The GL🌐CEPS
-Policy Paper-

Research and Analysis in Diplomacy and Foreign Policy Pillar

Strengthening the role of proceeds of crime and anti-money laundering Act (POCAMLA) in investigation and prosecution of financial crimes

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Executive Summary

This paper explores the successes and challenges of the Proceeds of Crime and Anti-money laundering Act No. 9 of 2009 (POCAMLA) in the investigation and prosecution of financial crimes in Kenya. It argues that the law has been successful in enhancing international cooperation and multi-lateral engagements in countering money laundering, enforcement of compliance in financial crimes reporting, and strengthening Kenya's counter-terrorism regime. Nevertheless, the country remains blacklisted internationally as a major money laundering jurisdiction. This necessitates revisiting the discourse of investigation and prosecution of financial crimes in order to address the risk issues including lenient penalties, shortage of capacity in enforcement institutions, the rapid evolution of the digital finance environment, legal bottlenecks, and the danger of oppressive prosecution. Key recommendations include enforcement of stiffer penalties, increasing budgetary allocations for investigative agencies and the Office of the Director of Public Prosecutions (ODPP) and the establishment of a financial crimes research centre.
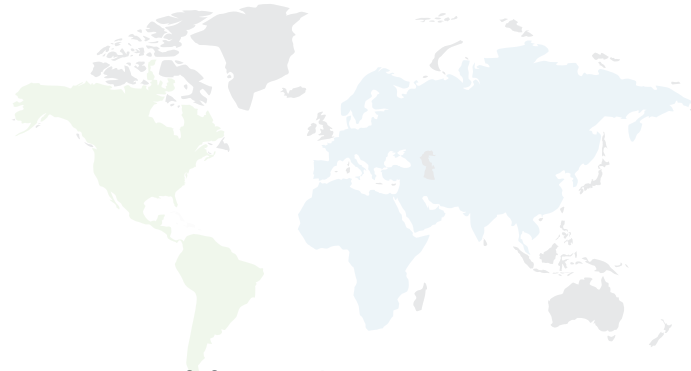
Background

The investigation and prosecution of financial crimes in Kenya are premised on the Proceeds of Crime and Anti-money laundering Act, No.9 of 2009, hereafter, referred to as POCAMLA. The law criminalises the offense of money laundering and provides guidelines on the tracing, seizure, freezing, and confiscation of the proceeds of crime. It establishes the Financial Reporting Centre (FRC), the Assets Recovery Agency (ARA), and the Anti-Money Laundering Advisory Board. These bodies, alongside the police and the prosecution, are charged with the responsibility of enforcing compliance with the law. The Act has undergone subsequent amendments and revisions as documented in Act No. 51 of 2012, Act No. 14 of 2015, Act No. 19 of 2015, Act No. 3 of 2017, L.N. 105/2017, Act No. 15 of 2017, Act No. 10 of 2018, Act No. 18 of 2018 and Act No. 24 of 2019. Despite its existence, Kenya remains blacklisted internationally for money laundering.

Since its enactment, POCAMLA has been consistently used by the investigative and prosecution agencies in Kenya to restrain, preserve and seize proceeds of crime and money laundering. The Directorate of Criminal Investigation (DCI), the Ethics and Anti-Corruption Commission (EACC), and the Office of the Director of Public Prosecutions (ODPP) have on several occasions applied the law to pursue suspected cases of money laundering. The law has equally empowered financial institutions and designated non-financial businesses and professions to report suspicious transactions and activities in their systems. The FRC, for instance, has entered into MOUs with the Central Bank of Kenya (CBK), Capital Markets Authority (CMA), and the Insurance Regulatory Authority (IRA) for the regulation and supervision of the reporting entities to ensure they provide compliance reports annually. The ARA and ODPP have used POCAMLA to recover proceeds of crime through criminal and civil forfeiture proceedings.

