East Africa Tax and
Governance Network

PLUGGING
THE LOOPHOLES

Assessing Finance Act 2018 against Kenya's Anti-Money Laundering and Counter-Terrorism Financing Obligations

ABOUT EATGN

The East African Tax and Governance Network (EATGN) was founded in 2009 in Nairobi, Kenya, as a membership organisation of individuals and non-state actor institutions that share the understanding that taxation is fundamental in achieving social justice and development goals.

EATGN is therefore a network of more than 16 organisations across the East Africa Community (EAC) specialising in taxation, governance, public policy, research and capacity building specifically working to create links between its various constituencies in the region to improve tax policy while deepening democratic governance. Of interest is the importance EATGN attaches to understanding tax management and how these shape policy outcomes.

The network is working to establish strong and sustainable national tax justice platforms in the EAC by implementing a five-year strategic plan 2019-2023. This will be done through pursuit of substantial growth in research - to fill in the identified knowledge gaps, conduct evidence-based programming and facilitate policy dialogue. It also intendeds to achieve this through building its technical expertise and through the strengthening of its current partnerships while fostering new strategic linkages.

To implement its activities over the next five years, EATGN works through a steering committee and country focal point organisations to find clarity, build concise momentum, develop agenda and work towards a common East African tax strategy for its membership in relation to current regional tax debates and policy-making processes.

ABOUT PATRIOTS KENYA

The Providing Appropriate Tools Required to Interpret and Observe Tax Structures in Kenya (PATRIOTS KENYA) initiative facilitated the conduct of research, development of a common civil society organisations (CSO) position, presentation of submissions to the National Treasury and presentation of memorandum to the National Assembly following the review of income tax legislation through the publication of the Draft Income Tax Bill of 2018 (ITB). EATGN gratefully acknowledges the Oxfam Kenya office which generously supported the PATRIOTS KENYA initiative.

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ABSTRACT

This study is policy brief on the introduction of Section 37B (4) to the Tax Procedures Act 2015, by the Finance Act 2018 exempting funds repatriated under Section 37 B Amnesty from the provisions of the Proceeds of Crime and Anti-Money Laundering Act 2009, and other Laws on Financial Reporting and Investigation

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TABLE OF CONTENTS

1. INTRODUCTION AND BACKGROUND........ 6
1.1. Tax Amnesty and Exemptions on Foreign Income........ 6
2. THE IMPLICATIONS OF SECTION 37B (4)........ 7
3. FINANCIAL REPORTING AND ANTI-MONEY LAUNDERING/COUNTER-TERRORISM FINANCING LEGAL AND INSTITUTIONAL FRAMEWORK........ 8
3.1. Kenya in the Global Context........ 8
3.1.1. Financial Action Task Force (FATF) Recommendations........ 8
3.2. Kenya's Domestic Legal and Institutional Framework........ 10
3.2.1 Reporting Financial Transactions: A duty for financial institutions and their Regulators........ 10
4. LEGAL, POLICY, AND PRACTICAL THREATS OF SECTION 37B (4) EXEMPTION........ 11
5. CONCLUSIONS AND RECOMMENDATION........ 13
6. REFERENCES........ 14

LIST OF ABBREVIATIONS

AML/CTF	Anti-money laundering and Counter-Terrorism Financing
CBK	Central Bank of Kenya
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
FRC	Financial Reporting Centre
MLA	Mutual Legal Assistance
PEP	Politically-Exposed Persons
POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
SACCOs	Savings and Credit Cooperative Societies
SASRA	Sacco Societies Regulatory Authority
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention Against Transnational Organised Crime
VAT	Value Added Tax

1. INTRODUCTION AND BACKGROUND

In June 2018, the Cabinet Secretary for Treasury Mr. Henry Rotich presented the Budget Policy Statement for the 2018/19 financial year in the National Assembly.[1] The Statement estimated a net expenditure for the 2018/19 financial year amounting to KES 2.55 Trillion. This expenditure is the highest ever in the country's history, and will be funded mainly through collected revenues, appropriations-in-aid and debt.

