Funded
by the European Union
and the Council of Europe

Implemented
by the Council of Europe

Project against Economic Crime in Kosovo[*] (PECK)

www.coe.int/peck

TECHNICAL PAPER

Legal Opinion on the redrafting of the Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing of Kosovo

prepared by

Mr Giuseppe Lombardo and Mr Herbert Zammit LaFerla, Council of Europe experts, and reviewed/edited by Mr Edmond Dunga, PECK Project Advisor

ECCU-PECK-eng-3/2015

[*] This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

For more information please contact: Economic Crime and Co-operation Unit Action against Crime Department Directorate General Human Rights and Rule of Law Council of Europe F-67075 Strasbourg Cedex E-mail: contact.econcrime@coe.int Website: www.coe.int/peck	This document has been produced with the financial assistance of the European Union and the Council of Europe. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe.

Table of Contents

1. EXECUTIVE SUMMARY 5
2. INTRODUCTION 8
3. METHODOLOGICAL BASIS AND APPROACH ADOPTED 9
4. GENERAL OBSERVATIONS 9
5. REPRESSIVE MEASURES AND FIU 13
6. PREVENTIVE AND OTHER MEASURES FOR FINANCIAL INSTITUTIONS AND DNFBPS 21
7. CONCLUSIONS AND RECOMMENDATIONS 34

List of Acronyms

AML/CFT	Anti-Money Laundering / Countering the Financing of Terrorism
AR	Assessment Report
CBK	Central Bank of Kosovo
CC	Criminal Code
CDD	Customer Due Diligence
CETS	Council of Europe Treaty Series
CETS 198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
CoE	Council of Europe
CSL	Civil Service Law
DNFBPs	Designated Non-Financial Business and Profession
EC	Essential Criterion
EU	European Union
FATF	Financial Action Task Force
FIU-K	Financial Intelligence Unit of Kosovo
FT or TF	Financing of Terrorism or Terrorism Financing
LIS	Law on International Sanctions
LLP	Law on Liability of Legal Persons
ML	Money Laundering
MoF	Ministry of Finance
MoU	Memorandum of Understanding
NGO	Non-Government Organisation
STR	Suspicious Transaction Report
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSCRs	United Nations Security Council Resolutions

1. EXECUTIVE SUMMARY

Following the adoption of the two assessment reports on Compliance with International AML/CFT Standards and Compliance with International Anti-Corruption Standards for Kosovo prepared by the Joint European Union and Council of Europe Project against Economic Crime in Kosovo (PECK), the PECK Project engaged two Council of Europe experts in the framework of Activity 4 of its Workplan (Support for the revision of the AML/CFT Law) to provide assistance, technical advice and guidance in the revision process of the Law No. 03/L-196 on Prevention of Money Laundering and Terrorism Financing (hereafter the "AML/CFT Law") in order to meet respective European and international standards. On 5 June 2015 the Kosovo authorities presented a revised but incomplete draft of the AML/CFT Law. This draft Law together with other relevant documents have been the basis of this Technical Paper and Legal Opinion on the proposed amendments. This Legal Opinion is further supported by the international (2012 FATF Recommendations) and European standards for the prevention of money laundering and the financing of terrorism.

While the proposed amendments address issues related to the criminalisation of money laundering and terrorist financing; the functions of the FIU-K; and, to some extent, the imposition of sanctions, various important recommendations formulated in the PECK Assessment Report (PECK AR) have not been addressed thus weakening the harmonisation of the Law with international standards.

On the preventive side proposed amendments to the AML/CFT Law should aim to enhance its harmonisation with international standards. The amendments have addressed various weaknesses that had been identified in the PECK AR for the application of CDD procedures (although some key deficiencies remain); record keeping; the reporting obligation particularly related to the reporting of financing of terrorism; compliance function; supervisory powers; issues related with references to casinos, games of chance and licensed objects of games of chance; and risk assessment and risk management. Notwithstanding, in some instances it appears that part of the objective of the AML/CFT Law revision is primarily driven more on strengthening the powers of the FIU-K rather than the objective of harmonisation with international standards. Suffice to mention at this stage the rationale of changes aimed at increasing the FIU-K supervisory powers in an unusual way that limits the conduct of supervision by the CBK and other sectoral supervisors thus eventually jeopardising supervisory efficiency and harmonisation of cooperation.

On a general note this Paper finds that the revised AML/CFT Law remains fragmented to an extent that at times certain obligations are not applied to some categories of reporting subjects – for example issues related to internal programmes and controls for compliance purposes. On the other hand, at other times obligations are applied both on a general and specific level – for example CDD and reporting - creating inconsistencies, at times verging on the discriminatory, in the process. Moreover the *verbatim* approach for the transposition of certain international obligations continues to feature in these amendments without the drafter considering the applicability of such provisions within the context of the legal structure and provisions in Kosovo - for example the continued and enhanced reference to certain legal arrangements, in particular *trusts*, when as established by the PECK AR such arrangements cannot be established under the domestic law and since it is not clear whether trusts or other legal arrangements established outside Kosovo can establish as such business relationships or open bank accounts in Kosovo. Other findings of a general nature are some of the definitions of terms used in the Law.

Moreover this Paper finds that the draft AML/CFT Law lacks some transitional provisions for the application of new obligations to existing customers and the continuity of agreements and directives signed or issued under current provisions that are now being removed or replaced in the Law.

Repressive measures and Financial Intelligence Unit

As regards repressive measures and the Financial Intelligence Unit (FIU) the Technical Paper of the proposed amendments to the AML/CFT Law raises concerns and issues for consideration related to:

- The keeping of a duplicative set of ancillary offences for money laundering and issues related to criminal corporate liability, which need further consideration;
- The duplicate criminalisation of terrorist financing (in the draft and in the CC), which creates legal uncertainty that poses a serious risk to the effective application of the TF criminal provisions;
- An incomplete framework for the implementation of UNSCRs concerning targeted financial sanctions related to terrorism and terrorist financing;
- Structure and operations of the FIU-K regarding the effect of non-core functions on the efficiency of the FIU-K; and
- Administrative Sanctions and Remedial Measures whereby while positively noting the introduction of a graduated pecuniary sanction, this Paper recommends to introduce provisions dealing with graduated non-pecuniary remedial measures to be applied proportionately to the seriousness of the offence though the findings of on-site and off-site examinations.

Preventive Measures

On the preventive side, while as indicated above some concerns raised in the PECK AR in particular those relating to the obligations of reporting subjects such as the customer due diligence and reporting obligations have been for most parts addressed, the Technical Paper of the proposed amendments to the AML/CFT Law raises further concerns and issues for consideration related to:

- The categories of reporting subjects under Article 16;
- Consolidation of provisions on the assessment and prevention of risk for which this Paper is recommending a new Article with new and revised provisions;
- Consistency in the application of all CDD measures to all reporting subjects such as the identification and verification process, beneficial owner and application of enhanced measures;
- Issues of inconsistency with the FATF Standards on CDD, issues related to PEPs, beneficial owners and beneficiaries of life or other investment related insurance business as well as failure to complete CDD;
- The treatment of Record Keeping obligations – being transferred to a separate Article under the Law retaining present provisions and added new ones;
- Consistency in compliance with overall obligations related to the issue of 'fragmentation' whereby provisions for some obligations should be made applicable to all reporting subjects, see for example where CDD cannot be completed;
- Protection and prohibition of disclosure with additional proposals for provisions to strengthen harmonisation with international and European standards including protecting the personal information of employees making reports or providing information to the FIU-K in accordance with their obligations under the AML/CFT Law;
- Supervision and compliance which appears to be loose at one end and too restrictive on the other with possible negative implications for effectiveness and efficiency;

- Statistics as the proposed amendments are completely silent on this important element under the 2012 FATF Methodology and for the FIU-K to undertake its obligations for assessing AML/CFT risks in all sectors and for measuring the effectiveness of the AML/CFT regime.

For ease of reference the Kosovo authorities have been provided with a revised version of the amended law with proposed amending text and explanatory comments where appropriate. This document forms an integral part of this Legal Opinion. It should be emphasised that any drafting suggestions are only by way of guidance and should be regarded as indicative to be edited or redrafted by the Kosovo authorities, if accepted, to correlate to the aspects of the legislative structure in Kosovo.

Conclusions and Recommendations

As regards repressive measures and the FIU, while a number of issues noted in the PECK AR were addressed by the draft, issues that need to be further addressed include:

- Further considerations regarding the criminalisation of money laundering, particularly the duplicative ancillary offences regime;
- Further considerations regarding the criminalisation of terrorist financing, particularly the duplicative criminalisation of TF;
- A rethink of the rationale for the proposed amendments concerning the non-core functions of the FIU-K and their implications on its efficiency and effectiveness, particularly the proposed "primary" supervisory responsibility of the FIU-K ;
- A rethink of the entire sanctioning regime for administrative, prudential and criminal offences of the AML/CFT Law, including the authority/authorities that should be responsible for issuing sanctions and the introduction of non-pecuniary graduated remedial measures; and
- Consideration of the proposed additional amendments to the AML/CFT Law put forward in this Paper.

On the preventive side, while positively addressing various issues related to the main obligations under the Law, the revised Law still falls short in adequately meeting certain international standards and in removing some of the previous complexities, ambiguities, legal uncertainties and inconsistencies.

Some areas that need to be further addressed on the preventive side in order to achieve this goal are:

- Consideration of the various recommendations made in the PECK AR for changes or additions to the AML/CFT Law which have not been addressed by the proposed amendments;
- A rethink on the fragmentation of the Law ensuring that all obligations applicable to the entire range of reporting subjects are provided for in a general part of the Law with the provisions for selected reporting subjects covering those specific issues applicable to such reporting subjects only;
- A rethink of the compliance supervisory regime ensuring its efficiency and effectiveness but taking into consideration its implications on the FIU-K resources, given that the FIU-K is being proposed as the primary supervisory body for the purposes of the AML/CFT Law;
- A review of proposed approach to the risk assessment and risk management requirements in the draft Law (currently scattered among different provisions) ; and
- Consideration of the proposed additional amendments to the AML/CFT Law put forward in this Paper.

2. INTRODUCTION

The Joint European Union and Council of Europe Project against Economic Crime in Kosovo (PECK) assessed Kosovo's compliance with international AML/CFT and AC standards in two consecutive cycles (2012-2014) based on MONEYVAL and GRECO methodologies specifically tailored to Kosovo. The corresponding assessment reports were prepared and adopted during a Plenary Meeting held in Pristina on 2 – 3 December 2014. The reports provide a comprehensive assessment of Kosovo's AML/CFT and AC frameworks and recommendations for addressing identified shortcomings. A number of concrete recommendations were made on the AML/CFT Law as well.

In the framework of Activity 4 of the PECK Workplan (Support for the revision of the AML/CFT Law), the PECK Project consequently engaged two Council of Europe experts (Mr Giuseppe Lombardo and Mr Terence Donovan) to provide assistance, technical advice and guidance in the revision process of the Law No. 03/L-196 on Prevention of Money Laundering and Terrorism Financing (hereinafter the "AML/CFT Law") in order to meet respective European and international standards.

On 11 and 12 December 2014, the PECK Project organised and facilitated the first mission of Council of Europe experts to Pristina with the main aim being to focus on technical and concrete discussions of outstanding issues and identified needs for the revision of the AML/CFT Law.

The second mission of PECK experts on 25 to 27 March 2015 followed the adoption of the Concept Document on Upgrading the Level of Prevention of Money Laundering and Terrorist Financing (Government Decision No. 08/12 of 5 February 2015) and the Decision No. 32/2015 of 13 February 2015 issued by the Ministry of Finance (MoF) on setting up the Working Group for the initial drafting of the Draft Law amending and supplementing the AML/CFT Law.