The investigation and prosecution of financial and economic crimes in Kenya have increased following the legislation's enactment. Crimes

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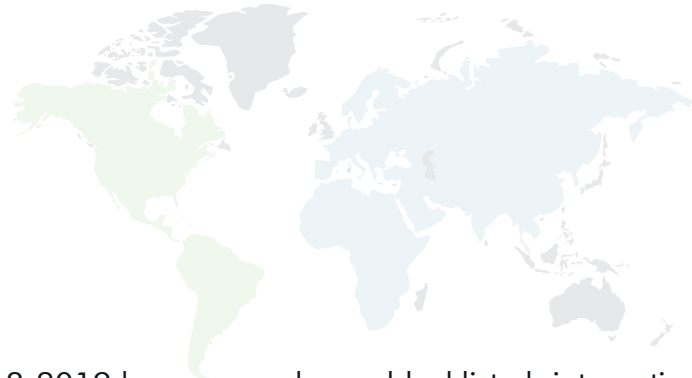
prosecuted between 2018-2019 have grown by 16.7%. Evidence indicates that financial crimes, particularly money laundering, continue to frustrate legitimate businesses; corrupt the financial system, and devalue government command over the economy and revenue generation. The crime remains a scourge due to increased international financial mobility and terror financing through an array of channels involving cybercrime. This is amplified by the great leap forward in technological advancements such as artificial intelligence, blockchain technology, digitisation of economies, and rapid globalisation that have significantly shaped the business environment in Kenya. While POCAMLA remains a step in the right direction over the past decade, the country, nonetheless, remains blacklisted internationally as a major money laundering jurisdiction. This necessitates revisiting the discourse of investigation and prosecution of financial crimes in order to address the risk issues as well as applicable strategies to attack the criminal financial activities and prevent, detect and punish illegal fundsentering the system. In examining the successes and challenges of POCAMLA, this study set out to explore the legal framework governing the management of financial crimes in Kenya, with a view towards strengthening its use in investigation and prosecution. The onus of this paper is therefore to analyse these issues and make policy recommendations towards strengthening Kenya's Anti-Money Laundering (AML) regime.

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Key Issues

The following factors remain key in the discussion regarding the successes achieved so far and the constraints hindering the effective prosecution of economic and financial crimes in Kenya.

a)   Accomplishments of POCAMLA

The ongoing discussion explores the significant contributions POCAMLA has made towards the fight against financial crimes in Kenya. These include augmenting international cooperation and multi-lateral engagements in anti-money laundering (MLA), enforcement of compliance in financial crimes reporting, and strengthening Kenya's counter-terrorism framework.

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Enhancing international cooperation and multi-lateral agency engagements in counter money laundering (MLA)

The law has seen significant gains made in multi-agency collaborations are foreign policy engagements as efforts to counter illicit flow of funds intensify. The establishment of the Multi-Agency Team (MAT) in 2015 has enhanced interagency cooperation in the investigation and repossession of assets acquired through criminal activities. The National Police Service (NPS), EACC, ARA, Kenya Revenue Authority (KRA), and FRC are collaborating in tracing, identifying, freezing, and recovery of proceeds of crime. The Act continues to improve international cooperation in fighting money laundering, corruption, and terrorist financing. Investigative agencies have benefited from the provisions of Part XII of POCAMLA that provide for international assistance in investigations relating to financial crimes. They have been able to track, seize and repatriate assets stolen from Kenya and hidden in other countries such as the United Kingdom, Switzerland, and Jersey Islands. In addition, the international collaborations have seen Kenyan investigators and prosecutors benefit from technical multilateral assistance on how to best deal with complex cases of corruption and financial crimes. The Act is also an indication of Kenya's compliance with Financial Action Task Force (FATF) regulations as the country continues her quest to join the prestigious Egmont Group.

