

# NARRATIVE REPORT ON KENYA



## PART 1: NARRATIVE REPORT

Kenya's financial sector is highly secretive. The country scored 76 out of 100 in terms of secrecy, which explains its high ranking of 24 in the Financial Secrecy Index of 2020. Though the country's share of the offshore world is not large, it has increased since 2018 and it may be set to increase further as the government positions Nairobi as the latest African International Financial Centre.

### Africa's newest international financial centre

Kenya lies on the east coast of Africa with a population of nearly 50 million people as of 2019. In 2018, Kenya was identified as one of the fastest growing economies in Sub-Saharan Africa with [GDP per capita over US \\$1,710](#)<sup>1</sup>. The GDP grew by 5.9% in 2018, up from 4.9% in 2017, [driven by](#) services, agriculture and industry.<sup>2</sup>

Kenya also takes the lead in East Africa on [foreign direct investment](#) with a majority of inflows being attributed to extractives and infrastructure projects.<sup>3</sup> The key economic goal set out in [Kenya's Vision 2030](#) is to sustain high levels of economic growth.<sup>4</sup> However, key development challenges remain, including inequality, healthcare, education and climate change.

According to a [study done by Oxfam Kenya](#), less than 0.1% of the population own more wealth than the bottom 99.9%.<sup>5</sup> The rising inequality in Kenya cannot be ignored. In the recently published Paradise Papers, a [former minister was identified](#) as having London based assets owned through a Mauritius based company.<sup>6</sup>

In 2016, the [Panama Papers](#) implicated several Kenyans hiding their wealth in offshore jurisdictions, with a number of politically exposed persons being identified.<sup>7</sup> The use of secrecy jurisdictions is not unknown in Kenya.

In 2019, the Mauritius leaks [revealed](#) that DAC Aviation International, a UN Contractor, had been engaging in tax avoidance, leading to the revenue authority raising an audit.<sup>8</sup> Despite this and efforts by Tax Justice Network Africa to have the [Kenya-Mauritius double taxation agreement suspended](#),<sup>9</sup> the executive arm of government opted to sign another agreement.

### Introducing the Nairobi International Financial Centre

In an effort to achieve a "well-functioning financial system in order to accelerate economic growth by encouraging foreign direct investment, safeguarding the economy from external shocks, and establishing Kenya as a leading financial centre in Eastern and Southern Africa",<sup>10</sup> the Government of Kenya included the [Nairobi International Financial Centre](#) as one of the commitments for Vision 2030.





As a result, in September 2017, the Nairobi International Financial Centre Act, No. 25 of 2017, entered into force to provide a legal framework for the development of the Nairobi International Financial Centre and the Nairobi International Financial Centre Authority. [According to the National Treasury](#),<sup>11</sup> the purpose of the Nairobi International Financial Centre is to establish a "stable, efficient and globally competitive

**Rank: 24 of 133**

**How Secretive?** 76

Moderately secretive	0 to <25
	25 to <50
	50 to <75
Exceptionally secretive	75 to 100

**How big?** 0.08%

 kg	huge
 kg	large
 kg	small
 kg	tiny

huge: >5%    large: >1% to 5%    small: >0.1% to 1%    tiny <0.1%

*Kenya accounts for 0.08 per cent of the global market for offshore financial services. This makes it a tiny player compared to other secrecy jurisdictions.*

The ranking is based on a combination of its secrecy score and scale weighting.  
 Full data is available here: <http://www.financialsecrecyindex.com/database>  
 To find out more about the Financial Secrecy Index, please visit <http://www.financialsecrecyindex.com>.  
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financial services sector in Kenya” with the ultimate objective of encouraging domestic and foreign investment, generating saving opportunities and contributing to overall economic growth.

To achieve this, the Nairobi International Financial Centre Authority will improve the transparency and ease of doing business by reforming the existing regulatory and institutional framework, establish a one-stop shop for financial services and related firms, and offer incentives and opportunities to attract global firms to establish a presence in Nairobi.<sup>12</sup> The National Treasury is set on adopting an integrated model similar to that of the City of London.