On 22 May 2015, Mr Herbert Zammit LaFerla replaced Mr Terence Donovan on the CoE team of experts to provide a joint Technical Paper and a Legal Opinion on the revised but incomplete AML/CFT Law which was provided by the Kosovo authorities.

This Technical Paper is drawn up as follows: it first lays down the methodological basis and the approach adopted (Section 3) followed by some general overall observations on the revised AML/CFT Law in Section 4. Section 5 then assesses, evaluates and comments on the repressive measures and the FIU-K provisions of the AML/CFT Law. This is followed by an assessment, evaluation and comments on the provisions of the AML/CFT Law dealing with preventive and other measures for financial institutions and DNFBPs in Section 6. Section 7 concludes this Legal Opinion with recommendations.

For ease of reference the Kosovo authorities have been provided with a revised version of the amended law with proposed amending text and explanatory comments where appropriate. This document forms an integral part of this Legal Opinion. It should be emphasised that any drafting suggestions are only by way of guidance and should be regarded as indicative to be edited or redrafted by the Kosovo authorities, if accepted, to correlate to the aspects of the legislative structure in Kosovo.

Moreover it is advisable that the authorities consider also the proposed amendments to other financial laws – Law on Banks, Law on CBK, Law on NGOs and others as identified in the PECK AR which should contribute to a more robust and harmonised AML/CFT legal framework and regime for Kosovo.

3. METHODOLOGICAL BASIS AND APPROACH ADOPTED

The Legal Opinion in this Technical Paper is based on the following documents:

- the English version of the AML/CFT Law with proposed amendments as at 5 June 2015 provided by the Kosovo authorities and which is not final and complete;
- the Concept Document on Upgrading the Level of Prevention of Money Laundering and Terrorist Financing (Government Decision No. 08/12 of 5 February 2015);
- the AR on Compliance with International AML/CFT Standards under the PECK Project as adopted on 2 December 2014;
- the Joint Report of the PECK Experts' Mission to Pristina on 25 – 27 March 2015.

Moreover, the Technical Paper has taken into consideration the comments made by some authorities being the Central Bank of Kosovo, the American Chamber of Kosovo, Kosovo Bankers Association and the General Police Directorate at the Ministry of Internal Affairs as included in the Concept Document.

Furthermore, the Legal Opinion takes note of the 2012 FATF Standards and in particular the Interpretative Notes, ensuring implementation where these strengthen the findings of the PECK AR on Compliance with International AML/CFT Standards. Finally the Opinion takes note of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the EU Third AML Directive).[1,2]

Finally, it should be noted that the draft provided by Kosovo is not final or complete. It includes various highlighted paragraphs which, the experts understand, need still to be addressed by the Kosovo authorities. Consequently no comments are made in this Paper on these paragraphs except where it is absolutely necessary because of the effect on and continuity with other amended paragraphs.

This Legal Opinion should not be interpreted as taking into account all the proposals and recommendations made in the PECK AR on Compliance with International AML/CFT Standards. It is up to the Kosovo authorities to evaluate and decide on their inclusion. However where proposed changes need to be complemented by further inclusion of such recommendations in the PECK AR these have been included. Moreover, although this Legal Opinion takes consideration of the FATF International Standards and the EU Standards, it should not be interpreted as being a full assessment of compliance by Kosovo with these standards.

4. GENERAL OBSERVATIONS

The proposed amendments to the AML/CFT Law should aim to enhance its harmonisation with international standards. The amendments have addressed various weaknesses that had been identified in the PECK AR for the criminalisation of ML, the FIU core functions, the application of CDD procedures; record keeping; the reporting obligation particularly related to the reporting of financing of

---

[1] OJ L 309, 25.11.2005 p. 15 - 36

[2] Since the PECK assessment was partly based on the EU Third Directive this is being taken as the reference basis for this Paper. The EU Fourth AML Directive was just published in the EU Official Journal in May 2015 (OJ L 141, 5.6.2015, p. 73-117) and no assessment for Kosovo against the new Directive has been undertaken yet. Notwithstanding recommendations made on the basis of the EU Third AML Directive and which are being retained in the EU Fourth AML Directive are supported in this Paper.

terrorism; compliance function; supervisory powers; issues related with references to casinos, games of chance and licensed objects of games of chance; and risk assessment and management.

Notwithstanding, in some instances it appears that part of the objective of the revision is primarily driven more on strengthening the powers of the FIU-K rather than the objective of harmonisation with international standards, taking into account the extensive recommendations made in the PECK AR on Compliance with International AML/CFT Standards. Suffice to mention at this stage the rationale of changes aimed at increasing the FIU-K supervisory powers in an unusual way that limits the conduct of supervision by the CBK and other sectoral supervisors thus eventually jeopardising supervisory efficiency and harmonisation of cooperation.

Consequently, and as it will be shown in this Paper, a number of issues of inconsistency with the Standards remain outstanding, as well as issues that, as identified in the PECK AR, leave some parts of the Law unclear, inconsistent and subject to interpretation. The rest of this Paper will highlight these major deficiencies which remain in the AML/CFT Law and other important recommendations of the PECK AR which have not been addressed.

The following are some general observations in this regard.

Fragmentation

According to paragraph (5) of Article 5 of the Concept Document on Upgrading the Level of Prevention of Money Laundering and Terrorist Financing (Government Decision No. 08/12 of 5 February 2015) *Amendments will address the structure of the Law with the objective of clarifying the law and the application more easily. Such amendments also include simplifying of the Law by compiling general provisions where this is possible and specific provisions only when the general provisions are not sufficient.* This is interpreted or implies that part of the objective is that the revised Law will move away from fragmentation and will include all obligations that are applicable to all reporting subjects in the general provisions and leave separate provisions for those reporting subjects who require obligations that are specific to their category, for example casinos and lawyers.

Unfortunately the revised AML/CFT Law remains fragmented to a large extent with the consequence that some of the obligations under the Law which should be applicable to all reporting subjects being repeated for the different categories of reporting subjects to which the Law attributes “Additional obligations”. Moreover, due to this fragmentation, some categories of reporting subjects who are not subjected to additional obligations may not be rendered subject to some of the obligations of the Law. Indeed, this shortcoming is identified for example under paragraph (2) of Article 6 of the Concept Document *The Draft Law should be amended to guarantee that casinos and gaming houses are prohibited from disclosing information on suspicious transaction reports submitted to the FIU* when this obligation should be under the “general provisions” since it is applicable to all reporting subjects. Likewise paragraph (7) of Article 6 *The Draft Law should be amended to define the scope and content of reporting obligations for trust and company service providers* when the reporting obligation should be applicable to all reporting subjects.

Some examples of obligations of a general nature but which are only attributed to specific categories of reporting subjects would be: inability to complete the customer due diligence (paragraph (6) of Article 19); the establishment of internal money laundering and terrorist financing prevention programmes and the compliance function (paragraph 13 and paragraphs 17 – 19 of Article 19); identifying whether a customer is acting as principal (paragraph (3) of Article 19) and other instances.

It is therefore recommended that the whole AML/CFT Law be revised accordingly, taking account of instances referred to further down in this Paper.

Cross-references

As highlighted in the PECK AR on Compliance with International AML/CFT Standards and as recognised under the Concept Document (see Article 6 last paragraph) the Law needed some technical adjustment due to wrong references to other articles both in the Law itself and other Laws. To this effect the Concept Document has provided a summary of these in its Annex 1

Notwithstanding, with the addition of new Articles and the renumbering of others, some cross-references to relevant articles remain incorrectly stated – see for example paragraph (6) of Article 19; paragraph (2) of Article 21; and paragraphs (2.1) and (2.3) of Article 33.

An overall revision of the draft Law for this purpose would be opportune.

Transposition of Standards

The PECK AR on Compliance with International AML/CFT Standards had identified that in some instances, with particular reference to legal arrangements and more precisely regarding *trusts*, the legislator seems to have transposed verbatim the respective FATF Standards without paying due attention to the fact that the original text refers to trusts or other similar legal arrangements that do not actually exist in the laws of Kosovo. In this regard the PECK Assessment Team urged the authorities to perform a thorough revision of the respective legislation, primarily the AML/CFT Law, in order to detect and eliminate all the false or misleading references in any source of primary or secondary legislation that implies the existence and/or acceptance of express trusts or similar legal arrangements in Kosovo.

It does not appear that in reviewing the AML/CFT Law the drafters took the above into consideration. There are various instances in the revised Law with specific references to trusts: definition of beneficial owner, definition of entity; definition of legal arrangements and the specific definition of the term “Trust” itself; constituents of customer due diligence; and others.

Notwithstanding, it is important that such references to ‘trusts’ remain if Kosovo allows reporting subjects, such as banks and financial institutions or lawyers to provide financial or legal services to such foreign trusts (not registered in Kosovo) accordingly.

Transitional Provisions

A new Article 53A on “Transitional Provisions for Application of the Law” is being inserted consisting of two paragraphs. Paragraph (1) requiring reporting subjects to apply the new provisions of the Law to existing customers on a materiality and risk basis, reflecting EC 10.16 of Recommendation 10 of the 2012 FATF Standards. Paragraph (2) ensures that all agreements and administrative instructions, directives or guidance issued under the Law prior to the proposed amendments remain in force – for example the MoU for supervisory delegation between the FIU-K and the CBK on the basis of the previous Article 36A of the AML/CFT Law which is now being removed.

Implementation of the Law

The proposed amendments to the AML/CFT Law provide under various Articles for the FIU-K, the CBK or a sectoral supervisory authority to issue administrative directives, instructions or guidance to

reporting subjects for compliance with the Law. It is opined that most of these provisions although being similar in nature they could create inconsistency for the issue of similar documents for other provisions of the AML/CFT Law. In order to avoid inconsistency and for completeness purposes, a second paragraph to Article 50 is proposed providing for the mandatory obligations upon the FIU-K, the CBK and other sectoral supervisory authorities to issue, amend and revoke administrative directives, instructions and guidance to all reporting subjects for the implementation of their obligations under the AML/CFT Law. Notwithstanding, while most of the previous paragraphs under different Articles referring to this power are being removed, the amendments to the Law still retain specific provisions for the issue of sub-legal acts in specific provisions and for specific purposes, such as CDD measures and record keeping and NGOs and Political Parties (subject that the latter two are retained as reporting subjects), but in accordance with the provisions of paragraph (2) of Article 50.

Definitions

A number of definitions of terms used in the AML/CFT Law are being introduced or revised and better harmonised with definitions in international standards. The review under this Paper of the proposed amended Law provides additional amendments and insertions in the definitions for further harmonisation:

- *Games of chance*: since the definition is drawn from that of the main law it is appropriate to link it accordingly by adding the following at the beginning of the definition: *in accordance with the Law No. 04/L-080 on Games of Chance means a….*
- *Monetary instruments*: the inclusion of the word "shall include" at the beginning makes the definition open for the addition of any other instrument that carries a monetary value but which is not specifically mentioned in the definition.
- *Politically Exposed Persons*: it is not clear whether item (viii) *directors, deputy directors and members of boards or equivalent positions in international organisations* is meant to cover situations of persons who are or who have been entrusted with a prominent function by an international organisation in accordance with the 2012 FATF Standards Recommendation 12 since the Recommendation speaks about being entrusted in a prominent function as opposed to internal senior officials.
- *Transaction*: it is proposed to include the words *in a business relationship one of whom is a reporting subject under this Law*. This is now necessary due to a proposal to include a definition for "occasional transaction".
- *Occasional transaction*: *means any transaction other than a transaction carried out in the exercise of a business relationship formed by a reporting subject and another person or entity*. Since the term 'occasional transaction' is used throughout the Law in relation to CDD measures it is deemed appropriate to define the term within the context of a "business relationship" as defined.

