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## **An Appraisal of Kenya's Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023**

By: **Michael Sang** \*

### **Abstract**

*This paper provides an in-depth appraisal of the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023 in Kenya. The legislative amendments discussed in this appraisal encompass various critical aspects of Kenya's Anti-Money Laundering (AML), Combating the Financing of Terrorism (CFT) and Counter Proliferation Financing (CPF) framework, aiming to align the nation's laws and regulations with international standards. The amendments range from expanding definitions of economic crimes to empowering regulatory authorities, simplifying extradition measures, and enhancing operational independence for key institutions. By addressing compliance deficits, including terrorism financing as an extraditable offense, and harmonizing licensing regimes with Financial Action Task Force (FATF) standards, Kenya demonstrates its commitment to combating financial crimes, money laundering, and terrorism financing effectively. These reforms not only strengthen Kenya's domestic financial system but also contribute to global efforts to curtail the flow of illicit funds and dismantle networks facilitating financial crimes.*

*Key Words: Anti-Money- Laundering- and -Combating- of -Terrorism -  
Financing- Laws- (Amendment) Act- 2023, FATF, Financial-Crimes*

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*\* LLB, Moi University; LLM, University of Cape Town, South Africa; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.*

## **1. Introduction**

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act of 2023 represents a pivotal development in Kenya's ongoing efforts to bolster its legal and regulatory framework in the fight against financial crimes, money laundering, and the financing of terrorism. This comprehensive legislative reform touches upon various aspects of Kenya's Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) regime, with a clear focus on aligning the nation's laws and regulations with international standards and best practices. The amendments discussed in this appraisal encompass a range of critical areas, including the expansion of definitions, enhanced supervision by regulatory authorities, extradition measures, and operational independence for key institutions. These changes collectively aim to reinforce Kenya's commitment to combating illicit financial activities, strengthening its position on the global stage in the ongoing battle against money laundering and terrorism financing. In this overview, I delve into the specific amendments, their implications, and the broader impact they have on Kenya's AML/CFT/CPF landscape.

## **2. The International AML/CFT/CPF Framework**

### **2.1 International Treaty Framework**

#### **2.1.1 United Nations Convention Against Transnational Organized Crime**

The United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, is an important international treaty designed to combat transnational organized

crime.<sup>1</sup> The Palermo Convention was adopted in 2000 and entered into force in 2003. Its primary purpose is to promote international cooperation and coordination among nations in addressing and preventing transnational organized crime.<sup>2</sup> The convention includes three key protocols that address specific aspects of transnational organized crime: a. **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children:** This protocol aims to combat human trafficking, protect victims, and prosecute traffickers. It highlights the need for victim assistance and the prevention of human trafficking; b. **Protocol against the Smuggling of Migrants by Land, Sea and Air:** This protocol addresses the issue of migrant smuggling and seeks to prevent and combat the illegal and dangerous transportation of migrants across international borders; c. **Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition:** This protocol focuses on curbing the illegal trade in firearms and ammunition, which often fuels various forms of organized crime.<sup>3</sup>

The Palermo Convention and its protocols emphasize several core principles, including the need for countries to criminalize and prosecute transnational organized crime, cooperate in investigations and prosecutions, and take measures to prevent and suppress such

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<sup>1</sup>United Nations Convention against Transnational Organised Crime available at [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf) accessed 6 October 2023

<sup>2</sup> Ibid

<sup>3</sup> Ibid

criminal activities.<sup>4</sup>

Countries that are parties to the Palermo Convention are expected to adopt legislative and administrative measures to implement its provisions. This includes enacting laws that criminalize various forms of transnational organized crime and establishing mechanisms for international cooperation.<sup>5</sup>

The convention has had a significant impact in promoting international collaboration in combating transnational organized crime. It has led to the enactment of laws and the establishment of specialized law enforcement units in many countries to address these challenges.<sup>6</sup>

### **2.1.2 United Nations Convention Against Corruption**

the United Nations Convention against Corruption (UNCAC) is a significant international treaty aimed at combating corruption worldwide. UNCAC was adopted in 2003 and came into force in 2005. Its primary purpose is to promote and strengthen measures to prevent corruption, facilitate international cooperation in investigating and prosecuting corruption-related offenses, and promote asset recovery.<sup>7</sup>

UNCAC encourages countries to adopt and implement effective anti-corruption policies and practices, including measures to prevent corruption in the public and private sectors. It requires member states

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<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> United Nations Convention against corruption available at <https://www.unodc.org/unodc/en/treaties/CAC/> accessed 6 October 2023

to criminalize various forms of corruption, including bribery, embezzlement, and money laundering.<sup>8</sup>

UNCAC emphasizes international cooperation in the investigation and prosecution of corruption cases. It encourages the extradition of offenders and the sharing of information and evidence across borders. One of the crucial aspects of UNCAC is the promotion of asset recovery. It facilitates the return of stolen assets to their countries of origin.<sup>9</sup>

The convention calls for transparency and accountability in government operations and public administration. UNCAC establishes a mechanism for monitoring the implementation of its provisions through a peer review process known as the "Review of Implementation of the Convention." This process assesses each country's progress in adhering to the convention's requirements. UNCAC has played a significant role in fostering international cooperation in the fight against corruption. It has led to the enactment of anti-corruption laws and the establishment of anti-corruption agencies in many countries.<sup>10</sup>