[The International Monetary Fund \(IMF\) defines an international financial centre](#) as a centre (usually a city) where the bulk of financial sector activity is offshore, the transactions are initiated elsewhere, and the majority of institutions involved are controlled by non-residents.<sup>13</sup> International financial centres typically have large numbers of financial institutions engaged, primarily, in business with non-residents; financial systems with external assets and liabilities out of proportion to domestic economies; and, more popularly, centres which provide low or zero taxation, moderate or light financial regulation, banking secrecy and anonymity.<sup>14</sup>

The Nairobi International Financial Centre Authority has yet to publish their strategy and framework or widely consult the public, despite the threat that the tax concessions and banking secrecy may facilitate unhealthy tax competition, aggressive tax avoidance, and illicit financial flows.

In 2019, the National Treasury promised to fast track the operationalization of the Nairobi International Financial Centre. Governments has, since February 2019, been in the process of forming a Board of Directors to oversee the operations of the Nairobi International Financial Centre Authority and finalising the Nairobi International Financial Centre Regulations to implement the Act.<sup>15</sup> So far government have yet to publicise any further information or invite public comment about the progress of the Nairobi International Financial Centre.

Alongside the establishment of the Nairobi International Financial Centre, [Kenya continues to expand its tax treaty network](#). Kenya currently has 15 double taxation agreements in force, seven that are signed and not yet in force, seven concluded and not signed, five under negotiation and 15 under consideration.<sup>16</sup> [Most recently](#),

Kenya has operationalized double taxation agreements with China, the United Arab Emirates, and the Netherlands. A number of these double taxation agreements have been identified as being unfavourable to Kenya.<sup>17</sup>

In tandem with these developments, the Kenya Revenue Authority and other regulatory bodies have been actively pursuing and committed to meeting the standards set out by the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting project. Some of the efforts include signing the convention on Mutual Administrative Assistance in Tax Matters and taking steps to meet the international standards set out in the Global Forum’s Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information.

Additionally, in 2015, Kenya rolled out the overhaul of the regulatory framework for business and taxation that set a solid foundation for financial transparency regarding the availability of ownership information and reporting on beneficial ownership.

## Financial sector requirements

The Kenyan banking sector is [regulated by the Central Bank of Kenya](#) and has 43 banking institutions, eight representative offices of foreign banks, 12 microfinance institutions, and three credit reference bureaus.<sup>18</sup>

Kenya’s Vision 2030 includes broad objectives relating to consumer protection through the increase of transparency, fairness and affordability of banking and other financial products and services.<sup>19</sup>

The Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009 became effective in June 2010 to provide a framework for identifying, tracing, freezing, seizing and confiscating any proceeds of crime. The provisions of the Proceeds of Crime and Anti-Money Laundering Act override any obligations relating to secrecy or other restrictions on disclosure of information imposed by any other law or otherwise.<sup>20</sup>

The Proceeds of Crime and Anti-Money Laundering Act established the Financial Reporting Centre for purposes of assisting in the identification of proceeds of crime and combating money laundering. The Financial Reporting Centre is also tasked with the fight against financing of terrorism under the Prevention of Terrorism Act

2012. The centre maintains a register of reporting institutions, receives reports on suspicious activities or transactions from reporting institutions, receives cash transaction reports above a certain threshold, and receives reports on cross-border conveyancing of monetary instruments.

The Proceeds of Crime and Anti-Money Laundering Regulations of 2013 have been effective since March 2013 and set out the obligations of reporting institutions. Reporting institutions include financial institutions and designated non-financial businesses and professions. All institutions are required to carry out Money Laundering Risk Assessments to identify, assess, monitor, manage and mitigate risks. In this regard, reporting institutions are required to carry out a customer due diligence to determine the following:

- Verified customer's identity using reliable, independent source documents (tax registration and identification documents);
- The verified identity of the beneficial owner<sup>21</sup> and develop an understanding of the ownership and control structure of the customer;
- Purpose and nature of the business relationship; and
- On-going due diligence on the business relationship and scrutiny of transactions carried out to ensure consistency with the reporting institution's knowledge of the customer, their business and risk profile, including the source of funds.