Moreover the term "financial intermediaries" used in paragraph (6) of Article 18 is not defined. If this term is with reference to 'banks and financial institutions' then paragraph (6) of Article 18 – which is generic applying to all reporting subjects – should be moved under Article 19 – specific for banks and financial institutions and the term "financial intermediaries" replaced by the term "banks and financial institutions" for clarity and consistency.

5. REPRESSIVE MEASURES AND FIU

Concerning repressive measures and the FIU, while a number of changes has been introduced to bring the provision of the draft in line with the international standard, it is likewise noted that a number of valid recommendations in the PECK AR on Compliance with International AML/CFT Standards have either been partly introduced or not introduced at all. It is opined that, while some recommendations have been indirectly addressed for example by removing problematic provisions to which the recommendations were meant, other recommendations should be included for better harmonisation of the revised AML/CFT Law with the international standards. While this Section of the Paper therefore tries to introduce some of these recommendations it cannot be guaranteed that all recommendations have been taken into consideration as it lies with the Kosovo authorities to decide on their acceptance.

The Concept Document on Upgrading the Level of Prevention of Money Laundering and Terrorist Financing under Article 6 addresses two (2) main legal aspects that need to be addressed in the draft law under paragraphs (11) and (12) dealing with:

- defining in detail the procedure for the application of administrative sanctions against reporting entities for non-compliance with the law and to harmonise the procedure, to provide instruction for good administrative practices and administrative appeals against sanctions imposed by the FIU-K; and
- examining the modalities for the avoidance of dual criminality of certain offences, which are defined in the [AML/CFT] Law, but also in the Criminal Code.

Criminalisation of Money Laundering

The draft addresses some of the issues noted by the PECK AR, although some gaps remain. The draft defines ML by way of cross reference to the crime stipulated by the Law (and no longer as a standalone definition), and clarifies that property includes also tangible and intangible assets. However, the ML provision still provides for a separate set of ancillary offences, which overlap with the ones provided for by the CC, and contains a number of provisions that go beyond the scope defined by the Vienna and Palermo Conventions. It is recommended that *ad hoc* references to the ancillary offences be eliminated from the draft (see suggested edits in the text of the draft), and that the additional ML conducts be reconsidered to see whether they really add value to the ML criminal provision (for example, authorities should consult with law enforcement and prosecutors and see whether these particular types of conducts have ever been investigated or prosecuted).

There are some other technical issues that should be addressed. The ML criminal provision in the draft still provides that the perpetrator can be convicted for the ML offence *even if he/she has not been convicted of the related predicate criminal offence.* As noted by the PECK AR, this is not what is required by FATF. FATF new Methodology Essential Criterion (EC) 3.5 provides that when proving that property is the proceeds of crime it should not be necessary that a person (that is, any person and not only the one who eventually committed the ML offence) be convicted of the predicate offence. Edits have been suggested to address this shortcoming. As regards self-laundering, the PECK AR criticised the reference to “separate proceedings”, which is being therefore proposed to be eliminated from the draft.

The draft does not address the issues noted by the PECK AR on criminal corporate liability. Neither the Criminal Code (CC) nor the Law on Liability of Legal Persons (LLP) contains any clear

provision in relation to other (civil or administrative) forms of liability applicable to legal entities and hence it cannot be established whether and to what extent the criminal liability of legal persons would preclude any possible parallel civil or administrative proceedings or sanctions. As the PECK AR suggests that other sources of administrative legislation may contain provisions relevant in this field, authorities are recommended to review administrative legislation to determine if, in addition to criminal sanctions, other forms of liability can be applied to legal entities. The PECK AR also noted that the provisions in the AML/CFT Law on corporate liability and those provided for by the LLP should be harmonised. To avoid the risk of duplicative provisions, authorities should consider eliminating the provisions on corporate liability from the draft or, if they wish to maintain them, the LLP should clarify that. As regards ML the corporate liability sanctions are provided for in the AML/CFT Law (in a way similar to what the CC does in regards to ML, where there is a provision that cross-refers to the AML/CFT Law).

Criminalisation of Terrorist Financing (TF)

The draft addresses, to an extent, the issues of different punishments for TF due to the existing duplicate criminalisation and the leniency of the fines, noted by the PECK AR. However, by maintaining a standalone provision for TF, it does not fully resolve the issues created by the duplicate criminalisation of TF, and it is not in line with the Action Plan annexed to the AML/CFT Strategy for the years 2014-2018. The draft law harmonises the custodial penalties with the ones provided for by the CC, introducing the same range of penalties provided for by the CC (5 to 15 years of incarceration). It also clarifies that the fine (alternative to incarceration) is of 500,000 EUR (as opposed to "up to" 500,000 EUR, which had been criticised by the PECK AR as being potentially too lenient in the absence of a mandatory minimum). However, the draft does not fully resolve the issues posed by the duplicate criminalisation of TF. A standalone provision criminalising TF would still be competing with the existing provisions in the CC, which had not been amended when the standalone TF offence was introduced in the AML/CFT Law. Although the custodial penalties have been harmonised, the non-custodial punishments appear to have not. The duplicate criminalisation creates a legal uncertainty that poses a serious risk to the effective application of the TF criminal provisions. It is also not in line with the Action Plan annexed to the National Strategy of Kosovo for the prevention of and the fight against the informal economy, ML, TF and other financial crimes for the period 2014-2018, which, acknowledging the duplicate criminalisation of TF and the differences between the two TF offences, it stipulates that the criminalisation of TF should only be included in the CC and its content should be amended to comply with the TF Convention.

Targeted financial sanctions related to terrorism and terrorist financing

The Kosovo regime for the implementation of FATF 2012 Recommendation 6[3] and the relevant United Nations Security Council Resolutions (UNSCRs) requiring countries to freeze without delay terrorist assets and to prohibit making funds and other resources (including financial services) available to designated persons and entities is incomplete and not always consistent with the standards. The Law No. 03/L-183/2010 on implementation of International Sanctions (LIS) sets the basis for the implementation of "international sanctions", defined as *"restrictions and obligations imposed by the resolution, convention, covenant, declaration or any act of the United Nations Organisation or other international organisations"* of economic, financial, political, communication and public nature (paragraph (1.2) of Article 2). Although there is no specific reference to "freezing" or "prohibition of making funds or other assets from being made available for the benefit of designated persons and entities[4]", these could be captured by the definition of "Financial sanctions"

[3] Previous Special Recommendation III.

[4] Glossary to the FATF Recommendations, definition of "targeted financial sanctions".

(paragraph (1.4) of Article 2 of the LIS): *"restrictions on the rights of entities, to which international sanctions are implemented, to manage, use or dispose of cash, securities, goods, other assets and property rights; payment restrictions for entities to which international sanctions are implemented; other restrictions on financial activities".* There are however several issues with the LIS, *inter alia*:

- The LIS relies on a Government decision for its implementation, which has not been issued;
- It lacks a mechanism for identifying targets for designations based on the designation criteria set out in United Nations Security Council Resolutions (UNSCR – 1267/2001 and its successor resolutions) and to make submissions of persons and entities to the competent UN sanction committees, for designation;
- It does not provide a mechanism for identifying targets for designation, based on the designation criteria set out in UNSCR 1373/2001, and for designating entities pursuant to that UNSCR.
- It does not provide for authority or procedures and mechanisms to examine and give effect to the actions initiated under the freezing mechanisms of other countries pursuant to UNSCR 1373;
- It is not clear that "financial sanctions" would cover all the instances envisaged by FATF[5].

While many of these points could be addressed by the Government decision, it is not clear that the LIS could be actually used for the implementation of the UNSCR 1373 (given that this Resolution is not based on actual designations, but only provides general obligations for UN members and for the criteria for designations, leaving the actual designations to UN members). This point should be clarified. If the LIS, in its actual formulation, cannot be the basis for the implementation of UNSCR 1373, authorities could either amend it or introduce a provision in the draft AML/CFT Law empowering an authority (e.g. the Government) to implement UNSCR 1373.

Financial Intelligence Unit

The structure of the FIU-K does not present, *per se*, particular issues in terms of technical compliance with FATF 2012 Recommendation 29[6]. The FIU-K is presided by a Board consisting of representatives of several authorities with AML/CFT responsibilities. Although this arrangement is not extremely common, it is not unheard of in certain countries. In the case of the FIU-K, there is a very strict separation between the "core" operational functions of the FIU-K (receipt, analysis and dissemination of information related to ML, predicate offences and TF) and the responsibilities of the Board. The former are vested in the Director and the FIU-K. The latter are not operational and do not affect the core functions or the operational independence of the FIU-K. The proposed responsibility for the Board to approve the internal regulations of the FIU-K (upon the proposal of the FIU Director) does also not affect the operational independence. Naturally, one would have to see how these functions are implemented in practice before making a final determination that they, indeed, do not affect the operational independence of the FIU-K, but this falls outside the scope of this Opinion.

---

[5] The obligation to freeze should extend to: (i) all funds or other assets that are owned or controlled by the designated person or entity, and not just those that can be tied to a particular terrorist act, plot or threat; (ii) those funds or other assets that are wholly or jointly owned or controlled, directly or indirectly, by designated persons or entities; and (iii) the funds or other assets derived or generated from funds or other assets owned or controlled directly or indirectly by designated persons or entities, as well as (iv) funds or other assets of persons and entities acting on behalf of, or at the direction of, designated persons or entities.
Countries should prohibit their nationals, or any persons and entities within their jurisdiction, from making any funds or other assets, economic resources, or financial or other related services, available, directly or indirectly, wholly or jointly, for the benefit of designated persons and entities; entities owned or controlled, directly or indirectly, by designated persons or entities; and persons and entities acting on behalf of, or at the direction of, designated persons or entities, unless licensed, authorised or otherwise notified in accordance with the relevant UNSCRs.

[6] Previous Recommendation 26.

The proposed amendments to the selection of the FIU-K Director may undermine the transparency of the selection process. The current provision (Art. 12) requires that the Ministry of Finance and Economy (MFE – now Ministry of Finance (MoF)) shall make a pre-selection of most suitable candidates that best meet the criteria established by the Law and shall shortlist at least two (2) candidates. Then, the Minister proposes the successful candidate to the Board, which appoints the Director (Art. 11, para. 2). These requirements are proposed to be repealed, and replaced with a requirement according to which "After receiving the short list from the Secretary of the FIU-K Board, the Board interviews the shortlisted candidates and after interviewing them selects the Director of the FIU", and that the "Ministry of Finances in coordination with the Secretary of the FIU-K Board shall select the candidates that meet the conditions defined in this Article and shall draft the short list and forward it to the Board to interview them". The appointment of the Director is, in proposed amendment, an act that falls within the sole responsibility of the Board. While this amendment is not particularly problematic, not requiring anymore that the most suitable candidates are those that "best" meet the criteria established by the Law (they must meet the criteria of the Article) and, most importantly, that a minimum of two candidates must be shortlisted, hampers the transparency of the process (one candidate only could be shortlisted, for example), and may result in not choosing the best candidate. Therefore, these amendments should be revisited and ensure the transparency of the process.

The rationale of the proposed amendment that classifies the FIU-K staff as "public servants but not civil servants" is unclear and may not be in line with Kosovo Law. The Civil Service Law (CSL) is currently applicable to the employees of the FIU-K, by virtue of Article 1, which subjects to the CSL, *inter alia*, executive and independent agencies. The CSL provides that certain categories of public servants are excluded from the Civil Service, but it does not mention the FIU-K. Paragraph (4) of Article 1 provides that the institutions of the public administration that are regulated by special law shall be subject to the provisions of the CSL, except in cases where the special law contains provisions that are different from the CSL's. This carve-out provision does not seem applicable to the case of the FIU-K, since the AML/CFT Law does not contain provisions that are different from the CSL's; the proposed amendment would not amount to such provisions (which would have to be related to specific aspects of the employment), but aims at introducing a general exception from the application of the CSL, which only the CSL could provide. Given that the PECK AR does not raise any issue or concern on the status of the FIU-K's employees as civil servants, the rationale of this proposed amendment is unclear.

