya are subject to adequate AML/CFT regulation and supervision, authorities should consider the following recommendations:

General

- Appropriate measures should be taken to make the Centre operational as soon as possible.
- Financing of terrorism should be criminalised and financial institutions subjected to appropriate measures to combat it.

Recommendation 23

⁴⁸ The Insurance Regulatory Authority has pursuant to section 3A of the Insurance Act issued Guidelines to the Insurance Industry on Implementation of the POCAMLA in June 2011. The purpose of the guidelines is to provide guidance on detection, deterrence and reporting incidences of possible crimes related to proceeds of crime and money laundering by the insurance industry.

- Appropriate measures should be taken to remedy the deficiencies in the AML measures (as discussed in the report) that financial institutions are required to implement.
- The Centre should develop and put in place an AML/CFT compliance monitoring programme, including an onsite inspection programme, to ensure that financial institutions are effectively complying with AML obligations under the POCAMLA.
- The non-banking financial laws should be amended to establish measures to prevent criminals or their associates from holding or being the beneficial owners of a significant interest in a financial institution.
- The insurance law should be amended to require the directors and the senior officers of the insurers to satisfy the integrity requirement of the fit and proper test.
- Establish the requirement for the licensing or registration of independent MVT service providers.
- Establish the obligation for non-deposit taking micro finance institutions to be licensed in Kenya.
- The Retirement Benefit Authority should enforce section 22⁴⁹ of the Retirement Benefits Act which requires all administrators, custodians and fund managers to be registered by the Authority.

Recommendation 25

- Guidelines should be established by the Centre to assist financial institutions implement and comply with their AML/CFT requirements under the POCAMLA.
- The Guidelines should also be issued to provide reporting entities with a description of ML and FT techniques and methods.
- The AML Guideline issued by the Central Bank of Kenya and the draft guidelines of the CMA should be harmonised with the POCAMLA. Further, to avoid duplication of functions, the Centre and the financial supervisors should agree on the authority which will issue guidelines for AML/CFT purposes.

Recommendation 29

- Ensure that the scope of the onsite inspections would include a review of policies, procedures, books and records, and extend to sample testing.
- Amend the provisions of the POCAMLA to provide the Centre with adequate powers to compel production or to obtain access to all records, documents or

⁴⁹ After the circulation of the report for discussion by the ESAAMLG Task Force of Senior Officials, the authorities in Kenya indicated that section 22 of the Retirement Benefits Act is faithfully applied.

information relevant to monitoring compliance outside the scope of an onsite inspection.

Recommendation 30

- The Centre should be adequately staffed and funded to undertake its AML supervisory function under the POCAMLA.
- Staff of supervisory authorities should be provided with adequate and relevant training for combating money laundering and the financing of terrorism.

3.10.3 Compliance with Recommendations 23, 29, 17 & 25

	Rating	Summary of factors relevant to s.3.10 underlying overall rating
R.17	PC	<ul style="list-style-type: none"> • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. • The overall effectiveness of the sanctions under the POCAMLA could not be assessed.
R.23	NC	<ul style="list-style-type: none"> • There are deficiencies in the AML measures that financial institutions are required to implement. • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. • It was not possible to assess the effectiveness of the new legal framework under the POCAMLA. • Except for the CBK, the other financial regulators have not undertaken any onsite inspections for AML purposes. • Apart from the Banking Act, the other financial laws do not have any measures to prevent criminals or their associates from holding or being the beneficial owner of a significant interest in a financial institution. • In the insurance sector, other than the principal officer, the integrity requirement does not seem to apply to the directors and the senior officers of the insurers. • There is no requirement for the licensing or registration of independent MVT service providers. • Non-deposit taking micro finance institutions are not licensed in Kenya. • There is no effective supervision of the financial institutions (other than those subject to the core principles) for compliance with the AML requirements under the POCAMLA.
R.25	NC	<ul style="list-style-type: none"> • Guidelines issued to institutions licensed by the Central Bank of Kenya do not address aspects relating to combating the financing of terrorism • Guidelines do not provide reporting entities with a description of ML and FT techniques and methods • Guidelines not issued to all other reporting entities • No guidelines have been issued to assist financial institutions to

		comply with their AML obligations under the POCAMLA.
R.29	NC	<ul style="list-style-type: none"> • The Centre was not yet operational at time of on-site visit. • 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 Centre does 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 overall effectiveness of the supervisory regime under the POCAMLA could not be assessed.

3.11 Money or value transfer services (SR.VI)

3.11.1 Description and Analysis (summary)

640. Money or value transfer (MVT) service operators in Kenya comprise the traditional international money remitters (such as Western Union and Money Gram) and local money remitters. The first mobile phone operator entered the payment business space in March 2007 and was subsequently joined by others in providing local mobile payment services. One of the mobile phone operators, Safaricom, also provides international money remittance services.

641. One of the objects of the Central Bank of Kenya under section 4A of the Central Bank of Kenya Act is to formulate and implement such policies as to best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems. However, at the time of the on-site visit, Kenya did not have specific legal provisions for the supervision and regulation of payment systems.⁵⁰

Designation of registration or licensing authority (c. VI.1)

642. Given the fact that Kenya does not have legal provisions for the regulation and supervision of payment systems, MVT service operators are not directly licensed or registered by the Central Bank of Kenya. Instead, the Central Bank requires the MVT service operators to provide their services through licensed financial institutions. The Central Bank requires a licensed financial institution that intends to provide money remittance services under a franchise to apply to the Central Bank for a “no-objection”. Upon receipt of a letter indicating that the Central bank does not object to the provision of a money remittance service, the licensed financial institution then proceeds to provide the money remittance service.

643. In the case of mobile payment services operators, they are licensed by the Communication Commission of Kenya to provide communication services. There is not yet a law in place under which they can be licensed or registered. Instead,

⁵⁰ At the time of the on-site visit, the Kenyan authorities had drafted a National Payments Systems Bill.

they obtain a 'no-objection' letter from the Central Bank of Kenya in order to provide payment services. In the case of Safaricom which provides international money remittance services, it has been specifically licensed by the Central Bank as an authorized foreign exchange dealer.

- 644. In the absence of licensing or registration requirements, informal MVT services operators conduct their business without any form of licensing or registration.
- 645. The Central Bank of Kenya does not have a system of maintaining the current list of MVT service operators and their agents. In the case of MVT services conducted through licensed financial institutions, the Central Bank is able to know MVT service points and their addresses because these services are provided through existing branches of financial institutions which the Central Bank already knows. However, in the case of mobile payment service providers, the Central Bank does not maintain any lists and addresses of agents of mobile phone operators.

Application of FATF Recommendations (applying R.4-11, 13-15 & 21-23 & SRI-IX) (c. VI.2)

- 646. As discussed above, formal MVT services are provided through licensed financial institutions that are subject to anti-money laundering measures as described in this report. Further as described in this report, there are no requirements for reporting institutions to implement measures to combat the financing of terrorism.

Monitoring of value transfer service operators (c. VI.3)

- 647. The Central Bank of Kenya monitors financial institutions for compliance with the FATF Recommendations as discussed under Recommendation 29 of this report. In this regard, MVT services operators affiliated to licensed financial institutions are monitored by the Central Bank of Kenya. However, as discussed above, mobile phone operators that provide mobile payment services are not licensed by the Central Bank and are not subject to supervision by the Central Bank. Further, there is no designated competent authority that supervises other MVT service providers, such as the Postal Corporation and informal MVT service operators, for AML/CFT purposes. In this regard, these MVT service operators are not monitored to ensure they comply with FATF Recommendations.

List of agents of value transfer service operators (c. VI.4)

- 648. There are no requirements for MVT services operators to maintain current lists of their agents. In the case of MVT service operators affiliated to a licensed financial institution, the risk posed by the absence of the requirement to maintain a current list of agents is mitigated by the fact that the MVT service is provided through branches of licensed financial institutions. However, in the case of mobile payment service providers, the lists and addresses of agents of mobile phone operators are not known to the Central Bank because mobile phone operators are not required to maintain them. Authorities explained that, in practice, each

mobile phone operator maintains a record of its agents because it has to first enrol the agent before the agent can become part of the settlement system of the mobile phone operator.

649. As for the Postal Corporation, it did not appoint agents. Instead, it provided the money transfer services through its own branch network.

Sanctions (applying c.17.1-17.4- c. VI.5)

650. Sanctions in the Proceeds of Crime and Anti-Money Laundering Act are available to MVT service operators which are reporting institutions. Mobile phone companies that offer funds or value transfer services fall under the definition of financial institutions for the purposes of the POCAMLA. As discussed under Recommendation 17, the sanctions under the POCAMLA are broad enough to deal with a variety of situations. With respect to MVT service operators that are licensed financial institutions, the administrative sanctions available under the Central Bank Act are applicable.
651. As already discussed above, there were not legal provisions for the supervision and regulation of payment services in Kenya at the time of the on-site visit. As such, there were no sanctions available to deal with natural or legal persons that provided MVT services without licence or registration.

Additional element- applying Best Practices Paper for SR VI (c. VI.6)

652. The Best Practices Paper for SRVI discusses five areas in which preventive measures should be considered, namely: licensing/registration; identification and awareness raising, anti-money laundering regulations; compliance monitoring and sanctions.
653. The best practices have not been met because:
- There is no requirement for all MVT service operators to be licensed or registered with the Central Bank of Kenya;
 - The Central Bank of Kenya has not conducted any exercise to identify informal MVT service operators and making them aware of their AML/CFT obligations. The External Remittances Committee had in the past mooted the idea of conducting a survey but the survey did not take off.
 - Mobile and informal MVT service operators are not subject to AML/CFT requirements; and
 - There are no sanctions for unlicensed MVT service operators.

3.11.2 Recommendations and Comments

654. Financial institutions which provide MVT services are licensed by the CBK and are subject to on-site inspections. However, with respect to other MVT service operators outside the purview of the Central Bank, the authorities should consider the following recommendations:

- A law to provide for the regulation and supervision of MVT service operators should be developed;
- The law should require MVT service operators to be licensed or registered with a competent authority;
- The law should provide for effective and dissuasive sanctions for any natural or legal person that provides a MVT service without being duly licensed or registered by a competent authority;
- Mobile phone operators that provide mobile payment services should be subject to AML/CFT requirements;
- A system for monitoring all MVT service operators to ensure they comply with the FATF Recommendations should be developed;
- Enforceable means should be developed that require each licensed or registered MVT service operator to maintain a current list of its agents which must be made available to the designated competent authority; and
- The recommendation in this report on the sanctions framework in respect of FATF Recommendation 17 should be implemented.

3.11.3 Compliance with Special Recommendation VI

	Rating	Summary of factors underlying rating
SR.VI	NC	<ul style="list-style-type: none"> • There are no licensing or registration requirements for MVT service operators. • There is no AML/CFT compliance monitoring for MVT service operators (except those affiliated to a financial institution licensed by the Central Bank of Kenya. • MVT service operators are not required to maintain current list of agents.

4. PREVENTIVE MEASURES – DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

4.1 Customer due diligence and record-keeping (R.12)

(Applying R.5, 6, and 8 to 11)

4.2 Description and Analysis

655. The following DNFBPs (as defined by the FATF) are reporting institutions for the purposes of the POCAMLA:

- Casinos (including internet casinos)
- Real estate agencies
- Dealing in precious stones
- Dealing in precious metals

- Accountants who are sole practitioners or are partners in their professional firms
656. Under section 48 of the POCAMLA, the reporting obligations apply to accountants when preparing or carrying out transactions for their clients in the following situations-
- (a) Buying and selling of real estate;
 - (b) Managing of client money, securities or other assets;
 - (c) Management of bank, savings or securities accounts
 - (d) Organising of contributions for the creation, operation or management of companies;
 - (e) Creation, operation or management of buying and selling of business entities
657. It is to be noted that the reporting obligations of the accountants do not apply when organising contributions for the creation, operation or management of legal arrangements.
658. Lawyers, notaries and other independent legal professionals are not subject to the AML obligations under the POCAMLA.
659. Trust and Company Service Providers (TCSP) in Kenya are not subject to the AML obligations under the POCAMLA.

Applying Recommendations.5, 6, and 8 to 11

660. The AML obligations under the POCAMLA apply to all reporting institutions in the same way, irrespective of whether they are DNFBPs or financial institutions. That being so, the AML legal framework for DNFBPs suffers from the same deficiencies as for financial institutions. These have been discussed in section 3 of this report. To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF.
661. Prior to the enactment of the POCAMLA the DNFBP sector was not subject to AML/CFT obligations. The application of AML requirements to the DNFBP sector is very recent and the level of compliance could not be assessed at the time of the onsite visit as the POCAMLA became operational immediately after the onsite visit.

4.1.2 Recommendations and Comments

662. For the successful combating of money laundering and terrorist financing, Kenyan authorities should as soon as possible bring in lawyers, notaries and other

independent legal professionals as well as Trust and Company Service Providers within the definition of reporting institutions.

663. Authorities in Kenya should take appropriate measures to ensure that the deficiencies in the AML legal framework regarding recommendations 5, 6 and 8 to 11 as discussed in section 3 of this report are remedied expeditiously.
664. Authorities in Kenya should ensure that the reporting obligations of the accountants under the POCAMLA should also apply when organising contributions for the creation, operation or management of legal arrangements.
665. It is recommended that the authorities should actively engage with the DNFBP sectors to encourage and assist the rapid development of a compliance culture with AML requirements.

4.1.3 Compliance with Recommendation 12

	Rating	Summary of factors relevant to s.4.1 underlying overall rating
R.12	NC	<ul style="list-style-type: none">• Lawyers, notaries and other independent legal professionals and Trust and Company Service Providers are not subject to the AML obligations under the POCAMLA.• The AML legal framework for DNFBPs suffers from the same deficiencies as for financial institutions.• There is no effective compliance with AML obligations in the DNFBP sector.• To the extent that TF is not criminalised in Kenya, the preventative measures are not designed to combat TF.• Reporting obligations of the accountants under the POCAMLA do not apply when organising contributions for the creation, operation or management of legal arrangements.

4.2 Suspicious transaction reporting (R.16) (Applying R.13 to 15 & 21)

4.2.1 Description and Analysis

Requirement to make STRs on ML and TF to FIU - Applying Recommendation 13, Protection for making STRs - Applying Recommendation 14, Establish and maintain internal controls to prevent ML and TF - Applying Recommendation 15 and Special attention to countries not sufficiently applying FATF Recommendations - Applying Recommendation 21

666. Lawyers, notaries and other independent legal professionals and TCSPs are not subject to the AML obligations under the POCAMLA. All STRs must be made to the FRC. The Kenyan AML legal framework does not allow accountants to send their STR to their appropriate SRO.

667. The AML obligations under the POCAMLA apply to all reporting institutions in the same way, irrespective of whether they are DNFBPs or financial institutions. That being so, the AML legal framework for DNFBPs suffers from the same deficiencies as for financial institutions. These have been discussed in section 3 of this report. To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF.
668. Prior to the enactment of the POCAMLA the DNFBP sector was not subject to AML/CFT obligations. The application of AML requirements to the DNFBP sector is very recent and the level of compliance could not be assessed at the time of the onsite visit as the POCAMLA became operational immediately after the onsite visit.

4.2.2 Recommendations and Comments

669. For the successful combating of money laundering and terrorist financing, Kenyan authorities should as soon as possible bring in lawyers, notaries and other independent legal professionals as well as Trust and Company Service Providers within the definition of reporting institutions.
670. Authorities in Kenya should take appropriate measures to ensure that the deficiencies in the AML legal framework regarding recommendations 13, 14, 15 and 21 as discussed in section 3 of this report are remedied expeditiously.
671. It is recommended that the authorities should actively engage with the DNFBP sectors to encourage and assist the rapid development of a compliance culture with AML requirements.

4.2.3 Compliance with Recommendation 16

	Rating	Summary of factors relevant to s.4.2 underlying overall rating
R.16	NC	<ul style="list-style-type: none"> • Lawyers, notaries and other independent legal professionals and Trust and Company Service Providers are not subject to the AML obligations under the POCAMLA. • The AML legal framework for DNFBPs suffers from the same deficiencies as for financial institutions. • There is no effective compliance with AML obligations in the DNFBP sector. • To the extent that TF is not criminalised in Kenya, the preventative measures are not designed to combat TF.

4.3 Regulation, supervision and monitoring (R.24-25)

4.3.1 Description and Analysis

Recommendation 24

Regulation and supervision of casinos (c.24.1, 24.1.1, 24.1.2 & 24.1.3)

672. 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 the AML regulatory and supervisory regime. The powers of the Centre to monitor and sanction apply to all reporting institutions in the same way, irrespective of whether they are DNFBPs or financial institutions. These powers are discussed in section 3.10 in this report.
673. It is to be noted that at the time of the onsite visit, there was no effective regulatory and supervisory regime to ensure that casinos were effectively implementing AML measures as required under the FATF Recommendations as the Centre had not been established.
674. Pursuant to the provisions of section 5 of the Betting, Lotteries and Gaming Act (BLG Act), 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). The Board is established under section 3 of the BLG Act. The operation of unlicensed gaming premises is an offence under the section 45 of the BLG Act. The Act also provides for specific offences for the conduct of any unlicensed activity.
675. Section 5(3) of the BLG Act requires the Board to issue a licence or permit only 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. Under section 5(2) of the BLG Act, the Board may make investigations or require the submission of declarations or further information deemed necessary in order to enable it to examine the application.
676. Section 46 of the BLG Act sets out the licensing requirements for operating gaming premises. Form 13A which is prescribed under the First Schedule to the Betting Lotteries and Gaming Regulations must be used for an application for a Public Gaming licence. The form requires the applicant and the partners, directors and secretary of the body corporate (applying for the Gaming Licence) and the managers to declare if they have been convicted of any criminal offence involving fraud or dishonesty. Under section 5(4) of the BLG Act, any person who knowingly makes a false statement or declaration in an application for a licence commits an offence which is punishable by a fine not exceeding Ksh. five thousand or imprisonment for a term not exceeding six months.
677. In practice, in order to ensure that criminals do not own, control or operate casinos, the Board also obtains information on applicants from law enforcement authorities to ensure that any person with a criminal record is not issued with a licence. In the case of foreign applicants, officers are sent abroad to gather information about the applicants. The authorities informed the assessment team that in all the licensing cases they had dealt with, the applicants were natural persons who owned the casinos and did not have cases of legal person applicants. The assessment team was also informed that the Board had only licensed one applicant in the last five years.

678. However, it does not appear that the Board will be able to prevent criminals or their associates from being the beneficial owner of a significant controlling interest in a casino as the fit and proper test under the law does not apply to beneficial owners.

Monitoring (c.24.2 & 24.2.1)

679. As discussed above, the Centre is the designated authority which has responsibility for the AML regulatory and supervisory regime. The powers of the Centre to monitor and sanction apply to all reporting institutions in the same way, irrespective of whether they are DNFBPs or financial institutions. These powers are discussed in section 3.10 in this report.
680. At the time of the on-site visit, the Centre had not been established and there was no monitoring of DNFBP for compliance with AML obligations.

Recommendation 25

Guidelines for DNFBPs (applying R.25.1)

681. Under 24(f) of the POCAMLA the Centre may issue guidelines to reporting institutions. At the time of the on-site visit, the Centre had not yet been established and as such there were no guidelines for DNFBPs.

4.3.2 Recommendations and Comments

682. The authorities in Kenya should consider implementing the following recommendations:
- Financing of terrorism should be criminalised and DNFBP should be subject to measures to combat financing of terrorism;
 - The application of the fit and proper test under the BLG Act should be extended to enable the Board to prevent criminals or their associates from being the beneficial owner of a significant controlling interest in a casino;
 - Lawyers, notaries, independent legal professions and TCSPs should be required to comply with the AML obligations under the POCAMLA;
 - Appropriate measures must be taken to ensure that the Centre becomes operational as soon as possible;
 - The Centre should be provided with sufficient technical and other resources to perform its functions.
 - Actions, as recommended, must be taken to remedy the deficiencies identified under Recommendations 17 and 29;
 - AML/CFT guidelines should be issued to assist DNFBPs to implement and comply with their respective AML/CFT requirements.

4.3.3 Compliance with Recommendations 24 & 25 (criteria 25.1, DNFBP)

	Rating	Summary of factors relevant to s.4.3 underlying overall rating
R.24	NC	<ul style="list-style-type: none"> To the extent that TF is not criminalised in Kenya, the preventative measures are not designed to combat TF. Lawyers and TCSPs are not subject to AML measures under the POCAMLA There are 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 Recommendations 17 and 29 that apply to financial institutions also apply to the DNFBPs. DNFBPs are not monitored for compliance with AML measures The overall effectiveness of the supervisory regime in the DNFBP sector could not be assessed.
R.25	NC	No guidelines have been issued to assist DNFBPs to implement and comply with their respective AML/CFT requirements.

4.4 Other non-financial businesses and professions

Modern Secure transaction techniques (R.20)

4.4.1 Description and Analysis

Other vulnerable DNFBPs (c. 20.1)

683. Kenya has not considered applying Recommendations 5, 6, 8-11, 13-15, 17 and 21 to non-financial businesses and professions (other than DNFBP) that are at risk of being misused for ML and TF.

Modernisation of conduct of Financial Transactions (c. 20.2)

684. Cash continues to be an important medium for settling transactions in Kenya. However, the authorities have been taking measures to modernise the national payment system and encourage the use of alternative payment systems which are less prone to the risk of money laundering through the implementation of the Kenya Payment System Framework. Through the Kenya Electronic Payment and Settlement System which was launched in 2005, there has been a marked increase in the use of payment cards and electronic funds transfer systems which are displacing the use of cash. Table 1 and Table 2 below provide some statistics on the number of ATMs, POS and Payment Cards and on mobile funds transfers respectively. The use of cash was also indirectly being discouraged by the low value bank notes that were in circulation. The highest Kenya bank note was Ksh1,000 which was equivalent to about US\$13.

Table: Number of ATMS, POS AND PAYMENT CARDS

Month	ATMS*	ATM Cards	Prepaid Cards	Charge Cards	Credit Cards	Debit Cards	POS Machines
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Dec 09	1,827	985,141	16,749	1,682	106,842	3,700,646	15,871
Jan 10	1,840	1,073,052	16,870	1,579	106,273	3,659,965	17,092
Feb 10	1,865	1,069,050	17,230	2,474	106,139	3,768,154	17,587
March 10	1,887	1,090,092	17,250	844	106,529	3,894,580	18,582
April 10	1,904	1,126,793	16,803	825	110,357	3,955,160	19,753
May 10	1,940	1,165,574	16,562	817	108,299	4,067,088	19,399
June 10	1,943	1,252,893	16,081	791	109,888	4,156,187	16,608
July 10	1,973	1,271,823	19,701	802	109,271	4,256,198	21,934
Aug 10	1,995	1,316,350	20,115	773	110,792	4,353,272	21,805
Sept10	2,025	1,339,649	19,795	749	112,658	4,539,792	20,309

* Pesa Point ATMS included.

Source: CBK Survey

Table: Mobile phone funds transfers: Number of Transactions, Registered customers and Agents

Month	Transactions (million)	Reg. Customers (million)	Agents
Dec '09	21.691	8.885	15,225
Jan '10	20.072	9.478	16,935
Feb '10	20.812	9.674	17,193
March'10	24.0765	9.969	27,622
April '10	22.6917	10.207	29,570
May '10	24.6953	10.493	31,036
June '10	25.0379	10.912	31,902
July '10	26.9116	13.476	32,973
Aug' 10	26.826	14.585	33,864
Sept'10	29.4479	15.225	35,373
Oct' 10	31.315	15.736	37,009

Source: CBK Survey

4.4.2 Recommendations and Comments

685. It is recommended that the authorities in Kenya should consider applying Recommendations 5, 6, 8-11, 13-15, 17 and 21 to non-financial businesses and professions (other than DNFBP) that are at risk of being misused for ML and TF.

686. Kenyan authorities should consider enacting a national payment system law to provide a regulatory and supervisory framework for the payment systems.

4.4.3 Compliance with Recommendation 20

	Rating	Summary of factors underlying rating
R.20	LC	<ul style="list-style-type: none"> Kenya has not considered applying Recommendations 5, 6, 8-11, 13-15, 17 and 21 to non-financial businesses and professions (other than DNFBP) that are at risk of being misused for ML and TF.

5. LEGAL PERSONS AND ARRANGEMENTS & NON-PROFIT ORGANISATIONS

5.1 Legal Persons – Access to beneficial ownership and control information (R.33)

5.1.1 Description and Analysis

Measures to prevent unlawful use of legal persons (c. 33.1)

687. Kenya's approach to preventing the unlawful use of legal persons in relation to ML, relies on an investigative approach supplemented by a company registry and record keeping requirements. While companies are required to disclose information on the shareholders and directors there is no requirement to keep information on the beneficial ownership of legal persons.

Company registry (Registrar of Companies)

688. Companies doing business in Kenya, including, foreign companies, must be registered with the Registrar of Companies (ROC) who is appointed under section 382 of the Companies Act. Pursuant to section 3 of the Companies Act, the Registrar must keep the Register of Companies. The registry system is kept manually but the implementation an electronic filing system started in September 2008. All companies registered since that date, are recorded on the new electronic database. Data on existing companies prior to September 2008 are still being recorded in the electronic filing system. The authorities expect that the process will be completed by June 2010. On average, the Registrar receives 150 applications for registration per day. Most companies are registered through lawyers, certified public secretaries or firms that provide company secretarial services. Such firms comprise of lawyers, accountants or certified public secretaries.
689. Lawyers and certified public secretaries (TCSPs) are not reporting persons for the purposes of the POCAMLA.
690. The registration requirements for companies limited by shares, companies limited by guarantee and unlimited companies under the Companies Act are similar. When registering a company, the applicant must file memorandum and articles of association (for companies limited by guarantee and unlimited companies. A company limited by share may also have articles of association). The memorandum of a company must state: (a) the name of the company, (b) that the registered office of the company must be in Kenya and; (c) where the company has a share capital the full name, occupation and postal address of the subscribers (or first members of the company).
691. Section 177 of the Companies Act requires that every public company must have at least 2 directors while a private company must have at least one director. Pursuant to the provisions of the Companies Act, every company must have a

secretary. Both individuals and companies may be appointed as directors and secretaries of companies.

692. The following particulars of the directors and officers that must be supplied and updated include:
- (a) Where the director is an individual, the name and surname; any former name and surname, nationality, postal address; business occupation, details of other directorship and date of birth (for directors of public companies).
 - (b) Where the secretary is an individual, the name and surname; any former name and surname and postal address.
 - (c) Where the director or secretary is a company, the corporate name, registered or principal office.
693. Companies have fourteen days to notify the Registrar of the appointment of the directors or the secretary or of any change of directors or secretary. There is no requirement for directors to be resident in Kenya. The representative of the Registrar of Companies who met the assessment team indicated that the use of non-resident corporate directors from UK, Cayman Island, Mauritius and Seychelles was quite common in Kenya. Further, there is no requirement for the disclosure of the shareholders, beneficial owners or directors of the corporate director. The use of corporate directors may obscure the control structure of companies.
694. Nominee shareholders are allowed and there is no requirement for the Registrar to keep information on the beneficial owner.

Registration of limited liability partnerships

695. Limited Liability partnerships are registered with the Registrar of Companies pursuant to section 7 of the Limited Partnerships Act. The following information must be submitted at the time of registration-
- The name of the partnership (as previously approved by the Registrar of Companies)
 - The general nature of the business
 - The full name of each partners
 - The term, if any, for which the partnership is entered into, and the date of commencement
 - A statement that the partnership is limited and the description of every limited partner as such

- The sum contributed by each limited partner and whether paid in cash or how otherwise paid.

Corporate record keeping requirements

Register of Directors

696. Every company is required under section 201 of the Companies Act to keep a register of its directors and secretaries at its registered office. The register must contain the following particulars with respect to each director:
- (a) in the case of an individual, his present Christian name and surname, any former Christian name or surname, his postal address, his nationality and, if that nationality is not his nationality of origin, his nationality of origin, his business occupation, if any, particulars of all other directorships held by him and, in the case of a public company, the date of his birth; and
 - (b) in the case of a corporation, its corporate name and registered or principal office and postal address.
697. For the purposes of section 201 of the Companies Act, “a person in accordance with whose directions or instructions the directors of a company are accustomed to act shall be deemed to be a director and officer of the company.” (Section 201(9) of the Companies Act).
698. A company must deliver to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors or in any of the particulars contained in the register, specifying the date of the change.
699. The company and every officer of the company who is in default of the requirement to keep the register of directors and to notify the ROC of the appointment of directors and any changes thereto is liable to a default fine.
700. In terms of the provisions of section 201(6) of the Companies Act, the register of directors must be open to the inspection by any member without charge and other person upon payment of nominal fee during business hours. If the company refuses an inspection, the company and every officer of the company is liable to a default fine. Further, the Court may, under section 201(8) of the Companies Act, by order compel an immediate inspection of the register.

Register of shareholders

701. Every company must keep a register of its members which must include information on (a) the names and postal addresses of the members, (b) the date on which each person was entered in the register as a member; and (c) the date at which any person ceased to be a member.

702. Shareholders may be natural or legal persons and the use of nominee shareholders is allowed. Shares can also be held on behalf of another person however, there is no duty to disclose to the company or ROC the identity on whose behalf the share is being held. This does not capture the FATF's definition of beneficial ownership.
703. The register must be kept at the registered office or at such other place in Kenya which must be notified to the Registrar of Companies (section 112 (2) & (3) of the Companies Act). The register of members must be open to the inspection by any member without charge and other person upon payment of nominal fee during business hours. Section 115(1) of the Companies Act refers.
704. Any member or other person may require a copy of the register, or of any part thereof, upon payment of a nominal fee. The company must cause any copy so required by any person to be sent to that person within a period of fourteen days commencing on the day next after the day on which the requirement is received by the company.
705. If any inspection is refused or if any copy required under this section is not sent within the time specified, the company and every officer who is in default becomes liable to a fine not exceeding forty shillings and further to a default fine of forty shillings.

Annual returns

706. Companies are required under sections 125 and 126 of the Companies to file annual returns with the Registrar of Companies. The annual return must include the following information:
- Situation of the registered office and postal address of the company
 - Names and postal addresses of the current members of the company
 - All such particulars with respect to the current directors of the company as are required to be contained in the register of directors.
707. Failure to comply with the requirement to file the annual return renders the company and its officers liable to a default fine. The representative of the Registrar of Companies who met the assessment team indicated that more than 60 per cent of the registered companies were non-compliant with the requirement to file annual returns. In order to encourage compliance with this requirement, the ROC publishes periodical notices in the local newspapers. While some companies respond others, specially, small family owned companies do not. That being so, the information kept with the ROC is not necessarily accurate and up to date.

Access to information on beneficial owners of legal persons (c. 33.2)

708. Records kept by ROC are available for public inspection upon payment of a nominal fee (section 384(1) of the Companies Act). The ROC indicated that they

receive requests from investigatory bodies on a daily basis and legal officers are assigned to handle the requests to ensure speed and accuracy in providing the information. Requests are normally responded to within 7 days.

- 709. The register of members and directors kept by the companies in Kenya are also available for inspection. Moreover, law enforcement agencies may use their investigatory powers to have access to company records.
- 710. These provisions provide easy access to investigative and supervisory authorities for any purpose. The authorities indicated that Government Officials are not required to pay any fees for inspecting the documents held by the registrars and they may also access the correspondence file which is not publicly available.
- 711. The use of the manual system for keeping company records may undermine the timely access to these records by investigative and supervisory authorities. Further, the information which is available pursuant to the mechanism described above does not capture accurate and current information on the beneficial ownership and control of legal persons. In particular, information is not verified and the use of nominee shareholders and corporate directors may obscure beneficial ownership and control information available on a company. Share warrants to bearer may also render the beneficial ownership and control structure of a company opaque.

Prevention of misuse of bearer shares (c. 33.3)

Share warrants to bearer

- 712. The company law regime in Kenya does not provide for the issue of bearer shares by companies. However, a company limited by share may under the provisions of section 85 of the Companies Act issue share warrants. The bearer of the share warrant is entitled to the share specified in the warrant itself. Such shares may be transferred by delivery of the warrant. Although they are known as “share warrants”, this situation effectively allows for the use of bearer shares. To the knowledge of the ROC representative with whom the assessment team met, the use of share warrants in Kenya is very rare.
- 713. No specific measures are in place to ensure that the share warrants are not misused for ML and TF purposes.

5.1.2 Recommendations and Comments

- 714. According to ROC most of the applicants use lawyers and certified public secretaries as agents for incorporating their companies. However, lawyers and certified public secretaries are not captured as reporting persons under the POCAMLA. Authorities must ensure that lawyers and certified public secretaries who act as company registration agents are included as reporting persons under the POCAMLA and that they adequately implement and comply with AML/CFT requirements.

715. Very limited information is available on corporate directors which may also be a company incorporated outside of Kenya. It is recommended that measures should be put into place to require the identification of the beneficial owner of corporate directors.
716. Further, mechanisms should be put in place to determine the identity of the beneficial owner where nominee or corporate shareholders are used.
717. Measures should be put in place to curb the misuse of share warrants. For example, the authorities may require that the owners of the share warrants should be known to the company and that this information should be made readily available to the investigatory authorities upon request.
718. The ROC should expedite the implementation of electronic filing system for keeping, maintaining, preserving and ensuring timely access to its records.

5.1.3 Compliance with Recommendations 33

	Rating	Summary of factors underlying rating
R.33	NC	<ul style="list-style-type: none"> • There are limited measures in place to ensure that there is 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. • The use of the manual system for keeping company records may undermine the timely access to these records by investigative and supervisory authorities. • The use of nominee and corporate shareholders and of corporate directors may obscure beneficial ownership and control information available on a company. • The information kept with the ROC is not verified and as such is not necessarily accurate and up to date. • Information on beneficial ownership of companies is not available as there is no requirement to capture such information under the laws in Kenya. • Although the use of share warrants is reportedly rare in Kenya, no specific measures are in place to ensure that the share warrants are not misused for ML & TF purposes.

5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34)

5.2.1 Description and Analysis

Measures to prevent unlawful use of legal arrangements (c. 34.1)

719. Trusts in Kenya may be created by a trust deed or a will under Common law. Trusts that involve immovable property⁵¹ must be registered with the Principal Registrar of Documents under the Registration of Documents Act (RDA). The registration of trusts that do not involve immovable property is optional. As at 04 June 2010 there were 1365 trusts registered under the RDA. From the discussions held during the onsite visit, it would appear that private trusts are commonly used in Kenya. However, there were no official figures on the total number of trusts that exist in Kenya as this information is not captured.