The Proceeds of Crime and Anti-Money Laundering Regulations also apply to any persons (including directors and senior management) who know or ought to reasonably know that property forms part of the proceeds of crime or who fails to comply with monitoring and reporting obligations. Failure to report a restricted activity constitutes a crime.

In 2016, Central Bank of Kenya adopted a Risk Based Supervisory Framework for Anti-Money Laundering and Countering Financing of Terrorism. The framework was designed to further complement prudential supervisions and legal compliance.

In 2019, the Government of Kenya proposed to introduce an amendment to the definition of designated non-financial businesses and professions required to report suspicious transactions under the Proceeds of Crime and Anti-Money Laundering Act. Section 50 of the 2019 Finance Bill<sup>22</sup> includes advocates, notaries and other independent legal

professionals who are sole practitioners, partners or employees within professional firms. This is could be a significant milestone for transparency as advocates and other legal professionals are currently protected from disclosing details of transactions or money held on behalf of their clients and this has been a useful tool for exacerbating illicit financial flows.

This amendment is based on vulnerabilities identified in money laundering and terrorism financing risk assessment of the legal profession as part of the Financial Action Task Force assessment.<sup>23</sup> If the amendment is accepted by parliament, it will require lawyers to report to the Financial Reporting Centre as banks do. However, those in the legal profession have responded with concerns that the amendments will infringe on advocate-client privilege.<sup>24</sup> Members of Parliament have, so far, opposed the amendment on similar grounds and proposed that the new requirement should be brought as a standalone, substantive bill.<sup>25</sup>

#### **Regulation of business conduct on transparency and accountability**

Various types of entities are permitted in Kenya including companies, partnerships, limited liability partnerships, sole proprietorships, trusts, societies, and co-operative societies.

In 2015, the president of Kenya assented several bills relating to the regulatory framework for business and taxation that were targeted at improving the ease of business. Some of these regulations include the Companies Act, the Insolvency Act, Special Economic Zones Act, the Business Registration Act 2015, the Companies and Insolvency Legislation (Consequential Amendments) Act 2015 and the Finance Act Amendments 2015.

As of 2015, any individual attempting to register an entity is required to hold and provide a Personal Identification Number (registration for tax purposes), a copy of their identity card and photographs of the directors or partners in the case of a company or partnership. Companies and co-operative societies are required to maintain a register of members that should be open and shared with the Registrar of Companies in the case of a company. On registration, LLPs are required to provide the name, identification document, nationality and the place of residence of each partner and manager of the partnership.

The Business Registration Act established the Business Registration Services to administer incorporation, registration, operation and

management of companies, partnerships and other entities. The body is responsible for monitoring these entities and supporting the functions of the Registrar of Companies including in maintaining updated ownership information.

Information about companies incorporated in Kenya is available online via the [e-citizen](#) portal.<sup>26</sup> The Register of Companies is required to include the shareholders, beneficial owners, directors and address of the company. This information is only accessible through payment of an administrative fee. Information on the beneficial ownership is limited to the name and address of the identified persons; no verification of this information is required. In relation to Trusts, Section 54B of the Income Tax Act, Chapter 470 of the Laws of Kenya (ITA), requires that the full identities and addresses of trustees, settlors and beneficiaries of the trust be disclosed to the KRA.

To support the operationalization of the Mutual Administrative Assistance in Tax Matters Convention, the Mutual Legal Assistance Act sets out the procedure for responding to foreign jurisdiction requests for information and identifies Kenya Revenue Authority as a Competent Authority.