As regards the core functions of the FIU-K, the draft amendments address the issues of technical compliance noted by the PECK AR, largely in line with the revised FATF standard. The PECK AR noted an ambiguity in the powers of the FIU-K to request additional information from reporting entities, which could result in legal challenges. The draft amendments clarify that the FIU-K can request from reporting subjects any data, documents or information it needs to undertake its functions under the AML/CFT Law, which must be provided within the timeframe established by FIU-K. However, there is no sanction for non-compliance with this obligation. This is quite a serious issue that the draft should address. The amendments, in line with the revised FATF standard, extend the core responsibilities of the FIU-K to the predicate offences to ML; establish that the FIU-K can perform strategic analysis; reorganise the provisions on domestic and international exchange of information, and state that the FIU-K can request from public or government bodies data, documents and information it needs for the purpose of exercising its functions under the AML/CFT Law, and can have access to the databases maintained by those bodies. In this case the requirement, as currently envisaged by the draft, is to provide the information "without delay". While obtaining promptly the required information is an ideal scenario, the current draft provision is, on the one hand, not very realistic in terms of enforcement and, on the other, may create ambiguity as it does not specify what "without delay" means. It is recommended to adopt a different and more specific timeframe, which

could be left to the mutual agreements with concerned institutions, through *ad hoc* memoranda of understanding.

The draft, in line with the standard, provides for spontaneous dissemination and for dissemination upon request, however the grounds for spontaneous dissemination should be specified, as well as the recipients of the disseminated information. The FATF standard requires that the FIU-K should be able to disseminate information and the results of its analysis *to competent authorities when there are grounds for ML, predicate offences or TF.* As it stands, the draft does not specify the grounds upon which information or the outcome of the FIU-K's analysis can be disseminated, nor the recipients.

The draft proposes an increase of the FIU-K's tasks in the area of supervision, which could compromise the effectiveness of the FIU-K, by diverting resources to non-core FIU functions. In the current system, the FIU has also the responsibility of supervising and inspecting reporting subjects, in order to check compliance with AML/CFT requirements. As noted in the context of other CoE-funded projects, this responsibility is somehow unusual, in that the law vests it in the FIU-K, and provides for its "delegation" to the CBK or other sectoral supervisors. The proposed amendments emphasise that it is the FIU-K that has "primary" responsibility for supervision. Qualifying the supervision responsibility as "primary" is quite peculiar and unheard of in other countries where the FIU has the responsibility to supervise reporting entities' compliance with the AML/CFT requirements. Moreover the draft introduces requirements (such as the requirement for other supervisors to obtain the FIU-K's approval before commencing an inspection or to change the scope of an inspection) that are not just unheard of but rather unprecedented for an FIU, and may affect the other supervisors' responsibility in the exercise of the supervisory function. As stressed during the meeting of March 2015, the FIU-K's responsibility in supervising reporting subjects should be limited to those reporting entities that do not have a designated supervisor or, if one exists, when there are issues of capacity that would prevent an effective supervision.

The effectiveness in discharging the FIU-K's core functions can also be affected by other responsibilities, and by the extension of the reporting requirements to natural and legal persons trading goods. The draft clarifies that the FIU-K is the responsible authority for issuing administrative sanctions (see further down) and for the appeal process (currently in the Administrative Instruction No. 03/2014), thus increasing significantly the workload deriving from non-core FIU functions. In addition to the existing requirements for NGOs to report transactions (which go beyond the standard), the draft requires natural and legal persons trading in goods when receiving payments in cash in an amount of ten thousand EUR or more to report it to the FIU-K, presumably as part of the reporting under paragraph (1.2) of Article 21 of the AML/CFT Law. This requirement goes beyond the EU Directive (which requires reporting of suspicious transactions, not of all transactions equal to or exceeding a threshold) and will result in an exponential increase of the reports received by the FIU, which, in the absence of adequate human and technical resources, may seriously affect the capacity of the FIU to process information and generate AML/CFT intelligence. The rationale of these requirements is not clear and they should be revisited.

Sanctions

The Concept Document addresses the issue of sanctions and administrative penalties under Article 6. Paragraph (10) of Article 6 requires that the draft AML/CFT Law should change the current legislation to define in detail the procedure for administrative sanctioning of reporting institutions addressing also the mandates and responsibilities of the FIU-K, the Central Bank of Kosovo and other sectoral supervisory authorities. Moreover, paragraph (11) further requires that the AML/CFT Law should be amended to define in detail the procedure for the application of administrative sanctions against

reporting entities for non-compliance with the AML/CFT Law and to harmonise the procedure, to provide instructions for good administrative practices and appeals against administrative sanctions imposed by the FIU-K.

The draft introduces a single type of administrative sanction (pecuniary penalty) for all reporting subjects, and clarifies that the FIU-K is the responsible authority for issuing sanctions, but not all AML/CFT requirements are covered and the minimum penalty may not be dissuasive. For example, there is no sanction for non-compliance with the obligation of reporting entities to provide data, documents or information requested within the timeframe established by FIU-K (Art. 14, para 1.4. of the draft). While the amended provisions address the PECK AR's concerns about certain types of penalties being only applicable to legal persons, and about the difference in maximum penalties of the current provisions[7] they do not fully address the PECK AR recommendation to introduce a graduated regime of administrative penalties, and not exclusively of a pecuniary nature (the draft introduces a graduation, but only in the amount of pecuniary fines that can be imposed). Authorities should consider introducing such graduated approach in line with the PECK AR Recommendations (see recommendation further down). The minimum penalty (500 EUR) is too low, and may not be dissuasive. In the light of comparative similar experience and the practice of domestic legislation the authorities should also revisit the ratio between minimum and maximum levels of fines as they are unprecedented, extremely high (2,000 times or 10,000 times) and consequently unrealistic.

The draft proposes FIU-K as the only authority with powers to impose sanctions. Given that this responsibility will add to the non-core functions of the FIU-K and will have resource implications (human, time and financial), authorities should consider whether it may be more opportune for sanctions contemplated by the AML/CFT Law to be imposed by the sectorial supervisory authorities, with a duty to inform the FIU-K. Alternatively Kosovo authorities could retain the whole sanctioning regime within the FIU-K, with sectorial supervisors proposing sanctions to the FIU-K. In this case consideration should be given to the impact on the effectiveness of the core FIU functions given the resource (human, time and financial) implications.

The draft introduces an administrative procedure to challenge the fines, with the FIU-K being the responsible authority for the first appeal. Given than the procedure is being already regulated by the Law on Administrative Procedure and by an administrative decision issued pursuant to the existing AML/CFT Law, and considering that a bill is currently pending before Parliament, introducing an *ad hoc* regime for appealing sanctions in the AML/CFT Law appears redundant. Moreover, the PECK AR had expressed reservations on the transparency of the appeals mechanism with appeals being filed with the FIU-K who is the authority that is established for imposing the fine in the first instance. Consequently the authorities may wish to reconsider the introduction of an *ad hoc* regime for appealing sanctions in the AML/CFT Law and consider, if such a reference is really needed in an AML/CFT Law, a cross reference to the provisions already in place.

In addition to the issues noted above, the following areas remain unaddressed:

- According to paragraph (6) of Article 24 the NGO Competent Body under the Law on NGOs may suspend or revoke the registration of an NGO for violation of any provision of the AML/CFT Law pursuant to the relevant Law on Freedom of Association in Non-Governmental Organisations (Law on NGOs). As already indicated in the PECK Report, the competent body under the Law on NGOs, does not have the power to suspend or revoke the registration of an NGO for the purposes mentioned in paragraph (6) of Article 24 and hence the paragraph

[7] Articles 31A and 31B.

needs to be reviewed or relevant counter provisions made in the Law on NGOs as indicated in the PECK AR – EC SR VIII.3.2.

- Paragraphs (4) to (6) of Article 29: Movement of monetary instruments into and out of Kosovo - Obligation to declare, establish the powers and procedures to be followed by Customs for breaches of declarations. Paragraphs (12) to (15) expand further on the seizure of monetary instruments and sanctions. While there is a cross-reference in paragraph (13) to paragraph (4) of the Article it would be opportune to cross-refer paragraphs (4) to (6) with the relevant paragraphs (12) to (15) for legal clarity.
- According to paragraph (5) of Article 34, *For every day of non-compliance, within the time period specified in the decision of the FIU-K, the reporting subject shall be subject to a daily fine of five hundred (500) Euros.* As had already been noted in the PECK AR, it needs to be clarified whether the daily sanction contemplated under paragraph (5) of Article 34 is in addition to any penalty imposed under Article 33 and how it takes into account any time frame given by the FIU-K for remedial purposes in terms of paragraph (7) and paragraph (8) of Article 34.
- The imposition of a fine for breaches of paragraph (4) of Article 21 under paragraph (3) of Article 43 should be applicable to all reporting subjects as paragraph (4) of Article 21 dealing with "tipping off" is applicable to all reporting subjects and the Law cannot punish one category and not the other as it would be discriminatory and inconsistent.
- As already recommended in the PECK AR on Compliance with International AML/CFT Standards, the offence under paragraph (7) of Article 43 on whoever acts as a bank or financial institution without registering in accordance with Section 3.1[8] of the Banking Regulation[9] should be removed. First, because the Banking Regulation referred to (UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation), has been repealed with the coming into force of the Law on Banks in 2012. Second, because this offence (carrying a different penalty) is now contemplated under paragraph (6) of Article 58 and paragraph (1) of Article 84 of the Law on Banks which is the specific law covering licensing and sanctioning for banks and other financial institutions for prudential purposes - although similar provisions for financial institutions are absent. Hence, as recommended in the PECK AR the treatment of this offence in two legislative acts, carrying different penalties, creates legal ambiguity and results in legal complexity in the application of the criminal penalties.
- It is advisable that paragraph (8) of Article 43 be drafted to refer to the whole Article 30 and Article 31 as the articles include other provisions with reference to inspections which may be both on-site or off-site.

Some other PECK AR's concerns appear not to have been addressed by the draft. PECK AR expressed concerns over dual criminal offences in the AML/CFT Law and specific financial legislation carrying different penalties; and legal uncertainty on the application of administrative and other penalties to directors and senior management of reporting subjects.

Authorities should consider using the draft provision on sanctions that had been recommended by the PECK AR. The text proposed by the PECK AR is readjusted to take into account the proposed amendments. It is proposed that a new Article 32A be introduced accordingly. The proposed Article 32A is composed of three (3) paragraphs; the first one with two options for authorities' consideration (the first empowering the FIU-K to impose remedial measure, the second

[8] Reference Article 3: '3.1 No person shall engage in the business of a bank or financial institution without an effective license issued by BPK.'

[9] UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation.

vesting this responsibility directly in sectorial supervisors); the second paragraph establishing the categories of measures that could be imposed in a graduated manner and proportionately to the seriousness of the offence; and the third providing for a right of appeal for some imposed measures using the appeals structure proposed under Article 35 – without prejudice to earlier comments on the transparency of the contemplated appeal process. Article 32A is inspired from similar provisions in the Law on Banks and other financial legislation.

Article 32A
Compliance Remedial Measures

Option 1:

1. Notwithstanding the provisions of Article 31 and Article 32 of this Law and without prejudice to administrative sanctions contemplated by this Law, it shall be the responsibility of the FIU-K to impose graduated remedial measures on reporting subjects for deficiencies identified in the course of on-site or off-site examinations. Such measures as defined in this Article may be recommended to the FIU-K by the relevant sectoral supervisor.

Option 2:

1. Notwithstanding the provisions of Article 31 and Article 32 of this Law and without prejudice to administrative sanctions contemplated by this Law, it shall be the responsibility of the sectoral supervisors or the FIU-K to impose graduated remedial measures on reporting subjects for deficiencies identified in the course of on-site or off-site examinations.

