

PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING (AMENDMENT) ACT, 2017

Introduction

The fight against money laundering is recognised internationally as a pillar of national security and one of the marks of a strong financial system. Global institutions such as the United Nations and Financial Action Task Force (FATF) continually publish Watch Lists whilst measuring countries' compliance in the fight against money laundering.

Money Laundering is not novel to Kenyans with the Kenya National Youth Service saga still fresh in our minds not to mention the allegations of Kenya as a drug trafficking hub being in the news recently. Corruption, Drug Trafficking, Poaching and Terrorism just to mention a few are some of the hallmarks of money laundering and this belies the need to combat money laundering. A simple definition of money laundering is the act of introducing money obtained through illegitimate and criminal means into the financial system and concealing the source of that money by way of a series of complex transactions meant to integrate the funds to seem as though they have originated from a legitimate source.

The key word in money laundering is '*money*'. This then means that the sector most affected or at most risk of money laundering is the Financial Services sector. Kenya is without doubt the Financial Services hub in East Africa with a robust Capital Markets, Banking and Insurance industry. The Cytonn Q3'2016 Banking Sector Report available [here](#) describes Kenya as over-banked with a relatively high ratio of banks to total population, with 41 commercial banks serving of 44 million people. The Cytonn H1'2016 Insurance Sector Report available [here](#) states that similar to banking, the insurance sector is filled with too many players, with 51 insurance firms serving 44 million people. In addition to being East Africa's financial hub Kenya's geographical location predisposes it to Money Laundering due to its close proximity to countries such as Somalia as was witnessed by the Government's response in the wake of the Garissa Terrorist attack by closing money remittance services it deemed as avenues of money laundering.

In Kenya, the Proceeds of Crime and Money Laundering Act was enacted in 2009 (the Act) to provide for the offence of money laundering, which had not existed previously and to introduce measures to combat the offence by providing for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. Recently, we have seen amendments to the parent Act by way of the Proceeds of Crime and Money Laundering (Amendment) Act 2017 which was signed into law on 3rd March 2017 having been pending since 26th November 2015.

The Anti Money Laundering Legal and Institutional Framework in Kenya

As mentioned above the Act was enacted in 2009 and due to the vulnerability of the Financial Services Sector a couple of regulatory bodies published regulations and/or guidelines to enhance and ensure compliance of the institutions they regulate. These include: -

- (i) The Insurance Regulatory Authority Guidelines to the Insurance Industry on Implementation of the Proceeds of Crime and Anti-Money Laundering Act, 2011
- (ii) The Central Bank of Kenya National Payment System (Anti-Money Laundering Guidelines for The Provision of Mobile Payment Services) Guidelines, 2013
- (iii) The Central Bank of Kenya Prudential Guidelines and Guideline on Anti-Money Laundering and Combating the Financing of Terrorism - CBK/PG/08
- (iv) The Capital Markets Authority Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets, 2015

These Guidelines promote the risk based approach which promotes efficient use of resources based on the risk profile of a client and also avoids a tick the box approach, in addition, to placing the responsibility of governance on the highest tier of governance in a Corporate entity, its Board of Directors. In terms of an institutional framework the Act established the Financial Reporting Centre (FRC), the Anti-Money Laundering Advisory Board, and the Asset Recovery Agency. These bodies assist with the identification of proceeds of crime and combating money laundering in compliance with international standards and

collaborate with similar bodies in other countries. The FRC was as structured, primarily an institution receiving reports from reporting institutions on an annual basis with no supervisory powers of its own. It had no enforcement powers and upon citing irregularities in reports it received it then had to forward this to other state agencies, as applicable, such as the Kenya Revenue Authority, the Ethics and Anti-Corruption Commission among others for action. The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 therefore seeks to give more teeth to the FRC in the following manner:

New provision	Description
Stricter penalties	In addition to the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, the new law provides that a person who fails to comply with its provisions will be liable to a monetary penalty not exceeding Kshs. 5,000,000/= while the penalty for a corporate body will not exceed Kshs. 25,000,000/=.
Continued failure to comply with the provisions	In the case of continued failure, the person or reporting institution shall be liable to an additional monetary penalty of Kshs. 10,000/= per day for a maximum of 180 days.
Additional powers of the FRC	<p>The law gives additional powers to the FRC to:</p> <ul style="list-style-type: none"> ▪ seek revocation of licences for financial and real estate institutions that are used as conduits for money laundering activities. ▪ issue warnings and directions to reporting institutions; ▪ bar persons from employment with reporting institutions; ▪ issue an order to a competent supervisory authority requesting the suspension or revocation of a licence or registration of a specified reporting institution whether entirely or in a specified capacity or of any employee of the reporting institution. ▪ Apart from financial organizations, the powers of the FRC extend to non-governmental organizations, non-financial entities such as real estate agencies, those dealing in precious stones, casinos and certain professions such as accountants.
Executive Involvement in the FRC	<ul style="list-style-type: none"> ▪ While the Act seeks to give operational independence on the one hand by removing the FRC from the general ambit of the State Corporations Act thus giving it power to hire its own staff, It on the other hand allows the Executive's Involvement by:- ▪ The Cabinet Secretary (for Finance), in consultation with the Anti-Money Laundering Advisory Board, should determine the terms and conditions of service for the Director-General and Deputy Director-General of the FRC; ▪ The Cabinet Secretary may approve the general terms and conditions of service of the FRC

Conclusion

Whilst, the above amendments taken together with the enactment of The Companies Act, 2015 which provides for increased disclosures and enhanced transparency of legal entities and the recent proactive efforts by the NGO Co-ordination Board are a step in the right direction especially in dealing with the legal and institutional gaps that existed and more still needs to be done to ensure the Technical and Operational Gaps are plugged. This is especially so with Kenya's intention of establishing an International Financial Centre, see our Note on the same [here](#) and the operationalization of the monetary element of the East African Community enhancing cross-border conveyancing of monetary instruments (the CMA has already published a Policy Guidance Note on Global Depositary Receipts (GDRs) and Global Depositary Notes (GDNS) in Kenya).

We therefore see the need to:

- a) Provide guidelines to enhance the reporting obligations of Non Designated Financial Businesses and Professions such as Lawyers, Accountants and Real Estate Agents who in light of the nature of their professions and ethical responsibilities can play a significant role in combatting money laundering.
- b) Fortify the ability of the FRC to discharge its mandate through the establishment of strong internal governance structures and increased budgetary allocation;
- c) Ensure Inter-Agency Co-ordination and information sharing between the key agencies such as the Kenya Revenue Authority, The Ethics and Anti-Corruption Commission, Directorate of Criminal Investigation and the National Counter Terrorism Centre as the offences mostly dealt with by these Agencies are more often than not a predicate to money laundering.
- d) The need of a strong and efficient judicial system that can expeditiously resolve issues such as extradition and asset recovery as international collaboration is key in combating money laundering due to its cross border nature. This also enhances mutual reciprocity where Kenya is trying to recover its assets lost due to corruption and money laundering.
- e) The need for an Independent/autonomous FRC with limited interference from Politically Exposed Persons who are listed by FATF as a major risk therefore there is need to delink the governance of the FRC from the Executive.

All these measures coupled with political goodwill and use of information technology to ensure timely and real time communication which is essential in combating money laundering will go a long way not only in entrenching Kenya as an East African Financial Hub but also an International Financial Centre of Repute. Not to mention the good it will bring to the growth of our economy by stifling corruption and enhancing foreign inflows while making Kenya a more secure Country. The goal should therefore be to provide for financial inclusion without compromising the measures to combat money laundering.