### **2.1.3 The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988**

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, commonly known as the 1988 Drug Trafficking Convention, is an international treaty aimed at

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<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Ibid

combating drug trafficking and related offenses.<sup>11</sup> The 1988 Drug Trafficking Convention was adopted in response to the growing global concern over the illicit production, trafficking, and abuse of narcotic drugs and psychotropic substances. Its primary purpose is to enhance international cooperation and coordination to prevent and combat drug-related crimes.<sup>12</sup>

The Convention establishes strict controls on the production, distribution, and possession of narcotic drugs and psychotropic substances. It classifies these substances into different schedules based on their potential for abuse and harm.<sup>13</sup> The Convention encourages member states to extradite individuals involved in drug trafficking offenses, making it easier to prosecute offenders across borders. It provides measures for the seizure and confiscation of assets and proceeds derived from drug trafficking, weakening the financial incentives for drug-related criminal activities.<sup>14</sup>

The Convention promotes international cooperation among law enforcement agencies, including information sharing and joint operations to combat drug trafficking networks. It underscores the importance of drug abuse prevention, treatment, and rehabilitation programs, recognizing that addressing demand for drugs is as crucial as targeting supply. Member states are expected to adopt domestic

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<sup>11</sup>The United Nations Convention against Illicit traffic in narcotic drugs and psychotropic substances, 1988 available at <https://www.incb.org/incb/en/precursors/1988-convention.html#:~:text=It%20provides%20comprehensive%20measures%20against,deliveries%20and%20transfer%20of%20proceedings>. Accessed 6 October 2023

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

laws and measures to implement the convention's provisions, including criminalizing drug trafficking, establishing controls over precursor chemicals used in drug production, and cooperating with other countries to combat drug-related crimes.<sup>15</sup>

The 1988 Drug Trafficking Convention has played a significant role in strengthening international efforts to combat drug trafficking. It has led to the enactment of stringent drug control laws in many countries and has facilitated international cooperation in tackling drug-related crimes.<sup>16</sup>

## **2.2 Institutional Arrangements**

### **2.2.1 Financial Action Task Force**

The Financial Action Task Force (FATF) is an intergovernmental organization established to combat money laundering, terrorist financing, and other threats to the integrity of the international financial system.<sup>17</sup> FATF was founded in 1989 by the Group of Seven (G7) countries. Its primary objective is to set international standards and promote effective measures for combating money laundering and terrorist financing. FATF aims to protect the global financial system from being used for illicit activities.<sup>18</sup>

FATF has 39 member countries and territories, including major economies and financial centers. Additionally, there are associate members and observer organizations. FATF develops and regularly

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<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Financial Action Task Force (FATF) available at <https://www.fatf-gafi.org/en/home.html> accessed 6 October 2023

<sup>18</sup> Ibid



updates a set of 40 recommendations, commonly known as the FATF Recommendations. These recommendations provide a comprehensive framework for countries to combat money laundering and terrorist financing<sup>19</sup>.

FATF conducts mutual evaluations of member and non-member jurisdictions to assess their compliance with the FATF Recommendations. These evaluations help identify weaknesses in AML/CFT/CPF systems and encourage countries to improve their measures. FATF identifies and publishes lists of jurisdictions with deficiencies in their AML/CFT/CPF systems, urging global financial institutions to apply enhanced due diligence measures when dealing with these jurisdictions.<sup>20</sup>

FATF works to spread awareness about AML/CFT/CPF issues and provides guidance to countries and financial institutions to strengthen their defenses against money laundering and terrorist financing. FATF encourages international cooperation among countries, law enforcement agencies, and financial institutions to combat money laundering and terrorist financing effectively<sup>21</sup>.

FATF's recommendations and assessments have had a profound impact on the global fight against money laundering and terrorist financing. Many countries have strengthened their AML/CFT/CPF laws and regulations to align with FATF standards. The organization's public statements and evaluations influence international financial institutions, which often implement stricter

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<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

AML/CFT/CPF measures in response to FATF assessments.<sup>22</sup>

### **2.2.2 Basel Committee on Banking Supervision**

The Basel Committee on Banking Supervision is an international organization that plays a crucial role in setting global standards for prudential banking regulation and supervision.<sup>23</sup> The Basel Committee was established in 1974 by the central bank governors of the Group of Ten (G10) countries. Its primary goal is to enhance the stability and integrity of the international banking system by developing and promoting effective banking supervisory standards and guidelines.<sup>24</sup>

The committee consists of senior representatives from central banks and banking supervisory authorities of member countries. Its membership has expanded to include more than 40 countries and jurisdictions, making it a global body. The Basel Committee is best known for developing the Basel Accords, a series of international banking standards that provide guidelines for capital adequacy, risk management, and prudential supervision. The most notable of these accords are Basel I, Basel II, and Basel III.<sup>25</sup>

The committee focuses on risk management practices in banking, including credit risk, market risk, and operational risk. It provides guidance on how banks should assess and manage these risks. It issues supervisory guidelines and recommendations to ensure that banks and financial institutions are adequately regulated and