Information collected

720. No CDD is conducted on the founder/settlor, trustee or beneficiary of the trusts registered under the RDA. Only the trust deed is registered by the Principal Registrar of Documents. Section 3 of the RDA provides for a registry to be kept in Nairobi for the whole of Kenya except the Coast Province, for which a registry is kept in Mombasa. A document is registered under the RDA by the registrar filing a copy of the document in the register. A certificate of registration, signed by the registrar is endorsed on every registered document, showing the number of the document in the register and the date of registration. The registry must also keep indexes of all registered documents.
721. Trusteeship services are provided by lawyers and other persons. There is no registration or other requirement which apply to trustees. However, trustees who have been appointed by a body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, or the trustees of a pension fund may apply for a certificate of incorporation of the trustees as a corporate body under the Trustees (Perpetual Succession) Act (Trustees Act). For the purposes of incorporation, under the Trustees Act the information that must be submitted include:
- The objects and constitution of the trust concerned, together with the date of, and parties to, every deed, will or other instrument, if any, creating, constituting or regulating it.
 - A statement and short description of the property or interest therein which at the date of application is held or intended to be held by the trustees.
 - A statement as to whether the trust concerned is a society registered or exempted from registration under the Societies Act, or is incorporated under the Companies Act, together with the relevant certificate of registration, exemption or incorporation.

⁵¹ Section 2 of the Registration of Documents Act defines the term “immovable property” as including land, buildings, hereditary allowances, rights of way, lights, ferries, fisheries and any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber (except coconut trees), growing crops or grass.

- The names and addresses of the Trustees.
722. No CDD is conducted on the Trustees for the purposes of the incorporation as a corporate trustee under the Trustees Act. There is also no requirement to inform the relevant authority (the Minister) of any changes in the trustees or in the addresses of the trustees.
723. Information on trusts that do not involve immovable property is not available as registration is not compulsory and there is no requirement to keep such information with any institution or trust service providers.
724. The measures in place with respect to trusts are not sufficient to prevent the unlawful use of trusts for money laundering and terrorist financing purposes as there is no transparency regarding the beneficial ownership and control of trusts.

Access to information on beneficial owners of legal arrangements (c. 34.2)

725. The registers kept under the RDA (section 39) and the Trustees Act (section 15) are available for public inspection subject to the payment of a nominal fee. Law enforcement agencies may use their investigatory powers to have access to the records kept under the RDA and Trustees Act. These provisions provide easy access to investigative and supervisory authorities for any purpose. The authorities indicated that Government Officials are not required to pay any fees for inspecting the information kept under the RDA and the Trustees Act. However, information available in these registers does not capture accurate and current information on the beneficial ownership and control of trusts.
726. There is no mandatory filing requirement for trusts that do not involve immovable property and no register of trusts is required to be maintained by any institution. Competent authorities would therefore not be able to obtain or access to information on the beneficial ownership and control of these trusts in a timely fashion.

5.2.2 Recommendations and Comments

727. The authorities should consider putting in place measures to ensure more transparency concerning the beneficial ownership and control of trusts to prevent the unlawful use of trusts for money laundering and terrorist financing purposes.
728. There is no mechanism in place for accessing beneficial ownership information and control of trusts. 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.
729. Authorities should ensure that lawyers and other persons who provide trusteeship services are captured under the definition of reporting persons under the POCAMLA and that they adequately implement and comply with AML/CFT requirements.

5.2.3 Compliance with Recommendations 34

	Rating	Summary of factors underlying rating
R.34	NC	<ul style="list-style-type: none">• The measures in place with respect to trusts are not sufficient to prevent the unlawful use of trusts for money laundering and terrorist financing purposes as there is no transparency regarding the beneficial ownership and control of trusts.• Competent authorities are not able to obtain or have access to adequate, accurate and current information on the beneficial ownership and control of trusts as such information is not captured in most cases.

5.3 Non-profit organisations (SR.VIII)

5.3.1 Description and Analysis

Legal framework

730. Since Kenya has not yet criminalised terrorist financing in a manner consistent with the FATF Special Recommendations on Terrorist Financing, the NPO sector is not subject to the requirements set out in Special Recommendation VIII as required under the FATF Standards. The current legal framework covering registration/licensing and supervision of the NPO sector is premised on Non-Governmental Organisation Co-ordination Act, 1990 and its Regulations, 1992; and the Societies Act, 1997 and its Rules. Rules and the Regulations elaborate in detail the conduct and administration of the NPO sector requirements in Kenya. Under the POCAMLA, the NPOs are subject AML obligations.

Overview of the sector

731. In terms of section 9 of the NGO Act, the Board must establish and maintain a documentation centre on NGOs and their activities and other such relevant information relating to the NGO sector in general within Kenya. For societies, similar information is held by the Registrar of Societies.
732. There are 6800 NGOs registered under the NGO Act and provides a variety of social development services such as health, education, water and sanitation, governance and children and women. Since the registration process allows for one NGO to provide more than one social service, the authorities were unable to provide a comprehensive breakdown of the number of NGOs and the area of involvement. There are no existing records on societies due to the fact that the registration process does not require societies to state whether the activities are for community uplifting or commercial purposes as in the case of clubs.

Registration

Registration of Non-Governmental Organisations

733. Registration and licensing requirements for NGO's are set out in Part III of the Non-Governmental Organisations Coordination Act, 1990 (the NGO Act). The NGO Act establishes the Non-Governmental Organisations Co-ordinations Board (the Board) as a statutory body to deal with all matters relating to NGOs within the country (section 3). Under section 2 of the NGO Act, a Non-Governmental Organisation *"means a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organised themselves nationally or internationally for the benefit of the public at large and the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services"*.
734. In terms of sections 10 and 11 of the NGO Act, every NGO wishing to operate in Kenya must be registered and licensed by the Board. It is an offence to operate an NGO without registration certificate from the Board punishable by a fine not exceeding fifty thousand Kenya Shillings, or an imprisonment of eighteen months or both. Further, any person who has been convicted for violation of registration and licensing provisions shall be disqualified from holding office in any NGO for a period of ten years (Section 22(4) of the NGO Act).
735. Under section 10(4) of the NGO Act, the Minister responsible for NGOs may by notice in the Gazette, exempt such NGO from registration as he may determine. This provision is specifically applicable to entities of other jurisdictions (e.g. Department for International Development of the United Kingdom) and international organisations (e.g. International Committee of Red Cross) which operate in Kenya on the basis of Memorandum of Understanding signed with the Minister. The MoU defines the nature and extent of the operations of the NPO.
736. The Board, that is a statutory body, is established under section 3 of the NGO Act, must issue a certificate of registration in terms of section 12 of the NGO Act once all requirements have been met by the applicant. The day to day running of the Board is managed by an Executive Director who is appointed by the Minister.
737. The functions of the Board are set out in section 7 of the NGO Act. They include:
- To advise, facilitate and coordinate the work of all national and international NGOs operating in the country;
 - To maintain the register of national and international NGOs operating in Kenya, with the precise sectors, affiliations and locations of their activities;
 - To receive and discuss annual reports of the NGOs submitted to the Board;
 - To provide policy guidelines on NGOs; and
 - To receive, discuss and approve the code of conduct prepared by the Council for Self-Regulation of the NGOs and their activities in Kenya.

738. There is no specific provision in the NGO Act that gives powers to the Board to carry out the functions under section 7. The authorities are reviewing the NGO Act to close this gap.
739. In terms of Regulation 3 of the NGO Regulations, the Minister must set up a Bureau and appoint such officers as may be necessary for the effective implementation of the NGO Act. As at the time of the onsite visit, 52 officers were appointed as staff of the Bureau. It is worth noting that failure to comply with any provision of the NGO Regulations is an offence punishable, if found guilty, by a fine not exceeding KSh. six thousand, or imprisonment to a term not exceeding six months or both unless specifically so provided for.
740. Applications for registration are submitted by the chief officer of the proposed NGO to the Executive Director of the Bureau in prescribed forms in Schedule 1 to the NGO Regulations pursuant to section 3 of the NGO Act detailing the following but not limited to:
- other officers of the organisation;
 - the head office and postal address of the organisation;
 - the sectors of the proposed operations;
 - the districts, divisions and locations of the proposed activities;
 - the proposed average annual budget;
 - the duration of the activities;
 - all sources of funding; and
 - the national and international affiliation and certificates of incorporation.
741. The Board has powers to refuse (section 14) as well as suspend and cancel (section 16) registration of an NGO whose operations are inconsistent with the provisions of the NGO Act. In 2010, there were 1250 NGOs which were deregistered for failure to submit annual returns.
742. There is established under section 23 of the NGO Act Kenya National Council of Voluntary Agencies. It is a self-regulatory body headed by a Chairman and has its own structure, rules and procedures. The main function of the Council is to develop and adopt a code of conduct, which is subject to approval by the Board, and such other regulations that may facilitate self-regulation by the NGOs on matters of activities, funding programmes, foreign affiliates, national security, training, the development of manpower, institution building, scientific and technological development and such other matters as may be of national interest. Due to lack of capacity the Council has not yet carried out its mandate as required under the Act.

Registration of Societies

743. Kenya established the Registrar of Societies under section 8 of the Societies Act. The Registrar falls under the Office of the Attorney General. The Registrar is appointed by a Minister.

744. In terms of section 9 of the Societies Act every society wishing to operate in Kenya must apply and obtain a certificate of registration in a manner prescribed in the Societies Rules. The Registrar can refuse or cancel/suspend the certificate of registration under sections 11 and 12 of the Societies Act. Under section 2 of the Societies Act, a society *“includes any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and branch of a society, but does not, except in paragraphs (i)⁵² and (ii)⁵³ of section 11(2)(f)⁵⁴ of this Act...”*.
745. The following information, but not limited to, is required for registration of a society under Form A to the Schedule of the Societies Rules:-
- the name of the society;
 - the objects of the society;
 - the name of each organisation or group of a political nature established outside of Kenya, if any, of which the society is a branch or is affiliated to or connected with;
 - the class or classes of persons to whom membership of the society is open;
 - the present number of members;
 - the titles of the officers of the society, trustees and auditors;
 - the names, occupations and addresses of the present or proposed officers;
 - the land and premises (if any) owned by the society and the manner in which such property is held or vested; and
 - the custody and investment of the funds and property of the society, and the designation of the persons responsible thereof; the purpose for which funds can be used; the inspection of books; formation of branches; and disposal of property where a society is dissolved as required under section 19(1) of the Societies Act.
746. It is an offence under section 4 of the Societies Act to operate a society which is not registered, licensed or exempted. It is punishable on conviction to a fine not exceeding five hundred thousand Kenya shillings or to imprisonment for a term not exceeding six months, or both such fine and such imprisonment.
747. The Societies Act provides for a general offence and penalty provision under its section 42 to deal with any contravention of the Act where there is no express penalty provision. It states that a society guilty of an offence shall be liable to a fine not exceeding five hundred Kenya shillings, and in addition every officer thereof shall be guilty of the like offence and liable to the like fine or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment. However, this general provision creates an exception from liability for an officer. It states that *“Provided that an officer shall not be convicted if he*

⁵² identical to any other society which either existed or is existing, or was refused license.

⁵³ nearly resembles the name of any other society as, to be likely to deceive the public or the members of either society as to its nature or identity.

⁵⁴ refusal of registration.

establishes to the satisfaction of the court that he exercised due diligence to prevent its commission and that the offence occurred by reason of matters beyond his control”.

748. The authorities indicated that there are NGOs which are operating without proper licenses and efforts are ongoing to ensure full registration/licensing.

Review of adequacy of laws and regulations of NPOs (c. VIII.1)

749. The current NGO regulatory framework is under review by the Board for better regulation and supervision of the sector. The Board has conducted a national data validation survey of NGOs with a view to understanding the activities of the NGOs in the country. Further, the Board intends to carry out the validation process on a three-year basis and the information will be used to determine existing and emerging challenges to the operations of the NGO sector. There is no similar exercise for the societies sector conducted by the authorities.
750. However, the authorities have not undertaken any reviews of the adequacy of domestic laws and regulations that relate to the activities of the NPO sector to determine risks and vulnerabilities of the sector being misused for terrorist financing.

Protecting the NPO sector from terrorist financing through outreach and effective oversight (c. VIII.2)

751. The authorities have not undertaken outreach to the NPO sector with a view to protecting the sector from terrorist financing abuse. The Board intends to conduct awareness programmes in relation to the obligations of the NGOs as reporting entities under the Proceeds of Crime and Anti-Money Laundering Act, 2009.
752. NGOs are required in terms of Regulation 24 of the NGO Regulations to submit annual reports on:
- general information of the NGO (i.e. contact details, including of those running it);
 - finance information (i.e. audited assets and financial flows)
 - a breakdown of amounts spent on projects per sector, region and country;
 - banking details (i.e. names of banks and branches used by the NGO);
 - Governance (i.e. meetings of the members, the board and the minutes); and
 - Declaration undertaken on the contents of the annual reports.
753. In terms of section 30 of the Societies Act, every registered society must submit annual returns to the Registrar. The contents of the annual returns are set out in Form 1 of the Rules. It is the view of the assessors that the information prescribed to be contained in the annual returns in relation to societies is inadequate for the authorities to determine whether or not a society is vulnerable to abuse for terrorist purposes. It is an offence for failure to comply with annual returns obligation, which is punishable by a fine not exceeding ten thousand Kenya shillings or to imprisonment for a term not exceeding one year, or both.

754. Every registered society must keep a register of its members (section 25); books of account detailing flow of funds (section 26); and have the society's accounts rendered by the treasurer for perusal by its members (section 27). In all instances, failure to comply is an offence and carries a fine or imprisonment, or both as stated in each of the sections. In addition, every registered society must subject its books and all documents, including the members register, to inspection by the Registrar, or any person authorised in writing by the Registrar (section 28) as well as its members (Rule 16 of the Societies Rules). It is an offence for failure to comply and, on conviction, carries a liability to a fine not exceeding one thousand Kenya shillings or to imprisonment for a term not exceeding two months, or both.
755. Additionally, every registered society must hold at least once a year an annual general meeting in which all members participate to discuss all accounts of the monies received and utilised, including audited accounts, and cause to elect or appoint all such officers, trustees and auditors and, where applicable, such committees consistent with the constitution and rules of the society. A registered society found guilty of contravening this section is subject to a fine and/or imprisonment under section 42 of the Societies Act.
756. The public and the competent authorities are required to fulfil prescribed terms and conditions by the Registrar of Societies and the Board to gain access to information. However, access to information is hampered by inadequate implementation of the specific provisions in both Acts relating to obtaining and maintaining of NPOs information.

Diversion of funds for terrorists purposes (c. VIII.3)

757. Kenya has not determined the NPOs which account for a significant portion of the financial resources under the control of the sector and the substantial share of the sector's international activities with a view to promoting effective supervision or monitoring of those NPOs.
758. As already explained under the overview section above, section 3 of the NGO Act requires NGO to submit specific information supporting application for registration and licensing. The Board is required to maintain a register with such information under section 9 of the Act. In practice however, there are difficulties for the Board to effectively obtain and keep up-to-date information. This is because of lack of enforcement measures regarding information submissions obligations by the NGOs, large volume of stored in a manual filing system and shortage of personnel.
759. Pursuant to Regulation 24 of the NGO Regulations, registered NGO are obliged to submit annual reports to the Board and failure to do so is an offence which carries a fine of twenty five thousands Kenyan shillings. Further, Regulations 20 to 22 requires every registered NGO to notify the Board when changing its physical and postal addresses; names and constitution changes; and names of officer or their tiles. The Board is required under section 23 to change the NGO Register to reflect the changes made under Regulations 20 to 22 and issue a new registration

certificate to the NGO. Any registered NGO which changes its details without the knowledge of the Board is guilty of an offence.

760. Where any person is found guilty of making, signing or uttering a false statement or declaration in support or request for exemption under section 32 (rules and procedures for self-regulation and efficient administration of NGOs prescribed by the Minister) such a person is liable to a fine not exceeding two hundred thousand Kenya shillings or to imprisonment for a term not exceeding three years or both, including disqualification from holding office in any NGO for a period of ten years. Further, the Board may deregister the NGO involved, and where a foreign national is concerned, the Minister may recommend to the Minister in charge of immigration for expulsion from Kenya.
761. In terms of sections 25 and 26 of the Societies Act, every registered society must keep a register of its members and books of account with all the details of flow of funds. Further, the treasurer of the society must render accounts for perusal by its members. Failure to comply with the requirements under sections 25 to 27 of the Societies Act is an offence punishable by a fine and imprisonment, or both.
762. In practice however, both the Registrar of Societies and the Board indicated that while the majority of the NGOs do submit annual returns and keep books of accounts with detailed information, there are some NGOs which do not adhere to the requirements. Furthermore, the authorities are unable to ascertain the usefulness of the contents of the annual returns and other such financial information submitted by the NGOs. There are no effective monitoring and enforcement measures in place as a consequence of the Registrar of Societies and the Board being under-resourced. Consequently, it is difficult for the domestic authorities to gain access to adequate records on domestic and international transaction information which is detailed enough to verify whether or not the funds are used in a manner consistent with the allocation and purpose of the NGO.
763. The specific sanctions applicable to sections 25 to 30 and the general sanction provision under section 42 of the Societies Act cover administrative, civil, and criminal procedures for those NGOs which contravene the Act. The NGO Act provides for administrative (section 16), civil and criminal sanctions (section 22). However, it is the view of the assessors that the sanctions applicable under both Acts appear not to be proportionate and dissuasive considering the amounts and limitations on the length of imprisonment. Further, the assessors could not determine effectiveness of the available sanctions as no information on any sanction issued to NPOs was made available by the authorities.
764. There is no specific record-keeping and maintenance requirement for the NPOs in the legal framework of the sector. However, since NPOs are designated as reporting institutions under the POCAMLA, they are thus subject to the record-keeping provisions set out in section 46 of the same Act of which the scope and the adequacy of the section has already been discussed under the FATF Recommendation 10 in Section 3 of this report.

765. In terms of sections 4, 5 and 6 of the Societies Act, existence and management of as well as membership to an unlawful society is an offence which, on conviction, carries a penalty of a fine not exceeding five thousands Kenya shillings, or imprisonment for a term not exceeding six months or both; a fine not exceeding ten thousand Kenya shillings or imprisonment term not exceeding three years or both; and a fine not exceeding five thousand Kenya shillings or imprisonment term not exceeding one year, respectively.

Powers to investigate and sanction (c. VIII.4, VIII.4.1, VIII.4.2 & VIII.4.3)

766. Since Kenya has not criminalised financing of terrorism, there are no mechanisms implemented by domestic competent authorities to ensure effective information gathering and investigation on abuse of NPOs for terrorist financing. However, since the NPO sector is subject to reporting of suspicious transactions under the POCAMLA, it is expected that once operational the FRC will analyse and disseminate such information for possible investigation and prosecution by competent authorities. Additionally, the Registrar of Societies has general powers to request information and accounts from societies where it suspects improper conduct (section 31 of the Societies Act).
767. In terms of section 38 of the Societies Act, the Registrar or any administrative officer or any police officer of or above the rank of Assistant Inspector may, in writing, require any person to provide information in relation to operation of any unlawful society, or suspected unlawful society, or as to the operations or property of a society which has been dissolved or ceased to exist to attend before the Registrar and such attendance may be required at any police station. It is an offence for failure to comply with this provision which is punishable on conviction by a fine not exceeding one thousand Kenya shillings or to imprisonment for a term not exceeding two months, or to both.
768. In terms of section 39 of the Societies Act, a magistrate, police officer of or above the rank of Assistant Superintendent or any police officer authorised in writing has powers of entry, arrest, search and seize without a warrant where there is reason to believe that operations or activities of an unlawful society are underway. The police have mandate to investigate issues relating to managing of unlawful society (section 5 of the Societies Act), being a member of unlawful society (section 6 of the Societies Act) and prohibition of specified acts by or on behalf of certain societies in terms of section 40 of the Act.
769. It was not clear to the assessors whether the authorities have applied these powers to effectively investigate and gather information on NPOs in a manner that demonstrated the presence and application of effective domestic cooperation, coordination and information sharing among all relevant competent authorities holding relevant information on NPOs in general.

Domestic and international cooperation (c. VIII.5)

770. The Ministry of Foreign Affairs and the Office of the Attorney General are the appropriate points of contacts to which international requests for information and responses regarding activities of the NPO sectors are handled. The authorities have not received international request on NPO operations in general and specifically in relation to terrorist financing activities.

5.3.2 Recommendations and Comments

771. The NPO sector in Kenya has specific and separate regulatory framework for NGOs and societies as demonstrated by, *inter alia*, the different regulators/supervisors (the Registrar of Societies and the NGO Board) and the licensing and registration requirements under each legislation for the societies and the NGOs. Since there are no terrorist financing obligations applicable to the NPO sector, it was not clear how the two regimes in practice would be applied together to protect the sector from misuse for terrorist financing purposes in Kenya.
772. It is recommended that the authorities in Kenya should expeditiously take necessary steps to ensure that the NPO sector is subject to CFT obligations consistent with Special Recommendation VIII.

5.3.3 Compliance with Special Recommendation VIII

	Rating	Summary of factors underlying rating
SR.VIII	NC	<ul style="list-style-type: none"> The NPO sector in Kenya is not subject to the requirements under SR.VIII.

6. NATIONAL AND INTERNATIONAL CO-OPERATION

6.1 National co-operation and coordination (R.31 & R.32)

6.1.2 Description and Analysis

Mechanism for domestic cooperation and coordination in AML/CFT (c. 31.1)

Policy cooperation

773. The National Taskforce on Anti-Money Laundering and Combating the Financing of Terrorism (NTF) was established by the Minister of Finance through a gazette notice No. 2702 of 2003 on 19 April 2003. It is a multidisciplinary taskforce, whose membership comprises of following organizations deemed crucial to the implementation of the national AML/CFT regime; Ministry of Finance (Chair of the Taskforce), Central Bank of Kenya (Hosts the Secretariat), Kenya Police, the Criminal Investigation Department (CID), the National Security Intelligence Service (NSIS), Banking Fraud Investigation Department (BFID), Attorney General's Chambers, the Capital Markets Authority, the Kenya Revenue Authority, the Immigration Department, the Insurance Regulatory Authority, the Kenya Bankers Association, the Ministry of Trade & Industry and the Ministry of Foreign Affairs. The National Counter Terrorism Centre and the NGO Co-ordination Board were later brought on board.

774. The NTF's primary mandate is to facilitate the development of a national policy framework on AML/CFT that is in line with international standards and best practices. The NTF is also responsible for developing a robust and effective AML/CFT regime in Kenya by sensitizing members of the public on the dangers of money laundering.
775. Key achievements of the NTF to-date include the following:
- The Proceeds of Crime and Anti-Money Laundering Act 2009;
 - Draft Anti-Money Laundering Regulations that will take effect after enactment of the Proceeds of Crime and Anti-Money Laundering Act 2009; and
 - Enhanced institutional capacity of NTF member organizations by exposing members to various international AML/CFT training programs that exemplify best practice.
776. The Kenya Government also established a National Counter Terrorism Centre (NCTC) in 2004. The main functions of the Centre are to coordinate resources relating to counter-terrorism, create awareness on terrorism and provide training to other government departments on counter-terrorism. In addition the NCTC has worked out border arrangements to help improve on counter-terrorism coordination by government agencies manning the borders. It also identifies terrorism concerns and advice institutions, where they might be vulnerable. The NCTC is not a statutory body but its mandate to coordinate matters relating to terrorism is based on the executive decision which set up the Centre. A Technical Working Committee has been convened by the NCTC to work on the Anti-Terrorism Bill.

Operational cooperation

777. An Inter Agency Investigative Forum, spearheaded by the KACC, was established in August 2006, comprising the following investigative and oversight agencies in Kenya:
- National Security Intelligence Service
 - Criminal Investigations Department
 - Kenya Anti-Corruption Commission
 - Kenya National Audit Office
 - Efficiency Monitoring Unit
 - Banking Fraud Investigation Unit
 - Kenya Revenue Authority (Customs, Domestic Taxes and Registrar of Motor Vehicles)
 - Inspectorate of State Corporations
 - Directorate of Public Procurement
 - Directorate of Military Intelligence
 - Department of Immigration Services

778. The Forum was formed to enhance the collaborative efforts for sharing information among governmental agencies to combat corruption and economic and related crimes. The Forum oversees the activities of the Coordinating Committee which comprises Liaison officers from the 11 agencies that constitute the Forum and their main function is to implement activities agreed upon by the Forum. The Forum has issued Guidelines for sharing information between the agencies. In pursuance of the above, these guidelines have been developed to provide a platform for information sharing and tasking in the spirit of collaborative partnerships.
779. The Capital Markets Authority, the Central Bank of Kenya, the Insurance Regulatory Authority and the Retirement Benefits Authority have entered into an MOU concerning cooperation in supervision of financial institutions under their jurisdiction. The Memorandum was executed in August 2009 and has facilitated collaboration amongst the domestic financial regulators.
780. At the time of the onsite visit the FRC had not been established. There was therefore no mechanism in place to address operational co-operation and, where appropriate, co-ordination between the authorities at the law enforcement/FIU level and between the FIU, law enforcement and supervisors.

Additional element –mechanisms for consultation between competent authorities (c. 31.2)

781. The Inter Agency Investigative Forum constitutes a mechanism for consultation between some of the competent authorities that are stakeholders in AML/CFT Laws and Regulations.

Recommendation 32 (criterion 32.1 only)

782. There has been no review of the effectiveness of the systems for combating money laundering and terrorist financing in Kenya. There are no measures in place in Kenya to combat terrorist financing.

6.1.2 Recommendations and Comments

783. The authorities in Kenya should take appropriate measures to expedite the coming into operation of the FRC.
784. Effective mechanisms should be put into place to ensure that the FRC is able to cooperate and where appropriate, coordinate domestically with policy makers, law enforcement, supervisors and other competent authorities concerning the development and implementation of policies and activities to combat ML and TF.
785. The authorities in Kenya should consider putting into place appropriate mechanisms for consultation with competent authorities, the financial sector and other sectors (including DNFBP) that are subject to AML/CFT laws, regulations, guidelines or other measures.

6.1.3 Compliance with Recommendation 31 & 32 (criterion 32.1 only)

	Rating	Summary of factors underlying rating
R.31	PC	<ul style="list-style-type: none">• There is no mechanism in place to enable the FRC to cooperate and coordinate domestically with law enforcement and supervisory authorities concerning the development and implementation of policies and activities to combat ML as there is no operational FIU in Kenya.• There is 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.
R.32	NC	<ul style="list-style-type: none">• Kenya has not undertaken the review of the effectiveness of its systems for combating ML and TF on a regular basis.• TF is not criminalised in Kenya.

6.2 The Conventions and UN Special Resolutions (R.35 & SR.I)

6.2.1 Description and Analysis

Legal framework

786. The Kenyan Authorities have ratified and domesticated the Vienna and the Palermo Conventions. Kenya has also ratified the 1999 UN Convention for the Suppression of the Financing of Terrorism.

Ratification of AML related UN Conventions (c. 35.1)

787. Kenya signed the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on the 20th of December 1988 and proceeded to accede to it on the 19th of October 1992.

788. On the 15th of November 2000, Kenya signed the UN Convention against Transnational Organised Crime and acceded to it on the 16th of June 2004. However, as indicated under Recommendation 1 above, although Kenya has domesticated most of the provisions of the two conventions some of the acts were not criminalised. Kenya has also not criminalised acts related to participation in an organized criminal group⁵⁵, racketeering, terrorist financing, trafficking in human beings⁵⁶ and migrant smuggling.

Ratification of CFT related UN Conventions (c.I.1)

⁵⁵ Offences related to the participation in an organised criminal group are criminalised under the Prevention of Organised Crimes Act which was enacted after the onsite visit and became effective on 23 September 2010.

⁵⁶ Offences related to the Trafficking in human beings are criminalised under The Counter Trafficking in Persons Act which was enacted after the onsite visit and became effective on 23 September 2010.

789. Kenya only signed the UN International Convention for the Suppression of the Financing of Terrorism on the 4 December 2001 and ratified it on 27 June 2003. The offence of terrorist financing is not criminalised in Kenya. Despite these shortcomings, Kenya has however acceded to nine conventions and protocols set out under SR II above, which are annexes to the UN International Convention for the Suppression of the Financing of Terrorism.

Implementation of Vienna Convention (Articles 3-11, 15, 17 & 19- c. 35.1)

790. The articles to the Vienna Convention are implemented in Kenya under various laws. The articles are mainly provided for under the POCAMLA, Narcotic Drugs and Psychotropic Substances (Control) Act (NDPSC Act), Postal Corporation of Kenya Act and other ancillary legislation such as the Extradition (Contiguous and Foreign Countries) Act, Foreign Judgments (Reciprocal Enforcement) Act, Extradition (Commonwealth Countries) Act and Witness Summonses (Reciprocal Enforcement) Act.
791. The provisions in Article 3 of the Vienna Convention relating to offences and sanctions associated with narcotic drugs and psychotropic substances are implemented in terms of the NDPSC Act and the POCAMLA. The implementation of requirements under Article 4 relating to establishing jurisdiction over offences associated with narcotic drugs and psychotropic substances is provided for under the NDPSC Act and the POCAMLA. The provisions of the POCAMLA and the NDPSC Act enable the implementation of the requirements on confiscation of instrumentalities under Article 5 of the Convention. Articles 6 – 11 of the Convention on extradition, mutual legal assistance, other forms of (international) cooperation and training are implemented under the provisions of the POCAMLA, NDPSC Act, Extradition (Contiguous and Foreign Countries) Act, Foreign Judgments (Reciprocal Enforcement) Act, Extradition (Commonwealth Countries) Act and Witness Summonses (Reciprocal Enforcement) Act.
792. KRA has deployed K-9 and scanners to most of the ports of entry around the country, which are specifically tasked with detecting drugs. The Police have Anti-Narcotics Units which are located in all border points. Port police who patrol the high seas work in conjunction with the Anti-Terrorism Police Unit.
793. The provisions in Article 19 of the Convention which require measures to prevent the use of mails for illicit traffic are provided for implementation under the Postal Corporation of Kenya Act.

Implementation of SFT Convention (Articles 2-18, c 35.1 & c. I.1)

794. Kenya has not yet enacted any laws criminalising terrorist financing therefore the implementation of the provisions of the UN Convention for the Suppression of the Financing of Terrorism could not be determined. The non-criminalisation of the offence of terrorist financing in Kenya means that it is still not a predicate offence to the offence of money laundering therefore the provisions of the POCAMLA

cannot also be applied to determine the implementation of the provisions of the UN Convention for the Suppression of the Financing of Terrorism.

Implementation of Palermo Convention (Articles 5-7, 10-16, 18-20, 24-27, 29-31 & 34- c. 35.1)

795. Kenya has enacted laws which provide for the implementation of provisions under Articles 6, 7, 10, 11, 12-16 and 18. The articles deal with criminalisation of the laundering of proceeds of crime, establishing an FIU, liability of legal persons, prosecution, adjudication and sanctions, confiscation and seizure of proceeds of crime or property or equipment or other instrumentalities used in the commission of a crime, provision of international cooperation on confiscation, establishing jurisdiction over ML offences, extradition and mutual legal assistance.
796. Kenya has however not enacted laws that would enable the provisions of Article 5 of the Palermo Convention which criminalises participation in an organized criminal group to be implemented⁵⁷. The absence of such criminalisation, also affect liability of legal persons participating in committing offences involving an organized criminal group as required under Article 10(1). It also follows that the Kenyan Authorities can not prosecute or confiscate or seize proceeds obtained from participation in an organised criminal group as such acts have not been criminalised in Kenya. Pursuant to these shortcomings the requirements of Articles 11 and 12 of the Convention cannot be fully implemented in Kenya. As discussed under Recommendation 3 above, it is again not clear whether according to the current Kenyan laws, property of corresponding value can be confiscated or seized to fulfil the implementation of Article 12(1)(a) of the Convention.
797. Although the POCAMLA provides for international cooperation for purposes of confiscation, it appears the non-criminalisation of participation in an organised criminal group under the same act or as a predicate offence will cause difficulties in implementing such a request as the provisions creating extra-territorial jurisdiction in Kenya under that Act require dual criminality. The full implementation of Article 13 cannot be fully realized under the current Kenyan laws.
798. As indicated above, the provisions of Article 5 of the Palermo Convention are not criminalised in Kenya. Article 15 of the Palermo Convention which partly require, that countries establish jurisdiction for the crime of participation in an organised criminal group covered under Article 5, is not supported by the current legislation in Kenya and has not been given effect.
799. The Extradition (Commonwealth Countries) Act in its schedule of extraditable offences does not provide extradition for the offence of corruption to enable implementation of the requirements of Article 16 as read with Article 8 of the

⁵⁷ It is to be noted that offences relating to Participation in Organised Criminal Group are now criminalised under the Prevention of Organised Crimes Act 2010. The Act was enacted after the onsite visit and became effective on 23 September 2010.

Palermo Convention. The crime of participation in an organised criminal group is again not an extraditable offence under the two Acts⁵⁸. Kenya therefore has not enacted laws to enable the full implementation of Article 16 of the Convention.

800. Kenya does not have a specific Act providing for mutual legal assistance but provisions for mutual legal assistance are found in the NDPSC Act and the POCAMLA. The provisions in the two acts are however not exhaustive to cover the full implementation of provisions under Article 18 of the Palermo Convention.
801. The Kenyan Authorities have not adopted legislative provisions to implement the requirements of Article 20 of the Palermo Convention on special investigative techniques involving controlled delivery. The authorities however informed the assessors during the on-site visit that controlled delivery was being used under the administrative powers which the police have when carrying out crime investigation.
802. The Kenyan Authorities have taken measures to implement Article 24 of the Convention on the protection of witnesses through the enactment of the Witness Protection Act.
803. The authorities however, have not taken any measures to implement provisions of Article 25 of the Palermo Convention which provides for assistance to and protection of victims.⁵⁹
804. The POCAMLA, NDPSC Act and the Anti-Corruption and Economic Crimes Act have enabled the implementation of Articles 26, 27, 29, 30, 31 and 34 of the Palermo Convention on law enforcement and prevention of organised crime.
805. During the on-site visit the assessors were informed by the Police C.I.D. that its members received training which lasted from a month to six months from the C.I.D. Training School. However, it appeared to the assessors that there were no specific training programmes which had been put in place for the police or the assessors were not informed of such specific programmes. The Anti-Corruption Commission indicated that although it had short term training courses including exchange programmes with other authorities, it could not have long term continuous training programmes due to the nature of the employment contracts of the staff, which were only for four years. The nature of the employment contracts made it difficult for the Commission to retain staff as there was no long term career progression for the staff. Although the DPP's Office indicated that it was receiving a lot of training particularly on AML and CFT, the assessors were of the view that most of the training was being done on *ad hoc* basis with no proper

⁵⁸ The Kenyan authorities have indicated that sections 24 and 25 of the Prevention of Organized Crimes Act 2010 amend the provisions of the Extradition (Commonwealth Countries Act) and the Extradition (Contiguous and Foreign Countries) Act to make the offences relating to Participation in Organised criminal group extraditable offences.

⁵⁹ The Kenyan authorities have indicated that sections 11-18 of the Counter Trafficking in Persons Act 2010 make provisions that provide for the assistance and protection of victims.

training programmes in place. At least such programmes were not provided to the assessors. The Kenya Revenue Authority has a training programme which runs for two years for its technical staff, conducted by the Kenya Revenue Authority Training Institute. The Authority also indicated that its members were trained on money laundering by the UNODC using its on-line ML Training Module. It also provided refresher courses on a needs basis depending on the gaps identified. The assessors were however not given the statistics of those trained on ML. Overall therefore, it did not appear to the assessors that there are specific training programmes in place to assist the law enforcement officers to deal with the challenges arising from money laundering and terrorist financing crimes in line with the requirements of Article 29 of the Palermo Convention.