Enforcement of compliance in financial crimes reporting

Many financial institutions and designated non-financial businesses and professions have complied with reporting requirements of POCAMLA. This has enabled the prosecution of non-compliant financial institutions. For instance, the Central Bank of Kenya (CBK) fined five banks including Standard Chartered Bank, Equity, Kenya Commercial Bank (KCB), Cooperative Bank, and the Diamond Trust Bank (DTB) a combined penalty of Ksh 392 million following their failure to report suspicious transactions linked to the NYS II scandal. The banks had allowed transactions over Ksh 3 billion linked to the scandal without proper customer due diligence thereby validating large money transfers contrary to the CBK policy on transactions. In the year 2019/2020, ARA filed forfeiture proceedings of 23 motor vehicles and 13 parcels of developed land deemed to be proceeds of crime and money laundering. Similarly, the ODPP has operationalised the Proceeds of Crime Recovery Unit to facilitate the 'follow-the-money' strategy in pursuance of proceeds of crime. Consequently, in 2020, the ODPP recovered Ksh 2 billion worth of proceeds of crime and related matters which was handed over to the Treasury.

The EACC has equally managed significant disruption in the movement of illicit finances. In the 2019/2020 financial year, the agency processed 36.9% of reports received on corruption, economic crime, and unethical conduct, which were relevant to its mandate. This enabled the recovery of property worth over Ksh11 billion from corrupt individuals.

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Strengthening Kenya's counter-terrorism regime

The enactment of POCAMLA has significantly strengthened Kenya's counter-terrorism policy regime. The law preceded the development of the Prevention of Terrorism Act, 2012, which criminalised terrorism and its financing. This further gave way to the adoption of the Prevention of Terrorism Regulations, 2013, to implement the UN Security Council Resolutions 1267 and 1373. Moreover, to instrument, the United Nations Security Council Resolutions on Suppression of Terrorism, the Counter Financing of Terrorism Inter-Ministerial Committee, was established to ensure Kenya is compliant with its international obligations on combating terrorism financing.

POCAMLA's provision for identifying, tracking, seizing, and freezing suspected illicit finances has reduced the flow of finances to terrorist networks. Both money laundering and terrorist financing activities circumvent legalities of the financial sector. The systems used in terrorist financing and money laundering are very similar and in many instances identical to avoid detection, conceal the sources of the money and, in the case of terrorism, conceal both the funding activity and the nature of the funded activity. Indeed, the investigative agencies and the ODPP have applied such provisions and sued several individuals and financial institutions for their suspected engagement in terrorist financing. For instance, a branch manager at Diamond Trust Bank (DTB) was charged for failing to report the withdrawals as suspicious transactions which were later traced to the Dusit D2 attacks. This is indicative of consistent reinforcement of Kenya's AML/CFT regime.
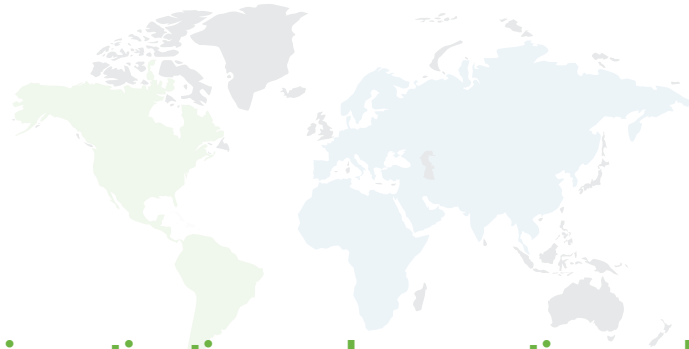
b) Challenges to investigation and prosecution under POCAMLA

The following discussion revisits the crucial risk issues in the investigation and prosecution of financial crimes. These include lenient penalties, shortage of capacity, inadequate technological adaptation, stakeholder complicity in furthering financial crimes, legal bottlenecks, and the danger of oppressive prosecution.