To finance the budget, the Cabinet Secretary introduced a raft of measures through the Finance Bill 2018, among them the introduction of Value Added Tax (VAT) on fuel and other petroleum products, introduction of presumptive tax of 15 % for unincorporated businesses with a turnover of less than 5 million (excluding professional firms), doubling of excise duty payable on charges on mobile banking services from 10 % to 20%, and introduction of National Housing Fund Levy, among other measures. Passed amidst contentions within the National Parliament and between the National Assembly and the Executive, President Uhuru Kenyatta assented the Finance Bill, 2018 into law on 21 September 2018, a day after its enactment. This brief evaluates an exemption created by Section 37B (4) of the Tax Procedures Act 2015 introduced through the Finance Act, 2018 in the context of Kenya's municipal and international anti money laundering and Counter-Terrorism Financing (AML/CTF) legal obligations.

1.1. Tax Amnesty and Exemptions on Foreign Income

The Tax Procedures Act, 2015 is a statute that provides for the procedures of tax administration, including assessment and payment of taxes by eligible taxpayers. Section 37B of the Act exempts taxable foreign income from payment of income tax. This amnesty on foreign-earned income was introduced in 2016 in what can be understood as an incentive to encourage repatriation into Kenya of income earned in foreign countries. Section 39 of The Finance Act 2018 repealed section 37 B of the Tax Procedures Act, 2015 and replaced it with a new section with the same number, that is, section 37B. The new section reads thus:

> 37B. (1) Notwithstanding any other provision of this Act, the Commissioner shall refrain from assessing or recovering taxes, penalties or interest in respect of any year of income ending on or before the 31st December 2017, and from following up on the sources of income under the amnesty where –
>
> (a) that income has been declared for the year 2017 by a person earning taxable income outside Kenya;
> (b) the returns and accounts for the year 2017 are submitted on or before the 30th June 2019; and
> (c) the funds declared voluntarily have been transferred back to Kenya.
>
> (2) This section shall not apply in respect of any tax where the person who should have paid the tax —
> (d) has been assessed in respect of the tax or any matter relating to the tax; or
> (e) is under audit, investigation or is a party to ongoing litigation in respect of the undisclosed income or any matter relating to the undisclosed income.
>
> 3) Where no funds have been transferred within the period of the amnesty, there shall be a five-year period for remittance, but a penalty of ten percent shall be levied on the remittance.

[1]Available on http://www.treasury.go.ke/component/jdownloads/send/198-2018-2019/883-budget-speech.pdf

(4) The funds transferred under the amnesty shall be exempt from the provisions of Proceeds of Crime and Anti-Money Laundering Act, 2009 or any other Act relating to reporting and investigation of financial transactions, to the extent of the source of the funds excluding funds derived from proceeds of terrorism, poaching and drug trafficking.

Besides extending the pre-existing tax amnesty by one year, that is until June 30, 2019 and covering income earned up to the year ending December 31, 2017, the new section 37B of the Tax Procedures Act, 2015 introduces a new restraint: money repatriated under the amnesty is not subject to anti-money laundering laws or any other laws that deal with reporting and investigation of financial transactions.

2. THE IMPLICATIONS OF SECTION 37B (4)

The new sub section 4 came rather as a surprise because while the tax amnesty can be rationalized as a mechanism for encouraging repatriation of funds that will boost the economy by spurring investment, it is hard to rationalize in the same way, an exemption from a law that is intended to protect the economy from the injection of illicit funds derived from crime. As a legal provision with a normative effect, the coming into force of section 37 B (4) of the Tax Procedures Act, 2015 has the following implications:

(a) The Commissioner of Income Tax may not inquire into the source of funds besides being barred from assessing, claiming and recovering tax on any funds declared under the provision. Once declared under this provision, the funds can be repatriated from the foreign country free of tax. Where income has been declared under the section, beneficiaries of this provision have until end of June 2019 to remit the funds free of tax and penalties. Thereafter, the money can still be remitted to Kenya over a period of five years free of tax but will attract a penalty of 10%.