2. The sanctions shall be applied proportionately to the severity of the offence, to natural and legal persons recognised as reporting subjects under this Law and/or their directors or senior management as the case may be:

(i) issue written warnings;
(ii) issue written orders requiring the reporting subject or other person or entity to take remedial action to rectify identified weaknesses within a specified period of time;
(iii) order a reporting subject or any other person or entity to periodically report on the remedial measures being undertaken;
(iv) requiring a reporting subject or any other person or entity not to engage in one or more of the licensed activities;
(v) dismiss, suspend or replace a person from his or her position in the entity concerned;
(vi) prohibit such person from serving in or engaging in activities or being employed within the same sector of business for a stated period or for life;
(vii) restrict the powers of managers, directors or other senior officials;
(viii) impose administrative penalties in accordance with the provisions of this Article without prejudice to any criminal proceedings;
(ix) suspend or revoke the licence or registration of the reporting subject in accordance with the provisions of paragraph (10) of Article 34.

3. The person or entity affected by the imposition of graduated remedial measures under items (iv) to (vii) of paragraph 2 of this Article has the right to an administrative appeal under the applicable legislation.

6. PREVENTIVE AND OTHER MEASURES FOR FINANCIAL INSTITUTIONS AND DNFBPs[10]

With the proposed amendments to the AML/CFT Law on the basis of the Concept Document for amending the Law it can be safely stated that the preventive measures, including sanctions, for the financial sector and the DNFBPs have been adequately strengthened and to a large extent clarified. Notwithstanding some deficiencies remain. This Technical Paper has shown that a number of valid recommendations in the PECK AR on Compliance with International AML/CFT Standards have either been partly introduced or not introduced at all. It opines that, while some recommendations have been indirectly addressed for example by removing previous offending articles to which the recommendations were meant, other recommendations should be included for better harmonisation of the revised AML/CFT Law with the international standards. While this Section of the Paper therefore tries to introduce some of these recommendations it cannot be guaranteed that all recommendations have been taken into consideration as it lies with the Kosovo authorities to decide on their acceptance.

According to the Concept Document the changes to the AML/CFT Law should address various issues on the preventive side dealing with customer due diligence, record keeping, internal controls and AML/CFT programmes, supervision and others.

Reporting Subjects

As identified in the PECK AR the coverage of reporting subjects is quite adequate – although it remains unclear to what extent a money laundering and terrorist financing risk assessment of the additional entities (such as NGOs) has been undertaken.

- It is not clear why the draft maintains NGOs and Political Parties as 'reporting subjects,' as opposed to, for example requiring reporting subjects to impose enhanced CDD measures on such persons when providing services to them, as the case may be and if they indeed pose a higher risk. Authorities should reconsider this approach, particularly in the light of the results of a national risk assessment. If there is a proven risk that these entities can be abused for ML/TF and it is demonstrated that the only way to manage this risk is through subjecting these entities to the full scope of the AMLCFT Law, there is a need to provide clarifications to reporting subjects such as NGOs and Political Parties on who constitutes a customer for them for the purposes of their obligations under the AML/CFT Law, such as CDD.
- In paragraph (1.3) of Article 16 – Reporting Subjects, it is appropriate to include with casinos a reference to licensed objects of games of chance in accordance with the provisions under Article 28 of the AML/CFT Law for consistency.
- In paragraph (1.6) of Article 16 there is a need to clarify why the 'accountants' category of DNFBPs is in brackets. The PECK Report has remarked that this raises concern and legal ambiguity as to the level that accountants are considered as reporting subjects in the light of their inclusion also under paragraph (1.7) of Article 16 and in the light of the provisions of Article 26 of the AML/CFT Law.

Assessment and Prevention of Risk

Under the 2012 FATF Standards the assessment and prevention of risk is a very important element that needs to be addressed in national legislation – more specifically Recommendation 1 on the assessment of risk and the application of a risk-based approach, Recommendation 15 on risks in new technologies, and Recommendation 19 on higher risk countries. In paragraphs (5) and (9) of Article 6

[10] FATF terminology: Designated non-Financial Businesses and Professions.

of the Concept Document specific references are made to the need of addressing risk factors, elements and situations. To this effect it is noted that the proposed changes make some references to the measurement and mitigation of risk spread throughout the Law.

It is proposed that a new Article 16A – 'Assessment and Prevention of Risk' be inserted which comprises of all the present/proposed paragraphs relating to risk, with some modifications, viz. Art 17 (2.2) and (2.6); Art 18(7); Art 19(7).

The proposed Article 16A includes three (3) new paragraphs introducing Recommendation 1 on national risk assessment and institutions' risk assessment and Recommendation 19 on high risk countries of the 2012 FATF Standards.

Paragraph (1) to the new Article 16A introduces a legal obligation for Kosovo to undertake or update a national risk assessment, in accordance with Recommendation 1 of the FATF Standards 2012. The paragraph imposes responsibility on the FIU-K and empowers the MoF to issue instructions accordingly. This paragraph is based on practice since, indeed Kosovo has already undertaken a national risk assessment and the MoF has already issued an Administrative Instruction on procedures, but noting the new provisions under Article 50 requiring the MoF to issue an administrative instruction:

1. The FIU-K shall periodically ensure and co-ordinate a national risk assessment of money laundering and the financing of terrorism to identify, assess and evaluate risks and make recommendations to the Government for the establishment of policies, strategies and risk management measures to mitigate the identified risks. The national risk assessment shall be updated at least every three years and the Ministry of Finance may issue an Administrative Instruction in accordance with Article 50 of this Law establishing the procedures to be followed.

Paragraph (2) of the new Article 16A reflects the second part of Recommendation 1 of the FATF Standards 2012 requiring all reporting subjects to assess risks of money laundering and terrorist financing that they may be exposed to consequent to their activities and products:

2. All reporting subjects shall periodically determine the risk of money laundering and terrorist financing that they are exposed to through the provision of their services, products, geographic location and delivery mechanisms and channels. The risk assessment shall be provided to the FIU-K and, for banks and financial institutions also to the Central Bank of Kosovo, upon request.

The inclusion of paragraph (6) to the proposed Article 16A transposes the Recommendation 19 of the 2012 FATF Standards dealing with high risk countries and the application of measures against countries for which this is called for by the FATF:

6. All reporting subjects shall apply enhanced due diligence measures in accordance with paragraph (1) of Article 18 that are effective and proportionate to the risks identified for business relationships and transactions with natural and legal persons, including financial institutions, from countries as may be stipulated by the FIU-K on the basis of international measures against such countries and the FIU-K shall determine appropriate, effective and proportional countermeasures to be applied against such countries.

Customer Due Diligence

Various amendments and new provisions have been introduced to meet the deficiencies in the present AML/CFT Law relating to CDD. Foremost among these is the re-introduction of the definition of what constitutes CDD and the timing of the application of the full CDD measures as opposed to the identification and verification elements only. This Legal Opinion proposes that the definition of CDD should remain faithful to the international standards and consequently, some added elements concerning the risk-based approach, as indicated above, have been transposed to the new proposed Article 16A dealing specifically with risk issues.

Notwithstanding other deficiencies identified through this Opinion remain:

- Paragraph (2.3 renumbered 2.2) of Article 17 in relation to the beneficial owner states that *Where reporting subjects consider that the risk of money laundering or terrorist financing is high, they shall take reasonable measures to verify his or her identity so that the institution or person covered by this law is convinced that it knows who the beneficial owner is….* The FATF Standard (Recommendation 10/2012 previously Recommendation 5) requires that reasonable measures be taken to verify the identity of the beneficial owner without any reference to the risk element. Thus the Standard is not specific that this is only done for high risk customers but that it is done consistently. Moreover, the beneficial owner is to be identified always and not "when applicable". It is recommended that the paragraph be amended accordingly.
- Paragraph (2.4 renumbered 2.3) of Article 17 should be amended as follows to include the concept of the business and risk profile through the understanding of the business relationship *understanding and obtaining information on the purpose and targeted nature of the business relationship such that reporting subjects may develop the business and risk profile of their customers, as well as monitor business relationships;*
- Recommendation 10 of the 2012 FATF Standards requires that in the case of life or other investment-related insurance business, in addition to the CDD measures required for the customer and the beneficial owner, reporting subjects should also apply specific CDD measures for the beneficiaries of such instruments. The proposed paragraph (4a) to Article 17 covers these obligations. Thus reporting subjects need to identify and record the name of the beneficiary if such beneficiary is a natural or legal person or obtain sufficient information if the beneficiary is designated by characteristics or by class. In addition, where the identified beneficiary is a legal person or a legal arrangement and the reporting subject determines that such beneficiary presents a higher risk, then the reporting subject shall take reasonable measures to identify and verify the identity of the beneficial owner of the beneficiary at the time of payout. This provision is complementary to the proposed additional provisions under paragraph (5) of Article 18 concerning the enhanced customer due diligence for PEPs.[11]
- There is no general provision for all reporting subjects for measures to be taken in the case where the CDD cannot be completed, and the proposed provision is also inconsistent with the standard, as it applies only in the case in which verification of identity is not possible (as opposed to the more general FATF requirement, which talks about failure to complete main

[11] It could be argued that in practice such provisions would apply only to banks and financial institutions as these are the only entities that could deal in the insurance business. The FATF Standards and Methodology are not specific on this under Recommendation 22 but refer only to the application of Recommendation 10. Consequently countries could apply these provisions for insurance business only to banks and financial institutions to follow practice. But on the other hand, although applicable to all reporting subjects, thus ensuring consistency that if there is any eventuality that these provisions become applicable to some other sector in addition to the financial sector, all other reporting subjects who do not deal in the insurance business would automatically not apply these provisions. This applies also to the provisions for PEPs under paragraph (5) to Article 18 of the AML/CFT Law.

elements of the CDD). Such a provision is only found under paragraph (6) to Article 19 in relation to banks and financial institutions. It is important that for the sake of consistency this provision becomes applicable to all reporting subjects since the CDD processes are applicable to all reporting subjects, and be extended beyond the case in which the reporting entity is unable to verify the customer, as this is too restrictive and not in line with the standard. It is therefore proposed to remove paragraph (6) to Article 19 and insert a new paragraph (5) to Article 17 reading:

> *Where a reporting subject is unable to complete the customer due diligence measures of a client, the beneficial owner, or the beneficiaries of a life or investment related insurance business in accordance with the provisions of this Article the transaction should not be performed, any business relationship should be terminated or not commenced and any account closed with any property returned to its source. Such action is without prejudice for the reporting subject to report such circumstances as suspicious acts or transactions to the FIU-K pursuant to paragraph 1 of Article 21 of this Law and to report additional material information pursuant to paragraph 2 of Article 21 of this Law.*

- It needs to be clarified that the enhanced measures under paragraph 2 (non-face-to-face business), under paragraph 4 (correspondent banking relationships) and under paragraph 5 (politically exposed persons) of Article 18 be applied in addition to the enhanced measures required under paragraph (1) of the same Article 18.
- There are a number of deficiencies concerning PEPs. There are no requirements for PEPs who are or who have been entrusted with a prominent function by an international organisation, although there is a definition of international organisations' PEPs which includes their directors, deputy directors and members of the Board or equivalent. With reference to paragraph (5) of Article 18 the AML/CFT Law is not making any distinction between domestic and foreign PEPS and does not require that reporting entities should always determine whether a customer or beneficial owner is a foreign PEP. Instead, the provision requires the *taking of reasonable measures,* which the FATF Standard (Recommendation 12 under the 2012 Standards – previously Recommendation 6) only provides for domestic PEPs. On the other hand, it is acknowledged that the Law is being more stringent than FATF in applying the enhanced CDD measures in both cases always (in the case of domestic PEPs under FATF Standards reporting entities are required to apply enhanced CDD measures only when the domestic PEP presents a higher risk).