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<sup>22</sup> Ibid

<sup>23</sup> Basel Committee on Banking Supervision available at <https://www.bis.org/bcbs/> accessed 6 October 2023

<sup>24</sup> Ibid

<sup>25</sup> Ibid

supervised to prevent financial crises and systemic risks.<sup>26</sup>

The Basel Committee monitors the implementation of its standards in member countries and conducts peer reviews to assess compliance with these standards. It plays a role in developing frameworks for handling banking crises and cross-border banking resolutions. The Basel Committee's standards, particularly Basel III, have had a significant impact on the global banking industry. These standards aim to enhance the resilience of banks, improve risk management, and reduce the likelihood of banking crises.<sup>27</sup> Many countries have adopted Basel standards into their banking regulations and supervision practices, contributing to a more stable international banking system.

### **2.2.3 Egmont Group**

The Egmont Group is an international organization of financial intelligence units (FIUs) from various countries around the world. It was established in 1995 in Brussels, Belgium. Its primary purpose is to facilitate international cooperation and information exchange among FIUs to combat money laundering, terrorist financing, and other financial crimes effectively.<sup>28</sup>

The Egmont Group comprises more than 160 member FIUs from different countries. Each member FIU is responsible for collecting, analyzing, and disseminating financial intelligence to combat financial crimes within its jurisdiction. The Egmont Group serves as

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<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> The Egmont Group available at <https://egmontgroup.org/> accessed 6 October 2023

a platform for member FIUs to share information, expertise, and best practices related to financial intelligence and money laundering investigations.<sup>29</sup>

Member FIUs collaborate on joint investigations and provide assistance to one another in pursuing cross-border financial crime cases. The group supports capacity-building efforts in member countries, helping them develop effective systems and procedures for detecting and combating financial crimes. Egmont members advocate for stronger international cooperation in combating money laundering and terrorist financing, working with other organizations like the Financial Action Task Force (FATF).<sup>30</sup>

The Egmont Group has significantly improved international cooperation in the fight against money laundering and terrorist financing. It has facilitated the exchange of critical financial intelligence, enabling countries to identify and disrupt criminal and terrorist networks. The group's work has contributed to the global effort to strengthen AML/CFT/CPF regimes, making it more difficult for criminals to exploit the international financial system.<sup>31</sup>

## **2.3 International Organizations**

### **2.3.1 ESAAMLG**

The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) is an international organization that focuses on combating money laundering and the financing of terrorism in the eastern and southern regions of Africa. It was established in 1999 in

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<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Ibid

Arusha, Tanzania, following a meeting of the Eastern and Southern Africa Heads of State or Government.<sup>32</sup>

The primary purpose of ESAAMLG is to enhance the capacity of its member countries to combat money laundering and terrorist financing. It aims to create a regional framework for cooperation and collaboration in the fight against financial crimes. ESAAMLG's membership includes countries from the eastern and southern African regions. Member countries collaborate to develop and implement effective anti-money laundering (AML) and countering the financing of terrorism (CFT) measures.<sup>33</sup>

ESAAMLG conducts mutual evaluations of its member countries to assess their compliance with international AML/CFT/CPF standards and to identify areas for improvement. The organization provides training and technical assistance to member countries to help them strengthen their AML/CFT/CPF regimes, develop legislation, and enhance the skills of their law enforcement and financial institutions.<sup>34</sup>

ESAAMLG facilitates the exchange of information and best practices among member countries to improve their understanding of AML/CFT/CPF issues and effective response strategies. Member countries collaborate on regional initiatives and strategies to combat money laundering and terrorist financing effectively. ESAAMLG engages with international organizations such as the FATF to align

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<sup>32</sup> The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) available at <https://www.esaamlg.org/> accessed 6 October 2023

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

regional AML/CFT/CPF efforts with global standards. It has played a crucial role in helping member countries develop and implement robust AML/CFT/CPF regimes. This has contributed to improved financial integrity and stability in the eastern and southern African regions. Through mutual evaluations and peer reviews, ESAAMLG has helped member countries identify and address vulnerabilities and deficiencies in their AML/CFT/CPF systems.<sup>35</sup>

### **2.3.2 The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA)**

The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA) is a regional initiative focused on enhancing cooperation among countries in Eastern Africa to recover assets obtained through illegal means, such as corruption and other financial crimes.<sup>36</sup> ARIN-EA was established in 2017 as a collaborative effort among Eastern African countries to address the challenge of asset recovery. The primary goal of ARIN-EA is to facilitate cross-border cooperation and coordination among law enforcement agencies and other relevant authorities in the region for the recovery of assets acquired through corruption and other illicit activities.<sup>37</sup>

Its membership consists of countries in the Eastern Africa region that are committed to combating corruption, money laundering, and related financial crimes. Member countries work together to share

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<sup>35</sup> Ibid

<sup>36</sup>The Asset Recovery Inter-Agency Network for Eastern Africa (ARIN-EA) available at [https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/Presentations/ARIN\\_EA\\_Presentation.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/Presentations/ARIN_EA_Presentation.pdf) accessed 6 October 2023