This amnesty is a significant incentive and as the Cabinet Secretary explained, the incentive was intended to encourage movement of funds into Kenya. While the government forfeits tax on income that would otherwise be payable on the foreign earned income, this opportunity cost, the Cabinet Secretary hopes, will result in repatriation of funds into the country which will in turn spur the economy by boosting investments.

(b) Crucially, and of interest to this brief, is that law enforcement agencies and regulators, including those tasked with monitoring the financial sector such as the Financial Reporting Centre (FRC) and the Central Bank of Kenya (CBK) may not inquire into the source of funds repatriated under the amnesty. By exempting funds remitted under the amnesty from "the provisions of Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2009, and any other law on reporting and investigations of financial transactions," state authorities are essentially denied the legal authority to inquire into the sources of funds declared and remitted under the amnesty provision.

This exclusion of Kenya's chief anti-money laundering law, and *'any other law on reporting and investigations of financial transactions'* is very broad. It essentially exempts remittances under the amnesty from the entire (AML/CTF) legal regime extending from the Proceeds of Crime and Anti-Money Laundering Act, 2009 to include Proceeds of Crime and Anti-Money Laundering Regulations, 2013, Prevention of Terrorism Act, 2012, The Banking Act, and CBK Prudential Guideline on Proceeds of Crime and Money Laundering (Prevention) and Combating the Financing of Terrorism (2013) among others.

3. FINANCIAL REPORTING AND ANTI-MONEY LAUNDERING/COUNTER-TERRORISM FINANCING LEGAL AND INSTITUTIONAL FRAMEWORK

3.1. Kenya in the Global Context

Over the last twenty years or so, countries around the world have made efforts to curb anti money laundering and financing of terrorism (AML/CTF). Numerous multilateral AML/CTF efforts have been made, culminating in the adoption of numerous instruments and commitments. Money laundering and transnational terrorism are modern day challenges that represent the dark side of globalization as a modern-day phenomenon. The Oxford dictionary has defined globalization as “The process by which businesses or other organizations develop international influence or start operating on an international scale.” Beyond being a process of internationalization of business and other affairs, globalization is a reality that defines modern day global commerce, characterized by globalization of markets, and driven chiefly by the internet, enhanced integration of banks and other financial institutions across the globe, efficient international payment systems and international travel.

The globalization of commerce has, unfortunately been accompanied by risks such as increased transnational organized crime such as money laundering, drug trafficking, poaching and terrorism. Recognizing the fact that money laundering is a threat to global order, the international community has made efforts to curb the vice, together with related menaces such as drug trafficking and terrorism financing. The international AML/CTF efforts are analysed below:

3.1.1. Financial Action Task Force (FATF) Recommendations

The global AML/CTF efforts are chiefly mediated through the Financial Action Task Force (FATF). Established in 1989, the FATF is an independent inter-governmental body mandated to issue minimum standards to member states for safeguarding the global financial system from being used as channels of money laundering, terrorism financing and proliferation of financing for weapons of mass destruction. It monitors compliance with the standards and identifies AML/CTF threats. FATF framework also integrates FATF-style affiliate Regional Bodies for nine different geographical zones, namely, Asia/Pacific, the Caribbean, Eurasia, Eastern & Southern Africa, Central Africa, Latin America, West Africa, Middle East and North Africa, and Europe. In this regard, Kenya is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).[2]

FATF has issued the *International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation.*[3] These standards contain 40 Recommendations relating to money laundering and 9 special recommendations relating to terrorism financing. The standards are the global minimum standards on anti-money laundering and counter terrorism financing strategy and have received a near-universal endorsement with 180 countries of the world adopting them.