  However, these enhanced CDD measures are not always consistent with the FATF standard. Given the risk of corruption in Kosovo it is sensible to treat domestic PEPs like foreign ones. Moreover paragraph (5) of Article 18 is silent on the determination whether the beneficiaries of life or other investment related insurance business have a PEP status and the additional measures that need to be in place according to the Interpretative Note for Recommendation 12 of the 2012 FATF Standards. Amendments to this effect are proposed under paragraph (5) of Article 18. The Kosovo authorities may wish to address the other deficiencies noted.
- As noted earlier, authorities should reconsider considering NGOs as reporting entities. If this approach is confirmed and NGOs remain as reporting subjects for the purposes of the AML/CFT Law, the obligation under the first part of paragraph (10) of Article 24 is already applicable to NGOs as reporting subjects in terms of paragraph (1) of Article 17 and Article 18 for enhanced CDD measures. It is only being included here with the objective of guiding NGOs to apply the CDD requirement to the founders prior to registration. To this effect it is proposed to link paragraph (10) to the NGOs obligations as reporting subjects under Article 16 of the AML/CFT Law by inserting the following at the beginning of the paragraph: *In accordance with their obligations under this Law as reporting subjects,….*

- Since the identification and verification procedures under Articles 17 and 18 are already applicable to all reporting subjects there is no need to repeat the provisions under paragraph (1) of Article 26 which is meant to cover only 'additional elements' for covered professionals. It is therefore recommended to remove this paragraph and to start the reference to what constitutes the term 'covered professionals' by amending the present paragraph (2) of Article 26 accordingly. Thus the general provisions would be applied consistently.
- Paragraph (2) of Article 28 establishes the timing of the identification and verification process for Casinos and Games of Chance. Although this provision is specific to this category of DNFBPs, since the main identification and verification procedures are established for all reporting subjects under Articles 17 and 18 it is appropriate that the specific timing of identification and verification for Casinos and Games of Chance be established within this additional framework. Thus it is proposed that paragraph (10) be linked to the general procedures as follows: *In accordance with the provisions of Articles 17 and 18 of this Law,…*

Record Keeping

Although the proposed amendments to the AML/CFT Law are addressing record keeping procedures and obligations, the relevant paragraphs which address both customer and transaction information are included under Article 17 which deals with CDD measures. It is proposed that, because of the importance of the record keeping element in international standards, all provisions in the Law related to record keeping be moved to a separate new Article. To this effect a new Article 17A – *Record Keeping* is proposed. Article 17A consists of the previous paragraphs (5) to (8) of Article 17 (renumbered paragraphs (1) and (3) to (5)) with some amendments and the addition of two new paragraphs.

- A new paragraph (1.4) is being inserted to ensure that information related to reported suspicious acts or transactions is retained for a period of five years from the reporting date even if the transaction itself was effected earlier:

  1.4 When the transaction information relates to a report filed to the FIU-K in relation to a suspicious act or transaction, the five (5) year period shall commence with the date of the filing of the report in accordance with Article 21 of this Law.

- Another new paragraph (5) is being added highlighting the record keeping obligations for the originator, intermediary and beneficiary institution in the case of wire transfers:

  5. In the case of wire transfers, banks and financial institutions carrying out this activity shall maintain a record of all relevant information on the payer and that accompany a transfer, all information that is received on the payer and all other information that accompanies a transfer when they act as originator, intermediary or beneficiary institution respectively for a period of five (5) years from the date of execution of the transaction.

- As highlighted in the PECK AR on Compliance with International AML/CFT Standards the present text of Article 20 does not require the examination of the background and purpose of large complex transactions and the documenting of the findings which is essential for record keeping. Consequently, while paragraph (1.2) of Article 17A makes references to the retention of reports under Article 20 such reports, under the present text, refer only to information concerning the transaction and not the assessment of the transaction. It is therefore recommended that paragraph (3) of Article 20 be amended by adding the words: Reporting Subjects *shall examine to the extent possible the background and purpose of such transactions and* shall set forth in writing *their findings and* the specific information…

Consistency in compliance with overall obligations

As already indicated under Section 4 of this Paper under the sub-heading “Fragmentation” some obligations under international standards that should be applicable to all reporting subjects are at times only included under the “Additional obligations” for a specific category of reporting subjects. Such obligations are either repeated – in some instances not consistently – for other categories or are ignored. Moreover, where a category of reporting subjects is not subjected to ‘additional obligations’ it often results that such obligations would not become applicable. On the other hand there are a few instances where an obligation that is specific to a particular category of reporting subjects is included under the general provisions – see for example paragraph (6) to Article 18 and Section 4 of this Paper under ‘Definitions’. Hence the importance as highlighted in Section 4 for the structure of the AML/CFT Law to be such that it focuses on the general obligations for all reporting subjects with exceptions for any category being included in specific provisions.

While it is advisable that the AML/CFT Law be revised overall with this objective in mind, the following are some of the main instances that need to be addressed:

- Paragraphs (3) to (5) of Article 19 deal with the provisions of Essential Criteria 5.4 and 5.5 under the previous FATF Methodology (incorporated under Recommendation 10 under the 2012 FATF Standards) whereby it must be ascertained whether a person is acting as principal or on behalf of a third party, in which case additional identification measures are to apply. Article 19 deals with ‘Additional obligations of banks and financial institutions’. However, Essential Criteria 5.4 and 5.5 (now entrenched under Recommendation 10 and its Interpretative Note under the 2012 FATF Standards) are applicable not only to banks and financial institutions but also to DNFBPs. The proposed amendments to the AML/CFT Law do not provide for similar obligations for other reporting subjects. It is therefore advisable that paragraphs (3) to (5) be transferred from Article 19 to Article 17 which deals with CDD issues for all reporting subjects and revised accordingly.
- A new section entitled ‘Internal money laundering and terrorist financing prevention programs’ is being introduced under Article 19 - ‘Additional obligations of banks and financial institutions’ comprising of paragraphs (13) to (16). Paragraph (13), which therefore becomes applicable only to banks and financial institutions, deals with the obligation to promulgate written internal policies and procedures and the setting up of controls for the prevention and detection of money laundering and shall enforce them. Similar references are made in the specific provisions for two other categories of DNFBPs, for example covered professional and casinos. However this obligation, which according to international standards (Recommendation 15 or Recommendation 18 under the FATF 2012 Standards and its Interpretative Note) should be applicable to all reporting subjects, remains applicable mainly to banks and financial institutions while for covered professionals (paragraph (12) of Article 26) and casinos including games of chance (paragraph (6) of Article 28) there is an obligation for the authorities to develop such procedures. Other categories of reporting subjects are not therefore covered. It is consequently recommended that paragraph (13) of Article 19 be moved to new Article dealing with compliance issues for all reporting subjects and revised accordingly and the provisions of paragraph (12) of Article 26 and paragraph (6) of Article 28 be also revised accordingly because of the specific elements for the relevant categories of reporting subjects with a cross-reference to the general obligation under the new Article.
- Another new section entitled ‘Compliance function for AML/CFT’ is being proposed for inclusion under Article 19 - ‘Additional obligations of banks and financial institutions’ composed of paragraphs (17) to (20) dealing with the appointment of a Compliance Officer and its functions. However this obligation, which according to international standards

(Recommendation 15 or Recommendation 18 under the FATF 2012 Standards and its Interpretative Note) should be applicable to all reporting subjects. Paragraph (8) of Article 24 makes references to the 'authorised representative' of an NGO and it is proposed to insert a minor addition to link the function of the 'authorised representative' to that of the Compliance Officer. There is no reference to the appointment of a Compliance Officer for any other category of reporting subjects. It is therefore recommended that the obligations under paragraphs (17) to (20) be transferred from Article 19 to a new Article dealing with compliance issues for all reporting subjects and revised accordingly. It should be mentioned that this recommendation is also found in the PECK AR on Compliance with International AML/CFT Standards.

Suspicious Transaction and other Reporting

The PECK AR on Compliance with International AML/CFT Standards has identified serious concerns on the reporting obligations under the AML/CFT Law: relevant for this analysis are the absence of a financing of terrorism reporting obligation; and the absence of a reporting obligation to some categories of DNFBPs. The Concept Document specifically addresses these concerns in Article 6 – Main elements of the proposed Policy through paragraph (1) regarding the financing of terrorism reporting obligation and paragraph (7) on the reporting obligation of specific categories of reporting subjects.

It is positive to note that the financing of terrorism obligation has been addressed with the proposed amendment to the definition of 'Suspicious act or transaction' while the obligation to report is now being applied to all reporting subjects through the revised provisions of Article 21.

Notwithstanding the proposed amendments to the AML/CFT Law this Opinion finds additional shortcomings which, if addressed, would further consolidate the reporting obligation.

- The reporting obligation for all reporting subjects established under paragraph (1) of Article 21 requires two types of reporting: suspicious acts and transactions (paragraph (1.1)) and currency transaction reporting (paragraph (1.2)). While a timeframe of 24 hours for reporting is established for paragraph (1.1) no reporting timeframe is established for paragraph (1.2). The proposed amendments later set different timeframes for different categories of reporting subjects for paragraph (1.2) but this is not set for all categories. For example it is not set for banks and financial institutions and all other categories of DNFBPs except for Traders receiving Cash Payments over the established threshold (30 days – paragraph (2) of Article 23)) and 'covered professionals' (15 days – paragraph (3) of Article 26). While this situation creates inconsistencies in the AML/CFT Law particularly where no timeframe is established it will have implications for supervisory authorities to establish whether reporting subjects are in compliance with the Law when filing such reports, particularly for the majority of reporting subjects where no time frame is established.
- Likewise for reporting of suspicious acts and transactions under paragraph (1.1) of Article 21 which establishes a timeframe of 24 hours for all reporting subjects, for certain categories of reporting subjects this is later increased to 3 days (NGOs – paragraph (3) of Article 24; Political Parties – paragraph (4) of Article 25; and Covered Professionals- paragraph (8) of Article 26). While creating an inconsistency within the AML/CFT Law as the objective and urgency of reporting of suspicious acts and transactions for the FIU-K should be similar irrespective of who is filing the report, this may in itself be discriminatory.
- With reference to paragraph (1.2) of Article 21 the obligation to report under paragraph (1) of Article 21 is now applicable to all reporting subjects and not limited to banks and financial

institutions. Hence references to 'banks and financial institutions' should be replaced by references to 'reporting subjects'.