<sup>37</sup> Ibid

information, resources, and expertise. ARIN-EA member agencies collaborate to trace and recover assets that have been stolen or acquired through corrupt practices and hidden in other countries. The network serves as a platform for member countries to exchange information, experiences, and best practices in asset recovery and related investigations.<sup>38</sup>

ARIN-EA provides training and technical assistance to member agencies to strengthen their capabilities in asset recovery efforts. The network promotes awareness and advocacy for the importance of asset recovery and the return of stolen assets to their rightful owners, including governments and victims of corruption. It works with international organizations and other asset recovery networks to enhance its effectiveness and align its efforts with global standards.<sup>39</sup> ARIN-EA's collaborative approach has the potential to significantly enhance the capacity of Eastern African countries to recover stolen assets and combat corruption. By fostering regional cooperation and sharing best practices, ARIN-EA contributes to strengthening the legal frameworks and institutions involved in asset recovery in the Eastern Africa region.

### **3. Compliance Deficits in Kenya's AML/CFT/CPF Regime Previously Identified by FATF**

#### **3.1 Reporting Entities**

The compliance deficit in Kenya's Anti-Money Laundering, Combating of Financing of Terrorism and Counter proliferation Financing (AML/CFT/CPF) regime related to the reporting of

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<sup>38</sup> Ibid

<sup>39</sup> Ibid

advocates and certified public secretaries as reporting entities under the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) highlights a significant issue in the country's AML/CFT/CPF framework.

In the context of AML/CFT/CPF regulations, "reporting entities" are entities or professionals that are required by law to report suspicious transactions or activities that may involve money laundering or terrorism financing to the designated authorities, typically the Financial Intelligence Unit (FIU). These reporting entities play a crucial role in detecting and preventing financial crimes by identifying and reporting suspicious activities to the authorities for investigation.<sup>40</sup>

Advocates and certified public secretaries are professionals who provide legal and corporate services in Kenya. These professionals often handle financial transactions and legal matters for their clients, making them potentially vulnerable to being used as intermediaries in money laundering schemes. The compliance deficit identified by FATF indicates that Kenya had not included advocates and certified public secretaries as reporting entities under its AML/CFT/CPF laws, specifically the POCAMLA.<sup>41</sup>

This omission meant that these professionals were not legally obligated to report suspicious transactions or activities related to money laundering or terrorist financing to the appropriate authorities. The failure to include advocates and certified public

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<sup>40</sup> ESAAMLG (September 2022) 'Kenya's Mutual Evaluation Report: Technical Competence-Proposals to address deficiencies.

<sup>41</sup> Ibid



secretaries as reporting entities can create vulnerabilities in the AML/CFT/CPF framework. Criminals may exploit this gap by using these professionals to facilitate money laundering or terrorism financing without fear of detection.<sup>42</sup>

This compliance deficit can result in the underreporting of suspicious activities and hinder the effectiveness of Kenya's efforts to combat money laundering and terrorist financing. In response to the compliance deficit identified by FATF, it is essential for Kenya to amend its AML/CFT/CPF laws to include advocates and certified public secretaries as reporting entities. By doing so, Kenya can strengthen its AML/CFT/CPF framework, enhance its ability to detect and prevent financial crimes, and align with international standards and best practices in combating money laundering and terrorism financing.<sup>43</sup>

### **3.2 Beneficial Ownership Information**

Section 93 A of the Companies Act provides that every company shall keep a register of its beneficial owners. A company shall enter in its register of beneficial owners, information relating to its beneficial owners as prescribed in the regulations. A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation. A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within fourteen days after making the amendment.<sup>44</sup>

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<sup>42</sup> Ibid

<sup>43</sup> Ibid

<sup>44</sup> Companies Act, 2015, sec 93A

The Trustees (Perpetual Succession) Act states that where the settlor declares a trust in respect to a property which he does not own at the time of the declaration, no rights or duties shall arise under the trust instrument at the time of constitution of the trust and the trust shall be deemed to come into existence at the time the settlor becomes beneficially or legally entitled to the property which was the subject of the declaration.<sup>45</sup> It also states that subject to the terms of the trust, a beneficiary may disclaim his or her interest or any part of it, whether or not he has received any benefit from the trust. A disclaimer shall be in writing addressed to the trustees.<sup>46</sup>

The compliance deficit related to beneficial ownership information and the regulation of trusts in Kenya's AML/CFT/CPF regime, as previously identified by FATF, points to a gap in the country's efforts to enhance transparency and combat money laundering and terrorism financing. Beneficial ownership information refers to identifying the individuals who ultimately own or control a legal entity, such as a company. This information is crucial for detecting and preventing money laundering and other financial crimes because it helps reveal the true beneficiaries behind legal structures.<sup>47</sup>

The identified compliance deficit relates to the lack of specific measures or provisions to ensure access to beneficial ownership information and control of trusts under the Companies Act and the Trustee (Perpetual Succession) Act. This deficit means that there may be difficulties in obtaining and verifying beneficial ownership

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<sup>45</sup> The Trustees (Perpetual Succession) Act Sec 3E

<sup>46</sup> *Ibid*, sec 3I

<sup>47</sup> ESAAMLG (September 2022) 'Kenya's Mutual Evaluation Report: Technical Competence-Proposals to address deficiencies.