[2]See country profile on http://www.fatf-gafi.org/countries/#Kenya

[3]FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France, available online at www.fatf-gafi.org/recommendations.html

These recommendations require states to establish robust domestic legal and institutional mechanisms to combat money laundering and terrorism financing. This multi-lateral approach recognises that in a globalised world, financial institutions are stakeholders and players in the global financial system and weakness in one jurisdiction means fault in the global system. In other words, weak AML/CTF framework in one country means a weakness at the global level since the world today is highly interconnected more than ever before. Therefore, FATF recommendations require states to enact laws and create institutions to be able to do the following:

(a) Ensure financial institutions undertake strong 'Know your customer' practices to ensure that the identity of their customers as well as the nature of their business or source of funds is known and maintain proper records. (Recommendation 5-12).

(b) Additional or more stringent measures for Politically-Exposed Persons (PEPs) such as senior government officials and their families and business associates about their identity, businesses and sources of funds. (Recommendation 6). This is a recognition that as custodians of public resources and state power, these individuals could also be conduits of illicit funds owing to their positions and influence.

(c) Create financial intelligence units to monitor financial transactions with a view of intercepting suspicious ones that could be connected to money laundering or financing of terrorism. (Recommendation 13-16).

(d) Create mechanisms for the recovery of proceeds of crime and impose severe punishment for offences money laundering and financing of terrorism. (Recommendation 1, 2, 17-20).

(e) Create financial intelligence units with mandates to spearhead AML/CTF strategies and other competent authorities to recover proceeds of crime. (Recommendation 26-32).

(f) Ensure cooperation with other states as far as combating money laundering and terrorism financing is concerned and put in place mechanisms for international mutual assistance. (Recommendation 36-39).

Aside from the FATF recommendations, which are specific to AML/CFT, there are other international legal instruments that directly and indirectly address money laundering and other forms of transnational organised crime that obligates states to take steps to combat them in their own territories or cooperate towards multilateral efforts. These include the United Nations Convention Against Corruption (UNCAC), United Nations Convention Against Transnational Organised Crime (UNTOC), United Nations Conventions for Countering Terrorism and Terrorist Finance, and The Harare and London Scheme for Mutual Legal Assistance in Criminal Matters within the Commonwealth (MLA), among others. Kenya is party to all these treaties and has also adopted the FATF recommendations. As treaty obligations, Kenya has a duty to implement these measures by creating a domestic framework for their adherence. Kenya's Constitution has a uniquely strong commitment to international law. Under article 2(6), any treaty or convention ratified by the country forms part of the law in Kenya. In addition, article 132 (1) (c) (iii) obligates the President to take the lead in championing the country's international legal obligations and requires him to report annually to the National Assembly on the progress made by the country in fulfilling these obligations.

3.2. Kenya's Domestic Legal and Institutional Framework

Over the last ten years, Kenya has taken several steps to create AML/CTF framework in fulfilment of its international legal obligations cited above and respond to real challenges of explosion of organised crimes such as money laundering, drug trafficking, corruption and terrorism. As far as these challenges are concerned, Kenya's history has in the past been less than impressive. For instance, a UN Report found that money derived from piracy off the coast of Somalia found its way into the Kenyan economy, and principally invested in airline, fishing, car importing and energy. [4] This is only one classic example of how proceeds of crime committed outside Kenya end up in the country's economy as investments. Kenya has also been a transit point for international drugs [5] and human trafficking [6]. The country has also suffered severely under transnational terrorism since the bombing of United States Embassy in Nairobi in 1998, with more recent attacks such as Westgate, Garissa University and Dusit D2 standing out as scars in the country's security history.[7] Poaching is also a big menace in Kenya, with species such as rhinos and elephants bearing the greatest brunt because of their valued ivory horns. Corruption, taking the form of bribery and kickbacks, inflated prices in public procurement, and suspect movement of cash from government accounts is a big problem in Kenya.