Photo credit: The Star

Kenya's Director of Public Prosecutions, Noordin Haji (left) and Director, Directorate of Criminal Investigations, George Kinoti (right)

Lenient Penalties

Section 16(1) of the POCAMLA provides maximum penalties to be handed to those convicted of money laundering. These punishments appear affordable compared to amounts under investigation in the perpetrated crime. Whereas corporate bodies face penalties of up to Ksh. 25 million or the amount of the value of the property introduced in the offense, whichever is less; natural persons on the other hand face jail terms of up to fourteen years or fines not exceeding Ksh 5 million or the equivalent value of the property involved in the offense whichever is higher or both. Therefore, there is likely to be more cases of recidivism and increased offending as repercussions are not severe compared to the potential gains from the crime.

There is more evidence to the fact that financial institutions have been key enablers of money laundering schemes in Kenya. The lukewarm approach exhibited in prosecuting money laundering offenses involving financial institutions and substituting them with compassionate punishments is detrimental to the prevention of money laundering in Kenya. This has been seen in the use of Deferred Prosecution Agreements (DPA) as a strategy to evade severe punishment. For instance, in the NYS scandal aforementioned, the ODPP chose to defer the prosecution of banks involved, substituting it with a fine of Ksh 385 million, while the banks allowed Ksh 3,578,000,000, to pass through their systems. Proponents of punishment argue that to

maximise a punishment's deterrence value, its seriousness should be proportional to the harm done to society. Likewise, prevention of financial crimes can only be effective if punishment is prompt enough to prevent the offender from enjoying the proceeds. Even though the criminal justice system provides for lesser sentences for cooperating suspects, too lenient punishments are likely to reverse prevention efforts, encourage recidivism and embolden new offenders.

Photo Credit: KTO Law Firm

Shortage of capacity for enforcement

The investigative agencies and the ODPP do not have adequately trained personnel, funds, and technological prowess to fully implement POCAMLA. The successful investigation of economic crimes requires a vast engagement of forensic expertise. Despite a number of investigative officers being trained in this element, the inadequacy of manpower to cover the large volume of economic crimes occurring in Kenya remains a concern. Being a relatively new law, there is still a deficiency of vast practical investigative and prosecutorial experience that would amplify the existing legal and law enforcement knowledge to perfect investigation and prosecution. In particular, investigative institutions such as the EACC and the DCI are yet to acquire and adopt modern intelligent and analytical technologies such as data mining to aid in the detecting, tracking, monitoring, and reporting suspicious new trends. There still exists the inadequate capacity to carry out background checks on customers or verify their records. Consequently, criminals continue to exploit such weaknesses to launder money.

The rapid evolution of digital finance

The rapid evolution of technology, particularly the use of the internet in the financial sector is a challenge to the detection and prosecution of money laundering in Kenya. The use of online money transfer is capable of evading detection. The consistent migration of banking institutions to the online space, anonymous online payment services, transfers using mobile phones, and virtual currencies such as Bitcoin continue to complicate the detection of illegal transfer of money. POCAMLA does not recognise virtual currency as legal tender indicating that Anti-Money Laundering (AML) requirements have not addressed digital asset risks. This is an indication that a gap remains in formulating a framework to address risks associated with digital assets. As Kenya moves towards the use of Bitcoin as a reserve currency, the possibility of cryptocurrency becoming a legal tender in the country remains real. The situation is bound to increase financial risks.

Suspicious transnational dealings within the mobile money sector, in particular, have been difficult to track and investigate due to inadequate enforcement in this sector. Criminal anonymity plays a significant role as criminals use false identification documents to open mobile payment accounts, which hinder law enforcement from identifying and making arrests. This coupled with insufficient reporting, increases the risk of abuse. Despite restrictions in maximum amounts per single transaction allowed by mobile money providers, there are no legal restrictions on operating a chain of transactions as per the set limits through multiple sim cards. Therefore, offenders have had opportunities to launder money severally without raising suspicion.