Implementation of UN SCRs relating to Prevention and Suppression of FT (c. I.2)

806. Kenya has not enacted any laws which provide for the criminalisation of terrorist financing. It therefore does not have a legal framework to enable the implementation of the UN Security Council Resolutions on freezing of funds related to terrorist financing.

Additional element- ratification or implementation of other relevant international conventions (c. 35.2)

807. Kenya is party to the following relevant international conventions:
- Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970.
 - Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971.
 - Convention on the Prevention and Punishment of Crimes of Internationally Protected Persons including Diplomatic Agents 1973;
 - International Convention against the Taking of Hostages, 17 December 1979.
 - Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980.
 - Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 24 February 1988;
 - Protocol for the Suppression of Unlawful Acts against the safety of Fixed Platforms located on the Continental Shelf, Rome, 10 March 1988;
 - International Convention for the Suppression of Terrorist Bombings, 15 December 1997; and
 - Convention on Safety of Maritime Navigation 1998.

6.2.2 Recommendations and Comments

808. It is recommended that the authorities in Kenya should consider enacting laws criminalizing Terrorist Financing to enable implementation of Articles 2-18 of the Suppression of the Financing of Terrorism Convention.

809. Kenya should consider enacting laws that criminalize participation in an organized criminal group⁶⁰ to enable it to implement the provisions of Articles 11,12,13,15 of the Palermo Convention.
810. The Authorities should clarify the legal position on confiscation of property of corresponding value in order to meet the requirements of Article 12(1)(a) of the Palermo Convention.
811. It is recommended that the authorities should consider amending the schedule of extraditable offences to the Extradition (Commonwealth Countries) Act to include the offence of corruption.
812. It is recommended that Kenya considers coming up with comprehensive legislation on Mutual Legal Assistance which would cover the full scope of provisions under Article 18 of the Palermo Convention.⁶¹
813. Kenya is encouraged to amend the current laws relating to gathering of evidence during criminal investigations to specifically provide for special investigative techniques such as controlled delivery.
814. There is need for Kenya to enact legislation which provides for assistance to and protection of victims which would enable it to implement the requirements of Article 25 of the Palermo Convention.
815. The Kenyan Authorities should come up with a training programme for law enforcement, prosecutors and other designated authorities dealing with prevention, detection and control of the offences prescribed under the Palermo Convention.
816. Kenya should consider enacting laws to give effect to the freezing mechanisms under UNSCRs 1267 and 1373.
817. It is recommended that the Authorities consider ratifying the outstanding UN Conventions and Protocols annexed to the UN Convention for the Suppression of the Financing of Terrorism.

6.2.3 Compliance with Recommendation 35 and Special Recommendation I

	Rating	Summary of factors underlying rating
R.35	NC	<ul style="list-style-type: none"> Lack of legislative provisions to fully implement the requirements under the Palermo Convention and the TF Convention.

⁶⁰ This recommendation has already been implemented with the enactment of the Prevention of Organised Crimes Act 2010 after the onsite visit. The Act became effective on 23 September 2010.

⁶¹ The authorities in Kenya have indicated that pursuant to Article 2 of the new constitution, all conventions become part of the laws of Kenya and therefore can be a basis for mutual legal assistance.

		<ul style="list-style-type: none"> • Lack of clear extradition provisions relating to terrorist financing. • Non- criminalisation of participation in criminal organised group⁶². • Insufficient information, such as comprehensive statistics to support implementation or use of special investigative techniques. • Lack of legislation providing assistance to and protection of victims.
SR.I	NC	<ul style="list-style-type: none"> • Offences relating to Terrorist Financing have not been criminalised in Kenya to enable implementation of provisions under the TF Convention. • Lack of laws giving effect to the freezing mechanisms under the UNSCRs 1267 and 1373.

6.3 Mutual Legal Assistance (R.36-38, SR.V)

6.3.1 Description and Analysis

Legal framework

818. Currently Kenya does not have a comprehensive domestic law on mutual legal assistance but the authorities indicated that they rely on bilateral agreements and executive discretions such as IGAD Mutual Legal Assistance and Extradition Convention and the Harare Scheme, to which Kenya is party to provide mutual legal assistance. The authorities further informed the assessors that efforts were being made to come up with a comprehensive Mutual Legal Assistance legislation. The Foreign Judgments (Reciprocal Enforcement) Act provides for the enforcement of foreign judgments on a reciprocal basis. The POCAMLA and the NDPSC Act also contain some provisions relating to mutual legal assistance.
819. The authorities further informed the assessors that where a MLA request which does not involve an offence which is criminalised in Kenya is received and there is no applicable international instrument, then depending on the nature of the request, the authorities would either assist or reject the request. Where the request involves an offence which is not criminalised in Kenya and the execution of the request involves cohesive or intrusive measures they would either reject the request or where necessary, the authorities would make a formal application to the courts for the assistance required to be obtained through a court order. However no specific examples of such cases were given to enable the assessors to verify the extent of the practice given that the law states otherwise.
820. During the on-site visit the assessors were informed by the Authorities that pursuant to an administrative arrangement the Attorney General is the Designated Competent Authority dealing with MLA matters. Under Part VI of the NDPSC Act and Part XII of the POCAMLA, it can be inferred that the Attorney General, for purposes of administering MLA provisions in the two Acts, is the Designated Competent Authority.

⁶² This deficiency has now been rectified by Kenya with the enactment of the Prevention of Organised Crimes Act, which became effective on 23 September 2010.

821. Mutual legal assistance requests to Kenya come through the Ministry of Foreign Affairs, which then refers them to the Attorney General's Office for processing or clearance for processing by the respective agency. The procedure for sending back the requested information to the requesting authority was not very clear to the assessors. The DPP's Office indicated that its Office does not normally deal with the request but where such requests are cleared for processing by the DPP's office they are referred to the relevant law enforcement agency for action. The agency after attending to it, may send the information required directly to the requesting competent authority or send the collected information back to the DPP's office for dispatching to the requesting competent authority through the Ministry of Foreign Affairs or the agency may send the information direct to the Ministry of Foreign Affairs for dispatch to the requesting competent authority.
822. The assessors were not provided with details on the international, bilateral or regional agreements which Kenya has entered into to facilitate mutual legal assistance or extradition.

Recommendation 36

Widest possible range of mutual assistance (c. 36.1)

823. Pursuant to the provisions of section 115(2) of the POCAMLA, countries may, for the purpose of an investigation or proceedings of ML, make requests to the Attorney General in Kenya to arrange for:
- Evidence to be taken, or information, documents or articles to be produced or obtained;
 - a warrant or other instrument authorizing search and seizure to be obtained and executed;
 - a person to come and assist with investigations or proceedings in Kenya;
 - a restraint order or forfeiture order issued in terms of the POCAMLA, enforced in the other country or to obtain a similar order and have it executed in that country, provided there is dual application of such procedures in Kenya and the other country;
 - an order or notice to be served; or
 - other assistance to be provided pursuant to a treaty or any other written arrangement between Kenya and the other country.
824. Section 59 of the NDPSC Act, also sets out similar provisions. However, the assistance may only be obtained in relation to drug and psychotropic substances offences under that Act.
825. The POCAMLA and the NDPSC Act provide for a reasonable range of mutual assistance with the only limiting factor being that the assistance which can be offered or requested is only in terms of an investigation or proceedings under the two Acts.

826. In order to comply with a request for obtaining of evidence for the purpose of an investigation or other proceedings relating to an offence, the Attorney General of Kenya can nominate a court in Kenya to receive such evidence. The court nominated will have the power to secure attendance of witnesses and receive sworn evidence just like in any other proceedings before the court. The court receiving such evidence will certify or verify it in the manner specified by the Attorney General, after which it will furnish it to the Attorney General for it to be transmitted to the requesting jurisdiction (section 118, POCAMLA & section 62, NDPSC Act).
827. Where a request for obtaining and execution of a search and seizure warrant is made, the Attorney General of Kenya will apply to the High Court for the warrant. Such a warrant might relate to but not limited to the production, search and seizure of information, documents or evidence (including financial records from financial institutions or other persons). The High Court will issue such a warrant provided it is satisfied that proceedings or an investigation in relation to the request has commenced in the requesting country and that there are reasonable grounds to believe that the evidence relevant to the investigation or proceedings is available in Kenya (section 119, POCAMLA & section 63, NDPSC Act).
828. The two Acts also provide for the following range of mutual legal assistance:
- Facilitating the entry, departure and the other rights of a person requested from another jurisdiction to come and assist with an investigation or proceedings in Kenya. This might include detention of the person whilst in Kenya during the time of providing the assistance, if the person was in custody in the other country by virtue of a court order (section 117, POCAMLA & section 61, NDPSC Act):
 - Enforcement of foreign restraint and confiscation orders against property believed to be in Kenya. The only complication arising from this arrangement is that the same section requires an order where such assistance can be given to be final and not subject to an appeal or review in the requesting jurisdiction. This might create difficulties when it comes to provisional or interim orders such as restraining orders, which are intended to secure the property pending finalisation of investigations or proceedings before determining whether a final order should be issued or not. There is potential for defendants to challenge such provisional orders (section 120, POCAMLA & section 64, NDPSC Act).
 - Gives discretion to the Attorney General of Kenya to decide on how best property forfeited in terms of this Part (XII) should be treated that is whether the whole of it or part of it should be returned or remitted (if funds) to the requesting State [section 120(10), POCAMLA].
829. The extent of the requests for assistance under section 115(1)(f) of the POCAMLA was not clear as examples of a treaty or other written agreement between Kenya and another country were not provided by the authorities.

830. The authorities drew the attention of the assessors to a book titled “Compendium of bilateral, regional and international agreements on extradition and MLA in criminal matters” prepared by the UNODC’s Regional Office for Eastern Africa in cooperation with the Office of the DPP, however this book was not helpful to the assessors as the authorities did not specifically guide them to the relevant agreements/treaties they were relying on for purposes of satisfying section 115(I)(f) of the POCAMLA.
831. Although the authorities were of the view that MLA could be provided for any other offence which is not criminalised in Kenya, in the absence of any cases to serve as precedent as to how a court of law would handle the formal aspects of such a request, the assessors were not satisfied with how the courts would order assistance in such matters.

Provision of assistance in timely, constructive and effective manner (c. 36.1.1)

832. At the time of the on-site visit, the authorities indicated that the Attorney General’s Office had a controlled Register for registering mutual legal assistance requests made by other countries since 2008. The DPP’s Office which is responsible for dealing with such applications within the Attorney General’s Office, informed the assessors that depending on the complexity of the request, on average, it takes them about two weeks to clear a request in order for it to be further attended to by the agency directly linked to the request. Once the DPP’s Office clears the request and refers it to the relevant agency for action, the agency may come back to it with the information required or send it directly to the requesting country on its own.
833. The legal department of the Ministry of Foreign Affairs which also assists with requests received, attended to and returned to the requesting States, does not keep a record on the number on such requests. The assessors observed that although the Attorney General’s Office was regarded as the Designated Competent Authority dealing with requests for mutual legal assistance, it did not keep proper records of the applications received, acceded to, rejected, the kind of assistance required, the time taken to attend to the requests and proper systems of monitoring the progress of attending to such requests and eventually retaining of comprehensive statistics on the requests successfully attended to and returned to the requesting State. The information contained in what was called a register shown to the assessors was not comprehensive to be informative on how a request would be processed up to the end. The authorities indicated that such information would be in the individual files of the requests but a request to see a few of the actual files to determine what they would reflect on how the requests are processed was not met.
834. It was therefore difficult for the assessors to determine whether Kenya is able to provide mutual legal assistance in a timely, constructive and effective manner.

No unreasonable or unduly restrictive conditions on mutual assistance (c. 36.2)

835. It does not appear that there are any prohibitions or unreasonable, disproportionate or unduly restrictive conditions on mutual legal assistance requests under the POCAMLA and the NDPSC Act. The Authorities had also indicated that the assistance offered is on a case by case basis and that the system was very flexible when determining the requests. However, the assessors could not verify this information as no examples of cases to demonstrate this practice were provided by the Authorities to support their view.

Efficiency of process (c. 36.3)

836. The Kenyan authorities could not demonstrate that there was a clear and efficient process for the execution of mutual legal assistance requests in a timely way and without undue delay. The authorities indicated that there was a general framework for receiving requests for legal assistance from another country through the Ministry of Foreign Affairs to the Attorney General's Office and then to the Police and other law enforcement agencies for action. No mechanism or measures are in place for the Attorney General's Office or any other authority to follow up on the progress of the requests received and the effectiveness in the provision of mutual legal assistance. At the time of the on-site visit, the DPP's Office had no comprehensive statistics on how many requests had been received by the Office, the subject matter, how many requests were acceded to or rejected, average time involved in dealing with the requests. It was therefore difficult for the assessors to determine the efficiency of the process in the absence of relevant statistics.

Provision of assistance regardless of possible involvement of fiscal matters (c. 36.4)

837. Under sections 118, 119 and 120 of the POCAMLA Kenya may receive requests for assistance for obtaining evidence, search warrants and enforcement of certain orders. Sections 62, 63 and 64 of the NDPSC Act allow for similar requests for legal assistance. There are no restrictions under these provisions regarding offences involving fiscal matters.
838. However section 3(3) of the Foreign Judgments (Reciprocal Enforcement) Code, provides that the Act does not apply to a judgment or order whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty. This section imposes a restriction in the event that a request to enforce a foreign judgment in terms of the Act involves fiscal matters.

Provision of assistance regardless of existence of secrecy and confidentiality laws (c. 36.5)

839. It would appear that requests for mutual legal assistance may not be denied on the grounds of secrecy in Kenya. Section 17(1) of the POCAMLA overrides any obligation as to secrecy or other restriction on disclosure of information imposed by any other Kenyan law or otherwise, where such information is required relating to the commission of an offence or attempt to commit an offence under

the POCAMLA. However, the effectiveness of this provision could not be ascertained in the absence of any judicial pronouncement.

840. Section 17(2) of the POCAMLA protects any person against any liability which might arise from the person breaching an obligation based on secrecy or restriction on disclosure of information provided by any other law or agreement, where the person is required to disclose such information in compliance with an obligation imposed on the person by the POCAMLA.
841. Section 123 of the POCAMLA provides further guidance on secrecy and confidential provisions under the Income Tax Act by stating the following:

“ 123. Notwithstanding the provisions of the Income Tax Act, and with regard to any other secrecy provision in any other Act, whenever any investigation is instituted in terms of this Act, including an investigation into any other offence, and an investigation into the property, financial activities, affairs or business of any person, the Commissioner General of the Kenya Revenue Authority or any official designated by that person for this purpose, shall be notified of such investigation with a view to mutual cooperation and the sharing of information.”

Availability of powers of competent authorities (applying R28, c.36.6)

842. In terms of Part XII of the POCAMLA and Part VI of the NDPSC Act, the Attorney General will have to apply for orders from the Courts to execute the requests for mutual legal assistance. Where such orders are issued, the powers of competent authorities required under R.28 would be available for use in response to requests for mutual legal assistance.

Avoiding conflicts of jurisdiction (c. 36.7)

843. The legislation which provides for mutual legal assistance in Kenya, particularly the POCAMLA and the NDPSC Act, does not address this requirement. However, it appears the approach provided for under section 11(4) of the Extradition (Commonwealth Countries) Act will be used in considering requests where particularly the best venue for the trial has to be decided. In terms of that section the Attorney General has to take into consideration all the circumstances of the case, including such factors as:
- the relative seriousness of the offence in question;
 - the date on which each such request, requisition or application was made; and
 - the nationality or citizenship or ordinary residence of the person against whom the request is being made.
844. The effectiveness of these provisions could not be assessed in the absence of relevant statistics confirming what happens in practice.

Additional element –Availability of powers of competent authorities required under R28 – (c. 36.8)

845. The powers which the competent authorities are required to have when it comes to compelling production, search and seizure and obtaining of information or evidence in its various forms provided for under R28, do not appear to apply to direct requests made by foreign judicial or law enforcement authorities to their Kenyan counterparts. The Authorities informed the assessors that requests which would require formal applications to be made to the courts before getting the information requested, would normally be channelled through the Attorney General's Office. The Police informed the assessors that in situations where they had received such requests directly, they had referred the requests to the Attorney General's Office for instructions or processing. The Police further indicated that if any information relating to such requests was given by them, it would have been given informally. The position taken by the Authorities seem to be in line with the provisions of the POCAMLA and the NDPSC Act.

International cooperation under SR V (applying c.36.1-36.6 in R.36, c. V.1)

846. Mutual legal assistance relating to terrorist financing could not be determined as such conduct has not been criminalised in Kenya. The Kenyan authorities informed the assessors that they could provide MLA to requests on TF, however only one case where such request had been considered was provided. The assessors therefore found it difficult to conclusively decide on whether this was the norm with such requests based only one case, particularly if the requests involved intrusive measures.

Additional element- (applying c. 36.7 & 36.8 in R 36, c. V.6)

847. Due to absence of legislation criminalising terrorist financing, it could not be determined whether the powers which the competent authorities have to compel production, search and seizure of information or evidence under R28, could be used in situations where there was a direct request from foreign judicial or law enforcement authorities to their Kenyan counterparts. The assessors took it that these could be the requests which law enforcement agencies would seek assistance of the DPP's Office for guidance and depending on the nature of the request, the DPP would either reject the request or apply for a court order to obtain the information required as it would involve cohesive measures.

Recommendation 37

Legal framework

848. The POCAMLA, NDPSC Act, the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act provide for requests to meet dual criminality requirements and where in these Acts, dual criminality is not explicitly provided for as a requirement, it can easily be inferred that it is required from the provisions dealing with international cooperation. The current legislation and the submissions made to the assessors by the Authorities during the on-site visit suggest that the Attorney General is the Competent Authority responsible for mutual legal assistance but in the absence of comprehensive

legislation on mutual legal assistance, it could not be determined whether the Attorney General has any discretion when considering requests which do not meet the dual criminality requirements.

Dual criminality and mutual assistance (c. 37.1 & 37.2)

849. Dual criminality is taken into account under Kenyan laws when considering requests for mutual legal assistance and extradition. The extent of the discretionary approach based on whether cohesive or intrusive measures would be required to execute a request could not be ascertained as the authorities did not provide specific examples of cases where this approach was used. Provisions under Part XII of the POCAMLA (sections 118-120) use the term “*corresponding law of that country*”, which to the assessors was interpreted to mean that the provisions which are used by the requesting country have to be similar to the domestic provisions in Kenya, in order for the request to be considered. Section 8 as read with the meaning of “*extradition crime*” given under section 2 of the Extradition (Contiguous and Foreign Countries) Act, requires dual criminality for any extradition application to be granted. The schedule to section 8 lists the offences which are extraditable, if the requirements of dual criminality are met. Section 4 of the Extradition (Contiguous and Foreign Countries) Act sets out the dual criminality requirements relating to extradition under that Act. The schedule to this section again lists the offences which are extraditable under that Act once the dual criminality requirements set out in that section have been met.
850. As explained in the legal framework segment to this recommendation, due to the absence of legislation on mutual legal assistance, it was not clear whether the Attorney General had powers to use his discretion to consider international cooperation requests where the requests did not meet the dual criminality test required under the current laws. In terms of the laws, it would appear that once the dual criminality requirements have been met there would be no impediments in providing the assistance required.

International co-operation under SRV (applying c. 37.1-37.2 in R37, cV.2)

851. The offence of terrorist financing is not criminalised in Kenya therefore it is not one of the offences listed under the schedules to the Extradition (Contiguous and Foreign Countries) Act and the Extradition (Contiguous and Foreign Countries) Act as extraditable. And due to the dual criminalisation requirements provided for under the above two Acts, the non-criminalisation of terrorist financing activities in Kenya would make extradition for such offences as well as rendering of any other formal assistance impossible under the current laws. In the absence of examples of decided cases, the Kenyan authorities could not demonstrate that extradition and other formal assistance which required a court process in the absence of dual criminality is possible.

Recommendation 38

Timeliness to requests for provisional measures including confiscation (c. 38.1)

852. Section 120 of the POCAMLA and section 64 of the NDPSC Act set out the procedural requirements regarding requests for enforcement of provisional measures such as restraint orders (including any other orders issued to give it effect), confiscation orders and pecuniary orders. The orders may arise from non-conviction or conviction based proceedings. The orders may cover any property which can be located in Kenya in connection to the offence.
853. As the POCAMLA came into operation after the on-site visit no statistics were available to show the effectiveness of its provisions. It was also not possible to determine the timeliness of the responses to mutual legal assistance requests including for enforcement of provisional measures under the NDPSC Act as no statistics were provided.

Property of corresponding value (c. 38.2)

854. The definition of the term “tainted property” under the POCAMLA only covers property used in, or in connection with the commission of an offence or proceeds derived from the offence; or property which is in Kenya and is the proceeds of a foreign offence in respect of which an order may be registered. The definition does not include property of corresponding value. It is not clear whether property of corresponding value can be considered in making a confiscation order. The scope of section 29 of the Penal Code which specifically provides for property of corresponding value is only limited to the two offences under sections 118 and 119 of the Penal Code.

Coordination of seizure and confiscation actions (c. 38.3)

855. At the time of the on-site visit, there were no formal arrangements in place to coordinate seizure and confiscation actions with other countries.

International cooperation under SR V (applying c. 38.1-38.3 in R.38, c.V.3)

856. Taking into account the requirement for dual criminality and that terrorist financing is not criminalized in Kenya, it did not appear that it would not be possible for formal assistance to be offered to foreign countries in the identification, freezing, seizure or confiscation/forfeiture of funds used for terrorist financing.

Asset forfeiture fund (c. 38.4)

857. Part XI of the POCAMLA provides for the establishment of a “*Criminal Assets Recovery Fund*” into which all moneys and property confiscated shall be deposited. The money deposited into this Fund includes the balance of money derived from the execution of foreign confiscation orders after payments have been made to the requesting jurisdiction. The use of the assets of the Fund is determined by the Minister through regulations which are yet to be issued.

Sharing of confiscated assets (c. 38.5)

858. The Attorney General may, in terms of section 120(10) of the POCAMLA, determine whether the whole or any part of property which has been forfeited should be returned or remitted to a requesting jurisdiction.

Additional element – recognition of foreign orders for a) confiscation of assets from organisations principally criminal in nature; b) civil forfeiture and c) confiscation of property which reverses burden of proof (applying c. 3.7 in R3- c. 38.6)

859. Foreign non-criminal confiscation orders are recognized and enforced in Kenya in terms of section 120 of the POCAMLA, provided that the act against which the foreign order is issued is recognized under the domestic laws of Kenya. It does not appear that it would be possible to prosecute or secure any of the abovementioned orders against an organization in Kenya only on the basis that it is criminal in nature.

Additional element under SR V (applying c. 38.4-38.6 in R38, c. V.7)

860. Terrorist financing is not criminalized in Kenya therefore foreign orders relating to financing of terrorism cannot be recognized in Kenya as these would require the court orders to be first domesticated through a court process. The offence is not a recognised crime in terms of Kenyan laws.

Statistics (applying R32)

861. The assessment team was not provided with any statistics on mutual legal assistance requests which had been received by the Kenyan Authorities. From the submissions made by the DPP's Office, it did not appear to the assessors that such statistics are kept.

6.3.2 Recommendations and Comments

Statistics

862. The authorities are encouraged to maintain comprehensive statistics on the number of mutual legal assistance requests received, the nature of such requests, date of acknowledgment of receipt to the requesting jurisdiction, the number of requests acceded to, number of requests rejected and reasons where possible, time taken to respond to the requests acceded to and time taken to dispatch the response.

Recommendation 36

863. The authorities are encouraged to have comprehensive legislation on mutual legal assistance, clearly defining the designated competent authority which is responsible for mutual legal assistance, the powers of the competent authority and conditions under which requests for such assistance can be acceded to or denied.
864. The Authorities are also encouraged to criminalise terrorist financing and the other outstanding predicate offences so that the jurisdiction is able to cover a wider range of offences when offering mutual legal assistance.

865. It is recommended that the Attorney General's (DPP's) Office puts in place effective mechanisms to ensure that requests for mutual legal assistance are dealt with efficiently, in a timely, constructive and effective manner.
866. The authorities should consider amending the Foreign Judgments (Reciprocal Enforcement) Act so that foreign judgments involving fiscal matters can also be enforced with little impediments.

Recommendation 37

867. The requirement for dual criminality limits the mutual legal assistance which can be offered particularly on the offences which have not yet been criminalised such as but not limited to terrorist financing, human trafficking⁶³, smuggling of migrants, racketeering and participation in an organised criminal group⁶⁴.
868. Absence of comprehensive legislation on mutual legal assistance makes it difficult to determine the basis upon which the Competent Authority would use its discretion in acceding to requests where the dual criminality requirement has not been met.

Recommendation 38

869. It is recommended that the authorities should put in place mechanisms to ensure that there is timeliness in attending to requests for provisional measures to compliment the procedures set out in the POCAMLA and the NDPSC Act.
870. There should be clear provisions providing for forfeiture of property of corresponding value, alternatively the definition of "tainted property" in section 2 of the POCAMLA should be amended to include property of corresponding value. The authorities should consider amending s29 of the Penal Code to cover all offences.
871. It is recommended that the authorities should consider putting in place mechanisms to coordinate seizure, freezing and confiscation actions with other countries.

SR V

872. Terrorist Financing is 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 matters. It is therefore recommended that Kenya should expedite the processes for the criminalisation of TF in line the FATF standards.

6.3.3 Compliance with Recommendations 36 to 38 and Special Recommendation V

⁶³ appropriate wording to be inserted

⁶⁴ same as above.

	Rating	Summary of factors relevant to s.6.3 underlying overall rating
R.36	PC	<ul style="list-style-type: none"> • Lack of comprehensive legislation on mutual legal assistance clearly providing for a designated competent authority dealing with mutual legal assistance requests and the powers of such authority. • Non-criminalisation of some of the predicate offences which limits the extent of formal mutual legal assistance which can be offered. • Lack of mechanisms to deal with requests in an efficient, timely, constructive and effective manner. • Insufficient information kept to determine the effectiveness of the mutual legal assistance regime in Kenya.
R.37	PC	<ul style="list-style-type: none"> • Non-criminalisation of some of the predicate offences in Kenya provides 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.
R.38	PC	<ul style="list-style-type: none"> • Lack of mechanisms to ensure that there is timeliness in attending to requests for provisional measures. • Other predicate offences like corruption, migrant smuggling and racketeering are 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. • Lack of statistics to determine the timeliness in effectively attending to requests for provisional measures.
SR.V	NC	<ul style="list-style-type: none"> • Terrorist Financing is 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.

6.4 Extradition (R.37, 39, SR.V)

6.4.1 Description and Analysis

Legal framework

873. Extradition in Kenya is provided for under the Extradition (Contiguous and Foreign Countries Act), Extradition (Commonwealth Countries) Act and the Fugitive Offenders Pursuit Act. The three acts provide for the arresting, detaining, extradition and deportation of suspected criminals. The Extradition (Contiguous and Foreign Countries) Act also provides for the extradition of criminals where there is an agreement between Kenya and another country. The Extradition (Commonwealth Countries) Act provides for extradition for countries which are members to the Commonwealth and are designated in terms of that Act. The Refugee Act, among other things, provides for the disqualification of certain categories of persons from being refugees.

874. Section 16 of the Extradition (Contiguous and Foreign Countries) Act and section 6 of the Extradition (Commonwealth Countries) Act provide restrictions to the surrender of a person and these include:

- If the case upon which the request is based is of a political nature;
- If the person is likely to be punished for his race, religion, nationality or political opinion;
- Where the request is being made in connection with a case which if the person had been charged in Kenya, the person would have been entitled to a discharge based on a previous acquittal or conviction for the same offence;
- That the person will only be dealt with only for the offence for which is surrender is requested or a lesser offence arising from the same facts proved before the court of committal; and

875. If the person committed an offence triable by the courts in Kenya or serving a sentence under any conviction in Kenya, until after he has been discharged, whether by acquittal or on the expiration of the sentence or otherwise.

Dual criminality and mutual assistance (c. 37.1 & 37.2)

876. The principal of dual criminality is used under Kenyan laws when considering requests for mutual legal assistance and extradition. Section 8 as read with the meaning of “extradition crime” given under section 2 of the Extradition (Contiguous and Foreign Countries) Act, requires dual criminality for any extradition application to be acceded to. An “extradition crime” is defined as meaning a crime which, if committed within the jurisdiction of Kenya, would be one of the crimes described in the schedule. The schedule to section 8 lists the offences which are extraditable, provided the requirements of dual criminality are met. Section 4 of the Extradition (Commonwealth Countries) Act sets out the dual criminality requirements relating to extradition under that Act. The schedule to this section again lists the offences which are extraditable under that Act once the dual criminality requirements set out in that section have been met. It would therefore follow that the offences which are not listed in both these schedules would not be extraditable offences under the Kenyan laws.

877. Section 4(3) of the Extradition (Commonwealth Countries) Act provides for the extradition of persons for committing ancillary offences to the offences listed in the schedule. The ancillary offences provided for include attempting or conspiring to commit, assisting, counseling or procuring the commission of or being accessory before or after the commission of the offence.

878. The authorities expressed the view that where the requirements of dual criminality have been met there would be no impediments in providing the assistance required. This view is supported by the provisions of section 4(2) of the

Extradition (Commonwealth Countries) Act which provides that for purposes of determining whether an offence upon which the request is being made is within the description contained in the schedule, factors such as any special intent, state of mind or special aggravating circumstances which may be necessary to constitute the offence under the relevant law (it is assumed this would be the Kenyan law) shall be disregarded. It would appear where the requirements of dual criminality have been met, technical differences in the laws between the requesting and the requested country, which might include differences in the manner in which the offence is categorized or denominated, no longer become an impediment to providing mutual legal assistance.

Money laundering as extraditable offence (c. 39.1)

879. ML is an extraditable offence in terms of the Sixth Schedule to the POCAMLA.

Extradition of nationals (c. 39.2)

880. The definition of a “fugitive” in section 2 of the Extradition (Commonwealth Countries) Act applies to any person who is, or is suspected of being in or on his way to Kenya, who is accused of or has been convicted of an extradition offence in the requesting State. The definition appears to apply to everyone in Kenya, regardless of whether one is a Kenyan national or not. Section 5 of the same Act further enhances this position. In terms of the section “every fugitive is liable” to be arrested, detained and surrendered. The section gives discretion to the authorities as to the limitations, exceptions, conditions or modifications when it comes to the application of the Act in relation to the country making the request. The provision however does not appear to segregate nationals against non-nationals when it comes to using the discretion. It does appear possible that Kenyan nationals can be extradited. The authorities also indicated that Kenya can extradite its own nationals but in the view of the assessors, it would only be for offences listed in the schedules described under the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act.

Cooperation for prosecution of nationals (applying c. 39.2(b), c. 39.3)

881. The Kenyan laws provide for the extradition of its own nationals therefore the cooperation required under criterion 39.3 would ordinarily not apply

Efficiency of extradition process (c. 39.4)

882. The Extradition (Commonwealth Countries) Act which provides for extradition requests from Commonwealth countries which are designated under the Act requires such requests to be made to the Attorney General. The Attorney General upon receiving the request and is satisfied that it meets the requirements of the Act, will issue a written authority for the request to proceed. The authority is sent to the magistrate court for purposes of issuing a warrant of arrest against the person. The magistrate will be guided in issuing the warrant of arrest by the provisions under section 8 of the Act, which among other things will require the

court to consider the evidence availed to it in support of the request to determine if it would meet the domestic standards under which a warrant can be issued. Section 9 of the Act provides for the committal of the person after arrest. If the request for the person's extradition is upheld by the High Court in terms of section 10 of the Act then the Attorney General in terms of section 11 can prepare a warrant of surrender of the person to the requesting State. The extradition process provided under this Act appeared not to be very complicated but the authorities did not provide the assessors with any specific examples of extradition requests where this process had been followed and the time it took for the authorities to comply with the requests. On that basis the assessors were unable to determine the efficiency of the extradition process under this Act.

883. The Extradition (Contiguous and Foreign Countries) Act provides for extradition requests made under that Act to be made to the Minister by a diplomatic counsellor or representative of the country making the request. The authorities indicated that most of the requests came through the Ministry of Foreign Affairs which then forwards the requests to the Attorney General's Office. The Act sets out the procedures which are then supposed to be followed in processing the request. The assessors were again not able to determine the efficiency of the extradition process provided for under this Act as no statistics or specific examples of cases were cited by the authorities to show the effectiveness of the extradition regime.

Additional element – existence of simplified procedures relating to extradition (c. 39.5)

884. There are no simplified procedures relating to extradition in place.

Additional element under SR V (applying c. 39.5 in R 39, c. V.8)

885. Terrorist Financing is not criminalized, which makes it a non-extraditable offence in terms of the current Kenyan laws.

Statistics (applying R32)

886. The Kenyan authorities did not provide any statistics on the number of extradition requests received, acceded to or rejected and the time it took to process the requests acceded to.

6.4.2 Recommendations and Comments

887. It is recommended that the authorities consider coming up with legislation criminalising terrorist financing offences so that the offences also become extraditable offences.
888. The authorities are encouraged to maintain comprehensive statistics on extradition requests received, acceded to, refused and the time taken to process the granted requests. Measures should be taken by the authorities to criminalise predicate offences which fall under the FATF Glossary which are not yet

criminalised so that the offences can also be included in the schedules of extraditable offence.

6.4.3 Compliance with Recommendations 37 & 39, and Special Recommendation V

	Rating	Summary of factors relevant to s.6.4 underlying overall rating
R.39	PC	<ul style="list-style-type: none"> Not all the predicate offences have been criminalised which makes the offences non-extraditable. Overall effectiveness of the extradition regime could not be assessed.
R.37	PC	<ul style="list-style-type: none"> The authorities could not demonstrate that mutual legal assistance can be offered in the absence of dual criminality. Terrorist financing is not criminalised. Overall effectiveness could not be determined.
SR.V	NC	<ul style="list-style-type: none"> Terrorist financing offences are not criminalised, therefore are not extraditable offences.

6.5 Other Forms of International Co-operation (R.40 & SR.V)

6.5.1 Description and Analysis

Widest range of international cooperation and clear and effective gateways for exchange of information (c. 40.1, 40.1.1 and 40.2)

FIU to FIU cooperation

889. In terms of section 23(1)(b) of the POCAMLA, the Centre was set up for purposes of exchanging information on money laundering and other related offences with counterparts in other countries. The actual power of the Centre to provide such international cooperation to similar bodies or appropriate law enforcement authorities lies in section 24(k) of the POCAMLA. Further, section 24(l) of the POCAMLA allows the Director to enter into other forms of cooperation such as MoU with similar bodies for purposes of carrying out his functions provided conditions of protection and usage of information are sought by the Centre and met by the counterpart. This provision has not been implemented since the Centre is still at formative stages.