In 2014 Kenya was removed by FATF from the list of countries with strategic deficiencies in combating money laundering and terrorism financing.[8] Before this step, the country had rated poorly because of gaps that existed in the law that failed to sufficiently criminalize and punish terrorism financing, seize and freeze terrorist assets, lack of a Financial Intelligence Unit, and lack of adequate domestic laws to deal with money laundering, among other weaknesses. The United States State Department continues to list Kenya as a country of 'Primary Concern' with respect to money laundering and financial crimes.[9]

In a bid to raise its standing and deal with these weaknesses, Kenya took several measures to meet FATF standards. These include the enactment of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013 (enacted under the Proceeds of Crime and Anti-Money Laundering Act, 2009) , the enactment of Prevention of Terrorism Act, 2012, Prevention of Organised Crime Act, 2010, the Mutual Legal Assistance Act, 2011, Proceeds of Crime & Anti -money Laundering (Amendment) Act,2017 (to establish and the Assets Recovery Agency and enable the freezing, seizing and confiscation of proceeds of crime), and the operationalization of the FRC (established under section 9 of Proceeds of Crime and Anti-Money Laundering Act, 2009). Because of these steps, Kenya was removed from FATF list of countries with strategic deficiencies and is no longer subject of FATF monitoring.[10]

3.2.1. Reporting Financial Transactions: A duty for financial institutions and their Regulators

The AML/CTF law in Kenya adopts a framework in which supervision of financial transactions in undertaken by the FRC, which is Kenya's Financial Intelligence Unit (FIU), and also the regulators in the financial sector.[11]

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[4] See Somalia report of the Monitoring Group on Somalia and Eritrea submitted in accordance with resolution 2111 (2013)-15 October 2014- S/2014/746 pages 27, 115 and Annex 4.6

[5] See the United Nations Office on Drugs and Crime, World Drug Report 2017 (ISBN: 978-92-1-148291-1, eISBN: 978-92-1-060623-3, United Nations publication, Sales No. E.17.XI.6).

[6] Human Trafficking in Eastern Africa: Research Assessment and Baseline Information in Tanzania, Kenya, Uganda, and Burundi (2008), International Organization for Migration (IOM), ISBN 978-92-9068-443-5

[7] In the 1998 bombings orchestrated by Al Qaeda, over 200 people died, in Westgate Mall attack 71 deaths occurred while Garissa University attack claimed 148 lives. The 2019 Dusit D2 attack left more than 20 people dead.

[8] FATF Public Statement: High Risk and Non Cooperative Jurisdictions: Improving Global AML/CFT Compliance: On-going process – 27 June 2014 available on-http://www.fatf-gafi.org/media/fatf/documents/statements/Compliance-27-June-2014.pdf

[9] Kenya has been flagged on more occasion see: https://www.businessdailyafrica.com/news/US-puts-Kenya-on-list-of-cash-laundering/539546-5050904-jwwmva/index.html

[10] See note 8 above.

[11] Insurance is regulated by Insurance Regulatory Authority, banks are regulated by the CBK, deposit taking Savings and Cooperative Societies (SACCOs) are regulated by Sacco Societies Regulatory Authority (SASRA).

The law designates financial institutions such as banks, micro finance institutions, insurance companies, forex bureaus, and deposit taking Savings and Credit Cooperative Societies (SACCOs), among others, as reporting institutions required to submit reports.[12] These institutions are obliged to report any "suspicious or unusual" transaction within seven days of occurrence. The institutions as a matter of law and necessity must develop a system to enable it to detect "suspicious or unusual" transactions. The institutions are also required to employ a Money Laundering Reporting Officer and give them sufficient independence to carry out their tasks. Any cash transactions above USD 10,000 must be reported to the Centre irrespective of whether or not they are "suspicious or unusual."

In line with FATF Recommendations, there are additional requirements for PEPs, such as enhanced monitoring and verification of source of funds. PEPs are defined to include state and public officers, who are essentially government officials and their families and close business associates. On their part, supervisory bodies, who are the regulators of different financial sub sectors, are similarly required to report any "suspicious or unusual" transactions that come to their attention. Reporting financial institutions such as banks have a duty to know their customers and carry out due diligence to ascertain their identities, including the identity of beneficial owners of accounts, the nature of their businesses and source of funds, among others. A customer must declare the source of funds and the direct and indirect beneficiaries of cash withdrawn from a bank account.