### **Beneficial ownership transparency**

In 2017, Transparency International Kenya published a report highlighting the state of [beneficial ownership transparency in Kenya](#).<sup>27</sup> Transparency International Kenya assessed the beneficial ownership transparency legal framework against the ten beneficial ownership transparency principles covering several areas including the definition of a beneficial owner, availability and access to information on legal entities including trusts, roles and responsibility of financial institutions, business and professionals, and bearer shares and nominees.

The assessment determined that the anti-money laundering laws in Kenya adequately defined beneficial ownership, however, minor shortcomings in the requirements of legal entities to maintain information on all natural persons who exercise ownership or control of the legal entity were identified.<sup>28</sup> In addition, the ability of enforcement bodies, the tax authority and the FRC to access beneficial ownership information requires improvement particularly where the scope information included in the Register of Companies is limited and no proof of verification is provided.<sup>29</sup>

In particular, access to beneficial ownership information relating to private companies is limited.

In relation to trusts, significant improvement is required in the access of competent authorities to beneficial ownership information.<sup>30</sup> Further, advocates have no obligation to identify the beneficial owners of their clients.<sup>31</sup> This can, arguably, be extended to other professionals.

As identified above, Kenya has ratified the Mutual Administrative Assistance in Tax Matters Convention, which is considered to be a positive step in supporting exchange of information and transparency.

Kenya does not prohibit the use of nominee shareholders and directors; however, the ongoing legislative reform is expected to remedy this weakness.<sup>32</sup> The Companies Act 2015 prohibits the use of bearer shares.<sup>33</sup>

As of July 2019, following an amendment of the Companies Act, it is now mandatory for companies to maintain a register of beneficial owners with the relevant information relating to the beneficial owners.<sup>34</sup> The relevant information to be provided will be determined by the Companies (Beneficial Ownership Information) Regulations, 2019<sup>35</sup>, which are still under review. Companies must submit a copy of the register to the Companies Registrar within 30 days of preparation, failure to comply results in a fine of approximately US\$5,000. This should give rise to significant outcomes for transparency given that the Companies Act defines the beneficial owner as a natural person with a threshold of 10% shares or voting rights.

### **Global Forum on Transparency and Exchange of Information: Key findings**

[The Global Forum's Phase 2 review of Kenya](#), carried out in 2016,<sup>36</sup> analysed the practical implementation and effectiveness of the legal framework and was based on the laws, regulations and exchange of information mechanisms in force or effect as at 18 December 2015.

Based on a review of the regulatory framework as set out above, the Global Forum staff determined that Kenya's overall rating was largely compliant. Some of the justifications included the introduction of Section 54B of the ITA, the prohibition on bearer shares,

The Global Forum team did, however, identify that the anti-money laundering regime is limited, the Registrar of Companies did not have a system of oversight to monitor compliance with ownership obligations and sanctions for non-compliance were

not enforced in practice and trustees of Kenyan trusts are only required to maintain accounting records where the trust derives income subject to tax in Kenya.

## **What does the Nairobi International Financial Centre mean for the future of transparency in Kenya?**

The Lord Mayor of the City of London Corporation and one of the City Corporation's main lobbying bodies, the City UK, have [strongly influenced and participated in the design and implementation of the Nairobi International Financial Centre.](#)<sup>37</sup>

Despite the progress in transparency and exchange of information, the establishment of the Nairobi International Financial Centre will be a drastic move in the wrong direction. International financial centres thrive on secrecy and incentives, and it has been demonstrated<sup>38</sup> that the proposed Nairobi International Financial Centre could lead to profit shifting and base erosion.

In particular, Section 17 of the Nairobi International Financial Centre Act stipulates that any person connected to the Nairobi International Financial Centre Authority or who has access to any information relating to the affairs of the Authority shall not divulge any of that information unless disclosure is required by law or by a Court of law. Disclosure in contravention of this section constitutes an offence liable to a fine not exceeding approximately US \$2,000 or an imprisonment term not exceeding three years or both.