Police to police cooperation

890. In the Eastern African Region cooperation is provided under the Eastern Africa Police Chiefs Cooperation Organisation (EAPCCO) Agreement between the Police in Kenya and members of EAPCCO. The Eastern Africa Police Chiefs Cooperation Organisation (EAPCCO) was created in 1998, in Kampala, Uganda, as a regional practical response to the need to join police effort against transnational and organized crime. EAPCCO consist of the following 11 member countries: Burundi, Djibouti, Ethiopia, Eritrea, Kenya, Rwanda, Seychelles, Somalia, Sudan, Tanzania, and Uganda. The priority crime areas for the Sub-region as determined by EAPCCO are: Anti-terrorism, Motor vehicle thefts, Anti-

drugs, Economic crimes and corruption, Illegal firearms, Cattle rustling, Environmental and Wildlife crime and Trafficking in human beings and Illegal immigrants

891. On an international level, Kenya is a member of INTERPOL and is thus able to provide police to police international cooperation. As an INTERPOL member country Kenya maintains a National Central Bureau (NCB) within the Kenya Police. The NCB is the designated contact point for the General Secretariat of the INTERPOL, regional offices and other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives.
892. On a bilateral basis, cooperation is provided through liaison partners in foreign diplomatic missions based in Kenya.

Supervisor to supervisor cooperation

893. The financial sector supervisory authorities have put in place mechanisms to facilitate cooperation and exchange of information with their foreign counterparts. They indicated that they fully cooperate with their foreign counterparts. In two instances cited by the Central Bank of Kenya and the Retirement Benefit Authorities, the authorities were able to provide expeditious responses to requests from foreign counterparts.

Central Bank of Kenya

894. Under the provisions of section 31(3) of the Banking Act, the Central Bank may, on a reciprocal basis, exchange information with any monetary authority or financial regulatory authority, fiscal or tax agency or fraud investigations agency within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority, fiscal or tax agency or fraud investigations agency.
895. The Bank has entered into MOU concerning cooperation in the supervision of financial institutions with the Central Banks of Tanzania, Uganda, Rwanda and Burundi under the Monetary Affairs Committee of the EAC and with the Reserve Bank of South Africa. It is currently in the process of negotiating MOU on information exchange and cooperation with Mauritius⁶⁵ and Pakistan.

Capital Markets Authority (CMA)

896. Under section 11(2)(q) of the CM Act, the CMA may, for the purposes of carrying out its objectives, cooperate or enter into agreements for mutual cooperation with other regulatory authorities for the development and regulation of cross border activities in capital markets.

⁶⁵ The MOU between the Central Bank of Kenya and The Bank of Mauritius was signed on 8 August 2011.

897. Kenya is a member of the IOSCO and is a signatory of the IOSCO multilateral memorandum of understanding (MMOU) concerning consultation and cooperation and the exchange of information. Kenya has also entered into bilateral MOU with the Securities and Futures Commission of Chinese Taipei and with the Securities Commission of Malaysia concerning mutual assistance and cooperation.
898. The CMA is also a signatory of the East African Member States Securities Regulatory Authorities (EASRA) MOU. The objectives of the EASRA MOU are to establish a basis for technical cooperation and to foster mutual assistance including the execution of requests and the sharing of information. The other signatories of the MOU are the Capital Markets and Securities Authority Tanzania, Capital Markets Authority Uganda and the Capital Markets Advisory Council, Rwanda.

Insurance Regulatory Authority (IRA)

899. The representatives of the IRA that met with the assessment team indicated that pursuant to section 3C(1)(d) of the Insurance Act, the Board of the IRA may share information with foreign counterparts⁶⁶.
900. Kenya is a member of the IAIS and is in the process of applying to become a signatory of the IAIS MMOU on Cooperation and Exchange of Information.
901. Further, Kenya has recently entered into a multilateral Memorandum of Understanding (MoU) on co-operation in the regulation and supervision of the insurance industry with the Insurance Regulatory Authorities of the EAC Partner States, namely, Burundi, Rwanda, Tanzania and Uganda. The MoU sets forth the basis upon which the Authorities propose to provide for mutual assistance and the exchange of information for the purpose of facilitating the performance of their functions under the respective laws, regulations and requirements of the Authorities' jurisdictions.

Retirement Benefits Authority (RBA)

902. Under section 7(d) of the Retirement Benefits Act. The RBA may enter into association with other bodies or organisations within or outside Kenya as the Board may consider desirable or appropriate and in furtherance of the purpose for which the Authority is established⁶⁷. The RBA is a member of the International Organisation of Pension Supervisors. One of the aims and purposes of IPOS is to

⁶⁶ Section 3A of the Insurance Act was amended by section 51 of the Finance Act 2010. The new provision under section 3A(h) which provides "*share information with other regulatory authorities and to carry out any other related activities in furtherance of its supervisory role*" came into force on 01 January 2011.

⁶⁷ The Retirement Benefits Act was amended by section 76 of the Finance Act 2010. The new section 44A which provides: "*The Authority may share information with other regulatory authorities*" came into force of 01 January 2011.

promote international cooperation on pension supervision and facilitate contact between pension supervisors. At the time of the onsite visit, the RBA was negotiating to enter into bilateral MOU with South Africa and Swaziland.

903. The representatives of the RBA that met with the assessment team indicated that there are no legal impediments in the law regarding cooperation and exchange of information. They have in the recent past exchanged information regarding requests from Zambia and Uganda.

Kenya Revenue Authority (KRA)

904. The KRA is able to provide the widest range of international cooperation to its foreign counterparts. It has entered into MOU on exchange of information with the Revenue Authorities of Kenya, Rwanda, Tanzania and Uganda. It has also entered into an MOU with the Ethiopian Revenue and Customs Authority on mutual administrative assistance on customs and tax matters and with the Egyptian Customs Authority.
905. Further, Kenya is a member of the World Customs Organisation. It cooperates with other customs organisations through the Regional Intelligence Liaison Offices (RILO) network which has been set up by the WCO to, inter alia, encourage information exchange, organise and support regional intelligence-based operations; facilitate mutual assistance and cooperation with other enforcement agencies, and promote and maintain regional cooperation between Customs and between Customs and other law enforcement agencies and organisations. The RILO network comprises 11 offices covering the WCO's six regions. Kenya is a member of the WCO East and Southern Africa RILO. The other members are: Angola, Botswana, Ethiopia, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.
906. The aim of this mechanism is to enhance the effectiveness of global information and intelligence exchange and to strengthen cooperation between all Customs services tasked with combating transnational crime. The exchange of information and intelligence takes place via the Customs Enforcement Network (CEN), a WCO global data information-gathering and communication system for intelligence purposes. Amongst the information that it captures, the CEN is a database of Customs seizures and offences and communication network to facilitate international exchanges and contacts.

Other agencies (post office, immigration)

907. The Postal Corporation of Kenya shares information through the Universal Postal Union to which it is a member.
908. The Department of Immigration Services is a member of the East Africa Community Regional Immigration Chiefs Committee. However it should be noted that this is not a Regional or International Organisation.

Spontaneous exchange of information (c. 40.3)

909. The exchange of information is possible both spontaneously and upon request and in relation to both money laundering and underlying predicate offences.
910. Under the provisions of section 24(k) of the POCAMLA it appears that the Centre may exchange information both spontaneously and upon request on money laundering and predicate offences. Since the Centre is still being formed, no information has been received or request made for exchange of information consideration.

Making inquiries on behalf of foreign counterparts (c. 40.4)

911. The police are able to and do make inquiries on behalf of foreign counterparts.
912. The powers of the CBK (section 28 of the Banking Act) and CMA (sections 11(2)(h) and 13(1) of the CM Act) to request information appear to be sufficiently wide to enable them to make inquiries on behalf of foreign counterparts. The power of the IRA to request information (section 9(2) of the Insurance Act) appears to be restrictive. It was not clear to the assessment team whether the RBA may request information outside of the scope of an inspection.

FIU authorised to make inquiries on behalf of foreign counterparts (c. 40.4.1)

913. Under the provisions of section 24(e) of the POCAMLA the Centre may request any information from reporting institutions. It would appear that it may use its powers of international cooperation under section 24(k) of the POCAMLA to realise the objective set out in section 23(1)(b) of the Act for purposes of exchanging information with similar bodies in other jurisdictions. Further, the Centre does not, at this point of its formative stages, have arrangements to enable it to have access to other sources of information as required under this criterion and no such requests were made.

Conducting of investigations on behalf of foreign counterparts (c. 40.5)

914. In terms of the provisions under Part XII of the POCAMLA, the police can conduct investigations on behalf of a foreign counterpart, where a formal application for such assistance is made through the Attorney General (sections 118 & 122).
915. The Kenya Revenue Authority in terms of section 10 of the EAC Customs Management Act can conduct investigations on behalf of foreign counterparts.
916. The CBK, CMA and the RBA do not have statutory powers to conduct investigations. It is not clear whether the powers of the IRA to investigate as provided under section 9 of the Insurance Act may be used to conduct investigations on behalf of foreign counterparts.

No unreasonable or unduly restrictive conditions on exchange of information (c. 40.6)

917. There are no disproportionate or unduly restrictive conditions that apply to exchanges of information.

Provision of assistance regardless of possible involvement of fiscal matters (c.40.7)

918. Provision of assistance is possible regardless of possible involvement of fiscal matters (section 123, POCAMLA). The authorities have also indicated that requests for cooperation are not refused on the sole ground that the request is also considered to involve fiscal matters.

Provision of assistance regardless of existence of secrecy and confidentiality laws (c.40.8)

919. Under sections 17 and 123 of the POCAMLA assistance can be provided regardless of the existence of secrecy and confidentiality laws. The two sections override secrecy and confidentiality provisions in any other laws, including secrecy and confidentiality relating to fiscal matters. The provisions have still not been tested in court so there were no cases that could guide the assessors as to the extent the provisions could be applied.
920. The confidentiality provisions that apply to the CBK, IRA and CMA are discussed under Recommendation 4. The CBK and RBA may exchange information with foreign counterparts. However, it is not very clear whether the CMA and IRA would be able to exchange information that they are required to keep confidential under the law.

Safeguards in use of exchanged information (c.40.9)

921. Where MOU and bilateral agreements are in place, information is exchanged with foreign counterparts subject to the conditions set out under the MOU or the bilateral agreements. In every other case, there are no controls and safeguards to ensure that information received by competent authorities is used only in an authorised manner. There are no national provisions on privacy and data protection in Kenya.

FIU

922. Under section 24(l) of the POCAMLA, the Director of the Centre has the authority to seek assurance from foreign FIU requesting information to provide an undertaking on protection and usage of information exchanged.

Additional element –exchange of information with non-counterparts (c.40.10 & c.40.10.1)

923. It was not clear to the assessors, if information could be exchanged with non-counterparts. The Authorities did not provide the assessors with any cases confirming that such a practice exists in Kenya.

Additional element- provision of information to FIU by other competent authorities pursuant to request from foreign FIU (c. 40.11)

924. There is no express provision in the POCAMLA which would enable the FRC to obtain from other competent authorities or other persons relevant information requested by a foreign counterpart FIU.

Statistics (applying R.32)

925. No statistics on international cooperation was made available to the assessment team.

6.5.2 Recommendations and Comments

926. There are clear gateways for the police, Kenya Revenue Authority and financial supervisors to provide a wide range of international cooperation to foreign counterparts. However, it was not possible to determine whether the authorities in Kenya are able to provide assistance in a rapid, constructive and effective manner as no statistics was made available to the assessment team. At the time of the onsite visit, there was no operational FIU in Kenya.
927. In order to enhance regime to enable the competent authorities in Kenya to provide the widest range of international cooperation to foreign counterparts in a rapid, constructive and effective manner it is recommended that the authorities in Kenya should-

Recommendation 40

- Take such measures as are required to ensure that the FIU becomes operational as soon as possible.
- Review and amend the powers of the IRA and RBA to enable them to conduct inquiries on behalf of foreign counterparts.
- The CBK, CMA and the RBA should be given adequate statutory powers to conduct investigations. The powers of the IRA to investigate as provided under section 9 of the Insurance Act should be clarified to ensure that they are able to conduct investigations on behalf of foreign counterparts.
- The confidentiality provisions under the CM Act and the Insurance Act should be reviewed to clearly provide for exceptions to enable the CMA and the IRA to exchange confidential information with foreign counterparts.
- With respect to information which is received by competent authorities outside the scope of MOU or bilateral agreements, appropriate controls and safeguards should be put in place to ensure that information received by competent authorities is used only in an authorised manner.

Special Recommendation V

- Take such measures as are necessary to expedite the criminalisation of TF in Kenya and should ensure that Recommendation 40 also apply to the obligations under SRV.

Recommendation 32

- Competent authorities should put mechanisms in place to ensure that:-
 - Financial sector supervisors maintain comprehensive annual statistics on matters of international requests that they make and receive, relating to or including AML/CFT, including whether the request was granted or refused.
 - The Centre maintains comprehensive annual statistics on formal requests for assistance it makes or receives, including whether the request was granted or refused and on spontaneous referrals made by the Centre to foreign authorities.

6.5.3 Compliance with Recommendation 40 and Special Recommendation V

	Rating	Summary of factors relevant to s.6.5 underlying overall rating
R.40	PC	<ul style="list-style-type: none"> • There is no operational FIU in Kenya. As such, the assessors could not determine the effectiveness of the provisions related to exchange of information with counterparts under the POCAMLA. • The IRA and RBA do not have powers to enable them to conduct inquiries on behalf of foreign counterparts. • The CBK, CMA and the RBA do not statutory powers to conduct investigations. • It is not clear whether under the powers of the IRA to investigate as provided under section 9 of the Insurance Act is able to conduct investigations on behalf of foreign counterparts. • The confidentiality provisions under the CM Act and the Insurance Act do not provide for exceptions to enable the CMA and the IRA to exchange confidential information with foreign counterparts. • With respect to information which is received by competent authorities outside the scope of MOU or bilateral agreements, there are no appropriate controls and safeguards in place to ensure that information received by competent authorities is used only in an authorised manner. • The overall effectiveness of the regime could not be assessed as competent authorities do not keep comprehensive statistics on matters of international requests that they make and receive,

		relating to or including AML/CFT, including whether the request was granted or refused.
SR.V	NC	TF is not criminalised in Kenya

7. OTHER ISSUES

7.1 Resources and statistics

928. The discussion on the description, analysis and recommendations for improvement that relate to Recommendations 30 and 32 is contained in all the relevant sections of the report, that is, section 2, parts of sections 3 and 4 and in section 6. There is a single rating for each of these Recommendations, even though the Recommendations are addressed in several sections.

	Rating	Summary of factors relevant to Recommendations 30 and 32 and underlying overall rating
R.30	PC	<ul style="list-style-type: none"> • The FRC is not operational and is not yet adequately staffed and funded to undertake its AML supervisory function under the POCAMLA. • Staff members of supervisory authorities have not been provided with adequate and relevant training for combating money laundering and the financing of terrorism. • LEAs are not adequately funded to effectively carry out their mandates • There is no adequate training of law enforcement agencies on ML and FT issues.
R.32	NC	<ul style="list-style-type: none"> • Kenya does not review the effectiveness of its systems for combating money laundering and terrorist financing on a regular basis. • Competent authorities in Kenya do not keep comprehensive annual statistics on matters relevant to the effectiveness and efficiency of systems for combating ML & TF.

TABLES

Table 1: Ratings of Compliance with FATF Recommendations

Table 2: Recommended Action Plan to improve the AML/CFT system

Table 3: Authorities' Response to the Evaluation (if necessary)

Table 1. Ratings of Compliance with FATF Recommendations

The rating of compliance vis-à-vis the FATF Recommendations should be made according to the four levels of compliance mentioned in the 2004 Methodology (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC)), or could, in exceptional cases, be marked as not applicable (NA).

Forty Recommendations	Rating	Summary of factors underlying rating ⁶⁸
Legal systems		
1. ML offence	PC	<ul style="list-style-type: none">• Not all the designated categories of predicate offences, including racketeering, financing of terrorism and migrant smuggling are criminalised in Kenya.• The offence of money laundering under section 4 of the POCAMLA does not apply to persons who commit the predicate offence.• The effectiveness of the money laundering regime in Kenya could not be assessed.
2. ML offence – mental element and corporate liability	PC	<ul style="list-style-type: none">• The POCAMLA does not provide for administrative liability to run parallel with criminal and civil proceedings.• The effectiveness of the regime could not be determined.
3. Confiscation and provisional measures	NC	<ul style="list-style-type: none">• Predicate offences that have been criminalised do not cover all the designated categories of offences. This compromises the scope of offences for which provisions relating to confiscation or forfeiture can be used.• Forfeiture of property of corresponding value provided for under section 29 of the Penal Code does not cover all offences.• It is not clear whether forfeiture of property of corresponding value is

⁶⁸ These factors are only required to be set out when the rating is less than Compliant.

		<p>provided for under the POCAMLA.</p> <ul style="list-style-type: none"> • The POCAMLA does not provide for steps to prevent or void actions. • The absence of statistics made it impossible to determine effectiveness.
Preventive measures		
4. Secrecy laws consistent with the Recommendations	NC	<ul style="list-style-type: none"> • The restricted scope of the provisions under section 17 of the POCMALA, casts serious doubt on 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 overall effectiveness could not be assessed.
5. Customer due diligence	NC	<ul style="list-style-type: none"> • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. • The overall effectiveness of the POCAMLA could not be ascertained as it became effective immediately after the onsite visit. • There are no requirements for financial institutions to undertake CDD measures when- <ul style="list-style-type: none"> - There is a suspicion of money laundering or terrorist financing regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations or - The financial institution has doubts about the veracity or adequacy of previously obtained customer identification data. • There is no requirement for financial institutions to obtain the correct permanent address, other contact details, and the occupation of the

		<p>applicant for business who is a natural person.</p> <ul style="list-style-type: none"> • It did not appear that legal arrangements were covered under the provisions of Section 45(1) of the POCAMLA. • For legal arrangements, there is no requirement to verify that any person purporting to act on behalf of the legal arrangement is so authorized. • Most of the categories of the financial institutions are required not to verify the legal status of legal arrangements and to obtain information containing the names of the trustees, address and provisions regulating the power to bind the legal arrangement. • There is no requirement for financial institutions to identify the beneficial owner (as defined by the FATF), and take reasonable measures to verify the identity of the beneficial owner using relevant information or data obtained from a reliable source such that the financial institution is satisfied that it knows who the beneficial owner is. • For customers who are legal persons or arrangements, there are no requirements under law or regulation or other enforceable means for financial institutions to: understand the ownership and control structure of a company. • For customers who are legal persons or arrangements, there are no requirements under law or regulation for financial institutions to determine who are the natural persons that ultimately own or control the customer, including those persons who, exercise ultimate effective control over a legal person or arrangement.
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		<ul style="list-style-type: none"> • Most of the categories of the financial institutions are not required to obtain information on the purpose and intended nature of the business relationship. • There is no requirement for financial institutions to conduct ongoing due diligence on the business relations. • There is no requirement for financial institutions to conduct enhanced due diligence for higher risk categories of customer, business relationship or transaction. • There is no requirement to verify the identity of the beneficial owner before establishing a business relationship or conducting transactions for occasional customers. • Where a financial institution is unable to comply with criteria 5.3 to 5.6, there is no requirement which prohibits the financial institution from opening the account, commencing business relations or performing the transaction. • There is also no requirement that the financial institution should consider making a suspicious transaction report. • There is no requirement that apply where the financial institution has already commenced the business relationship in the circumstances described under criterion 5.16 to terminate it and to consider making a suspicious transaction report.
6. Politically exposed persons	NC	There is no enforceable obligation do reporting institutions to identify PEPs or take other such measures as required under the FATF standard.
7. Correspondent banking	NC	There are no specific enforceable obligations that apply to cross-border correspondent banking and other similar relationships.

8. New technologies & non face-to-face business	NC	<ul style="list-style-type: none"> • 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. • There are also no requirements for financial institutions to have in place such other measures as are required under Recommendation 8.
9. Third parties and introducers	NC	There is 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.
10. Record keeping	PC	<ul style="list-style-type: none"> • There is no specific requirement either in law or regulation which requires financial institutions to maintain records for identification data, account files and business correspondence for at least five years following the termination of an account or business relationship (or longer if requested by competent authority in specific cases upon proper authority). • No requirement for financial institutions to ensure that all customer and transaction records and information are available on a timely basis to domestic competent authorities upon appropriate authority. • To the extent that TF is not criminalised in Kenya the preventative measures are not designed to combat TF. • The overall effectiveness of the record retention provisions of the POCAMLA could not be assessed.
11. Unusual transactions	NC	<ul style="list-style-type: none"> • No requirement for financial institutions to examine as far as possible the background and the

		<p>purpose of such transactions.</p> <ul style="list-style-type: none"> • No requirement for financial institutions to keep such findings available for competent authorities and auditors.
12. DNFBP – R.5, 6, 8-11	NC	<ul style="list-style-type: none"> • Lawyers, notaries and other independent legal professionals and Trust and Company Service Providers are not subject to the AML obligations under the POCAMLA. • The AML legal framework for DNFBPs suffers from the same deficiencies as for financial institutions. • There is no effective compliance with AML obligations in the DNFBP sector. • To the extent that TF is not criminalised in Kenya, the preventative measures are not designed to combat TF. • Reporting obligations of the accountants under the POCAMLA do not apply when organising contributions for the creation, operation or management of legal arrangements.
13. Suspicious transaction reporting	NC	<ul style="list-style-type: none"> • The STR reporting regime under the POCAMLA was not effective as the Centre was not operational at the time of the onsite visit. • The reporting regime is undermined as some of the designated categories of predicate offences are not criminalised in Kenya. • There is no legal obligation for reporting entities to file STRs related to terrorist financing.
14. Protection & no tipping-off	PC	<ul style="list-style-type: none"> • The tipping-off prohibition provision under the POCAMLA does not meet the requirement under the standards. • The effectiveness of the regime in place could not be assessed.
15. Internal controls, compliance & audit	NC	<ul style="list-style-type: none"> • The requirement for internal controls under the POCAMLA pertains only

		<p>to the reporting obligation but does not require financial institutions to establish procedures, policies and controls covering customer due diligence, the detection of unusual and suspicious transactions and record retention.</p> <ul style="list-style-type: none"> • For institutions licensed under the Banking Act, the AML Guideline, does not cover TF activities and does not specify the minimum measures that must be implemented. • No requirement for compliance arrangements except for institutions licensed under the Banking Act. • There is no requirement for financial institutions to communicate their AML/CFT procedures, policies and controls to their employees. • There is 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 for ongoing employee training except for institutions under the Banking Act. • No requirement to put in place screening procedures to ensure high standards when hiring employees. • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF.
16. DNFBP – R.13-15 & 21	NC	<ul style="list-style-type: none"> • Lawyers, notaries and other independent legal professionals and Trust and Company Service Providers are not subject to the AML obligations under the POCAMLA. • The AML legal framework for DNFBPs suffers from the same

		<p>deficiencies as for financial institutions.</p> <ul style="list-style-type: none"> • There is no effective compliance with AML obligations in the DNFBP sector. • To the extent that TF is not criminalised in Kenya, the preventative measures are not designed to combat TF.
17. Sanctions	PC	<ul style="list-style-type: none"> • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. • The overall effectiveness of the sanctioning regime under the POCAMLA could not be assessed.
18. Shell banks	PC	<ul style="list-style-type: none"> • No prohibition preventing financial institutions to enter into, or continue, correspondent banking relationships with shell banks. • No requirement for financial institutions to satisfy themselves that their respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.
19. Other forms of reporting	C	<ul style="list-style-type: none"> • This recommendation is fully met.
20. Other NFBP & secure transaction techniques	LC	<p>Kenya has not considered applying Recommendations 5, 6, 8-11, 13-15, 17 and 21 to non-financial businesses and professions (other than DNFBP) that are at risk of being misused for ML and TF.</p>
21. Special attention for higher risk countries	NC	<p>The authorities in Kenya have not implemented the requirements under Recommendation 21.</p>
22. Foreign branches & subsidiaries	NC	<p>There are no requirements for financial institutions to ensure that their foreign branches and subsidiaries observe AML/CFT measures consistent with home country requirements and the FATF recommendations and to have in place such other measures as required under Recommendation 22.</p>
23. Regulation, supervision and monitoring	NC	<ul style="list-style-type: none"> • There are deficiencies in the AML measures that financial institutions are required to implement.

		<ul style="list-style-type: none"> • To the extent that TF is not criminalized in Kenya, the preventative measures that are in place are not designed to combat TF. • It was not possible to assess the effectiveness of the new legal framework under the POCAMLA. • Except for the CBK, the other financial regulators have not undertaken any onsite inspections for AML purposes. • Apart from the Banking Act, the other financial laws do not have any measures to prevent criminals or their associates from holding or being the beneficial owners of a significant interest in a financial institution. • In the insurance sector, other than the principal officer, the integrity requirement does not seem to apply to the directors and the senior officers of the insurers. • There is no requirement for the licensing or registration of independent MVT service providers. • Non-deposit taking micro finance institutions are not licensed in Kenya. • There is no effective supervision of the financial institutions (other than those subject to the core principles) for compliance with the AML requirements under the POCAMLA.
24. DNFBP - regulation, supervision and monitoring	NC	<ul style="list-style-type: none"> • To the extent that TF is not criminalised in Kenya, the preventative measures are not designed to combat TF. • Lawyers and TCSPs are not subject to AML measures under the POCAMLA • There are 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 Recommendations 17 and 29 that apply to financial institutions

		<p>also apply to the DNFBPs.</p> <ul style="list-style-type: none"> • DNFBPs are not monitored for compliance with AML measures • The overall effectiveness of the supervisory regime in the DNFBP sector could not be assessed.
25. Guidelines & Feedback	NC	<ul style="list-style-type: none"> • No guidelines have 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 do not address aspects relating to combating the financing of terrorism • Guidelines do not provide reporting entities with a description of ML and FT techniques and methods • No guidelines have been issued to assist DNFBPs to implement and comply with their respective AML/CFT requirements.
Institutional and other measures		
26. The FIU	NC	<ul style="list-style-type: none"> • There is no operational FIU in Kenya. • The effectiveness of the provisions of the POCAMLA relating to the FRC could not be assessed as they have not been implemented. • The powers and functions of the Centre do not extend to combating of the financing of terrorism.
27. Law enforcement authorities	PC	<ul style="list-style-type: none"> • The overall effectiveness for ML could not be assessed. • Some of the designated categories of predicate offences, including TF, are not criminalised in Kenya.
28. Powers of competent authorities	PC	<ul style="list-style-type: none"> • The overall effectiveness for ML and TF could not be assessed. • Some of the designated categories of predicate offences, including TF, are not criminalised in Kenya.
29. Supervisors	NC	<ul style="list-style-type: none"> • The Centre was not yet operational at time of on-site visit.

		<ul style="list-style-type: none"> • The assessors could not establish whether the scope onsite inspections under the POCAMLA would include a review of policies, procedures, books and records, and extend to sample testing. • The Centre does 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 overall effectiveness of the supervisory regime under the POCAMLA could not be assessed.
30. Resources, integrity and training	PC	<ul style="list-style-type: none"> • The FRC is not operational and is not yet adequately staffed and funded to undertake its AML supervisory function under the POCAMLA. • Staff members of supervisory authorities have not been provided with adequate and relevant training for combating money laundering and the financing of terrorism. • LEAs are not adequately funded to effectively carry out their mandates • There is no adequate training of law enforcement agencies on ML and FT issues.
31. National co-operation	PC	<ul style="list-style-type: none"> • There is 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 as there is no operational FIU in Kenya. • There is 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.
32. Statistics	NC	<ul style="list-style-type: none"> • Kenya does not review the effectiveness of its systems for

		<p>combating money laundering and terrorist financing on a regular basis.</p> <ul style="list-style-type: none"> Competent authorities in Kenya do not keep comprehensive annual statistics on matters relevant to the effectiveness and efficiency of systems for combating ML & TF.
33. Legal persons – beneficial owners	NC	<ul style="list-style-type: none"> There are limited measures in place to ensure that there is 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. The use of the manual system for keeping company records may undermine the timely access to these records by investigative and supervisory authorities. The use of nominee and corporate shareholders and of corporate directors may obscure beneficial ownership and control information available on a company. The information kept with the ROC is not verified and as such is not necessarily accurate and up to date. Information on beneficial ownership of companies is not available as there is no requirement to capture such information under the laws in Kenya. Although the use of share warrants is reportedly rare in Kenya, no specific measures are in place to ensure that the share warrants are not misused for ML & TF purposes.
34. Legal arrangements – beneficial owners	NC	<ul style="list-style-type: none"> The measures in place with respect to trusts are not sufficient to prevent the unlawful use of trusts for money laundering and terrorist financing purposes as there is no transparency regarding the beneficial ownership and control of trusts. Competent authorities are not able to obtain or have access to adequate,

		accurate and current information on the beneficial ownership and control of trusts as such information is not captured in most cases.
International Co-operation		
35. Conventions	NC	<ul style="list-style-type: none"> • Lack of legislative provisions to fully implement the requirements under the Palermo Convention and the TF Convention. • Lack of clear extradition provisions relating to terrorist financing. • Non- criminalisation of participation in criminal organised group⁶⁹. • Insufficient information, such as comprehensive statistics to support implementation or use of special investigative techniques. • Lack of legislation providing assistance to and protection of victims.
36. Mutual legal assistance (MLA)	PC	<ul style="list-style-type: none"> • Lack of comprehensive legislation on mutual legal assistance clearly providing for a designated competent authority dealing with mutual legal assistance requests and the powers of such authority. • Non-criminalisation of some of the predicate offences which limits the extent of formal mutual legal assistance which can be offered. • Lack of mechanisms to deal with requests in an efficient, timely, constructive and effective manner. • Insufficient information kept to determine the effectiveness of the mutual legal assistance regime in Kenya.
37. Dual criminality	PC	<ul style="list-style-type: none"> • Non-criminalisation of some of the predicate offences in Kenya provides a ground to refuse a request on the offences due to failure to satisfy the dual criminality requirement. • The power of the competent authority

⁶⁹ This deficiency has now been rectified by Kenya with the enactment of the Prevention of Organised Crimes Act, which became effective on 23 September 2010.

		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.
38. MLA on confiscation and freezing	PC	<ul style="list-style-type: none"> • Lack of mechanisms to ensure that there is timeliness in attending to requests for provisional measures. • Other predicate offences like corruption, migrant smuggling and racketeering are 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. • Lack of statistics to determine the timeliness in effectively attending to requests for provisional measures.
39. Extradition	PC	<ul style="list-style-type: none"> • Not all the predicate offences have been criminalised which makes the offences non-extraditable. • Overall effectiveness of the extradition regime could not be assessed.
40. Other forms of co-operation	PC	<ul style="list-style-type: none"> • There is no operational FIU in Kenya. As such, the assessors could not determine the effectiveness of the provisions related to exchange of information with counterparts under the POCAMLA. • The IRA and RBA do not have powers to enable them to conduct inquiries on behalf of foreign counterparts. • The CBK, CMA and the RBA do not statutory powers to conduct investigations. • It is not clear whether under the powers of the IRA to investigate as provided under section 9 of the

		<p>Insurance Act is able to conduct investigations on behalf of foreign counterparts.</p> <ul style="list-style-type: none"> • The confidentiality provisions under the CM Act and the Insurance Act do not provide for exceptions to enable the CMA and the IRA to exchange confidential information with foreign counterparts. • With respect to information which is received by competent authorities outside the scope of MOU or bilateral agreements, there are no appropriate controls and safeguards in place to ensure that information received by competent authorities is used only in an authorised manner. • The overall effectiveness of the regime could not be assessed as competent authorities do not keep comprehensive statistics on matters of international requests that they make and receive, relating to or including AML/CFT, including whether the request was granted or refused.
Nine Special Recommendations	Rating	Summary of factors underlying rating
SR.I. Implement UN instruments	NC	<ul style="list-style-type: none"> • Offences relating to Terrorist Financing have not been criminalised in Kenya to enable implementation of provisions under the SFT Convention. • Lack of laws giving effect to the freezing mechanisms under the UNSCRs 1267 and 1373.
SR.II. Criminalise terrorist financing	NC	Terrorist Financing has not yet been criminalised in Kenya.
SR.III. Freeze and confiscate terrorist assets	NC	There are no measures in place in Kenya to implement the freezing and confiscation of terrorist funds and assets.
SR.IV. Suspicious transaction reporting	NC	<ul style="list-style-type: none"> • There is no legal obligation for reporting entities to file STRs related

		to terrorist financing.
SR.V. International co-operation	NC	<ul style="list-style-type: none"> • Terrorist Financing is 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. • Terrorist financing offences are not criminalised, therefore are not extraditable offences.
SR VI. AML requirements for money/value transfer services	NC	<ul style="list-style-type: none"> • There are no licensing or registration requirements for MVT service operators. • There is no AML/CFT compliance monitoring for MVT service operators (except those affiliated to a financial institution licensed by the Central Bank of Kenya. • MVT service operators are not required to maintain current list of agents.
SR VII. Wire transfer rules	NC	Wire transfer transactions conducted by financial institutions are not subject to the requirements set out in SR.VII.
SR.VIII. Non-profit organisations	NC	<ul style="list-style-type: none"> • The NPO sector in Kenya is not subject to the requirements under SR.VIII.
SR.IX. Cross Border Declaration & Disclosure	NC	<ul style="list-style-type: none"> • There is no effective declaration system in place since the one anticipated under the POCAMLA has not yet been implemented. • The system in force prior to the POCAMLA was not being enforced.

Table 2: Recommended Action Plan to Improve the AML/CFT System

AML/CFT System	Recommended Action (listed in order of priority)
1. General	No text required
2. Legal System and Related Institutional Measures	
2.1 Criminalisation of Money Laundering (R.1 & 2)	<ul style="list-style-type: none"> • While Kenya has adopted an all crimes approach, the offences criminalised do not meet the minimum range of predicate offences prescribed in each of the designated categories of offences as defined by the FATF. It is recommended therefore that Kenya should consider criminalising the following predicate offences: <ul style="list-style-type: none"> - Participation in an organised criminal group⁷⁰ and racketeering; - Terrorism financing; and - Trafficking in human beings⁷¹ and migrant smuggling. • The provisions of section 4 of the POCAMLA should be amended to extend the application of the offence of money laundering to persons who commit the predicate offence. • It is recommended that the Kenyan authorities should put into place appropriate mechanisms to maintain comprehensive statistics on matters relevant to ML investigations, prosecutions and convictions.
2.2 Criminalisation of Terrorist Financing (SR.II)	The Kenyan authorities should as a matter of priority take the necessary steps to criminalise terrorist financing in accordance with the requirements of SR.II.
2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)	<ul style="list-style-type: none"> • The Kenyan Authorities should consider criminalising predicate offences to include all designated categories of offences as defined under the FATF Glossary. This would enable freezing, seizing and confiscation or forfeiture

⁷⁰ The Prevention of Organised Crimes Act as enacted after the onsite visit and became effective on 23 September 2010.

⁷¹ The Counter Trafficking in Persons Act, 2010 was enacted after the onsite visit and became effective on 23 September 2010.