The framework is a system constant surveillance on financial transactions with a view of detecting and intercepting money laundering and terrorism financing. It is a specialized law enforcement arrangement specifically established for the financial sector and designated non-financial businesses and professions. This is a result of the recognition that criminals engaged in economic crimes will seek to integrate proceeds of crime into the legitimate financial system to benefit from the money. Preventing this from happening will, in turn, help stop predicate crimes and sources of illicit funds such as poaching and drug trafficking. It is also recognition that transnational terrorism requires money and can be stopped by intercepting its financing.

4. LEGAL, POLICY, AND PRACTICAL THREATS OF SECTION 37B (4) EXEMPTION

From the above, Kenya has many laws that make provisions for the combating of money laundering and terrorism financing, and related challenges. The framework is still in its nascent stages, with the laws having been enacted less than ten years ago and the FRC having become operational only six years ago in 2012. These laws and legal institutions are no guarantee that Kenya will succeed in combating money laundering in the country as well as play its part in combating the vice on the global stage.

It will take vigilance, enhancement of the capacities of the concerned authorities to exercise their mandate, respect for the laid down law and institutions and a culture that commits to integrity in financial dealings both in public and private sectors. Thus, the broad exemption from AML/CTF laws for foreign cash inflows introduced by section 37 B (4) is a step in the wrong direction for the following reasons:

(a) The provision createsn a gap in the AML/CTF law, a loop hole that can be exploited to repatriate proceeds of crime into Kenya. It could open room for money that is a product of economic crimes committed in Kenya or elsewhere to get back into the country's financial system, and indeed the global financial system.

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[12]Section 2 of the Proceeds of Crime and Anti-Money Laundering Act, 2009
[13]Laundering Regulations, 2013.
[14]Regulation 33 of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013.
[15]Regulation 33 of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013.
[16]Regulation 33 of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013.
[17]Regulation 33 of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013.
[18]http://frc.go.ke/about-frc/background.html

It is noteworthy that the exemption does not cover funds "derived from proceeds of terrorism, poaching and drug trafficking. "This provision is of course intended to address questions that would be elicited by this blanket exemption. In other words, the provision notes that money can be remitted into Kenya under the amnesty except for dirty money derived from these three crimes. This provision is unhelpful for two reasons: first, money does not come with labels. In fact, illicit money is always disguised. The illicit source of funds can only be identified upon inquiry and investigations and seeking to understand its source. Therefore, barring any inquiry will mean money, legitimate or otherwise, will pass under the amnesty and exemption created by section 37 B. Second, poaching and drug trafficking are not the only predicate offences that are often the source of illicit money. As noted above, the list is long and includes bribery and other forms of corruption, outright theft of public funds, human trafficking, and trade in counterfeit goods among other offences. As already noted, Kenya has suffered and continues to suffer from these problems.

(b) In exempting money remitted under the amnesty from the provisions of Proceeds of Crime and Anti-Money Laundering Act, 2009 or any other Act relating to reporting and investigation of financial transactions" this law interferes with the mandate and operations of FRC, the CBK and other regulators of the financial sector to carry out inquiries into transactions or financial affairs of beneficiaries of income repatriated under the amnesty.

This is because the obligation of a financial institution to report a transaction that is "unusual or suspicious" is waived with respect to funds transmitted under the amnesty. In addition, it would follow that a reporting institution is not obliged to inquire into the source of funds or the intended beneficiaries. Similarly, a customer seeking to transact in money received under the amnesty is not obliged to answer any inquiries from the reporting institution, FRC, or any other law enforcement agency since the money enjoys a blanket amnesty from the laws on "reporting and investigation of financial transactions." In short, the provision weakens the effectiveness of the system to detect, prevent and suppress inflow of illicit money as it restrains financial institutions, respective regulators, and the FRC in their obligations.

(c) The provision also offends know principles of public policy. It contradicts special laws enacted for the specific purpose of combating money laundering and terrorism financing. The strong AML/CTF legal and institutional framework discussed above is a strategy to safeguard the Kenyan economy from inflow of illicit funds. It is a known principle of public law that encouraging behaviour results in more of it; supressing results in less of it.