information of companies, including those operating through trusts, which could hinder efforts to prevent money laundering and terrorist financing.<sup>48</sup>

To address this compliance deficit, Kenya may need to consider amending its regulatory framework to explicitly include measures that ensure access to beneficial ownership information and control of trusts. This could involve developing regulations or guidelines that specify how beneficial ownership information should be collected, maintained, and made accessible to relevant authorities. Additionally, it may require clarifying the obligations and responsibilities of trustees in relation to AML/CFT/CPF efforts to improve transparency and compliance in this area.<sup>49</sup>

### **3.3 Misuse of Technological Advancements for Money-Laundering and Terrorism Financing**

The compliance deficit regarding the misuse of technological advancements for money laundering and terrorism financing in Kenya's AML/CFT/CPF regime, as identified by FATF, underscores the absence of enforceable requirements for financial institutions to implement measures aimed at preventing the illicit use of technology. Technological advancements have led to new opportunities for criminals to facilitate money laundering and terrorism financing through digital means, such as online transactions, cryptocurrencies, and digital payment systems.<sup>50</sup> Financial institutions, including banks and other entities in the financial sector, play a critical role in preventing and detecting financial crimes. To address the misuse of

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<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid

technology for money laundering and terrorism financing, it is essential to establish clear and enforceable requirements for these institutions.<sup>51</sup>

The compliance deficit identified by FATF points to a gap in Kenya's AML/CFT/CPF framework. It suggests that there are no specific and enforceable regulations or guidelines in place that mandate financial institutions to implement measures and controls to prevent the misuse of technology for illicit financial activities. Without such requirements, financial institutions may lack the necessary guidance and incentives to adopt technological solutions and practices that can effectively identify and deter money laundering and terrorism financing conducted through digital channels.<sup>52</sup>

Addressing this compliance deficit would likely involve developing and implementing regulatory frameworks that specifically address the risks associated with the use of technology in financial crimes. This might include requirements for customer due diligence (CDD) in online transactions, the monitoring of digital financial activities, and reporting of suspicious digital transactions. Additionally, providing guidance on the use of technology for AML/CFT/CPF purposes and fostering cooperation between financial institutions and relevant authorities in the digital realm could enhance the country's ability to combat financial crimes in the digital age.<sup>53</sup>

### **3.4 Reporting Obligations of Accountants**

The compliance deficit related to reporting obligations of accountants

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<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid

in Kenya's AML/CFT/CPF regime, as identified by FATF, signifies a gap in the country's regulatory framework concerning the reporting of suspicious financial transactions by accountants.

Reporting obligations of accountants refer to the legal requirements for accountants, including certified public accountants (CPAs), to report suspicious financial transactions or activities related to money laundering and terrorism financing. The compliance deficit indicates that there might be a lack of specific and enforceable regulations or guidelines in Kenya that mandate accountants to report suspicious transactions to relevant authorities.<sup>54</sup>

Without clear reporting obligations, accountants may not be legally obligated to identify and report transactions or activities that could potentially involve money laundering or terrorism financing. Addressing this compliance deficit would involve introducing and enforcing regulations or guidelines that explicitly require accountants to report suspicious financial transactions or activities to designated authorities, such as the Financial Intelligence Unit (FIU) in Kenya. These reporting obligations would help strengthen the country's AML/CFT/CPF efforts by expanding the network of professionals who play a role in detecting and reporting financial crimes, ultimately contributing to a more robust and effective AML/CFT/CPF framework.<sup>55</sup>

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<sup>54</sup> Ibid

<sup>55</sup> Ibid

#### **4. An Appraisal of the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023**

##### **4.1 Expanded Definition of Economic Crime**

The Anti-money laundering and combating of terrorism financing laws (amendment) Act 2023 amended Anti- Corruption and Economics Crimes Act in the definition of "economic crime" by inserting the following new paragraph- an offence involving the laundering of the proceeds of corruption.<sup>56</sup>

I argue that the expansion of the definition of "economic crime" in the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act 2023 to include "an offence involving the laundering of the proceeds of corruption" represents a significant development in Kenya's legal framework to combat financial crimes. In the context of legal and regulatory frameworks, "economic crime" typically refers to a broad category of offenses that involve financial or economic misconduct, such as fraud, embezzlement, corruption, and money laundering.<sup>57</sup>

The definition of "economic crime" is crucial because it determines the scope of offenses that fall under the purview of the Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) laws. The amendment expands the definition of "economic crime" to explicitly include "an offence involving the laundering of the proceeds of corruption." This means that money laundering activities specifically related to corruption, which was not explicitly covered

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<sup>56</sup> Anti-money laundering and combating of terrorism financing laws (amendment) Act 2023

<sup>57</sup> Anti- Corruption and Economics Crimes Act, sec 2

before, are now considered economic crimes under the law.

Including money laundering of corruption proceeds within the definition of "economic crime" is a crucial step in enhancing Kenya's legal framework to combat financial crimes, particularly those associated with corruption. It aligns with international standards and best practices in AML/CFT/CPF efforts by recognizing the importance of addressing the financial aspects of corruption, which often involves the illicit flow of funds through the financial system. This expansion empowers authorities to investigate and prosecute money laundering offenses that are directly tied to corrupt activities more effectively.