	<p>orders to be issued against all the designated categories of offences.</p> <ul style="list-style-type: none"> • Section 29 of the Penal Code which provides for forfeiture of property of corresponding value should be amended to cover all offences. • To clarify the provision of forfeiture of corresponding value in the POCAMLA, it is recommended that it be amended to have a similar provision to section 29 of the Penal Code but covering all offences. • In order to avoid any doubt of “benefits” which are subject to confiscation, it is recommended that the term “benefits” as used in section 61 of the POCAMLA be defined. • Provisions of section 61 of the POCAMLA seem to exclude forfeiture of the actual benefit acquired by the defendant or accused person. Further to that, it is also not clear whether payment of the amount considered appropriate by the court can be interpreted to mean forfeiture of property of corresponding value. It is recommended that the authorities consider amending this section, so that it can provide for an inquiry as to what would have happened to the actual benefit realized by the accused person or defendant and where it is no longer available for purposes of forfeiture then the court can order payment of an appropriate amount in comparison to the value of the benefit to Government. • Pursuant to the above recommendation it is not clear whether the POCAMLA currently provide for confiscation or forfeiture of property of corresponding value. It is therefore recommended that the Authorities clearly provide for forfeiture of property of corresponding value both under the conviction based (criminal) forfeiture and non-conviction based (civil) forfeiture. • The Authorities should review provisions under sections 36, 41(3) and 42(1) of the NDPSC Act relating to when forfeiture of proceeds from drug related offences can be applied. The provisions are not consistent with each other. • The Authorities should consider amending section 55 of the Anti-Corruption and Economic Crimes Act to allow priority to be given to
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	<p>forfeiture of the actual unexplained assets and where that is not possible the courts can then order the person to pay an amount equivalent to the unexplained assets.</p> <ul style="list-style-type: none"> • The laws, specifically the POCAMLA, should be amended to provide for power to void actions where persons involved knew or ought to have known that as a result of their actions the authorities would be prejudiced in their ability to recover property subject to confiscation. • The Authorities are encouraged to maintain statistics relating to freezing, seizing and confiscation or forfeiture of proceeds of crime from, instrumentalities used in and instrumentalities intended to be used in the commission of money laundering, other predicate offences and property of corresponding value. This would enable effectiveness and efficiency of systems for combating money laundering and other predicate offences to be assessed.
2.4 Freezing of funds used for terrorist financing (SR.III)	The Kenyan authorities should adopt measures in accordance with SR.III for the freezing and seizing of terrorist funds and assets.
2.5 The Financial Intelligence Unit and its functions (R.26)	<ul style="list-style-type: none"> • The POCAMLA provides for the establishment of a Financial Reporting Centre as a national centre to receive, analyse and disseminate financial intelligence information to authorised agencies in Kenya. Given that currently there is no operational FIU, the authorities in Kenya should move with speed to establish the FRC in a manner that is consistent with the FATF Recommendation 26. • It is further recommended that the authorities in Kenya should consider the following:- <ul style="list-style-type: none"> - provide effective guidance to reporting entities in consultation with designated supervisory/regulatory bodies under the Act. The guidance should also include the manner of reporting taking into account the diversity of reporting entities under the Act, specification of reporting forms, and the procedures that should be followed when filing a report. - develop effective mechanism to enable the Centre to have access, directly or indirectly,

	<p>on a timely basis to the financial, law enforcement and administrative information to properly perform its functions. The authorities should consider arrangements such as MoU and designation of authorised officers to facilitate effective access to such information. Where online databases exist, the authorities should consider having processes that provide secured direct online-access to such databases for efficient analysis.</p> <ul style="list-style-type: none"> - develop and implement enforceable policies and procedures in line with the provisions of i) Chapter 6 of the Constitution, ii) POCAMLA, and iii) Public Officers Ethics Act to cover matters related to integrity and conduct of the management and general staff of the FRC before, during and after employment. - put in place measures to ensure that there is effective dissemination of financial information to authorised domestic authorities for possible investigation and/or prosecution when there is suspicion for ML. - ensure that in practice, the Centre enjoys sufficient operational independence and autonomy to make sure that it is free from undue influence or interference. - put in place effective measures to ensure that information held by the Centre is protected and disseminated in accordance with the provisions of this Act. - once operational, the Centre should publicly release periodic reports, and such reports should include statistics, typologies and trends as well as information regarding its activities. - applying for membership in the Egmont Groups including having regard to the Egmont Group Statement of Purpose and its Principles for Information Exchange Between Financial Intelligence Units for ML cases. - The Centre should keep comprehensive statistics to enable it to assess effectiveness of its functions. - undertake effective awareness raising programmes involving supervisory bodies, law enforcement authorities, reporting
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	<p>entities and other relevant stakeholders in the AML framework to popularise its existence.</p>
<p>2.6 Law enforcement, prosecution and other competent authorities (R.27 & 28)</p>	<ul style="list-style-type: none"> • It is recommended that the Kenyan authorities should expedite the process for criminalising TF. • LEAs should be adequately funded in order to effectively carry out their mandates • Problems in the judiciary which lead to extreme delays in dealing with cases should be immediately addressed as this could negatively affect the ML/TF regime in Kenya. Two authorities who met the assessment team complained of unreasonable delays in case handling by the judiciary. • The structure in the AG's chambers should be reviewed in order to ensure effective operation and expansion of the DPP's chambers⁷². • There should be enhanced specialised training of all law enforcement agencies on ML and FT. • All in all, it would appear that the investigative units have wide powers to conduct investigations. Their only limitation would be capacity which has a huge bearing on such powers being used effectively. • The police and other law enforcement agencies should consider keeping statistics on cases where special investigative techniques are used. Such statistics would enable to determine the effectiveness of the use of the techniques. Statistics on ML and TF investigations and prosecutions should also be maintained.
<p>2.7 Cross Border Declaration & Disclosure</p>	<ul style="list-style-type: none"> • It is recommended that the implementing regulations under the POCAMLA should be issued expeditiously. • The authorities in Kenya should also consider amending the definition of the term "monetary instrument" under the POCAMLA's to include bearer negotiable instruments. • The POCAMLA should be amended:- <ul style="list-style-type: none"> - to introduce a provision to enable the designated competent authorities to request and obtain further information from the carrier with the regard to the origin of the currency or bearer negotiable

⁷² The Kenyan authorities have indicated that this recommendation has been implemented under the new Constitution.

	<p>instruments and their intended use upon discovery of a false declaration/disclosure of currency or bearer negotiable instruments or a failure to declare/disclose them.</p> <ul style="list-style-type: none"> - to introduce a requirement for information on the amount of currency or bearer negotiable instruments declared under section 12 of the POCAMLA or otherwise detected, and the identification data of the bearer to be retained for use by appropriate authorities in the instances described under criterion IX.4. - provide for a more severe sanction for the failure to report the conveyance of monetary instruments into or out of Kenya or the material misrepresentation of the amount of the reported monetary instruments. <ul style="list-style-type: none"> • The Centre should be made to become operational as soon as possible. • TF should be criminalised as a matter of priority and the freezing mechanism under SRIII should be put into place promptly. Authorities should ensure that criteria III.1 to III.10 under SR III should also apply in relation to persons who are carrying out a physical cross-border transportation of currency or BNI that are related to TF. • The authorities should put into place adequate measures to ensure that the system for reporting cross border transactions are subject to strict safeguards to ensure proper use of the information or data that is reported or recorded. • Authorities should consider having training and awareness programmes for all key stakeholders on cross border movement of currency and other bearer negotiable instruments as not all customs officers other than a few in the investigation department whose number could not be verified as the statistics were not provided, have undergone training on ML and yet, they are largely responsible for the implementation of the declaration system on all entry and exit points. A total of 147 officers in
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	<p>KRA have been trained on Anti-Money Laundering using the computer based Training Module given BY UNODC, which is based at the KRA Training school.</p> <ul style="list-style-type: none"> • Customs authorities should speed up the computerisation of their database to ease data collection, data retention and access to information. • The Customs authorities should improve on maintaining statistics to enable effectiveness to be determined and distinction of the violations committed, for example whether it is false declaration or illegal cross border transportation of non-declared cash above the threshold.
3. Preventive Measures – Financial Institutions	
3.1 Risk of money laundering or terrorist financing	
3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)	<p><i>General</i></p> <ul style="list-style-type: none"> • It is recommended that the Kenyan authorities should adopt preventative measures to combat TF and terrorism financing should be criminalized in line with the FATF 40+9 Recommendations. <p><i>Recommendation 5</i></p> <ul style="list-style-type: none"> • Authorities in Kenya are recommended to take the following measures to enhance the effectiveness of the AML regime: <ul style="list-style-type: none"> ➤ Establish an explicit obligation under law or regulation for financial institutions to undertake CDD measures in the following circumstances: <ul style="list-style-type: none"> - When there is a suspicion of money laundering or terrorist financing regardless of any exemptions or thresholds that are referred to elsewhere under the FATF Recommendations or - When the financial institution has doubts about the veracity or adequacy

	<p>of previously obtained customer identification data.</p> <ul style="list-style-type: none"> ➤ Establish an explicit obligation under law or regulation for financial institutions to obtain the correct permanent address, other contact details, and the occupation of the applicant for business who is a natural person⁷³. ➤ Establish an obligation under the POCAMLA to ensure that legal arrangements are adequately covered under section 45 (1) of the POCAMLA. ➤ For legal arrangements, introduce an obligation in law or regulation to ensure that financial institutions verify that any person purporting to act on behalf of the legal arrangement is so authorized. ➤ Establish an enforceable obligation to ensure that all the categories of the financial institutions verify the legal status of legal arrangements and obtain information containing the names of the trustees, address and provisions regulating the power to bind the legal arrangement. ➤ Introduce an obligation under law or regulation for financial institutions to identify the beneficial owner (as defined by the FATF), and take reasonable measures to verify the identity of the beneficial owner using relevant information or data obtained from a reliable source such that the financial institution is satisfied that it knows who the beneficial owner is. ➤ For customers who are legal persons or arrangements, introduce an enforceable requirement for financial institutions to: understand the ownership and control structure of a company.
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⁷³ Authorities may refer to the General Guide to Account Opening and Customer Identification issued by the Basel Committee's Working Group on Cross Border Banking.

	<ul style="list-style-type: none"> ➤ For customers who are legal persons or arrangements, establish an obligation under law or regulation for financial institutions to determine who are the natural persons that ultimately own or control the customer, including those persons who, exercise ultimate effective control over a legal person or arrangement. ➤ Introduce an enforceable requirement for all financial institutions to obtain information on the purpose and intended nature of the business relationship. ➤ Establish an obligation under law or regulation for financial institutions to conduct ongoing due diligence on the business relations and an enforceable obligation for financial institutions to take the other such measure as required under criteria 5.7.1 and 5.7.2. ➤ Establish an enforceable requirement for financial institutions to conduct enhanced due diligence for higher risk categories of customer, business relationship or transaction. ➤ Establish an enforceable requirement to verify the identity of the beneficial owner before establishing a business relationship or conducting transactions for occasional customers. ➤ Where a financial institution is unable to comply with criteria 5.3 to 5.6, establish an enforceable requirement which prohibits financial institution from opening the account, commencing business relations or performing the transaction. An enforceable obligation should also be introduced for financial institutions to consider making a suspicious transaction report under such circumstances. ➤ Establish an enforceable obligation that requires the financial institution where it has already commenced the business
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	<p>relationship in the circumstances described under criterion 5.16 to terminate it and to consider making a suspicious transaction report.</p> <p><i>Recommendation 6</i></p> <ul style="list-style-type: none"> • It is therefore recommended that authorities in Kenya should introduce an enforceable primary obligation for financial institutions to- <ul style="list-style-type: none"> ➤ put in place appropriate risk management systems to determine whether a potential customer, a customer or the beneficial owner is a PEP. ➤ obtain senior management approval when establishing a business relationship with a PEP. ➤ where a customer has been accepted and the customer or beneficial owner is subsequently found to be or becomes a PEP, obtain senior management approval to continue the relationship. ➤ take reasonable measures to establish the source of wealth and source of funds of customers and beneficial owners identified as PEPs. <p><i>Recommendation 7</i></p> <ul style="list-style-type: none"> • In addition to the normal CDD measures, Kenyan authorities should establish requirements either in law, regulation or other enforceable means for financial institutions to- <ul style="list-style-type: none"> ➤ Gather sufficient information about a respondent institution to understand fully the nature of the respondent's business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subject to a money laundering or terrorist financing investigation or regulatory action ➤ Assess the respondent institution's
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	<p>AML/CFT controls, and ascertain that they are adequate and effective</p> <ul style="list-style-type: none"> ➤ Obtain approval from senior management before establishing new correspondent relationships ➤ Document the respective AML/CFT responsibilities of each institution ➤ Where a correspondent relationship involves the maintenance of “payable-through accounts”, to be satisfied that: <ul style="list-style-type: none"> (a) their customer (the respondent financial institution) has performed all the normal CDD obligations set out in R.5 on those of its customers that have direct access to the accounts of the correspondent financial institution; and (b) the respondent financial institution is able to provide relevant customer identification data upon request to the correspondent financial institution. <p><i>Recommendation 8</i></p> <ul style="list-style-type: none"> • Mobile telephone banking in Kenya is being increasingly used. It is therefore recommended that authorities establish an enforceable obligation for financial institutions to have: <ul style="list-style-type: none"> ➤ 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; ➤ policies and procedures in place to address any specific risks associated with non-face to face business relationships or transactions. These policies and procedures should apply when establishing customer relationships and when conducting ongoing due diligence.
3.3 Third parties and introduced business (R.9)	It is recommended that the authorities should introduce an enforceable obligation for financial institutions that rely on third parties or introducers to

	perform some of the elements of the CDD process, 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.
3.4 Financial institution secrecy or confidentiality (R.4)	It is recommended that the authorities in Kenya should amend section 17 of the POCAMLA by repealing the qualification under section 17(2) of the POCAMLA.
3.5 Record keeping and wire transfer rules (R.10 & SR.VII)	<ul style="list-style-type: none"> It is recommended that the authorities in Kenya should ensure that: <p><i>Recommendation 10</i></p> <ul style="list-style-type: none"> ➤ financial institutions are required to maintain records of the identification data, account files and business correspondence for at least five years following the termination of an account or business relationship (or longer if requested by a competent authority in specific cases upon proper authority). ➤ Financial institutions are required to ensure that all customer and transaction records and information are available on a timely basis to domestic competent authorities upon appropriate authority. <p><i>Special Recommendation VII</i></p> <ul style="list-style-type: none"> ➤ Rules and regulations implementing the requirements for financial institutions under SR.VII are issued; ➤ measures are put into place to effectively monitor the compliance of financial institutions with rules and regulations implementing SR.VII ➤ Criteria 17.1 – 17.4 (in R.17) also apply in relation to the obligations under SR.VII
3.6 Monitoring of transactions and relationships (R.11 & 21)	<ul style="list-style-type: none"> The authorities should implement enforceable obligations in order to comply with the criteria under the FATF Recommendations 11 and 21. These are:

	<p><i>Recommendation 11</i></p> <ul style="list-style-type: none"> ➤ Regulations must be issued for the purposes of section 44(1) of the POCAMLA. ➤ Financial institutions should be required to examine as far as possible the background and the purpose of such transactions and set for their findings in writing. ➤ Financial institutions should be required to keep such findings available for competent authorities and auditors for at least five years. <p><i>Recommendation 21</i></p> <ul style="list-style-type: none"> ➤ 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 countermeasures.
<p>3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)</p>	<p><i>Recommendation 13 & SR IV</i></p> <ul style="list-style-type: none"> • The fact that the financing of terrorism is not a predicate offence to money laundering and not criminalised in Kenya means that suspicious transactions related terrorist financing are not covered for reporting purposes by financing institutions. The authorities should move with speed and take necessary legislative actions that would comprehensively subject the financing of

	<p>terrorism activities to reporting requirements consistent with SR IV of the FATF.</p> <ul style="list-style-type: none"> • For avoidance of doubt, the authorities may when amending POCAMLA consider separating the obligations for financial institutions to pay special attention to complex, large unusual transactions (R.11) and report suspicious transactions (R.13) obligations under section 44 of the Act and create a specific section for each since it appeared during the discussions held onsite that both the authorities and reporting institutions consider the two obligations to mean the same thing. This will assist both the authorities and reporting institutions to effectively implement the specific provisions in the Act in a manner consistent with the FATF standards in the early stages of implementation of the POCAMLA. • The other designated categories of predicate offences as described under section 2.1 of this report must also be criminalised in Kenya. <p><i>Recommendation 14</i></p> <ul style="list-style-type: none"> • Section 8 of the POCAMLA should be amended to ensure that the tipping-off is prohibited as required under the FATF standard. • The legal protection of identity of reporting staff is weakened by the exceptions requiring them to appear as witnesses in court proceedings if the courts consider significant to fully serve justice. This may discourage reporting of suspicious transactions by sowing seeds of fear amongst the reporting entities particularly given the infancy of the comprehensive reporting regime under the new Act. It is therefore recommended that the identity of reporting persons be legally protected without making exceptions that may compromise the effectiveness of the reporting regime. For the avoidance of doubt, the authorities should consider providing a definition of a “witness”. <p><i>Recommendation 25</i></p>
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	<ul style="list-style-type: none"> • The Centre should provide guidelines that will assist financial institutions to report STRs. Such guidelines should take into account the diversity of the reporting institutions under the Act. • The Centre should provide financial institutions required to report STRs with adequate and appropriate feedback taking into account the FATF Best Practice Guidelines on Providing Feedback to Reporting Financial Institutions and Other Persons.
3.8 Internal controls, compliance, audit and foreign branches (R.15 & 22)	<ul style="list-style-type: none"> • The POCAMLA which applies to all reporting entities has a provision on internal control and internal reporting procedures whose scope is limited to the reporting obligation. The Act does not address all the requirements under Recommendation 15 and application of AML/CFT requirements in respect of foreign subsidiaries of financial institutions. It is therefore recommended that appropriate provision should be made in law, regulation or other enforceable means to require financial institutions to do the following: <p><i>Recommendation 15</i></p> <ul style="list-style-type: none"> ➤ Establish and maintain internal AML/CFT procedures, policies and controls covering customer due diligence, record retention, detection of unusual and suspicious transactions; ➤ Communicate the procedures, policies and controls to employees; ➤ Develop appropriate AML/CFT compliance arrangements, including the power of a compliance officer or other appropriate staff to have timely access to relevant data, records and information; ➤ Maintain an adequately resourced and independent audit function to test compliance with AML/CFT procedures, policies and controls; ➤ Establish ongoing employee training to keep them informed of new developments

	<p>on ML and FT techniques, methods and trends and to explain to them all aspects of AML/CFT laws and obligations;</p> <ul style="list-style-type: none"> ➤ Develop and implement screening procedures to ensure high standards when hiring employees; and <p><i>Recommendation 22</i></p> <ul style="list-style-type: none"> ➤ Require their foreign branches and subsidiaries to observe AML/CFT measures in Kenya and FATF Recommendations to the extent allowed by laws in foreign countries; and ➤ Require financial institutions to inform supervisory authorities in Kenya when their foreign branches or subsidiaries are unable to observe appropriate AML/CFT measures because they are prohibited by laws or regulations in the foreign countries.
3.9 Shell banks (R.18)	<ul style="list-style-type: none"> • It is recommended that an obligation must be established through law, regulation or other enforceable means whereby- ➤ Financial institutions in Kenya should not be permitted to enter into correspondent banking relationships with shell banks; and ➤ Financial institutions should be required to satisfy themselves that their respondent financial institutions do not permit their accounts to be used by shell banks.
3.10 The supervisory and oversight system - competent authorities and SROs. Role, functions, duties and powers (including sanctions) (R.23, 29, 17 & 25)	<ul style="list-style-type: none"> • In order to ensure that financial institutions in Kenya are subject to adequate AML/CFT regulation and supervision, authorities should consider the following recommendations: <p><i>General</i></p> <ul style="list-style-type: none"> ➤ appropriate measures should be taken to make the Centre operational as soon as possible. ➤ Financing of terrorism should be criminalised and financial institutions

	<p>subjected to appropriate measures to combat it.</p> <p><i>Recommendation 23</i></p> <ul style="list-style-type: none"> ➤ Appropriate measures should be taken to remedy the deficiencies in the AML measures (as discussed in the report) that financial institutions are required to implement. ➤ The Centre should develop and put in place an AML/CFT compliance monitoring programme, including an onsite inspection programme, to ensure that financial institutions are effectively complying with AML obligations under the POCAMLA. ➤ The non-banking financial laws should be amended to establish measures to prevent criminals or their associates from holding or being the beneficial owner of a significant interest in a financial institution. ➤ The insurance law should be amended to require the directors and the senior officers of the insurers to satisfy the integrity requirement of the fit and proper test. ➤ Establish the requirement for the licensing or registration of independent MVT service providers. ➤ Establish the obligation for non-deposit taking micro finance institutions to be licensed in Kenya. ➤ The Retirement Benefit Authority should enforce section 22 of the Retirement Benefits Act which requires all administrators, custodians and fund managers to be registered by the Authority. <p><i>Recommendation 25</i></p> <ul style="list-style-type: none"> ➤ Guidelines should be established by the Centre to assist financial institutions implement and comply with their AML/CFT requirements under the
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	<p>POCAML.</p> <ul style="list-style-type: none"> ➤ The Guidelines should also be issued to provide reporting entities with a description of ML and FT techniques and methods. ➤ The AML Guideline issued by the Central Bank of Kenya and the draft guidelines of the CMA should be harmonised with the POCAML. Further, to avoid duplication of functions, the Centre and the financial supervisors should agree on the authority which will issue guidelines for AML/CFT purposes. <p><i>Recommendation 29</i></p> <ul style="list-style-type: none"> ➤ Ensure that the scope of the onsite inspections would include a review of policies, procedures, books and records, and extend to sample testing. ➤ Amend the provisions of the POCAML to provide the Centre with adequate powers to compel production or to obtain access to all records, documents or information relevant to monitoring compliance outside the scope of an onsite inspection. <p><i>Recommendation 30</i></p> <ul style="list-style-type: none"> ➤ The centre should be adequately staffed and funded to undertake its AML supervisory function under the POCAML. ➤ Staff of supervisory authorities should be provided with adequate and relevant training for combating money laundering and the financing of terrorism.
<p>3.11 Money value transfer services (SR.VI)</p>	<ul style="list-style-type: none"> • Financial institutions which provide MVT services are licensed by the Central Bank of Kenya and are subject to on-site inspections. However, with respect to other MVT service operators outside the purview of the Central Bank, the authorities should consider the following recommendations:

	<ul style="list-style-type: none"> ➤ A law to provide for the regulation and supervision of MVT service operators should be developed. ➤ The law should require MVT service operators to be licensed or registered with a competent authority. ➤ The law should provide for effective and dissuasive sanctions for any natural or legal person that provides a MVT service without being duly licensed or registered by a competent authority. ➤ Mobile phone operators that provide mobile payment services should be subject to AML/CFT requirements. ➤ A system for monitoring all MVT service operators to ensure they comply with the FATF Recommendations should be developed. ➤ Enforceable means should be developed that require each licensed or registered MVT service operator to maintain a current list of its agents which must be made available to the designated competent authority. ➤ The recommendation in this report on the sanctions framework in respect of FATF Recommendation 17 should be implemented.
4. Preventive Measures – Non-Financial Businesses and Professions	
4.1 Customer due diligence and record-keeping (R.12)	<ul style="list-style-type: none"> • For the successful combating of money laundering and terrorist financing, Kenyan authorities should as soon as possible bring in lawyers, notaries and other independent legal professionals as well as Trust and Company Service Providers within the definition of reporting institutions. • Authorities in Kenya should take appropriate measures to ensure that the deficiencies in the

	<p>AML legal framework regarding recommendations 5, 6 and 8 to 11 as discussed in section 3 of this report are remedied expeditiously.</p> <ul style="list-style-type: none"> • Authorities in Kenya should ensure that the reporting obligations of the accountants under the POCAMLA should also apply when organising contributions for the creation, operation or management of legal arrangements. • It is recommended that the authorities should actively engage with the DNFBP sectors to encourage and assist in the rapid development of a compliance culture with AML requirements.
4.2 Suspicious transaction reporting (R.16)	<ul style="list-style-type: none"> • For the successful combating of money laundering and terrorist financing, Kenyan authorities should as soon as possible bring in lawyers, notaries and other independent legal professionals as well as Trust and Company Service Providers within the definition of reporting institutions. • Authorities in Kenya should take appropriate measures to ensure that the deficiencies in the AML legal framework regarding recommendations 13, 14, 15 and 21 as discussed in section 3 of this report are remedied expeditiously. • It is recommended that the authorities should actively engage with the DNFBP sectors to encourage and assist in the rapid development of a compliance culture with AML requirements.
4.3 Regulation, supervision and monitoring (R.24-25)	<ul style="list-style-type: none"> • The authorities in Kenya should consider implementing the following recommendations: <ul style="list-style-type: none"> ➤ Financing of terrorism should be criminalised and DNFBP should be subject to measures to combat financing of terrorism. ➤ The application of the fit and proper test under the BLG Act should be extended to enable the Board to prevent criminals or their associates from being the beneficial

	<p>owner of a significant controlling interest in a casino.</p> <ul style="list-style-type: none"> ➤ Lawyers, notaries, independent legal professions and TCSPs should be required to comply with the AML obligations under the POCAMLA. ➤ Appropriate measures must be taken to ensure that the Centre becomes operational as soon as possible. ➤ The Centre should be provided with sufficient technical and other resources to perform its functions. ➤ Actions, as recommended, must be taken to remedy the deficiencies identified under Recommendations 17 and 29. ➤ AML/CFT guidelines should be issued to assist DNFBPs to implement and comply with their respective AML/CFT requirements.
4.4 Other non-financial businesses and professions (R.20)	<ul style="list-style-type: none"> • It is recommended that the authorities in Kenya should consider applying Recommendations 5, 6, 8-11, 13-15, 17 and 21 to non-financial businesses and professions (other than DNFBP) that are at risk of being misused for ML and TF. • Kenyan authorities should consider enacting a national payment system law to provide a regulatory and supervisory framework for the payment systems.
5. Legal Persons and Arrangements & Non-Profit Organisations	
5.1 Legal Persons – Access to beneficial ownership and control information (R.33)	<ul style="list-style-type: none"> • According to ROC most of the applicants use lawyers and certified public secretaries as agents for incorporating their companies. However, lawyers and certified public secretaries are not captured as reporting persons under the POCAMLA. Authorities must ensure that lawyers and certified public secretaries who act as company registration agents are included as reporting persons under the POCAMLA and

	<p>that they adequately implement and comply with AML/CFT requirements.</p> <ul style="list-style-type: none"> • Very limited information is available on corporate directors which may also be a company incorporated outside of Kenya. It is recommended that measures should be put into place to require the identification of the beneficial owner of corporate directors. • Further, mechanisms should be put in place to determine the identity of the beneficial owner where nominee or corporate shareholders are used. • Measures should be put in place to curb the misuse of share warrants. For example, the authorities may require that the owners of the share warrants should be known to the company and that this information should be made readily available to the investigatory authorities upon request. • The ROC should expedite the implementation of electronic filing system for keeping, maintaining, preserving and ensuring timely access to its records.
<p>5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34)</p>	<ul style="list-style-type: none"> • The authorities should consider putting in place measures to ensure more transparency concerning the beneficial ownership and control of trusts to prevent the unlawful use of trusts for money laundering and terrorist financing purposes. • There is no mechanism in place for accessing beneficial ownership information and control of trusts. 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. • Authorities must ensure that lawyers and other persons who provide trusteeship services are captured under the definition of reporting persons under the POCAMLA and that they

	adequately implement and comply with AML/CFT requirements.
5.3 Non-profit organisations (SR.VIII)	It is recommended that the authorities in Kenya should expeditiously take necessary steps to ensure that the NPO sector is subject to CFT obligations consistent with Special Recommendation VIII.
6. National and International Co-operation	
6.1 National co-operation and coordination (R.31)	<ul style="list-style-type: none"> • The authorities in Kenya should take appropriate measures to expedite the coming into operation of the FIU. • Effective mechanisms should be put into place to ensure that the FIU is able to cooperate and where appropriate, coordinate domestically with policy makers, law enforcement, supervisors and other competent authorities concerning the development and implementation of policies and activities to combat ML and TF. • The authorities in Kenya should consider putting into place appropriate mechanisms for consultation with competent authorities, the financial sector and other sectors (including DNFBP) that are subject to AML/CFT laws, regulations, guidelines or other measures.
6.2 The Conventions and UN Special Resolutions (R.35 & SR.I)	<ul style="list-style-type: none"> • It is recommended that the authorities in Kenya should consider enacting laws criminalizing Terrorist Financing to enable implementation of Articles 2-18 of the TF Convention. • Kenya should consider enacting laws that criminalize participation in an organized criminal group⁷⁴ to enable it to implement the provisions of Articles 11,12,13,15 of the Palermo Convention. • The Authorities should clarify the legal position on confiscation of property of corresponding value in order to meet the requirements of

⁷⁴ This recommendation has already been implemented with the enactment of the Prevention of Organised Crimes Act 2010 after the onsite visit. The Act became effective on 23 September 2010.

	<p>Article 12(1)(a) of the Palermo Convention.</p> <ul style="list-style-type: none"> • It is recommended that the authorities should consider amending the schedule of extraditable offences to the Extradition (Commonwealth Countries) Act to include the offence of corruption. • It is recommended that Kenya considers coming up with comprehensive legislation on Mutual Legal Assistance which would cover the full scope of provisions under Article 18 of the Palermo Convention. • Kenya is encouraged to amend the current laws relating to gathering of evidence during criminal investigations to specifically provide for special investigative techniques such as controlled delivery. • There is need for Kenya to enact legislation which provides for assistance to and protection of victims which would enable it to implement the requirements of Article 25 of the Palermo Convention. • The Kenyan Authorities should come up with a national training programme for law enforcement, prosecutors and other designated authorities dealing with prevention, detection and control of the offences prescribed under the Palermo Convention. • Kenya should consider enacting laws to give effect to the freezing mechanisms under UNSCRs 1267 and 1373. • It is recommended that the Authorities consider ratifying the outstanding UN Conventions and Protocols annexed to the UN Convention for the Suppression of the Financing of Terrorism.
<p>6.3 Mutual Legal Assistance (R.36-38 & SR.V)</p>	<p><i>Statistics</i></p> <ul style="list-style-type: none"> • The authorities are encouraged to maintain comprehensive statistics on the number of mutual legal assistance requests received, the nature of such requests, date of acknowledgment of receipt to the requesting

	<p>jurisdiction, the number of requests acceded to, number of requests rejected and reasons where possible, time taken to respond to the requests acceded to and time taken to dispatch the response.</p> <p>Recommendation 36</p> <ul style="list-style-type: none"> • The authorities are encouraged to have comprehensive legislation on mutual legal assistance, clearly defining the designated competent authority which is responsible for mutual legal assistance, the powers of the competent authority and conditions under which requests for such assistance can be acceded to or denied. • The Authorities are also encouraged to criminalise terrorist financing and the other outstanding predicate offences so that the jurisdiction is able to cover a wider range of offences when offering mutual legal assistance. • It is recommended that the Attorney General's (DPP's) Office puts in place effective mechanisms to ensure that requests for mutual legal assistance are dealt with efficiently, in a timely, constructive and effective manner. • The authorities should consider amending the Foreign Judgments (Reciprocal Enforcement) Act so that foreign judgments involving fiscal matters can also be enforced with little impediments. <p>Recommendation 37</p> <ul style="list-style-type: none"> • The requirement for dual criminality limits the mutual legal assistance which can be offered particularly on the offences which have not yet been criminalised such as but not limited to terrorist financing, human trafficking⁷⁵, smuggling of migrants, racketeering and participation in an organised criminal group⁷⁶. • Absence of comprehensive legislation on mutual
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⁷⁵ appropriate wording to be inserted

⁷⁶ same as above.

	<p>legal assistance makes it difficult to determine the basis upon which the Competent Authority would use its discretion in acceding to requests where the dual criminality requirement has not been met.</p> <p>Recommendation 38</p> <ul style="list-style-type: none"> • It is recommended that the authorities should put in place mechanisms to ensure that there is timeliness in attending to requests for provisional measures to compliment the procedures set out in the POCAMLA and the NDPSC Act. • There should be clear provisions providing for forfeiture of property of corresponding value, alternatively the definition of “tainted property” in section 2 of the POCAMLA should be amended to include property of corresponding value. The authorities should consider amending s29 of the Penal Code to cover all offences. • It is recommended that the authorities should consider putting in place mechanisms to coordinate seizure, freezing and confiscation actions with other countries. <p>SR V</p> <ul style="list-style-type: none"> • Terrorist Financing is 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 matters. It is therefore recommended that Kenya should expedite the processes for the criminalisation of TF in line the FATF standards.
6.4 Extradition (R.39, 37 & SR.V)	<ul style="list-style-type: none"> • It is recommended that the authorities consider coming up with legislation criminalising terrorist financing offences so that the offences also become extraditable offences. • The authorities are encouraged to maintain comprehensive statistics on extradition requests received, acceded to, refused and the time taken to process the granted requests. Measures should be taken by the authorities to criminalise predicate offences which fall under the FATF

	<p>Glossary which are not yet criminalised so that the offences can also be included in the schedules of extraditable offence.</p>
<p>6.5 Other Forms of Co-operation (R.40 & SR.V)</p>	<p>In order to enhance regime to enable the competent authorities in Kenya to provide the widest range of international cooperation to foreign counterparts in a rapid, constructive and effective manner it is recommended that the authorities in Kenya should-</p> <p><i>Recommendation 40</i></p> <ul style="list-style-type: none"> • Take such measures as are required to ensure that the FIU becomes operational as soon as possible. • Review and amend the powers of the IRA and RBA to enable them to conduct inquiries on behalf of foreign counterparts. • The CBK, CMA and the RBA should be given adequate statutory powers to conduct investigations. The powers of the IRA to investigate as provided under section 9 of the Insurance Act should be clarified to ensure that they are able to conduct investigations on behalf of foreign counterparts. • The confidentiality provisions under the CM Act and the Insurance Act should be reviewed to clearly provide for exceptions to enable the CMA and the IRA to exchange confidential information with foreign counterparts. • With respect to information which is received by competent authorities outside the scope of MOU or bilateral agreements, appropriate controls and safeguards should be put in place to ensure that information received by competent authorities is used only in an authorised manner. <p><i>Special Recommendation V</i></p> <ul style="list-style-type: none"> • Take such measures as are necessary to expedite the criminalisation of TF in Kenya and should ensure that Recommendation 40 also apply to

	<p>the obligations under SRV.</p> <p><i>Recommendation 32</i></p> <ul style="list-style-type: none"> • Competent authorities should put mechanisms in place to ensure that:- <ul style="list-style-type: none"> - Financial supervisors maintain comprehensive annual statistics on matters of international requests that they make and receive, relating to or including AML/CFT, including whether the request was granted or refused. - The Centre maintains comprehensive annual statistics on formal requests for assistance it makes or receives, including whether the request was granted or refused and on spontaneous referrals made by the Centre to foreign authorities.
7. Other Issues	
7.1 Resources and statistics (R. 30 & 32)	See above
7.2 Other relevant AML/CFT measures or issues	
7.3 General framework – structural issues	

Table 3: Authorities' Response to the Evaluation (if necessary)

Relevant sections and paragraphs	Country Comments

ANNEXES

Annex 1: Details of all bodies met on the on-site mission

Ministries, other government authorities or bodies

1. Anti-Narcotics Police Unit
2. Banking Fraud and Investigations Department of the Police
3. Betting Control and Licensing Board
4. Capital Markets Authority
5. Central Bank of Kenya
6. Communications Commission of Kenya
7. Criminal Investigation Department of the Kenya Police
8. Department of Immigration
9. Estate Agents Registration Board
10. Insurance Regulatory Authority
11. Kenya Anti-Corruption Commission
12. Kenya National Task Force on AML/CFT
13. Kenya Revenue Authority
14. Ministry of Environment and Natural Resources
15. Ministry of Foreign Affairs and International Cooperation
16. National Counter Terrorism Centre
17. National Security Intelligence Services
18. NGO Coordination Board
19. Registrar of Companies
20. Retirement Benefits Authority

Private sector representatives

21. Association of Kenya Insurers
22. Association of Microfinance Institutions
23. Association of Stockbrokers
24. British American Insurance
25. Commercial Bank of Africa
26. Institute of Certified Public Accountants of Kenya
27. Kenya Bankers Association
28. Law Society of Kenya

Annex 2: Copies of key laws, regulations and other measures
THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING
ACT, 2009

ARRANGEMENT OF SECTIONS

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2—Interpretation.