The AML laws seek to hinder flow of illicit funds and to deny criminals the proceeds of crime. To exempt any money from AML laws opens a loop hole that offends this principle and could have a snowball effect of spurring predicate economic crimes such as corruption, poaching, and drug trafficking, not to mention internal security threats, and possible economic distortions that money laundering is known to cause.

(d) As already discussed, AML/CFT strategies such as FAFT Recommendations are multilateral efforts anchored in law. Kenya's own AML/CTF laws are the country's attempts to comply with international standards and meet its international legal commitments. The exemption created by section 37 B (4) creates a weakness that makes Kenya's legal and institutional framework fall short of the FATF recommendations.

This puts the country at risk of being returned to Pre-2014 position where Kenya had been listed as a country "with strategic deficiencies on AML/CTF" and made subject to FATF monitoring. Should this happen, it will reverse the gains made in positioning the country as a regional financial hub. It should be recalled that the United States State Department retains Kenya as a country of "Primary Concern" as far as money laundering and other financial crimes are concerned.

5. CONCLUSIONS AND RECOMMENDATION

This brief has analysed the implications of section 37 B (4) of the Tax Procedures Act, 2015 introduced by the Finance Act, 2018. The brief has demonstrated that in exempting money repatriated from foreign countries under the amnesty created in section 37 B from the "Proceeds of Crime and Anti-Money Laundering Act, 2009 or any other Act relating to reporting and investigation of financial transactions," the section weakens the financial reporting, investigations and surveillance mechanisms carried out by the FRC, various financial institutions, the CBK and other financial sector regulators as mandated by law.

The exemption opens a loophole in the financial system that could be exploited to repatriate proceeds of crime. This is bound to cause economic distortions and incentivize predicate crimes such as corruption, poaching, and drug trafficking, among others. While the provision excludes money that is connected to terrorism, drug trafficking and poaching, it is further argued that this exclusion is unhelpful. It is unhelpful, first, because illicit money is always disguised as legitimate, and it is only upon inquiry that their legitimacy or otherwise can be ascertained. Second, there are more sources of illegitimate funds that would be a subject of money laundering beyond poaching, and drug trafficking. For Kenya in particular, this would include corruption and other economic crimes, bribery, and trade in counterfeit goods, among others. In addition, the change clearly contradicts existing laws and offends principles of public policy by giving preferential treatment to money repatriated under the amnesty. Moreover, the exemption makes Kenya's AML/CTF framework fall short of FATF recommendations, thereby threatening the country's standing with respect to AML/CFT legal and institutional framework and is bound to undermine the country's standing as a regional financial hub.

Considering the above, the brief recommends the following:

(a) The Government, both the National Assembly and the Executive should take steps to repeal section 37 B (4) of the Tax Procedures Act, 2015. The Executive should initiate the process since it is the law enforcement arm charged with AML/CTF enforcement in the country. On its part, the National Assembly should legislate to drop this section since the power to make and unmake laws of this nature rests with it.

(b) Pending any legal amendments to repeal section 37 B (4), players in AML/CTF enforcement should device strategies on how best to interpret the section in a fashion that will cause the least disruption and safeguard the effectives of the financial reporting and investigations mechanisms notwithstanding the coming into force of section 37B (4).

(c) The civil society should mobilize and generate discourse around this enactment and its implications as analysed in this brief. There is need to increase awareness about the threats of this enhancement and create political impetus for its reversal.

(d) The introduction of section 37 B (4) with minimum debate about its impact and without significant stakeholder and public participation specific to the issue raises questions about the effectiveness of public participation in legislative processes as mandated by law. The Finance Bill, much the same way as the bills commonly styled as Statute Law (Miscellaneous Amendments) Bill usually carries numerous proposals for amendments of various laws. The risk always is that some of these proposals are far-reaching and often escape public scrutiny. In this regard, the Civil Society should be vigilant in the future to flag out amendments that are undesirable.

6. REFERENCES

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