POCAMLA equally remains challenged by illicit flows of digital financial transactions across borders. In 2018, it was estimated that Kenya was

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losing an average of KES 40 billion every year through illicit financial flows since 2011. These amounts are supported by interoperability which progressively enables individuals to transfer money between accounts held with different mobile money operators, other financial system players such as banks, and across borders. This offers increased opportunities to criminals. For instance, the availability of M-PESA services in Afghanistan and India paired with the logistical prospects for sea shipments from Asia to Kenya, has contributed to the increased prominence of the drug trade in East Africa.

The use of proxy servers and anonymising software has made assimilation of illegal money almost impossible to detect, as money can be transferred or withdrawn, leaving little or no trace of an IP address. Money can also be laundered through online auctions and sales. For example, gambling websites and virtual gaming sites have been used to convert ill-gotten money into gaming currency, after which it is transferred back into real, usable, and untraceable legitimate funds. This is indicative of the many forms of cybercrimes that may prove difficult for existing anti-money laundering laws. In its current state, POCAMLA is majorly designed to uncover dirty money as it passes through traditional financial institutions. This allows money launderers to keep changing their modus operandi in order to survive the financial enforcement mechanisms.

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Legal bottlenecks

The non-inclusion of legal practitioners as Designated Non-Financial Business and Professions (DNFBPs) remains a key impediment in curbing financial crimes. The legal provisions that obstruct advocates from divulging information shared with their clients make it difficult for lawyers to report clients who are abetting or engaging in suspected financial transactions.

As witnessed in the recent case of the United States of America v. Ramon Olorunwa Abbas, aka "Ray Hushpuppi," aka "Hush," aka "Malik," and others, Kenyan law firms seem to be the preferred destinations for international money laundering actors. Classification of lawyers as DNFBPs would oblige them to monitor and report suspected money laundering activities.

This would imply that lawyers continuously take their clients through AML risk assessment in order to screen backgrounds and sources of wealth, identify politically exposed persons (PEPs) and apply enhanced due diligence on their monetary activities.

Despite the gravity of financial crimes, suspects take advantage of the bail and bond process as provided for in the Constitution of Kenya 2010 and the Criminal Procedure Code (CPC) Cap 75, Laws of Kenya, to seek liberty and thereby interfere with the ongoing cases through bribery and intimidation when out on bail or bond. The lenient punishment money laundering attracts cannot allow the courts to deny the accused bail despite the amount involved.

Danger of oppressive prosecution

POCAMLA casts a very wide net of persons who may be charged with money laundering beyond crimes in the Penal Code, Cap 63 Laws of Kenya. This gives the prosecution much discretion that may be detrimental to the public goodwill and cooperation required in crime prevention. Sections 3, 4, and 7 of POCAMLA identify six different types of criminals who may be prosecuted for money laundering. These are (a) one who knows or should reasonably have known that property has been obtained from crime but proceeds to engage in a transaction regarding the same property; (b) a person who helps to conceal or disguise the nature, source, location, movement or ownership of the property; (c) a person who deals with the property in a way that helps the offender avoid prosecution; (d) a person who takes away or diminishes any property acquired as a result of the commission of an offense; (e) a person who acquires, uses, or possesses property that they know or ought to have reasonably known was acquired through a crime committed by another person and (f) a person who promotes the offense of money laundering. The offence as defined makes it difficult to demarcate the legal boundary between the offense of money laundering and that of handling stolen goods as in sec. 322 of the Penal Code. Both crimes involve handling proceeds of crime of any value.

The six different types of criminals, particularly those in categories (a) to (e) could either be charged with money laundering or handling stolen goods so long as they knowingly (or ought to reasonably have known) transport, transmit, transfer, receive, or even attempt to transfer or receive a monetary instrument or anything of value. While the definition may make it difficult for a person suspected of the crime of money laundering to escape punishment, the law gives latitude for selective and oppressive prosecution which could be based on prejudice. This may jeopardise the crime prevention goal of criminal justice and take away public goodwill which is essential for gathering direct evidence to aid the prosecution of financial crimes.