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4—Acquisition, possession or use of proceeds of crime.

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6—Defence.

7—Financial promotion of an offence.

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9—Misrepresentation.

10—Malicious reporting

11—Failure to comply with the provisions of this Act.

12—Conveyance of monetary instruments to or from Kenya.

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15—Hindering a person in performance of functions under this Act.

16—Penalties.

17—Secrecy obligations overridden.

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20—Protection of information and informer

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22—Headquarters.

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24—Functions and powers of the Centre.

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29—Delegation by the Director.

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32—Oath of confidentiality.

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46—Obligation to establish and maintain customer records.

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55—Cooperation with the Agency.

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SECOND SCHEDULE – Conveyance of Monetary Instruments to or from Kenya.

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SIXTH SCHEDULE – Consequential Amendments.

AN ACT of Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I □ PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Proceeds of Crime and Anti-Money Laundering Act, 2009 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint:

Provided that such date shall not exceed six months after the date of assent.

Interpretation.

2. In this Act, unless the context otherwise requires—

“account” includes any facility or arrangement by which a reporting institution does any one or more of the following—

- (a) accepts deposits of monetary instruments;
- (b) allows withdrawals of monetary instruments or transfers into or out of the account;
- (c) pays cheques or payment orders drawn on a financial institution or collects cheques or payment orders on behalf of any person;
- (d) supplies a facility or arrangement for a safety or fixed term deposit box;

“accounting officer” means an accounting officer appointed under section 17 of the Government Financial Management Act, 2004;

“affected gift” means any gift made by the defendant at any time, if it was a gift of property -

- (a) received by that defendant in connection with an offence committed by him or any other person; or
- (b) any part thereof which, directly or indirectly represents, in that defendant’s hands, the property which that person received in that connection with an offence:

Provided that any such gift was made on or after the commencement of this Act;

“Agency” means the Assets Recovery Agency established under section 53(1);

“Agency Director” means the Director of the Agency appointed under section 53(2);

“authorised officer” means—

- (a) a police officer;
- (b) an officer of the department of the Kenya Revenue Authority for the time being responsible for matters relating to customs;
- (c) Agency Director; or
- (d) any person or class of persons designated by the Minister as an authorised officer to perform any function under this Act;

“Board” means the Anti-Money Laundering Advisory Board established under section 49;

“Centre” means the Financial Reporting Centre established under section 21;

“confiscation order” means an order referred to in section 61;

“court” means a court of competent jurisdiction;

“customs” or “the customs” means the customs department of the Kenya Revenue Authority;

“data” means representations, in any form, of information or concepts;

“defendant” means a person against whom a prosecution for an offence has been instituted, irrespective of whether that person has been convicted or not;

“designated non-financial businesses or professions” means–

- (a) casinos (including internet casinos);
- (b) real estate agencies;
- (c) dealing in precious metals;
- (d) dealing in precious stones;
- (e) accountants who are sole practitioners or are partners in their professional firms;
- (f) non-governmental organizations;
- (g) such other business or profession in which the risk of money laundering exists as the Minister may, on the advice of the Centre, declare;

“Deputy Director” means the Deputy Director appointed under section 25;

”Director” means the Director appointed under section 25;

“document” means any record of information, and includes,–

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols, or perforations having meaning for persons qualified to interpret them;
- (c) anything from which sounds, images, writings or data can be retrieved, with or without the aid of anything else; or
- (d) a map, plan, drawing, photograph, video tape or similar thing;

“estate agency” in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, means doing any of the following acts–

- (a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or
- (b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;

“financial institution” means any person or entity, which conducts as a business, one or more of the following activities or operations–

- (a) accepting deposits and other repayable funds from the public;
- (b) lending, including consumer credit, mortgage credit, factoring, with or without recourse, and financing of commercial transactions;
- (c) financial leasing;
- (d) transferring of funds or value, by any means, including both formal and informal channels;
- (e) issuing and managing means of payment (such as credit and debit cards, cheques, travellers' cheques, money orders and bankers' drafts, and electronic money);
- (f) financial guarantees and commitments;

- (g) trading in–
 - (i) money market instruments, including cheques, bills, certificates of deposit and derivatives;
 - (ii) foreign exchange;
 - (iii) exchange, interest rate and index funds;
 - (iv) transferable securities; and
 - (v) commodity futures trading;
- (h) participation in securities issues and the provision of financial services related to such issues;
- (i) individual and collective portfolio management;
- (j) safekeeping and administration of cash or liquid securities on behalf of other persons;
- (k) otherwise investing, administering or managing funds or money on behalf of other persons;
- (l) underwriting and placement of life insurance and other investment related insurance; and
- (m) money and currency changing;

“fixed date”, in relation to a defendant against whom–

- (a) a prosecution for an offence has been instituted, means the date on which such prosecution has been instituted; or
- (b) a restraint order has been made means the date of such restraint order, whichever is the earlier date;

“Fund” means the Criminal Assets Recovery Fund established under section 109;

“inspector” means a person designated as such under this Act;

“Kenya Revenue Authority” means the Kenya Revenue Authority established by section 3 of the Kenya Revenue Authority Act;

“Minister” means the minister for the time being responsible for matters relating to finance;

“monetary instruments” means coins and paper currency of Kenya or of a foreign country designated as legal tender and which is customarily used and accepted as a medium of exchange in the country of issue;

“money laundering” means an offence under any of the provisions of sections 3, 4 and 7;

“offence” in this Act, means an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya;

“person” means any natural or legal person;

“proceeds of crime” means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the

offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property from the time the offence was committed;

“property” means 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;

“realizable property” means property referred to in section 57;

“regulations” means regulations made under this Act;

“reporting institution” means a financial institution and designated non-financial business and profession;

“restraint order” means an order made under section 68;

“supervisory body” means a functionary or institution specified in the First Schedule, or such other functionary or institution as may be prescribed by the Minister;

“tainted property” in relation to an offence means—

- (a) any property used in, or in connection with, the commission of the offence;
- (b) any proceeds of the offence; or
- (c) any property in Kenya which is the proceeds of a foreign offence in respect of which an order may be registered, and when used without reference to a particular offence means tainted property in relation to an arrestable offence.

PART II MONEY LAUNDERING AND RELATED OFFENCES

Money laundering

3. A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
 - (b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—
 - (i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
 - (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or
 - (iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,
- commits an offence.

Acquisition, possession or use of proceeds of crime

4. A person who—

- (a) acquires;
 - (b) uses; or
 - (c) has possession of,
- property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by another person, commits an offence.

Failure to report suspicion regarding proceeds of crime

- 5.** A person who wilfully fails to comply with an obligation contemplated in section 44(2) commits an offence.

Defence

- 6.** If a person is charged with committing an offence under sections 3, 4 or 5, that person may raise as a defence the fact that he had reported a suspicion under the terms and conditions set forth in section 44 or, if the person is an employee of a reporting institution, that he has reported information pursuant to section 47(a).

Financial promotion of an offence

- 7.** A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

Tipping off

- 8.** (1) A person who—
- (i) knows or ought reasonably to have known that a report under section 44 is being prepared or has been or is about to be sent to the Centre; and
 - (ii) discloses to another person information or other matters which are likely to prejudice any investigation of an offence or possible offence of money-laundering,

commits an offence.

- (2) In proceedings for an offence under this section, it is a defence to prove that the person did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice any investigation of an offence or possible offence of money-laundering.

Misrepresentation

- 9.** A person who knowingly makes a false, fictitious or fraudulent statement or representation, or makes, or provides, any false document, knowing the same to contain any false, fictitious or fraudulent statement or entry, to a reporting institution, or to a supervisory body or to the Centre, commits an offence.

Malicious Reporting

- 10.** Any person who wilfully gives any information to the Centre or an authorised officer knowing such information to be false commits an offence.

Failure to comply with the provisions of this Act

11. (1) A reporting institution that fails to comply with any of the requirements of sections 44, 45, and 46, or of any regulations, commits an offence.

(2) In determining whether a person has complied with any requirement of the provisions referred to in subsection (1), the court shall have regard to all the circumstances of the case, including such custom and practice as may, from time to time, be current in the relevant trade, business, profession or employment, and may take account of any relevant guidance adopted or approved by a public authority exercising supervisory functions in relation to that person, or any other body that regulates or is representative of the trade, business, profession or employment carried on by that person.

Conveyance of monetary instruments to or from Kenya

12 (1) A person intending to convey monetary instruments in excess of the amount prescribed in the Second Schedule to or from Kenya shall, before so doing, report the particulars concerning that conveyance to a person authorised by the regulations for that purpose.

(2) A person authorised to receive a report made under subsection (1) shall, without delay, send a copy of the report to the Centre.

(3) A person who wilfully fails to report the conveyance of monetary instruments into or out of Kenya, or materially misrepresents the amount of monetary instruments reported in accordance with the requirements of subsection (1) commits an offence.

(4) Any monetary instrument used in a suspected violation of subsection (3), or which an authorised officer has reasonable grounds to suspect is tainted property, may be temporarily seized by an authorised officer for as long as is necessary to obtain a court order under section 68 or 82, but not later than five days.

(5) An authorised officer making a temporary seizure under subsection (4) shall give the person from whom the monetary instruments are seized—

- (a) a receipt specifying—
 - (i) the name, agency, rank of the seizing officer;
 - (ii) contact information for that officer and agency;
 - (iii) time, date and location of seizure;
 - (iv) description (including serial numbers) of the value of and types of instruments seized; and
- (b) a formal notice of the authorised officer's intent to initiate forfeiture proceedings under this Act against the seized monetary instruments.

(6) An authorised officer, other than Agency Director, shall immediately but not later than five days surrender monetary instruments seized under subsection (4) to the Agency Director in such manner as the Agency Director may direct.

(7) If an authorised officer fails to obtain an order under section 68 or 82 against the temporarily seized monetary instruments within five days from the date of seizure pursuant to subsection (4), then, unless that period is otherwise extended by the court, the monetary instruments shall be returned forthwith to the person from whom it was taken.

Misuse of information

13 (1) A person who knows or ought reasonably to have known—

- (a) that information has been disclosed under the provisions of Part II; or
- (b) that an investigation is being, or may be, conducted as a result of that disclosure,

and directly or indirectly alerts, or brings information to the attention of another person who will or is likely to prejudice the investigation, commits an offence.

Failure to comply with order of court

14. A person who intentionally refuses or fails to comply with an order of a court made under this Act, commits an offence.

Hindering a person in performance of functions under this Act

15. A person who hinders a receiver, a police officer or any other person in the exercise, performance or carrying out of their powers, functions or duties under this Act, commits an offence.

Penalties

16 (1) A person who contravenes any of the provisions of sections 3, 4, or 7 is on conviction liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and
- (b) in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.

(2) A person who contravenes any of the provisions of sections 5, 8 or 13 is on conviction liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding seven years, or a fine not exceeding two million, five hundred thousand shillings, or to both and
- (b) in the case of a body corporate, to a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher.

(3) A person who contravenes the provisions of section 12(3) is on conviction, liable to a fine not exceeding ten percent of the amount of the monetary instruments involved in the offence.

(4) A person who contravenes any of the provisions of sections 9, 10 or 14 is on conviction liable—

- (a) in the case of a natural person, to imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both, and
- (b) in the case of a body corporate, to a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher.

(5) A person who contravenes the provisions of section 11(1) is on conviction liable to a fine not exceeding ten percent of the amount of the monetary instruments involved in the offence.

(6) Where any offence under this Part is committed by a body corporate with the consent or connivance of any director, manager, secretary or any other officer of the body corporate, or any person purporting to act in such capacity, that person, as well as the body corporate, shall be prosecuted in accordance with the provisions of this Act.

Secrecy obligations overridden

17 (1) The provisions of this Act shall override any obligation as to secrecy or other restriction on disclosure of information imposed by any other law or otherwise.

(2) 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:

Provided that the information being sought under subsection (1) relates to commission of or attempt to commit an offence under this Act.

Client advocate relationship

18 (1) Notwithstanding the provisions of section 17, nothing in this Act shall affect or be deemed to affect the relationship between an advocate and his client with regard to communication of privileged information between the advocate and the client.

(2) The provisions of subsection (1) shall only apply in connection with the giving of advice to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client.

(3) Notwithstanding any other law, a Judge of the High Court may, on application being made to him in relation to an investigation under this Act, order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation.

(4) Nothing in subsection (3) shall require an advocate to comply with an order under that subsection to the extent that such compliance would be in breach of subsection (2).

Immunity where actions are exercised in good faith

19. A suit, prosecution or other legal proceedings shall not lie against any reporting institution or Government entity, or any officer, partner or employee thereof, or any other person in respect of anything done by or on behalf of that person with due diligence and in good faith, in the exercise of any power or the performance of any function or the exercise of any obligation under this Act.

Protection of information and informers

20. (1) Where any information relating to an offence under this Act is received by the Centre or an authorised officer, the information and the identity of the person giving the information shall be kept confidential.

(2) Subsection (1) shall not apply to information and identity of a person giving the information-

- (a) where it is for the purposes of assisting the Centre or the authorised officer to carry out their functions as stated under this Act; or
- (b) with regard to a witness in any civil or criminal proceedings—
 - (i) for the purposes of this Act; or
 - (ii) where the court is of the opinion that justice cannot fully be done between the parties without revealing the disclosure or the identity of any person as the person making the disclosure.

PART III FINANCIAL REPORTING CENTRE

Establishment of a Financial Reporting Centre

21. There is established a centre to be known as the Financial Reporting Centre, (hereinafter referred to as the “Centre”) which shall be a body corporate, with perpetual succession and a common seal and shall be capable, in its corporate name, of–

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property;
- (c) entering into contracts;
- (d) doing or performing such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

Headquarters

22 The headquarters of the Centre shall be in Nairobi.

Objectives of the Centre

23 (1) The principal objective of the Centre is to assist in the identification of the proceeds of crime and the combating of money laundering.

- (2) Without prejudice to subsection (1), the Centre shall–
 - (a) 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;
 - (b) exchange information with similar bodies in other countries regarding money laundering activities and related offences; and
 - (c) ensure compliance with international standards and best practice in anti-money laundering measures.

Functions and powers of the Centre

24. The Centre–

- (a) shall receive and analyse reports of unusual or suspicious transactions made by reporting institution under section 11 and all reports made under section 44;
- (b) shall send reports received under this Act to the appropriate law enforcement authorities or any other appropriate supervisory body for further handling if, having considered the report, the Director also has reasonable grounds to suspect that the transaction is suspicious;
- (c) may, at any time, cause an inspection to be made by an inspector authorised by the Director in writing and the inspector may enter the premises of any reporting institution during ordinary business hours to inspect any documents kept under the requirements of this Act, and ask any question relating to the documents, make notes and take copies of the whole or any part of the documents;
- (d) shall send to the appropriate law enforcement authorities or supervisory body any information derived from an inspection carried out pursuant to paragraph (c), if that inspection gives the Director reasonable grounds to suspect that a transaction involves proceeds of crime or money laundering;
- (e) may instruct any reporting institution to take such steps as may be appropriate to facilitate any investigation undertaken or to be undertaken by the Centre, including providing documents and other relevant information;

- (f) may compile statistics and records, disseminate information within Kenya or elsewhere, and make recommendations arising out of any information received, issue guidelines to reporting institution and advise the Minister;
- (g) shall design training requirements and may provide such training for any reporting institution in respect of transactions, record-keeping and reporting obligations in accordance with the provisions of this Act;
- (h) may consult with any relevant person, institution or organization for the purpose of exercising the powers or duties under this Act;
- (i) may, from time to time, publish in the Gazette such information as may be prescribed by the Minister;
- (j) shall create and maintain a database of all reports of suspicious transactions, related Government information and such other materials as the Director may from time to time determine to be relevant to the work of the Centre;
- (k) may provide information relating to the commission of an offence to any foreign financial intelligence unit or appropriate foreign law enforcement authority, subject to provisions of this Act and any conditions as may be considered appropriate by the Director;
- (l) 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 considers necessary or desirable for the discharge or performance of the functions of the Centre:
 Provided that the Director is satisfied, on a case by case basis, that the foreign financial intelligence unit has given appropriate undertakings-
 - (i) for protecting the confidentiality of anything communicated to it; and
 - (ii) for controlling the use that will be made of that information including an undertaking that it will not be used as evidence in any proceedings;
- (m) shall draft the regulations required by this Act, in consultation with the Board, for submission to the Minister for his approval, prior to publication in the Gazette;
- (n) shall set anti-money laundering policies in consultation with the Board;
- (o) shall maintain proper books of accounts;
- (p) shall engage in any lawful activity, whether alone or together with any other organization in Kenya or elsewhere, aimed at promoting its objectives;
- (q) shall perform such other functions in relation to money laundering as the Minister may direct; and
- (r) shall have all the powers necessary or expedient for the proper performance of its functions.

Appointment of Director and Deputy Director

25 (1) There shall be a Director and a Deputy Director of the Centre.

(2) The Director and the Deputy Director shall be fit, competent and proper persons, recommended by the Board and approved by the National Assembly for appointment to their respective positions.

(3) On approval of a person by the National Assembly under subsection (2), the Minister shall appoint that person to the office in respect of which the approval was given.

(4) A person shall not be appointed as a Director or a Deputy Director unless that person

- (a) holds a degree in law, economics or finance from a recognised institution;
- (b) has at least seven years work experience in the relevant field; and
- (c) meets such other requirements that may be prescribed by the Board.

- (5) The persons appointed as the Director and the Deputy Director shall hold office—
- (a) for a term of four years and three years, respectively, subject to renewal for one further term of four years and three years, respectively; and
 - (b) on such terms and conditions as may be determined by the Board and set out in the instrument of appointment which shall include specific and measurable performance targets.
- (6) The provisions of subsection (3) shall apply to the renewal of an appointment under subsection (5) (a).

Resignation of Director or Deputy Director

26 (1) The Director or the Deputy Director may resign by a written resignation addressed to the Minister.

(2) A resignation is effective upon being received by the Minister or by a person authorized by the Minister to receive it.

Removal from office

27 (1) The Minister may, in consultation with the Board, remove the Director or the Deputy Director from office on the grounds of gross misconduct, mental or physical incapacity or failure to satisfy the terms and conditions of service set forth in section 25(5)(b), or

- (a) where there is proof of a financial conflict of interest with any reporting institution;
- (b) if he is adjudged bankrupt or enters into a composition or scheme of arrangement with his creditors; or
- (c) if he has been convicted of an offence for which one may be sentenced to imprisonment for a term exceeding six months.

(2) The Minister may, in consultation with the Board, suspend the Director or Deputy Director from office pending determination of any inquiry as to whether grounds of misconduct, incapacity or incompetence exist.

Responsibilities of the Director

28. (1) The Director shall be the Chief Executive Officer of the Centre and shall be responsible for its direction and management.

(2) As the Chief Executive Officer, the Director shall be responsible for—

- (a) the formation and development of an efficient and performance driven administration; and
- (b) control and maintenance of discipline of staff.

(3) The Director shall perform the functions of the office subject to the policy framework which may be prescribed by the Minister on the advice of the Board.

Delegation by the Director

29. (1) Subject to this Act, the Director may in writing, delegate any of his powers and duties under this Act to any other officer or officers of the Centre as the Director may determine.

(2) A delegation made under subsection (1) may, at any time, be varied or cancelled by the Director.

When Deputy Director may act

30. The Deputy Director may act for the Director and shall exercise all the powers and perform all the functions conferred on the Director under this Act whenever the Director is temporarily absent, and shall perform other functions as the Director may, from time to time, assign to him.

Appointment of staff

31 (1) The Centre may appoint other officers and other staff as are necessary for the proper discharge of its functions under this Act, upon such terms and conditions of service as the Minister may, in consultation with the State Corporations Advisory Committee, approve.

(2) For the purposes of subsection (1), the State Corporations Advisory Committee means the Committee by that name established by section 27 of the State Corporations Act.

Oath of confidentiality

32. The Director, the Deputy Director and staff of the Centre shall—

- (a) before they begin to perform any duties under this Act, take and subscribe before a Magistrate or Commissioner for Oaths the oath of confidentiality prescribed in the Third Schedule;
- (b) maintain, during and after their employment, the confidentiality of any matter which they came across during their tenure of office.

Inspection

33. (1) Where an inspection is made under section 24(c), the reporting institution concerned and every officer and employee thereof shall produce and make available to the inspector all the books, accounts and other documents of the reporting institution and any correspondence, statements and information relating to the reporting institution, its business and the conduct thereof which the inspector may require within seven days or such longer time as the inspector may direct in writing.

(2) Failure to produce books, accounts, records, documents, correspondence, statements, returns or other information within the period specified in the direction under subsection (1) shall constitute an offence under this Act.

(3) The books of accounts and other documents required to be produced shall not, in the course of inspection, be removed from the premises of the reporting institution or other premises at which they are produced.

(4) The inspector shall make copies of any books, accounts and other documents required for the purpose of the inspector's report.

(5) All information obtained in the course of the inspection shall be treated as confidential and used solely for the purposes of this Act.

(6) An inspector shall submit a report to the Director, in which attention shall be made to any breach or non-observance of the requirement of this Act or any regulations made thereunder and any other matter revealed or discovered in the course of the inspection, warranting in the opinion of the inspector, remedial action or further action by the Director or the appropriate supervisory body.

Obligation to respond to the inspection reports

34. The Director may by notice in writing and after giving the reporting institution a reasonable opportunity of being heard, require the reporting institution to comply by the date or

within the period as may be specified therein, with such directions as are necessary in connection with any matter arising out of a report made under section 33.

Obligation of persons to provide information to the inspectors

- 35.** (1) The Director may, by notice in writing, require any person who is or has at any time been an employee or agent of the reporting institution being inspected, to—
- (a) give to the inspector all reasonable assistance in connection with the inspection; or
 - (b) appear before the inspector for examination concerning matters relevant to the inspection; or
 - (c) produce any books or documents that relate to the affairs of the reporting institution.
- (2) A person who—
- (a) refuses or fails to comply with a requirement of an inspector which is applicable to that person to the extent to which the person is able to comply with it; or
 - (b) obstructs or hinders an inspector in the exercise of the powers under this Act, or
 - (c) furnishes information which the person knows to be false or misleading in any material way; or
 - (d) appears before an inspector for examination pursuant to such requirement and makes a statement which the person knows to be false or misleading in any material way,
- commits an offence.
- (3) A person who contravenes the provisions of this section is liable on conviction to—
- (a) in case of a natural person, imprisonment for a term not exceeding three years or a fine not exceeding one million shillings, or to both; and
 - (b) in the case of a body corporate, a fine not exceeding five million shillings.

Obligation of a supervisory body and its staff.

- 36.** (1) A supervisory body and its staff shall report to the Centre any suspicious transaction that the supervisory body or its staff may encounter during the normal course of their duties.
- (2) A person who as an employee of a supervisory body deliberately or with intention to deceive does not make a report in accordance with this section commits an offence.
- (3) A person who contravenes the provisions of this provision is liable on conviction to—
- (a) in the case of a natural person, imprisonment for a term not exceeding three years or a fine not exceeding one million shillings, or to both, and
 - (b) in the case of a body corporate, a fine not exceeding five million shillings.

The Centre's power to obtain a search warrant

- 37.** (1) The Centre or the appropriate law enforcement agency, may apply to the High Court for a warrant to enter any premises belonging to or in the possession or control of a reporting institution or any officer or employee thereof, and to search the premises and remove any document, material or other thing therein for the purposes of the Centre, as ordered by the High Court and specified in the warrant.
- (2) The High Court may grant the application if it is satisfied that there are reasonable grounds to believe that—

- (a) the reporting institution has failed to keep or produce documents, records, or report on a suspicious transaction, as required by this Act; or
- (b) an officer, employee or partner of a reporting institution is committing, has committed or is about to commit any offence under this Act.

Property tracking and monitoring orders

38. For the purpose of determining whether any property belongs to or is in the possession or under the control of any person, the Centre, may upon application to the High Court, obtain an order—

- (a) that any document relevant to—
 - (i) identifying, locating or quantifying that property; or
 - (ii) identifying or locating any document necessary for the transfer of that property, belonging to, or in the possession or control of that person,
 be delivered forthwith to the Centre;

- (b) that the reporting institution forthwith produce to the Centre or the appropriate law enforcement agency all information obtained about any transaction conducted by or for that person during such period before or after the order as the High Court may direct.

Orders to enforce compliance with obligations under this Act

39. (1) A person who fails to comply with any obligation provided for under this Act, commits an offence.

(2) The Centre may, upon application to the High Court, after satisfying the Court that a reporting institution has refused to comply with any obligation, request or requirements under

this Act, obtain an order against all or any officers, employees or partners of the reporting institution in such terms as the High Court may deem necessary, in order to enforce compliance with such obligation.

(3) In granting the order pursuant to subsection (2), the High Court may order that should the reporting institution fail, without reasonable excuse, to comply with all or any provisions of the order, may order that institution, its officers, employees or partners to pay a fine not exceeding one million shillings for an individual and a fine not exceeding five million shillings for a body corporate.

Constitution of funds.

40. The funds of the Centre shall consist—

- (a) money appropriated by Parliament for the purposes of the Centre;
- (b) any Government grants made to it;
- (c) any other money legally acquired by it, provided that the Centre may accept donations only with the prior written approval of the Minister.

Financial year

41. The financial year of the Centre shall be a period of twelve months ending on the thirtieth June of each year.

Annual estimates

42. (1) At least three months before the commencement of each financial year, the Centre shall cause to be prepared estimates of the revenue and expenditure of the Centre for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Centre for the financial year and in particular, the estimates shall provide for—

- (a) the payment of salaries, allowances and other charges in respect of the staff of the Centre;
- (b) the payment of pensions, gratuities and other charges in respect of the staff of the Centre;
- (c) the proper maintenance of the buildings and grounds of the Centre;
- (d) the maintenance, repair and replacement of the equipment and other property of the Centre.

(3) The annual estimates shall be approved by the Board before the commencement of the financial year to which they relate and shall be submitted to the Minister for approval and after the Minister's approval, the Centre shall not increase the annual estimates without the consent of the Minister.

Books of accounts, records, audit and reports.

43. (1) The Centre shall cause to be kept proper books of accounts and records of accounts of the income, expenditure, assets and liabilities of the Centre.

(2) The Centre shall within three months of the closure of the financial year submit to the Controller and Auditor-General

- (a) a statement of income and expenditure during that period;
- (b) a statement of the assets and liabilities of the Centre on the last day of that year.

(3) The accounts of the Centre shall be audited and reported upon in accordance with the Public Audit Act.

PART IV – ANTI-MONEY LAUNDERING OBLIGATIONS OF A REPORTING INSTITUTION

Obligation to monitor and report suspected money laundering activity

44 (1) A reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or other transaction as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of transactions, to insignificant but periodic patterns of transactions that have no apparent economic or lawful purpose as stipulated in the regulations.

(2) Upon suspicion that any of the transactions or activities described in subsection (1) or any other transaction or activity could constitute or be related to money laundering or the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Centre in the prescribed form immediately and, in any event, within seven days of the date the transaction or activity that is considered to be suspicious occurred.

(3) Despite provisions of this section, a reporting institution shall file reports on all cash transactions equivalent to or exceeding the amount prescribed in the Fourth Schedule, whether they appear to be suspicious or not.

(4) A report under subsection (2) shall be accompanied by copies of all documentation directly relevant to the suspicion and the grounds on which it rests.

(5) The Centre may, in writing, require the person making the report under subsection (2) to provide the Centre with—

- (a) particulars or further particulars of any matter concerning the suspicion to which the report relates and the grounds upon which it rests; and
- (b) copies of all available documents concerning such particulars or further particulars.

(6) When a person receives a request under subsection (5), that person shall furnish the Centre with the requested particulars or further particulars and copies of documents to the extent that such particulars or documents are available to that person within a reasonable time, but in any case, not more than thirty days from the date of the receipt of the request:

Provided that the Centre may, upon written application by the person responding to a request and with the approval of the Director, grant the person an extension of the time within which to respond.

(7) A person who is a party to, or is acting on behalf of a person who is engaged in a transaction, in respect of which he forms a suspicion which, in his opinion, should be reported under subsection (2), may continue with and complete that transaction and shall ensure that all records relating to that transaction are kept and that all reasonable steps are taken to discharge the obligation under this section.

Obligation to verify customer identity

45. (1) A reporting institution shall take reasonable measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with it or to carry out a transaction or series of transactions with it, by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant, such as—

- (a) in the case of an individual—
 - (i) a birth certificate;
 - (ii) a national identity card;
 - (iii) a driver's licence;
 - (iv) a passport; or
 - (v) any other official means of identification as may be prescribed; and
- (b) in the case of a body corporate—
 - (i) evidence of registration or incorporation;
 - (ii) the Act establishing the body corporate;
 - (iii) a corporate resolution authorising a person to act on behalf of the body corporate together with a copy of the latest annual return submitted in respect of the body corporate in accordance with the law under which it is established; and
 - (vi) or any other item as may be prescribed;
- (c) in the case of a government department, a letter from the accounting officer.

(2) Upon the coming into force of this Act, a reporting institution shall undertake customer due diligence on the existing customers or clients.

(3) Where an applicant requests a reporting institution to enter into—

- (a) a continuing business relationship; or
- (b) in the absence of that relationship, any transaction,

the reporting institution shall take reasonable measures to establish whether the person is acting on behalf of another person.

(4) If it appears to a reporting institution that an applicant requesting to enter into any transaction, whether or not in the course of a continuing business relationship, is acting on behalf

of another person, the reporting institution shall take reasonable measures to establish the true identity of a person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise.

(5) In determining what constitutes reasonable measures for the purposes of subsection (1) or (3), regard shall be given to all the circumstances of the case, and in particular to—

- (i) whether the applicant is a person based or incorporated in a country in which there are in force applicable provisions to prevent the use of the financial system for the purpose of money laundering; and
- (ii) any custom or practice as may, from time to time, be current in the relevant field of business.

(6) The Minister may, by notice in the Gazette, list the countries to which subsection (5) (i) applies.

(7) Nothing in this section shall require the production of any evidence of identity where there is a transaction or a series of transactions taking place in the course of a business relationship, in respect of which the applicant has already produced satisfactory evidence of identity.

Obligation to establish and maintain customer records

46. (1) Subject to subsection (4), a reporting institution shall establish and maintain—

- (a) records of all transactions, in accordance with the requirements of subsection (3); and
- (b) where evidence of a person's identity is obtained in accordance with section 45, a record that indicates the nature of the evidence obtained, and which comprises either a copy of the evidence or such information as would enable a copy of it to be obtained.

(2) A reporting institution shall ensure that its customer accounts are kept in the correct name of the account holder.

(3) Records required under subsection (1)(a) shall contain particulars sufficient to identify—

- (a) the name, physical and postal address and occupation (or where appropriate business or principal activity) of each person—
 - (i) conducting the transaction; or
 - (ii) on whose behalf the transaction is being conducted,

as well as the method used by the reporting institution to verify the identity of that person;

- (b) the nature, time and date of the transaction;
- (c) the type and amount of currency involved;
- (d) the type and identifying number of any account with the reporting institution involved in the transaction;
- (e) if the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the

instrument, the number (if any) of the instrument and details of any endorsements appearing on the instrument;

- (f) the name and address of the reporting institution and of the officer, employee or agent of the reporting institution who prepared the record.

(4) The records required under subsection (1) shall be kept by the reporting institution for a period of at least seven years from the date the relevant business or transaction was completed without prejudice to any other records required to be kept by or under any other written law.

Obligation to establish and maintain internal reporting procedures

47. A reporting institution shall establish and maintain internal controls and internal reporting procedures to—

- (a) identify persons to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering;
- (b) enable any person identified in accordance with paragraph (a) to have reasonable access to information that may be relevant in determining whether a sufficient basis exists to report the matter under section 44(2); and
- (c) require the identified person in paragraph (a) to directly report the matter under section 44(2) in the event that he determines that sufficient basis exists.

Application of reporting obligations.

48. The reporting obligations under this Part shall apply to accountants when preparing or carrying out transactions for their clients in the following situations—

- (a) buying and selling of real estate;
- (b) managing of client money, securities or other assets;
- (c) management of bank, savings or securities accounts;
- (d) organisation of contributions for the creation, operation or management of companies;
- (e) creation, operation or management of buying and selling of business entities.

PART V – THE ANTI-MONEY LAUNDERING ADVISORY BOARD

The Anti-Money Laundering Advisory Board.

49. (1) There is established a Board to be known as the Anti-Money Laundering Advisory Board consisting of—

- (a) the Chairperson, who shall be appointed by the Minister from among members of the Board appointed under paragraphs (f) to (h);
- (b) the Permanent Secretary in the Ministry for the time being responsible for finance;
- (c) the Attorney-General;
- (d) the Governor, Central Bank of Kenya;
- (e) the Commissioner of Police;
- (f) the Chairman, Kenya Bankers' Association;
- (g) the Chief Executive Officer, Institute of Certified Public Accountants of Kenya;

- (h) two other persons appointed by the Minister from the private sector who shall have knowledge and expertise in matters relating to money laundering;
- (i) the Director, who shall be the secretary.

(2) The *ex-officio* members under paragraphs (b) to (g) may attend in person or through a designated representative.

(3) A person appointed under subsection (1) (h) shall hold office for a term of three years but shall be eligible for reappointment for one further term of not more than three years.

(4) In deliberation of a matter, the Board may co-opt such other persons as appear to it to have special knowledge or experience in anti-money laundering.

Functions of the Board.

50. The functions of the Board shall be to advise the Director generally on the performance of his functions and the exercise of his powers under this Act and to perform any other duty as prescribed to be performed by the Board under this Act.

Conduct of business of the Board

51. The business and affairs of the Board shall be conducted in accordance with the provisions of the Fifth Schedule but subject thereto, the Board may regulate its own procedure.

PART VI – THE ASSETS RECOVERY AGENCY

Definitions applicable to Parts VI-XII.

52. (1) In Parts VI to XII, except where it is inconsistent with the context or clearly inappropriate, any reference to–

- (a) a person who holds property shall be construed as a reference to a person who has any interest in the property, and–
 - (i) if the estate of that person has been sequestrated, also to the trustees of his estate; or
 - (ii) if the person is a company or other legal entity which is being wound up, also to the liquidator thereof;
- (b) a person who transfers property to another person shall be construed as a reference to a person who transfers or grants to any other person any interest in the property;
- (c) anything received in connection with an offence shall be construed as a reference also to anything received as a result of and in connection with the commission of that offence.