#### **4.2 Proliferation Financing**

The amendment Act provides that the Capital Markets Authority shall regulate, supervise and enforce compliance for anti-money laundering, combating the financing of terrorism and countering proliferation financing purposes by institutions supervised by the Authority and whom the provision of the Proceeds of crime apply.<sup>58</sup> The Central Bank may disclose any information including information on anti-money laundering, counter-terrorism financing and countering proliferation financing to any monetary authority , fiscal or tax agency , fraud investigations agency , domestic or foreign counter parts, or the Financial Reporting Centre. The Central Bank may also issue regulations, guidelines, directions, rules instructions for anti-money laundering, combating the financing of terrorism and countering proliferation financing purposes.<sup>59</sup>

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<sup>58</sup> Anti-money laundering and combating of terrorism financing laws (amendment) act 2023, Sec 12 A

<sup>59</sup> Ibid, sec 36B

These provisions represent a comprehensive approach to enhancing the regulatory framework to counter the financing of proliferation activities. The amendment empowers the Capital Markets Authority to take on a role in regulating, supervising, and enforcing compliance with AML/CFT/CPF and proliferation financing measures for institutions that fall under its supervision. These institutions may be subject to provisions outlined in the Proceeds of Crime Act.

I argue that this provision recognizes that institutions within the capital markets, such as securities firms, investment funds, and other financial entities, can be vulnerable to being used for the financing of proliferation activities. By bringing them under the oversight of the CMA, there is a better chance of detecting and preventing such financing within the capital markets.

The amendment also authorizes the Central Bank to share information, including details related to anti-money laundering, counter-terrorism financing, and countering proliferation financing, with various entities. This provision promotes international cooperation and information exchange in the fight against proliferation financing. The Central Bank is granted the authority to issue regulations, guidelines, directions, rules, and instructions specifically for anti-money laundering, combating the financing of terrorism, and countering proliferation financing purposes.

I aver that these regulations and guidelines serve as a crucial tool for ensuring that financial institutions and entities under its supervision have clear and effective measures in place to prevent and detect proliferation financing activities.



### **4.3 Operational Independence of the Financial Reporting Centre**

The Amendment Act seeks to amend the State Corporations Act (Cap. 446) to exclude the application of the Act to the Financial Reporting Centre thereby facilitating the operational independence of the Financial Reporting Centre in conformity with the Financial Action Task Force (FATF) Standards.<sup>60</sup>

The amendment to exclude the application of the State Corporations Act (Cap. 446) to the FRC is a significant step toward ensuring the operational independence of the FRC in line with Financial Action Task Force (FATF) standards. Operational independence is a fundamental principle for Financial Intelligence Units (FIUs) like the FRC. FIUs are responsible for receiving, analyzing, and disseminating financial intelligence related to money laundering, terrorist financing, and other financial crimes.<sup>61</sup>

Operational independence ensures that FIUs can carry out their functions effectively and without undue influence or interference from external entities, including the government. I posit that by exempting the FRC from the State Corporations Act, the amendment enhances the FRC's operational independence and flexibility in carrying out its responsibilities related to financial intelligence and AML/CFT/CPF activities.

This amendment aligns with FATF standards and recommendations, which emphasize the importance of operational independence for

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<sup>60</sup> Ibid, Memorandum of objects and reasons

<sup>61</sup> Financial Intelligence Units (FIUs) available at <https://www.cid.go.ke/index.php/sections/investigationunits/financial-investigations-unit-fiu.html> accessed 6 October 2023

FIUs. FIUs should be able to function autonomously, free from political or other external influences, to ensure the effectiveness of their work in combating financial crimes.

Operational independence of the FRC enhances its ability to collect, analyze, and disseminate financial intelligence effectively, which is crucial for supporting law enforcement agencies and AML/CFT/CPF efforts in the country. It also contributes to building trust and confidence in the financial system's integrity and Kenya's commitment to combat money laundering and terrorist financing.

#### **4.4 Extradition**

The Amendment Act provides that a fugitive criminal being sought by a requesting state may consent to be extradited to that requesting State without conducting formal extradition proceedings.<sup>62</sup> It seeks to amend the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) by providing for simplified extradition measures and expressly providing for the offence of terrorism financing as an extraditable offence.<sup>63</sup> The Bill also seeks to amend the Extradition (Commonwealth Countries) Act (Cap. 77) by providing for simplified extradition measures and expressly providing for the offence of terrorism financing as an extraditable offence<sup>64</sup>.

The proposed amendments are significant steps in streamlining and facilitating extradition procedures, particularly concerning offenses related to terrorism financing. The amendment act introduces

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<sup>62</sup> Anti-money laundering and combating of terrorism financing laws (amendment) act 2023, sec 10A

<sup>63</sup> Ibid, memorandum of objects and reasons

<sup>64</sup> Ibid

provisions that allow a fugitive criminal to consent to extradition to a requesting state without the need for formal extradition proceedings. This simplification streamlines the process and may expedite the extradition of individuals suspected of criminal activities.

The amendment act also expressly includes the offense of terrorism financing as an extraditable offense. This means that individuals accused or convicted of terrorism financing can be subject to extradition to face charges or serve sentences in the requesting state. This inclusion aligns with international efforts to combat terrorism financing, as it allows for the extradition of individuals involved in financing terrorist activities, which is crucial for global security.