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A case in point is the judicial review of Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others [2016]. The suspects in the criminal case on money laundering, questioned their prosecution, claiming that the ODPP had not precisely established what crimes had generated the property in question. The court dismissed this position and appeared to be applying section 322 4(a) of the Penal Code that cushions the ODPP from being compelled to prove that the defendant knew or ought to have known the goods in question were stolen. Therefore, the Act is capable of promoting selective and oppressive prosecution as the ODPP is at liberty to determine which cases to prosecute under POCAMLA and which ones to designate under other statutes such as the Penal Code.

Moreover, without a fair notice on the value of the monetary instrument that is either punishable as money laundering or theft, the law risks being seen as void for vagueness. If the purpose and spirit of anti-money laundering law is to protect the Kenyan economy from devaluation and collapse, it makes little sense to state in law that dealing in proceeds of crime whose monetary value is as little as a coin amounts to money laundering and could lead to economic collapse. The law needs to be realistic enough to qualify and quantify the value of the proceeds of crime being punished and relate it to its potential consequence once introduced into the Kenyan economy. This will allow other related crimes to be prosecuted under other existing laws. In comparison, the United States (US) statute equivalent to POCAMLA presents a more purposeful and specific approach to detect and deter money laundering and the financing of terrorist activities. It puts an obligation on the prosecution to prove that the proceeds were derived from a "specified unlawful activity." These activities include over 200 types of U.S. crimes laid out in the US statutes and range from drug trafficking, terrorism, fraud to organized crime. In addition, the law specifies as money laundering, any financial transaction in proceeds of crime greater than US$ 10,000 through a US bank.
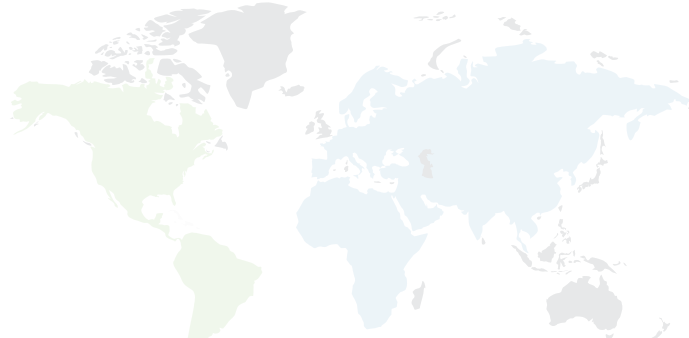
## Lack of political and public goodwill in countering financial crimes

Money laundering, corruption, and related crimes continue to fester due to a lack of political goodwill in addressing them. Politicians instead interfere with cases in court by soliciting public sympathy. This is further compounded by the fact that a number of them and other influential personalities have pending cases in court for corruption and related crimes. For instance, Migori County governor Zacharia Okoth Obado faces fraud and embezzlement cases in court. The defendant has been severally accused of attempted undue influence over the case brought against him.

Influential individuals curtail their prosecution or the seizure and confiscation of their ill-gotten funds or assets through their networks. For instance, Chris Okemo and Samuel Gichuru, are wanted for money laundering, corruption, and racketeering charges in Jersey Islands. However, to date, Kenyan authorities are yet to open criminal proceedings against the two individuals despite their embezzlement of billions of taxpayers' money.

There have been concerns that some stakeholders such as lawyers and designated reporting institutions negligently or intentionally facilitate the movement of illicit funds as was in the NYS scandal. Indeed, financial institutions including Standard Chartered Bank and Kenya Commercial Bank have been penalised in the past by regulatory authorities for abetting money laundering and financing terrorism. Some investigators, prosecutors, and court officials shield criminals after being compromised. These examples suggest that many incidents of money laundering and terrorist financing could be going on but disregarded. The existence of criminal networks within the system presents intensified complexities that aggravate the fight against money laundering in Kenya. These issues implore the country to trace its policy frameworks and strategies which make it more vulnerable to endemic money laundering and corruption.