(3) For the purposes of Parts VI to XII, a person will have benefited from an offence if that person has at any time, whether before or after the commencement of this Act, received or retained any proceeds of crime.

The Agency and its Director.

53. (1) There is established a body to be known as Assets Recovery Agency (hereinafter referred to as the “Agency”) which shall be a semi-autonomous body under the office of the Attorney-General.

(2) The Attorney-General shall appoint a fit, competent and proper person to be the Director of the Agency (hereinafter referred to as the “Agency Director”).

(3) For a person to be appointed as the Agency Director, the person shall -

- (a) hold a degree in law, economics or finance from a recognized university;
- (b) have at least seven years working experience in a relevant field, five of which shall have been at senior management level;
- (c) have such other requirements that may be prescribed by the Attorney-General.

(4) The Agency Director may, with the approval of the Attorney-General, obtain such number of staff on secondment and on terms and conditions of service as may be approved by the Attorney-General, and may make such arrangements for the provision of services, as he considers appropriate for or in connection with the exercise of his functions.

(5) Anything which the Agency Director is authorised or required to do may be done by—

- (a) a member of staff of the Agency, or
- (b) a person providing services under arrangements made by the Agency Director,

if authorised by the Agency Director (generally or specifically) for that purpose.

Functions and powers of the Agency

54. (1) The functions of the Agency shall be to implement the provisions of Parts VII to XII inclusive and to exercise all powers set forth therein.

(2) The Agency shall have all the powers necessary or expedient for the performance of its functions.

Co-operation with the Agency

55. A person who or a body which has functions relating to investigation or prosecution of offences under this Act and the Agency shall co-operate in the exercise of their powers or the performance of their functions under this Act.

PART VII – CRIMINAL FORFEITURE

Nature of proceedings.

56. (1) For the purposes of this Part, proceedings on application for a confiscation order or restraint order are civil.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings on application for a confiscation order or a restraint order.

Realizable property

57. (1) Subject to the provisions of subsection (2), the following property shall be realizable in terms of this Part—

- (a) any property held by the defendant concerned; and
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

(2) Property shall not be realizable property so long as a forfeiture order is in force in respect thereof.

Value of property

- 58.** (1) For the purposes of this Part the value of property, other than money, in relation to any person holding the property, shall be—
- (a) where any other person holds an interest in the property, the market value of the property, less the amount required to discharge any encumbrance on the property; and
 - (b) where no other person holds an interest in the property, the market value of the property.
- (2) Notwithstanding the provisions of subsection (1), any reference in this Part to the value at a particular time of a payment or reward, shall be construed as a reference to—
- (a) the value of the payment or reward at the time when the recipient received it; or
 - (b) where subsection (3) applies, the value set out in that subsection, whichever is the higher.
- (3) If, at the particular time referred to in subsection (2) the recipient holds—
- (a) the property, other than cash, which that person received, the applicable value shall be the value of the property at the particular time; or
 - (b) property which directly or indirectly represents in his hands the property which he received, the applicable value shall be the value of the property, in so far as it represents the property which he received, at the relevant time.

Gifts.

- 59** (1) For the purposes of this Part, a defendant shall be deemed to have made a gift if he has transferred any property to any other person directly or indirectly for a consideration which is significantly less than the value of the property.
- (2) For the purposes of subsection (2) the gift which a defendant is deemed to have made shall consist of that share in the property transferred by the defendant which is equal to the difference between the value of that property as a whole and the consideration received by the defendant in return.

Conclusion of proceedings against defendant.

- 60.** For the purposes of this Part, proceedings against a defendant shall be concluded when—
- (a) the defendant is acquitted or found not guilty of an offence;
 - (b) subject to section 61(2), the court convicting the defendant of an offence, sentences the defendant without making a confiscation order against him;
 - (c) the conviction in respect of an offence is set aside on review or appeal; or
 - (d) the defendant satisfies the confiscation order made against him.

Confiscation Orders

- 61** (1) Whenever a defendant is convicted of an offence, the court convicting the defendant shall, on the application of the Attorney-General, the Agency Director or of its own motion, inquire into any benefit which the defendant may have derived from—
- (a) that offence;
 - (b) any other offence of which the defendant has been convicted at the same trial; and
 - (c) any criminal activity which the court finds to be sufficiently related to that offence,

and, if the court finds that the defendant has so benefited, the court shall, in addition to any punishment which it may impose, make an order against the defendant for the payment to the Government of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) The amount which a court may order the defendant to pay to the Government under subsection (1)–

- (a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Part; or
- (b) if the court is satisfied that the amount which is just as contemplated in section 63(1) is less than the value referred to in paragraph (a), the amount payable shall not exceed an amount which, in the opinion of the court might be so realized.

(3) A court convicting a defendant may, when passing sentence, indicate that it will hold an inquiry as contemplated in subsection (1) at a later stage if–

- (a) it is satisfied that that inquiry would unreasonably delay the sentencing of the defendant; or
- (b) the Attorney-General applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

(4) If the judge or magistrate who convicted the defendant is absent or for any other reason not available, any judge or magistrate of the same court shall consider an application referred to in subsection (1) and hold the inquiry referred to in that subsection and that person may, in the proceedings, take such steps as the judge or magistrate who is absent or not available could lawfully have taken.

(5) A court before which proceedings under this section are pending, may, in considering an application under subsection (1)–

- (i) refer to the evidence and proceedings at the trial;
- (ii) hear further oral evidence or take documentary evidence as the court may deem fit;
- (iii) direct the Agency Director to tender to the court the affidavit referred to in section 64(1); and
- (iv) direct a defendant to tender to the court an affidavit referred to under section 64 (5).

(6) The amount ordered to be paid under a confiscation order shall be paid on the making of the order:

Provided that if the defendant indicates to the court that he needs time to pay the amount ordered to be paid, the court making the confiscation order may make an order allowing payment to be made in a specified period.

Value of proceeds

62. (1) Subject to the provisions of subsection (2), the value of crime of the defendant's proceeds of crime shall be the sum of the value of the property, services, advantages, benefits or rewards received, retained or derived by him at any time after the commencement of this Act in connection with the offence committed by him or any other person.

(2) In determining the value of a defendant's proceeds of crime, the court shall–

- (a) where it has made a forfeiture order or where a forfeiture order has previously been made in respect of property which is proved to the satisfaction of the court to have been–
 - (i) the property which the defendant received in connection with the criminal activity carried on by him or any other person; or
 - (iii) property which, directly or indirectly, represented in the defendant’s possession or control, which he received in that connection,

leave the property out of account;

- (b) where a confiscation order has previously been made against the defendant, leave out of account, those proceeds of crime which are proved to the satisfaction of the court to have been taken into account in determining the amount to be recovered under that confiscation order.

Amount which might be realized.

63. (1) For the purposes of sections 61(2)(b) and 67(4)(a), the amount which might be realized at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of the values at that time of all–

- (a) realizable property held by the defendant; and
- (b) affected gifts made by the defendant,

less the sum of all obligations, if any, of the defendant having priority and which the court may recognize for this purpose.

(2) Notwithstanding the provisions of section 58(1) but subject to the provisions of section 59(2), the value of an affected gift at the time of the making of the relevant confiscation order shall be–

- (a) the value of the affected gift at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or
- (b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value; or
- (c) such amount as the court believes is just.

(3) If at the time of the making of the relevant confiscation order the recipient holds the property–

- (a) other than in monetary instruments, which such person received, the value concerned shall be the value of the property at that time; or
- (b) which directly or indirectly represents in their hands the property which that person received, the value concerned shall be the value of the property, in so far as it represents the property which that person received, at the time.

(4) For the purposes of subsection (1), an obligation has priority at the time of the making of the relevant confiscation order if it is an obligation–

- (a) of the defendant, where the defendant has been convicted by a court of any offence to pay–
 - (i) a fine imposed before that time by the court; or

- (ii) any other amount under any resultant order made before that time by the court;
- (b) which–
 - (i) if the estate of the defendant had at that time been sequestrated; or
 - (ii) where the defendant is a company or other legal entity, if that company or that legal entity is at that time being wound up, would be payable in pursuance of any secured or preferential claim against the insolvent estate or against the company or legal entity, as the case may be;

(5) A court shall not determine the amounts which might be realized as contemplated in subsection (1) unless it has afforded all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property.

Statements relating to proceeds of crime.

64. (1) The Agency Director may or, if so directed by the court, shall tender to the court an affidavit by the defendant or any other person in connection with any matter which is being inquired into by the court under section 61(1), or which relates to the determination of the value of a defendant's proceeds of crime.

(2) A copy of the affidavit referred to in subsection (1), shall be served on the defendant.

(3) The defendant may dispute the correctness of any allegation contained in an affidavit referred to in subsection (1), and if the defendant does so, he shall state the grounds upon which he relies.

(4) In so far as the defendant does not dispute the correctness of any allegation contained in the affidavit under subsection (1), that allegation shall be considered to be conclusive proof of the matter to which it relates.

(5) A defendant may or, if so directed by the court, tender to the court an affidavit or affirmation in writing by him or another person in connection with any matter which relates to the determination of the amount which might be realized as contemplated in section 59(1).

(6) A copy of the affidavit or affirmation tendered under subsection (5) shall be served on the Agency Director.

(7) The Agency Director may admit the correctness of any allegation contained in an affidavit or affirmation tendered under subsection (5).

(8) In so far as the Agency Director admits the correctness of any allegation contained in an affidavit or affirmation tendered under subsection (5), that allegation shall be considered to be conclusive proof of the matter to which it relates.

Evidence relating to proceeds of crime

65. (1) For the purpose of determining whether a defendant has derived a benefit in an inquiry under section 61(1), if it is found that the defendant did not, at the fixed date, have legitimate sources of income sufficient to justify the interests in any property that he holds, the court shall accept this fact as *prima facie* evidence that the interests form part of the benefit.

(2) For the purpose of an inquiry under section 61(1), if it is found that a court had ordered the defendant to disclose any facts under section 64(5) and that the defendant had without

sufficient cause failed to disclose the facts or had, after being so ordered, furnished false information, knowing that information to be false or not believing it to be true, the court shall accept these facts as *prima facie* evidence that any property to which the information relates—

- (a) forms part of the defendant's benefit, in determining whether he has derived a benefit from an offence; or
- (b) is held by the defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to

in section 61(1).

(3) For the purposes of determining the value of a defendant's proceeds of crime, in an inquiry under section 61(1) if the court finds that defendant has benefited from an offence and that the defendant held property at any time, or since, his conviction, the court shall accept these facts as *prima facie* evidence that the property was received by him at the earliest time at which he held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 61(1).

(4) If the court finds that the defendant has benefited from an offence and that expenditure had been incurred by him since the beginning of the period contemplated in subsection (3), the court shall accept these facts as *prima facie* evidence that the expenditure was met out of the advantages, payments, services or rewards, including any property received by him in connection with the offences or related criminal activities referred to in section 61(1) committed by him.

(5) For the purpose of determining the value of any property in an inquiry under section 57(1), if the court finds that the defendant received property at any time as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in that subsection committed by the person or by any other person, the court shall accept this fact as *prima facie* evidence that that person received that property free of any other interest therein.

Effect of confiscation orders.

66. Where a court makes a confiscation order, the order shall have the effect of a civil judgment.

Procedure where person absconds or dies.

67. (1) If a court is satisfied—

- (a) that—
 - (i) a person had been charged with an offence; or
 - (ii) a person had been convicted of any offence; or
 - (iii) a restraint order had been made against a person; or
 - (iv) there is sufficient evidence for putting a person on trial for an offence; and
- (b) a warrant for that person's arrest had been issued and that the attendance of that person in court could not be secured after all reasonable steps were taken to execute that warrant;
- (c) the proceedings against that person cannot be resumed within a period of six months due to his continued absence; and
- (d) there are reasonable grounds to believe that a confiscation order would have been made against that person were it not for his continued absence,

the court may, on an application by the Agency Director, inquire into any benefit he may have derived from that offence.

(2) Whenever a defendant who has been convicted of an offence dies before a confiscation order is made, the court may, on an application by the Agency Director, inquire into any benefit he may have derived from that offence if the court is satisfied that there are reasonable grounds to believe that a confiscation order would have been made against him were it not for his death.

(3) The administrator of the estate of the deceased may appear before the court and make representations for the purposes of any inquiry.

(4) The court conducting an inquiry under this section may—

- (a) if the court finds that the person referred to in subsection (1) or (2) has so benefited, make a confiscation order and the provisions of this Part shall, with the necessary changes, apply to the making of that order;
- (b) if a receiver has not been appointed in respect of any of the property concerned, appoint a receiver in respect of realizable property; and
- (c) authorise the realization of the property concerned in terms of Part VIII.

(5) A court shall not exercise its powers under subsection (4) (a) or (c) unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the making of the orders.

(6) Sections 64 and 65 shall not apply to an inquiry under this section.

(7) If a person, excluding a person contemplated in subsection (1)(a)(ii), against whom a confiscation order had been made under subsection (4), is subsequently tried and—

- (a) convicted of one or other of the offences in respect of which the order had been made, the court convicting that person may conduct an inquiry under section 61(1) and make an appropriate order;
- (b) acquitted of the offence in respect of which the order had been made, the court acquitting that person may make an appropriate order.

Restraint Orders

Restraint orders.

68. (1) The Agency Director may apply to a court *ex parte* for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

(2) A restraint order may be made in respect of—

- (a) realizable property as may be specified in the restraint order and which is held by a person against whom the restraint order is being made;
- (b) all property which, if it is transferred to that person after the making of the restraint order, would be realizable property.

(3) A court to which an application is made under subsection (1) may make a temporary restraint order if the court is satisfied that—

- (a) a criminal investigation has been started in Kenya with regard to an offence; or

- (b) there is reasonable cause to believe that a person leads a criminal lifestyle and has benefited from his criminal conduct.
- (4) A restraint order shall provide for the period of the notice to be given to persons affected by the order.
- (5) Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provisions as the court may think fit for the reasonable–
 - (a) living expenses of a person against whom the restraint order is being made and his family or household;
 - (b) legal expenses of that person in connection with any proceedings instituted against him in terms of this Part or any criminal proceedings to which the proceedings may relate;
 - (c) carrying on of any trade, business, profession or occupation:

Provided that the court may place conditions as it believes appropriate for the purpose of ensuring that the restraint order is effective and the court is satisfied that the person whose expenses shall be provided for has disclosed, under oath, all his interests in the property subject to a restraint order and that the person cannot meet the expenses or carry on the trade or profession concerned out of his unrestrained property.

(6) A court making a restraint order may also make further order in respect of the discovery or disclosure of any facts, including facts relating to any property over which the defendant may have effective control and the location of such property, as the court may consider necessary or expedient with a view to achieving the objects of the restraint order.

(7) A court making a restraint order shall at the same time make an order authorising the seizure of all movable property concerned and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(8) Property seized under subsection (7) shall be dealt with in accordance with the directions of the court that made the relevant restraint order.

- (9) A court that made a restraint order–
 - (a) may, on application by a person affected by that order, vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied that the–
 - (i) operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship to the applicant; and
 - (ii) hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
 - (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.

(10) When a court orders the rescission of an order authorising the seizure of property in terms of subsection (9)(a) the court shall make such other orders as it considers appropriate for the proper, fair and effective execution of the restraint order concerned.

Cases in which restraint order may be made

- 69.** (1) A court may exercise the powers conferred on it by section 68(1)–

- (a) when—
 - (i) a prosecution for an offence has been instituted against the defendant concerned; and
 - (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
 - (iii) the proceedings against that defendant have not been concluded; or
- (b) when—
 - (i) that court is satisfied that a person is to be charged with an offence; and
 - (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that person.

(2) Where the court has made a restraint order under subsection (1) (b), that court shall rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable.

Order to remain in force pending appeal

70. A restraint order and an order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the outcome of any appeal against the decision concerned.

Seizure of property subject to restraint order

71. (1) In order to prevent any realizable property from being disposed of or removed contrary to a restraint order, a police officer may seize that property if he has reasonable grounds to believe that the property will be so disposed of or removed.

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the court that made the relevant restraint order.

Appointment of manager in respect of property subject to restraint order

72. (1) Where a court has made a restraint order, that court may, at any time—

- (a) appoint a manager to do any one or more of the following on behalf of a person against whom the restraint order has been made—
 - (i) perform any particular act in respect of any or all the property to which the restraint order relates;
 - (ii) take care of the said property;
 - (iii) administer the said property;
 - (iv) where the said property is a business or undertaking, carry on, with due regard to any law which may be applicable, the business or undertaking; and
 - (v) in the case of property that is perishable, or liable to deterioration, decay or injury by being detained in custody, to sell or otherwise dispose of the said property;

- (b) order the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a receiver has been appointed under paragraph (a), into the custody of that receiver.
- (2) A person affected by an order under subsection (1)(b) may at any time apply for the variation of–
 - (a) rescission of the order; or
 - (b) the terms of the appointment of the manager concerned or for the discharge of that manager.
- (3) The court that made an order under subsection (1)(b)–
 - (a) may at any time–
 - (i) vary or rescind the order; or
 - (ii) vary the terms of the appointment of the manager concerned or discharge that manager;
 - (b) shall discharge the manager concerned if the relevant restraint order is rescinded;
 - (c) may make an order relating to the fees and expenditure of the manager as it considers fit, including an order for the payment of the fees of the manager from the confiscated proceeds, if a confiscation order is made, or by the Government if no confiscation order is made.

Orders in respect of immovable property subject to restraint order

73. (1) A court that has made a restraint order in respect of immovable property may at any time, with a view to ensuring the payment to the Government where a confiscation order has–

- (a) not been made, of an amount equal to the most recent value of the immovable property; or
- (b) been made, of an amount exceeding the amount payable under the confiscation order,

order the Registrar of Lands to place a restriction on the land register in respect of that immovable property.

(2) A person affected by an order in subsection (1) may at any time apply for rescission of the order.

- (3) The court that made an order in subsection (1)–
 - (a) may at any time rescind the order; and
 - (b) shall rescind the order if the relevant restraint order is rescinded or the amount payment of which is secured by the order has, with the consent of the court, been paid into court;
 - (c) shall if, the order is rescinded, the court shall direct the Registrar of Lands to lift the restriction placed by virtue of that order on the land register in respect of that immovable property and the Registrar of Lands shall give effect to such direction.

Variation and rescission of certain orders suspended by appeal

74. The lodging of an appeal against a decision to vary or rescind any order referred to in sections 68(10), 72 (3) and 73(3) shall act as a stay of such a variation or rescission pending the determination of the appeal.

Realization of Property

Realization of property.

- 75.** (1) A court may exercise the powers conferred upon it by subsection (2) when—
- (a) a confiscation order has been made against the defendant concerned;
 - (b) that confiscation order is no longer subject to review or appeal; and
 - (c) the proceedings against that defendant have been concluded.
- (2) A court may, on the application of the Agency Director—
- (a) if a receiver has not been appointed in respect of any of the property concerned, appoint a receiver in respect of the realizable property;
 - (b) subject to subsection (3), authorise a manager appointed under section 72(1)(a) or a receiver appointed under paragraph (a) of this subsection, as the case may be, to realize any realizable property in such manner as that court may determine;
 - (c) order any person who holds realizable property to surrender the said property forthwith into the custody of a manager appointed under section 72(1)(a) or a receiver appointed under paragraph (a) of this subsection, as the court may determine.
- (3) A court shall not exercise its powers under subsection (2) (b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property.
- (4) If the court is satisfied that a person—
- (a) is likely to be directly affected by the confiscation order; or
 - (b) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 61(1) which was committed by the defendant,

the court may allow that person to make representations in connection with the realization of that property.

(5) If the court is satisfied that a person who has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 61(1) which was committed by the defendant—

- (a) has instituted civil proceedings, or intends to institute such proceedings within a reasonable time; or
- (b) has obtained a judgment against the defendant,

in respect of that damage, loss or injury, the court may order that the receiver suspend the realization of the whole or part of the realizable property concerned for the period that the court deems fit in order to satisfy such a claim or judgment and related legal expenses and may make such ancillary orders as it deems expedient.

- (6) The receiver shall, as soon as possible after—
- (a) the proceedings referred to in subsection (5)(a) have been disposed of; or
 - (b) the judgment referred to in subsection (5)(b) has been satisfied, as the case may be; or

- (c) the period determined under subsection (5) has expired,

whichever is the earliest, realize the realizable property concerned as contemplated in subsection (2).

Application of certain sums of money.

76. (1) Subject to subsection (2), the following sums of money under the control of a receiver appointed under this Part, namely—

- (a) the proceeds of any realizable property realized by virtue of section 75; and
- (b) any other sums of money, being property of the defendant concerned,

shall, after the payments as the court may direct, have been made out of the sums of money, be applied on that defendant's behalf in satisfaction of the confiscation order made against that person:

(2) Notwithstanding subsection (1), where the court directs and payments out of the sums of money referred to in that subsection,

- (a) the Government shall not have a preferential claim; and
- (b) if any money remains under the control of the receiver after the amount payable under the confiscation order has been fully paid, the receiver shall distribute that money—
 - (i) among those persons who held realizable property realized by virtue of section 76; and
 - (ii) in such proportions as the court may direct after affording the persons an opportunity to make representations to it in connection with the distribution of those sums of money.

(3) Without limiting the generality of subsection (1), the payments that a court may direct to be under that subsection shall include any payment in respect of an obligation which was found to have priority under section 63.

Exercise of powers by court and receiver

77 (1) The powers conferred upon a court by sections 68, 69, 71, and 72, or upon a receiver appointed under this Part shall—

- (a) subject to paragraphs (b) and (c), be exercised with a view to making available the current value of realizable property for satisfying any confiscation order made or which might be made against the defendant;
- (b) in the case of realizable property held by a person to whom that defendant has directly or indirectly made an affected gift, be exercised with a view to realizing not more than the current value of the gift;
- (c) be exercised with a view to allowing a person other than the defendant or the recipient of the gift to retain or recover the current value of any property held by that person,

and, except as provided in sections 61(1) and 68(6), any obligation of that defendant or the recipient of the gift which conflicts with the obligation to satisfy a confiscation order shall be left out of account.

(2) The provisions of subsection (1) shall not be construed as prohibiting any court from making any additional order in respect of a debt owed to the Government.

Variation of confiscation orders

78. (1) If the court is satisfied that the realizable property is inadequate for the payment of the balance of the amount to be recovered under a confiscation order against the defendant concerned, that court may, on the application of that defendant, issue a certificate to that effect stating the reasons for the court being so satisfied.

(2) For the purpose of subsection (1), the court may—

(a) in the case of realizable property held by—

- (i) a person whose estate has been sequestrated, take into account the extent to which the proceeds of property in that estate may be distributed among the creditors; or
- (ii) a company or other legal entity which is being wound up, take into account the extent to which the assets of that company or legal entity may be distributed among the creditors;

(b) leave out of account any inadequacy in the realizable property which is in the opinion of that court, wholly or partly attributable to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made an affected gift from the risk of any realization in terms of this Part.

(3) If a certificate referred to in subsection (1) has been issued, the defendant may apply to the court that made the confiscation order against that person for the reduction of the amount to be recovered under that confiscation order.

(4) In making an order under subsection (3), the court may substitute for the amount to be recovered under that confiscation order such lesser amount as that court may consider just in the circumstances of the case.

Effect of bankruptcy on realizable property.

79. (1) When a person who holds realizable property is adjudged bankrupt—

- (a) the property for the time being subject to a restraint order made before the date of the bankruptcy order; and
- (b) the proceeds of any realizable property realized by virtue of section 75 and for the time being under the control of a receiver appointed under this Part, shall not vest in the Registrar of the High Court, Official Receiver or the Public Trustee.

(2) When a defendant who has directly or indirectly made an affected gift to any other person is adjudged bankrupt—

- (a) no court shall set aside the disposition of that gift under the Bankruptcy Act, if—
 - (i) a prosecution for an offence has been instituted against the defendant and the proceedings against that person have not been concluded; or

- (ii) the property of any other person is subject to a restraint order;
- (b) any court that sets aside any disposition in paragraph (a) after the conclusion of the proceedings against the defendant, shall take into account any realization of the property of other person in terms of this Part.

(3) Where a person has been adjudged bankrupt, the powers conferred upon the court by sections 64 to 72 and 73(2) or upon a receiver appointed under this Part, shall not be exercised in respect of any property which—

- (a) forms part of the bankrupt's estate; or
- (b) the Official Receiver concerned is entitled to claim from the bankrupt under the Bankruptcy Act.

(4) Nothing in the Bankruptcy Act shall be construed as prohibiting a court or a receiver appointed under this Part from exercising any power contemplated in subsection (3) of any property or proceeds mentioned in subsection (1).

Effect of winding up of companies or other legal entities on realizable property

80. (1) When a court has made an order for the winding-up of any company or other legal entity which holds realizable property or a resolution for the voluntary winding-up of that company or legal entity has been registered in terms of any applicable law, no—

- (a) property for the time being subject to a restraint order made before the relevant time; or
 - (b) proceeds of any realizable property realized by virtue of section 75 and for the time being under the control of a receiver appointed under this Part,
- shall form part of the assets of any that company or legal entity.

(2) Where an order mentioned in subsection (1) has been made in respect of a company or other legal entity or a resolution mentioned in that subsection has been registered in respect of that company or legal entity, the powers conferred upon a court by sections 68 to 73 and 75(2) or upon a receiver appointed under this Part, shall not be exercised in respect of any property which forms part of the assets of such company or legal entity.

(3) Nothing in the Companies Act or any other law relating to legal entities in general or any particular legal entity, shall be construed as prohibiting any court or receiver appointed under this Part from exercising any power in subsection (2) in respect of any property or proceeds mentioned in subsection (1).

- (4) For the purpose of subsection (1), “the relevant time” means where—
 - (a) an order for the winding-up of the company or legal entity, as the case may be, has been made, the time of the presentation to the court concerned of the application for the winding-up; or
 - (b) no such order has been made, the time of the registration of the resolution authorizing the voluntary winding-up of the company or legal entity, as the case may be.

(5) The provisions of section 79(2) are, with the necessary changes, applicable to a company or legal entity which has directly or indirectly made an affected gift.

PART VIII CIVIL FORFEITURE

Recovery and Preservation of Property

Nature of proceedings

81. (1) All proceedings under this Part shall be civil proceedings.

(2) The rules of evidence applicable in civil proceedings shall apply to proceedings under this Part.

Preservation orders

82. (1) The Agency Director may, by way of an *ex parte* application apply to the court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The court shall make an order under subsection (1) if there are reasonable grounds to believe that the property concerned—

- (a) has been used or is intended for use in the commission of an offence; or
- (b) is proceeds of crime.

(3) A court making a preservation order shall at the same time make an order authorising the seizure of the property concerned by a police officer, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

Notice of preservation orders

83 (1) If a court makes a preservation order, the Agency Director shall, within twenty-one days after the making of the order, give notice of the order to all persons known to the Agency Director to have an interest in property which is subject to the order; and publish a notice of the order in the Gazette.

(2) A notice under subsection (1) shall be served in accordance with the provisions of the Civil Procedure Act.

(3) A person who has an interest in the property which is subject to a preservation order may give notice of his intention to oppose the making of a forfeiture order, or to apply for an order excluding his interest in the property concerned from the operation thereof.

(4) A notice under subsection (3) shall be served upon the Agency Director, in the case of—

- (a) a person upon whom a notice has been served under subsection (1), within fourteen days after service; or
- (b) any other person, within fourteen days after the date upon which a notice under subsection (1) is published in the Gazette.

(5) A notice served under subsections (3) or (4) shall contain full particulars of the address for the delivery of documents concerning further proceedings under this Part and shall be accompanied by an affidavit stating—

- (a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his interest in the property concerned; and
- (c) the reasons which the person intends to rely on in opposing a forfeiture order or applying for the exclusion of his interest from the operation thereof.

Duration of preservation orders

- 84.** A preservation order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette, unless—
- (a) there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;
 - (b) there is an unsatisfied forfeiture order in force in relation to the property subject to the preservation order; or
 - (c) the order is rescinded before the expiry of that period.

Seizure of property subject to preservation orders

- 85.** (1) In order to prevent property subject to a preservation order from being disposed of or removed contrary to that order, any police officer may seize any that property if he has reasonable grounds to believe that the property will be so disposed of or removed.
- (2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the court that made the relevant preservation order.

Appointment of manager in respect of property subject to preservation orders.

- 86.** (1) Where a court has made a preservation order, the court shall, if it deems it appropriate or at the request of the Agency Director, at the time of the making of the order or at a later time—
- (a) appoint a manager to do, subject to the directions of that court or the Agency Director, any one or more of the following on behalf of the person against whom the preservation order has been made, namely—
 - (i) to assume control over the property;
 - (ii) to take care of the said property;
 - (iii) to administer the said property and to do any act necessary for that purpose;
 - (iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
 - (v) in the case of property that is perishable, or liable to deterioration, decay or injury by being detained in custody to sell or otherwise dispose of the said property;
 - (b) order any person holding property subject to the preservation order to surrender forthwith, or within such period as that court may determine, any such property into the custody of the manager.
- (2) The court that made an order under subsection (1) may make the order relating to the fees and expenditure of the receiver as it deems fit, including an order for the payment of the fees of the manager—
- (a) from the forfeited property if a forfeiture order is made; or
 - (b) by the Government if no forfeiture order is made.

Orders in respect of immovable property subject to preservation order

- 87.** (1) A court that has made a preservation order in respect of immovable property may at any time, with a view to ensuring the effective execution of a subsequent order, order the Registrar of Lands to place a restriction on the land register in respect of that immovable property.
- (2) An order under subsection (1) may be made in respect of the following restrictions—

- (a) that the immovable property shall not without the consent of the court be mortgaged or otherwise encumbered;
 - (b) that the immovable property shall not without the consent of the court, be attached or sold in execution; and
 - (c) that the immovable property shall not, without the consent of the court—
 - (i) vesting the Registrar of the High Court or Official Receiver concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated;
 - (ii) where the owners of the immovable property is a company or other corporate body which is being wound up, form part of the assets of that company or corporate body.
- (3) In order to give effect to subsection (1), the Registrar of Lands concerned shall—
- (a) make the necessary entries in his registers and the necessary endorsement on the office copy of the title deed, and thereupon any such restriction shall be effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but shall lapse on the transfer of ownership of the immovable property concerned;
 - (b) when the original of the title deed is produced to him, make the necessary endorsement thereon.
- (4) Unless the court directs otherwise, the custody of immovable property on the title deed of which a restriction contemplated in subsection (2)(c) was endorsed shall, from the date on which—
- (a) the estate of the owner of the immovable property is sequestrated; or
 - (b) where the owner of the immovable property is a company or other corporate body, that company or corporate body is being wound up,

vest in the person or persons in whom the said custody would have vested if such a restriction were not so endorsed.

(5) Where the court granted its consent in respect of a restriction contemplated in subsection (2)(c) and endorsed on the title deed of immovable property, the immovable property shall be deemed, if the—

- (a) estate of the owner of the immovable property was sequestrated, to have vested in the Registrar of the High Court or Official Receiver concerned, as the case may be, as if such a restriction were not so endorsed; or
- (b) owner of the immovable property is a company or other legal entity which is being wound up, to have formed part of the assets of such company or legal entity as if such a restriction were not so endorsed.

(6) A person affected by an order contemplated in subsection (1) may at any time apply for the rescission of the order.

Provision for expenses

88. (1) A preservation order may make such provision as the court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his family or household.

(2) A court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—

- (a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and
- (b) the person has disclosed under oath all his interest in the property and has submitted to that court an affidavit.

Variation and rescission of orders

89. (1) A court which makes a preservation order—

- (a) may, on application by a person affected by that order, vary or rescind the preservation order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
 - (i) that the operation of the order concerned will deprive the applicant of the means to provide for his reasonable living expenses and cause undue hardship for the applicant; and
 - (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
- (b) shall rescind the preservation order when the proceedings against the defendant concerned are concluded.

(2) When a court orders the rescission of an order authorising the seizure of property under paragraph (a) of subsection (1), the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation order concerned.

(3) A person affected by an order for the appointment of a manager may at any time, apply for the—

- (a) variation or rescission of the order;
- (b) variation of the terms of the appointment of the manager concerned; or
- (c) discharge of the manager.

(4) The court that made an order for the appointment of a manager—

- (a) may, if it deems it necessary in the interests of justice, at any time—
 - (i) vary or rescind the order;
 - (ii) vary the terms of the appointment of the manager concerned; or
 - (iii) discharge that manager;
- (b) shall rescind the order and discharge the manager concerned if the relevant preservation order is rescinded.

(5) A person affected by an order in respect of immovable property may, at any time, apply for the rescission of the order.

(6) The court that made an order in respect of immovable property—

- (i) may, if it deems it necessary in the interests of justice, at any time rescind the order; or
- (ii) shall rescind the order if the relevant preservation order is rescinded.

(7) If an order in respect of immovable property is rescinded, the court shall direct the Registrar of Lands concerned to lift any caveat entered by virtue of that order on the land registry in respect of that immovable property, and the Registrar shall give effect to such direction.

Forfeiture of Property

Application for forfeiture order

90. (1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

(2) The Agency Director shall give fourteen days notice of an application under subsection (1) to every person who served notice in terms of section 83(3).

(3) A notice under subsection (2) shall be served in accordance with the provisions of the Civil Procedure Act.

(4) A person who served notice under section 83(3) may appear at the hearing of the application under subsection (1) to—

(a) oppose the making of the order; or

(b) apply for an order—

(i) excluding his interest in that property from the operation of the order; or

(ii) varying the operation of the order in respect of that property,

and may adduce evidence at the hearing of the application.

Late service of notice

91 (1) A person who, for any reason, does not serve notice in terms of section 83(3) may, within fourteen days of his becoming aware of the existence of a preservation order, apply to the court for leave to serve that notice out of time.

(2) An application under subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 90(1), but shall be made before judgment is given in respect of such an application for a forfeiture order.

(3) The court may grant an applicant referred to in subsection (1) leave to serve notice in terms of section 83(3) within the period which the court deems appropriate, if the court is satisfied on good cause shown that such applicant—

(a) has for sufficient reason failed to serve notice in terms of section 83(3); and

(b) has an interest in the property which is subject to the preservation order.

(4) When a court grants an applicant leave to serve notice out of time, the court—

(a) shall make any order as to costs against the applicant; and

(b) may make any order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order,

which it deems appropriate.

(5) A notice served after leave has been obtained under this section shall contain full particulars of the chosen address of the person who serves such notice for the delivery of documents concerning further proceedings under this part and shall be accompanied by the affidavit referred to in section 83(5).

Making of forfeiture order

92 (1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—

(a) has been used or is intended for use in the commission of an offence; or

(b) is proceeds of crime.

(2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

(5) The Registrar of the High Court making a forfeiture order shall publish a notice thereof in the Gazette as soon as practicable but not more than thirty days after the order is made.

(6) A forfeiture order shall not take effect—

- (a) before the period allowed for an application under section 89 or an appeal under section 96 has expired; or
- (b) before such an application or appeal has been disposed of.