I postulate that by providing for simplified extradition measures and expressly including terrorism financing as an extraditable offense, Kenya enhances its cooperation with other countries in combating international crime and terrorism. Simplified procedures and clear provisions for extraditing individuals involved in terrorism financing contribute to global efforts to dismantle terrorist networks and prevent the flow of funds to terrorist organizations.

These amendments align with international standards and conventions on extradition, including those recommended by bodies like the United Nations and INTERPOL. They reflect Kenya's commitment to fulfilling its international obligations in the fight against terrorism and transnational crime.

#### **4.5 Authorization of Capital Markets Authority**

The Act seeks to amend the Capital Markets Act (Cap. 485A) to empower the Capital Markets Authority to supervise its licensees under the Act to whom the provisions of the Proceeds of Crime and

Anti-Money Laundering Act apply.<sup>65</sup>

The proposed amendment is also a significant development in strengthening the regulatory framework for combating money laundering and terrorist financing within the capital markets. This amendment grants the Capital Markets Authority (CMA) the authority to supervise and regulate its licensees who fall under the purview of the Proceeds of Crime and Anti-Money Laundering Act. Licensees within the capital markets include various financial institutions and entities, such as securities firms, investment funds, and other market participants. I argue that by extending regulatory oversight to these entities in matters related to AML/CFT/CPF, the CMA can play a more active role in preventing financial crimes within the capital markets.

This amendment aligns with international AML/CFT/CPF standards and recommendations, which emphasize the importance of robust regulatory supervision of financial institutions and other entities susceptible to money laundering and terrorist financing as discussed above. It reflects Kenya's commitment to meeting international obligations in combating financial crimes and ensuring that its regulatory authorities are equipped to address AML/CFT/CPF challenges effectively.

Empowering the CMA to supervise its licensees under the Proceeds of Crime and Anti-Money Laundering Act contributes to the overall strengthening of Kenya's AML/CFT/CPF framework. Effective supervision and regulation within the capital markets can help identify and mitigate potential vulnerabilities and risks associated

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<sup>65</sup> Ibid

with money laundering and terrorist financing activities.

#### **4.6 Insurance Regulatory Authority**

The Act seeks to amend the Insurance Act (Cap. 487) to empower the Insurance Regulatory Authority (IRA) to supervise its licensees and their agents under the Insurance Act to whom the provisions of the Proceed s of Crime and Anti-Money Laundering Act, 2009, apply.<sup>66</sup> It also seeks to harmonize the licensing regime under the Act with the Financial Action Task Force (FATF) Standards.

This empowerment allows the IRA to take a more active role in ensuring that insurance companies and their agents adhere to AML/CFT/CPF regulations and requirements. The amendments aim to harmonize the licensing regime under the Insurance Act with the Financial Action Task Force (FATF) Standards. Aligning the licensing regime with FATF Standards reflects Kenya's commitment to meeting international AML/CFT/CPF obligations and ensuring that its regulatory authorities are equipped to address AML/CFT/CPF challenges effectively.

The amendments also enhance the oversight and supervision of the insurance sector in matters related to anti-money laundering and countering the financing of terrorism. Effective supervision can help identify and mitigate potential vulnerabilities and risks associated with money laundering and terrorist financing activities within the insurance industry.

#### **4.7 Supervisory Role of the Central Bank of Kenya**

The Act seeks to amend the Central Bank of Kenya Act (Cap.491) to

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<sup>66</sup> Ibid

empower the Central Bank of Kenya to supervise its licensees under the Act to whom the provisions of the Proceeds of Crime and Anti-Money Laundering Act, 2009, apply.<sup>67</sup>

I argue that this empowerment allows the CBK to take a more active role in ensuring that financial institutions, such as banks and other entities under its purview, adhere to AML/CFT/CPF regulations and requirements. The amendment also enhances the CBK's oversight and supervision of financial institutions in matters related to anti-money laundering and countering the financing of terrorism. Effective supervision by the CBK can help identify and mitigate potential vulnerabilities and risks associated with money laundering and terrorist financing activities within the financial sector.

In addition, empowering the CBK to supervise its licensees in compliance with AML/CFT/CPF provisions aligns Kenya's financial sector with international standards and recommendations, including those set by FATF as discussed herein above. It demonstrates Kenya's commitment to meeting international AML/CFT/CPF obligations and ensuring that its regulatory authorities have the necessary tools to combat financial crimes effectively.

## **Conclusion**

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act of 2023 signifies Kenya's proactive and multifaceted approach to strengthening its legal and regulatory framework against financial crimes. This legislative overhaul has addressed critical compliance deficits identified by the FATF while aligning Kenya's laws and regulations with international standards

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<sup>67</sup> Ibid

and best practices in the realms of AML/CFT/CPF.

The discussed amendments encompass a wide spectrum of areas, from expanding definitions of economic crimes and enhancing the operational independence of regulatory authorities to simplifying extradition measures and empowering key supervisory bodies, such as the Capital Markets Authority and the Insurance Regulatory Authority. Furthermore, the inclusion of terrorism financing as an extraditable offense and the alignment of licensing regimes with FATF standards underscore Kenya's commitment to global efforts to combat financial crimes and terrorist financing.