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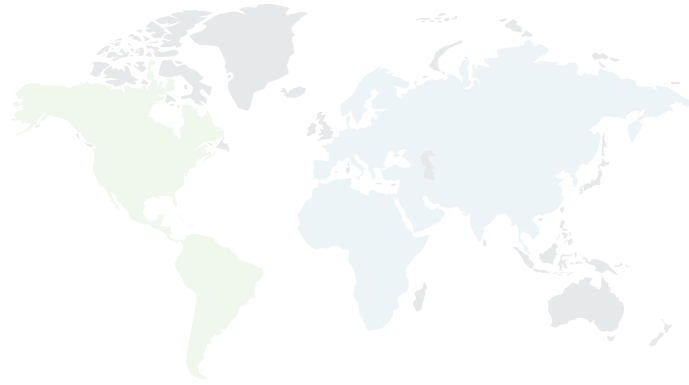
Conclusion

Kenya has substantially moved to curb the money laundering menace by establishing a legal environment through POCAMLA to abate it. The gains already made are significant. However, key shortcomings in relation to legal penalties, shortage of capacity in enforcement institutions, the rapid evolution of the digital finance environment, legal bottlenecks, and danger of oppressive prosecution remain to be addressed. Effective implementation of POCAMLA, therefore, needs to address risk issues that impact on prevention, detection, and punishing of illegal funds entering the financial system. The law must at the same time address strategies to attack criminal financial activities.


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Recommendations

Improving capacity for enforcement

a) Kenya's Parliament should work towards increasing budgetary allocations for investigative agencies and the ODPP. This will enable them to hire additional staff, enhance the training of their staff to deal with financial crimes as well as acquire requisite investigative resources.

b) The ODPP, DCI, and FRC should enhance bilateral and multilateral engagements regionally and internationally to improve the capacity of staff on countering money laundering.

c) The Office of the Attorney General should strengthen and expand the existing mutual legal agreements in order to assist in the tracing and seizing of funds and assets held in jurisdictions outside Kenya as well as enable the extradition of suspects to face trial in Kenya or other jurisdictions.

Legislative reforms

d) Kenya's Parliament should amend sections 3,4 and 7 of POCAMLA to specify the value of monetary instruments that should be classified as proceeds of crime, while specifying the bracket of offences and the required threshold to qualify for money laundering.
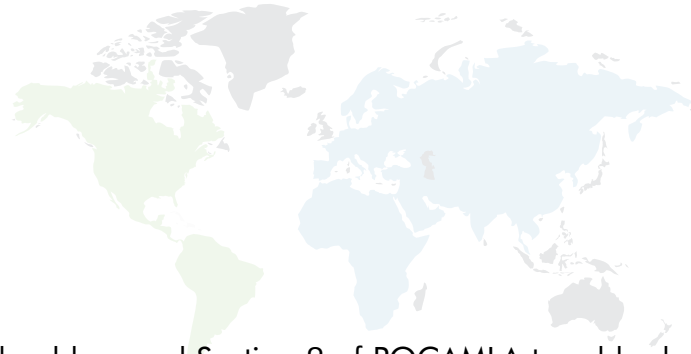
e) Kenya's Parliament should amend Section 2 of POCAMLA to add advocates as reporting agents to the law and designate high-risk non-financial businesses and professions such as casinos, car bazaars, and dealers in precious metals as reporting agencies.

f) Kenya's Parliament should amend POCAMLA should extend its scope in the investigation and prosecution of money launderers using mobile money transfer platforms.

g) Kenya's Parliament should amend POCAMLA to stipulate stiffer penalties such as life imprisonment or fines not less than three times the amount laundered.