A strong secrecy regime combined with a corruption-ridden economy is certainly a recipe for disaster with the potential to facilitate illicit financial activity without the need of accessing offshore jurisdictions. The majority of tax havens tend to powerful rich countries or dependencies of such countries, which attract money because people trust that their money is safe in a legal system backed by a stable democracy.<sup>39</sup>

As a result, less obviously trustworthy locations will typically find their 'competitive edge' in going down market, accepting dirtier money than other jurisdictions.<sup>40</sup> The Nairobi International Financial Centre is expected to permit selected local investors access on par with foreign investors.<sup>41</sup>

Already, Kenya's beneficial ownership transparency and anti-money laundering regime require significant strengthening, although the secrecy element of the Nairobi International Financial

Centre is not as intense as that of some well-known offshore jurisdictions. Due to a lack of consultancy on the framework thus far, it is unknown which direction the Authority will be taking, but progress should be expected in the coming year.

*With thanks to Joy Waruguru Ndubai*



## Endnotes

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PART 2: SECRECY SCORE

OWNERSHIP REGISTRATION

- 63 1. Banking Secrecy
- 50 2. Trust and Foundations Register
- 75 3. Recorded Company Ownership
- 50 4. Other Wealth Ownership
- 100 5. Limited Partnership Transparency

LEGAL ENTITY TRANSPARENCY

- 100 6. Public Company Ownership
- 100 7. Public Company Accounts
- 100 8. Country-by-Country Reporting
- 75 9. Corporate Tax Disclosure
- 100 10. Legal Entity Identifier

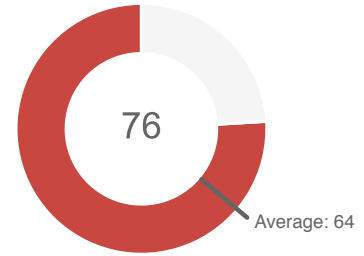
INTEGRITY OF TAX AND FINANCIAL REGULATION

- 75 11. Tax Administration Capacity
- 38 12. Consistent Personal Income Tax
- 100 13. Avoids Promoting Tax Evasion
- 50 14. Tax Court Secrecy
- 50 15. Harmful Structures
- 70 16. Public Statistics

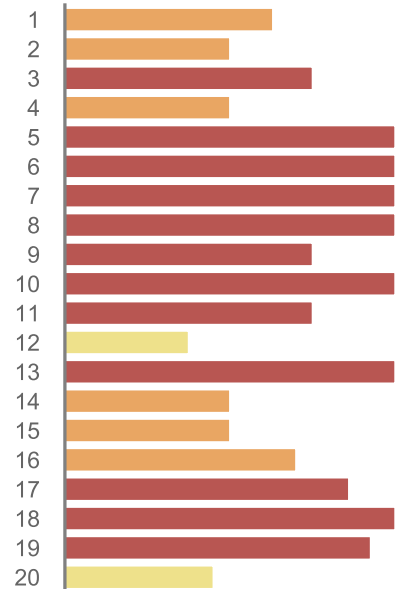
INTERNATIONAL STANDARDS AND COOPERATION

- 86 17. Anti-Money Laundering
- 100 18. Automatic Information Exchange
- 93 19. Bilateral Treaties
- 45 20. International Legal Cooperation

Secrecy Score



Key Financial Secrecy Indicators



Notes and Sources

The FSI ranking is based on a combination of a country's secrecy score and global scale weighting (click [here](#) to see our full methodology).

The secrecy score is calculated as an arithmetic average of the 20 Key Financial Secrecy Indicators (KFSI), listed on the right. Each indicator is explained in more detail in the links accessible by clicking on the name of the KFSI.

A grey tick in the chart above indicates full compliance with the relevant indicator, meaning least secrecy; red indicates non-compliance (most secrecy); colours in between partial compliance.

This report draws on data sources that include regulatory reports, legislation, regulation and news available as of 30 September 2019 (or later in some cases).

Full data is available here: <http://www.financialsecrityindex.com/database>.

To find out more about the Financial Secrecy Index, please visit <http://www.financialsecrityindex.com>.