- The obligation to report under paragraph (1) of Article 21 is applicable to all reporting subjects and not limited to banks and financial institutions and hence the suspension of execution of a transaction under paragraph (5) and paragraph (6) of Article 21 should likewise be applicable to all reporting subjects and not banks and financial institutions only in accordance with international standards and for consistency. Indeed the temporary freezing under the proposed Article 22 is applicable to all reporting subjects and not to banks and financial institutions only.
- As already reiterated in this Paper it is of utmost importance that those obligations under the Law that are applicable to all reporting subjects are not repeated in the sectoral paragraphs for specific categories of reporting subjects except to the extent that the AML/CFT Law intends to provide for specific requirements for a particular category. This could and will lead to inconsistencies and ambiguities in the Law. Hence, since paragraph (2) under Article 23 is establishing the time limit for reporting for NGOs it is appropriate to clarify that there is only one reporting obligation under Article 21 and which also includes reporting of suspicious acts and transactions. It is therefore suggested that the words *in accordance with the provisions of paragraph (1.2) of Article 21 of this Law* be inserted to link the exception in paragraph (2) of Article 23 to the main reporting obligation under paragraph (1.2) of Article 21 – without prejudice to the earlier comments on the inconsistency in the AML/CFT Law on the reporting timeframe for different categories of reporting subjects.
- Likewise, and without prejudice to the earlier comments on the inconsistency in the AML/CFT Law on the reporting timeframe for different categories of reporting subjects, the words *in accordance with the provisions of paragraph (1.2) of Article 21 of this Law* should be inserted in paragraph (3) of Article 26 for 'covered professionals'.
- Moreover and as already indicated in this Paper, the timeframe for the reporting of suspicious acts and transactions, which is established at 24 hours in the main reporting obligation for all reporting subjects under Article 21 is extended to three (3) days in the case of three (3) categories of DNFBPs. Without prejudice to the earlier comments on the inconsistency in the AML/CFT Law on the reporting timeframe for different categories of reporting subjects, words *in accordance with the provisions of paragraph (1.1) of Article 21* should be inserted in paragraph (3) of Article 24 for NGOs, paragraph (4) of Article 25 for Political Parties and paragraph (8) of Article 26 for covered professionals.
- Paragraph (10) of Article 24 on additional obligations for NGOs again requires NGOs to *as well as shall notify in writing the FIU-K at any time when a suspicion for money laundering or terrorist financing arises*. This should be removed in the light that the reporting obligation for all reporting subjects is already included under paragraph (1) of Article 21 and in paragraph (3) of the same Article 24. Thus the obligation for reporting suspicious acts and transactions for NGOs is provided for three times in the Law, and with different wording that could lead to legal ambiguity and inconsistency. Even if the authorities decide to retain the reporting obligation in paragraph (3), the reference in paragraph (10) of Article 24 should be removed.
- With the proposed amendment to paragraph (8) of Article 26 to cover all 'covered professionals' paragraph (7) of Article 26 which again establishes a reporting obligation for certified accountants and licensed auditors in addition also to the main reporting obligation under paragraph (1) of Article 21 becomes superfluous and should be removed to avoid duplication of obligations and possible inconsistencies.
- Paragraph (3) of Article 28 for additional obligations of Casinos and Games of Chance is creating a reporting obligation for these categories of reporting subjects which is identical to

the reporting obligations created under the provisions of paragraph (1) of Article 21 to which Casinos and Games of Chance, as reporting subjects, are already subject to. Hence, paragraph (3) of Article 28 not being an "additional obligation" should be removed to avoid ambiguities and interpretation of the reporting obligation.

Protection and Prohibition of disclosure ('tipping off')

The protection and 'tipping off' requirements under Recommendation 14 of the FATF Standards have remained the same under the new Recommendation 21 of the 2012 FATF Standards. Consequently the findings of the PECK AR on Compliance with International AML/CFT Standards for Recommendation 14 remain valid, notwithstanding the 2013 amendments to the AML/CFT Law. The Concept Document makes slight references to 'tipping off' in paragraph (2) of Article 6 stating that *The Draft Law should be amended to guarantee that casinos and gaming houses are prohibited from disclosing information on suspicious transaction reports submitted to the FIU.*

In summary, the PECK AR in its analysis of the FATF Recommendation 14 and the relevant provisions of the EU Third AML Directive identified deficiencies to which recommendations have been made mainly to:

- extend protection to directors, officers and employees whether temporary or permanent in all instances in the AML/CFT Law;
- amend the prohibition of disclosure for harmonisation with the international standard;
- protect personal information of employees of reporting subjects who make reports to the FIU-K under the AML/CFT Law.

It appears that none of these recommendations have been addressed in the proposed amendments.

Moreover the PECK AR Report made recommendations for the consideration of Kosovo authorities within the context of Article 27 of the EU Third AML Directive[12] providing for the protection of employees from threats or hostile actions and Article 28 of the EU Third AML Directive[13] providing for categorised instances where the prohibition of disclosure ('tipping off') can be lifted. Recommendations were also made within the context of Article 7 of the CoE CETS 198 on the monitoring of accounts and transactions.

It appears that no consideration has been given to these recommendations which have not been addressed in the proposed amendments. Notwithstanding, in the light that Kosovo is not a signatory to CETS 198 this Paper will not pursue further this recommendation. However, the Kosovo authorities may wish to reconsider Article 27 and Article 28 of the EU Third AML Directive (as transposed in the EU Fourth AML Directive) in the light of Kosovo's potential EU membership.

An assessment of the proposed amendments to the AML/CFT Law under this Paper indicates that identified deficiencies remain:

- The general prohibition of disclosure (tipping off) is found in paragraph (4) of Article 21 which however as drafted is not in harmony with the international standard – with the only amendment proposed by the authorities being in applying it to the officers of all reporting subjects, although similar provisions are found in the sectoral additional provisions for specified categories of reporting subjects.

[12] Transposed into Article 38 under the EU Fourth AML Directive.

[13] Transposed into Article 39 under the EU Fourth AML Directive.

- It is proposed to amend paragraph (4) of Article 21 in accordance with FATF Recommendation 14 (Recommendation 21 under the 2012 Standards) and as provided in the PECK AR to ensure that first the prohibition is extended to the reporting subjects themselves (corporate legal liability); second to ensure it applies to both temporary and permanent staff; third to ensure it applies to all reporting under the Law and not only to reporting under Article 21; fourth to include disclosure that a report has been or is being filed; fifth to include instances where information is being prepared to be filed and sixth to include instances where a money laundering or financing of terrorism investigation is being carried out; and finally to clarify that only banks and financial institution will disclose information to the CBK. These amendments (in italics) will fully cover the FATF Standard under Recommendation 14:

  Art 21(4): *Reporting subjects*, *the* directors, officers, employees *be they temporary or permanent* and agents of ~~any~~ *the* reporting subject who make or transmit reports pursuant to *this Law* ~~the present article~~ shall not *disclose the fact that a report has been filed or is in the process of being filed, or* provide the report, or communicate any information contained in the report or regarding the report, *including where such information is being prepared to be filed accordingly, or that a money laundering or financing of terrorism investigation is being or may be carried out,* to any person or entity, including any person or entity involved in the transaction which is the subject of the report, other than the FIU-K or *the* CBK *in the case of reports filed by banks or financial institutions*, unless authorised in writing by the FIU-K, a Prosecutor, or a Court.

- As detailed above the PECK AR in assessing compliance with the Recommendation 14 (Recommendation 21 under the FATF Standards 2012) and Article 27 of the EU Third AML Directive for the protection of employees from threats and hostile actions made recommendations accordingly. The protection under the EU Directive goes further than the protection for reporting under the Law. It is therefore recommended that a new paragraph (7) to Article 21 providing for the confidentiality of personal information be inserted as follows:

  Art 21(7): The FIU, any investigating, prosecuting, judicial or administrative authority and reporting subjects or other persons and entities who are in possession of personal information of employees and other officers of reporting subjects who report suspicions of money laundering or the financing of terrorism or who provide related information, either internally or to the FIU-K, in accordance with this Law shall protect and keep confidential such personal information.

- Reference paragraph (9) of Article 24 providing for the prohibition of disclosure of information (tipping off) in accordance with the AML/CFT Law, since there is a proposal for paragraph (4) of Article 21 providing for such prohibition to be applicable to all reporting subjects it is not necessary to repeat the provision under the specifics for NGOs except to the extent that the provisions of paragraph (4) of Article 21 are directly applicable to the "authorised representative". The same applies for paragraph (9) of Article 25 for Political Parties, paragraph (13a) of Article 26 for covered professionals, and paragraph (7) of Article 28 for casinos.

- With reference to paragraph (9) of Article 26, according to international standards, both the FATF and the EU, the exception of legal privilege being provided to lawyers under the AML/CFT Law is likewise applicable to certified accountants and auditors. Kosovo authorities may wish to consider and review accordingly.

- The PECK AR made a recommendation under FATF Recommendation 14 (Recommendation 21 under the 2012 FATF Standards) to extend the protection under Article 35 (now renumbered Article 45) to cover directors, officers and employees whether permanent or temporary of reporting subjects thus ensuring legal clarity. As no proposals for amendments have been put forward for Article 45 it is proposed to provide for legal clarity by the addition of

the words *or a reporting subject under this Law or to any of their directors, officers and employees whether temporary or permanent* following the word 'person or entity'.

Supervision and Compliance

One of the main concerns raised in the PECK AR on Compliance with International AML/CFT Standards is the issue of the supervisory mandate and powers under the AML/CFT Law. Some issues were addressed through the amendments to the AML/CFT Law in 2013 through the introduction of Article 36A whereby the CBK and other sectoral supervisors retained their supervisory powers under their respective laws as applicable for the purposes of the AML/CFT Law only under a written agreement with the FIU-K. Although this was a positive step forward which in practice has been applied between the FIU-K and the CBK, yet a number of issues related to the supervisory remit and the supervisory powers for the purposes of the AML/CFT Law remain as highlighted in the PECK AR. Briefly these refer to:

- absence of a legal mandate for the CBK and other sectoral supervisors to issue rules and regulations for the purposes of the AML/CFT Law;
- absence of a legal mandate for the CBK and other sectoral supervisors to apply prudential supervisory powers under their respective laws for the purposes of the AML/CFT Law with the exception of sanctions;
- legal uncertainty on the powers of the FIU-K to undertake off-site supervisory examinations;
- legal ambiguity on the general powers of the FIU-K to undertake unconditioned on-site examinations.

According to paragraph (10) of Article 6 of the Concept Document *the draft law should change the current legislation to define in detail the compliance supervision and the procedure for administrative sanctioning of reporting institutions addressing also the mandates and responsibilities of the FIU-K, the Central Bank of Kosovo and other supervisory authorities.*

This Paper finds that at times the proposed amendments to the AML/CFT Law concerning the supervision of reporting subjects under the Law has gone to extreme extents whereby, while accepting the CBK and other sectoral supervisors with a remit under the AML/CFT Law, yet the methodology adopted to implement such supervisory mandate is too stringent with possible severe implications on the supervisory efficiency and harmonisation of cooperation while on the other hand removing the 2013 amendment for the FIU-K to enter into written agreements with other sectoral supervisors for the purposes of supervision under the AML/CFT Law.

With reference to paragraph (1) of Article 32 whereby it is proposed that the FIU-K assumes primary responsibility for the supervisory remit for the purposes of the AML/CFT Law it is important for Kosovo authorities to carefully consider the impact that the supervisory role on the FIU-K would have on the effectiveness and efficiency of its core functions. The supervisory role is resource demanding and any discussion on the supervisory structure and framework, including which authority should assume overall supervisory responsibility should give due consideration to this issue.

Indeed the authorities may wish to consider whether, consequent to its supervisory experience in supervising the financial sector for prudential purposes, the CBK be given a supervisory remit for the entire financial sector directly through relevant provisions in the Law with the current and proposed provisions retained to apply only for agreements between the FIU-K and other sectoral supervisors. Consequently any reference in Article 32 to the 'primary' role of the FIU-K for supervision purposes

and references to reporting subject under Article 30 should be revisited. This option for the supervisory framework would also contribute positively to the imposition of sanctions.

Another option as indicated below (see proposed amendments to Article 31) is to retain provisions similar to the current Article 36A whereby a supervisory mandate be delegated through the signing of MoUs that follows the acceptable principles of delegation. This option would still require the references to the 'primary' role under Article 32 and references to reporting subjects under Article 30 to be revisited once a supervisory mandate is delegated.

This Opinion finds that a number of deficiencies and ambiguities remain while others have been created through the proposed amendments. This Paper makes proposals for further amendments accordingly.