Protection of third parties

93 (1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities—

- (a) that the person was not in any way involved in the commission of the offence; and
- (b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property,

the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(2) Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).

(3) A person who—

- (a) had knowledge of the application for the forfeiture order before the order was made; or
- (b) appeared at the hearing of that application,

shall not be permitted to make an application under subsection (2), except with leave of the court.

(4) A person who makes an application under subsection (1) or (2) shall give not less than fourteen days written notice of the making of the application to the Agency Director who shall be a party to any proceedings in the application.

(5) An applicant or the Agency Director may in accordance with the High Court rules, appeal to the Court of Appeal against an order made under subsection (1).

(6) A person appointed by the court under this Act as a receiver or trustee shall, on application by any person who has obtained an order under subsection (1), and where the period

allowed by the rules of court with respect to the making of appeals has expired and any appeal against that order has been determined—

- (a) direct that the property or Part thereof to which the interest of the applicant relates, be returned to the applicant; or
- (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

Exclusion of interests in property

94 (1) The High Court may, on application—

- (a) under section 90(3); or
- (b) by a person referred to in section 91(1),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—

- (a) has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.

(3) The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence ; or
- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned in connection with the commission of an offence.

(4) If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.

(5) Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.

(6) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future use of the property in connection with the commission of an offence.

Forfeiture order by default

95 (1) If the Agency Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 91(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who served notices in terms of section 83(3) have knowledge of notices given under section 91(2), the High Court may—

- (a) make any order by default which the High Court could have made under sections 88(1) and (2);
- (b) make such order as the High Court may consider appropriate in the circumstances; or
- (c) make no order.

(2) The High Court may, before making an order in terms of subsection (1), call upon the Agency Director to adduce such further evidence, either in writing or orally, in support of his application as the High Court may consider necessary.

(3) A person whose interest in the property concerned is affected by the forfeiture order or other order made by the High Court under subsection (1) may, within twenty days after that person has acquired knowledge of such order or direction, set the matter down for variation or rescission by the High Court.

(4) The court may, upon good cause shown, vary or rescind the default order or give any other direction on such terms as it deems appropriate.

Exclusion of interests in forfeited property

96 (1) A person affected by a forfeiture order who was entitled to receive notice of the application for the order under section 91(2), but did not receive such notice, may, within forty five days after the notice is published in the Gazette, apply to the High Court for an order excluding his interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property.

(2) The hearing of the application shall, to the extent practicable and consistent with the interests of justice be held within thirty days of the filing of the application.

(3) The High Court may make an order under subsection (1) if it finds on a balance of probabilities that the applicant for the order falls within the provisions of subsections (2) or (3) of section 91.

(4) The provisions of section 94 (4) and (5) shall apply to any proceedings under this section.

Appeal against forfeiture order

97. Any preservation order and any order authorizing the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 92(1) shall remain in force pending the outcome of any appeal against the decision concerned.

Effect of forfeiture order

98 (1) Where the High Court has made a forfeiture order and a manager has not been appointed in respect of any of the property concerned, the High Court may appoint a manager to perform any of the functions referred to in section 99 in respect of that property.

(2) On the date when a forfeiture order takes effect the property subject to the order shall be forfeited to the Government and vests in the manager on behalf of the Government.

(3) Upon a forfeiture order taking effect the manager may take possession of on the property subject to the order on behalf of the Government from any person in possession, or entitled to possession, of the property.

Fulfilment of forfeiture order

99 (1) The manager shall, subject to any order for the exclusion of interests in forfeited property under section 94(2)(a) or 96(3) and in accordance with the directions of the Agency Director—

- (a) deposit any moneys forfeited into the Fund;
- (b) deliver any property forfeited into the Fund; or
- (c) dispose of property forfeited by sale or any other means and deposit the proceeds of the sale or disposition into the Fund.

(2) Any right or interest in forfeited property not exercisable by or transferable to the Government, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.

(3) A person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting together with, or on behalf of that person, shall not be eligible to purchase forfeited property at any sale held by the manager.

(4) The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and the High Court costs shall be defrayed out of the Fund.

PART IX GENERAL PROVISIONS RELATING TO PRESERVATION AND FORFEITURE OF PROPERTY

Offence may form the basis of multiple orders

100. The fact that a preservation order or a forfeiture order has been made on the basis of an offence in which a specific person has been involved shall not prevent the making of another or other preservation orders or forfeiture orders on the basis of the same offence.

Application of part to deceased estates

101 (1) Any notice authorised or required to be given to a person under this Part shall, in the case of a deceased person, be sufficiently given to the administrator of the deceased's estate.

(2) A reference in this Part to the property of a person shall, in the case of a person who is deceased, be a reference to property that the deceased held immediately before his death.

(3) An order may be applied for and made under this Part—

- (a) in respect of property which forms part of a deceased's estate; and
- (b) on evidence adduced concerning the activities of a deceased person.

Effect of death of joint owner of preserved property

102 (1) If a person has an interest in property as a joint owner, his death after a preservation order is made in respect of the interest does not, while the order is in force, operate to

vest the interest in the surviving joint owner or owners and the preservation order continues to apply to the interest as if the person had not died.

(2) A forfeiture order made in respect of that interest applies as if the order took effect in relation to the interest immediately before the person died.

(3) Subsection (1) does not apply to an interest in property if a preservation order ceases to apply to that interest without a forfeiture order being made in respect of that interest.

PART X PRODUCTION ORDERS AND OTHER INFORMATION GATHERING POWERS

Production orders

103 (1) Where a person has been charged with or convicted of an offence, and a police officer has reasonable grounds for suspecting that any person has possession or control of—

- (a) a document relevant to identifying, locating or quantifying property of the person, or to identifying or locating a document necessary for the transfer of property of such person; or
- (b) a document relevant to identifying, locating or quantifying tainted property in relation to the offence, or to identifying or locating a document necessary for the transfer of tainted property in relation to the offence,

the police officer may make an *ex parte* application with a supporting affidavit to a court for an order against the person suspected of having possession or control of a document of the kind referred to.

(2) A police officer to whom the documents are produced may—

- (a) inspect the documents;
- (b) make copies of the documents; or
- (c) retain the documents for as long as is reasonably necessary for the purposes of this Act.

(3) Where a police officer retains documents produced to him, he shall make a copy of the documents available to the person who produced them.

Evidential value of information

104 (1) Where a person produces a document pursuant to an order under this Part, the production of the document, or any information, document or things obtained as a direct or indirect consequence of the production of the document, shall not be admissible against the person in any criminal proceedings except proceedings under section 107.

(2) For the purposes of subsection (1), proceedings on an application for a restraining order, or a confiscation order are civil proceedings.

Failure to comply with a production order

105 (1) Where a person is required by a production order to produce a document to a police officer, the person shall commit an offence under this section if he—

- (a) contravenes the order without reasonable cause; or
- (b) knowingly produces or makes available a document known to the person to be false or misleading in a material particular.

(2) A person who contravenes the provisions of this section commits an offence and shall, on conviction, be liable-

- (a) in the case of a natural person, to imprisonment for a term not exceeding seven years or a fine not exceeding two million shillings or to both; or,
- (b) in the case of a body corporate, to a fine not exceeding ten million shillings.

Power to search for and seize documents relevant to locating property

106 (1) A police officer may, under warrant issued under section 107-

- (a) enter upon land or into premises;
- (b) search the land or premises for any document of the type described in section 103(1); and
- (c) seize any document found in the course of that search that the police officer believes, on reasonable grounds, to be a relevant document in relation to an offence, provided that the entry, search and seizure is made.

(2) Any authority or officer exercising powers under this Act or any regulations made thereunder who, without reasons recorded in writing -

- (a) searches or causes to be searched any building or place; or
- (b) detains, searches or arrests any person,

commits an offence and is liable on conviction to imprisonment for a term not exceeding five years, or a fine not exceeding one million shillings, or to both.

Search warrant for location of documents relevant to locating property

107 (1) Where-

- (a) a person has been charged or convicted of an offence; or
- (b) a police officer has reasonable grounds for suspecting that there is or may be, within the next seventy-two hours, upon any land or in any premises, a document of the type described in section 103(1) in relation to the offence,

the police officer may make an application supported by an affidavit to a court of competent jurisdiction for a search warrant in respect of that land or those premises.

(2) Where an application is made under subsection (1) for a warrant to search land or premises, the court may, subject to subsection (4) issue a warrant authorizing a police officer, whether or not named in the warrant, with such assistance and by such force as is necessary and reasonable-

- (a) to enter upon the land or into any premises and to search the land or premises for property of that kind; and
 - (b) to seize property found in the course of the search that the police officer believes on reasonable grounds to be property of that kind.
- (3) A court shall not issue a warrant under subsection (2) unless it is satisfied that-
- (a) a production order has been given in respect of the document and has not been complied with; or
 - (b) a production order in respect of the document would be unlikely to be effective; or

- (c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without any notice to any person; or
 - (d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.
- (4) A warrant issued under this section shall state—
- (a) the purpose for which it is issued, including a reference to the nature of the relevant offence;
 - (b) a description of the kind of documents authorised to be seized;
 - (c) a time at which the warrant ceases to be in force; and
 - (d) whether entry is authorised to be made at any time of the day or night or during specified hours.
- (5) If during the course of searching under a warrant issued under this section, a police officer finds—
- (a) a document of the type described in section 103(1) that the police officer believes on reasonable grounds to relate to the relevant offence, or to another offence; or
 - (b) anything the police officer believes on reasonable grounds will afford evidence as to the commission of an offence,
- the police officer may seize that property or thing and the warrant shall be deemed to authorise such seizure.

Searches conducted without written reasons.

108. An officer or any authority exercising powers under this Act or Regulations made thereunder who, without reasons recorded in writing—

- (a) searches or causes to be searched any building or place; or
- (b) detains or searches or arrests any person,

commits an offence and is liable upon conviction to imprisonment for a term not exceeding five years, or a fine not exceeding one million shillings , or both.

PART XI CRIMINAL ASSETS RECOVERY FUND

Establishment of Criminal Assets Recovery Fund

109. There is established a fund to be known as the Criminal Assets Recovery Fund.

Finances of the Fund

110. The Fund shall consist of—

- (a) all moneys derived from the fulfilment of confiscation and forfeiture orders stipulated in Part VII to X;
- (b) all property derived from the fulfilment of forfeiture orders as stipulated in section 100;
- (c) the balance of all moneys derived from the execution of foreign confiscation orders after payments have been made to requesting countries under this Act;
- (d) any moneys appropriated by Parliament, or paid into, or allocated to, the Fund under the provisions of any other Act;

- (e) domestic and foreign grants;
- (f) any money or property recovered under the Anti- Corruption and Economic Crimes Act, 2003, or under any other Act other than money or property recovered on behalf of any public body or person;
- (g) any property or amount of money received or acquired from any other legal sources; and
- (h) all property or moneys transferred to the Fund pursuant to the provisions of this Act.

Administration of the Fund

111. The Fund shall be administered by the Agency.

Functions of the Agency under this Part

112. In the administration of the Fund, the following shall apply-

- (a) all monies derived from concluded confiscation and forfeiture orders stipulated in Parts VII to X shall be paid into the Consolidated Fund; and
- (b) all property derived from concluded confiscation or forfeiture orders stipulated in Parts VII to X shall vest in the Government and be disposed of in accordance with relevant law relating to disposal of public property.

Other matters to be prescribed

- 113.** (1) The Minister may prescribe, by way of regulations, matters in connection with-
- (a) the administrative operations of the Fund; and
 - (b) the utilization of properties and monies standing to the credit of the Fund.
- (2) Regulations issued under sub section (1) shall be laid before Parliament.

PART XII INTERNATIONAL ASSISTANCE IN INVESTIGATIONS AND PROCEEDINGS

Principles of mutuality

114. For the purposes of this Part, the principles of mutuality and reciprocity shall at all times be recognised.

Request made by Kenya to other countries.

- 115** (1) For the purpose of an investigation or proceedings under this Act, the Attorney-General may request an appropriate authority of another country to arrange for-
- (a) evidence to be taken, or information, documents or articles to be produced or obtained in that country;
 - (b) a warrant or other instrument authorizing search and seizure to be obtained and executed in that country;
 - (c) a person from that country to come to Kenya to assist in the investigation or proceedings;

- (d) a restraint order or forfeiture order made under this Act to be enforced in that country, or a similar order to be obtained and executed in that country to preserve property that had it been located in Kenya would be subject to forfeiture or confiscation under this Act;
- (e) an order or notice under this Act to be served on a person in that country; or
- (f) other assistance to be provided, whether pursuant to a treaty or other written arrangement between Kenya and that country or otherwise.

(2) Requests by other countries to Kenya for assistance of a kind specified in subsection (1) may be made to the Attorney-General.

Evidence, etc.; obtained from another country.

116. Evidence, documents or articles obtained pursuant to a request made under section 115 shall—

- (a) be received in evidence in Kenya;
- (b) not be used for a purpose other than that specified in that request, except with the consent of the appropriate authority of the foreign country; and
- (c) be returned when its use is no longer required, unless that authority indicates to the contrary.

Transfer to Kenya of a person to assist in an investigation or proceedings.

117 (1) The effect of a request made pursuant to section 115(c) shall be to authorise the entry into and departure from Kenya of the person who is the subject of the request, as well as the presence of the person in Kenya for so long as required for the purposes of the request.

(2) Where the person who is the subject of a request under section 111(c) is in custody in the other country by virtue of a sentence or order of a court or tribunal exercising criminal jurisdiction, the effect of a request under section 115(c) shall be to authorise the detention in custody of the person in transit to and from Kenya, and while in Kenya at such places as the Attorney-General may specify.

(3) A person in Kenya pursuant to a request under subsection section 115(1) shall not—

- (a) be detained, prosecuted or punished for any offence that is alleged to have been committed, or was committed, prior to that person's departure from the requested country pursuant to the request;
- (b) be subjected to any civil suit in respect of any act or omission that is alleged to have occurred, or occurred, prior to that person's departure from the requested country pursuant to the request;
- (c) be required to give evidence or produce a document or thing which he could not be required to give or produce—
 - (i) in any criminal proceeding in Kenya; or
 - (ii) subject to the requesting country conceding any claim by the person to a privilege or immunity under the law of the requested country in any criminal proceedings in the requested country; or

- (d) be required to give evidence or produce a document or thing in any proceeding in Kenya other than the proceeding to which the request relates.

Requests to Kenya for evidence

118 (1) Where country requests assistance from Kenya in obtaining evidence for the purpose of an investigation or a proceeding in relation to any offence under corresponding law of that country, the Attorney-General may nominate a court in Kenya to receive such evidence as appears to the court appropriate in order to give effect to the request.

(2) The court nominated pursuant to subsection (1) shall have the same power to secure the attendance of witnesses, administer oaths and receive evidence as it has for the purposes of other proceedings before the court—

(3) The evidence received by the court shall be certified or verified by the court in such manner as the Attorney-General specifies and then furnished to the Attorney-General for transmission to the requesting country.

Requests to Kenya for search warrants

119 (1) Where a country requests assistance from Kenya in obtaining and executing a search and seizure warrant for the purposes of an investigation or proceedings relating to the corresponding law of that country, the Attorney-General may apply to the High Court for the warrant requested.

(2) Where, on application, the High Court is satisfied that—

- (a) a proceeding or investigation relating to a serious offence has commenced in the requesting country; and
- (b) there are reasonable grounds for believing that evidence relevant to the investigation or proceedings is located in Kenya,

it may issue a warrant under this section authorizing entry for the purpose of search for the thing and if found the thing shall be seized.

(3) Any written law with respect to the procedure for the making and disposal of an application for the execution of a search warrant shall apply, as if the application were for the issue of a warrant under the Criminal Procedure Code.

Requests to Kenya for the enforcement of certain orders

120. (1) Where—

- (a) a court or tribunal of another country issues a restraint order or confiscation order, (whether based upon criminal or *in rem* or other non-conviction based proceedings), in respect of an offence against the corresponding law of that country; and
- (b) that country requests assistance from Kenya in enforcing those orders against property believed to be located in Kenya, the Attorney-General may apply to the High Court for the registration of the order.

(2) Where the Attorney-General applies to the High Court for the registration of an order pursuant to subsection (1) the High Court shall register the order.

(3) An order registered in accordance with this section shall have effect and shall be enforced, as if it were an order made under this Act or forfeiture orders, as the case may be

where the High Court is satisfied that—

- (a) the order is final, not subject to appeal, and a certified copy of such order bearing the seal or the signature of the court has been submitted;
- (b) the person against whom, or in relation to whose property the order has been made, received notice of the proceedings outside of Kenya and had an opportunity to defend his interest in the property; and
- (c) enforcement of the order would not be contrary to the interests of justice.

(4) To preserve the availability of property in Kenya that is subject to confiscation proceedings that have been or are likely to be instituted in another country, the Attorney-General may apply to the court to issue an order of restraint of the said property.

(5) In issuing the order of restraint the court may rely on information set forth in the request from the other country describing the nature of the pending investigations or proceedings and setting forth a reasonable basis to believe that the said property will be named in a confiscation order at the conclusion of the proceedings.

(6) A copy of the application to register and enforce orders from another country shall be provided to any person who appears to own or control or otherwise have a legal interest in the property in the manner prescribed in section 79.

(7) A person entitled to notice pursuant to subsection (6) shall have thirty days from the date of such receipt of notice or publication, whichever is later, to file an objection contesting the enforcement of the order from another country.

(8) Unless a person contesting enforcement of an order from another country is able to establish one of the conditions (1) of section 93(1) the court may enter such orders as may be necessary to give effect to the orders of a court or tribunal of the other country and the court shall be bound by the findings of fact to the extent that they are stated in the foreign order.

(9) Where an amount of money is to be paid under an order from another country is expressed in a currency other than that of Kenya, the amount shall be converted into the currency of Kenya on the basis of the official exchange rate prevailing as of the date of the registration of the order.

(10) Where the Attorney-General considers it appropriate either because an international arrangement so requires or because it is permits or in the public interest, the Attorney- General may order that the whole or any part of any property forfeited pursuant subsection (7) or the value thereof be returned or remitted to the requesting state.

PART XIII MISCELLANEOUS PROVISIONS

Access to information

121 (1) The Attorney-General may request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation in terms of this Act and such person shall notwithstanding anything to the contrary contained in any law which prohibits or precludes that person—

- (a) from disclosing any information relating to the activities, affairs or business of any other person; or
- (b) from permitting any person to have access to any registers, records or other documents, or electronic data which have a bearing on the said activities, affairs or business,

furnish the Attorney-General with such information and permit the Attorney-General to have access to any registers, records, documents, and electronic data, which may contain such information.

(2) The provisions of subsection (1) shall not be construed as prohibiting any Minister by whom or any other department or institution by which, or under the control of whom or which, any law referred to in subsection (4) is administered, or any board, institution or body established by or under any such law, from making any practical and reasonable procedural arrangements with regard to the furnishing of such information or the granting of the access contemplated in subsection (1) and according to which the information or the granting of the access contemplated in that subsection shall be furnished or granted with regard to any reasonable safeguards which any such Minister, authority, board, institution, body or person, subject to the provisions of subsection (3), requires to maintain the confidentiality of such information, registers, records, documents or electronic media.

(3) No person shall, without the written permission of the Attorney-General disclose to any other person any confidential information, registers, records, documents or electronic data which came to his knowledge in the performance of that person's functions in terms of this Act and relating to the activities, affairs or business of any other person, except-

- (a) for the purpose of performing that person's functions in terms of this Act;
- (b) in the course of adducing evidence in any criminal proceedings or proceedings in terms of this Act; or
- (c) when required to do so by an order of a court of law.

(4) A person who contravenes subsection (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years, or to a fine not exceeding two million shillings, or to both.

Investigations

122. Whenever the Attorney-General has reason to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence, the Attorney-General may, prior to the institution of any civil or criminal proceeding, under written authority direct a specific investigation.

Sharing of information

123. Notwithstanding the provisions of the Income Tax Act, and with regard to any other secrecy provision in any other Act, whenever any investigation is instituted in terms of this Act, including an investigation into any other offence, and an investigation into the property, financial activities, affairs or business of any person, the Commissioner General of the Kenya Revenue Authority or any official designated by that person for this purpose, shall be notified of such investigation with a view to mutual cooperation and the sharing of information.

Hearings of court to be open to public

124. (1) Subject to the provisions of this section, the hearings of the court contemplated in this Act, except for *ex parte* applications, shall be open to the public.

- (2) If the court, in any proceedings before it, is satisfied that—
- (a) it would be in the interest of justice; or
 - (b) there is a likelihood that harm may ensue to any person as a result of the proceedings being open,

it may direct that such proceedings be held behind closed doors and that the public or any category thereof shall not be present at such proceedings or any part thereof.

(3) An application for proceedings to be held behind closed doors may be brought by the Attorney-General or the manager referred to in section 68 and any other person referred to in subsection (2), and such application shall be heard behind closed doors.

(4) The court may at any time review its decision with regard to the question whether or not the proceedings shall be held behind closed doors.

(5) Where the court pursuant to subsection (2) on any grounds referred to in that subsection directs that the public or any category thereof shall not be present at any proceedings or part thereof, the court may—

- (a) direct that no information relating to the proceedings, or any part thereof held behind closed doors, shall be made public in any manner;
- (b) direct that no person, in any manner, shall make public any information which may reveal the identity of any witness in the proceedings; and
- (c) give such directions in respect of the record of proceedings as may be necessary to protect the identity of any witness:

Provided that the court may authorise the publication of any information it considers just and equitable.

(6) A person who discloses information in contravention of subsection (5) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding two years, or to a fine not exceeding five hundred thousand shillings, or to both.

Monitoring orders

125 (1) An authorised officer may apply, *ex parte*, for a monitoring order directing a reporting institution to give information to that officer.

- (2) A monitoring order shall—
- (a) direct a reporting institution to disclose information obtained by it about transactions conducted through an account held by a particular person with it;
 - (b) be for such a period as the court may deem necessary.

(3) A monitoring order shall not be issued unless the court is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the order is sought has—

- (a) committed or was involved in the commission, or is about to commit or be involved in the commission of, a serious offence; or
- (b) benefited directly or indirectly, or is about to benefit directly or indirectly from the commission of a serious offence.

- (4) A monitoring order shall specify–
- (a) the name or names in which the account is held or believed to be held; and
 - (b) the information that the institution is required to give.
- (5) Where a reporting institution which has been given notice of a monitoring order, knowingly–
- (a) contravenes the order; or
 - (b) provides false or misleading information in purported compliance with the order,
- commits an offence.
- (6) A person who contravenes the provisions of this section shall, on conviction, be liable–
- (a) in the case of a natural person, to imprisonment for a term not exceeding three years, or to a fine not exceeding two million shillings, or to both; or
 - (b) in the case of a body corporate, to a fine not exceeding ten million shillings.

Monitoring orders not to be disclosed

126 (1) A reporting institution that is, or has been subject to a monitoring order shall not disclose the existence or operation of the order to any person except–

- (a) an officer or agent of the institution for the purpose of ensuring compliance with the order;
- (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or
- (c) a police officer authorised in writing to receive the information.

- (2) A person who contravenes subsection (1) shall, on conviction, be liable,–
- (a) in the case of a natural person, to imprisonment for a term not exceeding three years, or to a fine not exceeding two million shillings, or to both; or
 - (b) in the case of a body corporate, to a fine not exceeding ten million shillings.

(3) A person described in subsection (1) shall not disclose the existence or operation of a monitoring order except to another such person, and may do so only for the purposes of the performance of his duties or functions.

(4) A person who contravenes the provisions of subsection (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding two million shillings or to both.

(5) Nothing in this section prevents the disclosure of information concerning a monitoring order for the purposes of or in connection with legal proceedings or in the course of proceedings before a court, provided that nothing in this section shall be construed as requiring a legal adviser to disclose to any court the existence or operation of a monitoring order.

Conduct of person outside Kenya

127. The conduct of a person that takes place outside Kenya constitutes an offence under this Act if the conduct would constitute an offence against a provision of any law in Kenya if it occurred in Kenya.

Admissibility of electronic evidence

128. Notwithstanding the provisions of the Evidence Act, any court hearing any matter in relation to this Act may admit electronic evidence.

Admissibility of statements and documents of persons who are dead or cannot be traced, etc

129. Notwithstanding any written law to the contrary, in any proceedings against any person for an offence under this Act—

- (a) any statement made by any person to an officer of any enforcement agency in the course of an investigation under this Act; and
- (b) any document, or copy of any document, seized from any person by an officer of any enforcement agency in exercise of his powers under this Act,

shall be admissible in evidence in any proceedings under this Act before any court, where the person who made the statement or the document or the copy of the document is dead, or cannot be traced or found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which appears to the court unreasonable.

Preservation of secrecy

130 (1) Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court or under the provisions of any written law, no person shall disclose any information or matter which has been obtained by him in the performance of his duties or the exercise of his functions under this Act.

(2) A person who has any information or matter which to his knowledge has been disclosed in contravention of subsection (1) shall not disclose that information or matter to any other person.

(3) A person who contravenes subsection (1) or (2) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding one year or a fine not exceeding one million shillings or to both.

Supersession

131. Where there is a conflict between the provisions of this Act and the provisions of any written law with regard to any matter, the provisions of this Act shall prevail.

Amendment of Schedules

132. (1) The Minister may, by order in the Gazette, amend the First, Second or the Fourth Schedules.

(2) An Order made under sub section (1) shall not decrease the monetary sums specified in the Second and Fourth Schedules.

Consequential amendments

133. The Acts identified in the Sixth Schedule are amended as indicated in the Sixth Schedule.

Regulations

134. (1) The Minister shall make Regulations—

- (a) with regard to the nature of the information contemplated in section 44 and the manner in which it is to be reported;
- (b) with regard to the designation of persons for purposes of section 47;

- (c) in consultation with the Chief Justice, prescribing from time to time the maximum allowable costs for legal services in connection with an application for a preservation of property order or forfeiture order or the defending of a criminal charge which may be met out of property that is subject to a preservation of property order;
 - (d) providing for high risk customers or clients; and
 - (e) providing for any matter which he may consider necessary or expedient to prescribe or to regulate in order to achieve the objects of this Act.
- (2) Notwithstanding the provisions of subsection (1), the Minister may make regulations generally for carrying out the purposes and provisions of this Act, including the following–
- (a) regulations that require reporting institution to exercise due diligence and take reasonable measures to satisfy themselves as to the true identity of any person seeking to enter into a business relationship with them, or seeking to carry out a transaction or series of transactions with them, by requiring the person to produce an official record reasonably capable of establishing the true identity of the person;
 - (b) regulations that require reporting institution to establish and maintain records of transactions;
 - (c) regulations that require reporting institution to report transactions or activities that they have reasonable grounds to believe are suspicious or unusual as defined by the regulations and this Act;
 - (d) regulations that require reporting institution to establish and maintain internal reporting procedures to make employees aware of domestic laws relating to money-laundering, and the procedures and related policies established and maintained by them pursuant to this Act, to provide employees with appropriate training in the recognition and handling of suspicious activities that may be indicative of money laundering, to provide for an independent auditing of monitoring procedures, and to maintain an adequate anti-money laundering compliance programme.

FIRST SCHEDULE s.2

SUPERVISORY BODIES

1. The following institutions are the supervisory bodies referred to in section 2.
 - (a) Central Bank of Kenya;
 - (b) Insurance Regulatory Authority;
 - (c) Betting & Licensing Control Board;
 - (d) Capital Markets Authority;
 - (e) Institute of Certified Public Accountants of Kenya;
 - (f) Estate Agents Registration Board;
 - (g) Non-Governmental Organizations Co-ordination Board;
 - (h) Retirement Benefits Authority.

SECOND SCHEDULE s. 12(1)

CONVEYANCE OF MONETARY INSTRUMENTS TO OR FROM KENYA

A person who transports monetary instruments of US\$ 10,000 or its equivalent in Kenya Shillings or any other currency into or out of Kenya shall declare, in a prescribed form, at the port of entry or exit.

THIRD SCHEDULE s.32(a)

OATH OF CONFIDENTIALITY

I.....(full names).....DO HEREBY SWEAR BY THE ALMIGHTY GOD/SOLEMNLY AND SINCERELY AFFIRM THAT I will not, without due authority, disclose or make known to any person any information acquired by me by reason of the duties performed by me on behalf or under the direction of the Financial Reporting Centre or by reason of any office or employment held by me pursuant to The Proceeds of Crime and Anti-Money Laundering Act, SO HELP ME GOD.

DATED this.....day of.....20.....Name of Officer.....Signature.....
SWORN/AFFIRMED by the said.....at.....
BEFORE ME.....

FOURTH SCHEDULE s.44(3)

REPORTING THRESHOLD

A reporting institution shall file reports all cash transactions exceeding US\$ 10,000 or its equivalent in any other currency carried out by it.

FIFTH SCHEDULE s. 51

PROVISIONS AS TO THE CONDUCT OF BUSINESS AND AFFAIRS OF THE BOARD

The Board to meet at least four times in a year

1. The Board shall meet as often as necessary for the transaction of business but it shall meet not less than four times every financial year and not more than four months shall elapse between the date of one meeting and the next.

The Chairperson to preside all meetings

2. (1) The Chairperson shall preside at every meeting of the Board at which the chairperson is present but in the absence of the chairperson, the members present shall appoint one from among their number to preside at that meeting.

(2) The Chairperson or, in the absence of the chairperson a member appointed by the Board to act in the place of the chairperson, may at any time call a special meeting upon a written request by a majority of the members.

Notice of meeting

3. Unless six members otherwise agree, at least seven days' written notice of every meeting of the Board shall be given to every member of the Board.

Decision of the Board to be by majority

4. Unless a unanimous decision is reached, a decision on any matter before the Board shall be by a majority of votes of the members present and in the case of an equality of votes, the Chairperson or the member presiding shall have a casting vote.

A member is entitled to have opinion recorded

5. Any member present at a meeting of the Board or a subcommittee thereof, shall have the right to require his opinion to be recorded in the minutes if the Board or the sub-committee, as the case may be, passes a resolution, which in the opinion of that member is contrary to his advice or to law.

Board member to disclose interest

6. A member of the Board who has a direct or indirect interest in a matter being considered or to be considered by the Board shall, as soon as possible after the relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Board and shall not be present during any deliberations on the matter.

The Board to cause minutes to be recorded and kept

7. The Board shall cause the minutes of all proceedings of its meetings to be recorded and kept, and the minutes of each meeting shall be confirmed by the Board at the next meeting of the Board and signed by the Chairperson or the member presiding at the meeting.

Quorum

8. (1) Subject to subsection (2), six members shall constitute a quorum for the conduct of business at any meeting of the Board.

(2) When there is no quorum at or for the continuation of a meeting of the Board only because of the exclusion of a member under paragraph 6, the other members present may, if they deem it expedient so to do—

- (a) postpone the consideration of that matter until there is a quorum; or
- (b) proceed to consider and decide the matter as if there was quorum.

SIXTH SCHEDULE s.133

CONSEQUENTIAL AMENDMENTS

2. Extradition (Contiguous and Foreign Countries) Act

1.(1) This paragraph amends the Extradition (Contiguous and Foreign Countries) Act.

(2) The schedule to the Act is amended by inserting at the end the following paragraph.

“any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009.”

1. Extradition (Commonwealth Countries) Act

1.(1) This paragraph amends the Extradition (Commonwealth Countries) Act.

(2) The schedule to the Act is amended by inserting at the end the following paragraph:

“31. any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009.”

3. Narcotic Drugs and Psychotropic Substances (Control) Act

1.(1) This paragraph amends the Narcotic Drugs and Psychotropic Substances (Control) Act.

(2) Section 49 of the Act, is repealed.

Annex 3: List of all laws, regulations and other material received

List of Laws, Regulations and Guidelines

- 1 Accountants Act
- 2 Administration Police Act
- 3 Advocates Act
- 4 Anti-Corruption and Economic Crimes Act
- 5 Banking Act
- 6 Central Bank of Kenya Prudential Guidelines for Institutions Licensed under the Banking Act
- 7 Guideline on Agent Banking- CBK/PG/15
- 8 Betting, Lotteries and Gaming Act
- 9 Brokers Act
- 10 Capital Markets Act
- 11 The Capital Markets (Licensing Requirements) (General) Regulations
- 12 The Capital Markets (Collective Investments Schemes) Regulations 2001
- 13 The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations 2002
- 14 Central Bank of Kenya Act
- 15 The Revised Forex Bureau Guidelines 2007
- 16 Central Depositories Act
- 17 Co-operative Societies Act
- 18 Companies Act
- 19 Constitution
- 20 Council of Legal Education Act
- 21 Criminal Procedure Act
- 22 Dangerous Drugs Act
- 23 Diamond Industry Protection Act
- 24 East African Community Customs Management Act, 2004
- 25 Estate Agents Act
- 26 Evidence Act
- 27 Extradition (Commonwealth Countries) Act
- 28 Extradition (Contiguous and Foreign Countries) Act
- 29 Foreign Judgments (Reciprocal Enforcement) Act
- 30 Insurance Act
- 31 Insurance Regulations
- 32 International Crimes Act, 2008
- 33 Interpretation and General Provisions Act
- 34 Judicature Act
- 35 Kadhis' Courts Act
- 36 Kenya Communications (Amendment) Act
- 37 Kenya Post Office Saving Bank Act
- 38 Kenya Revenue Authority Act
- 39 Law Society of Kenya Act
- 40 Limited Partnerships Act
- 41 Magistrates' Court Act

- 42 Microfinance Act
- 43 Microfinance (Deposit Taking Microfinance Institution) Regulations, 2008
- 44 Narcotic Drugs and Psychotropic Substances Control Act
- 45 National Security Intelligence Service Act
- 46 Non-Governmental Organisations Co-ordination Act
- 47 Notaries Public Act
- 48 Partnership Act
- 49 Penal Act
- 50 Pensions Act
- 51 Perpetuities and Accumulation Act
- 52 Police Act
- 53 Postal Corporation Act
- 54 Proceeds of Crime and Anti-Money Laundering Act (Act No. 9 of 2009)
- 55 Public Officer Ethics Act
- 56 Public Trustee Act
- 57 Registration of Documents Act
- 58 Retirement Benefits Act
- 59 Retirement Benefits (Managers and Custodians) Regulation
- 60 SACCO Societies Act
- 61 Societies Act
- 62 Trustee Act
- 63 Trustees (Perpetual Succession) Act
- 64 Witness Protection Act
- 65 Witness Summonses (Reciprocal Enforcement) Act

Bills

- 66 The Mutual Legal Assistance Bill 2009
- 67 Draft Prevention of Terrorism Bill 2009

Case law

- 68 Torroha v Republic [1989] KLR 630

Agreements and MOU

- 69 East African Revenue Authorities MOU on Exchange of Information on Tax and other Related Matters
- 70 General Agreement on Cooperation between the Government of the Republic of Kenya and The Government of the Republic of Burundi
- 71 Interagency Platform Tasking and Information Sharing Guidelines
- 72 MMOU between the Insurance Regulatory Authorities on Co-operation in the Regulation and Supervision of the Insurance Industry in the East African Community
- 73 MOU between the Egyptian Customs Authority and Kenya Revenue Authority
- MOU between the Ethiopian Revenues and Customs Authority of the Federal Republic of Ethiopia and the Kenya Revenue Authority of the Republic of Kenya

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