Evolving digital finance environment

h) The FRC should establish a financial research and analysis centre to carry out continuous research and analysis of the evolving digital finance space and crimes.

i) The FRC should petition the Central Bank of Kenya to revise guidelines on the receivership of international remittances through mobile phones in line with the existing trend to curb financial crimes.

j) The Communications Authority of Kenya should provide guidelines on the acquisition of an infinite number of sim cards by a single individual to curb possible money laundering schemes through multiple transactions daily transactions an individual can undertake beyond the set limits.

k) The Central Bank of Kenya should revise protocols for mobile transactions which would require customers to provide further details before proceeding with huge transactions. There should be a two to three-step verification process before one is allowed to make huge transactions.

l) The Central Bank of Kenya should review its approach towards cryptocurrency and embark on registration of players and agencies engaged in blockchain technology trading. This will effectively curtail money laundering and terror financing in the country's financial system.

Legislative reforms

m) The FRC, EACC, and the ODPP should intensify public campaigns on anti-money laundering and anti-corruption in order to attract the political and public goodwill needed in countering the vice.

n) The FRC, EACC, and the ODPP should intensify dialogue with the political class particularly the Parliament, the Presidency, and the Council of Governors to solicit support for legal reforms and anti-corruption and counter-money laundering agenda.

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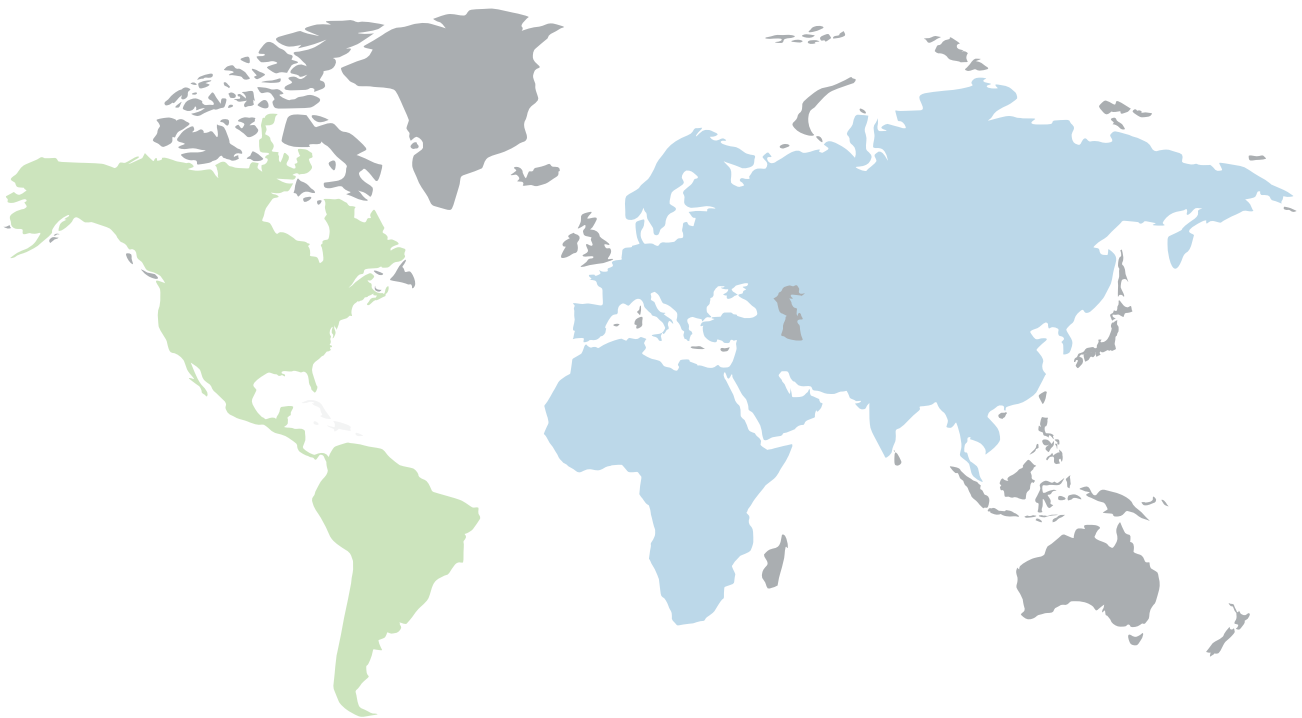
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