These legislative changes are pivotal in reinforcing Kenya's ability to effectively combat money laundering, terrorism financing, and other financial crimes within its borders. By expanding the definitions of economic crimes, enhancing supervision, and empowering regulatory authorities, Kenya aims to mitigate vulnerabilities and risks associated with illicit financial activities. Furthermore, the operational independence of institutions like the Financial Reporting Centre and the harmonization of licensing regimes demonstrate Kenya's dedication to fulfilling international obligations and fostering cooperation on the global stage.

In light of these amendments, Kenya's AML/CFT/CPF framework has evolved to meet the evolving challenges posed by transnational organized crime and the misuse of technological advancements. These legislative reforms not only strengthen Kenya's domestic financial system but also contribute to international efforts to curtail the flow of illicit funds and dismantle networks that facilitate financial crimes.

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As the global landscape of financial crimes and terrorist financing continues to evolve, Kenya's commitment to robust and compliant AML/CFT/CPF measures serves as a commendable example. The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act of 2023 sets a foundation for Kenya to play a proactive role in safeguarding its financial integrity and contributing to the global fight against money laundering and terrorism financing.



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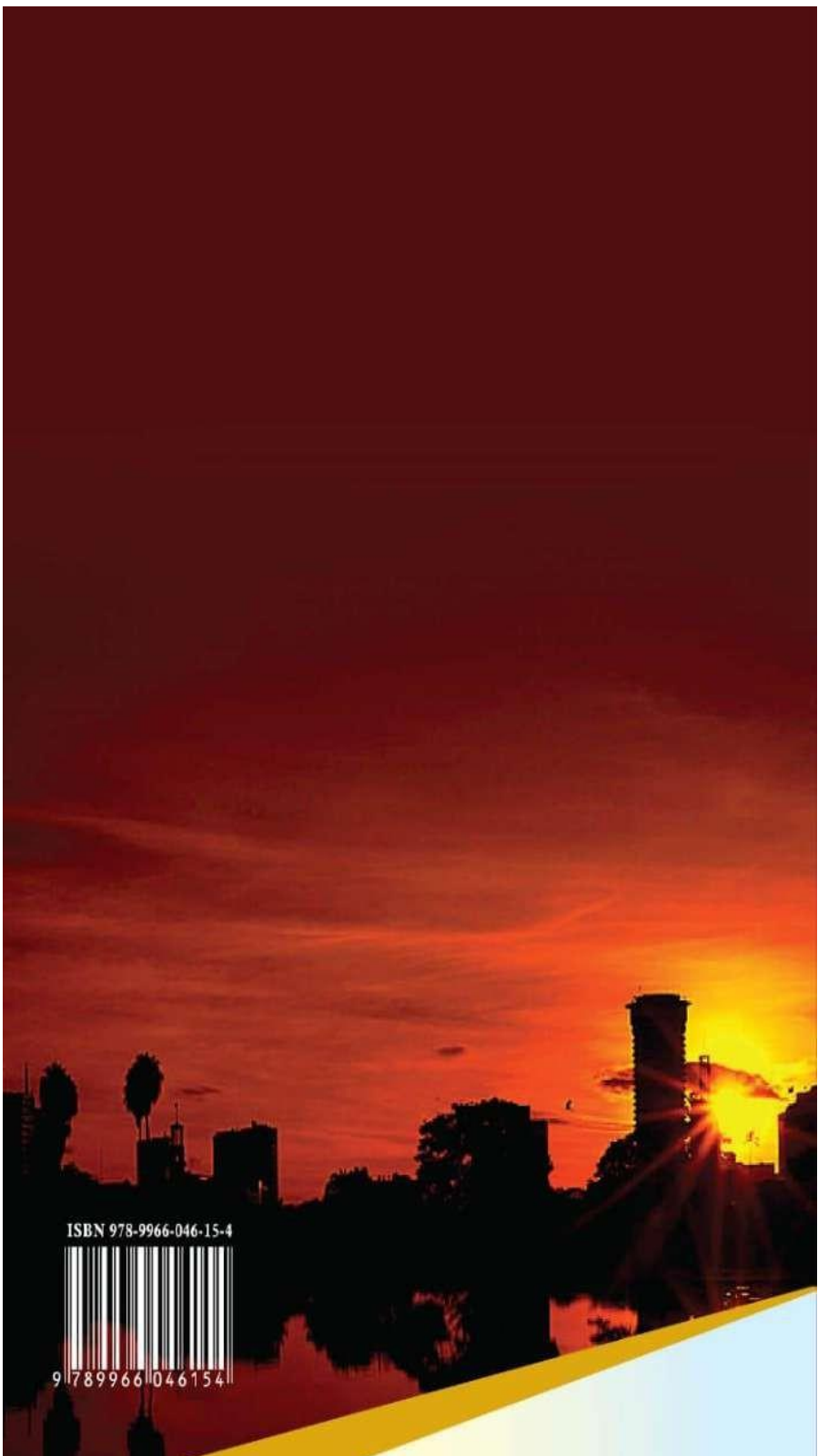
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## The Trustees (Perpetual Succession) Act

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