- Paragraph (1.9) of Article 14 – Duties and Competencies of the FIU-K requires the FIU-K to provide training. The duties of the FIU-K in this regard extend beyond training and should incorporate awareness and outreach. It is therefore recommended to amend this paragraph by the addition of the words *including awareness and outreach regarding the prevention of*….;
- Since it is proposed that the FIU has "primary" role in supervision, if this approach is confirmed, such primary responsibility should be reflected in Article 14, setting the overall duties and competencies of the FIU-K, including for off-site and on-site basis which is later further defined and established in the Law. In this scenario, it is proposed to insert an additional paragraph (1.13) to Article 14:

  1.13 supervise and monitor reporting subjects on compliance with this Law and regulations, directives and instructions issued there under as provided for in this Law both on an on-site and off-site basis;

- The proposed paragraph (1) to Article 31 is not clear and could be subject to interpretation. First it could be interpreted that the CBK and all other sectoral supervisors are automatically appointed a supervisory authority for the purposes of the AML/CFT Law notwithstanding the provisions of paragraph (1) to Article 32 which states that *FIU-K shall have primary responsibility in supervising the compliance of reporting subjects with the provisions of this Law*; second it could be interpreted that the CBK and other sectoral supervisors could undertake AML/CFT supervisory examinations in conjunction with their prudential supervisory remit. Moreover, subject to this interpretation, this will result in a confusion of who is responsible for what. Paragraph (1) of Article 31 therefore needs to be revised. To this effect it is proposed that a new paragraph (2) of Article 31 be inserted to control the supervisory mandates. Thus, although the AML/CFT Law would recognise that potentially the CBK and other sectoral supervisors could have a supervisory remit under the AML/CFT Law, only those with whom a MoU has been signed by and with the FIU-K would be empowered to exercise such function. This is similar to the present Article 36A under which the FIU-K and the CBK have already entered into an agreement:

  Art 31(2) For the purposes of putting into effect the provisions of paragraph (1) of this Article, the FIU-K shall enter into individual specific written agreements with the Central Bank of Kosovo or other sectoral supervisors with the aim of establishing a supervisory remit and the respective responsibilities, procedures and cooperation.

- While acknowledging the importance that supervisors establish the risk of money laundering and terrorist financing for those subject persons within their remit, it is advisable that for the sake of clarity, consistency and continuity the term "Compliance supervisors", which is not even defined, in renumbered paragraph (3) of Article 32 be replaced with the words *The FIU-K, the CBK or other sectoral….*

- Item (a) of paragraph (3) of Article 31 – renumbered as paragraph (4) – which is linking supervision of compliance with the adoption, renewal or rejection of the licence or authorisation, needs to be clarified to better define the type of compliance supervision it is referring to as normally supervisory examinations are either on-site or off-site.
- As indicated above the PECK AR identified a legal uncertainty on the powers of the FIU-K to undertake off-site examinations. This issue would be addressed through the proposed paragraph (1.13) to Article 14 as indicated above, and through the provisions of item (c) of renumbered paragraph (4) of Article 31. Within this context it is advisable that the AML/CFT Law defines the powers of supervisory authorities to demand information for the purpose of conducting off-site examinations. The proposed paragraph (5) to Article 41, which was recommended in the PECK AR, defines the procedures for off-site examinations:

  Art 31(5) For the purposes of undertaking off-site inspections of reporting subjects for assessing compliance with the provisions of this Law or any rules or regulations issued there-under, the FIU-K, the Central Bank of Kosovo and other sectoral supervisors pursuant to paragraph (2) of this Article may, by notice in writing served on a reporting subject, require that reporting subject produces, within the time and at a place as may be specified in that notice, any documents, including those related to internal procedures under this Law or any regulation, as may be required by the FIU-K, the Central Bank of Kosovo or other sectoral supervisors respectively, to fulfil their responsibilities under this Law, and the provisions of paragraphs (3), (4) and (5) of Article 30 shall apply accordingly.
- As argued in the PECK AR there is a need for a legal basis for the CBK and other supervisory authorities to apply their prudential supervisory powers for the purposes of monitoring compliance with the AML/CFT Law – example right of entry, right of access to all documents, right of demanding information etc. – see for example as provided for the CBK under the Law on Banks. Paragraph (6) to Article 31 is being proposed and introduced for this purpose. The exclusion of the power to impose administrative and other sanctions is because such powers are clearly covered under the AML/CFT Law and any powers of sanction and sanctions under the respective legislation are intended for breaches of that legislation and not for breaches of the AML/CFT Law:

  Art 31(6) The Central Bank of Kosovo and other sectoral supervisors with a supervisory mandate under paragraph (2) of this Article for the purposes of monitoring reporting subjects on compliance with this Law and related rules and regulations and who already have a prudential supervisory mandate conferred upon them through specific laws for such reporting subjects shall apply such prudential supervisory powers as are conferred upon them by the respective laws, and as may be applicable in fulfilling their supervisory mandate under this Article with the exception of the power to impose administrative or other sanctions and penalties contemplated by such specific laws for the infringement of these laws, and where such supervisory powers are not contemplated by the specific law the provisions of the supervisory powers of the FIU-K under Article 30 of this Law shall apply.
- While the obligations for the FIU-K, the CBK and other sectoral supervisors to keep each other informed on on-site and off-site inspections as is being proposed under paragraphs (3), (4) and (5) of Article 32 are healthy and conducive for effective cooperation and coordination in the supervisory process, yet the restrictive measures being proposed for the empowerment of the FIU-K to withhold the initiation of an inspection until approval by the FIU-K may have implications on the effectiveness of the supervisory regime in Kosovo for the purposes of the AML/CFT Law and may jeopardise the much needed cooperation and coordination in the supervisory process. It is advisable that these provisions be removed.

Statistics

Notwithstanding the emphasis in the PECK AR on Compliance with International AML/CFT Standards and the importance of the maintenance of comprehensive and meaningful statistics for the purposes of the FATF Methodology under the 2012 Standards, and notwithstanding the obligations on the FIU-K under Article 14 of this Law to compile information, statistics and reports and based thereon make recommendations to the relevant Ministry of Finance and other Ministries and bodies, the proposed amendments to the AML/CFT Law remain silent on the matter.

It should however be acknowledged that on 31 October 2013 the FIU-K has already issued Administrative Instruction No. 01/2013 on Compiling Statistics, Reports and Recommendations on Money Laundering and Terrorist Financing which is applicable to all reporting subjects while, as indicated in the PECK AR, the CBK is due to issue an Administrative Directive on the retention and collection of statistics applicable to the entire financial sector.

As proposed in the PECK AR a new Article 32B on Statistical Data is being introduced in the AML/CFT Law as the legal basis for the retention and collection of statistics by all stakeholders under the AML/CFT Law including, but not limited to, the police, the prosecutors, the judiciary etc.

The proposed Article 32B consists of five (5) new paragraphs. Paragraph (1) establishes the obligation for the maintenance of comprehensive statistics by all stakeholders, while paragraph (2) creates the obligation for all stakeholders to liaise with the FIU-K to determine the type of statistics to be maintained. Paragraph (3) then empowers the FIU-K, the CBK or a sectoral supervisor respectively to issue administrative directives, instruction or guidance for the maintenance of statistics by those reporting subjects under their remit, while paragraph (4) establishes the obligation to make available all statistical data maintained under the Article to the FIU-K. Finally paragraph (5) requires the FIU-K, the CBK and any sectoral supervisor to cooperate in the fulfilment of their responsibilities under Article 31 for the collection of statistics.

7. CONCLUSIONS AND RECOMMENDATIONS

As indicated in this Paper, the proposed amendments to the AML/CFT Law should enhance its harmonisation with international standards although deficiencies remain which, if addressed, would make the AML/CFT Law more robust, efficient and harmonised with international standards. However, while some recommendations in the PECK AR on Compliance with International AML/CFT Standards have been taken into consideration, a number of recommendations were not considered thus leaving the AML/CFT Law deficient on various issues and aspects as highlighted in this Paper. At times it is even difficult to understand the rationale behind certain proposed amendments.

On the repressive measures and the FIU-K aspect there remains concerns not only regarding the criminalisation of ML and TF but also regarding targeted financial sanctions related to terrorism and terrorist financing. Indeed this Paper finds that the Kosovo regime for the implementation of the FATF 2012 Recommendation 6[14] and the relevant UNSCRs requiring countries to freeze without delay terrorist assets and to prohibit making funds and other resources (including financial services) available to designated persons and entities is incomplete and not always consistent with the standards. Moreover this Paper raises certain concerns on the FIU-K, particularly its capacity to fulfil its core functions in the light of the strengthening of its non-core functions, such as supervision, and the qualification of the proposed supervision responsibility as "primary". Careful consideration should be given to these issues, which, in the light of the resource implications, could seriously affect the

[14] Previous Special Recommendation III.

effectiveness of the FIU-K's core functions. Finally, from a legal perspective, there are concerns on the sanctioning regime including the sole power vested in the FIU-K to impose sanctions and to be the first front of the administrative appeal and the absence of a system of graduated non-pecuniary administrative sanctions to be applied proportionately to the seriousness of the offence under off-site or on-site examinations.

Consequently, issues that need to be further addressed under the repressive measures and the FIU include:

- Further considerations regarding the criminalisation of money laundering, particularly the duplicative ancillary offences regime;
- Further considerations regarding the criminalisation of terrorist financing, particularly the duplicative criminalisation of TF;
- A rethink of the rationale for the proposed amendments concerning the non-core functions of the FIU-K and their implications on its efficiency and effectiveness, particularly the proposed "primary" supervisory responsibility and the responsibility of being the first front of the administrative appeal to a sanction;
- A rethink of the entire sanctioning regime for administrative, prudential and criminal offences of the AML/CFT Law, including the introduction of graduated remedial measures; careful consideration should also be given to the proposed introduction of an *ad hoc* procedure for appealing sanctions; and
- Consideration of the proposed additional amendments to the AML/CFT Law put forward in this Paper.

On the preventive measures side, while positively addressing issues related to the main obligations under the Law, such as for most part, the CDD process, the revised Law still falls short in adequately meeting certain international standards and in removing previous complexities, ambiguities, legal uncertainties and inconsistencies. The fragmentation of the AML/CFT Law has remained to an extent that at times certain obligations are not applied to some categories of reporting subjects – for example issues related to internal programmes and controls for compliance purposes. On the other hand, at other times obligations are applied both on a general and specific level – for example CDD and reporting - creating inconsistencies, at times verging on the discriminatory, in the process. The selective way that some recommendations in the PECK AR have been taken into account have in a way also created inconsistencies and legal uncertainties while leaving out important recommendations – for example provisions related to risk assessment and statistics. Maintaining non-FATF categories of reporting entities such as NGOs and extending cash reporting requirements can, in the absence of a proven risk, compromise the effectiveness of the reporting system and affect the capacity of the FIU-K, while posing unnecessary burdens to these sectors. The supervisory framework may be considered loose at one end – where the Law seems to allow any sectoral supervisor to undertake compliance supervision without any formal written agreements for delegation – while at the other end it is too stringent – outright requiring the prior authorisation of the FIU-K for the CBK and other sectoral supervisors to conduct supervisory examinations. A clear decision of what the authorities want in place is therefore a must.

In summary, some areas that need to be further addressed on the preventive side in order to achieve this goal are:

- Consideration of the various recommendations made in the PECK AR for changes or additions to the AML/CFT Law which have not been addressed by the proposed amendments;
- A rethink on the fragmentation of the Law ensuring that all obligations applicable to the entire

range of reporting subjects are provided for in a general part of the Law with the provisions for selected reporting subjects covering those specific issues applicable to such reporting subjects only;

- A rethink of the compliance supervisory regime ensuring its efficiency and effectiveness but taking into consideration its implications on the FIU-K resources given that the FIU-K is being proposed as the primary supervisory body for the purposes of the AML/CFT Law;
- A review of the proposed approach to the risk assessment and risk management requirements in the draft Law (currently scattered among different provisions); and
- Consideration of the proposed additional amendments to the AML/CFT Law put forward in this Paper.

Finally, it is advisable that the Kosovo authorities continue to positively revise the AML/CFT Law in a coordinated manner with the main objective being its harmonisation with the international standards through an efficient and effective way of implementation. To this effect the cooperation of all stakeholders cannot but be strongly emphasised.